RESISTING THE RESISTANCE: DIALOGUES BETWEEN THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE HIGHER NATIONAL COURTS (THE CASES OF THE DOMINICAN REPUBLIC AND ARGENTINA)

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Acknowledgments

This thesis marks the end of an important academic year. Since I do not endeavor to reproduce a *cliché,* I wish my words to be as honest and *me* as possible.

I thank my family for loving me unconditionally, no matter what crazy project I embark on or what part of the globe I decide to fly to.

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Executive Summary

The Inter-American Court of Human Rights is considered a relevant and influential legal voice, and its judgments are cited worldwide as they secured the protection of human rights in Latin American countries. However, a strong resistance to the compliance with its judgments and orders is taking place in the Americas. This work analyzes how two specific national courts (the Constitutional Tribunal of the Dominican Republic and the Supreme Court of Argentina) directly threatened the authority of the Inter-American Court through their decisions.

This work engages with the theoretical conceptualizations (legal formalistic, normative, sociological and compliance-based approaches) that seek to explain how international courts acquire, exercise and enhance authority and legitimacy. The thesis adopts the "*de facto* authority model" proposed by Alter, Helfer and Madsen to explain how the Inter-American Court's authority fluctuates according to the context of the cases and the audience it addresses.

The work also explains the concept of "transnational judicial dialogue" and how it became more complex and challenging in the era of the "judicialization of international relations". Following Huneeus' pioneering work, this thesis reflects on the difficulties that transnational judicial dialogues face in Latin America where judges, prosecutors and judicial operators are the main actors resisting the rulings of the Inter-American Court.

The type of interactions through orders of compliance and public hearings that the Inter-American Court initiated with the Constitutional Tribunal of the Dominican Republic after the ruling of the cases *"Yean & Bosico"* and *"Expelled Dominicans and Haitians v. Dominican Republic"*, and the dialogue that began after the Supreme Court of Argentina decided the *Fontevecchia case* are analyzed in detailed. Methodologically, this works emphasizes the discoursive strategies and judicial reasoning deployed by the Inter-American Court (key features for the *Law and Literature* movement) and a comparative analysis.

Introduction

Human rights norms, their implementation and mechanisms are experiencing a strong resistance at a global level[1]. Regional human rights systems and international courts are not exempted from this tendency either[2]. In the Americas, the Inter-American Court of Human Rights (IACtHR) is a relevant and "prominent legal voice"[3]. Moreover, its judgments are cited worldwide and they have "contributed to the protection of human rights of many people"[4] in the region. Nonetheless, states (as international subjects), domestic supreme and constitutional courts and scholars have been challenging its authority and legitimacy, to the extent of depicting the IACtHR's behavior as a "neo-absolutist tendency"[5].

Since this work is the culmination of a master's degree in human rights law, a basic knowledge of the functioning of the Inter-American System of Human Rights (IAS) is expected

[1] For a better account see: Philip Alston, "The Populist Challenge to Human Rights," *Oxford Journal of Human Rights Practice* 9, no. 1 (2017): 1–15; Eric Posner, *The Twilight of Human Rights Law*, 1st ed. (New York: Oxford University Press, 2014); Stephen Hopgood, *The End Times of Human Rights* (Ithaca: Cornell University Press, 2013); Kenneth Roth, "The Pushback Against the Populist Challenge," Annual Report (Human Rights Watch World, 2018).

[2] Jorge Contesse, "Resisting the Inter-American Human Rights System," *Yale International Law Journal* 44 (2019): 1–80; Laurence R Helfer, "Populism and International Human Rights Law Institutions: A Survival Guide," *Working Paper Series, No. 133, 2018*, 2018, 29; Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," *International Journal of Law in Context* 14, no. 2 (2018): 197–220; Alexandra Huneeus, "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights," *Cornell International Law Journal* 44, no. 3 (2011): 493–532. Contesse establishes the link: "To better understand the under studied matter of states' resistance to the Inter-American Human Right System, it may be useful to consider the discussion in the broad context of pushback against human rights or international law regimes". Ibid, p. 18.

[3] Jorge Contesse, "Inter-American Constitutionalism and Judicial Backlash," 2017.

[4] Ibid.

[5] Ezequiel Malarino, "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter- American Court of Human Rights," *International Criminal Law Review* 12 (2012): 694.

and presumed from the audience. As several scholars have dedicated to that descriptive enterprise[6], this work will directly reflect on specific challenges posed to the Inter-American Court by the higher national courts of the Dominican Republic and Argentina.

a. Research Questions and Objectives

Put briefly, the aim of this thesis is to show with specific cases, how two national domestic courts –namely the Constitutional Tribunal of the Dominican Republic, and the Supreme Court of Argentina)– have directly threatened and challenged the IACtHR's authority.

The research questions that will guide and will be answered along this work are the following: 1). What kind of dialogue or interaction does the IACtHR engage in with national courts when they refuse to follow its rulings? 2). What are the strategies used by the IACtHR in its decisions and orders to gain, consolidate and defend its own authority? 3). How does the IACtHR address national courts? 4). What kind of interactions would benefit the IACtHR and the national courts in the analyzed cases from the perspective of the IACtHR's authority and to better engage its domestic partners?

b. Theoretical Framework

This work engages with the classical, contemporaneous and novel literature on authority and legitimacy of international courts ("ICs"). Furthermore, the analysis will be framed within the scholarship developments that deal with transnational judicial dialogue,

[6] Héctor Faúndez Ledesma and Inter-American Institute of Human Rights, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects* (San José, C.R: Inter-American Institute of Human Rights, 2008); Lea Shaver, "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?," *Washington University Global Studies Law Review* 9, no. 4 (2010): 639–76.

especially in the era of the judicialization of politics. Last, the interactions between the IACtHR and the national courts will be explored under the lenses of the most recent literature on resistance, pushback and backlash to ICs.

c. Methodology

This is a descriptive, normative and comparative work. The focus will be primarily on a qualitative analysis of the rulings and orders of compliance of the IACtHR and the responses of the national courts. Although there is extensive research in the matter of compliance with the orders of the Inter-American Court, this work will include an interdisciplinary approach between *Law and Literature*, which has been neglected by scholarship so far[7]. The *Law and Literature*[8] movement differentiates itself from other "*Law ands…*" particularly by the fact that

[7] There is an increasing appeal in the field of international courts for defer to Political and Behavioral Sciences to explain how courts rule their decisions. See: Jakob Holtermann, "Philosophical Questions at The Empirical Turn," *European Journal of Legal Studies, Network of Legal Empirical Scholars (NoLesLaw)*, no. Special Issue (2019). While I value the important benefits of that shift, this work is an effort to refrain from that impulse. In other words, the aim is to analyze the rulings as legal documents that belong to a legal, cultural, as well as ongoing practice.

[8] *Law and Literature* as a scholarly field proposes an interdisciplinary way of interpreting the law. Among it, we can find different streams. This work will focus particularly in the developments and strategies offered by the movement *Law as Literature*, which has James Boyd White as his main representative. He formulates a way of examining the law similar to that applied by the humanities or art criticism, especially literary criticism. Moreover, he proposes the use of the same kind of analysis we apply to a literary piece (a poem, a tale, a novel) to legal materials (a law, a convention, a judgment). See: Agostina Allori, "Mazzeo, ALITT y Arriola: Razones, Re-significaciones y Prácticas," *Revista Jurídica Universidad de Palermo* 14, no. 2 (2015): 23–72.

Historically and by the influence of positivism, Law has been traditional thought in Law Schools as a rational and coherent system of norms. In this sense, the movement is a reaction to positivist legal education approaches in some continental legal systems (and inherited in Latin American as well). But the *Law and Literature* movement does not promote a skeptic *realist* version of law interpretation either. In a more complex way, what White proposes to see the law not only as a set of rules, institutions or bureaucracy, but as a literary and rhetoric activity. In his own words: "The law can be best understood and practiced when

it does not provide a specific method, recipe or rigid formula[9]. The richness of *Law and Literature* resides in inviting the lawyer to pose questions that defy the lineal logic of reasoning: Who is the audience for this specific judgment? How does the judge justify its decision? How is the argument structured? Does this way of reasoning create or modifies a previous practice? All these questions lead to other key aspect. The essential part of a judgment is not the final decision, but the legal reasoning[10]. In other words, the mechanisms the judges apply to convince the parties that they have reached the correct and just solution[11]. Two resources are essential when analyzing a judgment from a *Law and Literature* perspective: discourse analysis and legal reasoning.

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one comes to see that its language is not conceptual or theoretical –not reducible to a string of definitions– but what I call literary or poetic, by which I mean (…) that is complex, many-voiced, associative, and deeply metaphorical in nature". James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: The University of Wisconsin Press, 1985).

The attention to the humanities, and especially to literature is given by the fact that they focus on a "cultural artefact". This cultural artefact belongs to a certain historical moment, a certain culture, a certain practice. What both the literary and the artistic critic do is to find a meaning in that artefact. For that purpose, they have to dig into its history, its context and analyze the artefact under that light. It is the same proposal for the law: to take a legal artefact and to examine it taking into account the actors involved, the background, the historical and political moment. Ibid.

Finally, another key characteristic of the analysis employed by the literary critique is that it entails a comparative rather than a hard-analytic examination. This engages different parts of the mind and the soul: reflection, emotions, and it is essentially experiential; it cannot be fully translated in words, since something is always lost in translation. Furthermore, the study of the humanities –and literature in particular– enhances some qualities and skills that should be at the core of legal education but are not taught in traditional law schools: empathy, imagination, the understanding of human being's emotions and complexities, a defiance to lineal thinking. Ibid.

[9] James Boyd White, *From Expectation to Experience: Essays on Law & Legal Education* (Ann Arbor: The University of Michigan Press, 2000), p.54.

[10] White, *supra note* 8, p. 92.

[11] Ibid.

The field of discourse analysis understands that language does not originate from a vacuum; the words used in a text are not neutral or transparent[12]. Moreover, the natural language –especially when used by lawyers and judges– tends to be obscure[13]. As stated above, the purpose of using this technique is to discover the multiple meanings that a text has or hides. This thesis will analyze the discursive strategies employed by the IACtHR in its orders of compliance: How does the IACtHR address the national courts? What language does it use? Does it treat them as peers or as subordinates? It will also look at the way both the IACtHR and the national courts present their arguments, how they justify and reason their judgments.

The way in which the IACtHR is dealing with the responses of the higher courts of the Dominican Republic and Argentina has not been explored in a comparative perspective either. In addition to bringing a Law and Literature perspective into the analysis, this work incorporates the comparative perspective as well[14].

d. Road Map

This thesis will be organized in three chapters. Chapter I will engage with both the classical and contemporaneous literature that seek to explain the foundation of international courts authority and legitimacy. A specific model will be adopted as framework of this work, one focused on *de jure* authority of ICs (meaning, what gives in fact authority to an IC) and a

[12] Carlos Cárcova, *La Opacidad Del Derecho* (Madrid: Editorial Trotta, 2006), p.18-21.

[13] Ibid.

[14] However, a previous clarification is needed. Although comparisons will be established between the three cases, this work will also show and reflect on the limitations and difficulties of the comparative method. The limitations come primarily from the fact that, while Argentina and the Dominican Republic belong to the same region and share some commonalities, their legal systems and cultures differ in a considerable way from each other. In that sense, classifying this work as a comparative law text *stricto sensu* would be a mistake.

justification of that choice will be provided. Moreover, reference to specific literature that deals with the topic in the Inter-American context will be offered.

Chapter II will introduce the most significant debates in the field of "transnational judicial dialogue" or "dialogue between courts". Departing from the classical –and now canonical– works, the chapter will progressively advance to more novel and complex approaches. This works situates itself in the phenomenon of transnational judicial dialogue in the era of the judicialization of politics. Finally, the chapter proposes a categorization of the types of dialogues that had and are taking place in the Inter-American context.

Informed by the most recent, fresh and innovative literature on resistance to ICs, Chapter III will provide an explanation of the type of resistance that the two cases represent and its normative importance, including a comparative enquiry. The orders of compliance issued, and the public hearings called by the IACtHR in "resisting the resistance" will be described, explained and analyzed from a *Law and Literature* perspective. The same can be said of the reactions of national courts and the interactions that emerged after.

Finally, the conclusions will synthetize the findings and elaborations of this work and will provide recommendations about how the transnational judicial dialogue between the IACtHR and the domestic courts of the Dominican Republic and Argentina can be improved.

Chapter I

Authority, Legitimacy (of) and Compliance (with) International Courts

International Courts (ICs) exist in an increasingly complex and politicized world. They differ not only from national courts, but also from other global governance bodies[15]. In this sense, Alter, Helfer and Madsen highlight that:

> The contrast between ICs and other international bodies is striking. Few expect the UN Security Council to deliberate, vote or adopt legal edicts in the way that domestic legislatures do. Yet, government officials, lawyers, civil society groups, and actual or potential litigants expect IC to act like domestic courts in the sense of following predetermined rules of procedure and justifying their decisions on the basis of legal reasoning and argumentation[16].

Additionally, ICs tend to be relatively new institutions, which entails that their judgments may contest or discuss entrenched interpretations of social and legal rules[17]. Disputing deep-rooted practices and ideas is not an easy task, especially because international judges do so in a challenging environment where they co-exist with several "authoritative decision-makers"[18]. Furthermore, ICs are supposed to be the highest adjudicative bodies and interpreters of the international norms under their jurisdiction but, in practice, other actors – both international and domestic, political and legal– compete at the same time for giving meaning to those legal texts[19].

The context in which ICs operate, makes it important to review the literature about their authority and legitimacy and how different actors comply with their decisions. This chapter seeks to fulfill that aim. Therefore, it will be organized in three parts. In part I, I will briefly

[15] Karen Alter, Laurence Helfer, and Mikael Rask Madsen, "How Context Shapes the Authority of International Courts," *Law and Contemporary Problems* 79, no. 1 (2016), p. 4.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Ibid.

describe the different theories that explain authority, legitimacy (of) and compliance (with) ICs, as well as their critiques. In part II, I will present Karen Alter, Laurence Helfer and Mikael Rask Madsen's *de jure* authority approach, since I believe it will be useful for framing the authority of the Inter-American Court of Human Rights in the cases analyzed in this work. Finally, I will provide a justification of the selection of that model for the Latin-American context, explaining some caveats as well.

a. Authority, Legitimacy and Compliance: Different Approaches and Critiques

Alter, Helfer and Madsen describe the main "canonical conceptualizations of authority"[20] in global governance and ICs, which will be followed in this section. The authors identify four key approaches:

1. Legal Formalistic Approaches[21]**:** for this conceptualization, the authority of an IC stems from the "formal sources of the law"[22], that is to say, the delegation of the states through a treaty that creates the adjudicative body. Therefore, the ICs authority derives from its legal mandate. It is a limited type of authority, since the mandate "confers a right to rule only on specific matters"[23]. Alter, Helfer and Madsen criticize this approach because, unlike national law, international treaties are the result of complex diplomatic and inter-states negotiations that often leave –by choice– certain terms open or vague[24]. This "textual ambiguity" is often

[20] Karen Alter, Laurence Helfer, and Mikael Rask Madsen, "International Court Authority" (iCourts Working Paper Series No.112, 2017), p.7-8.

[21] Ibid, p. 8.

[22] Ibid.

[23] Ibid.

[24] Ibid.

strategic, so states can provide different explanations about the treaty's meaning to their national audiences[25].

2. Normative Approaches[26]**:** proponents of normativism confront authority against a set of ideal characteristics that an institution should have. This approach fuses authority with legitimacy[27]. They consider that the compliance or obedience to the rulings of an IC is the result of the legitimacy of that institution. Then, the logical consequence is that only if certain normative criteria are met, they can have *de facto* authority[28].

Alter, Helfer and Madsen offer examples of four different types of normative approaches. The first one is based on the eight requirements of legality established by Lon Fuller. In this sense, a judgment should be "sufficient general"[29], "publicly promulgated"[30], "applicable to future behavior"[31], "intelligible to those that must follow it"[32], "free of contradictions"[33], "certain", "possible to obey[34]" and there should be a "congruence between the legal norms and the officials operating with the law"[35]. The second normative approach focuses on procedural justice; whether or not the law operator acts with transparency during the process of law making and implementation, whether the decisions are proportional, accessible, representative, and if there are accountability mechanisms[36]. The third approach

[25] Alter, Helfer and Madsen, *supra note* 20, p.8.

[26] Ibid, p. 9.

[27] Ibid.

[28] Ibid.

[29] Ibid, footnote 5.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

takes into account the legitimacy of the actors that gave the power to an international institution. This is a popular conceptualization in the field of international criminal law. For instance, the *ad hoc* criminal tribunals created by the Security Council of the United Nations are considered to be already endorsed with an important pedigree[37]. The fourth conceptualization arises from Joseph Raz's theory of "service conception of authority"[38]. This philosopher's account considers that authority is legitimized when it serves individuals to make better decisions than those they would make on their own[39]. That is to say, "solving collective action problems legitimates authority"[40]. Overall, the critique Alter, Helfer and Madsen make to normative conceptualizations is that they cannot explain what happens when the IC follows the criteria that would give it normative authority (for instance the eight requirements proposed by Lon Fuller) but nonetheless, the ICs' rulings are not complied with (or vice-versa: the IC does follow the criteria but its judgment is accepted)[41].

3. Sociological Approach[42]**:** the sociological perspective stems from the classical work of Max Weber, who considered that the actions of an institution were justified if it they were welcomed by its constituency[43]. In other words, the focus was posited in what the audiences perceived as legitimate. The most relevant note of this conceptualization is that the focus was moved from the institution to the constituency[44]. Weber further asserted that the authority of

[37] Alter, Helfer and Madsen, *supra note* 20, p. 11.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid, p. 10.

[42] Ibid, p. 12.

[43] Ibid.

[44] Ibid.

an institution could be accepted for a myriad of reasons: charisma, tradition or legal-rationality, but that it was not possible to determine which of them fully explained obedience[45].

4. Compliance and Performance-Based Approaches: these approaches come mainly from the field of Political Science. They assess the influence of ICs by evaluating the level of effectiveness or impact of their judgments[46]. Alexandra Huneeus provides the following definition of compliance: "Compliance with the ruling of an international court occurs when a state carries out the actions ordered by a ruling issued by the state, or refrains from carrying out actions prohibited by the ruling"[47]. Huneeus recognizes that although implementation is not the only significant outcome of a judgment, it carries a normative priority from a legality point of view: "Compliance is by definition a central aspect of the rule of law; it is an essential stepping stone to constructing a basic institutional framework for legality and constitutionality. It matters as well for the legal order's reputation and perceived legitimacy"[48].

From my perspective, compliance is a way too unidimensional perspective of the international legal process. In the same line, Alter, Helfer and Madsen add that it "is also an insufficient measure of *de facto* authority because compliance can coexist with widespread rejection of IC rulings"[49]. Nonetheless, it should not be disregarded, especially in the Inter-American context.

In this sense, Huneeus[50] recognizes three main characteristics of the Inter-American Court that makes it unique, compared with other regional peers:

[45] Alter, Helfer and Madsen, *supra note* 20, p. 12.

[46] Ibid, p. 15.

[47] Karen Alter, Emilie Hafner-Burton, and Laurence Helfer, "Theorizing the Judicialization of International Relations," *International Studies Quarterly* 63, no. 3 (2019): 449–63.

[48] Ibid, footnote 65.

[49] Alter, Helfer and Madsen, *supra note* 20, p. 16.

[50] Huneeus, *supra note* 2.

1) The subject matter. The beginning of the IACtHR was marked by the paradigmatic cases it resolved about grave human rights violations committed by the state and dictatorial regimes. Moreover, the IACtHR hears cases of high-profile and egregious violations of human rights not only of one victim, but many times about groups or communities[51]. Therefore, "remediation is not only an important act of justice, but one that garners attention at the national and the international levels and, in turn, boosts the Court's legitimacy and influence"[52].

2) The particular jurisprudence and evolution of the IACtHR regarding reparations. Unlike any other Court in the world, the Inter-American one "regularly issues long lists of detailed actions that the state must take to repair the violation"[53], which includes as well "non-repetition measures"[54], or changes of the internal laws. Therefore, compliance can lead to structural changes in the respective countries. As Huneeus also highlights, the context becomes essential since offering just monetary compensation to victims or relatives of victims that suffered from horrendous crimes such as forced disappearances would be indeed insufficient and leave a sense of lack of justice[55].

3) The IACtHR has on its own hands the compliance of its decisions. Unlike the European Court of Human Rights that relies on the Council of Ministers, the IACtHR monitors the execution and implementation of the decision until the end of the compliance process, through its supervisory rulings and orders of compliance[56]. As Huneeus states: "For better or worse, the Court has formally defined its work to include not only adjudication of cases (like most

[51] Huneeus, *supra note* 2, p. 506.

[52] Ibid.

[53] Ibid, p. 500.

[54] Ibid, p. 506.

[55] Ibid, p. 500.

[56] Ibid.

courts), but also supervising implementation of it remedies (…). Compliance is not only an effect the Court may have; it is the work of the Court itself"[57].

b. Alter, Helfer and Madsen's IC Authority Model

In contrast with the models described above, Alter Helfer and Madsen propose a model of *de facto* authority of ICs, inquiring on the actions, reactions and practices of the IC's "key audiences"[58], that will be followed in this thesis. The authors point out that:

> Judges control neither the sword nor the purse. They cannot coerce litigants or other actors to behave in particular ways. Instead ICs issue decisions that identify violations of international rules and create a legally binding obligation to comply with the court's judgments interpreting these rules. Whether such compliance usually occurs, however, depends upon the responses of the different audiences[59].

The authors are particularly interested in how the audiences act in front of the rulings of an IC, whether they consider them binding or engage in processes to implement them. This model differs from the previous ones in many aspects. First, it is "agnostic"[60] as to the reasons "why an audience recognizes a court's authority"[61]. Second, it differs from sociological perspectives, because it does not focus on how the constituency perceives the IC, but on how they actually behave. Third, it does not question whether an IC's authority is legitimate from a *de jure* perspective; it directly assumes competence of the IC, because its creation was based in a consensual act of delegation[62]. Last, it differs from normative approaches since the authors believe that even when an IC fulfills all the normative criteria that would lead to an

[57] Huneeus, *supra note* 2, p. 506.

[58] Alter, Helfer and Madsen, *supra note* 15, p. 6.

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid, p. 6.

authoritative ruling, it may still not achieve *de facto* authority; and vice-versa: it can reach in fact authority without following those requirements[63].

Alter, Helfer and Madsen's IC authority model identifies two components as essential: **1. "Recognition"**[64], meaning that the audiences acknowledge an obligation to comply with the IC's ruling; or they implement the decision; or make reference to judgments of the IC; and **2. "Meaningful Action"**[65], which entails that the many audiences involved (not only the parties, but also other stakeholders in the international legal process) will push action to give full effect to the decisions of the IC[66].

From my perspective, the most appealing characteristic of this model is that it does not conceive authority of ICs as a binary and static feature. On the contrary, the authors present a gradual approach to authority and recognize its precarious status, namely that the authority of an IC can fluctuate over time depending on the different audiences before it. In this sense, they identify five types of progressive *de facto* authority: 1). "No authority"[67]; 2). "Narrow authority"[68]; 3). "Intermediate legal authority"[69]; 4). "Extensive authority"[70] and 5). "Popular authority"[71]. Graphic I illustrates and explains what defines each type of authority[72]. Graphic II[73] shows the indicators for "narrow", "intermediate" and "extensive" authority.

[63] Alter, Helfer and Madsen, *supra note* 15, p. 7.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Ibid, p. 9-12.

[68] Ibid.

[69] Ibid, p. 9-12.

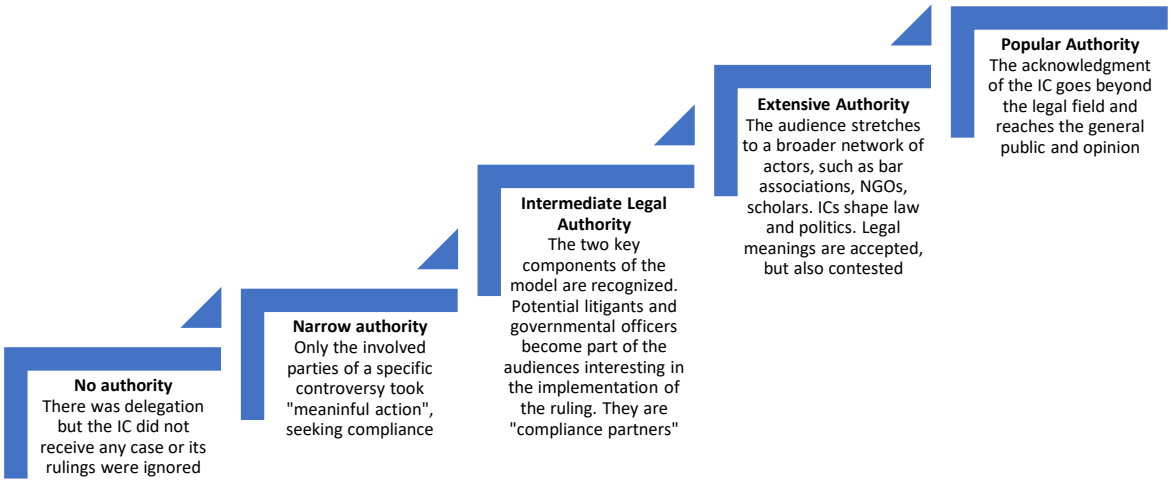
[70] Ibid.

[71] Ibid.

[72] This graphic was my own creation, based on the work of Alter, Helfer and Madsen, *supra note* 15, p. 9-12.

[73] This graphic was my own creation, based on the work of Alter, Helfer and Madsen, *supra note* 15, p. 13.

Graphic I. Five types of *de facto* authority (Alter, Helfer and Madsen)



Graphic II. Indicators of narrow, intermediate and extensive authority

Narrow Authority	Intermediate Legal Authority	Extensive Authority
▪ The losing party in a dispute recognizes the obligation to fulfill with the judgments	▪ Evidence of multiple actors presenting cases before the IC ▪ IC rulings influence the behavior of future litigants in cases alike	▪ Established lawyers that appear before the same IC ▪ NGO using international litigation ▪ Different audiences (practitioners, judges, Government officers using the IC's rulings on a daily basis)

Another aspect that makes Alter, Helfer and Madsen's IC authority model worth of examination is that they maintain that contextual factors shape authority in different manners[74]. First, they recognize that each IC operates in a specific "institutional context"[75], meaning that there are a set of characteristics that make each IC special, such as its rules of access and jurisdiction, the possibilities that litigants have of resorting to alternative adjudicative bodies (in this sense, the less attractive the other options, the more cases a IC will receive) and the

[74] Alter, Helfer and Madsen, *supra note* 15, p. 17.

[75] Ibid.

subject-matter[76]. Acknowledging this last factor is crucial for the Inter-American System since, as mentioned before, the subject-matter competence of the IACtHR is broad and deals with a wide range of issues, from freedom of expression cases to mass atrocities in the context of dictatorships. In this same line, the authors state:

> IC may have more difficulty gaining any *de facto* authority for high-politic disputes, such as those involving military force or systematic human rights abuses, because a wide range of actors, such as executive branch, officials, are watching the court and have the incentive and the means to challenge the ruling contrary to their interests[77].

Second, the authors identify different "key constituencies"[78] that impact and make *de facto* authority of an IC to vary as well: executive branches, national administrative officers, legal experts (lawyers, scholars), civil society groups (human rights NGOs, think tanks) and national courts. While this thesis pays attention to the last three, it poses its main focus on how authority is exercised by the IACtHR in front of the national higher tribunals of the Dominican Republic and Argentina. In this sense, the authors recognize that "gaining support from national judges may help ICs achieve intermediate authority by mobilizing compliance partners even when executive branch officials or legislators reject specific international rulings"[79] and that "extensive authority can be achieved only when IC jurisprudence is internalized by domestic legal constituencies –including national judges"[80].

Last, there are other factors of global, regional and domestic politics that shape *de facto* authority. Respectively, ICs that follow contemporary local, regional and global trends are more likely to enhance narrow, intermediate and extensive legal authority[81]. But, on the other

[76] Alter, Helfer and Madsen, *supra note* 15, p. 17.

[77] Ibid. 21.

[78] Ibid, p. 22-23.

[79] Ibid.

[80] Ibid, p. 23.

[81] Ibid, p.26.

hand, following a global trend may generate resistance in the local level or in other audiences (or vice-versa)[82]. Shifts in domestic politics may also hinder *de facto* authority of an IC. An example of this, in my view, is the incorporation of new members to the Supreme Court of Argentina, which produced a change in its jurisprudence regarding the IACtHR.

c. Justification of the Chosen Approach

In a previous work about the way in which National Courts enhance their authority, I have relied on normative theories, especially those related to procedural justice[83]. For that reason, I have the academic responsibility of explaining why I shift towards a *de facto* authority model in this thesis. Nonetheless, I will present a critique to Alter, Helfer and Madsen's approach as well.

First, this work deals with ICs, not with domestic ones. Therefore, the aforementioned authors' model seems to better capture the complexities of the international sphere in which ICs operate. In the case of National Courts, the audiences are narrower, and geopolitics do not play such a big role as they do in the international field.

Second, this model is appealing because it does not present authority as a binary phenomenon. Quite the contrary, it maintains that it varies according to the different constituencies, that it can have different degrees and that it can change over time. In other words, the model argues for a **fluid concept of authority**. This feature is particularly important for this work, since I will not make general claims about the authority of the IACtHR but focus on whether the Court has *de facto* authority in two specific interactions.

[82] Alter, Helfer and Madsen, *supra note* 15, p. 26.

[83] See: Allori, *supra note* 8.

Third, I will show in Chapter III, that paying attention to the contexts is essential for the IACtHR, which already operates in a difficult region with high deficiencies in terms of Rule of Law and Law obedience[84].

Last, as to my critics, I still believe that what judges do, does matter. Alter, Helfer and Madsen are "agnostic" both as to how ICs act as well as why audiences recognizes an IC as authoritative. This work shows the discursive strategies that the IACtHR deploys in order to gain authority in front of two National Courts (the Supreme Tribunal of the Dominican Republic and the Supreme Court of Argentina). As it will be explained in Chapter III, although the IACtHR makes big argumentative efforts in both cases, we could say that regarding the Dominican Constitutional Tribunal it has "no authority", whereas in the case of the Supreme Court of Argentina its authority varied from an "extensive authority" to an "intermediate" or even "narrow" legal authority. The contexts of these countries are completely different and that is why this framework seems to be the most suitable for this work. Consequently, I recognize that judges, especially those seating in the benches of ICs are constrained by other factors, and that geopolitics can produce changes from one day to another. Nonetheless, I differ from Alter, Helfer and Madsen's approach in my belief that the IACtHR judges have the responsibility of issuing treaty-based, well-reasoned, clear and argumentative compelling legal rulings, despite of the outcome they may obtain.

[84] César Rodríguez Garavito, *El Derecho En América Latina: Un Mapa Para El Pensamiento Jurídico Del Siglo XXI*, 1st ed. (Buenos Aires: Siglo Veintiuno Editores, 2015).

Chapter II

Transnational Judicial Dialogue in the Era of the Judicialization of Politics

The pioneer work of Anne Marie Slaughter and Laurence Helfer[85] at the end of the nineties and turn of the new millennium marked the beginning of the recognition of transnational judicial dialogue as a globalized phenomenon, and consequently, the foundation of a new scholarly legal field[86].

Departing from the experiences of the supranational and regional European Courts (European Court of Justice and European Court of Human Rights), Helfer and Slaughter started referring to the interactions between international Courts or among international and national Courts as "transnational judicial dialogue"[87]. For the authors, this phenomenon was the correlative product of an increasingly globalized world, expressed in a "judicial globalization"[88], "a global community of Courts"[89] or a "Judicial Comity"[90]. However, this "community of law" –the world envisioned by Slaughter– faces a myriad of challenges today under the era of the judicialization of politics –both at a national and international level–, worthy of analysis.

This chapter seeks to describe the academic development in the field of transnational judicial dialogues and to define how it developed and is used in the Latin American context.

[85] Laurence Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *The Yale Law Journal* 107, no. 2 (1997): 273–391.

[86] Olga Frishman, "Transnational Judicial Dialogue as an Organisational Field," *European Law Journal* 19, no. 6 (2013): 739–58.

[87] Helfer and Slaughter, *supra note* 85.

[88] Anne-Marie Slaughter, "Judicial Globalization," *Virginia Journal of International Law* 40, no. 4 (2000): 1103–24.

[89] Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal* 44, no. 1 (2003): 191–220.

[90] Slaughter, *supra note* 88, p.1112.

Therefore, it will be divided in three parts. In the first one, I will explore the classical and foundational literature that defines "transnational judicial dialogue", how the different interactions between courts can be classified and what image of the world such theory envisioned. In the second part, I will explain how the judicialization of politics provides elements that generate an increasing complex scenario for dialogues between courts. In the third part, I will show the type of interactions that took place in the Inter-American System and, briefly, how the dialogues were received in the countries under analysis: the Dominican Republic and Argentina.

a. Revision of the Classical Literature on Transnational Judicial Dialogues and the Consequently Envisioned World

The term "transnational judicial dialogue"[91] coined by Slaughter entails that judges and courts play a key role in "global governance"; which demands a more frequent and fluid communication between judges both at the international and local level and, at the same time describes a change in communication flow, starting in the last decade of the 20th century.

Slaughter pointed out that the image used to come to our minds when we thought about globalization were corporate and banking international lawyers rather than courts. But from her perspective, understanding judicial globalization has deeper and more important consequences for international law and human rights. She stated that the phenomenon of "Judicial Globalization (…) describes a much more diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases

[91] Several expressions are used as synonyms, such as: "transjudicial dialogue", "community of courts", "judicial globalization", "judicial comity", "dialogue among Courts", "Constitutional Dialogues". Frishman, *supra note* 86.

involving national as much as international law"[92]. Furthermore, a key component of judicial globalization is transnational litigation, which triggers a significant conceptual shift:

> The underlying conceptual shift is from two systems –international or domestic– to one; from international and national judges to judges applying international law, national law or a mixture of both. In other words, the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global system, but they certainly constitute a global community of courts[93].

Slaughter advocated for a community of courts where both national and international judges were aware of the essential role they played and could see each other as fellow professionals sharing a common endeavor and not as competitors[94]. The author further argued that dialogues took place among different judicial actors' levels: amid different national courts, among transnational, international and supranational courts, and between international and national courts[95]. Slaughter established a classification of dialogues according to the courts involved. In this sense, "she refers to dialogue between national or regional courts across borders as **horizontal communication**"[96] and the one "between domestic and supranational courts as **vertical** (…) more structured and direct"[97]. She also recognized "**mixed vertical and horizontal communication**, giving rise to 'mediated dialogue', where the supranational courts

[92] Slaughter, *supra note* 88, p.1104.

[93] Slaughter, *supra note* 89, p.192.

[94] Both international and national judges "face common substantive and institutional problems; they learn from one another's experience and reasoning; and they cooperate directly to resolve specific disputes. Increasingly, they conceive of themselves as capable of independent action in both international and domestic realms. Over time, whether they sit on a national supreme court or a constitutional court or on an international court or tribunal, they are increasingly coming to recognize each other as participants in a common judicial enterprise". Ibid, p. 193.

[95] Alison Young, *Democratic Dialogue and the Constitution* (Oxford University Press, 2017), 256.

[96] Ibid. Emphasis mine.

[97] Ibid. Emphasis mine.

take account of the views of domestic courts, and often can derive principles of supranational law by taking account of the decisions of national courts"[98]. In 2003, Slaughter acknowledged two corollaries of the kind of judicial globalization she was explaining: 1) Cross fertilization and 2). Active Judicial Cooperation[99].

As the scholarship in the field evolved, Olga Frishman observes that "transjudicial dialogue" refers nowadays to two set of actions: 1). "Direct interaction between judges" and 2). "Citation of foreign and international judgments in national decisions"[100]. Frishman states that direct interaction today may take the form of face to face communication (in judges associations' encounters, conferences, seminars, institutional meetings) or through IT facilities (teleconference or virtual networks that connect magistrates)[101]. The second form is what Slaughter categorized as "cross fertilization" and which increased in some jurisdictions thanks to the information revolution and the availability of Judiciaries websites and legal databases. Nonetheless, this type of dialogue has been adamantly resisted by some national courts, like the United States' one, with former Justice Scalia as the main detractor[102][103].

[98] Young, *supra note* 95. Emphasis mine.

[99] Slaughter, *supra note* 89, p. 193. By "cross fertilization" she meant that "constitutional courts are citing each other's precedent on issues ranging from free speech to privacy rights, to death penalty", while "active cooperation" entailed a vigorous assistance in "conflicts among national courts involved in transnational litigation between private parties across borders". Ibid.

[100] Frishman, *supra note* 86, p.741.

[101] Ibid.

[102] Anne-Marie Slaughter, "Court to Court," *The American Journal of International Law* 92, no. 4 (1998): 708–12; Bob Goodlatte, Ron Lewis, and Anne-Marie Slaughter, "Judges without Borders," *Foreign Policy*, no. 143 (2004): 12–14; Laurence Helfer and Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" *California Law Review* 93 (2005): 901–56.

[103] This is an interesting point that will be explored in the last chapter, since one of the current Justices of the Supreme Court of Argentina, Carlos Rosenkrantz, share a similar perspective.

At an academic level, scholars have tried to theorize the phenomenon of Transnational Judicial Dialogue as well. Frishman[104] recognizes three different approaches:

1). Anne-Marie Slaughter's foundational conceptualization of courts belonging to a "global community", which she envisioned as an "epistemic community" as well. In this scenario, judges –both in the domestic and international level– shared common goals in a "judicial enterprise" and cooperated with each other to achieve it[105]. Although Slaughter was not advocating for an unattainable utopia, the Inter-American context exposes two factors that make the concretization of that view very hard. First, that beyond globalization, courts are also immersed in the phenomenon of the judicialization of politics, given correlation in the politization of the judiciary. Second, the extraordinary work of Alexandra Huneeus provides empirical data that shows that the resistance to the IACtHR stems primarily from National courts. Her research will be explored in detail below.

2). A second approach portraits judges as belonging to a network and, therefore, "the relationship between courts should be analyzed through the analytical tools used to understand networks"[106]. This vision maps the interactions between courts and tries to understand the reasons and incentives why those interactions occur[107], from a behavioral perspective.

[104] Frishman, *supra note* 86, p. 472.

[105] Slaughter describes this judicial enterprise as follows:

> Constitutional Courts –or any courts concerned with constitutional issues– will be forging a deeply pluralist and contextualized understanding of human rights law as it spans countries, cultures, and national and international institutions. The interactions between these courts and formal human rights tribunals established by treaty will indirectly involve national and international legislatures – parliaments and treaty drafters– on vital questions reflecting both the universality and diversity of humanity. Direct judicial exchanges can only foster these processes, although they are quite likely to highlight the fault-lines of conflict as well as the opportunities for cooperation. Slaughter, *supra note* 88, p. 1124.

[106] Frishman, *supra note* 86, p. 472.

[107] In this sense, the work of Shai Dothan is highly instructive: Shai Dothan, "International Courts Improve Public Deliberation," *Michigan Journal of International Law* 39, no. 2 (2018).

3). The third and last approach conceives courts interactions as an "organizational field", which implies that they are social entities, goal-oriented, deliberately designed and structured and linked to an external environment. Furthermore, in this paradigm, courts are seen as relational systems involved in a common enterprise (cultural-cognitive component), guided by "organizational archetypes" (rules and values of the organization) and "repertoires of collective actions" (meaning that they are constrained by the exogenous dynamics as well)[108].

The scholarship has advanced towards considering approaches two and three more realistic. Beyond the caveats I presented regarding the first approach, I still consider we should not dismiss it and that the idea of a "global community of courts" should be an achievement the legal community (especially judges) should strive for.

b. What is New? The Judicialization of Politics and International Relations

In a recent work, Alter, Burton and Helfer claim that "international relations are now experiencing what has become the norm in many domestic systems: the judicialization of politics"[109]. The judicialization of politics is a process that describes an increasing role of judges and courts in policy decision and making and a shift from the legislative and executive powers to the judiciary[110].

In the case of Latin America, the wave of constitutional reforms that incorporated human rights treaties to a constitutional level came hand in hand with a growing use by the common citizen and NGOs of the judiciary as a place to defend their individual and collective

[108] Frishman, *supra note* 86, p. 472-474.

[109] Karen Alter, Emilie Hafner-Burton, and Laurence Helfer, "Theorizing the Judicialization of International Relations," *International Studies Quarterly* 63, no. 3 (2019): 449–63.

[110] Ibid.

rights, but also to resolve conflicts that were not strictly legal, but also social and political and that belonged to the maneuvering faculties of the executive powers[111].

Alter, Burton and Helfer explain that at the international level "judicialization (…) can diminish the sovereignty of the states and autonomy of their leaders"[112]. While this shift does not imply that the role of officials is completely left out, it does mean that governments' actions are subjected to judicial review, which may produce "outcomes that may be quite different from what the absence of judicialized politics would otherwise have engendered"[113]. Some Latin American cases are highly illustrative. In this sense, the IACtHR became an energetic protagonist at the time of rejecting the amnesties and ordering the reopening of investigations of human rights atrocities committed during the dictatorships in the regions. These measures pushed the governments of Argentina, Brazil, Perú, El Salvador and others, "to prosecute international crimes without destabilizing domestic political bargains"[114].

At the international level, Alter Burton and Helfer find two preconditions for the emergence of judicialized politics: 1). Delegation to an adjudicative body to resolve a controversy, which could be done through a treaty, but this is not a *sine qua non* condition and 2). Actors claiming legal rights ("one or more actors with standing must bring –or threaten to bring– a complaint to an adjudicatory body"[115]). This last requirement initiates a process "for

[111] For a better account at the domestic levels, see: Catalina Smulovitz, "La Política Por Otros Medios. Judicialización y Movilización Legal En La Argentina," *Desarrollo Económico* 48, no. 190/191 (2008): 283–305; Lucas Martin, "Giro Judicial y Legitimidad Pública En La Política Argentina," in *Ciudadanía y Legitimidad Democrática En América Latina* (Ciudad Autónoma de Buenos Aires: Prometeo Libros, 2011), 363–94. At an international level: Alexandra Huneeus, "Constitutional Lawyers and the Inter-American Court's Varied Authority," *Law and Contemporary Problems* 79, no. 1 (2016): 179–207.

[112] Alter et al., *supra note* 109, p. 449.

[113] Ibid.

[114] Ibid.

[115] Ibid, p. 450.

authoritatively naming legal violations, identifying remedies for those violations, and preventing future violations"[116]. Therefore, the existence of legal actors willing to fight for their rights and the existence of an adjudicatory body are necessary conditions for the judicialization of politics in the international context. Furthermore, the authors recognize four characteristics that adjudicatory bodies must comply with: 1). The body should decide on concrete legal disputes among clear legal parties; 2). The decision, that is to say, the outcome, should be formally independent (not biased by a State's position); 3). Adjudicators should have the power and legitimacy to rule and authoritative judgment when a violation of the law has occurred; and 4). The adjudicators should be able to order a sanction or remedy to prevent further violations[117]. The IACtHR is clearly one of the adjudicatory bodies that fulfills with these conditions. According to the authors, those bodies "that meet these criteria can incentivize potential litigants to raise legal arguments, making their demands for policy change more credible and specific and generating additional pressures on states and national decision-makers to change their policies"[118].

But, why does the judicialization of international relations matter? Alter, Burton and Helfer claim that the relevance of this phenomenon lies in the fact that it empowers new actors and produces a shift from political to legal discussions, even if they do not go through all the phases of judicialization, which ends with the compliance phase[119]. A similar stand is shared by Shai Dothan, who shows how ICs help improve public deliberation not only at an academic

[116] Alter et al., *supra note* 109, p. 450.

[117] Ibid, p.451.

[118] Ibid, p. 451.

[119] Ibid, p. 458. See also: Jeffrey Staton and Alexia Romero, "Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System," *International Studies Quarterly* 63, no. 3 (2019): 477–91.

(and sometimes elitist) level, but also in the domestic sphere[120]. While I agree with this view, I argue as well that the most empowered actors in this phenomenon are judges, who can produce at the same time a sense of competition among them, instead of the collaborative spirit that Slaughter had envisioned. In the following section, I will show how this concern is backed by the work of Alexandra Huneeus "Courts Resisting Courts" in the Inter-American context.

c. Transnational Judicial Dialogue in Latin America: Courts Resisting Courts

As described in Chapter I, Alexandra Huneeus[121] recognized three main characteristics of the Inter-American Court that makes it unique, compared to other regional human rights courts or tribunals: 1). The subject matter (the beginning of the IACtHR is marked by the paradigmatic cases where it resolved about grave human rights violated at the hands of the State and dictatorial regimes); 2). The particular jurisprudence and evolution of the IACtHR regarding reparations; and 3). The IACtHR has on its own hands the compliance of its decisions[122].

But the most revealing data from Huneeus' work is that, when the orders of compliance include several actors, among them the judiciary and public prosecutor's offices, the rate of compliance with the decisions of the IACtHR decreases in a significant way. In this sense, instead of acting as "compliance partners"[123], judges and prosecutors have been reluctant to follow the rulings of the court[124]. The author observes that the position of the judiciary is different than that of the executive –the traditional visible face in international law– and has

[120] Dothan, *supra note* 107.

[121] Huneeus, *supra note* 2, p 500-506.

[122] Ibid.

[123] Ibid, p. 494.

[124] Ibid, p. 504.

therefore less incentives to follow compliance[125]. She provides a series of explanations to justify her claim. First, executing the foreign affairs policy of the country is not exactly in the "job description of national courts"[126]. Furthermore, national judges do not appear in the headquarter of the IACtHR in Costa Rica or have to provide face-to-face reasons in front the IACtHR's judges[127]. So far, that task belongs exclusively to the executive power. Second, Huneeus argues that in many states it is not clear whether the judgments of the court are binding or not, or what hierarchy they have in their constitutional design[128].[129] Third, and essential to the purpose of this work, Huneeus argues that national judges can feel threatened by the IACtHR, as if their status as final and decisive voices are usurped. She claims:

> Judges may feel more threatened by the Court than do other state actors. Executives, too, resist and resent the intrusion from abroad when a ruling comes down, but for judges, each Court ruling is a direct incursion into their legal terrain. The Inter-American Court only reviews cases after victims have exhausted judicial resources. For the IAS to take a case is thus already a judgment that the local judges got it wrong[130].

Last, Huneeus points out that although the judiciary has evolved in the last decades in the region, a replacement of judges after dictatorial regimes did not take place in all countries, because of the structures of the judiciary. Thus, the IACtHR's rulings may be asking for the compliance of magistrates that worked against the success of those cases or were even complicit of those regimes.

[125] Huneeus, *supra note* 2, p. 514.

[126] Ibid.

[127] Ibid.

[128] Ibid.

[129] This conundrum is not minor at all. For instance, the Dominican Republic counts with a dualistic system, while since the Constitutional Reform of 1994, Argentina is a monistic one. Nonetheless, even the jurisprudence of the Argentinean Supreme Court remains now unclear in this regard.

[130] Huneeus, "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights."

Nonetheless, despite of this resistance and the decreasing rates of compliance when the remedies require actions from the judiciary and public prosecutor's offices, the national courts did engage in the type of dialogue that Anne-Marie Slaughter denominated as "cross fertilization"[131]. That is to say that, although none of the states have reached full compliance with the rulings of the IACtHR, it is nevertheless used as an authoritative source for national courts to reason, justify and legitimize their rulings. As Huneeus observes:

> Following Court orders is distinguishable from using the Court's ruling as a source in performing judicial review. In citing to the Inter-American court for purposes of judicial review, national judges use the Court's ruling to fortify their own positions against other State actors. It bolsters their power. But in following Court orders, judges look to be yielding their position as ultimate arbiter, ceding power[132].

The cases I analyze in this work could be interpreted as a corollary of the phenomenon described by Huneeus: high national courts threatened and wounded by the verticality of the rulings of the IACtHR. If we use once more the categories of Slaughter, the two cases I will discuss show a form of "vertical dialogue" whereby both national courts openly challenge the authority of the IACtHR. I argue that the Constitutional Tribunal of the Dominican Republic is engaged in a "hostile" type of dialogue with the IACtHR, whereas the case of the Supreme Court of Argentina presents a "cold" approach to engagement with the IACtHR.

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[131] Interesting examples of cross-fertilization can be found in Argentina, especially with the jurisprudence regarding amnesties under dictatorial regimes; Chile and Costa Rica. In this sense, see: Tania Vivas Barrera and Jaime Cubides Cárdenas, "Diálogo Judicial Trasnacional En La Implementación de La Ssentencias de La Corte Interamericana," *Entramado, Unilibre Cali* 16 (2012): 184–204; Julieta Di Corleto, "El Reconocimiento de Las Decisiones de La Comisión y La Corte Interamericana En Las Sentencias de La Corte Suprema de La Justicia de Argentina," in *Implementación de Las Decisiones Del Sistema Interamericano de Derechos Humanos: Jurisprudencia, Normativa y Experiencias Nacionales*, Folio Uno (Buenos Aires: CEJIL, 2007); Agostina Allori, "The Impact of International Law on Domestic Judgments: The Influence of the Inter-American Court of Human Rights in the Ruling of the Argentinean Supreme Court Regarding Crimes Against Humanity," *International Journal of Legal Information* 43 (2015): 9–13.

[132] Huneeus, *supra note* 2, p. 515.

The encouraging news is that the same "unique dual regime of equitable remedies and ongoing supervision of compliance"[133] described by Huneeus can also be leveraged as a way to develop and rehearse different strategies to engage the National Judges as partners and not as competitors. In the next chapter, I will explain and reflect on whether the IACtHR has conducted that task in a successful way or not.

[133] Huneeus, *supra note* 2, p. 515.

Chapter III

Resisting the Resistance: Dialogues Between the Inter-American Court of Human Rights and the Higher National Courts (the cases of Argentina and the Dominican Republic)*

The aim of this chapter is to illustrate how two national domestic courts (the Constitutional Tribunal of the Dominican Republic and the Supreme Court of Argentina) have directly threatened and challenged the IACtHR's authority and how the IACtHR has responded to those attacks. To achieve that aim, this chapter will be divided in four sections. In section I, I will refer to the concepts of "pushback" and "backlash", situating the Dominican Republic in the former scenario and Argentina in the latter. In section II, I will provide a landscape of the resistance in the Dominican Republic: how it was triggered, and the responses and strategies employed by the IACtHR in this hostile relationship. In section III, I will describe the situation in Argentina and how both courts engaged in a ("cold") judicial dialogue to come to a compromise solution. I will conclude in part IV with a comparative analysis of the two case studies.

a. Pushback or Backlash? Framing the Resistance

Madsen, Cebulak and Wiebusch[134] provide the analytical framework which allows us to differentiate two forms of resistance to international courts: "pushback" and "backlash". While the authors identify the pushback as an ordinary kind of resistance –one that occurs from

* Part of this chapter was written in my visiting research stay at iCourts (The Danish National Research Foundation's Centre of Excellence of International Courts) and presented at the weekly Seminar carried on by the institution. I thank all the professors and colleagues that attended it for their insightful comments. I also thank iCourts and Central European University for providing me the funding to conduct that research in Denmark.

[134] Madsen, Cebulak and Wiebusch, *supra note* 2.

the system inwards (reversing a decision, for instance)– they characterize backlash as an extraordinary type, one that seeks to transform, eliminate or dismantle the system[135]. Table I shows the specific features the authors attribute to each form of resistance[136].

TABLE I

Form of reaction	Backlash	Pushback
Seeks to overturn or leave the system?	✔	✘
Seeks to reverse a development within the system?	✔	✔
Resistance to the content of a judgment/s?	✔	✔
Questions the authority of the IC?	✔	✘
Seek to change the "rules of the game"?	✔	✘

Furthermore, the authors pay special attention to the process, patterns and forms of resistance rather than the outcomes, since both pushback and backlash can be consequential or inconsequential regarding the law (in the case of pushback) and law and system (in the case of backlash)[137].

Keeping this framework in mind, I argue that the Dominican Republic's reaction to the Inter-American Court is a type of "backlash", while the process initiated by the Supreme Court of Argentina with the case *Fontevecchia* is, according to the aforementioned categories, a kind

[135] Madsen, Cebulak and Wiebusch, *supra note* 2, p. 13.

[136] The table was my own creation, based on the parameters established by Madsen, Cebulak and Wiebusch. Ibid.

[137] Ibid, p.14. This note is important when distinguishing the scenarios in both countries.

of "pushback".[138] This analysis is also shared by the work of Jorge Contesse[139]. He frames the resistance by the Dominican Republic as "frontal backlash"[140], while understanding Argentina's Supreme Court's reaction as a form of "judicial pushback"[141].

b. The Backlash from the Constitutional Tribunal of the Dominican Republic

b.1 Understanding the Dominican Context

Providing a depiction of the context in which the relationship between the Inter-American System and the Dominican Republic was forged and the main hot political topics in that country is essential to understand the cases under analysis. From a *Law and Literature* perspective, it allows us to appreciate the peculiarities of each legal practice and to conceive the legal texts that emerged from these interactions as cultural artefacts. As explained in Chapter I, contexts play a key role at shaping *de facto* authority of and IC as well.

The Dominican Republic signed and ratified the ACHR in 1978, in the period of transition to democracy and it accepted, without any condition, the jurisdiction of the IACtHR in 1999[142]. Leiv Marsteintredet explains that most of the cases that arrived at the IAS have

[138] Both share the fact that they do not come from the executive power but from the head institution of the judiciary. As I will argue later, this could be seen both as a threaten to the authority of the IACtHR or as an opportunity for the IACtHR to partner with the fellow domestic judges.

[139] Contesse, *supra note* 2.

[140] Ibid, p. 28.

[141] Ibid, p. 54. It should be noted that Contesse does not provide specific features of what qualifies as "backlash" and what as "pushback". Instead, he offers a criticism to this approach and seems more worried with those cases of judicial pushback that may impact the authority of the IACtHR in a less frontal and clear but equally harmful way. For him, the *Fontevecchia* case may have had this potential. I disagree with him. In the next section I will explain my reasons.

[142] Leiv Marsteintredet, "Mobilisation against International Human Rights: Re-Domesticating the Dominican Citizenship Regime," *Iberoamericana – Nordic Journal of Latin American and Caribbean Studies* XLIV, no. 1–2 (2014), p. 43.

dealt mainly with the violation of rights of Haitian migrants and children of Haitian origin[143]. The author further argues that in the Dominican Republic there is a pro-violation constituency, namely a political and social force against human rights, also referred as "the citizenship regime"[144], which has at its core the hatred and distrust towards Dominican-Haitian people. In his words: "the uses of Haiti and Haitians as enemies to the Dominican Nation has often been based on racism and by highlighting racial, cultural, linguistic and historical differences between the two countries"[145].

Marsteintredet tracks the starting point of the institutional mobilization of the pro-violation constituency and citizenship regime back to 2004, when a Migration Law (285/04) was passed[146]. The author conceived that the main goal of the law was to redefine and re-domesticate the Dominican citizenship regime[147]. In this sense, a crucial negative aspect of the law was that it established severe difficulties for children of undocumented migrants to acquire citizenship, by differentiating among resident and non-resident migrants. Only the children of parents with permanent residency were eligible to get citizenship. Unfortunately, the law was

[143] Marsteintredet, *supra note* 142, p. 43. Furthermore, "The Dominican State has been sentenced in four cases before the Court, three of which have dealt with this issue of Haitian-Dominican rights". Ibid.
To say it briefly, the cases deal with the deprivation of nationality and citizenship rights to Dominicans that were born in that land but have a Haitian background or with the children of Haitian that migrated to the Dominican Republic and do not have their legal papers. As it will be explored below, depriving people from their right to citizenship and nationality is a grave violation of their human rights, with severe consequences such as the inability to study in the country, work, exercise the right to get married, and to register the birth of their children. It means that they are denied the right as a full person and deprived from their human dignity.

[144] Ibid.

[145] Ibid.

[146] Ibid, p. 81.

[147] Ibid, p. 82.

passed unanimously with the initiative of the most conservative parties of the country and with no major opposition[148].

Marsteintredet notes the timing of the Law as a provocation to the IAS, since it was approved one year after the IACtHR received the case "*Yean & Bosico"*. The Act established in its preamble that "the regulation of migration and citizen is an unalienable right that is sovereign to the nation"[149], avoiding any reference to international human rights treaties[150]. This measure was accompanied in September 2004 with a Resolution calling to the President to "massively deport Haitian migrants"[151].

Two other steps were taken in the same direction. On the one hand, an administrative order was put in place to make the Migration Law retroactive. In this sense, all civil registries in the country would have to make a background check of the original birth certificates when issuing a copy to its citizens and suspend the procedure if there was any sign of irregularities from the past[152]. On the other, President Fernández promoted a Constitutional Reform in 2010, which established in the letter of the Constitution more restrictions to the *ius soli* principle and strengthened the *ius sanguinis* standard[153].

We can see then that the subject-matter in the relationship between the Dominican Republic and the IAS is a highly sensitive conflict, where deeper political and social issues are at stake.

[148] Marsteintredet, *supra note* 142, p. 83.

[149] Ibid.

[150] Ibid.

[151] Ibid.

[152] Ibid, p. 84.

[153] "The 2010 Constitution (art. 18) excluded from the *ius solis* clause children of people residing illegally in the country and specified that transit should be understood as defined by the law (…). As such the 2010 Constitution, building entirely on domestic legislation, settled the citizenship matters from that date forward" Ibid, p. 85.

b.2 The Origins of a Hostile Relationship

The beginning of a **hostile** relationship between the IACtHR and the Constitutional Tribunal of the Dominican Republic can be traced back to 2005. That year, the IACtHR ruled the case "*Niñas Yean y Bosico vs. República Dominicana*"[154], concerning two Dominican girls whose parents were Haitian and were deprived of their nationality, since the country established the *ius solis* criteria. The IACtHR found that several rights of the American Convention had been violated and established a robust set of detailed reparations that the State had to comply with. To say it briefly, the IACtHR understood the decision as such as a form of reparation; it ordered the publication of the most relevant parts of the judgment in important newspapers; the State –represented by public officers– had to apologize in public with the victims and their families through massive media as a guarantee of satisfaction and non-repetition; the State had to adopt –within a reasonable time– the legislative, administrative and proper measures to regularize the procedures for the acquisition of the Dominican nationality, even in cases of late registration of birth; the process had to be accessible and reasonable and give place to effective remedies if the requirements were denied and the State had to compensate the girls economically and pay the costs of proceedings[155].

As characteristic of the Inter-American System, the supervision of the full judgment was executed by the own Court[156] and it gave the State one year to present a report with the

[154] Caso de las Niñas Yean y Bosico vs. República Dominicana, No. Series C No. 130. (Corte Interamericana de Derechos Humanos August 9, 2005).

[155] Ibid. Reparations sections.

[156] The IACtHR is in charge of the full monitoring of compliance of its judgments. Article 65 of the American Convention of Human Rights just states that the IACtHR should submit a report to the General Assembly of the Organization of American States specifying whether the States had complied with its rulings. The procedure of compliance is not regulated by the ACHR but by the Rules of Procedures of the Court. Article 69 establishes that:

follow-ups. Right after the issue of the judgment, the State presented a requirement of interpretation of decisions, which was rejected by the Court. After that, the IACtHR issued two different orders of compliance. In the first one, of August 2010[157], it recognized that the State had fulfilled the publication in the newspaper, but it did not comply with the public apology to the victims and their families in the media and with the proper adoption of legislative measures (which had to have a link with the facts of the case, in the sense of improving the lives of Haitians descendants in that situation). More than a year later, the Dominican Republic had not complied with the aforementioned points. This lack of response from the State was addressed in a stringent manner and tougher language by the Court in its order of compliance of October 2011. While the first order "required" the State to adopt the necessary measures to comply with the judgment; the second order of compliance was a detailed and firm "reiteration" to the State of its international commitments and duties[158]. It is worth noting that none of these orders delegated or referred to the national judges as partners in the task of monitoring the process of

1.The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives.

2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate.

3. When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing.

4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders.

5. These rules also apply to cases that have not been submitted by the Commission.

[157] Orden de supervisión de cumplimiento de sentencia en el caso de las Niñas Yean y Bosico vs. República Dominicana (Corte Interamericana de Derechos Humanos August 27, 2010).

[158] Orden de supervisión de cumplimiento de sentencia en el caso de las Niñas Yean y Bosico vs. República Dominicana (Corte Interamericana de Derechos Humanos October 10, 2011).

compliance. Furthermore, in the second order of compliance, the IACtHR only quoted the Inter-American Commission, which expressed that the victims presented information alleging that the executive, legislative and judicial powers had hampered the full compliance with the judgment. Disregarding domestic judges as potential parts of the audience was a big mistake and a lost opportunity of establishing a collaborative enterprise with domestic judges by the IACtHR.

I borrow the concept of "collaborative enterprise" from the legal philosopher Ronald Dworkin. He understands the law –and particularly the adjudication activity of the judge– as a collective and collaborative one. In his own words: "The interpreter properly takes himself or herself to be in partnership with someone who came before"[159]. The first question writers, poets, composers should ask while building their story and narrative is: who is the audience? The IACtHR failed to include domestics judges on it. Although national judges are comprised under the persona of the "State", the refusal of the high courts to follow its judgments should be a red flag for the IACtHR to understand that domestic judges are indeed part of its audience and they should be addressed as such and treated as potential partners as well.

This approach has been already proposed by Alexandra Huneeus in "Courts Resisting Courts"[160]. The author observed, after analyzing a significant number of orders of compliance issued by the IACtHR, that the rate of compliance was lower when the remedies included the

[159]See: Ronald Dworkin, "Is There Truth in Interpretation? Law, Literature and History" (October 26, 2009). The idea is better developed in *Law's Empire*, where he conceives the judges' task as the one of a group of poets writing a novel *seriatim*, for which both, the judges and the novelists, are constrained by what has been already written but also engage, at the same time, in a critical and creative endeavor: "In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters, which is then added to what the text novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity". Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p. 229.

[160] Huneeus, *supra note* 2.

judiciary and public ministries in broad terms, such as imposing "the duty to investigate"[161]. Nonetheless, she suggests that this resistance can be reversed using four different strategies: 1) naming and involving specific actors (judges and prosecutors) in the different stages of the remedy's monitoring; 2) presenting more deference to the higher courts, especially regarding certain procedures; 3) citing the rulings of domestic high courts that endorse and comply with the IACtHR's decisions and 4) bonding through personal and direct contact with the local judges[162]. At least at a discursive level, the IACtHR was not able to involve the judicial actors in these first orders of compliance.

But the story did not end there. In 2013, the Supreme Tribunal of the Dominica Republic ruled a case concerning a writ of *amparo* presented by Ms. Juliana Dequis Pierre, with the aim of requiring a national identity document, which was denied because her parents were Haitians and she was registered in an irregular way[163]. Furthermore, the tribunal determined that the Constitution of 1924 established the *ius solis* criteria to define nationality, since according to the text of the Constitution: "Dominicans would be those who were born in Dominican territory and had Dominican parents; or those who were born abroad the country but whose parents were Dominicans, as longs as, during the majority of age, they reside in the Dominican Republic"[164]. The consequence of this ruling was that almost 10.000 Dominicans with Haitian background were rendered stateless[165].

[161] Huneeus, *supra note* 2. See table 2 in p. 509.

[162] Ibid, p. 521-531.

[163] Sentencia TC/0168/13 (Tribunal Constitucional de la República Dominicana September 23, 2013).

[164] Ibid. Paragraph 2.1.2, p.49. Own Translation.

[165] Randal Archibold, "Dominicans of Haitian Descent Cast into Legal Limbo by Court," *The New York Times*, October 24, 2013; "Stateless in the Dominican Republic," *Editorial, New York Times*, November 7, 2015.

b.3 The IACtHR's "Case of Expelled Dominicans and Haitians v. Dominican Republic" (And Its Backlash)

Following on from that ruling, in its decision of 28th August 2014, the IACtHR ordered the State to take the proper measures to allow the registration and issuing of identity papers for the victims who had Haitian background in the "*Case of Expelled Dominicans and Haitians v. Dominican Republic*"[166]. As pointed out by Ximena Soley and Silvia Steininger, the judgment of the IACtHR "condemned these practices in strong terms"[167]. According to the authors:

> The Court held that deportation measures followed logics of racial profiling and were often carried out without any type of due process guarantees. More importantly, it determined that the interpretation of the Constitutional Court on acquisition of Dominican nationality and the regularization plans of the executive were in contravention of Article 20 (1) ACHR, which enshrines the obligation to prevent statelessness. The arguments of the Dominican Republic in the sense that many of the persons could apply for Haitian nationality were dismissed since, in the Court's opinion, the Dominican Republic could not prove that this was indeed a viable option. Moreover, the Haitian legal framework was not unequivocal on whether the foreign-born children of Haitians could obtain nationality[168].

The counter-response did not take long to arrive. On November 4th, the Dominican Constitutional Tribunal decided in the case TC/0256/2014 that the jurisdiction of the Inter-American Court was not compulsory for the Dominican Republic, due to a technicality. Since the procedural act through which it was recognized was carried unilaterally by the President, without the approval of the Congress[169], the tribunal considered it had not juridical effect in the country. It argued that "since the accession in 1999 was based on an error, or a 'presumption

[166] Caso de Personas Dominicanas y Haitianas Expulsadas vs. República Dominicana, No. Ser. No. 282. (Corte Interamericana de Derechos Humanos August 28, 2014).

[167] Ximena Soley and Silvia Steininger, "Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights," *International Journal of Law in Context* 14, no. 2 (2018): 237–57.

[168] Ibid, p. 249.

[169] Sentencia TC/0256/2014 (Tribunal Constitutional de la República Dominicana April 11, 2014).

of legality', no sentence issued by the IACtHR against the Dominican State was valid, which in effect also gave this sentence retroactive effect"[170].

In the reasoning, the tribunal addressed the fact that the IACtHR already ruled cases that involved the country and that even a national from the Dominican Republic seated on the bench of the IACtHR. Nonetheless, the tribunal considered that the constitutionality of such an act by the executive had not been challenged before, as it was in this case. It should be noted that the timing and chronology are not innocent either. By saying that "it was not innocent" I mean that the response was strategic and could be interpreted as a direct reaction to the IACtHR's ruling. This decision was the result of a petition that was sent to the Constitutional Court on November 28, 2005, just a few days after the IACtHR ruled the "*Case Yean & Bosico*" and resolved by the tribunal nine years later, a few days after the "*Case of Expelled Dominicans and Haitians*".

I would like to draw the attention to another important aspect that shows us that the reaction of the tribunal is a direct threat to the authority of the IACtHR. In this sense, in one of the final paragraphs of the judgment, the tribunal maintained that: the "mottos, principles, norms, values and rights of the American Convention on Human Rights will be fully applied, respected and taken into consideration"[171]. As I interpret it, the tribunal was not saying that it will not apply or follow the ACHR, but that it had a significant disagreement with the interpretative lines given by the IACtHR. In other words, the target of the tribunal's **hostility** was not the IAS, but the IACtHR.

Applying Madsen, Cebulak and Wiebusch, we can see in **Table II** which of the elements that constitute "backlash" are present in the Dominican Republic's case.

[170] Marsteintredet, *supra note* 142, p. 88.

[171] Tribunal Constitucional de República Dominicana, supra note 169, paragraph. 9.21, p.50.

TABLE II

Form of reaction	Sentence TC 0256/14
Seeks to overturn or leave the system?	✔ "Partial exit" (Contesse, 2019)
Seeks to reverse a development within the system?	✔ 3 Months later after the IACtHR's ruling
Resistance to the content of a judgment/s?	✔ 3 Months later after the IACtHR's case ruling
Questions the authority of the IC?	✔ At the core of the decision
Seek to change the "rules of the game"?	✔ Yes, although the last word is on the IACtHR

b.4 Did the IACtHR Resisted the Resistance? Yes!

After the "*Case of Expelled Dominicans and Haitians v. Dominican Republic"*[172], the IACtHR did not rule any other judgment related to the Dominican Republic. Nonetheless, it dealt with two provisional measures (PMs). In the first one, the Court made it clear in its reasoning that "The Dominican Republic is a State Party of the American Convention on Human Rights since April 19th, 1978 and that it recognized the contentious jurisdiction of the Court, in accordance to Article 62 on March 25th, 1999"[173]. The first PM sought to guarantee the life and integrity of Juan Almonte Herrera, who disappeared in 2010. The Dominican Republic recognized during a hearing that this was a complex case since the family of Almonte Herrera alleged that he was being prosecuted by the police and that he was detained without a judicial order in a search, while the National Police declared him as a fugitive[174]. The State had the obligation to provide information regarding the location of the alleged victim. The IACtHR

[172] Corte Interamericana, *supra note* 166.

[173] Medidas Provisionales. Resolución de la Corte Interamericana en el Asunto Juan Almonte Herrera y Otros (Corte Interamericana de Derechos Humanos November 13, 2015).

[174] Corte Interamericana, *supra note* 173, paragraph 14.

ended up lifting the measure, recognizing not only the lack of compliance of the State, but also its own failure:

> The time gone in this issue and the lack of advancements in the investigations directly affects the effectiveness of the present provisional measures, which fundamentally sought to avoid irreparable harms to the life and personal integrity of Almonte Herrera, through the expedited action of the national authorities to locate him. After more than five years, the Court does not count with concrete results that allow to determine with clarity what happened or the location of Mr. Almonte Herrera, in such a way that the provisional measures turned ineffective[175].

Nonetheless, paragraphs 22, 23 and 24 called the attention on the State to comply with its general obligations of protection and make it clear that the State did not fulfill the obligation to protect the life, integrity and freedom of the applicant.

The second PM required the protection of the life, integrity and personal security of the members of the "Centro Cultural Dominico-Haitiano". The IACtHR repeated that the Dominican Republic was obliged to follow the decisions of the IACtHR but dismissed the measure because it did not consider that there was any link to the "*Case of Expelled Dominicans and Haitians*", which is a specific requirement of Article 27.3 of the Rules of Procedures of the Court. The Court also emphasized that the case could still be presented before the Commission[176].

We can reflect on whether the IACtHR was resisting the resistance, mitigating it or giving up. The language employed by the Court in the PMs was firm regarding its own jurisdiction and the obligations of the State to respect it, but at the same time it seemed that it was backing off, avoiding any possible interaction with the Dominican State. The IACtHR ruled in four cases against the Dominican Republic, the last one being the "*Case of Expelled Dominicans and Haitians v. Dominican Republic"*, in August 2014.

[175] Corte Interamericana, *supra note* 173, paragraph 6. Own translation.

[176] Medidas Provisionales. Resolución de la Corte Interamericana en el Caso Nadege Dorzema y otros vs. República Dominicana (Corte Interamericana de Derechos Humanos February 23, 2016).

However, a major turn took place between December 2018 and March 2019. After eight years without issuing any orders of compliance regarding the Dominican Republic, the IACtHR called to a Joint Hearing for the Cases "*Yean & Bosico*" and "*Expelled Dominicans and Haitians*" in December 17th, 2018 [177]. The hearing took place 8th February of 2019 in the headquarters of the Court in Costa Rica. The Dominican State did not appear before Court or sent any delegation in representation. As a result of the deliberation with the victims and its representatives, the Court issued the last order of compliance recently on the 12th of March, 2019[178].

Both the public hearing and the order of compliance were seen, heard and read in detail for the elaboration of this work. In the following part, I will provide an analysis of the most relevant parts and I will connect it with the literature reviewed in previous chapters.

b.5 The Joint Hearing of February 2019

The Joint Hearing was convened in December 2018. The most salient fact was that the Dominican Republic did not appear before the IACtHR nor sent a diplomatic delegation. Interestingly as well, until the very end of it, when the President of the Court –Eduardo Ferrer Mac Gregor Poisot– referred to the Decision of the Tribunal (TC/0256/2014), the absence of the State was treated as a taboo topic. For instance, the Judge Ramiro Pazmiño Freire expressly stated: "this Court does not know the reasons why the State is not here"[179].

[177] "Audiencia Pública Conjunta Sobre Supervisión de Cumplimiento de Sentencia En Los Casos de Las Niñas Yean y Bosico y Haitianas Expulsadas vs. República Dominicana" (2019).

[178] Orden conjunta de supervisión de cumplimiento de sentencia en los casos de las Niñas Yean y Bosico y Haitianas Expulsadas vs. República Dominicana (Corte Interamericana de Derechos Humanos December 3, 2019).

[179] Corte Interamericana, *supra note* 177, 58:17'.

The hearing started directly with the presentation of the lawyers of the victims. The representatives highlighted the fact that for the last five years there had not been any improvement or advancement towards the compliance with the rulings. They also pointed out to the critical situation of the victims, some of whom were dying without seeing any result and to the fact that since 2014 the Dominican State stopped delivering reports related to the cases or presenting official data about the state of the matter.

The fact that the State was not there also gave more time to an exchange between the IACtHR and the victims. One of them in person, Violeta Bosico, took the floor and said:

> I want to start thanking the Inter-American Court for the decision ruled in our favor (…). Thanks to that ruling I could obtain my identity documents; I could start working, I am studying Psychology in the University. This has been a great achievement that changed my life. My life made a big turn because a person without identity documents does not exist in the Civil Registry. Just as my life has changed, I wish that the lives of other people in the same situation change as well, so they can study, work and be someone tomorrow (…) I also want to ask this Court as well as to the Dominican State to find a solution so young people can have access to their identity documents[180].

Beyond its emotive strength, Bosico's statement shows a kind of commitment to the victims that is rarely seen in international courts. One could speculate that the Court was looking for a source of legitimization by gaining credibility in front of the victims, whose protection is the final goal of the IAS and the ACHR.

Almost at the end of the hearing, the president of the Court took the lead again. He remarked how important these cases are for the architecture of the IAS, since they are the first ones to deal with the topics of citizenship and statelessness. Then, he made allusion to the Sentence of the Dominican Republic Tribunal (TC/0256/2014). Specifically, he asked the lawyers of the victims whether they believed that the decision had a negative impact in the compliance with the judgments of the IACtHR[181]. One of the lawyers of the victims answered:

[180] Corte Interamericana, *supra note* 177, 00:25:00.

[181] Ibid, 1:03:15.

"I will repeat what we maintained in our written presentations. We consider that the Tribunal's sentence cannot have legal effects (…). The State cannot make unilateral acts in order to withdraw from the jurisdiction of this Court. It is the Court the master of its own jurisdiction"[182]. Finally, the president repeated again one of his questions: "Do you think that it affected with the compliance with our rulings?"[183] To which, the same lawyer responded:

> It is possible, but we cannot say it with total certainty because we do not know the official position of the State. But as you well know, after that judgment, the State did not present any other report to this Tribunal. And in that sense, we believe it is important to request you to make a statement about your own jurisdiction regarding the Dominican Republic[184].

b.6 The Joint Order of Compliance of March 2019

That statement was delivered by the IACtHR on March 12, 2019 in the form of and order of compliance[185]. The 28-pages long document addressed point by point the concerns regarding both cases. Fifteen out of 28 pages tackled the question of the own jurisdiction of the Court, which already gives us an insight of how worried the Court was about the direct challenge posed by the Constitutional Tribunal of the Dominican Republic. The richness of the document, in contrast with the previous orders of compliance treated above, makes it worth of a thorough assessment.

As all the rulings and orders of compliance that arise from the IACtHR, this order is structured in three parts: a preambular one, the body of the legal reasoning, and a declarative and resolutive section. Furthermore, the body of legal reasoning is divided in five items: a). "Omission of the State to present information regarding the compliance in both cases); b). "Information from the victim's representatives and the Inter-American Commission regarding

[182] Corte Interamericana, *supra note* 177, 1:03:39.

[183] Ibid, 1:04:27.

[184] Ibid, 1:04:34.

[185] Orden conjunta de supervisión de cumplimiento de sentencia en los casos de las Niñas Yean y Bosico y Haitianas Expulsadas vs. República Dominicana.

the lack of compliance in both cases"; c). "Considerations of the Court about the international obligation of the State to comply with the decisions of this Court"; d). "Breach of the duty to inform and implement reparations by the Dominican Republic"; and e). "Considerations about the jurisdiction of the Inter-American Court regarding the Dominican Republic"[186]. The analysis of this work will focus mainly on items c, d and e.

The preambular part starts taking note of the violations the Court found in the cases under question and makes an interesting move. It states all the chronological events that took place since 2013, when the IACtHR issued the last order of compliance in the "*Yean & Bosico"* case and the measures carried on by the Court. Discursively, this is a smart strategy because the Court is showing, especially to the victims, that it did not stop working and how it resisted the Dominican backlash in what may seem as an "invisible" job[187]. For instance, in paragraph 7 it alludes to the "five letters sent by the Court's Registrar between November 2013 and July 2017 in the case *"Yean & Bosico"*, through which (…) it required the State to present information about the compliance or it reminded the State the deadline for compliance, without receiving any response"[188] and in paragraph 9, to the "letters sent by the Court's Registrar between November 2013 and July 2017 in the case *Expelled Dominicans and Haitians,* through which (…) it required the State to a report the adopted measures to comply with the judgment, since the deadline had already expired"[189]. The preambular part concludes with the IACtHR referring in paragraph 11 to the public hearing and the fact that only the victims and their representatives appeared before it.

[186] Corte Interamericana, *supra note* 185, p. 4. Own translation.

[187] I use this expression because all the documents presented before the Court and all its statements are public, but they do not receive the same public attention as the cases (both in its adjudicative and consultative role) or its orders of compliance.

[188] Corte Interamericana, *supra note* 185, paragraph 7, Preamble. Own translation.

[189] Ibid, paragraph 9, Preamble. Own translation.

The body of the order displays a majestic use of legal argumentation and reasoning. The Court not only deploys different strategies to legitimize itself, but also does what Alexandra Huneeus calls "naming names"[190], that is to say, it engages directly with the Constitutional Tribunal of the Dominican Republic as a key audience, which was the missing link in the previous rulings and orders. There is a balance in the wording used as well; while the language employed is tough at times and the Court uses some specific severe words, as the text advances, the argumentation becomes principled-based and has a vocation of neutrality and diplomacy.

To begin with, the IACtHR recognizes somehow its own defeat: the IACtHR ruled four cases against the Dominican Republic. From those four cases, it only issued orders of compliance in the "*Yean & Bosico"* one and only three out of five remedies were complied with. In the other, "*Expelled Dominicans and Haitians",* none of the ten measures ordered were complied with to date. Then, in the second paragraph of the body of the order, the Court establishes that it issues this order with the aim of:

> Taking a stand regarding the omission of the Dominican Republic to provide information about the compliance of the rulings of this Court in these two cases and to comply with the reparation ordered in them. Moreover, taking into account that the said omission coincided in time with the decision TC/0256/2014 of the Constitutional Tribunal of the Dominican Republic, in which it declared that the instrument of acceptance of the jurisdiction of the Court was unconstitutional, we will address the request of the representatives of victims to make a statement about it and we will analyze whether that sentence makes considerations that are against the international obligations contracted by the Dominican Republic[191].

The Court thus provides an overview of the state of the situation regarding these cases and then confronts the problem of how the Dominican Republic is dishonoring its international law obligations. I argue that in item c) "Considerations of the Court about the international

[190] Huneeus, *supra note* 2, p. 522.

[191] Corte Interamericana, *supra note* 185, paragraph 2, Body of the Decision. Own translation.

obligation of the State to comply with the decisions of this Court", the IACtHR uses four strong arguments to justify its reasoning:

1. By referring to other international tribunals. This is an important strategy and a key characteristic of the Inter-American Court, which is well known for its universalistic approach in interpretation and adjudication. The IACtHR does not rely exclusively on the American Convention or other instruments on which it has jurisdiction, but also draws on the interpretative developments of other instruments and sometimes on soft law. In paragraph 19 it states:

> The binding force and the definitive character of the international judgments are regulated not only for the decisions of the Inter-American Court of Human Rights, but also for all the sentences of International Tribunals, such as the International Court of Justice and regional tribunals for the protection of human rights such as the European Court of Human Rights and the African Court on Human and People's Rights[192].

From my perspective, while alluding to other Courts, the IACtHR is also portraying itself as a part of what Slaughter called "a judicial global community".

2. The IACtHR legitimizes itself as an authoritative voice by making express reference to the letter of the ACHR. In a research that studies the different strategies used by the European Court of Human Rights, Shai Dothan explains that "when a Court issues a judgment that is well endorsed in the Convention, the judgment will be considered more legitimate and noncompliance will signal a greater disrespect for the Convention System and cause a greater damage to the State's reputation"[193]. Here, in paragraph 20, the IACtHR textually quotes Article 68.1 of the ACHR, which establishes the binding obligation of the states to comply with the Court's judgments.

[192] Corte Interamericana, *supra note* 185, paragraph 19, Body of the Decision. Own translation.

[193] Shai Dothan, "Judicial Tactics in the European Court of Human Rights," *University of Chicago Working Papers* Paper No. 358 (2011), p. 123.

3. The Court recurs to its highly criticized "conventionality control doctrine"[194]*, but does it in a clever way, without naming it explicitly.* Instead of mentioning it, it presents the conventionality control masked as an accepted and a well-received principle of international law. The Court does not miss the opportunity either of sending a message to the Dominican Constitutional Tribunal:

> The States parties of the American Convention have the conventional obligation of implementing both at a national and internal level and rapidly, what has been determined for them in the sentences of this Tribunal, obligation that, as Customary International Law dictates, is binding for all the powers and bodies of the State (Executive, Legislative, Judiciary, other branches) and all the public and State authorities of any level, including the highest Tribunals of Justice, which have the duty to comply in good faith with international law[195].

4. The IACtHR uses a polite, diplomatic and neutral language. In paragraph 22, the IACtHR maintains that states cannot invoke justifications based on their internal systems to breach international treaty obligations. When the Court says: "it is not about resolving the problem of the supremacy of international law over internal law, but to honor the obligations

[194] Jorge Contesse states:

> The Inter-American Court defines the conventionality control doctrine as 'an instrument for applying international law'. The doctrine allows national judges to give direct application to international norms and standards of interpretation. By its own terms, however, the doctrine goes further: it decrees that in case of conflict between domestic norms and the American Convention on Human Rights, national judges shall give preference to the convention's norms. The court finds that all domestic judges are directly bound by the norms of the American Convention. What is new about the doctrine is its creation of domestic judicial power by an international court. The Inter-American Court seeks to transfer authority to domestic judges, bypassing domestic legislatures. The court claims that national judges should also follow the court's interpretations of the American Convention, increasing the authority of international judges at the expense of state signatories of the convention.

Jorge Contesse, "The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine," *The International Journal of Human Rights* 22, no. 9 (2018), p. 1170. But, progressively, the Inter-American Court extended the scope of the conventionality control to "any public authority". That is to say, any official of the state has to follow the Court's interpretation of the ACHR. See: Laurence Burgorgue-Larsen, "Chronicle of a Fashionable Theory in Latin America. Decoding the Doctrinal Discourse on Conventionality Control," in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, 1st ed. (Cambridge: Intersentia, 2005), p.655.

[195] Corte Interamericana, *supra note* 185, paragraph 21, Body of the Decision. Own translation.

to which the sovereign states committed"[196], the IACtHR is not only recognizing the sovereignty of the Dominican Republic, but also rhetorically reminding the State that this is not a battle for power. Some sort of respect and deference is showed.

In item d) "Breach of the duty to inform and implement reparations by the Dominican Republic", the IACtHR balances its previous diplomatic language by using bold words and a strong speech. For instance, the word "*desacato*"[197] is mentioned twice in this part, referring to the lack of compliance of the Dominican Republic with the remedies ordered by the Court, to the fact that it stopped sending reports and to its absence without justification before the public hearing. The Real Academy of Spanish language provides three definitions for the word "*desacato*"[198]. All of them carry a tough meaning: 1). "Lack of the due respect to the superiors"[199]; 2). "Irreverence to Sacred things"[200]; 3). "In some legal orders, a crime that is committed by slandering, insulting or threatening an authority in the exercise of its functions, whether in speech or in a written document"[201]. For its part, while looking a translation in English, I found words such as "disregard", "insult" and "disrespect"[202]. The Court uses the word "*desacato*" to refer to the failure of the State to provide updates regarding the cases and it links that failure, sequentially, to the judgment of the Constitutional Tribunal of the Dominican Republic (TC/0256/2014):

> The verified breach of the duty to provide information and the obligation to implement the pending measures imposed by this Court in the two cases turn out to be particularly grave because they constitute a position of "desacato" by the Dominican Republic to the binding

[196] Corte Interamericana, *supra note* 185, paragraph 22, Body of the Decision. Own translation.

[197] Ibid, paragraphs 30 and 35.

[198] "Diccionario de La Real Academia Española," accessed August 11, 2019, https://dle.rae.es/desacato.

[199] Ibid.

[200] Ibid.

[201] Ibid.

[202] "Linguee," accessed August 11, 2019, https://www.linguee.com/english-spanish/search?source=spanish&query=desacato.

> character of the judgments of this Court. Fundamentally since the omission to inform overlaps with the decision of the Constitutional Tribunal of the Dominican Republic TC/0256/2014 of 2014, in which the Tribunal declared the instrument that accepted the jurisdiction of this Court unconstitutional [203].

The last section of the body of the order item e). "Considerations about the jurisdiction of the Inter-American Court regarding the Dominican Republic" is a classical justification of its own jurisdiction principled in International Law[204], the Vienna Convention of the Law of the Treaties and the American Convention of Human Rights. The Court describes the chronological events through which the Dominican Republic accepted not only the Convention but also the authority of the Court and ends with a special call to the Supreme Tribunal of the Dominican Republic: "The decision of the Constitutional Tribunal of the Dominican Republic TC/0256/2014 seeks to impose limits to the exercise of the jurisdiction of the Inter-American Court established by Article 62 of the American Convention, going against the object and purpose of the Convention". But, from my perspective, the most relevant part of the body of the decision is paragraph 73, where the Court clearly states:

> With the aforementioned decision, the Constitutional Tribunal of the Dominican Republic, instead of assuming the important role of protecting human rights, as the Head of the Judiciary, *it created an atmosphere of legal uncertainty regarding the subsidiary protection of the Inter-American System of Human Rights. That had a negative impact in the compliance with the binding sentences of this Court (…) and has put the victims in a situation of vulnerability and lack of reparations to their violated rights*[205] (emphasis added).

Despite of the hard tone used by the Court, this paragraph is essential because the Court is recognizing the Dominican judges as peers that share a common enterprise: the protection of human rights in the region. While the IACtHR is not highly deferential (and this is even more patent in the resolutive part of the order, where it declares that the TC/0256/2014 has no

[203] Corte Interamericana, *supra note* 185, paragraph 35, Body of the Decision. Own translation.

[204] Specifically, the violation of the Estoppel and *Pacta Sunt Servanda* Principles.

[205] Corte Interamericana, *supra note* 185, paragraph 73, Body of the Decision. Own translation.

legal effect at all), this order of compliance shows a more elaborate effort by the IACtHR to address, cater and integrate the national judges in a shared endeavor, as proposed by Slaughter and Huneeus.

It is clear that the IACtHR left the Dominican Republic, and especially the Constitutional Tribunal, in an uncomfortable position. While the hostility towards the IACtHR was previously dealt with a discreet silence, the Court gave now the message that enough was enough. But not in a conclusive way, but in a manner that invites the Dominican Republic Constitutional Tribunal to engage in a shared mission for the protection of rights of vulnerable people. We will have to wait for the Dominican Republic's reactions. Since this is a relatively recent decision, no further responses or academic works were found[206]. But so far, three options seem available. One, to denounce the Convention as Trinidad and Tobago and Venezuela did; two, to make the Congress "resolve" the legal technicality and approve the Court's jurisdiction; or three, as an authoritative consequence from the order of the IACtHR, to wait for a new ruling of the Constitutional Tribunal reversing the TC/0256/2014 sentence[207].

c. The Pushback from the Supreme Court of Argentina

c.1 Argentinean Supreme Court (2003-2014): A Deferential Court to the IACtHR

Unlike the hostile relationship between the IACtHR and the Constitutional Tribunal of the Dominican Republic, the Supreme Court of Argentina was an ally of the IACtHR. The reliance and following of Argentina's Supreme Court of the rulings of the IACtHR acquired

[206] Only this newspaper article was found: Cecilia Palomo Caudillo, "República Dominicana: Entre La Simulación y El Cumplimiento Ante La Corte Interamericana de Derechos Humanos," *Diario 16*, October 16, 2019.

[207] Palomo Caudillo, *supra note* 206.

special momentum in the reopening of cases of crimes against humanity committed during the last dictatorship[208].

The most paradigmatic decisions of the former Supreme Court (2003-2014) reinvigorated the discussion of the place of human rights in a constitutional Rule of Law. In that enterprise they were deferential and granted a decisive role to the Inter American Court of Human Rights. That Supreme Court reopened the cases concerning crimes against humanity based on the premise that some of them had not been duly investigated and prosecuted. Furthermore, it placed particular emphasis on the rulings of the Inter-American Court as interpretative guidance in the construction of its own judicial opinions[209].

Argentina, like many other Latin-American countries, went through a Constitutional Reform that gave a group of human rights treaties (among them, the ACHR) the same hierarchy as the Constitution. The process of investigating, prosecuting and putting on trial those accused of the crimes committed during the last dictatorship of the country (1976-1983) cannot be understood without that historical and legal milestone[210].

The Inter-American Court decided its landmark case *Barrios Altos v. Peru*[211] in 2001. In that case, the IACtHR declared that the pardon and amnesties laws related to the dictatorships in the South Cone were in clear violation of the ACHR and declared that crimes against humanity were not subject to any statute of limitations. As a consequence, and backing up their decision on the *Barrios Altos* case, a mobilization started in Argentina in which lower Courts declared the unconstitutionality of the Due Obedience and Full Stop Acts[212].

[208] Allori, *supra note* 131.

[209] Ibid.

[210] Ibid.

[211] Caso Barrios Altos vs. Perú (Corte Interamericana de Derechos Humanos February 14, 2001).

[212] Allori, *supra note* 131.

In 2001, a major economic crisis hit Argentina, one that also unmasked a representation crisis as well. People –especially middle class and savers of small amounts of money– took part in demonstrations in the street, asking for "everyone to leave office" ("Que se vayan todos"). That slogan did not only target politicians, but also the members of the judiciary, who were also stained with corruption. In that context of distrust in all the governing class and judicial elite, Néstor Kirchner assumed the Presidency of the country with a 22 percent of the votes, a considerably low rate of popularity for taking office[213]. During his mandate he conducted a series of measures with the aim of addressing, in Weber's terms, his lack of legitimacy of origin. These measures were welcome by the civil society. At the core of his policy was the economic sovereignty of the country, an exaltation of human rights –especially in regard to the atrocities committed during the last dictatorship– and the modification of the process of selection of the judges of the supreme court, which until that moment was done in complete secrecy and complicity between the president and the senate. The new procedure was well received by NGOs and think-tanks because it allowed for the presentation of both support and objections to the proposed candidates to the bench[214]. Between 2003-2005, several judges were impeached or quitted for the sake of avoiding impeachment. Following the new process, which sought to establish gender and geographical balance and to put prestigious jurists in their respective fields on the bench, President Kirchner designated four judges for the Supreme Court: Ricardo Lorenzetti, Eugenio Zaffaroni, Elena Highton de Nolasco and Carmen Argibay[215].

The president's policy of exalting human right was also accompanied with aligned measures both and the Congress and the new Supreme Court. As an example, in 2003 the

[213] Allori, *supra note* 8.

[214] Ibid.

[215] Ibid.

Congress of Argentina overturned the amnesty laws passed after the return to democracy. For its part, the Supreme Court showed a devoted dedication to the IACtHR in its argumentations for the reopening of the cases of crimes against humanity[216].

Put briefly, in 2004, in the case *Arancibia Clavel*[217], the Supreme Court declared that crimes against humanity were indefensible. In 2006, in the case *Simón*[218], it established the unconstitutionality of the amnesty laws and finally in 2007 the Supreme Court issued its judgment in *Mazzeo*[219]. *Mazzeo* was a special case because it reopened the case *Riveros*[220], that had passed as *res iudicata*. This "Troika" of cases (*Arancibia Clave*l, *Simón* and *Mazzeo*) is the signature of one the most progressive Supreme Courts Argentina had. Likewise –altogether with the judgments of the IACtHR and the authoritative value the Argentine Supreme Court gave them– allowed the reopening and litigation of hundreds of cases along the country that had been close between the mid-eighties and beginning of the nineties[221].

Additionally, the Argentinean Supreme Court followed the IACtHR in cases that were not as sensitive as those related to crimes perpetrated during the last dictatorship in the country. According to Víctor Abramovich[222], in the case *Espósito*[223] (correlated with the case before the IACtHR *Bulacio*[224]), it established that the margin of discretion of Argentine courts was

[216] Allori, *supra note* 131.

[217] Arancibia Clavel, Enrique L., No. Fallos 327:3312 (Corte Suprema de la Nación Argentina 2004).

[218] Simón Julio Héctor y Otros, No. Fallos 328:2056 (Corte Suprema de la Nación Argentina 2005).

[219] Mazzeo, Julio Lilo y Otros, No. Fallos 330:3248 (Corte Suprema de la Nación Argentina 2007).

[220] Riveros, Santiago O. y otros, No. Fallos 313:1392 (Suprema Corte de la Nación Argentina 1990).

[221] Allori, *supra note* 131.

[222] Víctor Abramovich, "Comentarios Sobre 'Fontevecchia': La Autoridad de Las Sentencias de La Corte Interamericana y Los Principios de Derecho Público Argentino," *Revista Pensar En Derecho* 10, no. 5 (2017).

[223] Espósito, Miguel Ángel s/incidente de prescripción de la acción penal promovido por su defensa (Corte Suprema de la Nación Argentina December 23, 2004).

[224] Caso Bulacio vs. Argentina (Corte Interamericana de Derechos Humanos September 18, 2003).

narrowed by the integration of the country to an international system of protection of human rights (the Inter American System), which obliged it to comply with the decisions of the Inter American Court in terms of the Article 68 of the American Convention. To the Court, this obligation persisted even when it disagreed on the content of the ruling or whether it contradicted the domestic order. Later, in the case *Derecho*[225], the correlation of the case *Bueno Alves*[226], the Supreme Court maintained this interpretation and reopened a surpassed case, where a policeman was charged of torture.

No country under the jurisdiction of the IACtHR has a full record of compliance. Nonetheless, Argentina's courts were good allies that cited and relied on the IACtHR.

c.2 The Background of the Fontevecchia Case

After a long international judicial process, in November 2011[227], the IACtHR condemned the Argentinean State for the violation of the right to freedom of expression (Article 13 of the ACHR) of the journalists Jorge Fontevecchia and Héctor D'Amico. They were working and in charge of a magazine dedicated to political affairs and published in 1995 a note alleging that the former President Menem (in office at that time) had a non-recognized son and lover. Menem presented a civil judicial action arguing that his right to intimacy and privacy had been intruded. The National Chamber of Appeals of the Capital City found a violation to Menem's rights and condemned Fontevecchia and D'Amico to the payment of US$ 150.000. The case was appealed to the Supreme Court and the Highest Tribunal confirmed the decision but lowered the compensation amount to US$ 60.000. When the decision arrived

[225] Derecho René Jesús s/incidente de prescripción de la acción penal-causa no. 24.079 (Corte Suprema de la Justicia de la Nación Argentina November 29, 2011).

[226] Caso Bueno Alves vs. Argentina (Corte Interamericana de Derechos Humanos November 5, 2007).

[227] Caso Fontevecchia y D'Amico vs. Argentina (Corte Interamericana de Derechos Humanos November 29, 2011).

at the IACtHR, the Court found that the journalists had not intruded in the President's life, mainly because they were carrying on the duty to provide information in a democratic society, regarding a public officer with the highest rank of the country. Therefore, the IACtHR ordered the Argentinean State: a). To declare the civil sentence as null and void; b). To publish an abstract of the decision in the official bulletin and a journal with national scope and to upload the full judgment to the informative website of the Supreme Court and leave it there for a year; c). To reimburse the same amount of money to the victims, with interests.

In September 2015, the IACtHR issued its first order of compliance about this case since, until that date, the Argentinean State had not complied with any of the remedies established by the IACtHR. It reminded the State its duty not only to comply with international obligations, but also to keep that Court informed and updated[228]. One year later, in November 2016, the IACtHR delivered a new order of compliance where it recognized that Argentina had fulfilled the requirements of point b); but have not complied with a) –which was fundamentally in hands of the Supreme Court of Argentina– and c)[229].

c.3 The Unsettling Decision in the "Fontevecchia Case" of 2017

Turning to the political context and events of Argentina, in June 2016, President Mauricio Macri appointed Justices Carlos Rosenkrantz and Horacio Rosatti to the Supreme Court. The appointment of these judges meant a significant shift in the conformation of the Court, an institution that should change its members at a gradual pace. These new voices influenced significantly the reasoning of the decision *Fontevecchia*, issued on February 14th,

[228] Orden de supervisión de cumplimiento de sentencia en el caso Fontevecchia y D'Amico vs. Argentina (Corte Interamericana de Derechos Humanos January 9, 2015).

[229] Orden de supervisión de cumplimiento de sentencia en el caso Fontevecchia y D'Amico vs. Argentina (Corte Interamericana de Derechos Humanos November 22, 2016).

2017[230][231].

Carlos Rosenkrantz, a respected scholar in the country, and skeptic about the domestic use of both international and foreign law, had written many years before a scholarly article against foreign borrowings. Rosenkrantz starts its article making the following disclaim: "The perspective of this article is that of someone who lives in a country that has used and abused foreign law, notwithstanding this use and abuse probably because of it, has failed it its effort to build a sustainable legal and constitutional culture"[232]. Furthermore, he argues that Argentina's constitutional design, when imitating the American model, failed at capturing the peculiarities of the country. But the curious aspect of the article, coming from such a well-educated and prepared scholar, lies in his blunder at confusing foreign law with international law. The following fragment is highly illustrative, where he explains the logic of incorporating human rights in the Constitution of one member of Constituent Assembly of 1994:

> Alicia Olivera, a member of the 1994 convention (…) said that 'the decision to incorporate human right treaties into the Constitution had as its immediate source the abhorrent crimes committed by the military dictatorship in Argentina, especially the last one'. 'Our history', said Olivera, 'was condensed in the expression 'Never Again' and to guarantee that this will be the case, we should grant constitutional standing to the principles of *jus humanitarios*'. Olivera's comment emphasize that Argentina incorporated foreign law for an altogether expressive purpose. Argentina borrowed in order to manifest its adherence to the same restrictions on governmental power that characterized foreign or international law it adopted[233].

[230] Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso "Fontevecchia y D'Amico vs. Argentina" por la Corte Interamericana de Derechos Humanos (Corte Suprema de la Nación Argentina February 14, 2017).

[231] It is important to remark that it is not clear whether that decision was a judgment or a mere resolution, since it emerged as an answer to a legal document sent by the Direction of Human Rights of the Ministry of Foreign Affairs, to ask the Court to fulfill requirement a). of the IACtHR's ruling.

[232] Carlos Rosenkrantz, "Against Borrowings and Other Non-Authoritative Uses of Foreign Law," *International Journal of Constitutional Law* 1, no. 2 (2003), p. 269.

[233] Rosenkrantz, *supra note* 230, p. 280-281.

Important traces of Rosenkrantz's argumentation can be found in the decision of the Supreme Court, especially because the majoritarian vote tries to go back to Argentinean Constitutional tradition to which Rosenkrantz refers in its article, instead of alluding to this same Supreme Court jurisprudence.

The main arguments used by the majority of the Supreme Court of Argentina were the following: 1). That the IACtHR was not acting as a subsidiary body but as a fourth instance, which was against the IAS structure. 2). It considered that in principle the IACtHR's rulings are binding, except when they exceed the IACtHR's jurisdiction or when they go against the "constitutional public principles of Argentine order"[234], which is what they interpreted as happening in this case. 3). It determined that imposing the Argentine Supreme Court to review a *res judicata* decision where this institution had already intervened, questioned Argentina's Supreme Court as the "supreme adjudicative body and head of the country's judiciary"[235] and certainly contradicted fundamental principles of the Argentinean Constitution.

This was how the Supreme Court of Argentina changed a doctrine supported for more than a decade, declaring that the judgments of the Inter American Court of Human Rights that oblige the Argentine State to revoke its judicial decisions were not enforceable[236]. We can ask ourselves whether this Court's reaction can be framed as a case of pushback in Table III.

[234] Corte Suprema de la Nación Argentina, *supra note* 229, paragraph 16.

[235] Ibid.

[236] Ibid.

TABLE III

Form of reaction	Pushback
Seeks to overturn or give up the system?	✗ No
Seeks to reverse a development within the system?	✔ Yes, the decision of the IACtHR in a specific case
Resistance to the content of a judgment/s?	✔ Idem
Questions the authority of the IC?	**?**
Changes the "rules of the game"?	**?**

While the Madsen et al. framework is informed by empirical data, the categories the authors propose are theoretical and they are not found in a pure state in reality. The cases' analysis entails more complexities than those captured by these pure types. For instance, we cannot say that the *Fontevecchia* case does not threaten to the recognition of the authority of the IACtHR, especially if we take into account all the elements in the context: the overturning of a decade's worth of accepted jurisprudence, the change in the executive power –a factor that should not affect an independent judiciary, but does indeed – and the new members of the Supreme Court (with their respective ideological, academic and legal positions).

c.4 The Possibility of a [Cold] Transnational Judicial Dialogue

The *Fontevecchia* case has led to a rich debate between scholars and human right practitioners[237]. The public attention gained by the case and the treatment by the IACtHR, made from this case one of the most controversial and thought-provoking one of the last three years.

In August 2017, the representatives of the journalists Fontevecchia and D'Amico (the victims) asked for a public hearing in the headquarters of the IACtHR in San José de Costa

[237] See: Marcelo Alegre, "Monismo En Serio: 'Fontevecchia' y El Argumento Democrático," *Revista Pensar En Derecho* 10, no. 5 (2017) and Abramovich, *supra not*e 221.

Rica, in which I was lucky to be a participatory observant[238]. Unlike the Dominican Republic, which did not send its diplomatic representatives to the joint hearing of February 2019, Argentina sent a delegation formed by members of the Justice Ministry and the hearing started with the State's oral argument. The Argentinean representatives opened their statements recognizing the jurisdiction of the IACtHR and that their presence there was a manner to honor the international obligations that stemmed from the ACHR. They also expressed the will of the current administration to comply with the ruling and that the State had actually complied with remedies (b) and were in the process of reimbursing the money to the victims (c). They also pointed out that the IACtHR's decision was sent to the judiciary for the implementation of remedy (a), but that due to the principle of separation of powers, there was not much the executive power could do.

Of course, the presentation of Argentina was rebutted by the lawyers of the victims and criticized by the delegation sent in representation of the Inter-American Commission. Nonetheless, the hardest criticism came from Judge Eduardo Vio Grossi, who bombarded the representatives of Argentina with incisive questions. First, he asked: "What did the executive power do beyond sending a copy of the sentence of the Inter-American Court? Did you intervene somehow in the judicial process?"[239] To which, the representatives of the State replied that they did "what the executive could do"[240] and that "they did not make any additional presentation"[241]. Then, Judge Vio Grossi stated that "the separation of powers does not imply a lack of dialogue between the different branches of the State". And from here, the Judge started imparting what could be named as a shameful lesson on public international law.

[238] "Audiencia de Supervisión de Cumplimiento de Sentencia En El Caso Fontevecchia y D'Amico vs. Argentina" (2017).

[239] Ibid, 1:03:40.

[240] Ibid, 1:05.

[241] Ibid.

He explained to the State's representatives –who insisted on the fact that they could not offer a solution, because the Supreme Court of Argentina is the head of the judiciary– in a professorial tone that:

> The State is one. Whichever internal organization it has, it is only one and it assumes its obligations as a State. For us, the responsible is not the Supreme Court, or the Executive Power, or the Parliament. The responsible is the State (…) So I assume that for you, the voice of the State in this case is the one of the Supreme Court[242].

At that point, the highly confused and disoriented delegation of Argentina replied: "Yes"[243] and that it was not a matter of lack of will of the executive, but that they had their hands tied. Again, in an incisive tone, Judge Vio Grossi highlighted that the division of powers cannot be an excuse before an international court.

While Judge Vio Grossi's claim was extremely basic for an international lawyer or student, it unmasked a tension that Huneeus had highlighted before. Indeed, judges are not in charge of executing the foreign policy of a State. And to put the weight of the "dialogue between branches" on the shoulders of the executive power of Argentina could be seen as a way of the IACtHR of wriggling out of a problem. As a participatory observant of the hearing, I was wondering the whole time: how would this hearing develop if Rosenkrantz, Rossati and Highton de Nolasco were called to appear and debate before the IACtHR? A Court as progressive and flexible as the IACtHR could consider inviting the national judges to their hearings, especially when the rulings directly involve them.

After the public hearing, a riveting process began. In October 2017, the IACtHR issued its last order of compliance in this case[244]. From paragraphs 17 to 19 it recognized the efforts of the State to comply with the judgment and the rest of the order was directed to the Supreme

[242] Corte Interamericana, *supra note* 235, 1:09:36.

[243] Ibid, 1:10.

[244] Orden de supervisión de cumplimiento de sentencia en el caso Fontevecchia y D'Amico vs. Argentina (Corte Interamericana de Derechos Humanos October 18, 2017).

Court of Argentina. In an interesting turn of events, The IACtHR showed openness to ask the Supreme Court which possible paths Argentina could take to arrive to a compromise solution:

> In the present case, since it is a civil sentence that has no implications for the criminal records, the State could adopt other kind of juridical act, different to the revision of the sentence, to comply with the ordered measure, such as deleting the Supreme Court judgment from its website or Information Center, or to maintain the publication but to put a note in the margin of the sentence, indicating that it violates the American Convention[245].

However, not every sentence of the order was a bed of roses. In paragraph 23, the IACtHR reiterated that the decision of the Supreme Court of Argentina was a clear contravention to the State's international obligations. Furthermore, in paragraph 25, it expressed its concern and disappointment regarding the jurisprudential shift that took place in a Supreme Court that was previously "taken by this tribunal as a positive example"[246].

Finally, in December 2017, following the suggestion of the Inter-American Court, the Supreme Court of Argentina issued a strange resolution[247] in which it established that the Argentine State could comply with its international commitments with "a legal act different to a judgment"[248], establishing "a note in the margin of the sentence indicating that the ruling was incompatible with the ACHR"[249].

Although this compromise solution was seen with skepticism by some scholars[250], it showed the possibility of a ("cold") transnational judicial dialogue and the exercise by both Courts of active listening, flexibility and judicial negotiation.

[245] Corte Interamericana, *supra note* 242, paragraph 21. Own translation.

[246] Ibid, paragraph 25. Own translation.

[247] Resolución 4015/2017 (Corte Suprema de la Nación Argentina December 5, 2017).

[248] Corte Suprema de la Nación Argentina, supra note 244, paragraphs 3 and 4.

[249] Ibid.

[250] Contesse, *supra note* 2, p. 62.

By "cold" transnational judicial dialogue I mean that we should acknowledge and celebrate that both courts arrived to a compromised solution. Nonetheless, for a Court that has been deferential and respectful of the IACtHR as it was the Argentinean Supreme Court, its response was mostly formalistic and diplomatic. I argue that the Supreme Court of Argentina reacted, partly, because of the commotion that this case generated in the media and among public interest lawyers, judicial operators, scholars and students[251]. For instance, the law journal of the University of Buenos Aires –one of the most prestigious institutions in the country– issued a special volume exclusively dedicated to the *Fontevecchia* decision, with articles of the most revered scholars in the country[252]. As stated by Alter, Helfer and Madsen[253], ICs do not address a single audience but several constituents. In the case of Argentina, the IACtHR is indeed and authoritative institution for human rights practitioners, NGOs, law students and, most importantly, for the victims and relatives that resorted to the IAS and found relief. My perspective is that disregarding those audiences would have impacted the Supreme Court of Argentina's legitimacy in a significant negative manner.

d. Preliminary Conclusions

As I indicated at the beginning of this thesis, this is not a comparative work *stricto sensu*[254]. Nonetheless, some comparisons can be established among the interactions between

[251] Diario Clarín, "La Corte Rechazó que la CIDH pueda revocar sentencias del Máximo Tribunal Argentino," February 14, 2017.

[252] See: http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revista-10.php. Accessed 11/11/2019.

[253] Alter, Helfer and Madsen, supra notes 15 and 20.

[254] This clarification is done because I believe that in order to do a serious comparative work, a deeper knowledge of the legal culture of the countries is needed (not just knowing the law in the books). In the case of Argentina I am part of that practice, what Herbert Hart calls "internal point of view".

the IACtHR and the Constitutional Tribunal of the Dominican Republic, and the IACtHR and the Supreme Court of Argentina.

The first important point of comparison is the subject matter. While in the case of the Dominican Republic, the topic –namely the denial of access to citizenship to the Haitian community– is highly contested and controversial in the country and has a dense historic and political background; the case at issue in Argentina was a civil procedure with no further graver consequences for the IACtHR. This aspect is not minor when it comes to establishing whether the resistance takes the form of backlash or pushback. It could be expected that a sensitive topic for a community may be counter-measured with all the political strength and resources.

The second point of comparison is the type of resistance that is taking place in the two cases. I used the framework of Madsen et al. to categorize the Dominican Republic one as "backlash" and the Argentinean as "pushback". This is not just a theoretical categorization without any normative implication in real life[255]. I hope to have shown in this analysis that the forms of the resistance impacted the way in which the Inter-American Court responded to the challenges and how it "resisted the resistance".

In that line, the third point of comparison are the strategies deployed by the Inter-American Court. In this sense, in the scrutinized orders of compliance, the highest rhetorical effort and the use of different strategies took place in the joint order of compliance for the cases "*Yean & Bosico"* and "*Expelled Dominicans and Haitians"*.

I borrow the two-last point of comparison from the *Law and Literature* studies. We can ask ourselves whether the last orders of compliance were successful. By "successful" I mean, which was the performative impact of those orders, whether they generated any impact or outcome in the audience they sought to address. In the case of the Dominican Republic, that still remains an open question, but the relationship between the Constitutional Tribunal and the

[255] I thank Professor Shai Dothan for helping me to elaborate on the normative implications of this work.

IACtHR is, so far, a **hostile** one. Further research should be conducted to explore how the Constitutional Tribunal and the State finally reacted. In the case of Argentina, both the public hearing and the order of compliance generated such a robust public deliberation, that it obliged both courts to arrive to a compromise solution. Although I cataloged it as a "cold" transnational judicial dialogue, at least both tribunals showed signs of respect and diplomacy. Table IV presents a visual comparison.

TABLE IV

State	Subject matter	Type of Resistance	Strategy used by the IACtHR	Was the IACtHR successful?	Response of the National Court
Dominican Republic	Highly sensitive and controversial	Backlash	▪ Public hearing ▪ Reference to ICs ▪ Legal reasoning well based on International Law and the ACHR ▪ Balanced language ▪ "Naming names"	?	? Hostile dialogue
Argentina	Not controversial	Pushback	▪ Public hearing ▪ Balanced language ▪ "Naming names" ▪ Proposing a "compromise" solution	Yes	Yes Cold dialogue

Conclusions and Recommendations

To recapitulate, Chapter I engaged with the theoretical conceptualizations (legal formalistic, normative, sociological and compliance-based approaches) that seek to explain how ICs acquire, exercise and enhance authority and legitimacy. This thesis adopted the *de facto* authority model proposed by Alter, Helfer and Madsen for the analysis, since it better captures the complexities in which ICs operate and argues for a **fluid** concept of ICs authority. That is exactly what this work demonstrated: that the authority of the IACtHR was exercised in one way in front of the Constitutional Tribunal of the Dominican Republic and in a different one in front of the Supreme Court of Argentina.

Chapter II showed and explained how the field of "transnational judicial dialogue" evolved over the last two decades. Furthermore, it argued that the "judicialization of international relations" made the international sphere more complex and challenging, because it empowered new actors, such as domestic judges. Following Huneeus' pioneering work, the chapter also reflected on the difficulties that transnational judicial dialogues face in Latin America where judges, prosecutors and judicial operators are the main actors resisting the rulings of the IACtHR.

Chapter III provided an analysis of the type of interactions that the IACtHR initiated with two high courts in particular: the Constitutional Tribunal of the Dominican Republic and the Supreme Court of Argentina. In the case of the Dominican Republic, the relationship was cataloged as **hostile**. Despite of the efforts displayed by the IACtHR in the joint hearing and order of compliance, the state did not appear in front of the IACtHR nor sent any message after the last order of compliance of March 2019. In Alter, Helfer and Madsen's terms, the IACtHR exercised **"no legal authority"** in front of the Constitutional Tribunal of that country. Only time will show how the Dominican Republic will react to the joint hearing and order of compliance.

In the case of Argentina, the dialogue was defined as **cold**. I argued that the compromise solution was possible, partly, because of the high pressure that public interest lawyers, human rights practitioners, human rights NGOs, victims and scholars exercised over Argentina's Supreme Court. Nonetheless, for a court that had been a historical ally of the IACtHR, this response was only formalistic and diplomatic. In terms of Alter, Helfer and Madsen, the IACtHR changed from an **"intermediate"** o even **"extensive"** to a **"narrow legal authority**".

The encouraging news is that, as also showed by Alter, Helfer and Madsen, the IACtHR addresses other audiences as well and has a strong network of allies in the region: especially NGOs that litigate in front of the IAS, public interest lawyers, scholars that devote their work and research to the improvement of the system and, of course, the victims and their relatives. The IACtHR should not disregard these other audiences and should rely on them for conserving its legitimacy. For instance, listening to Claudia Bosico, one of the victims in the "*Yean & Bosico*" case was a good and benefiting strategy used in the joint public hearing.

Regarding national courts, the last orders of compliance issued for the cases against the Dominican Republic and Argentina presented an argumentative effort to engage the judiciaries that was not seen in previous orders of compliance. The IACtHR should stick to this strategy as well. But this is not enough. Following Huneeus, I believe that the IACtHR needs to show more respect and deference to national courts, to make them feel part of the same enterprise. As a participant observant at the hearing for the supervision of compliance of the *Fontevecchia case*, I believe that one of the most effective ways to do that is to invite judges of the supreme courts to participate in the public hearings. Deliberation and persuasion in person and face-to-face interaction could be effective tools for the IACtHR.

To conclude, at the beginning of this work, I framed the resistance to the IACtHR as part of a global phenomenon of backlash against human rights norms, implementation and mechanisms. The situation of Latin American right now is certainly disturbing: the break of

the constitutional and democratic order in Bolivia a week ago[256], the public demonstrations of the people fighting for their rights in Ecuador[257] and Chile[258], the presidency of Jair Bolsonaro, an openly anti-human rights and anti-gender policies fanatic in Brazil –one of the biggest players of the continent–, the escalating economic crises in Argentina with its consequences in inequality and poverty rise[259], and the ongoing humanitarian crises in Venezuela, just to mention a few.

Courts –in general– and the IACtHR –in particular– are constitutionally and conventionally designed to be the guardians of individuals' and people's rights. They carry on their shoulders the duty of protecting, preventing and addressing human rights violations in the region. The current events call for collaboration of human rights networks and the strengthening of transnational judicial dialogue. However, such dialogue between courts should not be moved by pettiness and disputes of power but by the honest realization that the conflicts the region faces require the efforts and cooperation of all the members of the system.

[256] BBC, "Bolivia Crisis: Clashes as Morales Supporters Oppose Interim Rule," November 14, 2019.

[257] The Guardian, "Army Deployed in Ecuador as Protests Descend into Violence," October 13, 2019.

[258] BBC, "Chile Protests: One Million Join Peaceful March for Reform," October 26, 2019.

[259] Foreign Affairs, "The Resurrection of Cristina Fernández de Kirchner: How Argentina's Economic Crisis Powered a Populist Revival," October 22, 2019.

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