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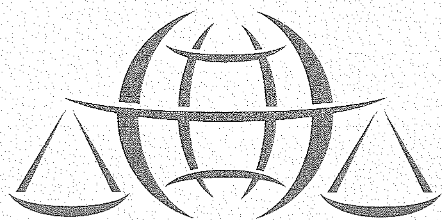

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DOMESTIC JUDICIAL DESIGN BY INTERNATIONAL HUMAN RIGHTS COURTS

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Regional human rights courts in Europe and the Americas came into being in the wake of World War II. The European Court of Human Rights (ECHR) and Inter-American Court of Human Rights (IACHR) were established in order to adjudicate on alleged violations of the rights of individuals. Yet, since their inception these courts have also influenced other areas of international law. Apart from their impact on general international law,[1] their case law has had significant spillover effects on international criminal law,[2] international refugee law,[3] international environmental law,[4] the law of armed conflicts,[5] and the law of the sea.[6]

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[1] *See* Lucius Caflisch & Antonio Cançado Trindade, *Les conventions américaine et européenne des droits de l'homme et le droit international général*, 1 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (2004); Cesare Pitea, *Interpretation and Application of the European Convention on Human Rights in the Broader Context of International Law: Myth or Reality?*, *in* HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21ST CENTURY 1 (Eva Brems & Yves Haeck eds., 2014).

[2] *See, e.g.*, Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-criminal Jurisdiction of the Human Rights Courts*, 107 AJIL 1 (2013) (discussing primarily IACHR case law); SONJA C. GROVER, THE EUROPEAN COURT OF HUMAN RIGHTS AS A PATHWAY TO IMPUNITY FOR INTERNATIONAL CRIMES (2010) (focusing primarily on ECHR case law); *see also* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585 (2010).

[3] *See, e.g.*, Hélène Lambert, *The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities*, 24 REFUGEE SURV. Q. 39 (2005); UN HIGH COMMISSIONER FOR REFUGEES, UNHCR MANUAL ON REFUGEE PROTECTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007); NUALA MOLE & CATHERINE MEREDITH, ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2010); ROBIN C. A. WHITE & CLARE OVEY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 179–82 (2010).

[4] *See, e.g.*, PHILIPPE SANDS, JACQUELINE PEEL, ADRIANA FABRA & RUTH MACKENZIE, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 775–89 (2012); PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 271–315 (2009); Loukis Loucaides, *Environmental Protection Through the Jurisprudence of the European Convention on Human Rights*, 2005 BRIT. Y.B. INT'L L. 249; Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 GEO. INT'L ENVTL. L. REV. 73 (2008); DONALD ANTON & DINAH SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (2011).

[5] *See, e.g.*, Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 6 EUR. HUM. RTS. L. REV. 732, 758–59 (2008); RÉPARER LES VIOLATIONS GRAVES ET MASSIVES DES DROITS DE L'HOMME: LA COUR INTERAMÉRICAINE, PIONNIÈRE ET MODÈLE? [REPAIR SERIOUS AND MASSIVE HUMAN RIGHTS VIOLATIONS: THE INTER-AMERICAN COURT, PIONEER AND MODEL?] (Elisabeth Lambert Abdelgawad & Kathia Martin-Chenut eds., 2010); Lixinski, *supra* note 2.

[6] *See* Hirsi Jamaa v. Italy, 2012-II Eur. Ct. H.R. 1; Jasmine Coppens, *The Law of the Sea and Human Rights in the* Hirsi Jamaa and Others v. Italy *Judgment of the European Court of Human Rights*, *in* HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21ST CENTURY, *supra* note 1, at 179.

Most of these spillovers into other areas of international law have been widely studied,[7] as has the question of states' compliance with the rulings of human rights tribunals.[8] By contrast, in this article we place institutions, rather than states, at the center of the analysis and move away from the debate about compliance that has dominated international law scholarship in recent years.[9] Instead, we explore another important spillover effect that has previously escaped detailed scholarly attention.[10] We show that as regional human rights courts, the ECHR and IACHR have been undertaking a broader array of roles than those originally envisioned and that their recent case law reduces the monopoly power of parliaments to determine how to structure their judiciaries, at least on the assumption that states comply with their international human rights obligations. Compliance with, and the efficacy of, the ECHR and IACHR judgments is inescapably related to what these two courts say, or see themselves as being in a position to say, about institutional reform, and some questions about compliance and efficacy will inform our discussion below. But our primary focus is on what the courts tell governments with respect to designing the judiciary (and not on orders that it gives the judiciary directly).[11]

More specifically, we examine the ways that the ECHR and IACHR have assessed the structure and functioning of domestic judicial systems and whether those regional courts have, in the process, consciously or unconsciously been advancing their own preferred conceptions of what a judicial system should look like. In other words, our goal is to identify the "judicial design agendas" of the ECHR and IACHR, with particular attention to questions concerning the separation of powers.[12] We are also especially interested in how the power of domestic courts is affected by the activities of the ECHR and IACHR in this realm. These two regional human rights courts, by empowering judges and also themselves, have not only created better conditions for their own entrenchment but also democratic deficits that may only increase as they evolve into quasi-constitutional courts that are not subject to domestic checks and balances.

Much of the thinking about the institutional design of state judiciaries is found between the lines in ECHR and IACHR decisions, but one can see instances in which these agendas come to the fore.

[7] *See supra* notes 1–6; *see also* Vassilis Tzevelekos, *Revisiting the Humanisation of International Law: Limits and Potential: Obligations* Erga Omnes, *Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation,* 6 ERASMUS L. REV. 62 (2013).

[8] *See, e.g.,* COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE (2013); Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights,* 6 J. INT'L L. & INT'L REL. 35, 46 (2010); Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law,* 11 CHI. J. INTL. L. 127 (2010).

[9] *See also* KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2013).

[10] *See* STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 46 (2005) (an early claim that the right to an independent and impartial tribunal in European Convention Article 6, *infra* note 16, includes both the individual human right aspect and the institutional aspect). As we show in part I, however, Article 6 is not the only "vehicle" for addressing institutional aspects of judicial power.

[11] On the jurisprudence of the IACHR in giving orders directly to judges, and on the efficacy of such orders, see Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights,* 44 CORNELL INT'L L.J. 493, 495, 502 (2011) (arguing that the IACHR could increase compliance by engaging judges more directly).

[12] *See, e.g.,* Dragoljub Popović, *European Court of Human Rights and the Concept of Separation of Powers, in* SEPARATION OF POWERS: GLOBAL PERSPECTIVES 194 (M. Prabhakar ed., 2008); David Kosař, *Policing Separation of Powers: A New Role for the European Court of Human Rights?,* 8 EUR. CONST. L. REV. 33 (2012).

One example is the line of cases in which the IACHR considered whether administrative proceedings could qualify as judicial proceedings for the purpose of meeting state obligations of offering adequate judicial protection under Article 25 of the American Convention on Human Rights[13] (American Convention). Other examples can be found in the cases where the remedies ordered by two courts have required institutional reforms. The IACHR has been bolder regarding the scope of remedies;[14] it has a broader mandate when it comes to reparations, and a specific provision in the American Convention requires states to change their legislation to conform to the convention.[15] Nevertheless, institutional change has also resulted from ECHR judgments under the European Convention on Human Rights[16] (European Convention), initially through a series of individual judgments and, more recently, nonmonetary reparation orders[17] and the so-called pilot judgments.[18] For instance, France had to alter the role of advocates general in the Conseil d'état and the Cour de cassation[19] as a result of the ECHR's Grand Chamber judgments in *Kress v. France* and *Martinie v. France.*[20] Turkey eventually abolished its National Security Courts altogether under pressure from the ECHR.[21] Finally, many believe that the Blair government's constitutional reform that abolished the House of Lords' Appellate Committee as the top

[13] American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123 [hereinafter American Convention]; *see, e.g.,* Castañeda Gutman v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 184 (Aug. 6, 2008). The United States is the only country that signed but did not ratify or accede to the convention.

[14] *See* Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi & Barbara Schreiber, *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to Its Functioning and Compliance with Its Decisions,* 12 SUR INT'L J. ON HUM. RTS. 9, 15 (2010) (empirical research on remedies ordered by the IACHR between 2001 and 2006 indicates that institutional and legal reform represents 8 percent of all remedies ordered by the IACHR).

[15] Article 2 of the American Convention, *supra* note 13, provides:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

[16] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221 [hereinafter European Convention].

[17] *See, e.g.,* Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime,* 19 Eur. J. Int'l L. 125, 146–49 (2008).

[18] *See, e.g.,* Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments,* 9 HUM. RTS. L. REV. 397 (2009); Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights,* 12 GERMAN L.J. 1231 (2011); DOMINIK HAIDER, THE PILOT-JUDGMENT PROCEDURE OF THE EUROPEAN COURT OF HUMAN RIGHTS (2013) (regarding the pilot judgments).

[19] *See* Décret n° 2009-14 du 7 janvier 2009 relatif au rapporteur public des juridictions administratives et au déroulement de l'audience devant ces juridictions, *at* http://www.textes.justice.gouv.fr/decrets-10181/.

[20] *See* Kress v. France, 2001-VI Eur. Ct. H.R. 1 (Grand Chamber); Martinie v. France, 2006-VI Eur. Ct. H.R. 41 (Grand Chamber); *see also* Nico Krisch, *The Open Architecture of European Human Rights Law,* 71 MOD. L. REV. 183 (2008) (for an overview of development of ECHR case law on this issue); Mitchel Lasser, *The European Pasteurization of French Law,* 90 CORNELL L. REV. 1032 (2005); Koen Lemmens. *But see Pasteur Was French: Comments on Mitchel Lasser's 'The European Pasteurization of French Law,' in* THE LEGITIMACY OF HIGHEST COURTS RULINGS: JUDICIAL DELIBERATIONS AND BEYOND 171 (Nick Huls, Maurice Adams & Jacco Bomhoff eds., 2009); Frédéric Sudre, *Conseil d'etat et Cour européenne des droits de l'homme: Vers la normalisation des relations entre le Conseil d'etat et la Cour européenne des droits de l'homme,* 22 REVUE FRANÇAISE DE DROIT ADMINISTRATIVE 286 (2006) (for critical positions).

[21] See section "Military Courts and Special Tribunals" in part I.

court in the United Kingdom was triggered by the ECHR's interpretation of the right to a fair trial.[22]

This article charts how the ECHR and IACHR have come believe that domestic judiciaries need to be structured in order to satisfy the requirements of the European and American Conventions—a task that moves the courts well beyond specific determinations of whether the rights of particular individuals under those two conventions have been violated (and, if so, what remedies are appropriate). We believe that this involvement of the ECHR and IACHR in domestic institutional design issues has gone largely unnoticed. More specifically, we argue that the two courts have increased the power of domestic courts by delving into institutional design and that, by the same actions, the two courts have increased their own power. Three mechanisms seem to contribute to this refashioning of domestic and international judicial power. The first one is that ECHR and IACHR have a broader understanding of what judicial power is than many member states and that this broader understanding has led the courts to judicialize new areas of law. Second, both courts also prioritize judicial independence over other judicial virtues, with the consequence that the courts' judgments have challenged the primacy of the legislature in lawmaking, which has altered, in turn, the domestic separation of powers. Finally, both courts affect the internal architecture of domestic judiciaries by endorsing the unification of court administration and also by empowering lower court judges, which alters hierarchical power structures within the domestic judiciaries themselves.

The analysis of the article centers on the case law of the ECHR and IACHR, and looks at judgments both in contentious cases (ECHR and IACHR) and advisory opinions (IACHR only). We chose these two human rights courts for three reasons: they address similar sets of issues stipulated by treaties with reasonably similar textual bases; their case law is sufficiently developed; and their judgments have similar normative weight. Another factor is that the ECHR's judgments affect both established and developing democracies, whereas the IACHR's judgments concern primarily developing democracies.[23] This factor enables us to examine whether the maturity of democracies affects the standards employed by international human rights bodies. Therefore, even though we do touch on the consequences of our findings beyond the European and inter-American systems, we do not study the case law of the other established regional human rights court—the African Court on Human and Peoples' Rights—which was only recently established and whose case law yet to develop enough for stable trends to be identified. We also exclude quasi-judicial human rights bodies, such as the Human Rights Committee, because their decisions have different normative weight, and the Court of Justice of the European Union, because doing so would raise issues that are not overly relevant for international law more broadly. Finally, we leave aside other specialized fields of international law, such as international arbitration, for they raise different issues stemming from textually different documents.[24]

[22] *See, e.g.*, David Hope, *The Reform of the House of Lords*, 60 REVUE INTERNATIONAL DE DROIT COMPARÉ 257, paras. 1.4, 3.1–.3; *see also* Diana Woodhouse, *The Constitutional Reform Act 2005—Defending Judicial Independence the English Way*, 5 INT'L J. CONST. L. 153, 154 (2007).

[23] We are aware, of course, that the twenty states that have opted to accept the IACHR's contentious jurisdiction in accordance with American Convention Article 62 vary greatly in their levels of economic development and institutionalization of democracy.

[24] One may persuasively argue that the European Union is unique in so many respects—especially because it comprises only liberal democracies—that the findings regarding this supranational judicial system are no transferable to other contexts.

A thorough study of whether ECHR and IACHR recommendations are implemented domestically is also beyond the scope of this article. We mention examples of domestic implementation merely to show the potential of ECHR and IACHR judgments to shape domestic judicial design, but we do not comprehensively analyze the actual compliance with those judgments or the factors influencing compliance. That is, our aim is to weave the "master narrative" that emerges from the two courts' judgments on judicial design rather than study the level of acceptance of this narrative among the states. Nevertheless, although we present to systematic assessment of efficacy, this article shows that many decisions of both courts regarding domestic judicial design have had an impact.

This article proceeds in three parts. Part I examines the case law of the ECHR and IACHR with regard to three sets of judicial design issues. It focuses primarily on issues addressed by both courts but also identifies areas where one court went significantly further than the other. Part II compares the judicial design agendas of the ECHR and IACHR, and then discusses how and to what extent the two courts define the contours of the "optimal judiciary." The conclusion, part III, summarizes our argument and discusses the potential consequences, intended and unintended, of the courts' following their current agendas for judicial design.

I. DOMESTIC JUDICIAL DESIGN ISSUES BEFORE INTERNATIONAL HUMAN RIGHTS COURTS

Human rights courts were not originally endowed with the competence to tell states how to structure their judiciaries. To be sure, the texts of both the American[25] and the European[26] Conventions do establish certain minimal rights that need to be protected through judicial institutions, but they do not provide detailed mandates to states regarding the specifics of institutional design. The relevant provisions state that individuals have particular rights but not that states have the obligation to protect those rights in any specific manner.[27] But the ECHR and IACHR have deemed those details to be a fundamental part of their mandates; the assumption has been that ordering adjustments to state structures has been necessary in order to provide the best possible recommendations to states for protecting human rights within their territories.

The main gateway through which the IACHR can impose certain requirements on domestic judiciaries is the principle of the "natural judge,"[28] which is considered to be an essential aspect

[25] *See* American Convention, *supra* note 13, Arts. 8, 25.

[26] *See* European Convention, *supra* note 16, Arts. 5, 6, 13.

[27] One notable exception is Article 25(2) of the American Convention, *supra* note 13, which reads:

The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

[28] *See, e.g.*, INTERNATIONAL COMMISSION OF JURISTS, INTERNATIONAL PRINCIPLES ON THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES, LAWYERS AND PROSECUTORS 7–11 (2d ed. 2007) (noting that the meaning of the principle of the "natural judge" (sometimes also referred to as the principle of the "legal judge") varies from one country to another); *see also* PHILIP M. LANGBROEK & MARCO FABRI, THE RIGHT JUDGE FOR EACH CASE: A STUDY OF

of the right to a fair trial.[29] Under that principle, no cases shall be heard by a tribunal established after the facts of the case; the judge hearing the case must be competent, impartial and independent;[30] and the tribunal must act "in accordance with the procedure established by law for hearing and deciding cases submitted to it."[31] The principle also forbids states from creating new tribunals to replace the jurisdiction that would normally correspond to ordinary courts.[32] Notably, the principle is sufficiently open-ended that the IACHR can use it to impose upon states its own vision of an effective judiciary.

The ECHR has not come up with an equivalent overarching principle, though the right to an independent and impartial tribunal similarly has served as the main "vehicle" for bringing judicial design issues to the fore.[33] More recently, however, the ECHR has found itself addressing structural issues affecting domestic judiciaries in the context of cases alleging violations of non–judicially oriented articles of the European Convention (as has the IACHR, albeit to a lesser extent, under the American Convention). How is that possible? The key to understanding this phenomenon is the identity of the applicant. In the last few years, domestic *judges* have started to bring individual applications about alleged violations of their own rights—situations that raise considerations beyond the right to a fair trial. The judges have invoked, among other rights, the rights to freedom of expression,[34] to freedom of religion,[35] and to respect for private and family life.[36]

The key insight to be drawn from the case law of the ECHR and IACHR is that human rights courts' understanding of a judiciary is broader than what the internal constitutional processes of states consider to be a judiciary. In other words, regional human rights courts, in an attempt to ensure that their mandates cover a wider range of situations, end up scrutinizing structures that

CASE ASSIGNMENT AND IMPARTIALITY IN SIX EUROPEAN JUDICIARIES (2007) (noting that this concept thus may set different requirements in different countries, with the most stringent set applicable in Germany).

[29] American Convention, *supra* note 13, para. 8.

[30] Berenson Mejía v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 119, para. 144 (Nov. 25, 2004); Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 114, para. 118 (Sept. 7, 2004); Castillo Petruzzi v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 52, para. 131 (May 30, 1999); Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, para. 30 (Jan. 30, 1987); Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, para. 20 (Oct. 6, 1987) (all requiring the intervention of an independent and impartial judicial organ, having the power to determine the lawfulness of measures adopted in a state of emergency).

[31] Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 107, para. 169 (July 2, 2004); Ivcher Bronstein v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 74, para. 112 (Feb. 6, 2001); Constitutional Court v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 71, para. 77 (Jan. 31, 2001); Castillo Petruzzi v. Peru, *supra* note 30, paras. 130–31; Judicial Guarantees in States of Emergency, *supra* note 30, para. 20.

[32] Berenson Mejía v. Peru, *supra* note 30, para. 143; Castillo Petruzzi v. Peru, *supra* note 30, para. 129; 19 Merchants v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 109, para. 165 (July 5, 2004); Las Palmeras v. Colombia, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 96, para. 51 (Nov. 26, 2002); Basic Principles on the Independence of the Judiciary, *in* Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders 58, UN Doc. A/CONF.121/22/Rev.1 (1985) (confirmed by GA Res. 40/32 (Nov. 29, 1985) and GA Res. 40/146 (Dec. 13, 1985)).

[33] For a succinct summary of relevant ECHR jurisprudence, see TRECHSEL, *supra* note 10, at 45–80, and KUIJER, *supra* note 22, at 171–382.

[34] *See, e.g.*, Wille v. Liechtenstein, 1999-VII Eur. Ct. H.R. 279; Kudeshkina v. Russia, App. No. 29492/05 (Eur. Ct. H.R. Feb. 26, 2009).

[35] *See, e.g.*, Pitkevich v. Russia (dec.), App. No. 47936/99 (Eur. Ct. H.R. Feb. 8, 2001).

[36] *See, e.g.*, Özpinar v. Turkey, App. No. 20999/04 (Eur. Ct. H.R. Oct. 19, 2010). For the IACHR, see *Atala Riffo v. Chile*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 147 (Feb. 24, 2012).

domestically are not necessarily seen as judicial. Hence, both courts, directly or indirectly, contribute to the expansion of judicial power at the expense of other political institutions and to the judicialization of new areas of law. They also prioritize judicial independence over other judicial virtues and indirectly challenge the primacy of the legislature in lawmaking. By doing so, they promote shifts in domestic (inter-branch) separation of powers. Finally, regional human rights courts, by prescribing unified standards of court administration and empowering lower court judges, also affect the internal architecture of domestic judiciaries (intra-branch separation of powers).

In order to address these phenomena, we analyze three subsets of issues dealt with by international human rights courts. We first examine the case law on military and special courts to show that both courts interpret "judicial power" more broadly than domestic constitutions.

We then focus on cases concerning the disciplining and removal of judges to show how regional human rights courts—by interpreting the notion of judicial independence—affect the domestic separation of powers and sometimes even push for a uniform model of court administration. We have chosen this set of cases because it has allowed human rights courts to connect individual human rights violations to the inner workings of the judiciary (after all, the victims are judges) much more tightly. And this tight connection has paved the way for more structure-oriented (as opposed to rights-oriented) analyses by the relevant courts. As indicated above, these cases have also allowed for the extension of institutional design issues beyond the confines of the right to a fair trial. In this category of cases, we do not deal with individual instances of abusing discretion but with cases that have structural implications for the management of other cases.

Finally, we analyze how both courts interpret the concept of "law," and inquire what status and normative effects they give to decisions of domestic courts. The ECHR, by elevating judicial decisions to the status of the source of law on a par with statutory law, is empowering the judiciary vis-à-vis the legislature and further shifting the separation of powers. By contrast, the IACHR seems to be taking a more conservative approach to the meaning of "law," and tells us that domestic judgments are not law (except in common-law countries, which are practically absent from the IACHR's docket). The Court suggests, however, that its own judgments are. This move treads an unsteady line between being conservative toward judicial power in civil-law countries and progressive regarding the IACHR's own influence over judicial power.

Due to the vast number of issues addressed by both the ECHR and IACHR, we further narrowed our analysis and focused primarily on issues that have been presented before *both* courts—which, in our opinion, provides us with the optimal environment for comparison. In this part of the article,[37] we hereby exclude judicial design issues that are not part of both the European and Latin-American legal traditions[38] or that have been raised before only one of these two courts.[39]

[37] We revisit some of these issues in the first two sections of part II to show that the judicial design issues that have been addressed by *both* the ECHR and IACHR represent only a small sample of the wide-ranging prescriptions that these two courts have made for domestic judiciaries.

[38] The typical examples of judicial design issues that fall within this category are the role of advocates general and the incompatibility of the judicial office with other functions that are not part of Latin American tradition and that were therefore not challenged before the IACHR. By contrast, these issues have been heavily contested before the ECHR. *See supra* notes 19–20 and accompanying text (regarding advocates general); Kosař, *supra* note 12, at 41–46 (regarding incompatibility with the judicial function).

[39] That is why we omit, for instance, a long strand of the ECHR's case law on improper case assignment and the role of court presidents; the IACHR has no equivalent case law.

Military Courts and Special Tribunals

One common issue that human rights courts are asked to address is the appropriate forum for hearing particular cases. Given that the term *tribunal* used by both the American Convention (Article 8) and European Convention (Article 6) in defining the right to a fair trial is somewhat vague, the courts have taken it upon themselves to determine what constitutes a tribunal capable of administering justice in any particular case.[40]

For the IACHR, these issues have arisen primarily in deciding between military and civilian justice systems. In a set of cases against Peru, the IACHR was asked to determine whether civilians accused of engaging in terrorist activities could be tried by military courts (which Peru argued was necessary due to the national security issues surrounding the cases). Consistently, the Court said that, while it was in principle possible to use military jurisdictions in terrorism cases (because of the sensitive nature of the charges), the cases would still be subject to the same fair trial requirements as civilian jurisdictions. Depriving the defense of access to documents and not allowing sufficient time to prepare were thus, in two cases, considered violations of fair trial rights.[41] These two cases were the first in which the IACHR analyzed questions of judicial design in relation to military courts.[42]

In a series of cases separate from the above—which concerned the rights of civilian *defendants* within the military justice system—the IACHR considered the question of military jurisdiction from the *prosecution* side. In particular, do military courts provide an adequate forum for providing remedies to victims of human rights violations? The IACHR curbed the jurisdiction of military courts, holding that military judges could entertain cases only against military personnel and, even then, only with respect to acts that were, by their nature, related to military affairs. Attacks against civilians were considered to fall outside this category, and military personnel involved in human rights violations against civilians (in particular, massacres) were to be judged by civilian judicial authorities.[43] In *Cesti Hurtado*, the IACHR went even further. The victim was a retired military officer who was tried before military tribunals after his retirement for acts unrelated to military service committed after his retirement from military service. The IACHR determined that the trial before a military tribunal was in violation of the American Convention and ordered that the proceedings be annulled.[44] The military courts did not have jurisdiction over acts not committed by military personnel (either active or on reserve) or for acts unrelated to military service.

In the two sets of cases discussed above, along with *Cesti Hurtado*, the IACHR significantly narrowed the scope of specialized jurisdictions, determining that, whenever a civilian was involved on either side of a case, those jurisdictions were likely inappropriate, except potentially insofar as they worked exactly like general courts.

The implication of these cases is that, according to the IACHR, military courts are considered tribunals to which the American Convention requirements for fair trial, as set forth in Article 8, apply. This result has important repercussions for domestic judiciaries. The key consequence of the first set of cases (about the rights of defendants) is that military courts must be restructured so that they meet the criteria applicable to ordinary courts. This requirement indirectly undercuts the very existence of military courts, however, as one may plausibly argue that, if military courts must provide the same guarantees as ordinary courts, a separate system of military courts is not needed. The second set of cases (about the need for the injured to obtain redress), coupled with *Cesti Hurtado*, reinforces this view by narrowing the jurisdiction of military courts even further. In particular, military courts have the capacity to try civilians only in very narrow circumstances (in which case they must provide the defendants with the same guarantees as ordinary courts) and to try military personnel only when the case meets certain conditions (for example, acts related to military service). If we add the potential complications of jurisdictional disputes between ordinary and military courts—which any state wants to avoid—the very raison d'être of military courts is put into question.

In other cases the IACHR has brought various constitutional courts and bodies—ones that were never considered part of judicial power of national systems—under the fair trial requirements of American Convention Article 8. These cases include *Constitutional Court*,[45] *YATAMA*,[46] *Castañeda Gutman*,[47] and *López Mendoza*.[48] *Constitutional Court* involved the impeachment of constitutional justices by the Peruvian Congress. More specifically, three justices of the Peruvian Constitutional Court were impeached over their refusal to endorse a piece of legislation being pushed through by then president Alberto Fujimori. This law, which called itself an "authoritative interpretation" of certain provisions of the Peruvian Constitution,

[40] We agree with Trechsel that the ECHR's various definitions of the term *tribunal* have not become important factors in the case law and that the "essential point is that the [ECHR] does not give much importance to the [domestic] label which is attached to the institutions that function as a court." TRECHSEL, *supra* note 10, at 48.

[41] Lori Berenson Mejía v. Peru, *supra* note 30, para. 167; Cantoral Benavides v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 69, para. 127 (Aug. 18, 2000); Castillo Petruzzi v. Peru, *supra* note 30, para. 148.

[42] The cases involving enforced disappearances in Honduras, the very first ones before the IACHR, did not raise such issues, as there was no question whether the prosecutions would be pursued before ordinary courts.

[43] Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 259, para. 158 (Nov. 30, 2012); *see also* Durand y Ugarte v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 68, paras. 116–17, 125, 126 (Aug. 16, 2000); Cantoral Benavides v. Peru, *supra* note 41, paras. 112–14; Las Palmeras v. Colombia, *supra* note 32, paras. 51–53; 19 Merchants v. Colombia, *supra* note 32, paras. 165–67, 173–74; Lori Berenson Mejía v. Peru, *supra* note 30, paras. 141–45; "Mapiripán Massacre" v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 134, para. 202 (Sept. 15, 2005); Palamara Iribarne v. Chile, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 135, paras. 139, 143 (Nov. 22, 2005); Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 140, paras. 189, 193 (Jan. 31, 2006); Montero Aranguren v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 150, paras. 53–54, 108 (July 5, 2006); La Cantuta v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162, para. 142 (Nov. 29, 2006); La Rochela Massacre v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 163, para. 200 (May 11, 2007); Escué Zapata v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 165, para. 105 (July 4, 2007); Zambrano Vélez v. Ecuador, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 166, para. 66 (July 4, 2007); Tiu Tojín v. Guatemala, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 190, paras. 118–20 (Nov. 26, 2008); Usón Ramírez v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 207, paras. 108–10 (Nov. 20, 2009); Radilla Pacheco v. México, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, paras. 272–73 (Nov. 23, 2009); Fernández Ortega v. México, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 215, para. 176 (Aug. 30, 2010); Rosendo Cantú v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 216, para. 160 (Aug. 31, 2010); Caso Cabrera García v. México, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 220, paras. 197–99 (Nov. 26, 2010); Vélez Restrepo v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 248, para. 240 (Sept. 3, 2012).

[44] Cesti Hurtado v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 56, para. 194 (Sept. 29, 1999).

[45] Constitutional Court v. Peru, *supra* note 31.

[46] YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

[47] Castañeda Gutman v. Mexico, *supra* note 13.

[48] López Mendoza v. Venezuela, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 233 (Sept. 1, 2011).

would essentially allow Fujimori to run for a third consecutive term. Given the apprehensions of several Constitutional Court justices that the law violated the Constitution, they were dismissed before they could give judgment on the case. The question of their dismissal was determined by the Peruvian Congress, the organ with the authority to remove Constitutional Court justices.

The IACHR, using ECHR precedents, said that even political trials were subject to the due process requirements contained in the American Convention;[49] that is, the Peruvian Congress would need to be follow court-like procedures in order to undertake political trials. This procedural requirement brings judicial processes centrally into play during impeachment procedures, which are, by nature, political processes. Second, the IACHR conveyed the message that removal of the Constitutional Court justices must meet the same criteria as the removal of ordinary judges, and hence treated the both types of courts alike.[50]

The IACHR applied the same approach to electoral courts. In *Castañeda Gutman* it considered the high-profile case of an independent candidate for the Mexican presidency who was prevented from running in the 2006 presidential election.[51] The case revolved around whether there were internal remedies for determining the political rights of Jorge Castañeda Gutman.[52] In this case, Castañeda, after being notified that he was not qualified to run for president, appealed to the Mexican courts through a general writ of *amparo*,[53] as opposed to appealing to the electoral courts.[54] The problem, however, was that Mexican law excluded electoral rights from the scope of *amparo*. The IACHR said that it was, in principle, permissible for states to exclude certain rights from *amparo*—but only if remedies of an equivalent nature and scope were available for those human rights excluded from the writ.[55]

The IACHR analyzed both the access to, and effectiveness of, an available remedy under Mexican electoral law.[56] It determined that one of the necessary requirements for the effectiveness of a remedy was that it could review legislation with respect to both the Mexican Constitution and the American Convention ("*control de convencionalidad*," or control of conventionality,[57] to be discussed further below in the section "Judicial Lawmaking"). The power of judicial review was, in this context, deemed essential for the existence of an effective remedy,[58] and because the electoral court was not designed to take into account Castañeda's political rights as protected by the Mexican Constitution and American Convention, it could not be considered an effective remedy.[59] The IACHR determined that Mexico had to modify its electoral court system in order to guarantee that those courts could review the legality of all acts under their jurisdiction against the Constitution and the American Convention.[60]

[49] Constitutional Court v. Peru, *supra* note 31, para. 77.
[50] *Id.*
[51] Castañeda Gutman v. Mexico, *supra* note 13.
[52] *Id.*, para. 2.
[53] A writ of *amparo*, typical of Spanish-American countries, is a general remedy for cases concerning the denial of human rights.
[54] Castañeda Gutman v. Mexico, *supra* note 13, para. 77.
[55] *Id.*, para. 92.
[56] *Id.*, para. 103.
[57] *Id.*, para. 129.
[58] *Id.*, para. 130.
[59] *Id.*, para. 133.
[60] *Id.*, paras. 227–31.

Mexico promptly did so, and, in its order reviewing compliance with the judgment, the IACHR noted that states' duties under the American Convention extended not only to substantive norms on fundamental rights but also to procedural norms, and it welcomed a reform in Mexico requiring electoral courts to take into account the IACHR's jurisprudence.[61] The institutional lesson of this judgment is similar to that of the *Constitutional Court* case. Electoral courts are considered "tribunals" within the meaning of American Convention and thus must meet the same requirements as ordinary courts.

Nevertheless, *Constitutional Court* and *Castañeda Gutman* were still about courts and the judiciary writ large. In the *YATAMA* case, the IACHR went further and subjected a nonjudicial body to the same requirements as ordinary courts. The Supreme Electoral Council of Nicaragua had refused to allow candidates of the YATAMA party to participate in forthcoming elections, and the IACHR was asked to consider whether the council was subject to the fair trial requirements guaranteed by Article 8 of the American Convention. The Court found that, to the extent that the Supreme Electoral Council was in a position to issue decisions that affected human rights protected by the American Convention (in this case, political rights), it is subject to the requirements of Article 8.[62] This case thus shows that the IACHR has a broader understanding of what judicial power is than some of the signatory states to the American Convention. In other words, once a special body is given the authority to decide on fundamental rights enshrined in the American Convention, it is treated as a "tribunal" and must meet all the procedural guarantees required for ordinary courts. This result sounds natural from the human rights point of view, but in institutional terms it means that these special bodies must become court-like, as a consequence of which the disputes that they decide become fully judicialized.

In *López Mendoza*, the IACHR pushed the definition of tribunal and the institutional constraints upon tribunals law even further. In the Court's view, "all bodies which exercise functions of a judicial nature, whether criminal or not, have a duty to adopt fair decisions based in the full respect for the guarantees of due process established in Article 8 of the American Convention."[63] This case concerned a local politician in Venezuela who was denied the right to run in a mayoral election. In analyzing whether the electoral commission's procedures were in accordance with those Article 8 guarantees, the Court determined that with regard to such issues, administrative proceedings such as those of the commission were subject to the same type of scrutiny as the "normal" judiciary. The IACHR said that the commission had a duty to give reasons for decisions of this kind (as with all judicial decisions) and that this duty was integral to the right to defense;[64] under Article 23(2) of the American Convention, the right to participate in government may be restricted only by "a competent court in criminal proceedings," thereby requiring the full due process protections of Article 8. The Court required Venezuela to change its electoral law so as to comply with the requirements of the American Convention.[65] In other words, the Court determined that a specialized jurisdiction must provide the full due process protections as ordinary courts. As with the case law on military courts,

[61] Castañeda Gutman v. Mexico, Monitoring Compliance with Judgment, Order, at 3, 4 (Inter-Am. Ct. H.R. Aug. 28, 2013) ("Considering," paras. 5, 9).
[62] YATAMA v. Nicaragua, *supra* note 46, paras. 149–50.
[63] López Mendoza v. Venezuela, *supra* note 48, para. 111.
[64] *Id.*, para. 149.
[65] *Id.*, para. 206.

this judgment challenges the existence of specialized electoral courts, and suggests that, even if they are allowed to exist, they need to be set up and behave exactly like ordinary courts. They would need to be fully transparent and independent, providing full hearings and rights to defense. They would also need to take international human rights standards into account (and provide full remedies against the violation of those rights), which can be seen as reinforcing the power of human rights courts.[66]

Like the IACHR, the ECHR has spent significant time and resources on reviewing the design and jurisdiction of military and other special courts, as well quasi-judicial bodies. These issues were mostly addressed in Turkish and British cases.[67] The prime example is the series of cases involving the Turkish National Security Courts. The Turkish National Security Courts were nonmilitary courts[68] established by the 1973 constitutional amendment to deal with crimes against Turkey's territorial or national integrity, democratic order, or national security. They were mixed courts comprising civilian and military judges and had jurisdiction over civilians. Even though the three-judge panels always included two civilian judges, the ECHR found this system incompatible with the right to an independent and impartial court guaranteed by Article 6 of the European Convention. It recognized that, when sitting as members of National Security Courts, "military judges enjoy constitutional safeguards identical to those of civilian judges[.] . . . [T]hey may not be removed from office or made to retire early without their consent[,] . . . and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties."[69] But it also noted that they "are servicemen who still belong to the army . . . . [T]hey remain subject to military discipline . . . . Decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army. Lastly, their term of office as National Security Court judges is only four years and can be renewed."[70]

The ECHR explicitly rejected the argument concerning expertise—namely, that the justification for the presence of military judges in the National Security Courts was their competence and experience in the battle against organized crime[71]—and concluded that "the applicant could legitimately fear that because one of the judges of the İzmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case."[72] In the wake of this decision, military judges can no longer sit on criminal trials against civilians, and the impact of this series of cases on the institutional design of the Turkish judiciary was far-reaching. Military judges were removed from the National Security Courts' panels in 1999, and the National Security Courts were

[66] We discuss this phenomenon in more detail in part II.

[67] The applications concerning military courts were lodged against other countries, too. Most of these cases, however, are either old or decided by the European Commission of Human Rights, not the ECHR. *See* Maszni v. Romania, App. No. 59892/00 (Eur. Ct. H.R. Sept. 21, 2006) (an exception to these cases).

[68] Incal v. Turkey, 1998-IV Eur. Ct. H.R. 1547, paras. 65–73 (Grand Chamber).

[69] *Id.*, para. 67 (cross-references omitted).

[70] *Id.*, para. 68 (cross-references omitted).

[71] *Id.*, para. 70. Note that in the *Incal* judgment itself, the Grand Chamber refused to consider this argument *in abstracto*, *id.*, but the chamber judgment in *Ciraklar v. Turkey* did so just four months later: "It is understandable that a civilian . . . should be apprehensive about being tried by a bench of three judges which includes a regular army officer . . . ." Çiraklar v. Turkey, 1998-VII Eur. Ct. H.R. 3059, para. 39.

[72] Incal v. Turkey, *supra* note 68, para. 72.

abolished in 2004.[73] What we see here is the ECHR's capacity to require a signatory state to change the composition of such courts, eventually leading to their elimination (which, in turn, increases the authority of ordinary courts).

Given the stance of the ECHR toward the National Security Courts—even when civilian judges were in the majority—it is not surprising that the ECHR also found that when trying civilians, the Turkish military courts, whose five-judge panels included only two civilian judges (the remaining three members being an army officer and two military judges) were also in violation of the right to a fair trial.[74] Turkey eventually accepted this reasoning, and the competence of military courts to try civilians, except in times of war, was abolished in 2009.[75] Like the IACHR,[76] the ECHR thus de facto ruled that military courts must meet the same requirements as civilian courts if they are to try civilians—which undermines the very need to have a separate system of military courts.

The ECHR's case law also went beyond the mere determination of the *ratione personae* jurisdiction of military courts and pronounced on military courts' structure and jurisdiction over military officers. In its earlier case law, the ECHR had accepted the participation of military judges on the Turkish Supreme Military Administrative Court, which decides primarily civil claims brought by military personnel regarding acts and omissions of the Ministry of Defense. Similarly, the ECHR had held that the majority of military judges on the panel of the then Dutch Supreme Military Court (comprising two civilian judges and four military judges), in a case involving offenses against military discipline, met the requirements of the right to a fair trial.[77] However, in a more recent line of case law on British courts-martial, the ECHR intensified its review and made clear its institutional choices. In *Findlay* it held that, because of the multiple roles played in general courts-martial by the "convening officer," those proceedings did not satisfy the requirements of the right to a fair trial.[78] In such proceedings the convening officer not only played a key prosecuting role but appointed the members of the court-martial, had the power to dissolve it, and acted as a "confirming officer" who ratified the decision of the court-martial (prior to which the decision was not final).

[73] Note that in 2004, the National Security Courts were transformed into Specially Empowered Courts, which were abolished only in 2014. *See* Law no. 6526, Fifth Judicial Package (amending Anti-terrorism Act, Code of Criminal Procedure and other laws, entered into effect March 6, 2014) (Turkey); Directorate General for EU Affairs [Turkey], *The Fifth Judicial Reform Package*, *at* http://www.abgm.adalet.gov.tr/eng/absurecindeturkyargisi/judicalreform/thefifty.html; Hande Özhabeş, *Assessment on Changes Regarding the Specially Empowered Judicial System in Turkey* (Apr. 2014), *at* http://tesev.org.tr/en/yayin/assessment-on-changes-regarding-the-specially-empowered-judicial-system-in-turkey/.

[74] *See* Şahiner v. Turkey, 2001-IX Eur. Ct. H.R. 155, paras. 33–47. In fact, the ECHR went even further and held that the "fact that two civilian judges, whose independence and impartiality are not in doubt, sat in that court *makes no difference* in this respect." *Id.*, para. 46 (emphasis added); *see also* Alfatlı v. Turkey (regarding the applicant Mahmut Memduh Uyan), App. No. 32984/96, paras. 34–46 (Eur. Ct. H.R. Oct. 30, 2003); Ahmet Koç v. Turkey, App. No. 32580/96, para. 31 (Eur. Ct. H.R. June 22, 2004).

[75] The competence to try military personnel for nonmilitary offenses was also restricted. *See Turkey Military Court Law Passed*, BBC NEWS (July 9, 2009), *a* http://news.bbc.co.uk/2/hi/europe/8142257.stm.

[76] *See supra* notes 41–44 and accompanying text.

[77] The Turkish case is *Yavuz v. Turkey* (dec.), App. No. 29870/96 (Eur. Ct. H.R. May 25, 2000), and the Dutch case is *Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) para. 89 (1976) (Grand Chamber).

[78] Findlay v. United Kingdom, 1997-I Eur. Ct. H.R. 263, paras. 74–78; *see also* Coyne v. United Kingdom, 1997-V Eur. Ct. H.R. 1842, para. 58; Cable v. United Kingdom, App. No. 24436/94, para. 21 (Eur. Ct. H.R. Feb. 18, 1999); Wilkinson v. United Kingdom, App. Nos. 31145/96, 35580/97, para. 24 (Eur. Ct. H.R. Feb. 6, 2001); Mills v. United Kingdom, App. No. 35685/97, para. 25 (Eur. Ct. H.R. June 5, 2001).

In the wake of these decisions about courts-martial, the United Kingdom revamped its system of military courts and abolished the posts of "convening officer" and "confirming officer."[79] Under the new model, a court-martial included the Permanent President of Courts Martial (an army lieutenant colonel due to remain in his post for four years until his retirement), a legally qualified civilian judge advocate, and two captains. But this institutional change still did not satisfy the ECHR, which, in *Morris v. United Kingdom*, found the new model also in violation of the right to a fair trial.[80] The ECHR scrutinized all institutional features of the revamped courts-martial and held that, while considering the permanent president to be a "significant guarantee of independence" and the presence of the judge advocate to be an "important guarantee," these safeguards and others (for example, rules on eligibility for selection and the oath taken by members) were considered insufficient to exclude the risk of outside pressure being brought to bear on the ordinary officer members; they were appointed on an ad hoc basis,[81] were of relatively junior rank,[82] had no legal training, and remained subject to army discipline and reports.[83] This holding de facto meant that military courts must meet the same requirements as civilian courts not only if they try civilians but also if they try military officers. Again, *Morris* effectively questioned the raison d'être of military tribunals and again pushed them toward being much more like ordinary courts.

Less than two years later, the Grand Chamber stepped in and revisited these issues in the *Cooper*[84] and *Grieves* cases.[85] The ECHR eventually found no violation of the principle of judicial independence in *Cooper*,[86] which concerned the UK air force court-martial system. It distinguished the air force system from the army system reviewed in *Morris* on the narrow ground that the lack of legal training of the two "ordinary" members of the Royal Air Force court-martial—a flight lieutenant and a squadron leader—was compensated for by the directions given by the judge advocate and by the briefing notes drawn up by the Royal Air Force's Courts Martial Administration Unit.[87] The Grand Chamber reached a contrary result in *Grieves*, however, which concerned the Royal Navy court-martial system.[88] The navy system differed from the air force system in the following respects: the post of the permanent president did not exist in the naval system; judge advocates were serving naval officers instead of civilians; and the briefing notes were less detailed.[89] Although the government argued that these differences were justified because of the particulars of naval service,[90] the Grand Chamber was unpersuaded and decided the case against the government.

[79] *See* Armed Forces Act 1996 (UK).

[80] Morris v. United Kingdom, 2002-I Eur. Ct. H.R. 387, paras. 59–72.

[81] *Id.*, para. 70.

[82] *Id.*, para. 72.

[83] *Id.* The ECHR also made clear that "the position of the military members of the court martial cannot generally be compared with that of a member of a civilian jury, who is not open to the risk of such pressures." *Id.*

[84] Cooper v. United Kingdom, 2003-XII Eur. Ct. H.R. 145 (Grand Chamber).

[85] Grieves v. United Kingdom, 2003-XII Eur. Ct. H.R. 247 (Grand Chamber).

[86] Cooper v. United Kingdom, *supra* note 84, paras. 105–34. The concurring opinion of Judge Costa attests that it was a close call.

[87] *Id.*, paras. 123–25. The Grand Chamber also took into account that the members of a court-martial cannot be reported on in relation to their judicial decision making.

[88] Grieves v. United Kingdom, *supra* note 85, paras. 74–91.

[89] *Id.*, paras. 81–82, 85–90.

[90] See the United Kingdom's argument in *Grieves v. United Kingdom*, *supra* note 85, para. 88.

Based on *Cooper* and *Grieves*, serving military officers cannot sit on military courts (as they could be subject to discipline and reports); the presence of a civilian and a permanent military judge on the military bench is required; and all members of military courts, including the ordinary members, must either have legal qualifications or be properly instructed by an experienced lawyer (as their lack of legal qualifications would otherwise undermine their independence). In other words, if military courts are to survive the ECHR's scrutiny, they must resemble ordinary courts in their composition and other key features.

Regarding the ECHR's stance on military judges and courts, we might thus conclude that the ECHR not only de facto banned both the jurisdiction of military courts over civilians[91] in times of peace and the presence of military judges in criminal trials against civilians, but also significantly curbed states' design choices regarding the structure of military courts established to try members of the armed forces.[92] All of these powers that cannot be exercised by military courts must thus de facto be transferred to ordinary courts—which is precisely what happened in Turkey. By the same token, these holdings tend undercut the rationale for having military courts in the first place, for they stop providing extra value in comparison to ordinary courts.

By contrast, the ECHR has arrived at mixed results regarding the institutional design of other (that is, nonmilitary) special courts and quasi-judicial bodies. The ECHR has adopted a less intensive review of special criminal courts that do not involve military judges and also, with one important exception, of other quasi-judicial bodies deciding administrative and civil-law matters. As to the former, in the recent judgment in *Fruni v. Slovakia*, the ECHR reaffirmed the earlier case law of the ECHR and European Commission on Human Rights[93] that the right to a fair trial in European Convention Article 6 cannot be read as prohibiting the establishment of special criminal courts if they have a basis in law,[94] and acknowledged that fighting corruption and organized crime may well require measures, procedures, and institutions of a specialized character.[95] In *Fruni*, all the judges of the Special Court were professional career judges whose term of office was not limited in time, which was deemed to meet the requirements of the European Convention.[96] The ECHR thus conveyed the message that when a special criminal tribunal consists of ordinary judges only, the Court will not interfere in domestic judicial design. As for the presence of civil servants, the ECHR found their inclusion in a judicial tribunal both compatible with European Convention Article 6[97] and "desirable and even essential" in

[91] Apart from the Turkish cases, see *Maszni v. Romania*, *supra* note 67, para. 51.

[92] This trend might reflect the general decline of military courts in Europe. For instance, the German Basic Law allows the establishment of federal military criminal courts "only during a state of defense or over members of the Armed Forces serving abroad or on board warships," BASIC LAW, Art. 96(2), *at* https://www.btg-bestellservice.de/pdf/80201000.pdf, but no such statute has actually been enacted. France abolished military courts in times of peace in 1982 (la loi 82-261 du 21 juillet 1982), and Slovakia did so in 2009. The Czech Republic went even further and, in 1993, prohibited military courts altogether—that is, even in times of war.

[93] *See, e.g.*, X v. Ireland, App. No. 8299/78, 1981 Y.B. Eur. Conv. on H.R. 132; Erdem v. Germany, 2001-VII Eur. Ct. H.R. 15.

[94] Fruni v. Slovakia, App. No. 8014/07, para. 142 (Eur. Ct. H.R. June 21, 2011).

[95] *Id.*

[96] *Id.*, paras. 135–49.

[97] Ringeisen v. Austria, 13 Eur. Ct. H.R. (ser. A) paras. 95–97 (1971).

principle[98]—unless they are in a subordinate position to their superiors in the organization from which they came.[99] Importantly, it is not necessary to prove that such a civil servant was actually given orders from his or her superior. The mere appearance of subordination is enough to cast doubt on her eligibility.[100]

More recently, the ECHR expanded its interpretation of the notion of "tribunal" in European Convention Article 6 so as also to cover judicial councils.[101] Judicial councils are constitutional organs sui generis, however—often with both judges and nonjudges (and sometimes predominantly nonjudges)—and they have never been intended to operate as courts and are not even within the state's judicial arm. They are independent, intermediary organizations positioned between the judiciary and politically accountable officials in the executive or legislative branch, and are given significant powers in appointing, promoting, and disciplining judges.[102] Subjecting these bodies to the requirements of the right to a fair trial thus significantly alters their role and may have repercussions regarding their composition and their powers.[103] In other words, the ECHR judicialized the functioning of judicial councils and effectively gave the last word in decisions regarding the careers of judges to judges themselves.

These cases on quasi-judicial bodies—ones not considered by domestic systems to be part of the judicial power—reveal a clear pattern. Civil servants are allowed to participate in adjudicating fundamental rights, but only insofar as they are not in a subordinate position to their superiors. This view seems prima facie reasonable, but virtually any civil servant is de jure subordinate to someone within his or her ministry or agency. Consequently, this seemingly benign condition has significant repercussions for domestic judicial design: it strongly counsels against the participation of civil servants in quasi-judicial tribunals. Similarly, politicians may sit on judicial councils, but only insofar as they do not constitute a majority and cannot outvote judicial members.[104]

In sum, this section has shown that the ECHR and IACHR both look beyond the domestic labels attached to institutions that function like courts.[105] They conceptualize a "judiciary" on broader terms than states do, and their judicial design agendas extend to wide-ranging judicial and quasi-judicial bodies. By expanding the standards originally applicable to the judiciary (narrowly construed) to quasi-judicial bodies, both courts have severely limited signatory states' choices regarding the institutional design of special courts, quasi-judicial bodies, and

[98] Ettl v. Austria, 117 Eur. Ct. H.R. (ser. A) para. 40 (1987).

[99] *See* Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) para. 67 (1988); Sramek v. Austria, 84 Eur. Ct. H.R. (ser. A) para. 42 (1984).

[100] *See* Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) para. 67 (1988); Sramek v. Austria, 84 Eur. Ct. H.R. (ser. A) para. 42 (1984).

[101] *See* Olujić v. Croatia, App. No. 22330/05, para. 44 (Eur. Ct. H.R. Feb. 5, 2009); Volkov v. Ukraine, 2013-I Eur. Ct. H.R. 73, para. 91; *see also* Özpinar v. Turkey, *supra* note 36, paras. 77–78 (where the ECHR read the requirements of independence and impartiality of the tribunal into the right to a private and family life). For further details see section "Removal and Disciplining of Judges" below.

[102] *See* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2008).

[103] See the consequences of the *Volkov* judgment discussed below in notes 181–89 and accompanying text.

[104] *See* TRECHSEL, *supra* note 10, at 48 n.14; Volkov v. Ukraine, *supra* note 101, para. 109 (regarding the ECHR).

[105] *See* TRECHSEL, *supra* note 10, at 47–48.

judicial councils, and have put those special jurisdictions under pressure. Correspondingly, this move expanded the authority of ordinary courts, whose jurisdiction broadened to cover areas of law, such as election law, military law, and laws governing the careers of judges, that were initially within the purview of different bodies. As cases on electoral and judicial councils attest, the gradual empowerment of ordinary courts often comes hand in hand with the judicialization of politics, by which we mean "the expansion of the province of the courts or the judges at the expense of the politicians and/or administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts."[106] The following section will show that both courts have adopted and created additional requirements concerning ordinary courts that further entrench a special role for judges in signatory states.

Removal and Disciplining of Judges

Judicial independence is considered a cornerstone of the rule of law, and it is not surprising that both the ECHR and the IACHR vigorously protect domestic judiciaries against inappropriate interferences. When dealing with such cases, however, the two courts have not limited themselves to finding violations based on the facts of the immediate case. They have also made some conscious institutional choices that go beyond the individual cases—especially those concerning the removal and disciplining of judges.

The IACHR's leading case dealing explicitly with the status of judges, the *Constitutional Court* judgment, was discussed above. That specific issue in the case concerned the dismissal of judges, but the Court also articulated some general considerations regarding disciplinary proceedings against judges. The IACHR said that disciplinary proceedings were permissible (and even necessary in a democratic society) but that the proceedings needed to respect due process guarantees and could not overstep their boundaries—for example, by examining matters related to the court's exercise of its jurisdiction. More specifically, in this case the Investigation Committee put in place in order to discipline judges for specific acts went well beyond its mandate and investigated the whole of the judges' judicial activity. The IACHR said that this overstepping amounted to a denial of the judges' right to a fair trial because they disciplined for actions with which they were not originally charged, which precluded the preparation of a proper defense.[107]

The IACHR also endorsed the view that "under the rule of law, the independence of all judges must be guaranteed and, in particular, that of constitutional judges, owing to the nature of the matters submitted to their consideration."[108] The IACHR used the guarantee of judicial independence and the special status of Constitutional Court justices as a legitimate basis for Peru's Congress to consider disciplinary action and to potentially order the removal of judges. But the IACHR also noted that the Congress was bound by the same rules for fair trials as any judicial body and that it was a "tribunal" for the purpose of removing or disciplining Constitutional Court justices. In other words, the only way to discipline judges is by using judicial

[106] Torbjörn Vallinder, *When the Courts Go Marching*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 13 (Neal Tate & Torbjörn Vallinder eds., 1995); *see also id.* (noting that the other meaning of judicialization is "the spread of judicial decision-making methods").

[107] Constitutional Court v. Peru, *supra* note 31, paras. 80–84.

[108] *Id.*, para. 75.

procedures and standards—even when the judges have special status and power as members of apex courts.

In *Apitz Barbera*, the IACHR dealt with issues that arose in connection with the extensive reforms to the Venezuelan judicial system after Hugo Chávez came to power in 1999—reforms that included the disciplining and dismissal of many judges.[109] The restructuring of judicial power in Venezuela, according to the state, required the hiring of provisional judges, who did not have the same rights and guarantees as their permanent counterparts.[110] Even those who were already judges in 1999 needed to reapply for their positions if they wished to continue in them.[111]

The restructuring process also resulted in the creation of the Commission on the Functioning and Restructuring of the Judicial Power,[112] which, among other things, had the power to admonish, suspend, and dismiss judges.[113] Subsequent legislation built on these premises and continued pursuing the reform goals. In 2009, a resolution from the Supreme Court of Justice (Tribunal Supremo de Justicia) determined that all judges and judicial employees would be subject to performance evaluations.

The main feature of these reforms was the creation of the "provisional judge." Between 2002 and 2004, around 80 percent of all judicial positions were occupied by provisional judges, who were freely appointed and dismissed.[114] In 2010 alone, 56 percent of the judges in Venezuela were replaced.[115]

In *Apitz Barbera*, the IACHR said that the vulnerability of the judicial system in this transition is magnified if no proper processes are in place for removing judges.[116] One issue in the case was whether the judges who determined the dismissal of Apitz Barbera and his colleagues in Venezuela should have been recused and whether their nonrecusal violated the American Convention.[117] The IACHR's examination of Venezuelan legislation and case law revealed that biased judges had no effective opportunity to be recused from a disciplinary trial. This situation could be understood as a violation of the duty to guarantee the right to a fair trial, as opposed to a duty to respect that right, under Article 25 of the American Convention.[118] In other words, the IACHR suggested that the right to a fair trial with respect to judges is not just something the state must not interfere with, but is something that the state must proactively seek institutionally to provide.

The IACHR also said that domestic courts had a duty, when hearing cases that can affect human rights, to give reasons for their decisions, lest they be arbitrary and in violation of the

[109] Apitz Barbera ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008).

[110] Chocrón Chocrón v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 227, para. 50 (July 1, 2011).

[111] *Id.*, para. 54.

[112] Comisión de funcionamiento y reestructuración del sistema judicial.

[113] Chocrón Chocrón v. Venezuela, *supra* note 110, para. 60.

[114] *Id.*, para. 69.

[115] *Id.*, para. 71.

[116] Apitz Barbera, *supra* note 109, para. 43.

[117] *Id.*, para. 62.

[118] *Id.*, para. 66.

American Convention.[119] The reasons could even be contrary to the case law of higher courts; the capacity of judges to disagree with higher courts is, indeed, a means of preserving judicial independence.[120] The Court differentiated between judicial appeals to review and correct the decisions of lower court judges, and disciplinary control to evaluate the conduct of judges as public employees: a lower court judge's commission of error cannot be the ground for disciplinary sanctions.[121] Because Apitz Barbera and his colleagues had been dismissed (at least in part) for going against the decisions of a hierarchically superior court, and because that was the only ground for the disciplinary procedure that led to their dismissals, their dismissals were considered to violate the American Convention.[122]

The IACHR ordered the state, in partial reparation, to establish a "Code of Ethics of the Venezuelan Judge" (Código de ética del juez y jueza venezolano) consistent with the Court's analysis of the rights at stake in the case.[123] In other words, the IACHR mandated a specific tool for restructuring or even designing the internal functioning of the judiciary in Venezuela—one that would, among other things, directly weaken higher courts' control over the rest of the judicial system. Although countries in Latin America are, at least formally, civil-law countries with no doctrine of precedent, most of those countries have actually adopted some form of the doctrine for the decisions of their highest (often constitutional) courts; the IACHR judgment in *Apitz Barbera*, however, seems to undercut the doctrine by preserving the capacity of lower court judges to decide cases contrary to the decisions of higher courts. This judgment thus interferes with the internal architecture of domestic judiciaries in that it undermines the role of appellate courts and changes the power allocation within the judiciary by giving more power to lower court judges.

In *Reverón Trujillo*,[124] the Court analyzed a similar case, one in which a judge was disciplined for allegedly abusing her authority and for not being sufficiently diligent with a case assigned to her.[125] Her dismissal was eventually overturned in Venezuela, but the body that did so refused to reinstate her position and to compensate her for lost income.[126] The IACHR case therefore addressed whether the overturning of her dismissal, but without reinstatement and payment of back salary, was a violation of Reverón Trujillo's right to an effective remedy.[127] The IACHR noted that one of the main purposes of the separation-of-powers doctrine is to guarantee the independence of judges and that independence should be guaranteed not only in relation to individual judges like Reverón Trujillo but also institutionally.[128] The Court thus took on the authority to review institutional matters since that authority is needed in order to guarantee the independence of judges. The IACHR was also presented, however, with an argument that the provision guaranteeing a right of access to an independent judiciary also entails

[119] *Id.*, para. 78 (citing Chaparro Álvarez v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 170, para.107 (Nov. 21, 2007)).

[120] *Id.*, para. 84.

[121] *Id.*, para. 86.

[122] *Id.*, para. 91.

[123] *Id.*, para. 253, operative para. 19.

[124] Reverón Trujillo v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 197 (June 30, 2009).

[125] *Id.*, para. 50.

[126] *Id.*, para. 55.

[127] *Id.*, para. 56.

[128] *Id.*, para. 67.

that judges themselves have a right to be independent and not subject to undue pressures.[129] The Court determined that judges had no right to be independent under Article 8(1) of the American Convention; instead, judges had a duty to be independent, and states had a duty to guarantee an independent judiciary. The duty to prevent violations of the right to an independent judiciary was understood to entail positive obligations on the state to have an appropriate legal framework in place, but this particular issue was not at stake in *Reverón Trujillo*.[130] The Court found that Venezuela had violated the American Convention,[131] and ordered Venezuela to enact legislation providing stronger protections for judges in disciplinary proceedings.[132]

The difference between the duty of states to guarantee an independent judiciary and the right of judges to be independent may seem minor and formalistic, but it may have important implications in the further development of the case law. From the perspective of the IACHR's competences, a finding that judges have a right to be independent would appear to be an impermissible extension of the American Convention, whereas finding that states have a duty to guarantee an independent judiciary is more in line with that convention. But also, from the perspective of institutional design, a duty upon states to guarantee an independent judicial branch, as opposed to the right of individual judges to be independent, enables the IACHR to be more directly involved in the design of the judicial system as a whole rather than simply providing remedies to individual judges. In this instance the more conservative approach to interpreting the American Convention enabled the Court to directly intervene regarding institutional design.

The IACHR extended this line of thinking in the *Constitutional Tribunal* case against Ecuador. The Court determined that the need to guarantee judicial independence has institutional dimensions because such independence affects the separation of powers and the important role that the judiciary plays in a democracy.[133] Building upon its finding in *Reverón Trujillo*, the IACHR found that the right of judges to be independent arises jointly from the right to an independent judiciary (Article 8(1) of the American Convention) and the right of access to public service (Article 23(1)(c) of the American Convention).[134]

In *Chocrón Chocrón v. Venezuela*,[135] the latest in a series of cases against Venezuela regarding the dismissal of judges,[136] the IACHR further addressed questions concerning the disciplining of judges. Mercedes Chocrón Chocrón was sworn in as a temporary judge in November 2002.[137] Three months later she was told that there were objections to her appointment and that she would be removed. The objections were neither published nor disclosed to Chocrón Chocrón,[138] and when the IACHR asked Venezuela to provide documentation concerning the

[129] *Id.*, para. 143.
[130] *Id.*, paras. 146–48.
[131] *Id.*, para. 127.
[132] *Id.*, operative para. 10.
[133] Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 268, para. 198 (Aug. 28, 2013).
[134] *Id.*, para. 199.
[135] Chocrón Chocrón v. Venezuela, *supra* note 110.
[136] Apitz Barbera ("First Court of Administrative Disputes") v. Venezuela, *supra* note 109; Reverón Trujillo v. Venezuela, *supra* note 124.
[137] *Id.*, para. 79.
[138] *Id.*, para. 82.

objections, none could be produced.[139] A central issue in the case was whether the removal of Chocrón Chocrón violated the American Convention.[140]

The IACHR noted that judges, unlike other public servants, are entitled to a series of special guarantees "essential for the exercise of the judicial function"—in particular, judicial independence.[141] Such protection is needed in order to maintain the separation of powers and to prevent judicial power and judges from being unduly influenced by external forces or even by appeal judges.[142] The Court went on to say that, even though both temporary and full-time judges are expected to perform the same function (administer justice) and are subject to the same requirements, they are not entitled to the same protections.[143] Nevertheless, even temporary judges needed to be guaranteed some stability in their positions in order to protect them (and the judicial branch as a whole) against external pressures.[144] While the Court highlighted that the judicial restructuring program in Venezuela pursued a legitimate long-term goal, it also said that in practice, and "despite the time that ha[d] passed, the restructuring process was ongoing"; that is, the program had yet to achieve its goal.[145] The Court therefore declared violations of the American Convention's provisions on judicial remedies (Articles 8(1) and 25(1))[146] and ordered Venezuela to change its legislation concerning the removability of judges.[147]

In discussing the implications of its judgment in *Chocrón Chocrón*, the IACHR noted that domestic organs in Venezuela should interpret them via the mechanism of "control of conventionality" (*control de convencionalidad*):[148] in order to be fully compliant with their obligations under the American Convention, domestic judiciaries (and other state organs) are supposed to take into account the IACHR's jurisprudence as to what the American Convention requires. The control of conventionality doctrine will be discussed in more detail below,[149] but the main point for our purposes is that the mechanism serves as the means by which the IACHR created an obligation on states to consult the American Convention (as interpreted by the IACHR) when reviewing or designing their judicial branches. In other words, through the use of this mechanism, the IACHR created for itself a central role in domestic institutional design.

The dismissal of judges was also addressed in *Constitutional Tribunal* (already discussed above in relation to judicial independence). The IACHR said that the removal of judges is an attack not only on judicial independence but, more broadly, on the democratic order.[150] In that case, judges of Ecuador's Constitutional Tribunal were subject to political trial by the National Congress in the wake of allegations of misconduct. The judges attended their trial and

[139] *Id.*, para. 80.
[140] *Id.*, para. 89.
[141] *Id.*, para. 67; *see also* Herrera Ulloa v. Costa Rica, *supra* note 31, para. 171; Palamara Iribarne v. Chile, *supra* note 43, para. 145; Reverón Trujillo v. Venezuela, *supra* note 124, para. 67.
[142] Chocrón Chocrón v. Venezuela, *supra* note 110, para. 97; *see also* Apitz Barbera ("First Court of Administrative Disputes") v. Venezuela, *supra* note 109, para. 55; Reverón Trujillo v. Venezuela, *supra* note 124, para. 67.
[143] Chocrón Chocrón v. Venezuela, *supra* note 110, para. 104.
[144] *Id.*, paras. 105–06.
[145] *Id.*, para. 108.
[146] *Id.*, para. 142.
[147] *Id.*, paras. 162, 205(8).
[148] *Id.*, para. 172.
[149] *See* section "Judicial Lawmaking" below.
[150] Constitutional Tribunal (Camba Campos et al.) v. Ecuador, *supra* note 133, para. 207.

were absolved by a majority of the Congress. Following that decision, however, an extraordinary session of the National Congress was called; the judges were not present, and they were dismissed from their positions.[151] Strong evidence suggests that the judges were dismissed to obstruct criminal proceedings against ex-president Bucaram, who was being brought to trial on corruption charges.[152] Although Ecuador's new constitution, adopted prior to the case being submitted to the IACHR, prohibits the political trial of judges, the IACHR reiterated the need to guarantee judicial independence and to restrict the involvement of the political branches with the judiciary—even with regard to constitutional court judges, who, as highlighted in *Constitutional Court*, have special status. If political branches, in hearing cases against judges, are not capable of acting within the parameters of what the IACHR considers to be a judicial body, they violate provisions of the American Convention.

In these cases the IACHR explicitly noted that institutional norms reflecting a particular model of separation of powers were subordinate to substantive human rights norms—which can be read as implying that human rights law overrides other legal considerations. This view has the effect of creating a legal hierarchy, with human rights norms at the top. And since the mandate of human rights courts such as the IACHR is to apply human rights treaties, it should be expected that human rights courts would construct such hierarchies. All legal problems are thus interpreted from a human rights perspective that privileges putting those norms front and center,[153] but one still needs to ask how this partial perspective comes to be integrated into the more general framework of international law.

The case of Karen Atala Riffo and her children is relevant for our present purposes.[154] Even though the crux of *Atala Riffo* revolves around the rights of a lesbian in a stable partnership to retain custody of her children from a previous (heterosexual) union, part of it is also about disciplinary proceedings against judges—since Atala Riffo is a judge in Chile. Disciplinary proceedings were initiated within the judiciary to determine whether Atala Riffo's conduct during the judicial proceedings for custody of her children affected her performance as a judge. Earlier, during those custody proceedings, it was made public that she was a lesbian in a same-sex relationship, and the disciplinary proceeding was called to assess whether her conduct "damage[d] the image . . . of the Judiciary."[155] Those proceedings (which included an inspection of her work environment) were conducted under the provisions of Judiciary Bylaw (Código orgánico de tribunales) regarding judges' moral conduct and "vices."[156] The inspector specifically mentioned her sexual identity as an object of concern. The sanctioning body (a court of appeals) that used that report as a basis for disciplining Atala Riffo did not expressly mention that part of the report as a basis for the sanctions but did not expressly reject it either.[157] What was inferred, instead, was that questioning her about her sexual identity was necessary to protect the "judiciary's image." The IACHR said that under no circumstances could someone's sexual

[151] *Id.*, paras. 67–98.
[152] *Id.*, para. 211.
[153] *See also* Lixinski, *supra* note 2.
[154] Atala Riffo v. Chile, *supra* note 36.
[155] *Id.*, para. 214.
[156] *Id.*, para. 219.
[157] *Id.*, para. 220.

orientation be the basis for disciplinary proceedings and that the Chilean authorities had violated the American Convention's nondiscrimination provision.[158]

This case was the first in the inter-American system in which a right other than the rights to a remedy or to a fair trial was used to assess and discuss judicial structure and design. Even though the rights to a remedy and to a fair trial were part of the Court's judgment, the rights to nondiscrimination and to a private life also affected the Court's discussion of judicial discipline and consequently its views on judicial design. More specifically, by thinking of judicial design beyond the confines of a fair trial and access to remedies, the IACHR has given itself the freedom to think about institutional design more broadly: such design needs to be assessed not only in terms of remedies and procedural fairness, but against the full gamut of human rights. It remains to be seen how this broader, less determinate agenda plays out in the future.

The ECHR has also occasionally touched upon the domestic issues of institutional design in relation to disciplining judges. Although the ECHR's first cases reviewing the decisions of disciplinary panels against judges—*Pitkevich v. Russia*,[159] plus Turkish[160] and Italian cases[161]—were not about institutional design per se, they are important for another reason. They show that in proceedings before the ECHR, disciplined judges may invoke not only their right to a fair trial but also other rights guaranteed by the European Convention.[162]

The reliance of domestic judges on other than fair trial rights was understandable. It is only recently, beginning with the 2009 case of *Olujic v. Croatia*,[163] that the ECHR has considered disciplinary proceedings as triggering the civil rights protections—the "civil limb"—of European Convention Article 6. In that case the applicant was a judge and also the president of the Supreme Court. In 1996, the Croatian National Judicial Council (CNJC) instituted disciplinary proceedings against him for, among other things, allegedly using his position to protect the financial activities of two individuals known for their criminal activities. During the disciplinary proceedings the applicant stated that the "proceedings against him had been politically motivated because of his opposition to the State's senior officials with regard to the concept of the judiciary."[164] The CNJC accepted the allegations, however, and the applicant was dismissed from the Supreme Court in 1998.

Before the ECHR Olujic alleged several violations of the right to a fair trial. In a landmark judgment the ECHR held that the facts of the case triggered the civil rights protections of European Convention Article 6,[165] and then found four substantive violations of the right to a fair

[158] *Id.*, paras. 221–22.
[159] Pitkevich v. Russia (dec.), *supra* note 35.
[160] *See, e.g*, Albayrak v. Turkey, App. No. 38406/97 (Eur. Ct. H.R. Jan. 31, 2008).
[161] *See* N. F. v. Italy, 2001-IX Eur. Ct. H.R. 25, paras. 26–34; Maestri v. Italy, 2004-I Eur. Ct. H.R. 183, para. 43 (Grand Chamber).
[162] In the *Pitkevich* case, the applicant was dismissed for proselytizing on the bench. Before the ECHR she invoked freedom of religion (European Convention, *supra* note 16, Article 9), freedom of expression (Article 10), freedom of association (Article 11), and prohibition of discrimination (Article 14). In *N. F. v. Italy* the applicant was reprimanded by the National Council of the Judiciary for being a Freemason; the ECHR found that the reprimand violated his freedom of association (Article 11). In the *Albayrak* case, the applicant was relocated to rural areas and reprimanded for following Kurdistan Workers' Party–related media—actions found to be in violation of his freedom of expression (Article 10).
[163] *See* Olujić v. Croatia, *supra* note 101, para. 16.
[164] *Id.*, para. 16.
[165] *Id.*, para. 44.

trial.[166] Two major judicial-design requirements emerge from this case. First, the ECHR subjected a sui generis constitutional organ, the CNJC, to the requirements of European Convention Article 6. This novel application of Article 6 has far-reaching implications for all judicial councils in Europe because it affects their composition and their powers.[167] Second, in order to conclusion that the civil rights protections of Article 6 were applicable, the ECHR had to reason not only that an individual constitutional complaint against the decision of the CNJC was available but also that the Croatian Constitutional Court's review of the CNJC's disciplinary proceeding could be taken as indicating that "the applicant [had] access to a court under the domestic system."[168] Moreover, by interpreting the Croatian Constitutional Court's role as a full judicial review of the CNJC's actions, the ECHR implicitly subordinated the CNJC to the Constitutional Court.[169] This move changed the balance of power between these two constitutional organs and gave to judges the final say in judicial politics.

In a subsequent case raising similar issues, *Özpınar v. Turkey*,[170] the ECHR avoided the Article 6 issues but reached a similar conclusion. The applicant became a judge in 1997. A disciplinary investigation was initiated five years later because of her chronic lateness for work, her unsuitable clothing, and her close relationship with a lawyer whose clients had allegedly benefited from her favorable decisions. The Turkish High Council of Judges and Public Prosecutors removed Özpınar from office, mainly on the ground that "by her inappropriate attitudes and relationships," she had "undermined the dignity and honour of the profession."[171] Özpınar subsequently lodged an application with the ECHR, alleging that her dismissal by the judicial council had been based on aspects of her private life and that no effective remedy had been available to her.

The novel aspect of this case was that Özpınar was dismissed not by a standard court, considered a part of the judicial power under the domestic constitution, but by a judicial council comprising both judges and nonjudges. At that particular time the Turkish High Council of Judges and Public Prosecutors comprised seven members:[172] the minister of justice (who acted as the council's president), the undersecretary of the Ministry of Justice, three members of the Court of Cassation and two members of the Council of State.[173]

As mentioned above, the ECHR did not address the Article 6 issues.[174] But the Court invoked European Convention Article 8 (right to respect for private and family life) as a means

[166] *Id.*, paras. 68, 76, 85, 91.

[167] See the consequences of the *Volkov* judgment discussed below in notes 181–89 and accompanying text.

[168] Olujić v. Croatia, *supra* note 101, paras. 35–37.

[169] *See* Volkov v. Ukraine, *supra* note 101, paras. 124–29 (where the ECHR found that ordinary courts had insufficient scope to review judicial council decisions).

[170] Özpinar v. Turkey, *supra* note 36.

[171] *See id.*, paras. 5–22.

[172] Note that the composition of the Turkish High Council of Judges and Public Prosecutors (Hakimler ve savcılar yüksek kurulu) changed as a result of the 2010 constitutional amendment. The 22-member council now includes the minister of justice, the undersecretary of the Ministry of Justice, three members of the Court of Cassation, two members of the Council of State, one member from the Judicial Academy, ten members from the civil and administrative courts of first instance, and four members appointed by the president of the Turkish Republic from among experienced lawyers and lecturers.

[173] Note that the council's judicial members were nominated by the Plenary Sessions of the Court of Cassation and the Council of State to the president of the republic, who formally appointed them.

[174] *Id.*, para. 30. Relying on *Apay v. Turkey* (dec.), App. No. 3964/05 (Eur. Ct. H.R. Dec. 11, 2007), it arrived at the conclusion that the criteria for triggering the "civil law" limb in Article 6 of the European Convention, *supra* note 16, were not met; the Turkish Constitution explicitly prohibits judicial review of decisions of the Turkish High Council of Judges and Public Prosecutors.

of addressing the dismissal of Özpınar on the merits. It did so on the grounds of her Article 8 complaint. The ECHR observed that the dismissal decision had been directly related to Özpınar's conduct, both private and professional, and that her reputation was at stake[175]—which interfered with her right to respect for her private life. The ECHR then distinguished between her on-the-bench and off-the-bench behavior and concluded that the criticisms of the applicant's on-the-bench behavior did not interfere with her private life.[176] But the Court found that the investigation had not substantiated those accusations, that it had taken into various actions of Özpınar that were unrelated to her professional activity,[177] and that she had been denied adversarial proceedings before an independent and impartial supervisory body.[178] The ECHR found a violation of Article 8 because the interference with the applicant's private life had not been proportionate.

Özpınar is important for two reasons. First, the ECHR reaffirmed its earlier approach that it will scrutinize domestic judicial-design issues under other substantive rights even though, under recent ECHR case law, disciplinary proceedings against judges fall within the civil rights protections of European Convention Article 6. Second, *Özpınar* implicitly suggests that a judicial council in which the minister of justice and his undersecretary sit is not an appropriate body for disciplining judges as it is not an independent and impartial supervisory body.

The ECHR went even further in *Volkov v. Ukraine*,[179] which concerned the dismissal of a Supreme Court judge. The first stage of the disciplinary proceedings took place before the Ukrainian High Council of Justice (UHCJ).[180] The ECHR identified four structural deficiencies at that stage: (1) judges were in the minority on the UHCJ; (2) judges on the UHCJ were not elected by their peers; (3) only four out of the UHCJ's twenty members worked there full time; and (4) the prosecutor general was a UHCJ member.

On the first issue, the ECHR stated that, for the tribunal to be considered impartial, at least half of its members, including the chairman, should be judges.[181] The ECHR relied heavily on the European Charter on the Statute for Judges,[182] which requires the substantial participation of judges in the relevant disciplinary body.[183] Since only three out of sixteen members of the UHCJ who attended the hearing in the applicant's case were judges, this criterion had not been met.

[175] Özpinar v. Turkey, *supra* note 36, para. 47.

[176] *Id.*, para. 71.

[177] *Id.*, para. 74; *see also* K.A. v. Belgium, App. Nos. 42758/98, 45558/99 (Eur. Ct. H.R. Feb. 17, 2005).

[178] Özpinar v. Turkey, *supra* note 36, paras. 77–78.

[179] Volkov v. Ukraine, *supra* note 101.

[180] Due to the limited space, we cannot deal with the remaining two stages in the same detail. Regarding the parliamentary stage of the disciplinary proceedings with Volkov, see *id.*, paras. 118–22, and *infra* note 208 and accompanying text. Regarding the High Administrative Court stage of the disciplinary proceedings with Volkov, see *id.*, paras. 123–30, and *supra* note 169 and accompanying text.

[181] *id.*, para. 109.

[182] Council of Europe doc. DAJ/DOC (98) 23 (1998), *at* https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf.

[183] Volkov v. Ukraine, *supra* note 101, paras. 78, 109.

In a second, closely related design issue,[184] the ECHR held, relying on the Venice Commission, that it is not enough to have at least half of the UHCJ membership appointed from the judiciary; these judicial members of the UHCJ must also be elected by their peers.[185] Since only three of the twenty members had been so elected, Ukraine failed to meet this criterion.

Third, only four UHCJ members worked there full time; the other members continued to work and receive a salary outside the UHCJ. According to the ECHR, this situation inevitably "involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality."[186] The ECHR also suggested that the minister of justice and the prosecutor general, who were ex officio members of the UHCJ, should not sit on the UHCJ at all since the loss of their primary position would entail resignation from the UHCJ.[187]

Finally, the ECHR again referred to the Venice Commission and suggested that the inclusion of the prosecutor general and other prosecutors as UHCJ members raised further concerns, as it could have a deterrent effect on judges and be perceived as a potential threat.[188] Due to these structural deficiencies in the proceedings before the UHCJ, the ECHR concluded that those proceedings violated the requirements of judicial independence and impartiality under European Convention Article 6(1).[189]

The ECHR's case law on disciplining judges reveals several important insights. First, institutional changes in this area are driven by judges themselves, who often rely on their substantive, rather than fair trial, rights. Second, by requiring at least half of the members of the disciplinary panels to be judges, the ECHR de facto rules out impeachment and other special mechanisms. Instead, it suggests that judges should be judged primarily by judges—which remains a controversial position[190] even though the IACHR has also staked out the same position in the cases analyzed above. Finally, the cases on high councils of the judiciary show that the ECHR constrains the choices of signatory states on how to design their judicial councils and also, implicitly, on which model of court administration they can adopt. More specifically, the ECHR orders judicial councils to be restructured so that judges are in the majority—which prioritizes judges at the expense of the politicians

[184] *Id.*, para. 111.

[185] *Id.*, paras. 79, 112.

[186] *Id.*, para. 113.

[187] *Id.*

[188] *Id.*, paras. 79, 114.

[189] *Id.*, para. 117.

[190] This position is particularly contentious in transition-to-democracy scenarios. *See, e.g.*, DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (2003) (on how South African judges from the apartheid era refused to appear before the Truth and Reconciliation Commission and fought back against any attempt to hold them to account); HAKEEM YUSUF, TRANSITIONAL JUSTICE, JUDICIAL ACCOUNTABILITY AND THE RULE OF LAW (2010) (on how Nigerian judges managed to escape accountability after the fall of the military regime); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007) (discussing the limited accountability of the Pinochet-era judges); Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 LAW & SOC. INQUIRY 99 (2010) (same); *see also* David Kosař, *The Least Accountable Branch*, 11 INT'L J. CONST. L. 234 (2013) (recent scholarship on judicial accountability puts into question whether judges should be judged by judges even in established democracies).

and other nonjudicial members of judicial councils. This restructuring effort is most visible in *Volkov*, where the ECHR read the nonbinding soft law on judicial councils, created mainly by judges themselves,[191] into the European Convention. The Court thus indirectly pushed for a particular model of court administration—namely, the strong judicial council model based on the Italian Consiglio superiore de la magistratura, which the European Union and Council of Europe enthusiastically endorse during the accession process for new EU member states.[192] The ECHR did so despite the growing criticism, both normative and empirical, of judicial self-government.[193]

Regarding the removability of judges, the ECHR initially adopted a deferential stance, but only toward judges of special adjudicatory bodies. For instance, in the *Campbell and Fell* judgment, the ECHR, discussing the removability of members of the Boards of Visitors, noted that the relevant domestic legislation contained "neither any regulation governing the removal of members of a Board nor any guarantee for their irremovability" and that "[i]t is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence."[194] The Court eventually concluded, however, that "the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present."[195] Similarly, in *Sramek v. Austria*, the ECHR accepted at face value that members of the Regional Real Property Transactions Authority could be removed only under narrow, statutorily defined circumstances; it found no violation of the European Convention in that respect.[196] This initial deference is misleading, however, since these cases touched upon judges of highly peculiar bodies and not judges of the ordinary courts.

The ECHR subsequently tightened its grip on the removability issues, even for judges at other than ordinary courts. For instance, in *Bryan v. United Kingdom* the ECHR faced an issue similar to the one addressed in *Campbell and Fell*. According to UK law, the secretary of state could issue a direction—at any time, even during ongoing proceedings—to revoke the power of the planning inspector to decide an appeal. Despite the similarity of these two cases, the ECHR stated that

> the very existence of this power available to the Executive, whose own policies may be in issue, is enough to deprive the inspector of the requisite appearance of independence, *notwithstanding* the limited exercise of the power in practice as described by the

[191] *See* Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe* 15 GERMAN L.J. 1257 (2014) (further details regarding this soft law).

[192] *See* Cristina Parau, *The Drive for Judicial Supremacy*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 619, 655 (Anja Seibert-Fohr ed., 2012); Bobek & Kosař, *supra* note 191, at 1258–62.

[193] This criticism spans virtually all the continents. *See, e.g.*, Garoupa & Ginsburg, *supra* note 102; Parau, *supra* note 192; Anja Seibert-Fohr, *European Perspective on the Rule of Law and Independent Courts*, 20 J. FÜR RECHTSPOLITIK 161 (2012); Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Rule of Law Series, Working Paper No. 28, 2002); Brent T. White, *Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia*, 4 E. ASIA L. REV. 209 (2009); DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016).

[194] Campbell v. United Kingdom, 80 Eur. Ct. H.R. (ser. A) para. 80 (1984).

[195] *Id.*

[196] Sramek v. Austria, *supra* note 99, para. 38. However, the Court found a violation of Article 6(1) of the European Convention, *supra* note 16, for another reason. *See id.*, para. 42.

Government *and irrespective of* whether its exercise was or could have been in issue in the present case.[197]

Similarly, in *Ninn-Hansen v. Denmark* the fact that "during [the term of the lay judges] it was not possible for any authority, including Parliament, to change the composition [of the Court of Impeachment] or in any other way influence the lay judges"[198] seems to have saved the Danish government.[199]

Two subsequent judgments, *Brudnicka v. Poland* and *Luka v. Romania*, confirm this trend. The applicants in the 2005 *Brudnicka* case[200] complained that the maritime chambers that had heard their cases had not been independent and impartial tribunals. The ECHR agreed with them: "Given that the members of the maritime chambers (the president and vice-president) are appointed and removed from office by the Minister of Justice in agreement with the Minister of Transport and Maritime Affairs, they cannot be regarded as irremovable, and they are in a subordinate position *vis-à-vis* the Ministers."[201] The ECHR thus held that maritime chambers cannot be considered impartial and independent tribunals.

More recently, in 2009, the ECHR addressed the irremovability of judges in *Luka v. Romania*.[202] Luka complained that the courts hearing his case had been neither impartial nor independent because they had included lay judges (so-called judicial assistants) who had been vulnerable to outside pressure. The ECHR agreed. Although the Court noted the advantage of courts that include a mixture of professional and lay judges,[203] it found that domestic law had not afforded sufficient guarantees as to their independence in performing their duties.[204] Most importantly, the ECHR stressed that the judicial assistants had not been irremovable and, moreover, that the applicable legislation did not list criteria for their removal.[205] Judicial assistants were therefore not protected against the premature termination of their duties, with the consequence that the panels that included such assistants were not independent.

A year later, in *Urban v. Poland*, the ECHR reaffirmed its strict position and held that a Polish trial court that included a so-called assessor—a candidate for the office of district court judge who could be removed by the minister of justice—lacked independence, even though the minister had the power to do so only with the approval of a regional court's board of judges (a power that the government's statistics showed had never been exercised).[206] In addition, the ECHR suggested that the dismissal of probationary judges must be susceptible to judicial review.[207] Finally, in the 2013 *Volkov v. Ukraine* case, the ECHR scrutinized the quasi-impeachment of Volkov via a plenary meeting of Parliament and concluded that that meeting was not an appropriate forum for examining issues of fact and law, assessing evidence, and "making a legal characterisation of the facts"; politicians sitting in Parliament were not required to have any of the legal or judicial experience needed to determine complex issues of fact and law in an individual disciplinary case.[208] The key insight of the *Urban* and *Volkov* cases is thus that the closer the resemblance between an ordinary court and the forum of a dismissed judge, the more stringent the applicable criteria become. The deferential approach of *Campbell and Fell* and *Sramek* is reserved only for decision makers of peculiar adjudicatory bodies, if at all.

In sum, these cases show that, in the exercise of their functions, judges are at once holders and stewards of the rights protected by the European and American Conventions. The fact that the ECHR and IACHR find themselves in a position to make determinations about the rights of judges means that the two courts endow themselves with the mandate to inquire into internal structures of the judiciary. In particular, the courts have determined that the processes for regulating judges must satisfy the same standards as the judiciary itself in administering justice to others. The broader implication is that the ECHR and IACHR see themselves as having a mandate to review the functioning of professional bodies in general—at least to the extent such bodies can sanction their members. And particularly in the *Özpinar* and *Atala Riffo* cases, the ECHR and IACHR, respectively, also found that requirements in addition to those for a fair trial and access to remedies—for instance, the right to private and family life—are applicable in efforts to regulate judges and in reviewing the composition of the judiciary. According to the ECHR and IACHR, judges are civil servants, but they also have lives beyond their public calling. Signatory states do not enjoy unfettered discretion in determining how judges should behave outside the bench.

But it is not only by deciding on the validity of specialized jurisdictions or regulating the role of the domestic judge that international human rights courts have a say in how to structure a domestic judiciary. As we shall see in the next section, international human rights courts also attempt to define what each country should understand as "law"—the very subject matter of judicial activity.

Judicial Lawmaking

The previous two sections showed how both the ECHR and IACHR, whether intentionally or not, have pushed for institutional changes regarding military tribunals and the disciplining of judges that have, in turn, gradually empowered the judiciary in its ordinary role and shifted the balance of power between the three branches of government. This section shows a subtler and less visible way in which the two courts have expanded the role of judges. In particular, the courts have interpreted "law," a term that appears in most limitation clauses of the European[209]

[197] Bryan v. United Kingdom, 335-A Eur. Ct. H.R. (ser. A) para. 38 (1995) (emphasis added). The Court eventually held, however, that Article 6(1) of the European Convention, *supra* note 16, was not violated; the scope of review of the High Court was sufficient to comply with that article. *But cf.* British-American Tobacco Co. v. Netherlands, 331 Eur. Ct. H.R. (ser. A) para. 77 (1995).

[198] Ninn-Hansen v. Denmark (dec.), 1999-V Eur. Ct. H.R. 321; *see also* Gubler v. France, App. No. 69742/01, para. 28 (Eur. Ct. H.R. July 27, 2006).

[199] *See also* Yavuz v. Turkey (dec.), App. No. 29870/96 (Eur. Ct. H.R. May 25, 2000).

[200] Brudnicka v. Poland, 2005-II Eur. Ct. H.R. 153.

[201] *Id.*, para. 41.

[202] Luka v. Romania, App. No. 34197/02 (Eur. Ct. H.R. July 21, 2009).

[203] *Id.*, para. 42.

[204] *Id.*, para. 47.

[205] *Id.*, para. 44.

[206] Urban v. Poland, App. No. 23614/08, paras. 49–50 (Eur. Ct. H.R. Nov. 30, 2010).

[207] *Id.*, para. 53.

[208] Volkov v. Ukraine, *supra* note 101, para. 122.

[209] European Convention, *supra* note 16, Arts. 5 (right to liberty and security), 8 (right to respect for private and family life), 9 (freedom of thought, conscience, and religion), 10 (freedom of expression), 11 (freedom of assembly and association), 12 (right to marry); *id.*, Protocol, Art. 1 (protection of property); *id.*, Protocol No. 4, Art. 2 (freedom of movement and residence).

and American[210] Conventions, so as to cover not only statutes and regulatory measures, but also judicial decisions.[211]

In Europe, this trend was gradual. It began in 1979 with the ECHR's decision in the seminal free speech case, *Sunday Times v. United Kingdom*.[212] When dealing with the law of contempt of court, which was largely "a creature of the common law and not of legislation,"[213] the Court observed that "the word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law."[214] The Court added:

> It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system.[215]

This pronouncement was not controversial. The case concerned a common-law jurisdiction, and nothing in the Court's careful wording implied that the same principle would apply to continental legal systems.[216] Subsequently, however, in *Kruslin v. France*,[217] the Court explicitly rejected the argument of France and the Delegate of the Commission[218] that judge-made law counts as a separate source of law only in common-law countries.

> The Sunday Times, Dudgeon and Chappell judgments admittedly concerned the United Kingdom, but *it would be wrong to exaggerate the distinction between common-law countries and Continental countries* . . . . Statute law is, of course, also of importance in common-law countries. Conversely, *case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts*. . . . Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law".[219]

[210] American Convention, *supra* note 13, Arts. 12 (freedom of conscience and religion), 13 (freedom of thought and expression), 15 (right of assembly), 16 (freedom of association), 17 (rights of the family), 21 (right to property), 22 (freedom of movement and residence), 23 (right to participate in government). The American Convention also has a general clause on restrictions (Article 30), which is used, for instance, to make restrictions possible to the right to private life (Article 11). *See* Lucas Lixinski, *Comparative International Human Rights Law: An Analysis of the Right to Private and Family Life Across Human Rights "Jurisdictions,"* 32 NORDIC J. HUM. RTS. 99, 102 (2014) (discussion of Article 11).

[211] Note that the concept of law plays a critical role also in those articles that do not have an explicit limitation clause. See, for example, Article 6 (right to a fair trial) of the European Convention, *supra* note 16, which requires that tribunals be established by "'law," and Article 7 (punishment without law), in which "law" determines the foundation for criminal proceedings.

[212] Sunday Times v. United Kingdom (No. 1), 30 Eur. Ct. H.R. (ser. A) (1979).

[213] *Id.*, para. 47.

[214] *Id.*

[215] *Id.*

[216] *See also* the follow-up cases against the United Kingdom: *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) para. 44 (1981), and *Chapell v. United Kingdom*, 152-A Eur. Ct. H.R. (ser. A) para. 53 (1989).

[217] Kruslin v. France, 176-A Eur. Ct H.R. (ser. A) (1990).

[218] *Id.*, para. 28 (for the position France and the delegate of the European Commission of Human Rights).

[219] *Id.*, para. 29 (emphasis added).

This conclusion has been confirmed by several Grand Chamber judgments[220] and is now part of the ECHR's settled case law. The concept of law in the European Convention must be understood to include not only statutory law but judge-made law in both common-law and civil-law jurisdictions.[221]

The impact of *Kruslin* cannot be overestimated. It has serious repercussions for European civil-law jurisdictions. Most of them do see judicial decisions as having some normative effects,[222] but judge-made law is not treated as a formal source of law and is not on a par with statutes. As the Delegate of the Commission argued in *Kruslin*, case law is a secondary source of French law, whereas the convention, in limitation clauses using phrases such as "in accordance with law" was, it was argued, referring only to primary sources of law—that is, statutes, not case law.[223] This position is, in fact, the standard one not only in France[224] but also in other civil-law systems in Europe.[225]

The ECHR rejected that position, however, and recognized neither the uniqueness of acts deriving from parliament nor their qualitative difference from other sources of law. This holding has the effect of upgrading judicial decisions to become primary sources of law, even in civil-law systems. The ECHR thus has explicitly taken the view that ordinary domestic courts not only interpret laws but also engage in lawmaking. The effect is to undermine the primacy of parliamentary legislation in continental Europe.[226] Some European domestic courts have already exploited this ECHR doctrine by recognizing their own decisions as having the same normative value as new statutes approved by parliament. For instance, the Italian Court of Cassation, the highest court for civil and criminal matters, declared its own case law as a new "element of law" under Article 666 of the Code of Criminal Procedure,[227] which was allegedly necessary to meet the requirements of the ECHR's case law on European Convention Article 7 (no punishment without law).

The impact of the *Kruslin* judgment and its progeny is not limited to their conceptual impact on categorizing sources of law and on defining the lawmaking role of judges in civil-law jurisdictions. This case law is also consequential. The recent Grand Chamber judgment in *Mooren*

[220] *See, e.g.*, Leyla Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 115, para. 88 (Grand Chamber); Sanoma Uitgevers B.V. v. Netherlands, App. No. 38224/03, para. 83 (Eur. Ct. H.R. Sept. 14, 2010) (Grand Chamber).

[221] Kruslin v. France, *supra* note 217.

[222] *See, e.g.*, Karl Larenz & Claus-Wilhelm Canaris, METHODENLEHRE DER RECHTSWISSENSCHAFT 133–262 (3d ed. 1995) (regarding Germany); HUGO UYTERHOEVEN, RICHTERLICHE RECHTSFINDUNG UND RECHTSVERGLEICHUNG. EINE VORSTUDIE ÜBER DIE RECHTSVERGLEICHUNG ALS HILFSMITTEL DER RICHTERLICHEN RECHTSFINDUNG IM PRIVATRECHT (1959) (regarding Switzerland); PHILIPE MALAURIE & PATRICK MORVAN, DROIT CIVIL: INTRODUCTION GÉNÉRALE 265 (2d ed. 2005) (regarding France).

[223] Kruslin v. France, *supra* note 217, para. 28.

[224] *See* MITCHEL DE S.-O.-L'E LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 173 (2004); Jan Komárek, *Questioning Judicial Deliberations*, 29 OXFORD J. LEGAL STUD. 805, 809–10, 824 (2009) (recent debate between Lasser and Komárek); *see also* Olivier Beaud, *Reframing a Debate Among Americans: Contextualizing a Moral Philosophy of Law*, 7 INT'L J. CONST. L. 53, 59 (2009).

[225] *See supra* note 222 and accompanying text.

[226] *See* Nicola Lupo & Giovanni Piccirilli, *European Court of Human Rights and the Quality of Legislation: Shifting to a Substantial Concept of 'Law'?*, 6 LEGISPRUDENCE 229 (2012).

[227] Cass., Jan. 21, 2010, n. 18288 (Sezioni unite), *at* http://www.europeanrights.eu/public/sentenze/18288_05_10.pdf (in Italian); *see also* Lupo & Piccirilli, *supra* note 226, 240–41.

v. Germany[228] is a perfect example. In *Mooren* the applicant contested the legality of his detention, and did so on two grounds. First, he argued that the distinction made by the domestic courts between "defective" and "void" detention orders[229] had no basis in the Code of Criminal Procedure. Second, he stressed that the Court of Appeal's refusal to reach a decision on the merits itself contradicted the clear wording Article 309, section 2, of that code.[230]

The ECHR rejected both arguments. Regarding the first, it noted that "the distinction made under German law between 'defective' and 'void' detention orders is well-established in the domestic courts' case-law" and thus that "the applicant, if necessary with the advice of his counsel, could have foreseen the Court of Appeal's finding on this point."[231] Regarding the second argument, the ECHR acknowledged that the Court of Appeal's decision to remit the case to the court of first instance—after finding the detention order to be defective—ran counter to Article 309, section 2, of the Code of Criminal Procedure.[232] The ECHR added, however, that "the Court of Appeal, in remitting the case to the District Court, expressly referred to previous decisions of other courts of appeal which concerned cases comparable to the applicant's,"[233] and that "[i]n these circumstances, the [ECHR was] satisfied that the remittal of his case to the court of first instance and his continuous detention at least up to that court's decision was sufficiently foreseeable for the applicant."[234]

In other words, the ECHR accepted that domestic courts have the power to amend the statute in criminal matters to the detriment of the defendant. It is clear that, without the shift in *Kruslin* that upgraded domestic judicial decisions to be on a par with statutes, the detention of Mooren would not have been "in accordance with a procedure prescribed by law," as required by Article 5(1) of the European Convention.

By contrast, the idea of judicial lawmaking in the IACHR is closely connected to the doctrine of *control of conventionality*. That doctrine, developed by the IACHR in a series of cases starting with *Almonacid Arellano*,[235] requires that domestic judges, in interpreting domestic law, take into consideration the American Convention and, importantly, the IACHR's interpretations of the convention. The underlying assumption is that states parties to the American Convention have made the convention, including the IACHR's interpretations of the convention, part of domestic law.[236]

[228] Mooren v. Germany, 2009 50 EHRR 554 (Grand Chamber).

[229] Note that a defective detention order remains a valid basis for detention until the defect is remedied by the appeal courts in the course of the judicial review proceedings, whereas a void detention order—one containing a serious and obvious defect—provides no lawful basis for detention. See *id.*, para. 48.

[230] *Id.*, para. 90.

[231] *Id.*, para. 91.

[232] *Id.*, para. 92.

[233] *Id.*, para. 93.

[234] *Id.*

[235] Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

[236] For more in-depth analysis of this notion and its evolution, see Ariel A. Dulitzky, *El impacto del control de convencionalidad. ¿Un cambio de paradigma en el sistema interamericano de derechos humanos?, in* TRATADO DE LOS DERECHOS CONSTITUCIONALES 533 (Julio Cesar Rivera ed., 2014); Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights,* 12 GERMAN L.J. 1203 (2011); Oswaldo Ruiz-Chiriboga, *The Conventionality Control: Examples of (Un)successful Experiences in Latin America,* 3 INTER-AM. & EUR. HUM. RTS. J. 200 (2010).

Under the early case law on control of conventionality, the doctrine applied specifically to the merits of a case: had the state complied with its obligations under American Convention Article 2 to incorporate the convention into domestic law? But the doctrine was then extended to apply to remedies. That is, separate from the question of a case's merits, the remedies ordered by a domestic court must take into account the American Convention and the IACHR's relevant jurisprudence.[237] And as the earlier discussion of *Castañeda Gutman* indicates, control of conventionality has been further extended to include structural issues—in that instance, the availability of judicial review of a previous decision in the same case.

The IACHR sees control of conventionality as applying to the interpretation not only of statutory law but also of internal legal *practices* broadly defined. And since the primary activity of courts is to review those internal practices (via the cases that are presented for decision), case law itself is expected to comply with the American Convention. The control of conventionality mechanism thus becomes an important means by which the IACHR defines its own role and expands its influence in the hemisphere.[238] Importantly, too, even if control of conventionality does not explicitly give courts the power to make laws, the doctrine does seem to imply that domestic courts, high or low, have the power to strike down laws. The IACHR's case law on control of conventionality, which categorizes court decisions as law for the purpose of limitation clauses, has important real-world consequences. By diffusing the power of judicial review—now spread over the entire judicial system—the doctrine potentially alters the rules of the game in countries with concentrated judicial-review powers.[239] That is, endowing domestic courts with the power to strike down laws may change both the outcome of court cases and the overall dynamic of the judicial systems themselves.

The question whether judicial decisions form part of the law for the purpose of the American Convention's limitation clauses has been addressed, but only tangentially, in two cases involving Barbados. In one of them, *Boyce*,[240] the IACHR applied the control of conventionality doctrine to consider whether the consideration of local laws by local courts and the UK Privy Council (still the court of last resort for Barbados under Commonwealth rules) had violated the American Convention. While the IACHR did not explicitly refer to court judgments as law per se, it implied that they were in determining that courts cannot be precluded from considering legal matters concerning the American Convention and that the UK Privy Council and the Caribbean Court of Justice are also subject to control of conventionality standards.[241] More recently, in *Dacosta Cadogan*,[242] a separate opinion by Judge García Ramírez said that, as Barbados is a common-law country, judicial decisions are part of the law of the land that needs to comply with the American Convention.[243]

Based on the above discussion of ECHR and IACHR jurisprudence, it is clear that the two courts have used different mechanisms in examining the matter of judicial lawmaking. The

[237] Dulitzky, *supra* note 236, at 534–35.

[238] *Id.* at 535.

[239] We are grateful to one of the anonymous reviewers for this insight.

[240] Boyce v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 169 (Nov. 20, 2007).

[241] *Id.*, para. 78.

[242] Dacosta Cadogan v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 2014 (Sept. 24, 2009).

[243] *Id.*, Sep. Op. Sergio García Ramírez, J., para. 12.

differences can be partly attributed to timing: it is only recently that common-law countries have had cases adjudicated by the IACHR, and it is uncertain whether this reasoning will spill over onto cases involving civil-law jurisdictions, as it did in the ECHR. In this context the IACHR has adopted a fairly restrictive interpretation of "law" in cases decided after *Boyce* and *Dacosta Cadogan*. One of these later cases involved American Convention Article 9 (*nullum crimen sine lege*), which, because of the nature of criminal law statutes, the Court saw as requiring a narrow interpretation.[244] Likewise, in *Barreto Leiva*,[245] which built on a 1986 advisory opinion,[246] the Court narrowly construed "laws" as referring only to the enactments of democratically elected representatives. Thus, at least for now, it appears that the IACHR does not consider domestic judicial decisions to be lawmaking for the purposes of the American Convention, even if control of conventionality clearly puts the IACHR's own judgments on the same footing as law.[247]

Therefore, on the question whether domestic courts engage in lawmaking, the ECHR and IACHR seem to diverge. Whereas the ECHR has used case law in common-law jurisdictions as a stepping stone to the position that judicial decisions are law for the purposes of the European Convention, the IACHR has so far adopted a narrow interpretation of what law is, and has restricted its extension to case law only in relation to the (few and recent) cases involving common-law jurisdictions. But the IACHR has used the concept of control of conventionality to make case law a part of the law, which makes its position somewhat problematic. More specifically, the IACHR sees its own jurisprudence as having the force of law in American Convention states but does not consider the domestic case law of states parties as relevant to the Court's determinations of whether countries are in compliance with the American Convention and the Court's dictates. This position supports the more conservative reading of the convention by civil-law jurisdictions and also the established understanding of judicial power in those countries. Although this position is therefore respectful of national sovereignty, it enables domestic judges to hide behind the IACHR when going against their governments (since judicial decisions are not taken into account in determining compliance with the American Convention), and it means that states' legislative branches need to be more mindful of the IACHR. That is, states have to revise legislation in light of IACHR judgments more actively than they would if judicial decisions were considered law; restrictive interpretations by judges of existing law in accordance with IACHR judgments would be sufficient. Article 2 of the American Convention creates an obligation upon legislative branches to enact legislation in accordance with the convention, and the Court has used that provision in several instances. But the doctrine of control of conventionality seemingly obligates states' legislative branches to enact legislation even when states' records have not come under IACHR scrutiny.

Despite these differences, each of the two courts' approaches to judicial lawmaking has the consequence of expanding judicial powers. This expansion seems at odds with the established differences between common-law and civil-law jurisdictions, and is therefore intrusive. As we

[244] Kimel v. Argentina, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 177, paras. 63–67 (May 2, 2008).

[245] Barreto Leiva v. Venezuela, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 206, para. 76 (Nov. 17, 2009).

[246] The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (May 9, 1986).

[247] Dulitzky, *supra* note 236, at 547.

highlighted above, however—at least with respect to civil-law jurisdictions in the Americas—many of those countries had already adopted means to give judicial decisions (at least of higher courts) some precedential value. More importantly, though, by construing domestic judicial power as a form of lawmaking, international human rights courts (perhaps unintentionally) have created further means of entrenching their power and expanding their own domestic influence. The central dynamic here is that the decisions of domestic judiciaries are the most common means of enforcing the judgments of international human rights courts, in part because domestic judges are more likely than legislatures to consult the decisions of courts from other jurisdictions, including international courts. In the inter-American system, in particular, the doctrine of control of conventionality ensures that domestic judges consult and enforce international (namely, IACHR) judgments. When such a dynamic is at work, domestic judges are themselves lawmakers (even if only to a limited extent), and the human rights court is, in effect, itself a domestic lawmaker.

The consequences of expanding judicial lawmaking powers are thus twofold. First, regional human rights courts empower domestic courts vis-à-vis other domestic institutions. Domestic courts are more natural allies of regional human rights courts than domestic legislatures are, and they may help the ECHR and IACHR both to secure compliance with their judgments and to enhance their legitimacy.[248] Domestic courts, in general, and the highest national courts, in particular, can help monitor the enforcement of ECHR and IACHR judgments in their own states and, by issuing similar decisions, even increase the support within their own states for those judgments.[249] This dynamic places the other branches of government in a difficult position before regional human rights courts; it is extremely hard for a government to contest before the ECHR or IACHR a judgment of its own highest court.[250] Hence, the second consequence of expanding the lawmaking powers of domestic courts is to increase the power of regional human rights courts. Put differently, by empowering domestic courts, the ECHR and the IACHR also empower themselves.

The analysis so far has shown the influence that regional human rights courts have had in three specific subject areas. But do these isolated pronouncements—the courts' responses to the particular cases that have appeared on their dockets—amount to something akin to a clear agenda or roadmap for domestic judicial design? The next part discusses this possibility.

II. JUDICIAL DESIGN AGENDAS OF REGIONAL HUMAN RIGHTS COURTS

Part I identified three avenues by which the regional human rights courts both constrained states' choices regarding the institutional design of domestic judiciaries and advanced their judicial design agendas. This part discusses broader implications stemming from the case law of the ECHR and IACHR, and identifies similarities and differences among them. The first section compares the judicial design agendas of the ECHR and IACHR, and the second

[248] *See* Sadurski, *supra* note 18, at 414–20 (who describes the cooperation between the ECHR and the Polish Constitutional Court that led to *Hutten-Czapska v. Poland*, 2006-VII Eur. Ct. H.R. 57 (Grand Chamber)); SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 111–12 (2014) (showing other examples).

[249] DOTHAN, *supra* note 248, at 111.

[250] *See* A. v. United Kingdom, 2009-II Eur. Ct. H.R. 137, para. 157 (where the ECHR observed that the "present situation is, undoubtedly, unusual in that Governments do not normally resort to challenging, nor see any need to contest, decisions of their own highest courts before this Court").

addresses how and to what extent these two courts define the contours of the "optimal judiciary." The overarching idea in this part is that human rights courts are embedding themselves domestically and constructing their power not only by *partnering* with domestic judiciaries[251] but also by *reshaping* them into more powerful players within the domestic sphere,[252] as we suggested at the end of part I. In other words, human rights courts empower themselves when they empower domestic courts.

Comparing the European and Inter-American Courts

Part I showed that both the ECHR and IACHR have been increasingly engaged with domestic judicial design, and it did so by examining three different dimensions of that engagement. This part takes a step back and assesses the intervention of both courts more broadly: Who is taking the domestic judicial design cases to the ECHR and IACHR? Which articles of the European and American Conventions are used as main "vehicles" to advance the judicial design agendas of the two courts? How much do the courts intervene in the design of domestic judiciaries (that is, how wide is the margin of appreciation that each court leaves for states parties)? How bold are the remedies prescribed by the two courts? Finally, does the maturity of democracy play any role in the level of deference afforded by the ECHR and IACHR? The answers to these questions will enable us to understand the differences and similarities in the judicial design agendas of the two courts, as well as how judicial power has expanded in favor of domestic and international courts.

The impact of domestic judges on agendas for judicial design. In both the ECHR and IACHR, the majority of applicants in cases pertaining to judicial design are themselves judges, and the cases turn on findings about the judicial function and the requirements around it.[253] Other applicants include politicians,[254] victims of massacres,[255] and people criminally prosecuted for terrorism.[256] In all of these cases, the applicants have been excluded from the civilian judiciary because their activities were beyond the scope of regular jurisdictions, because they were victims of noncivilians who sought refuge outside the reach of civilian courts, or because the offenses they were charged with pertained to national security. Given that domestic judges represent what is, by far, the largest group of applicants in cases that have raised questions of judicial design, those judges and those cases have played a central role as the ECHR and IACHR have developed their agendas for domestic judicial design. The extent to which judges have taken their own cases to the ECHR and IACHR is, indeed, not surprising. Those courts provide an opportunity for judges both to secure their own positions domestically and, more generally, to strengthen the judicial branch of government. Another factor is that in domestic systems the principal lawmaker—that is, the legislature—retains the ability to change the law in response

[251] See, for instance, the work of Karen Alter, *Altering Politics: International Courts and the Construction of International and Domestic Politics, in* POLITICAL REPRESENTATION IN THE GLOBAL AGE (Peter A. Hall, Wade Jacoby, Jonah Levy & Sophie Meunier eds., 2014) (arguing that human rights courts enhance their power by partnering with domestic institutions).

[252] For a narrower argument along the same lines, see Helfer, *supra* note 17, at 146.

[253] Constitutional Tribunal (Camba Campos et al.) v. Ecuador, *supra* note 133; Campbell v. United Kingdom, *supra* note 194.

[254] Castañeda Gutman v. Mexico, *supra* note 13; Incal v. Turkey, *supra* note 68.

[255] 19 Merchants v. Colombia, *supra* note 32.

[256] Lori Berenson Mejía v. Peru, *supra* note 30.

to an undesired court decision affecting domestic judicial design, and in some countries the principal lawmaker may retain a type of constitutional override.[257] With the involvement of international human rights courts, however, it may be much more difficult for states to alter the law following a court decision.

The incentive, as discussed above, for domestic judges to bring cases to international human rights courts has a strong "bridging effect"[258] between domestic and supranational judges. Through their willingness to rule in favor of individual judges and against their national governments, the ECHR and IACHR signal to bold judges throughout the states parties their readiness to review alleged violations of both procedural and substantive rights by judges' governments.[259] This empowerment of domestic judges against their own governmental institutions increases the likelihood that these judges will be willing to exercise the muscular judicial review needed to remedy convention violations at home.[260] By protecting domestic judges the ECHR and IACHR also move away from their traditional hierarchical relationship with domestic courts, in which the international courts review the work of domestic judges,[261] and toward a more partner-like relationship.[262] Over time, for example, the ECHR and IACHR have forged a compliance partnership with domestic judges.[263] Through such a process, international courts gain allies in domestic judges, who, protected by supranational courts from potential attacks by the political branches, will then work to further entrench the ideas and doctrines of the international courts domestically.

Convention provisions deemed relevant to judicial design. Myriad provisions in the European and American Conventions are now used to inform judicial design. The use of these provisions is largely the product of the increasing number of applications lodged by domestic judges, who often rely on substantive rights rather than on the right to a fair trial, which had long been the

[257] Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J. L. & CTS. 61, 65 (2013).

[258] The bridging/bonding distinction was introduced by Robert Putnam in BOWLING ALONE: COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22 (2000) and Pamela Paxton in *Social Capital and Democracy: An Interdependent Relationship*, 67 AM. SOC. REV. 254 (2002). Essentially, *bonding* social networks are defined as bringing "together people who are like one another in important respects (ethnicity, age, gender, social class, and so on)," whereas *bridging* ones "bring together people who are unlike one another." Robert D. Putnam & Kristin A. Goss, *Introduction, in* DEMOCRACIES IN FLUX: THE EVOLUTION OF SOCIAL CAPITAL IN CONTEMPORARY SOCIETY 1, 11 (Robert D. Putnam ed., 2002).

[259] *See,* mutatis mutandis, Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 311–12 (1997).

[260] *See* Helfer, *supra* note 17, at 158 (arguing that "[w]here executive branch officials or legislators maintain substantial control over judicial appointments, retentions, or salaries, a judge's interest in professional survival sharply diminishes his or her incentive to hold governments accountable for human rights abuses").

[261] Helfer & Slaughter, *supra* note 259, at 297.

[262] *See* Huneeus, *supra* note 11, at 495 (arguing that "the compliance gap between executives and justice system actors suggests that the Inter-American Court—and international human rights courts more generally—could increase compliance by more directly engaging national judges and prosecutors, deliberately cultivating national justice systems as partners in compliance"); Helfer, *supra* note 17, at 158 (arguing that "[t]he cooperation of national judiciaries is essential to maintaining and improving compliance with European human rights standards").

[263] On the importance of national courts in ensuring compliance with international human rights rulings more generally, see André Nollkaemper, *The Role of National Courts in Inducing Compliance with International and European Law—a Comparison, in* COMPLIANCE AND THE ENFORCEMENT OF EU LAW 164–65 (Marise Cremona ed., 2012); Harold Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1401, 1413 (1998–99); James Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 71 U. CHI. L. REV. 469, 506, 520–25 (2005); Helfer & Slaughter, *supra* note 259, at 288–90, 310–11, 353.

primary vehicle for advancing domestic judicial design. In this context the ECHR has considered freedom of expression,[264] freedom of association,[265] freedom of religion,[266] and respect for private and family life,[267] as well as fair trial rights.[268] The IACHR has also shown some initial activity along these lines,[269] though it still tends to rely primarily on the provisions for fair trial and access to remedies when discussing judicial design. Domestic judges and courts are strengthened as more and more actions by judges are decided in their favor, but the biggest winners are the international courts. The rights to a fair trial and to respect for private and family life are particularly important provisions for the purpose of expanding the jurisdiction of human rights courts, and they operate as veritable blanket clauses. Other provisions may also have that effect, albeit to a lesser extent. What is important is that, because nothing in either the European or American Convention directly authorizes the ECHR or IACHR to address matters of judicial design, the two courts have had to be creative and to advance their agendas, generally as obiter dicta, under the umbrella of rights explicitly protected by the conventions.

Implementation of judgments concerning judicial design. Both the ECHR and IACHR leave little room for domestic authorities to maneuver in implementing their judgments concerning judicial design. For instance, in *Morris* the ECHR rejected the United Kingdom's minimalist compliance with the *Findlay* ruling, and even after the country had revamped its courts-martial, the ECHR, in *Grieves*, found the United Kingdom noncompliant again. In *Volkov* the Court went even further and, apart from payments for pecuniary and nonpecuniary damage, ordered Ukraine to take a number of general measures aimed at reforming the system of judicial discipline, including "legislative reform involving the restructuring of the institutional basis of the system"[270] and, for the first time in its history, the reinstatement of the applicant as judge of Ukraine's Supreme Court at the earliest possible date.[271] The relevance of local expertise[272] and local specifics[273] in implementation are consequently reduced, and the ECHR may sometimes be perceived as remote and uncomprehending in relation to domestic concerns.[274] By contrast, the IACHR has consistently taken a stronger position and reinforced its own doctrine of control of conventionality (even citing examples across the continent of its recognition by domestic high courts) as the key to compliance. It has repeatedly noted that states and their judiciaries need to take into account IACHR jurisprudence when designing any judicial reforms.[275]

Both the ECHR and IACHR stipulate not merely the result to be achieved but also the desired model—that is, how to get there. Consider the following examples from the case law of the ECHR and IACHR: both courts curbed the jurisdiction of military courts over civilians and also military personnel, thereby effectively requiring trials before ordinary courts;[276] both courts de facto prohibit the impeachment of judges;[277] and the ECHR prefers judges to be disciplined by ordinary courts instead of by judiciary councils, which comprise both judges and nonjudges.[278] These differences matter because an obligation of means is a lot more intrusive upon domestic sovereignty than a mere obligation of result.[279] The latter leaves it up to states to choose how to meet the standards set by the regional human rights courts, thus allowing a plurality of institutional solutions, whereas the former directs states to adopt a particular institutional model and prohibits the alternatives. A reasonable interpretation is that in cases involving domestic judicial design, the ECHR and IACHR are ordering the *combination* of an obligation of result with an obligation of means. This combination reinforces the authority of international courts, but it also can be seen as strengthening domestic courts, at least if one considers that international court judgments are typically implemented domestically by the other branches of government. If those branches have little room for maneuver in implementing such judgments, there is no choice but to expand the powers of local courts in the way indicated.

Availability of remedies. The ECHR has much less discretion than the IACHR when it comes to ordering remedies.[280] The IACHR has made good use of its powers. In *Apitz Barbera*, for instance, the IACHR ordered Venezuela to approve within a year a bill already circulating in parliament (on a code of judicial ethics),[281] an order reiterated in *Reverón Trujillo*.[282] This latter case also stated that Venezuela needed to change its norms and practices on the free removal of provisional judges.[283] A couple of years later, after the code of judicial ethics had been approved by the parliament, the IACHR addressed its implementation in *Chocrón Chocrón* and required the legislation to be implemented "as soon as possible" in order to guarantee judicial

[264] Wille v. Liechtenstein, *supra* note 34; Kudeshkina v. Russia, *supra* note 34; Albayrak v. Turkey, *supra* note 160.

[265] N. F. v. Italy, *supra* note 161.

[266] Pitkevich v. Russia (dec.), *supra* note 35.

[267] Özpinar v. Turkey, *supra* note 36. See also *Atala Riffo v. Chile*, *supra* note 36, for the IACHR.

[268] See, for example, *Olujić v. Croatia*, *supra* note 101, and virtually all of the other ECHR decisions discussed in part I.

[269] Atala Riffo v. Chile, *supra* note 36.

[270] Volkov v. Ukraine, *supra* note 101, para. 200.

[271] *Id.*, para. 208.

[272] Jannika Jahn, *Ruling (In)directly Through Individual Measures?—Effect and Legitimacy of the ECHR's New Remedial Power*, 74 HEIDELBERG J. INT'L L. 1, 26 (2014).

[273] The inattention to local specifics may cause serious problems to the domestic authorities. For instance, the head of Ukraine's High Council of Justice, Oleksandr Lavrynovych, stated in an interview on October 8, 2013, that according to Ukrainian legislation, Volkov could only be newly appointed to the post but not reinstated; the law on the "Judiciary and Status of Judges" limited the number of judges to forty-eight. *See* European Human Rights Advocacy Centre, *Oleksandr Volkov Reinstated as Supreme Court Judge in Ukraine* (Feb. 2, 2015), *at* http://www.ehrac.org.uk/news/oleksandr-volkov-reinstated-as-supreme-court-judge-in-ukraine/; *see also Volkov v. Ukraine*, *supra* note 101 (Yudkivska, J., concurring). Despite this problem, Volkov was reinstated to the Supreme Court of Ukraine in February 2015.

[274] *See* John Bell, *Interpretative Resistance Faced with the Case-Law of the Strasbourg Court*, 14 EUR. PUB. L. 134, 142 (2008).

[275] *See, e.g.*, Atala Riffo v. Chile, *supra* note 36, paras. 281–84; López Mendoza v. Venezuela, *supra* note 48, paras. 226–28; Chocrón Chocrón v. Venezuela, *supra* note 110, paras. 164–72.

[276] *See, e.g.*, Cesti Hurtado v. Peru, *supra* note 44; Incal v. Turkey, *supra* note 68, para. 72; Grieves v. United Kingdom, *supra* note 85, para. 72.

[277] *See, e.g.*, Constitutional Tribunal (Camba Campos et al.) v. Ecuador, *supra* note 133; Volkov v. Ukraine, *supra* note 101, para. 122.

[278] Volkov v. Ukraine, *supra* note 101, paras. 109–17.

[279] *See also* Anja Seibert-Fohr, *European Perspective on the Rule of Law and Independent Courts*, 20 J. FÜR RECHTSPOLITIK 161, 166 (2012) (arguing, regarding judicial councils, that the problem with the Council of Europe's recent pronouncements is that they have gradually shifted the emphasis from obligations of results to obligations of means).

[280] *See generally* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2006). *But see* Helfer, *supra* note 17, at 146–49.

[281] Apitz Barbera ("First Court of Administrative Disputes") v. Venezuela, *supra* note 109, para. 253.

[282] Reverón Trujillo v. Venezuela, *supra* note 124, para. 191.

[283] *Id.*, para. 193.

independence, impartiality, and stability.[284] By contrast, the ECHR has been, at least in the past, more deferential to states.[285] The ECHR's judicial design rulings discussed in part I were declaratory and demanded financial compensation, but the Court imposed no explicit requirement that states adjust their domestic practices, even if the Court expected that that would happen.[286] More recently, however, the ECHR has introduced the concept of pilot judgments and started to require far-reaching remedies such as, in *Volkov*, the comprehensive legislative reform of the system of disciplining judges, as well as the reinstatement of a dismissed judge.[287] Only time will tell whether this bold remedy marks a shift in the ECHR's remedy policy or is a mere exception to the rule. Under any circumstances, the gap between the remedial powers of the two courts seems smaller now,[288] which is a sign that the power of these two courts is increasing.

Reach of judicial design cases. The judicial design cases discussed in part I show that the ECHR influences the judiciaries not only of developing democracies but also of developed ones. In fact, ECHR judgments have had especially strong implications for the judiciaries in established democracies. For instance, the Court's case law on military courts has forced the United Kingdom to revamp the structure of its military courts[289] and has changed the understanding of the concept of law in France and other civil-law jurisdictions.[290] But this is just the tip of the iceberg. Beyond the cases discussed in part I, the ECHR has, among other things, required the Netherlands to allow full judicial review of the Crown's administrative decisions,[291] ordered francophone countries to revise the role of advocates general in the Conseil d'état and the Cour de cassation,[292] and triggered the transformation of the House of Lords' Appellate Committee into the UK Supreme Court.[293] All of these judgments involve far-reaching changes that go beyond the remedy for a violation in an individual case. The ECHR has also showed little deference toward European transitional and developing democracies. It forced Turkey to abolish its national security courts and remodel its military judiciary;[294] required Croatia, Turkey, and Ukraine to revise the powers and composition of judicial councils;[295] and prompted Poland and Romania to revise the role of their special judicial officers.[296] Unlike the ECHR, the IACHR has jurisdiction mostly over countries still considered to

[284] Chocrón Chocrón v. Venezuela, *supra* note 110, para. 163.

[285] Huneeus, *supra* note 2, at 24.

[286] But note that this practice has begun to change toward more specific requirements for compliance. *See* Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the* Assanidze, Broniowski *and* Sejdovic *Cases*, 7 HUM. RTS. L. REV. 396 (2007); Huneeus, *supra* note 2, at 24.

[287] *See* notes 259–262 and accompanying text.

[288] *See* note 275 and accompanying text.

[289] *See* Findlay v. United Kingdom, *supra* note 78; Morris v. United Kingdom, *supra* note 80; Grieves v. United Kingdom, *supra* note 85.

[290] *See supra* notes 217–27 and accompanying text.

[291] *See* Benthem v. Netherlands, 97 Eur. Ct. H.R. (ser. A) paras. 32–44 (1985) (Grand Chamber); *see also* P. van Dijk, *The Benthem Case and Its Aftermath in the Netherlands*, 34 NETHERLANDS INT'L L. REV. 5 (1987).

[292] *See supra* notes 19–20 and accompanying text.

[293] *See supra* note 22.

[294] Incal v. Turkey, *supra* note 68; Şahiner v. Turkey, *supra* note 74.

[295] Olujić v. Croatia, *supra* note 101; Özpinar v. Turkey, *supra* note 36; Volkov v. Ukraine, *supra* note 101.

[296] Urban v. Poland, *supra* note 206; Luka v. Romania, *supra* note 202.

be maturing or developing democracies.[297] Control of conventionality is once again the key to developing those democracies, as far as the IACHR is concerned. Therefore, the maturity of democracy does not play a significant role[298] in the level of deference afforded by either the ECHR or IACHR. Their judicial design requirements are equally applicable to old and new democracies. What appears to be at stake here is a desire to promote stronger judiciaries both as an end in itself and as part of a broader human rights mandate. For these human rights courts, institution building is not a subsidiary matter.[299] It is a proactive engagement with judicial design—an engagement that strengthens domestic institutions while strengthening the international courts themselves.

To summarize our discussion of the domestic judicial design cases decided by the ECHR and IACHR: the most numerous applicants are judges; these judges employ a broad array of substantive articles of both the European and American Conventions as "vehicles" to advance their interests; both courts gradually narrowed the margin of appreciation for states parties to implement the courts' judgments and to restructure their judiciaries; both courts have recently prescribed bold nonpecuniary remedies requiring wide-scale judicial reforms[300] and the reinstatement of judges;[301] and the maturity of a state's democracy plays no demonstrable role in the level of deference afforded by the ECHR and IACHR regarding judicial design. All of these features reinforce the power of domestic courts or the international courts, and sometimes both.

Regarding the substantive areas of domestic judicial design discussed in part I, the ECHR and IACHR largely converge regarding the first two sets of issues: military courts and other special tribunals, and the disciplining and removal of judges. Both the ECHR and IACHR conceptualize a judiciary broadly when compared to states' domestic conceptualizations, and both courts, by expanding standards originally applicable to the judiciary, narrowly constructed, to quasi-judicial bodies, have severely limited states parties' choices regarding institutional design of military courts, quasi-judicial bodies, and judicial councils. Both courts have also strengthened the protections for ordinary judges and other judicial officers against disciplinary motions and removal, especially by bodies composed even in part of nonjudges. As a consequence, human rights courts not only determine whether a certain disciplinary or dismissal procedure was in accordance with the relevant convention but also have the power to specify the appropriate authority for hearing a given

[297] But see the caveat *supra* note 23.

[298] It would be wrong to infer, however, that the maturity of democracy does not play any role in adjudicating domestic judicial design issues, at least before the IACHR. For instance, *Atala Riffo v. Chile*, *supra* note 154, suggests that the IACHR was less specific and more deferential in its remedial powers to Chile, an Organisation for Economic Co-operation and Development member, than to Peru, as in *Cesti Hurtado v. Peru*, *supra* note 44, or *Constitutional Court v. Peru*, *supra* note 31.

[299] On subsidiarity in international human rights law, see Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AJIL 38 (2003), and Gerald Neuman, *Subsidiarity*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 360 (Dinah Shelton ed., 2013). On subsidiarity in international law more generally, see Andreas Føllesdal, *Principle of Subsidiarity as a Constitutional Principle in International Law*, 2 GLOBAL CONSTITUTIONALISM 37 (2013) and Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS. (forthcoming 2016). For the foundations and scope of the subsidiarity principle, see Jonathan Chaplin, *Subsidiarity: The Concept and the Connections*, 4 ETHICAL PERSP. 117 (1997) and Andreas Føllesdal, *Subsidiarity*, 6 J. POL. PHIL. 231 (1998).

[300] That said, the IACHR is still more proactive.

[301] *See* Volkov v. Ukraine, *supra* note 101, para. 208; Apitz Barbera ("First Court of Administrative Disputes") v. Venezuela, *supra* note 109, para. 246.

case domestically.[302] The only area in which the ECHR and IACHR diverge appears to be judicial lawmaking. Whereas the ECHR has elevated judge-made law to be on a par with legislation both in common-law and civil-law countries, the IACHR retains a narrower understanding of what law is and has restricted extending the concept of law beyond its own case law and to a (few and recent) cases involving common-law jurisdictions. This difference is relevant for the analysis presented in the following section, which examines whether the two courts have their own visions of the optimal domestic judiciary.

It may seem obvious that as a means of protecting fair trial rights, human rights courts should have the prerogative to pass judgment on the way that domestic proceedings are structured. However, the consequence of finding a violation of fair trial rights is much more intrusive than a mere declaration of noncompliance with a certain provision of a human rights instrument. And some commentators, as well as some states, may well say "too intrusive."

One may also object that some of the ECHR and IACHR judgments discussed in part I are best understood as responding to the political pressure to reduce their growing backlogs and (especially in Europe) to embrace subsidiarity.[303] Neither the ECHR nor the IACHR operates in a vacuum without any outside influences, and both courts face rising caseloads. In Europe, the Committee of Ministers and the Parliamentary Assembly have intensively pushed for cases to be handled domestically in order to reduce the ECHR's backlog. Moreover, some Council of Europe member states have recently put strong emphasis on subsidiarity. This effort culminated in the Brighton Declaration, which sought to add to the European Convention's preamble express reference to the principle of subsidiarity, which many observers interpreted as a signal to the ECHR to give greater deference to member states.[304] The ECHR thus has a strong incentive to empower domestic courts, thereby enabling individuals to seek relief before domestic courts rather than the ECHR, and also satisfying the political impetus for more subsidiarity. The doctrine of control of conventionality in the inter-American system of human rights is aimed to achieve the same ends, albeit neither the docket nor political emphasis on subsidiarity is as heavy as in the European system.

Notwithstanding the above, the actual consequences of empowering ordinary domestic courts to take on, as it were, part of the caseloads of the ECHR and IACHR are not clear, and especially in transitional democracies, judiciaries might be a part of the problem, not the solution.[305] Moreover, as we suggested above, both courts are fairly directive in what they expect of national governments regarding domestic judicial design; some of their judgments in this area allow for neither "strong" nor "weak" versions of subsidiarity;[306] and many ECHR judgments had been decided long before the Brighton process began. Hence, the recent emphasis on subsidiarity and the political pressure for the courts to reduce their caseloads cannot explain the courts' efforts to regulate and reshape domestic judiciaries. Some other dynamic must be at work. The obvious question is: do those judgments, taken cumulatively, amount to something akin to a clear judicial archetype? The next section explores this possibility.

The Quest for an Ideal or Minimal Judiciary?

The previous section showed that despite some differences in their views, both the ECHR and IACHR have sometimes interfered with domestic judicial design and imposed significant burdens on states that want to comply with their judgments. The focus of this section is to connect the three sets of domestic judicial issues discussed in part I and to inquire whether one or both of these courts has a broader normative agenda. More specifically, do the ECHR and IACHR have a view on what "the optimal judiciary" should look like, and to what extent do they push this view in their case law? As we suggested above, if these courts do have an agenda in mind, it is likely to be one that strengthens domestic judiciaries and has the consequence (unintended or otherwise) of also strengthening the courts themselves.

The ECHR and IACHR have laid a strong groundwork for the design of an optimal judiciary. This is not to say that they have necessarily done so with such a goal in mind or that they have had a master agenda spanning several decades and continents. Nevertheless, we argue that elements that have organically emerged from the two courts' case law, once systematized, show that they have been molding the design of national judiciaries toward their preferred model.

The standard requirement of a national judiciary is that judicial recourse must be prompt, impartial, independent, and before a competent judge whose court has been in existence prior to the facts of the dispute being heard. The term *judge* here is to be understood broadly since bodies other than courts (staffed by judges) are subject to the same requirements, as long as they are in a position to make determinations about the legal rights of individuals.[307] Additionally, these judges need to be subject to control and external review, and, no matter who or what body is exercising this control or in the position to discipline and remove judges, that body must abide by the same principles as the traditional judiciary.[308] And according at least to the IACHR's *Constitutional Court* case, constitutional or high court justices have a special status that needs to be acknowledged.[309] Taken together, the above represents a fairly general, easily agreeable set of principles that are correspond decently well to the elements one can infer from reading the texts of the conventions that the ECHR and IACHR enforce. We may call it a *minimal judicial design.*

[302] *See also* M. DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD 125–29 (2008) (noting the development of the human rights regime in Europe and its impact on the EU trade regime, constituting a "school of democracies").

[303] We thank one of the anonymous reviewers for this insight.

[304] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, para. 12(b) (Apr. 20, 2012), *at* http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf; *see also* Laurence Helfer, *The Burdens and Benefits of Brighton*, ESIL REFLECTIONS (June 8, 2012), *at* http://www.esil-sedi.eu/node/138; Jonas Christoffersen & Mikael Rask Madsen, *Postscript: Understanding the Past, Present and Future of the European Court of Human Rights*, *in* THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS (Jonas Christoffersen & Mikael Rask Madsen eds., 2013); Sarah Lambrecht, *Reforms to Lessen the Influence of the European Court of Human Rights: A Successful Strategy?*, 21 EUR. PUB. L. 257 (2015).

[305] We discuss this issue in the section "The Quest for an Ideal or Minimal Judiciary?" in part II.

[306] Jachtenfuchs and Krisch, *supra* note 299, observe that at least two versions of subsidiarity can be identified: a "weak" version characterized by "a presumption for the local that provides a low threshold and can be overcome by any reason that makes action on a higher level appear as advantageous," and a "strong" version characterized "by a high threshold—a presumption that can be rebutted only by strong reasons in exceptional cases."

[307] See the cases discussed in the section "Military Courts and Special Tribunals" in part I, especially the following: *YATAMA v. Nicaragua*, *supra* note 46, *López Mendoza v. Venezuela*, *supra* note 48, *Belilos v. Switzerland*, *supra* note 99, and *Sramek v. Austria*, *supra* note 99.

[308] Constitutional Court v. Peru, *supra* note 31; Chocrón Chocrón v. Venezuela, *supra* note 110; Olujić v. Croatia, *supra* note 101; Volkov v. Ukraine, *supra* note 101; Özpinar v. Turkey, *supra* note 36.

[309] Constitutional Court v. Peru, *supra* note 31, para. 75.

The ECHR and the IACHR, however, have gone far beyond these general principles. First, both courts consistently note that, should there be a conflict between general and specialized jurisdictions, preference should be given to the one more closely connected to the case at hand, with a strong preference for general courts, and with little regard to other state priorities (such as national security, in the example of the terrorism cases). Consequently, the "optimal judiciary" either should not include military courts or national security courts, or at least should limit the jurisdiction of such courts to selected crimes committed by military personnel.[310]

Second, both the ECHR and IACHR de facto prohibit the impeachment of judges. The IACHR does so because it requires political bodies deciding on impeachment to be bound by the same rules as any judicial body when it comes to fair trial rights—which is a condition that no political body can meet.[311] The ECHR has also suggested that parliamentarians do not have the legal and judicial experience deemed necessary for determining complex issues of fact and law in individual disciplinary cases.[312] Similarly, it found that retention-review mechanisms,[313] such as the reappointment of judges by political actors after a fixed term of office, violate the European Convention.[314]

Third, both courts, apart from discarding impeachment as an acceptable mechanism for removing judges, also further govern who can discipline judges. In *Volkov*, in particular, the ECHR went beyond minimal design to require the following: judges must constitute at least 50 percent of the members of any disciplinary body; these judicial members of the disciplinary body must be elected by their peers; nonjudicial members of the disciplinary body must work on that body full time so as to avoid dependence on their primary employers; and the prosecutor general cannot sit on a disciplinary body.[315] Imposing this design on a domestic judicial body is tantamount to micromanagement. From the perspective of institutional design, the *Volkov* requirements, read together, exclude participation of virtually any politicians in the disciplinary body and question the participation of many categories of civil servants, including prosecutors who traditionally sit on judicial councils together with judges. Moreover, by imposing the *Volkov* requirements on judicial councils, the ECHR also indicated, in effect, the optimal composition of judicial councils and advocated for the strong model for such bodies based on the Italian Consiglio superiore de la magistratura.[316] The IACHR's requirements on the composition of disciplinary bodies follow much the same model: its

[310] For IACHR cases see *Cesti Hurtado v. Peru, supra* note 44, para. 194, and the cases cited *supra* note 43. For ECHR cases, see *Incal v. Turkey, supra* note 68, paras. 67–72, *Maszni v. Romania, supra* note 67, para. 51, *Morris v. United Kingdom, supra* note 80, paras. 70–72, *Cooper v. United Kingdom, supra* note 84, paras. 123–24, and *Grieves v. United Kingdom, supra* note 85, paras. 80–89. All of the cases referred to in this footnote are discussed in the section "Military Courts and Special Tribunals" in part I.

[311] *See* Constitutional Court v. Peru, *supra* note 31, paras. 75–78; Constitutional Tribunal (Camba Campos et al.) v. Ecuador, *supra* note 133, para. 207.

[312] Volkov v. Ukraine, *supra* note 101, para. 122.

[313] By "retention-review mechanisms" we mean any mechanism of reappointment or reelection of judges. In other words, if a state opts for limited terms of judges and allows a renewal of that term, it stipulates a retention mechanism. *See* Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J. L. ECON. ORG. 211 (2012) (how retention mechanisms work in the United States).

[314] *See, e.g.*, Wille v. Liechtenstein, *supra* note 34; Gurov v. Moldova, App. No. 36455/02, para. 34 (Eur. Ct. H.R. July 11, 2006); Fatullayev v.Azerbaijan, App. No. 40984/07, paras. 143–46 (Eur. Ct. H.R. Apr. 22, 2010).

[315] Volkov v. Ukraine, *supra* note 101, paras. 109–17; *see also* Özpinar v. Turkey, *supra* note 36; Olujić v. Croatia, *supra* note 101. All three of these case are discussed in more detail in the section "Removal and Disciplining of Judges" in part I.

[316] *See supra* notes 192–93 and accompanying text.

members must be independent, capable of recusing themselves, become members through an adequate nomination procedure, and have their stability in the position guaranteed. All of these parameters have in set out in other, nondisciplinary cases, and a clear consequence is that politicians should not serve on bodies to discipline judges unless those politicians are capable as behaving as judges themselves.[317]

Fourth, an implication the ECHR and IACHR case law on quasi-judicial bodies is that virtually all aspects of public life, including deeply political questions such as election results, must be justiciable, which means that a court is considered the most appropriate forum to decide these issues. Both courts leave little room, if any, for a royal prerogative[318] or a political question doctrine.[319] Even special constitutional organs, such as electoral councils[320] and judicial councils,[321] must be subject to judicial review. This judicialization of new areas of law significantly shifts the domestic separation of powers, as it empowers the judiciary at the expense of the political branches.

Fifth, the requirements of the ECHR and IACHR on judicial design have the effect of further entrenching judicial decisions in domestic legal systems, with the further consequence of attributing to judges some capacity for making law themselves. For the ECHR, this process has advanced more quickly, as the Court has openly elevated domestic case law to be among the primary sources of law.[322] The IACHR is more conservative in this respect and treats only its own judgments, not the decisions of domestic courts, as on a par with legislation.[323] Nevertheless, even this partial acknowledgment of judicial lawmaking encroaches upon the prerogatives of domestic parliaments and undermines the centrality of parliamentary legislation in civil-law systems. It also strengthens the powers of international courts at the expense of domestic bodies—with implications for the legitimacy of these courts.

In sum, the ECHR and IACHR tend to prioritize ordinary professional judges and are skeptical regarding the inclusion of politicians, military judges, and other nonjudges on specialized courts. The courts also transfer decision-making powers to the ordinary judiciary via the judicialization of new areas of law and shield the judiciary from accountability by anyone other than their peers. What drives the ECHR and the IACHR in this direction is not entirely clear from the case law, but the changes do have the consequence of increasing the power of domestic courts and consequently of the international courts themselves, which gain "a key regional constituency."[324] Doctrines like the control of conventionality provide domestic judges with an incentive to rely on international courts as a protection against unstable regimes that rely too much on presidential powers, as in the *Constitutional Court* and *Apitz Barbera* cases against Peru and Venezuela, respectively.[325] The international human rights court becomes a shield

[317] Apitz Barbera ("First Court of Administrative Disputes") v. Venezuela, *supra* note 109, para. 253.

[318] *See* Benthem v. Netherlands, *supra* note 291.

[319] *See* IACHR judgments in *YATAMA v. Nicaragua, supra* note 46, and *López Mendoza v. Venezuela, supra* note 48.

[320] *See YATAMA v. Nicaragua, supra* note 46, and *López Mendoza v. Venezuela, supra* note 48.

[321] *See* Özpinar v. Turkey, *supra* note 36; Olujić v. Croatia, *supra* note 101; Volkov v. Ukraine, *supra* note 101.

[322] *See* Kruslin v. France, *supra* note 217; Leyla Şahin v. Turkey, *supra* note 220; Sanoma Uitgevers B.V. v. Netherlands, *supra* note 220.

[323] *See* Almonacid Arellano v. Chile, *supra* note 235, para. 124; *see also* Boyce v. Barbados, *supra* note 240, para. 78; Dacosta Cadogan v. Barbados, *supra* note 243, Sep. Op. García Ramírez, J., para. 12 (the early signs of acknowledgment of judicial decisions as law in the first common-law cases before the IACHR).

[324] Huneeus, *supra* note 11, at 526.

[325] Walter F. Carnota, *The Inter-American Court of Human Rights and Conventionality Control* 29 (July 24, 2012), *at* https://ssrn.com/abstract=2116599.

that protects and strengthens domestic judiciaries, while also increasing its own relevance in domestic law (and often politics). The more stringent standards imposed by the courts force many states to abandon their traditional legal and judicial structures and to revise their conceptions of the separation of powers.

The ongoing extension of competence by the ECHR and IACHR enables them to impose far-reaching institutional changes on the domestic level, but it also puts the courts' legitimacy and credibility at risk, and even creates a strain on them. To the extent that the courts are now engaged in institutional design, they need to have a much more concrete understanding of the relevant state's "framework of government" as defined by domestic constitutional law[326] and also of states parties' constitutional history—both of which lead the courts far beyond the application of international law. And because the courts suddenly need this new expertise, they need to seek it out in the form of special appointments, potentially giving those individuals unusual influence that may be neither reviewed nor critiqued. These domestic legal incursions having constitutional dimensions may also potentially shift the courts away from their core mission of international human rights and toward the role of what is essentially a constitutional court outside the national constitutional system—one that is consequently not even subject to the checks and balances required in domestic constitutional law. As a result, the legitimacy gap—a democratic deficit—is likely to be further widened and may even counteract the entrenchment benefits that arise from the courts' engagement with national courts through mechanisms like control of conventionality. Privileging domestic judicial branches over other branches of government may also undercut legitimacy if the executive, usually with broader foreign affairs prerogatives, decides to defy or even denounce the system.

Two more dangers loom large as the ECHR and IACHR effectively increase the power of domestic courts. First, in transitional democracies, judges are often a part of the problem, not the solution. Judges are often conservative and a part of the establishment,[327] and under dictatorships and Communist rule, the judiciary is often purged of judges who can be seen as "too progressive" or "anti-regime."[328] Those judges who stay on the bench have often collaborated with totalitarian or authoritarian regimes.[329] Even after the fall of such regimes, judges usually manage to resist significant purges,[330] with the consequence that at least during the early decades after political transition, the ECHR and IACHR have to partner mainly with judges from the previous regime.

[326] Moreover, as several scholars have argued, there is far less convergence on separation-of-powers issues than on human rights issues among the members of the Council of Europe and Organization of American States. *See, e.g.*, VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 53, 59, ch. 8 (2009) (see also pages 53 and 67); Kosař, *supra* note 12, at 58.

[327] *See, e.g.*, HILBINK, *supra* note 190.

[328] *See, e.g.*, Nuno Garoupa & Maria Maldonado, *The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America*, 19 CARDOZO J. INT'L. & COMP. L. 593 (on Latin America); BENJAMIN FROMMER, NATIONAL CLEANSING: RETRIBUTION AGAINST NAZI COLLABORATORS IN POSTWAR CZECHOSLOVAKIA 328, 333–34 (2005) (on Czechoslovakia).

[329] *See, e.g.*, DYZENHAUS, *supra* note 190; HILBINK, *supra* note 190; YUSUF, *supra* note 190.

[330] *See* DYZENHAUS, *supra* note 190; HILBINK, *supra* note 190; YUSUF, *supra* note 190. The widespread purge of German Democratic Republic judges after the reunification of Germany was unusual. See Erhard Blankenburg, *The Purge of Lawyers After the Breakdown of the East German Communist Regime*, 20 LAW & SOC. INQUIRY 223, 240–41 (1995), and more generally, David Kosař, *The Least Accountable Branch*, 11 INT'L J. CONST. L. 234, 250–55 (2013).

More generally, several European and Latin American judiciaries suffer from widespread corruption.[331] In such an environment, vesting in the judiciary the role of disciplining judges might not be the best idea.[332] But that is exactly what the ECHR and IACHR suggest be done. For judicial discipline, both courts are imposing one-size-fits-all solutions that are not sensitive to local conditions.[333] Similarly, by pushing a particular model of judicial council, especially in stages of transition, the ECHR has fetishized judicial independence without recognizing that doing so may perpetuate existing problems.[334] Imposing a nominally ideal judicial design actually entails a serious risk for domestic judges in the long term. As the literature on judicial reputation shows, allowing corrupt judges to remain in office may risk the collective reputation of the judiciary, ultimately undermining judicial independence.[335]

A second danger is tied in with the diversity of domestic judiciaries; they are not monolithic blocs.[336] The ECHR and IACHR often have to choose *which* judges they empower. When they increase the power of lower court judges vis-à-vis their superiors,[337] they inevitably weaken those superiors. When that happens, the judiciary no longer speaks with a single voice, and legal certainty is endangered.[338] A long strand of scholarship shows how European supranational courts, by forging alliances with lower courts, have alienated top ordinary courts[339] and undermined the role of domestic constitutional courts, the key guardians of fundamental rights and the rule of law.[340] The control of conventionality doctrine—which, according to the *Almonacid* case, granted the power to exercise conventionality control to all judges[341]—may potentially have the same effect in Latin America.

Therefore, the empowerment of domestic judiciaries does not yield straightforward results. Well-intentioned as they may be, the ECHR and IACHR may be treading murky waters when they interfere with domestic judicial design, and it remains to be seen what unintended consequences the courts' actions have within the states parties. Yet again, the only certain beneficiaries of this empowerment are the regional human rights courts themselves.

[331] *See, e.g.*, Edgardo Buscaglia, *Corruption and Judicial Reform in Latin America*, 17 POL'Y STUD. 273 (1996); Maria Popova, *Why the Bulgarian Judiciary Does Not Prosecute Corruption?*, 59 PROBS. POST COMMUNISM 35 (2012) (on Bulgaria); Kathryn Hendley, *'Telephone Law' and the 'Rule of Law': The Russian Case*, 1 HAGUE J. ON RULE L. 241, 252–53 (2009) (on Russia); Cristina Parau, *The Drive for Judicial Supremacy*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 619, 639–43, 649–56 (Anja Seibert-Fohr ed., 2012) (on Romania).

[332] We thank one of the anonymous reviewers for this insight.

[333] For a similar argument, see Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN L.J. 1257 (2014).

[334] *See supra* note 193 and accompanying text.

[335] *See, e.g.*, Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 228 (2009).

[336] We thank one of the anonymous reviewers for this insight.

[337] We use the term *superiors* loosely to cover higher courts, judicial councils, senior judges, and court presidents.

[338] Note that both the ECHR and IACHR have jurisdiction primarily over civil-law countries that place a strong premium on legal certainty. *See* FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES. A EUROPEAN PERSPECTIVE, ch. 4 (2009).

[339] *See, e.g.*, KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001).

[340] *See, e.g.*, Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420 (2013); Jan Komárek, *National Constitutional Courts and the European Constitutional Democracy*, 12 INT'L J. CONST. L. 525 (2014); Aida Torres Pérez, *The Challenge for Constitutional Courts as Guardians of Fundamental Rights in the European Union*, *in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE (Patricia Popelier, Armen Mazmanyan & Werner Vandenbruwaene eds., 2012).

[341] *See* Almonacid Arellano v. Chile, *supra* note 235, para. 124. But note that the IACHR has backtracked on this bolder view of the doctrine, with the consequence that in some states, lower judges might not have the power.

III. Conclusion

This article has discussed the phenomenon of international human rights courts engaging in domestic judicial design. It shows that the judgments of the ECHR and IACHR, rather than having effects only with respect to the individual whose rights have been violated, have much deeper structural effects in the design and operation of domestic judicial structures. We have argued that this phenomenon has gone somewhat unnoticed but has deep implications for the entrenchment and effectiveness of international law within domestic regimes. This entrenchment happens in no small part because both courts have carved central roles for themselves in building domestic law and institutions—which contributes to their status spearheading constitutionalist projects for their respective regions.

Most importantly, we have seen here that the ECHR and IACHR have a broader understanding of judicial power than some states parties and that this broader understanding has contributed to the judicialization of new areas of law. By empowering courts at the expense of other political institutions within the state and by challenging the primacy of the legislature in lawmaking, the courts have also shifted the domestic separation of powers. Finally, the ECHR and IACHR have affected the internal architecture of domestic judiciaries as the courts gradually endorse the unification of court administration and change the power structures within the judiciary (for example, by giving more significant roles to lower court judges). While many of these mechanisms enhance the domestic entrenchment of international human rights norms and, in particular, make these human rights courts' activities more relevant domestically, they can also have unintended consequences. Of special note are the widening legitimacy gaps of the ECHR and IACHR as their mandates evolve from overseeing international law to becoming new constitutional organs that operate outside the constraints of domestic constitutions.