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A Human Rights' Tale of Competing Narratives

Um Relato de Narrativas Rivais de Direitos Humanos

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Abstract

The paper explores the 2016 financial crisis experienced by the Inter-American Commission on Human Rights as an illustrative example within a larger context for rethinking the Inter-American System of Human Rights. We argue that reform must involve a reexamination of the dialectic roles of both member states and Inter-American institutions. The goal is to create new institutional opportunities that can cope with the current contexts of rights violations related to inequality, poverty and income distribution. It is also argued that different human rights narratives are at play within the context of the Inter-American System today, that is, the universalistic narrative of *Ius Constitutionale Commune* and the less explored story of member states resisting compliance with Inter-American decisions. These narratives are connected to the tension between the main goal of protecting human rights in the Americas and the member states' roles as the System's material supporters. The prevalence of the unidirectional and institutionalist narrative of *Ius Constitutionale Commune* may have contributed to the current challenges experienced within the Inter-American System. Member states have rebelled in recent times against this universal approach, particularly since the later years of the first decade of the 2000s. However, the Inter-American institutions continue to be nonresponsive to this backlash. This paper argues that rather than treating states as entities to be kept under strict surveillance and mistrust, the Inter-American System should be changed and reimagined through dialogue and a deeper consideration of domestic contexts, thus enabling its survival, and encouraging member states to participate at higher levels.

Keywords: Inter-American System of Human Rights; financial crisis; *Ius Costitutionale Commune;* member states; reform.

Resumo

Este artigo analisa a crise financeira vivida pela Comissão Interamericana de Direitos Humanos em 2016 como exemplo de um contexto mais amplo relacionado à necessária reflexão sobre a reestruturação do Sistema

Interamericano de Direitos Humanos. Argumenta-se que a reforma do sistema deve envolver o reexame dos papéis dialéticos tanto dos Estados-membros, quanto das instituições interamericanas. O objetivo maior desse esforço de reforma seria possibilitar a criação de oportunidades institucionais que pudessem dar conta dos contextos atuais de violação de direitos na região, relacionados à desigualdade, pobreza e redistribuição de renda. Argumenta-se também que diferentes narrativas de direitos humanos se articulam no contexto do Sistema Interamericano atualmente, quais sejam, a narrativa universalista do *Ius Constitutionale Commune* e a narrativa menos explorada relacionada à resistência dos Estados-membros em dar cumprimento às decisões interamericanas em âmbito doméstico. Essas duas narrativas estão conectadas à tensão existente entre o objetivo maior de proteção de direitos humanos nas Américas e o papel dos Estados-membros como sustentáculo material do Sistema Interamericano. A prevalência da narrativa unidirecional e institucionalista do *Ius Constitutionale Commune* pode ser vista como fator que tem contribuído para o incremento dos desafios experimentados pelo Sistema Interamericano atualmente. Estados-membros têm se rebelado contra essa abordagem universalista, particularmente desde as primeiras décadas dos anos 2000. No entanto, as instituições interamericanas continuam a ignorar tais reações estatais. Este artigo afirma que Estados não devem ser tratados como entidades que devam ser mantidas sob estrita vigilância, em um contexto de constante desconfiança. A reforma do Sistema Interamericano deve ocorrer por meio de diálogo e levando-se em consideração os diversos contextos domésticos, possibilitando assim a sobrevivência do sistema, além de encorajar uma participação mais intensa dos Estados-membros.

Palavras-chave: Sistema Interamericano de Direitos Humanos; crise financeira; *Ius Costitutionale Commune;* Estados-membros; reforma.

Introduction

The 2015 edition of *Social Panorama of Latin America*, a yearly publication on poverty trends produced by the Economic Commission for Latin America and the Caribbean, showed that the poverty and indigence rates in the region grew in both 2014 and 2015. Accordingly, "175 million people would be considered to be income poor in 2015, 75 million of whom would be living in extreme poverty."[1] Despite the recent progress in Latin America, such as the significant decline in poverty and indigence from 2010 through 2014, inequality has proven its resilience as a structural problem in the region.[2]

In this setting, how do we assess current and future contributions of the Inter-American System of Human Rights (the System) for such an unequal region? Can we think about rights protection without considering this particular context of structural inequality? In other words, how can we rethink and reimagine the System while focusing on the current problem of income distribution in post-transitional Latin American democracies?

These questions are not new. Víctor Abramovich previously called attention to the need for reestablishing the System's strategic role to improve the structural conditions in Latin America so as to secure the full enjoyment of rights for citizens at a national level.[3] Accordingly, in its beginnings during the 80s and the 90s as a last resource for victims of authoritarian regimes, the System approached the treatment of the authoritarian past. Currently, the regional context is more complex. Abramovich noted that many countries in the region had experienced democratic transitions but had not yet consolidated democracy; the resulting exclusion and inequality generate constant political instability.[4]

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[1] Economic Commission for Latin America and the Caribbean, *'Social Panorama of Latin America'* (2015), http://repositorio.cepal.org/bitstream/handle/11362/39964/S1600226_en.pdf?sequence=1&isAllowed=y

[2] Ibid.

[3] Víctor Abramovich, 'Das violações em massa aos padrões estruturais: novos enfoques e clássicas tensões no Sistema Interamericano de Direitos Humanos' (2009), *Sur Revista Internacional de Direitos Humanos,* v. 6, n. 11, p. 7-39.

[4] Ibid., 9-10.

In view of these broader challenges, this paper explores the 2016 financial crisis experienced by the Inter-American Commission on Human Rights (the Commission or IACHR) as an illustrative example within a larger context for rethinking the System as a whole. We argue that reform must involve a reexamination of the dialectic roles of both member states and Inter-American institutions; the goal is to create new institutional opportunities that can cope with the current contexts of rights violations related to inequality, poverty and income distribution.

We intend to show that the Commission's situation of financial hardship is deeply connected to a broader legitimacy issue that informs its proposed reforms, as debated in the Organization of American States (OAS) Special Working Group on the IACHR Strengthening Process during 2011 and 2012. The creation of this OAS Special Working Group was related to the member states' recent reactions against the Commission's overexpansion of powers, especially with regard to the issue of precautionary measures. The strengthening process was the member states' attempt to provide greater certainty and clarification to the Commission's powers, which could lead to a higher rate of compliance with its decisions. From another standpoint, the strengthening process can be seen as a constraint that the states have imposed on the System and its institutions.

Nevertheless, this move was in response to over 20 years of the Commission and the Inter-American Court of Human Rights (the Court) excessively expanding its interpretation of its powers. The result of this overexpansion of powers and activist interpretation was that scholars determined the universality of the Inter-American human rights system, or the *Ius Constitutionale Commune*.[5] This new scholarly narrative has led to studies on the roles that these institutions play as drivers in the establishment of a

[5] Armin von Bogdandy, '*Ius Constitutionale Commune Latinoamericanum.* Una Aclaración Conceptual' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), *Ius Constitutionale en América Latina: Rasgos, Potencialidades y Desafíos* (Universidad Nacional Autónoma de México, Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht and Instituto Iberoamericano de Derecho Constitucional, 2014) 12.

regional Latin American constitutional order.[6] This view includes a narrative in which states are the main perpetrators of human rights in the region, with the System being similar to a criminal human rights law imposed upon the states.[7]

This universal institutional view calls into question the development of the Inter-American system as a whole. This is due to the backlash from some member states, particularly since 2010. With specific regard to the Commission, states have questioned the reach of its legal powers, particularly its precautionary measures. The result of this questioning was an analysis of the Commission's powers and its constituting instruments. In relation to the Court, domestic constitutional courts have challenged the limits of its interpretation. Whether viewed either as a clarification process or as a court's multilevel dialogue, this backlash demonstrates the member states' push for a greater dialectic between them and the Inter-American institutions. This backlash, therefore, represents a strong compelling counterargument to the universal institutional narrative of the Inter-American legal regime.

This paper argues that different human rights narratives are at play within the context of the System. These narratives are connected to the tension between the main goal of protecting human rights in the Americas and the states' roles as the System's material supporters.

The prevalence of the unidirectional and institutionalist narrative of *Ius Constitutionale Commune* may have contributed to the system's failures. Member states have rebelled in recent times against this universal approach, particularly since the later years of the first decade of the 2000s. However, the Inter-American institutions continue to be nonresponsive to this backlash and unidirectional. This paper argues that, rather than treating states as entities to be kept under strict surveillance and mistrust, the system should be changed and reimagined through dialogue and a deeper consideration of domestic

[6] *Ius Constitutionale Commune en América Latina*, the Max Planck Institute for Comparative Public Law and International Law, http://www.mpil.de/en/pub/research/areas/comparative-public-law/ius-constitutionale-commune.cfm. For another example of this universal institutional approach see: Inter-American Commission on Human Rights, 'Universalization of the Inter-American System of Human Rights' (OAS/Ser.L/V/II.152, Inter-American Commission on Human Rights, 14 August 2014) 34–46.

[7] Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) (Special Edition) *Quebec Journal of International Law* 58, 65.

contexts, thus enabling the System to survive and encouraging member states to participate at higher levels.

This paper, consequently, provides a critical and contextual reading of the Inter-American System, including its member states and institutions. This paper also examines and reviews the scholarship developed by authors, the Court and the Commission on both Inter-American universalism and the backlash against the Inter-American institutions. The object of this paper, therefore, is to contrast the legal reasoning related to two competing narratives: that of the *Ius Constitutionale Commune* and that of the member states' refusal to comply with the System's decisions.

In presenting this critical and contextual reading of the backlash against Inter-American institutions, this paper is divided as follows: *Part I* briefly retells the history of the Commission and the Court before the 1990s, aiming to shed light on a historical perspective that shows that both the Court and the Commission were actually benefactors of a global movement rather than central pieces in the return of democracy and state-building in the region. Without aiming to offer a comprehensive history of the Inter-American System, this other historical perspective paves the way for different views on the System's role in the region, which is a necessary effort in the critique of Inter-American universalism. *Part II* analyses the narrative of the *Ius Constitutionale Commune*. It analyses how institutions and scholars, since the 1990s, have offered a new view on regional rights in which the Inter-American institutions are part of the meta-constitutional level of constitutional bodies in the region. This meta-constitutional view, however, is depicted as universal and institutional; it thus fails to take into account broader social contexts, such as rights violations related to poverty and inequality. This has led both the Commission and the Court to impose their interpretation in a top-down fashion, ultimately tying it to the development of conventionality control. *Part III* of this paper reviews occasions in which member states and their superior courts have not complied with, or have placed limits on, the Commission's powers and the Court's judgments. This paper uses as its examples the 2012 strengthening process and the judgments of the domestic courts, particularly

those of Costa Rica, Guatemala and Uruguay, in response to the Court's judgments. Universalist scholars have usually neglected these examples in their studies. However, both the 2012 strengthening process and the domestic courts' rebuttal of the Court's jurisprudence have strong legal bases that, in our view, cannot be neglected in the process of reimagining the System. Lastly, *Part IV* of this paper explains that, although both the Court and the Commission have provided strong academic universalist claims, these claims need to be further analyzed and scrutinized. This paper explores in greater detail the lesser-told stories of backlashes, refusals and resistance against the System's decisions to provide a comprehensive sketch of the System as a whole. This is done not merely as a critical deconstruction or as plain disregard of the language of rights,[8] but as a fundamental stage in beginning to redesign the System's role in the process of improving structural conditions and ensuring Latin American citizens' full enjoyment of rights, thus moving beyond the narrative of deficits in the regime and its institutions.

This paper, consequently, calls for a new view of the dialogue that Inter-American institutions have with member states and their domestic courts so as to bypass the universal institutional approach that is cemented in the system. This view calls for a more dialogical and context-sensitive approach to the interaction between Inter-American institutions and domestic actors. With this approach, we do not intend to merely deconstruct the institutional achievements of the Inter-American system; rather, we hope to contribute to the presentation of new avenues for a productive engagement with the system and its challenges.

1. A Prologue to the Inter-American Human Rights System

As explained previously, it is our belief that the current Commission's financial crisis is the beginning of a larger, systemic legitimacy crisis. This legitimacy

[8] Anne Orford, *Critical Thinking on Human Rights,* December 2016, http://rwi.lu.se/2016/12/anne-orford-why-to-apply-critical-thinking-to-human-rights/.

crisis, we argue, affects all tiers of the Inter-American Human Rights regime, including the Court. This is demonstrated by some states and their domestic courts rebutting the legal argument that both the Commission and the Court promote.

The Commission and the Court are the pivotal institutions of the Inter-American Human Rights System.[9] However, their roles have become prominent only since the late 1980s. Since then, the Court and the Commission have been dealing with the remnants of the preceding decades, when Latin America was dictatorial and war-torn.

The Commission came into existence with the signature of the OAS Framework Charter in 1948.[10] Under this new organization, the Commission had the duty to promote human rights in the region. It was not until the Santiago Final Act (1959) that the Commission actually was given proper powers to fulfill this initial mission.[11]

The duty to actually receive human rights complaints was not delegated to the Commission until the signature of the American Convention on Human Rights of 1969. With this instrument, the Court was also established. However, from that time through the late 1980s, the Latin American states with the worst records of human rights violations, such as Argentina, Chile and Guatemala, were not part of the convention.[12]

During this period, the OAS was also suffering a legitimacy crisis. The regional organization and the Commission were unable to promote security and human rights in the region, particularly in Central America.[13] During this

[9] *American Convention on Human Rights* Opened for Signature in 10 July 1969, Organisation of American States Treaty Series No. 36 (Entered into Force 18 July 1978) On the Commission see: Arts. 34-40: on the Court see: Arts: 52-65.
[10] Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Brill-Nijhoff, 2015) 47–48.
[11] Ibid 48.
[12] Tom Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet and Ox' (1997) 19 *Human Rights Quaterly* 510, 521.
[13] Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press, 2010) 143.

period, Central America was experiencing the lowest point of its recent history.[14]

The return to democracy and state-building in the Central American subregion was, first, aided by foreign intervention from outside the OAS.[15] The *Contadora* group was an initial movement for the pacification of the region.[16] These events led to UN intervention in the region in the form of negotiation help and, later, monitoring of the peace processes in the region. Eventually, peace accords were struck in Nicaragua in 1990, El Salvador in 1992 and Guatemala in 1996.[17]

In regard to the South American context, the return to democracy in the region was the result of both the fall of communism and strong human rights movements within the states. The former event led the US to soften its grip and to stop supporting dictatorial regimes.[18]

During this period of pacification, in a more global context, there was a transformation of the notion of human rights. In the aftermath of gross human rights violations elsewhere, the human rights field shifted and began to recognize transitional justice.[19] At the same time, international criminal courts proliferated, and a new faith was placed in the notion of criminalizing states.[20]

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[14] On the account of turmoil in Central America, see: Francisco Villagrán Kramer, 'The Background to the Current Political Crisis in Central America' in Richard E Feinberg (ed), *Central America: International Dimension of the Crisis* (Holmes & Meier Publishers, Inc., 1982).

[15] Willy Soto Acosta, 'Del Sueño Unitario a La Fragmentación: La República Federal de Centroamérica (1823-1838) [From the One Dream to Fragmentation: The Federal Republic of Central America (1823-1838)]' in Willy Soto Acosta and Max Sáurez Ulloa (eds), *Centroamérica: casa común e integración regional [Central America: Common House and Regional Integration]* (2014) 31; Pedro Caldentey del Pozo, 'Los Desafíos Estratégicos de La Integración Centroamericana [The Strategic Challenges of the Central American Integration]' (Series: Studies and Perspectives No. 156 of the Economic Commission of Latin America and Caribbean, Economic Commission of Latin America and Caribbean, September 2014) 8.

[16] Olivier Dabène, *The Politics of Regional Integration in Latin America* (Palgrave Macmillan, 2009) 54.

[17] María José Castillo Carmona and Gustavo Adolfo Machado Loría, 'Aspectos Generales Del Proceso de Integración Centroamericana: Un Breve Repaso Por Su Historia [General Aspects of the Central American Integration Process: A Brief Review of Its History]' (Cuadernos Centroamericanos del ICAP, No. 5, Institutio Centroamericano de Administración Pública, July 2013) 39–43.

[18] Sonia Cardenas, *Human Rights in Latin America: A Politics of Terror and Hope* (University of Pennsylvania Press, 2012) 136–137.

[19] Moyn, above n 13, 221.

[20] Ibid 176. See also Karen Engle, Zinaida Miller and D. M. Davis (Eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016).

Due to this major global movement of the 1990s, the Commission and the Court began to forge their roles within the Latin American region. In this view, the Inter-American system may be seen more as a beneficiary of than a trigger for pacification and democratization. This does not mean that the Inter-American decisions were of no importance to the region's complex processes of political change. On the contrary, we agree that Inter-American decisions such as *Velásquez Rodríguez* (the first case decided by the Court, which was related to enforced disappearances in Honduras) were fundamental to defining the System's approach to transitional justice in Latin America. Moreover, domestic transitions were influenced by the Inter-American approach.[21] The point here is that, if we put those first years of the Inter-American System in context, it becomes clear that the universality of the *Ius Constitutionale Commune* is not a natural feature of the System but a construct based on a specific institutionalist perspective for how to deal with authoritarian member states and rights violations. More importantly, this perspective continues to inform the System's approach to rights protection in the context of post-transitional democracies in Latin America. The first judgments of the Court, therefore, started to articulate this universality.[22]

2. The Story that Everyone Reads: Ius Constitutionale Commune in Latin America

Ius Constitutionale Commune in Latin America (ICCAL in Spanish) is currently presented as an institutional project of the Max Planck Institute for Comparative Public Law and International Law. The project originated in

[21] Roberto Gargarella, 'Tribunales Internacionales Y Democracia: Enfoques Deferentes O de Interferencia *[International Tribunals and Democracy: Deferential or Interference Viewpoints]*' (2016) 4 *Revista Latinoamericana de Derecho Internacional* 1, 3.
[22] Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101, 101–102.

collaborations between European and Latin American scholars on legal issues related to the exercise of public authority in Latin America.[23]

In the introduction to the volume entitled *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, which will be published in 2017,[24] the editors outline the main features of *Ius Constitutionale Commune* as a regional approach to transformative constitutionalism. Accordingly, ICCAL is presented as a scholarly approach with both ontological and normative functions.[25] This approach has to do with a new legal phenomenon that encompasses the articulation of various legal orders under so-called transformative constitutionalism; the System's treaties are connected to domestic constitutions and to both national and international case law, which "should help in diffusing human rights standards, compensating national deficits, and fomenting a new empowering dynamic among social actors."[26] Importantly, ICCAL is depicted as a "disciplinary combination of national and international legal scholarship, a comparative mindset, and a methodological orientation towards principles, in particular the triad of human rights, democracy, and the rule of law."[27]

ICCAL is expressly directed at transforming Latin America's reality through law.[28] In this setting, the authors are clear about their focus on legal

[23] Accordingly, "Our project on an emerging *ius constitutionale commune* in human rights (ICCAL) is the product of academic exchange between the Max Planck Institute for Comparative Public Law and International Law and Latin American experts. ICCAL is a legal but also a cultural and political project steeped in the structural transformation of public law. It is characterized by its objectives, key concepts and challenges. ICCAL's objectives are to promote the advancement and respect of human rights, democracy and the rule of law, to guide the opening of national legal orders to international law and the configuration of effective and legitimate international institutions. Some key concepts are dialogue, inclusion and legal pluralism. Its challenges are deep social exclusion and inequality, coupled with high levels of violence and relatively weak state institutions. Main features of the project include a comprehensive approach to public law, principle-based argumentation and the high value placed on comparative law." *Ius Constitutionale Commune en América Latina,* above n 6.

[24] von Bogdandy, Armin and Ferrer Mac Gregor, Eduardo and Morales Antoniazzi, Mariela and Piovesan, Flavia and Soley, Ximena, Ius Constitutionale Commune En América Latina: A Regional Approach to Transformative Constitutionalism (October 26, 2016). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-21. Available at SSRN: https://ssrn.com/abstract=2859583

[25] Ibid., p. 1-3.

[26] Ibid., p. 2.

[27] Ibid.

[28] Ibid., p. 8.

issues: rights protection and the roles of courts and judges.[29] The Latin American reality is described in terms of "structural deficiencies, weak institutions and exclusion,"[30] not in the sense of a complete failure, but as legal frameworks that are "applied in a selective fashion."[31] As a conceptual and scholarly venture, the authors correctly assert that "such concepts do not fall from the sky nor jump up from legal texts but require scholarly effort."[32] It is worth mentioning this dimension of conceptual construction to highlight that ICCAL's narrative is articulated through a universalistic lens in order to deal with a set of legal problems in Latin America. This narrative is based on a description of Latin American issues that is used to assert the best legal solution to deal with such problems. In the case of Latin America, this solution encompasses a regional body of law that is articulated using common ideas of rights, democracy and the rule of law.

In connecting their conceptual venture to transformative constitutionalism, the authors make it clear that the profound structural deficiencies and weak institutions in Latin America "lead to insecurity, impunity, or corruption."[33] Moreover, exclusion – or "the unacceptable living conditions for broad parts of the population"[34] – must be overcome. These Latin American issues may be transformed through a constitutional law vocabulary "that is not linked to any specific partisan agenda,"[35] thus allowing for a plurality of approaches to cope with poverty and redistribution. The editors of *Transformative Constitutionalism in Latin America* are clear about what they call the inclusiveness of this concept in political terms: "As European development after World War II has shown, a project of social inclusion can be shared and developed by conservative, liberal, and socialist forces. Some conceptual fuzziness regarding ICCAL is for that reason an advantage."[36]

[29] Ibid., p. 9.
[30] Ibid., p.8.
[31] Ibid.
[32] Ibid., p. 4.
[33] Ibid., p. 4.
[34] Ibid.
[35] Ibid.
[36] Ibid., p. 5.

ICCAL adopts this strategy of conceptual fuzziness to articulate its universalistic narrative toward law and transformation in Latin America, thus allowing it to assert that its conceptual venture is the most appropriate one to cope with problems of inequality, poverty and redistribution in the region. Any political perspective may be included according to ICCAL's view on constitutional law, so we all can share this legal strategy to overcome exclusion and structural deficiencies in Latin America. Similarly, we all share ICCAL's concerns about poverty, inequality and redistribution. The problem has to do with the universalistic legal approach of coping with these Latin American problems, as we may (and actually do) disagree on how to do so. As with any legal narrative, ICCAL highlights certain features while others remain in the dark. To highlight communality regarding the ideas of rights, democracy and the rule of law, ICCAL sets aside disagreement among courts and judges on concrete cases.

Different narratives may be contrasted with ICCAL's. This paper aims to do precisely that: to confront different perspectives on rights. However, we aim to tell a different story and not merely to prove that ICCAL is wrong; we aim to show that a competing narrative on rights protection can be articulated as part of a productive effort to rethink the System for the twenty-first century. A competing story related to disagreement with and refusal to implement Inter-American decisions is useful in the current Latin American context of post-transitional democracies because of the tensions between member states and the System. Member states are the material supporters of the System, but these states are also viewed as potential rights violators, just as they were during the era of Latin American dictatorships. In a post-transitional context such today's, it is important to change the way member states are treated so as to (hopefully) achieve more robust rights protection through the institutional opportunities of the Inter-American System.

3. The Lesser Known Story: States' Resistance to Following the Court's view on Ius Constitutionale Commune and Reforms to the Commission's Unchecked Powers

This part of the paper focuses on a narrative other than that of *Ius Constitutionale Commune*. It shows that, recently, states and their domestic courts have been less unyielding toward Inter-American institutions. Moreover, it shows that, although states and their courts do recognize the importance of the System, their backlash has been in line with providing dialogue with Inter-American institutions. However, as discussed later, the Court has been unresponsive to this dialogue.

Nonetheless, it is notable that the Court has a low compliance rate.[37] This compliance rate is even lower in two areas: "prosecution of crimes against human rights" and "adapting domestic legislation."[38] This next part of the analysis dwells on the technical legal arguments regarding why member states have not complied with these judgments, thus revealing a disconnection between *Ius Constitutionale Commune* and the story of backlash.

i. Backlash to the Commission: The 2012 Strengthening Process

As explained previously, the precautionary measures have no conventional basis. This is because neither the American Convention nor the Commission's statute, as ratified by member states, contemplate such powers.[39] The Commission awarded this new power to itself when drafting its own *Rules of Procedure*, on the basis of its long practice.[40]

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[37] Cecilia M Bailliet, Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America, (2013) 31 *NJHR* 477, 494-495.
[38] Damián González-Salzberg, Complying (Partially) with the Compulsory Judgments of the Inter-American Court of Human Rights, in Pedro Fortes et al (Eds.) *Law and Policy in Latin America: Transforming Court, Institutions, and Rights* (Palgrave Macmillan Publishers, 2017) 44-46.
[39] Rey Cantor, Ernesto y Ángela Rey Anaya, *Medidas Provisionales y Medidas Cautelares en el Sistema Interamericano de Derechos Humanos* (2008) 392-393.
[40] Ines Gillich, 'Limits and Potentials of Precautionary Measures and International Law: The Case of the Inter-American System' (2014) 38 *University of Western Australia Law Review* 167, 172.

As mentioned previously, these measures can be solicited by any individual, any other state or as a *motu propio* by the Commission. The Commission can also request these measures *inauditam partem*. This means that the Commission, under its consideration, could have requested such measures even without any state rebuttal of the claims.[41]

Before August 2013, the Commission's *Rules of Procedures* did not mention the need for the Commission to provide any reason whatsoever for the enactment of such measures.[42] This newfound power gave the Commission carte blanche to review state activity without the need for lodging individual petitions about human rights violations. It also bypassed the requirements that the Commission explain why it is requesting such measures and provide proof of its claims.

An extra feature of these powers, pre-2013, was that the Commission could maintain these procedures as long as it deemed necessary. Therefore, the Commission could grant and maintain a measure without needing to explain itself or to provide any standards for its application. This led to a stance by which the Commission could maintain these measures under whatever reasoning and for as long as it deemed such action necessary. This conflicted with the urgent and temporary nature of the measures.

With its newfound powers, the Commission enacted measures as part of controversial cases, including 382/10 (Indigenous Communities of the Xingu River Basin, Pará, Brazil) and second, the 260/07 (Communities of the Maya People of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala). Both cases related to indigenous rights and to the environmental impacts of national projects – energy production in Brazil and mining concession in Guatemala. The construction of the Belo Monte hydroelectric plant and the exploration of the Marlin gold mine were contested and they still are surrounded by heated domestic debates regarding how to properly accommodate development, indigenous rights and the protection of the environment. This is not an obvious or simple

[41] Ibid.
[42] Organization of American States, *Press Release: IACHR's amended Rules of Procedure enter into force today*, http://www.oas.org/en/iachr/media_center/PReleases/2013/057.asp.

task, and there is a need to go deeper into the details of each case to properly assess the context of rights violations. By using these examples, we do not mean that Brazil and Guatemala are per se right to put such projects into practice. On the contrary, our view is that, with clearer procedural rules related to precautionary measures, it would have been easier for the parties involved in these cases to reach reasonable decisions. Considering that there is little chance of a win-win result in this kind of complex situation, clearer rules related to each measure – how it is justified, how long it lasts and whether early state rebuttal is allowed – would enable space for negotiated solutions in the cases of Belo Monte and Marlin. There would at least be more chances of achieving mutual solutions in these cases, as Brazil and Guatemala would be called on to negotiate with the potential victims before the Commission. As will be explained below, there was little room for this kind of negotiation in the Belo Monte and Marlin cases, as the Commission ruthlessly imposed the measures in both cases. After strong reactions by Brazil and Guatemala, the Commission reviewed the initial content of the two measures, determining few changes in the projects and providing only modest rights protections for the indigenous peoples involved in the cases.

Regarding the 382/10 measure, on 1 April 2011, the Commission ordered that the government of Brazil "immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until certain minimum conditions are met."[43] The order also required the Brazilian government to include prior consultation with the affected indigenous communities, access to the social and environmental study for the communities in their native languages, and measures to guarantee individuals' health.[44]

The government of Brazil's response to the Commission's measures was to suspend its annual contribution to the Commission's budget.[45] In

[43] IACHR, *Precautionary Measures: 382/10* http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp.
[44] Ibid.
[45] Nicole Galindo Sanchez, 'La Reforma al mecanismo de medidas cautelares de la Comisión Interamericana de Derechos Humanos: Repercusiones en el marco de proteccion de derechos

reaction to this, the OAS Secretary-General at the time, who was usually passive, concerned himself with the Commission's measures, stating that they were mere recommendations and were not binding.[46]

As a result of the pressure, on 29 July 2011, the Commission modified the measures so that they only required the Brazilian government to guarantee the health of the indigenous communities affected by the project and ensure the protection of those communities' ancestral lands and natural resources.[47]

In the other example, the 260/7 precautionary measure, on 20 May 2010, the Commission ordered that the government of Guatemala halt the Marlin I mining project in the regions of Sipacapa and San Miguel Ixtahuacán. In doing so, the government needed to decontaminate the allegedly polluted water resources and ensure that the Mayan individuals had health assistance.[48]

The response of the Guatemalan government, as expected, was to reject the allegations of contamination.[49] Beyond this response to the alleged contamination, the Guatemalan government's responses to the Commission shifted from its initial compliance, and the government began claiming that the Commission's orders were abusive.[50] In these later responses, the government accused the Commission's measures of implying that there was already a violation of human rights even though such measures, by their nature, should not prejudge or assume such.

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humanos del Sistema Interamericano' (2013) *Universidad San Francisco de Quito Law Review* 1, 6.

[46] BBC, Comissao da OEA deve 'revisar decisao' sobre Belo Monte, http://www.bbc.co.uk/portuguese/noticias/2011/05/110502_insulza_jc.shtml.

[47] IACHR, *Precautionary Measures: 382/10* http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp

[48] IACHR *Precautionary Measures: 260-07*; http://www.oas.org/en/iachr/decisions/precautionary.asp.

[49] On the response of the Guatemalan government see: Report of 23 June 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc1.pdf; Report of 08 July 2010 http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc2.pdf; Report of 20 August 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc3.pdf; Report of 21 of September 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc4.pdf; Report of 22 of October 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc5.pdf; Report of 7 December 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc6.pdf;

[50] See particularly report of 22 of October 2010, page 18.

Due to this pressure and to a series of reports from the Guatemalan government, the Commission, on 7 December 2011, modified the measures so that they only ensured access to potable water resources for 18 Mayan communities.[51]

The backlash against the precautionary measures that the Commission ordered had deep implications for its functionality. On 7 June 2011, as a result of the mounting pressure from member states, the OAS General Assembly created the Working Group in Charge of the Process of Reflection on the Workings of the IACHR, which had the goal of strengthening the Inter-American Human Rights System.[52]

One of the main features of the process was to determine the parameters by which the Commission could use measures to require that states take action. This process involved all OAS member states, including those that had not ratified the American Convention.

Because of the participation of the states, many of these parameters coincided with the need to regulate the Commission's capacity to request precautionary measures. Henceforth, most of the member states' interventions relied on the argument that requirements and time frames must be clear when enacting and maintaining the measures.[53]

In this sense, although both member and nonmember states recognized the nature and importance of these measures – even without questioning the legal basis of these procedures – they stressed the need to clearly define legal concepts such as urgency and gravity, clarify the time frames and detail the procedures. From then on, member states such as Uruguay proposed the development of a best practices guide to ensure a better reaction from these states.[54]

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[51] IACHR *Precautionary Measures: 260-07 – Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the DePartment of San Marcos, Guatemala*; http://www.oas.org/en/iachr/decisions/precautionary.asp.
[52] OAS, *Process of Reflection on the Workings of the IACHR with a view to Strengthening the IAHRS*, http://www.oas.org/consejo/Reflexion.asp.
[53] See reflections on the nature of precautionary measures by Canada, Chile (Spanish), Costa Rica, Guatemala (Spanish), United States, Uruguay (Spanish).
[54] Reflection of Uruguay, page 7.

The process culminated on 1 August 2013 with the Commission approving resolution 1/2013. This resolution substantially reformed the Commission's *Rules of Procedure*.[55] The new *Rules of Procedure* introduced, among other changes, explicit criteria that the Commission would need to fulfill before taking precautionary measures. More importantly, the new resolution detailed that such measures should be adopted through reasoned resolutions and should include time frames that the Commission must adhere to.[56]

ii. Backlash to the Court: Rulings of Domestic Courts

The following sections present occasions when domestic courts have rebelled against the Court.

a. Guatemala: Applying Norms Retroactively and Legislating through the Back Door

Guatemala ratified the jurisdiction of the Court on the 9 March 1987. This ratification came with a caveat, however: the declaration of a reservation to the Court's powers of review. This reservation specified that the Court could entertain an alleged human rights violation only after its ratification.[57] Since then, Guatemala has been the subject of more amounts complaints within the system than any other country.

During the 1990s and 2000s, the Guatemalan state was condemned for a series of human rights violations because its authorities did not investigate grave crimes, including pre-1987 violations; the authorities instead maintained the context of impunity. [58] As a result of these human rights violations, the

[55] IACHR, *Resolution 1/2013: Reform of the Rules of Procedure, Policies and Practices*, http://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf.
[56] Ibid, 5.
[57] See Article 2 Acuerdo Gubernativo 123-87 of 9 March 1987.
[58] See: Corte IDH. Caso de la "Panel Blanca" (Paniagua Morales y otros) Vs. Guatemala. Reparaciones y Costas. Sentencia de 25 de mayo de 2001. Serie C No. 76; Corte IDH. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala. Reparaciones y Costas. Sentencia de 26 de mayo de 2001. Serie C No. 77; Corte IDH. Caso Bámaca Velásquez Vs. Guatemala.

Court ruled that Guatemala should reopen cases that its domestic courts had already decided on.

As a reaction to these judgments, in 2010, the Criminal Chamber of the Guatemalan Supreme Court interpreted that domestic law, or the lack of it, should not oppose the fulfillment of and compliance with the Court's ruling. In doing so, the Criminal Chamber declared the nullity of the criminal judgments and reopened the cases, thus ordering the criminal prosecutor's office to investigate.[59]

However, as a reaction to the Criminal Chamber's rulings, the Guatemalan Constitutional Court came to review on the constitutionality of such action. Within its *obiter*, the Constitutional Court ruled that, by complying in such a manner with the Court's ruling, the Criminal Chamber assumed powers that it had not been granted.[60]

The Guatemalan Constitutional Court engaged with the Court, stating that it should be more precise about how to enforce this ruling – namely, by explaining how to balance the other human rights while complying with the Court's judgment.[61] In doing so, the Constitutional Court stated that, before enforcing such rulings, a proportionality test must be applied. This test would include reviewing and balancing any potential violation of the Court's rulings vis-à-vis other domestic fundamental rights, such as equality under the law, due process and access to judicial remedies.[62]

In a second ruling, the Guatemalan Constitutional Court went even further. On this second occasion, although the Constitutional Court recognized the need to comply with international judgments, it stated that this compliance and execution must be bound with other constitutional rights and universal values.[63]

Reparaciones y Costas. Sentencia de 22 de febrero de 2002. Serie C No. 91; **y,** Corte IDH. Caso Carpio Nicolle y otros Vs. Guatemala. Fondo, Reparaciones y Costas. Sentencia de 22 de noviembre 2004. Serie C No. 117.

[59] Corte de Constitucionalidad, Expediente 548-2010, Amparo en Única Instancia, 25 agosto 2010, pp. 12.

[60] Ibid.

[61] Ibíd.

[62] Ibíd.

[63] Corte de Constitucionalidad, Expediente 386-2011, Amparo en Única Instancia, 13 de abril de 2011, pp. 14

As a side note, it is necessary to mention that this attitude is not confined to the Guatemalan Court. The Argentine Supreme Court stated that "the obligation to investigate and punish the violation of human rights exists within the frame and with the tools of the rule of law, and does not stand above them."[64]

The response of the Court with regard to the Guatemalan Constitutional Court was unilateral. The Court did not engage in dialogue with the Guatemalan Constitutional Court, instead deeming its conduct to be protecting impunity.[65] In its supervisory statement, the regional court neglected to develop a proportional test by which human rights could be safeguarded, and it ordered the Guatemalan state to reopen the criminal cases.

It is noteworthy that Guatemala had been condemned for its human rights violations even prior to its ratification of the Court's jurisdiction, neglecting its reservation. Moreover, the Court ruled in 2012 that, since 1982, Guatemala had failed to comply with the Inter-American Convention on Forced Disappearance of Persons of 1994.[66] The Court not only sought to verify Inter-American instruments – even those beyond its conventional competencies – but also retroactively applied the obligations contained within this instrument.[67] In this sense, the Court created new criminal felonies that applied to the Guatemalan state, bypassing legislative procedures.

In this circumstance, the crime of forced disappearance would be applied retroactively, thus violating internationally recognized principles such as *nullum crimen sine lege* and the nonretroactivity of *ratione personae*.[68]

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[64] On the translation and a broader explanation on the backlash, see: Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights' in Javier A Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press, 2011) 125.

[65] Corte IDH. 12 Casos Guatemaltecos Vs. Guatemala. Supervisión de Cumplimiento de Sentencia respecto de la obligación de investigar, juzgar y, de ser el caso, sancionar a los responsables de las violaciones a los derechos humanos. Resolución de la Corte Interamericana de Derechos Humanos de 24 de noviembre de 2015, 22, para 65.

[66] See posture of the Guatemalan state, Ibid, para 2.

[67] See American Convention on Human Rights: Article 62(3); see also, Statute of the Inter-American Court of Human Rights, Article 1.

[68] See Rome Statute Arts. 22 to 24; In a functional-reductionist fashion, such as the Inter-American Court does, we can quote similarly EcrtHR on Parot Doctrine and on retroactivity of

The Guatemalan state argued against the Court's interpretations in 2014, expressing that, although it had accepted the jurisdiction of the Court in 1987, it had include its express reservation that the Court could not review state actions from before 1987.[69] With regard to the retroactive application of norms, the Guatemalan state argued that the *Statute of the Court* mentioned that the Court only has jurisdiction through an interpretation of the American Convention on Human Rights.[70] Therefore, the Guatemalan state argued that the Court's application of the American Convention does not entitle it to become a criminal court by retroactively interpreting the *Inter-American Convention on Forced Disappearance of Persons*, defining the Guatemalan state's obligations in terms of the application of this convention, and defining a new criminal felony without legislative approval.[71]

In this sense, the Court was dismissive of its own jurisprudence, which stated that, in a democratic system, criminal or administrative punitive norms must preexist in order to ensure legal certainty and the fulfilment of the principles of the legality and nonretroactivity of punitive norms.[72]

However, the Court did not respond to these claims and instead declared the state in *desacato* (contempt) and in breach of its conventional duties.[73] The Court neglected, yet again, to detail each argument, neither explaining nor engaging with the Guatemalan position, which it claimed was a violation of article 26 of the Vienna Convention on the Law of Treaties.[74]

It must also be stated that, more recently, the Court introduced (similarly through a back door) more obligations for its member states. In a recent case, the state of Surinam was condemned for not applying the 2011

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norms, including treaties and norms of extreme violation of human rights violate fundamental criminal rights; Case of Del Río Prada v. Spain, App. No. 42750/09 (Oct. 21, 2013) paras. 55-62.

[69] Pronunciamiento del Estado de Guatemala en contra de la Sentencia de fecha 4 de septiembre de 2012, dictada por la Honorable Corte Interamericana de Derechos Humano, en el Caso Río Negro vrs. Guatemala, (10 diciembre 2012) pp.11-12

[70] Ibid, 16.

[71] Ibid, 17.

[72] Corte IDH, Caso Baena Ricardo y Otros (270 Trabajadores) Vs. Panama. Fondo, Reparaciones y Costas. Sentencia de 2 de febrero de 2001. Serie C No. 72, para 106.

[73] Corte IDH, Supervisión de Cumplimiento de Sentencia en 11 casos contra Guatemala respecto de la obligación de investigar, juzgar, de ser el caso, sancionar a los responsables de las violaciones a los derechos humanos, 21 de agosto de 2014, para 8.

[74] Ibid, para 17.

Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" – also known as the Ruggie Framework.[75] Human rights activists and other groups have questioned this framework because civil society and human rights victims did not participate in its development.[76] This new framework also represented backtracking from an earlier draft of the *Norms on the Responsibilities of Transnational Corporations and Other Business Entities* from 2003.[77] A major critique of these principles is that they perpetuate a notion of human rights protection in which influential transnational corporations can decide whether to guarantee rights based on economic gains even though weaker states cannot afford to dismiss those rights.

However, aside from its implementation of questionable principles, the Court found Surinam responsible for breaching human rights obligations as a result of not applying the Ruggie Framework at the beginning of a mining operation in 1997 and during the development of the first environmental impact in 2005 – years before the actual development of the framework.[78]

Using the doctrine of conventionality control, the Court states that its jurisprudence shall be seen as the most important guidelines for member states to comply with human rights obligations. Therefore, the Ruggie Framework, as questionable as it is, has become an obligation for all member states.

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[75] Corte IDH. Caso Pueblos Kaliña y Lokono Vs. Surinam. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2015. Serie C No. 309, para 224. On the Ruggie Framework see: John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*: *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN DOC A/HRC/17/31 (21 March 2011) [*Ruggie Principles*] 3; Surya Deva and David Bilchitz (eds.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 4-7; Jena Martin 'Business and Human Rights: What's the Board Got to Do with It?' (2013) 3 *University of Illinois Law Review* 959, 965.

[76] Deva and Bilchlitz, page 10.

[77] Jena Martin Amerson '"The End of the Beginning?" A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective' (2012) 17 *Fordham Journal of Corporative & Financial Law* 1, 30-31.

[78] Caso Pueblos Kaliña y Lokono Vs. Surinam, para 226.

b. Costa Rica: Bypassing the Republican and Rule-of-Law Constructs and Using a Functionalist Comparison for Cherry-Picking

Historically, Costa Rica has been an outlier, not only in the Central American region but also in Latin America. Costa Rica has, since the mid-20th century, been a stable democracy and has been successful in promoting the rule of law and in guaranteeing human rights through its courts.[79]

The Constitutional Chamber of Costa Rica's Supreme Court, or *Sala Cuarta*, is renowned for its constitutional developments and for its direct application of human rights instruments.[80] The *Sala Cuarta* was among the first courts in the region, behind only Panama's, to adopt the doctrine of the constitutional block – or, as the chamber refers to it, 'the Law of the Constitution' – *Derecho de la Constitución*.[81] The *Sala Cuarta* has applied this notion to the interpretation of human rights instruments, stating that when these instruments provide superior guarantees to those of the Costa Rican Constitution, they prevail over the constitution.[82]

In 2000, the *Sala Cuarta* reviewed a suit against an executive decree that regulated in vitro fertilization (IVF) treatments in Costa Rica. The *Sala Cuarta* declared the decree unconstitutional on the grounds that it violated the principle of legal reservation, insofar as only the nation's congress can regulate matters involving potential restrictions of human rights.

However, using international human rights instruments such as the Universal Declaration of Human Rights, the American Declaration on Human

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[79] Elena Martínez Barahona, 'Central American (High) Courts' in Diego Sánchez-Ancochea and Salvador Martí Puig (eds), *Handbook of Central American Governance* (Routledge, 2014) 164.
[80] Ibid 165–166.
[81] Luis Fernando Solano Carrera, 'Supremacía Y Eficacia de La Constitución Con Referencia Al Sistema Costarricense [Supremacy and Efficiency of the Constitution with Reference to the Costa Rican System]' in Consell Consultiu de la Generalitat de Catalunya, Agencia Catalana de Cooperació al Desenvolupament de la Generalitat de Catalunya and Centro de Estudios y Formación Constitutional Centroamericano (eds), *Constitución y Justicia Constitucional: Jornadas de Derecho Constitucional en Centroamérica* [Constitution and Constitutional Justice: Conferences on Constitutional Law in Central America] (Grup3, SL, 2008) 44; Manuel Eduardo Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (Inter-American Institute of Human Rights, 2011) 170.
[82] *Sentencia No 3435-92 (Judgment)* (Unreported, Sala Cuarta de la Corte Suprema de Costa Rica [Fourth Chamber of the Supreme Court of Costa Rica])

Rights, the American Convention on Human Rights and the Convention on the Rights of the Child – as well as its own nation's constitutional developments, the *Sala Cuarta* ruled that the current (1995) conditions of medicine and technology related to IVF treatments could still violate human lives. This interpretation provided for an expansive view on the right to life, according to which any technology that could not provide comprehensive protection to embryos would violate the right to life.

In 2012, the Court reviewed the *Sala Cuarta*'s judgment. In its *obiter*, the Court reviewed the developments of the other human rights regimes, both universal and regional.[83] The Court also reviewed the treaties that the *Sala Cuarta* used for its interpretation, stating that those instruments did not actually contain any linkage to protect the right to life in its preconception stage.[84] This decision showed that the Court had deep distrust toward the Costa Rican court and its efforts to justify an understanding of the right to life that differed from the Inter-American understanding. This Court's decision on IVF showed that the regional court had neglected to engage constructively with the broader interpretation of the *Sala Cuarta*'s arguments about the right to life, as the Court reviewed the same international instruments that the *Sala Cuarta* had but interpreted them more restrictively.

To justify its reasoning, the Court presented a comparative analysis of other European and Latin American states' regulations regarding IVF treatment. However, this analysis was done using a strict functionalist approach.

The functionalist method of comparison is based on exercising the mere identification of potential similar problems across legal regimes so as to determine possible solutions.[85] However, this comparative approach reduces the comparison to positive "black letter" terms, thus decontextualizing the

[83] Corte IDH. Caso Artavia Murillo y otros ("Fecundación in vitro") Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas Sentencia de 28 noviembre de 2012. Serie C No. 257, pages 69-75

[84] Ibid, para 24.

[85] Mathias Siems, *Comparative Law* (Cambridge University Press, 2014) 26; Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar Publishing Limited, 2016) 53.

epistemological reasons behind the norms and judgments.[86] In other words, functionalist comparisons presuppose that all the compared contexts are similar, thus shutting the door on reflective reasoning in terms of how certain courts develop their ideas in specific social, historical and legal contexts.[87] This has allowed the Court to cherry-pick favorable sources for its decisions.

The Court, through its comparative exercise, concluded that, although there is insufficient legislative material to draw comparison, the protection of embryos is not an absolute obligation and that, moreover, embryos should not be considered in the same way as human beings.[88] Using a proportionality test, the Court concluded that the *Sala Cuarta*'s interpretation represents a severe limitation on other rights, such as intimacy and life, and that it directly discriminates against people who are unable to reproduce.[89] Therefore, the Court ordered Costa Rica to adopt measures that would nullify the effects of the IVF treatment prohibition.

In 2015, the *Sala Cuarta* entertained a new suit against a different IVF executive decree that complied with the judgment of the Court. In this new review, the *Sala Cuarta* commended the efforts of the Costa Rican executive branch to comply with the Court's judgment, but it stated that, by doing so, it could not justify violations of the principles of the Costa Rican republican state, such as the separation of powers, the rule of law and congress's legal reservation.[90]

As it did in the case of the Guatemalan Constitutional Court, the Court reacted aggressively against the *Sala Cuarta*'s backlash. It stated that the constitutional chamber, as Costa Rica's highest court on the protection of

[86] Frankenberg, above n 85, 54; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 316–317, 320.
[87] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quaterly* 495, 497, 532; Diego López-Medina, *Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America* (Harvard Law School, 2001) 36; William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' (1998) 47 *American Journal of Comparative Law* 701, 703–704.
[88] Ibid, paras 255-256.
[89] Ibid, pages 87-96.
[90] File 15-013929-0007, *Sentencia No 01692 (Judgment)* (Unreported, Sala Cuarta de la Corte Suprema de Costa Rica [Fourth Chamber of the Supreme Court of Costa Rica]) Conclusion VI.

human rights, falls under the Court's supervision.[91] Without analyzing the executive decree or the Costa Rican constitutional system, it stated that the *Sala Cuarta*'s posture maintained a situation in which human rights were still violated.

It is to be noted that, in 2013, the Constitutional Tribunal of the Dominican Republic called out the Court's misuse of comparative exercises.[92] The Dominican court concluded that, although Inter-American member states may have similar conditions in a general sense, each individual state has unique particularities that the Inter-American institutions should not ignore when discussing state activity.[93] Thus, the Constitutional Tribunal called on the Court to adopt the European "margin of appreciation" doctrine.[94]

The Court did not respond to the Dominican court's ruling and, as a result, in 2014, the Dominican court declared unconstitutional the instrument by which the Dominican state had ratified the prior's jurisdiction.[95]

c. Uruguay: Neglecting State-Building and Democracy

Since its transition from military to civil rule, Uruguay has been a stable and leading democracy in the region.[96] Its amnesty law (*Ley de Caducidad*) was heavily scrutinized and was approved by referendum in 1989.[97] In 2009, the Uruguayan government submitted to the public an option to revoke the amnesty law. The majority of the public voted again in favor of maintaining the domestic amnesty.[98]

In 2013, the Court reviewed the Uruguayan amnesty, which presented an impediment to criminal investigations related to human rights violations

[91] Corte IDH, Supervisión de cumplimiento de sentencia, *Caso Artavia Murillo y Otros ("Fecundación in Vitro") vs. Costa Rica*, 26 de febrero de 2016, para 13.
[92] Tribunal Constitucional de la República Dominicana Expediente TC-05-2012-0077, Sentencia TC/0168/13, 23 septiembre 2013, page 72, para 2.6.
[93] Ibid.
[94] Ibid, paras 2.7- 2.13.
[95] See: Tribunal Constitucional de la República Dominicana Expediente TC-01-2005-0013, Sentencia TC/0256/14, 04 noviembre 2014.
[96] Leonardo Morlino, 'The Quality of Democracies in Latin America' (International Institute for Democracy and Electoral Assistance: Democracy-Building & Conflict Management, 2016) 24.
[97] Gargarella, above n 21, 6.
[98] Ibid 6–7.

committed during the Uruguayan dictatorship.[99] The Court maintained its jurisprudence on the matter of amnesties, declaring the incompatibility between such laws and the American Convention, as it had done before in the contexts of the amnesty laws adopted in Brazil, Chile and Peru.[100]

The Court displayed, again, a comparative analysis of universal and regional sources regarding amnesties.[101] However, the comparative analysis, being of a functionalist nature, neglected the particularities of the transitional processes that occurred in Peru, Chile, Brazil and Uruguay. The Court fully applied its Inter-American view on amnesties in the *Gelman* case, without any robust consideration of the two referendums held in Uruguay in 1989 and 2009. The fact that the *Ley de Caducidad* was in full force in the country was the main reason that the Court determined that Uruguay was responsible in the *Gelman* case.

The Court ultimately concluded that public scrutiny did not grant legitimacy to the amnesty law,[102] determining that the *Ley de Caducidad* lacked legal effects. For Roberto Gargarella, the Court ignored the strong democratic deliberation of the Uruguayan society with respect to Uruguayan amnesty.[103]

In 2013, the Uruguayan Supreme Court delivered a judgment that defined the limits of the Court's rulings.[104] In this instance, the former defined that, although the latter is the ultimate interpreter of the American Convention on Human Rights, its judgments do not become precedents in domestic forums.[105] The Uruguayan court stated that, when addressing issues of constitutional matters, it has the last word – not the Court.[106]

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[99] Corte IDH. *Caso Gelman Vs. Uruguay*. Fondo y Reparaciones. Sentencia de 24 de febrero de 2011. Serie C No. 221.
[100] Ibid, para 196. For more on the so-called "Inter-American view on amnesties," see Fabia Fernandes Carvalho Veçoso, 'Whose exceptionalism? Debating the inter-American view on amnesty and the Brazilian case' in Karen Engle, Zinaida Miller and D. M. Davis (Eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016) 185-215.
[101] Corte IDH, above n 99, paras 198-209.
[102] Ibid, 238.
[103] Gargarella, above n 21, 10.
[104] Corte Suprema de Justicia de la República Oriental del Uruguay, Sentencia No. 20, *Excepción de inconstitucionalidad Arts 1, 2 y 3 de la Ley Nro. 18.831*, 22 febrero 2013.
[105] Ibid, 17.
[106] Ibid, 18.

As a consequence, the Uruguayan Supreme Court ruled that reviewing the constitutionality of norms must be done under the Uruguayan constitutional regime. This argument thus precludes judgments of the Court from becoming constitutional bars of interpretation.[107] Even so, the Uruguayan Supreme Court referred to the case law of the Argentine Supreme Court, stating that the obligation to progressively promote human rights lies with the domestic court and not in the Court's generic considerations.[108]

The Court's response was as expected.[109] It repeated the arguments it had made in its 2013 judgment.[110] As with the Guatemalan case, the Court based the need for compliance with its rulings on Articles 26 and 27 of the Vienna Convention on the Law of Treaties,[111] which establish, by the doctrine of the conventionality control, that its judgments are the only basis for compliance with international norms; thus, those judgments are binding on all the powers of a state: executive, legislative and judicial.[112] The Court maintained its strict comparative analysis of other domestic courts' compliance with its decisions. Notably, in this exercise, the Court showed once more its strategy of cherry-picking judgments, as it made reference to the Criminal Chamber of the Guatemalan Supreme Court's decision to implement Inter-American judgments.[113] With this, the Court omitted the reality that the Guatemalan Constitutional Court had ruled against that decision and placed limits on compliance with Inter-American judgments.

4. Epilogue: Crisis as Opportunity

Most of the regional scholarship, as displayed in *Part II*, emphasizes the constitutional roles of both the Court and the Commission within the Inter-

[107] Ibid, 18-20.
[108] Ibid, 20.
[109] Corte IDH, Supervisión de Cumplimiento de Sentencia Caso Gelman vs. Uruguay, 20 marzo de 2013.
[110] Ibid, paras 53-58.
[111] Ibid, para 59.
[112] Ibid, paras 68-69.
[113] Ibid, paras 79-80.

American legal regime. Nevertheless, as we contend, their activities should be read in a broader context in order to understand, as detailed in *Part III*, the less-explored stories of member states' backlashes – and the legal justifications underpinning those backlashes.[114] We agree that both the Commission and the Court have acquired over time a vital role in the implementation of human rights in the region; however, their roles are determined by social constructs, moral factors and the capacities of both the member states and other stakeholders.[115]

In particular, as explained in *Part I* and *Part II*, the Commission and Court were part of a broader movement to bring human rights violations worldwide into account. During this period, both institutions developed their primary positions on (and interpretations of) political change as a result of Latin America's historical debt in guaranteeing and protecting human rights.

Considering the backlashes of the region's states and domestic courts, the System needs to rebuild its identity. Jurgen Kürtz and Sungjoon Cho's "identity formation" reading of international organizations may well be suited to the System's current situation.[116]

Kürtz and Cho explain that identity formation theory can be used to explain the evolution of an international organization (in our case, a legal regime), and they explain its evolution as a "dynamic process of its adaptation to its environment."[117] Kürtz and Cho continue, stating that identity formation theory is useful as a process of reflection and observation on different levels; through this process, a regime may judge itself in light of what others may judge it for.[118] This theory is similar to how human beings become aware of

[114] On a similar historical review position see: Par Engstrom, 'The Inter-American Human Rights System and US-Latin American Relations' in Juan Pablo Scarfi and Andrew R Tilman (eds), *Cooperation and Hegemony in US-Latin American Relations: Revisiting the Western Hemisphere Idea* (Palgrave Macmillan, 2016) 209.
[115] John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press, 2007) 76.
[116] Sungjoon Cho and Jürgen Kurtz, 'International Cooperation and Organizational Identities: The Evolution of the ASEAN Investment Regime' [2016] *Northwestern Journal of International Law & Business, Forthcoming* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802628>.
[117] Ibid 9.
[118] Ibid 9–10.

their own existence as they transform from adolescents into fully conscious adults.

The Inter-American Human Rights regime is at a stage in which its institutions need to change their stances on states and to grow organically with them. In other words, the Commission and the Court need to evolve their institutional viewpoints, which were adopted in the early 1990s. The region's states, with minor exceptions, have, in the last 25 years, made huge leaps in fostering their democracies and building up their own domestic institutions.[119] This is shown in the adoption of a new round of constitutions in the region that include broad human rights charters and judicial guarantees, including the *amparo*, *tutela*, *mandado de segurança*.[120]

A recent development in the region – the constitutional block – represents a new wave of human rights recognition and judicial activism.[121]

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[119] Héctor Fix-Zamudio, 'Breves Reflexiones Sobre La Naturaleza, Estructura Y Funciones de Los Organismos Jurisdiccionales Especializados En La Resolución de Procesos Constitucionales {Brief Reflexions on the Nature, Structure and Functions of the Jurisdictional Organisms Specialised in the Resolution of Constitutional Procedures]' in Juan Vega Gómez and Edgar Corzo Sosa (eds), *Tribunales y justicia Constituciona: Memoria del VII Congreso Iberoamericano de Derecho Constitucional [Constitutional Tribunals and Justice: Memories of the VII Ibero-American Congress on Constitutional Law]* (Universidad Nacional Autónoma de México, 2002) 207; Justin O Frosini and Lucio Pegoraro, 'Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?' (2008) 3(3) *Journal on Comparative Law* 39, 48; Detlef Nolte and Almut Schilling-Vacaflor, 'Introduction: The Times They Are a Changin': Constitutional Transformations in Latin America since the 1990s' in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Ashgate, 2012) 22; Pedro Salazar Ugarte, 'La Disputa Por Los Derechos Y El Ius Constitutionale Commune [The Dispute for Rights and the Ius Constitutionale Commune]' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), *Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos* [Ius Constitutionale Commune in Latin-America: Traits, Potentials and Challenges] (Instituto de Investigaciones Jurídicas de la Universidad Autónoma de México, Max-Planck Institut für Öffentliches und Völkerrecht and Instituto Iberoamericano de Derecho Constitutional, 2014) 41.

[120]Héctor Fix-Zamudio, 'La Creciente Internacionalización de La Constitutiones Iberoamericana, Especialmente En La Regulación Y Protección de Los Derechos Humanos [The Rising Internationalization of Ibero-American Constitutions, Specifically in the Regulation and Protection of Human Rights]' in Armin von Bogdandy, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi (eds), *La Justicia Constitucional y su Internacionalización: ¿Hacia un Ius Constitutionale Commune en América Latina?* [Constitutional Justice and its Internationalisation: Towards a Ius Constitutionale Commune in Latin America] (Instituto de Investigaciones Jurídicas de la Universidad Autónoma de México, Max-Planck Institut für Öffentliches und Völkerrecht and Instituto Iberoamericano de Derecho Constitutional) vol 2, 607; *American Convention on Human Rights* Opened for Signature in 10 July 1969, Organisation of American States Treaty Series No. 36 (Entered into Force 18 July 1978) Art. 25.

[121] Manuel Eduardo Góngora Mera, 'La Difusión Del Bloque de Constitucionalidad En La Jurisprudencia Latinoamericana Y Su Potencial En La Construcción Del Ius Constitutionale Commune Latinoamericano [The Difution of the Constitutional Block in the Latin-American

Under this new judicial trend, domestic constitutional courts have been actively granting rights to minorities, as illustrated in their recognition of same-sex marriage and the rights of indigenous people, women and other vulnerable groups.[122]

The Court, when analyzing human rights violations and drawing on sources, needs to move beyond its functionalist method. Proper comparison, using a sociological perspective, needs to be grounded in the study of epistemological reasons and other conditional factors – not only those of the system but also those of the legal regimes and states under review, and those of other states and other human rights regimes.[123] This new exercise of comparison, then, eliminates presumptions and biases, thus moving beyond institutionalist approaches.[124] This comparison allows for continuing organic growth based on social and dialogical constructs, leaving behind the "theoretical imprisonment" of previous judgments.[125]

An example of this is the 2012 *El Mozote* judgment. In this case, the Court reviewed the validity of Salvadorian amnesty under the ACHR. Although the Court committed the "comparative sin" of referring to previous amnesty cases, such as the Brazilian *Gomes Lund* case and the *Gelman* case, it dwelled more on the construction and achievement of peace in El Salvador.[126]

Jurisprudence and Its Potential within the Construction of the Latin-American Ius Constitutionale Commune]' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), *Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos* [Ius Constitutionale Commune in Latin-America: Traits, Potentials and Challenges] (Universidad Nacional Autónoma de México, Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht and Instituto Iberoamericano de Derecho Constitucional, 2014) 306.

[122] As a most recent example see: *Expedientes Acumulados 4783-2013, 4812-2013, 4813-2013 (Judgment)* (Unreported, Corte de Constitucionalidad de Guatemala, 6 July 2016).

[123] William Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000) 189.

[124] Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411, 441; Cheryl Saunders, 'The Impact of Internationalisation on National Constitutions' in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014) 401; Werner Menski, 'Comparative Law in a Global Context: The Legal Systems of Asia and Africa' (Cambridge University Press, 2006) 7.

[125] Diego Eduardo López-Medina, *Teoría Impura Del Derecho: La Transformación de La Cultura Jurídica Latinoamericana* Impure Theory of Law: The Transformation of the Juridical Latin American Culture] (Legis Editores S.A., 2005) 44.

[126] Corte IDH. Caso Masacres de El Mozote y lugares aledaños Vs. El Salvador. Fondo, Reparaciones y Costas. Sentencia de 25 de octubre de 2012. Serie C No. 252, paras 266-273. On the comparative sin, see para 283.

In this case, the Court recognized the distinctiveness of the Salvadorian peace process and the different characteristics of its amnesty, which was born out of an armed conflict.[127] The Court assessed the amnesty by considering the Salvadorian peace-negotiation process and determined that certain provisions of the amnesty violated human rights.[128] However, ultimately, the Court still maintained its posture on amnesties, which is based on its own jurisprudence.[129]

More interesting than the Court's judgment was the response of the Salvadorian Constitutional Chamber. Before getting into the Chamber's response, it is fair to mention that the Salvadorian Constitutional Chamber may be characterized by its use of critical comparative sources.[130] Furthermore, it has used critical comparativism to rebut, and even declare unconstitutional, judgments of other supranational courts, such as the Central American Court of Justice.[131]

The Salvadorian Chamber responded to the Court's decision in a critical comparative manner. In its decision, the Chamber reviewed the constitutionality of the Salvadorian amnesty. Interestingly, the Chamber engaged horizontally with the *El Mozote* ruling and with the broader jurisprudence of the regional court. Although the Chamber made clear that the Court's jurisprudence is based on self-imposed amnesties,[132] the Chamber used this argument to signal certain deficiencies in the application of the Salvadorian Constitution.[133] In other words, the Chamber reviewed the development of the Salvadorian Constitution in light of the construction of the Salvadorian state and its peace process. The Chamber recognized that, in the negotiation of the peace process, amnesty for grave violations of human rights was never mentioned. In this sense, the Salvadorian Chamber reviewed the

[127] Ibid, para 284.
[128] Ibid, para 296.
[129] Ibid, para 312.
[130] See: Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Inconstitucionalidad 71-2012, 253 octubre 2013, pages 13-14.
[131] See: Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Inconstitucionalidad 19-2012, 25 junio 2012.
[132] Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Inconstitucionalidad 44-2013/145-2013, 13 julio 2016, page 14.
[133] Ibid, pages 30-31.

jurisprudence of the Court, as well as those of other high courts, including the Argentinian and Colombian courts, using a historical and evolving construction of the Salvadorian Constitution and state after the nation's conflict. The result was that Salvadorian amnesty was declared to be limited, so amnesty was secured only for those crimes that did not represent grave violations of human rights.[134]

Therefore, the most interesting aspect of the Salvadorian decision was that it presented the Chamber as a catalyst in the bottom-up construction of democratic values in a dialectic manner. The Chamber placed itself as a peer to the Court and as being in dialogue with it. The regional court can further apply this lesson when trying to require compliance from domestic courts.

Part of the Commission's role should be reimagined to allow further bottom-up promotion of human rights in the region. Nowadays, the Commission only serves as an extra filter in a system in which states are criminalized and condemned twice for a single process. Being more engaging with member states and their domestic institutions would involve reimagining the role of the Commission to allow more institutional space for negotiated solutions between victims and member states, as mentioned earlier with respect to the Belo Monte and Marlin cases. Beyond these recommendations, the Commission's role may encompass context-driven agreements on concrete cases of human rights violations, leaving litigious procedures before the Court only for the most contested cases.

Conclusion

This paper aimed at exploring the different human rights narratives at play within the context of the System, particularly those narratives that are connected to the tensions regarding states' roles as material supporters of the System and thus of its main goal: protecting human rights in the region. These narratives revolve around the universalistic perspective of the *Ius*

[134] Ibid, pages 32-33.

Constitutionale Commune but also around less-explored stories such as member states' refusal to comply with Inter-American decisions.

In a context of post-transitional democracies in Latin America, the time has come to rethink the role of the Inter-American institutions. The financial crisis that the Commission suffered in 2016 illustrates the need for constructing different relationships among Inter-American institutions, member states, victims and civil organizations. Although the crisis has officially been declared to be overcome, we believe that deep reforms are needed within the System to enable concrete changes in the structural conditions of inequality that prevent Latin American citizens from fully enjoying their rights.[135] For such a venture, universalistic narratives about the System's role will be of little help, as these narratives decontextualize and depoliticize the protection of rights in the region.

Though it was important to strongly fight Latin American dictatorships' heritage during the first decades of the System's existence, the current contexts of rights violations are different, as they are related to issues of poverty and income distribution in the region. In this setting, shedding light on member states' experiences in refusing to comply with the System's decisions and on the related legal justifications underpinning these backlashes (beyond mere critical deconstruction) constitutes a fundamental stage in the reimagining of the Inter-American Human Rights System for the twenty-first century.

Referências

Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights' in Javier A Couso, Alexandra Huneeus and Rachel Sieder (eds), Cultures of Legality: Judicialization and Political Activism in Latin America (Cambridge University Press, 2011).

[135] Organization of the American States, 'IACHR Overcomes its severe financial crisis of 2016 and thanks countries and donors who made it possible', September 30, 2016, http://www.oas.org/en/iachr/media_center/PReleases/2016/145.asp.

American Commission on Human Rights, 'Universalization of the Inter-American System of Human Rights' (OAS/Ser.L/V/II.152, Inter-American Commission on Human Rights, 14 August 2014) 34–46.

Annelen Micus, The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru (Brill-Nijhoff, 2015).

Anne Orford, Critical Thinking on Human Rights, December 2016, http://rwi.lu.se/2016/12/anne-orford-why-to-apply-critical-thinking-to-human-rights/.

Armin von Bogdandy, 'Ius Constitutionale Commune Latinoamericanum. Una Aclaración Conceptual' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), Ius Constitutionale en América Latina: Rasgos, Potencialidades y Desafíos (Universidad Nacional Autónoma de México, Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht and Instituto Iberoamericano de Derecho Constitucional, 2014).

BBC, Comissao da OEA deve 'revisar decisao' sobre Belo Monte, http://www.bbc.co.uk/portuguese/noticias/2011/05/110502_insulza_jc.shtml.

Bogdandy, Armin and Ferrer Mac Gregor, Eduardo and Morales Antoniazzi, Mariela and Piovesan, Flavia and Soley, Ximena, Ius Constitutionale Commune En América Latina: A Regional Approach to Transformative Constitutionalism (October 26, 2016). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-21. Available at SSRN: https://ssrn.com/abstract=2859583

Case of Del Río Prada v. Spain, App. No. 42750/09 (Oct. 21, 2013).

Cecilia M Bailliet, Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America, (2013) 31 NJHR 477.

Cheryl Saunders, 'The Impact of Internationalisation on National Constitutions' in Albert HY Chen (ed), Constitutionalism in Asia in the Early Twenty-First Century (Cambridge University Press, 2014).

Corte IDH. Caso de la "Panel Blanca" (Paniagua Morales y otros) Vs. Guatemala. Reparaciones y Costas. Sentencia de 25 de mayo de 2001. Serie C No. 76.

Corte IDH. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala. Reparaciones y Costas. Sentencia de 26 de mayo de 2001. Serie C No. 77.

Corte IDH. Caso Bámaca Velásquez Vs. Guatemala. Reparaciones y Costas. Sentencia de 22 de febrero de 2002. Serie C No. 91.

Corte IDH. Caso Carpio Nicolle y otros Vs. Guatemala. Fondo, Reparaciones y Costas. Sentencia de 22 de noviembre 2004. Serie C No. 117.

Corte IDH. 12 Casos Guatemaltecos Vs. Guatemala. Supervisión de Cumplimiento de Sentencia respecto de la obligación de investigar, juzgar y, de ser el caso, sancionar a los responsables de las violaciones a los derechos humanos. Resolución de la Corte Interamericana de Derechos Humanos de 24 de noviembre de 2015, 22, para 65.

Corte IDH, Caso Baena Ricardo y Otros (270 Trabajadores) Vs. Panama. Fondo, Reparaciones y Costas. Sentencia de 2 de febrero de 2001. Serie C No. 72, para 106.

Corte IDH, Supervisión de Cumplimiento de Sentencia en 11 casos contra Guatemala respecto de la obligación de investigar, juzgar, de ser el caso, sancionar a los responsables de las violaciones a los derechos humanos, 21 de agosto de 2014, para 8.

Corte IDH. Caso Pueblos Kaliña y Lokono Vs. Surinam. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2015. Serie C No. 309, para 224.

Corte IDH. Caso Artavia Murillo y otros ("Fecundación in vitro") Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas Sentencia de 28 noviembre de 2012. Serie C No. 257.

Corte IDH. Caso Gelman Vs. Uruguay. Fondo y Reparaciones. Sentencia de 24 de febrero de 2011. Serie C No. 221.

Corte IDH, Supervisión de Cumplimiento de Sentencia Caso Gelman vs. Uruguay, 20 marzo de 2013.

Corte IDH. Caso Masacres de El Mozote y lugares aledaños Vs. El Salvador. Fondo, Reparaciones y Costas. Sentencia de 25 de octubre de 2012. Serie C No. 252, paras 266-273.

Corte de Constitucionalidad, Expediente 548-2010, Amparo en Única Instancia, 25 agosto 2010, pp. 12.

Corte de Constitucionalidad, Expediente 386-2011, Amparo en Única Instancia, 13 de abril de 2011, pp. 14.

Corte Suprema de Justicia de la República Oriental del Uruguay, Sentencia No. 20, Excepción de inconstitucionalidad Arts 1, 2 y 3 de la Ley Nro. 18.831, 22 febrero 2013.

Damián González-Salzberg, Complying (Partially) with the Compulsory Judgments of the Inter-American Court of Human Rights, in Pedro Fortes et al (Eds.) Law and Policy in Latin America: Transforming Court, Institutions, and Rights (Palgrave Macmillan Publishers, 2017).

Detlef Nolte and Almut Schilling-Vacaflor, 'Introduction: The Times They Are a Changin': Constitutional Transformations in Latin America since the 1990s' in Detlef Nolte and Almut Schilling-Vacaflor (eds), New Constitutionalism in Latin America: Promises and Practices (Ashgate, 2012).

Diego López-Medina, Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America (Harvard Law School, 2001) 36; William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' (1998) 47 American Journal of Comparative Law 701.

Diego Eduardo López-Medina, Teoría Impura Del Derecho: La Transformación de La Cultura Jurídica Latinoamericana Impure Theory of Law: The Transformation of the Juridical Latin American Culture] (Legis Editores S.A., 2005).

Economic Commission for Latin America and the Caribbean, 'Social Panorama of Latin America' (2015), http://repositorio.cepal.org/bitstream/handle/11362/39964/S1600226_en.pdf?sequence=1&isAllowed=y

Elena Martínez Barahona, 'Central American (High) Courts' in Diego Sánchez-Ancochea and Salvador Martí Puig (eds), Handbook of Central American Governance (Routledge, 2014).

Fabia Fernandes Carvalho Veçoso, 'Whose exceptionalism? Debating the inter-American view on amnesty and the Brazilian case' in Karen Engle, Zinaida

Miller and D. M. Davis (Eds.), Anti-Impunity and the Human Rights Agenda (Cambridge University Press, 2016).

Francisco Villagrán Kramer, 'The Background to the Current Political Crisis in Central America' in Richard E Feinberg (ed), Central America: International Dimension of the Crisis (Holmes & Meier Publishers, Inc., 1982).

Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 European Journal of International Law 101.

Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN DOC A/HRC/17/31 (21 March 2011) [Ruggie Principles].

Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 Harvard International Law Journal.

Héctor Fix-Zamudio, 'Breves Reflexiones Sobre La Naturaleza, Estructura Y Funciones de Los Organismos Jurisdiccionales Especializados En La Resolución de Procesos Constitucionales {Brief Reflexions on the Nature, Structure and Functions of the Jurisdictional Organisms Specialised in the Resolution of Constitutional Procedures]' in Juan Vega Gómez and Edgar Corzo Sosa (eds), Tribunales y justicia Constituciona: Memoria del VII Congreso Iberoamericano de Derecho Constitucional [Constitutional Tribunals and Justice: Memories of the VII Ibero-American Congress on Constitutional Law] (Universidad Nacional Autónoma de México, 2002).

Héctor Fix-Zamudio, 'La Creciente Internacionalización de La Constitutiones Iberoamericana, Especialmente En La Regulación Y Protección de Los Derechos Humanos [The Rising Internationalization of Ibero-American Constitutions, Specifically in the Regulation and Protection of Human Rights]' in Armin von Bogdandy, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi (eds),

La Justicia Constitucional y su Internacionalización: ¿Hacia un Ius Constitutionale Commune en América Latina? [Constitutional Justice and its Internationalisation: Towards a Ius Constitutionale Commune in Latin America] (Instituto de Investigaciones Jurídicas de la Universidad Autónoma de México, Max-Planck Institut für Öffentliches und Völkerrecht and Instituto Iberoamericano de Derecho Constitutional) vol 2.

IACHR, Precautionary Measures: 382/10 http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp.

IACHR Precautionary Measures: 260-07 – Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the DePartment of San Marcos, Guatemala; http://www.oas.org/en/iachr/decisions/precautionary.asp.

IACHR, Resolution 1/2013: Reform of the Rules of Procedure, Policies and Practices, http://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf.

Ines Gillich, 'Limits and Potentials of Precautionary Measures and International Law: The Case of the Inter-American System' (2014) 38 University of Western Australia Law Review 167.

Ius Constitutionale Commune en América Latina, the Max Planck Institute for Comparative Public Law and International Law, http://www.mpil.de/en/pub/research/areas/comparative-public-law/ius-constitutionale-commune.cfm.

Jena Martin 'Business and Human Rights: What's the Board Got to Do with It?' (2013) 3 University of Illinois Law Review 959.

Jena Martin Amerson '"The End of the Beginning?" A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective' (2012) 17 Fordham Journal of Corporative & Financial Law 1.

John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), Freedom from Poverty as a Human Right: Who Owes What to the Very Poor? (Oxford University Press, 2007).

Justin O Frosini and Lucio Pegoraro, 'Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?' (2008) 3(3) Journal on Comparative Law 39.

Karen Engle, Zinaida Miller and D. M. Davis (Eds.), Anti-Impunity and the Human Rights Agenda (Cambridge University Press, 2016).

Leonardo Morlino, 'The Quality of Democracies in Latin America' (International Institute for Democracy and Electoral Assistance: Democracy-Building & Conflict Management, 2016).

Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) (Special Edition) Quebec Journal of International Law 58, 65.

Luis Fernando Solano Carrera, 'Supremacía Y Eficacia de La Constitución Con Referencia Al Sistema Costarricense [Supremacy and Efficiency of the Constitution with Reference to the Costa Rican System]' in Consell Consultiu de la Generalitat de Catalunya, Agencia Catalana de Cooperació al Desenvolupament de la Generalitat de Catalunya and Centro de Estudios y Formación Constitutional Centroamericano (eds), Constitución y Justicia Constitucional: Jornadas de Derecho Constitucional en Centroamérica [Constitution and Constitutional Justice: Conferences on Constitutional Law in Central America] (Grup3, SL, 2008).

Manuel Eduardo Góngora Mera, Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication (Inter-American Institute of Human Rights, 2011).

Manuel Eduardo Góngora Mera, 'La Difusión Del Bloque de Constitucionalidad En La Jurisprudencia Latinoamericana Y Su Potencial En La Construcción Del Ius Constitutionale Commune Latinoamericano [The Difution of the Constitutional Block in the Latin-American Jurisprudence and Its Potential within the Construction of the Latin-American Ius Constitutionale Commune]' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos [Ius Constitutionale Commune in Latin-America: Traits, Potentials and Challenges] (Universidad Nacional Autónoma de México, Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht and Instituto Iberoamericano de Derecho Constitucional, 2014).

María José Castillo Carmona and Gustavo Adolfo Machado Loría, 'Aspectos Generales Del Proceso de Integración Centroamericana: Un Breve Repaso Por Su Historia [General Aspects of the Central American Integration Process: A Brief Review of Its History]' (Cuadernos Centroamericanos del ICAP, No. 5, Institutio Centroamericano de Administración Pública, July 2013) 39–43.

Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 International and Comparative Law Quaterly.

Mathias Siems, Comparative Law (Cambridge University Press, 2014) 26; Günter Frankenberg, Comparative Law as Critique (Edward Elgar Publishing Limited, 2016).

Nicole Galindo Sanchez, 'La Reforma al mecanismo de medidas cautelares de la Comisión Interamericana de Derechos Humanos: Repercusiones en el marco de proteccion de derechos humanos del Sistema Interamericano' (2013) Universidad San Francisco de Quito Law Review 1.

OAS, Process of Reflection on the Workings of the IACHR with a view to Strengthening the IAHRS, http://www.oas.org/consejo/Reflexion.asp.

Olivier Dabène, The Politics of Regional Integration in Latin America (Palgrave Macmillan, 2009) 54.

Organization of American States, Press Release: IACHR's amended Rules of Procedure enter into force today, http://www.oas.org/en/iachr/media_center/PReleases/2013/057.asp.

Organization of the American States, 'IACHR Overcomes its severe financial crisis of 2016 and thanks countries and donors who made it possible', September 30, 2016, http://www.oas.org/en/iachr/media_center/PReleases/2016/145.asp.

Par Engstrom, 'The Inter-American Human Rights System and US-Latin American Relations' in Juan Pablo Scarfi and Andrew R Tilman (eds), Cooperation and Hegemony in US-Latin American Relations: Revisiting the Western Hemisphere Idea (Palgrave Macmillan, 2016).

Pedro Caldentey del Pozo, 'Los Desafíos Estratégicos de La Integración Centroamericana [The Strategic Challenges of the Central American Integration]' (Series: Studies and Perspectives No. 156 of the Economic Commission of Latin America and Caribbean, Economic Commission of Latin America and Caribbean, September 2014).

Pedro Salazar Ugarte, 'La Disputa Por Los Derechos Y El Ius Constitutionale Commune [The Dispute for Rights and the Ius Constitutionale Commune]' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos [Ius Constitutionale Commune in Latin-America: Traits, Potentials and Challenges] (Instituto de Investigaciones Jurídicas de la Universidad Autónoma de México, Max-Planck Institut für Öffentliches und Völkerrecht and Instituto Iberoamericano de Derecho Constitutional, 2014).

Pronunciamiento del Estado de Guatemala en contra de la Sentencia de fecha 4 de septiembre de 2012, dictada por la Honorable Corte Interamericana de Derechos Humano, en el Caso Río Negro vrs. Guatemala, (10 diciembre 2012).

Report of 23 June 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc1.pdf; Report of 08 July 2010 http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc2.pdf.

Report of 20 August 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc3.pdf; Report of 21 of September 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc4.pdf.

Report of 22 of October 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc5.pdf; Report of 7 December 2010, http://goldcorpguatemala.com/wp-content/uploads/2014/11/doc6.pdf.

Roberto Gargarella, 'Tribunales Internacionales Y Democracia: Enfoques Deferentes O de Interferencia [International Tribunals and Democracy: Deferential or Interference Viewpoints]' (2016) 4 Revista Latinoamericana de Derecho Internacional 1, 3.

Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Inconstitucionalidad 71-2012, 253 octubre 2013.

Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Inconstitucionalidad 19-2012, 25 junio 2012.

Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Inconstitucionalidad 44-2013/145-2013, 13 julio 2016.

Samuel Moyn, The Last Utopia: Human Rights in History (The Belknap Press of Harvard University Press, 2010).

Sentencia No 3435-92 (Judgment) (Unreported, Sala Cuarta de la Corte Suprema de Costa Rica [Fourth Chamber of the Supreme Court of Costa Rica]).

Sonia Cardenas, Human Rights in Latin America: A Politics of Terror and Hope (University of Pennsylvania Press, 2012) 136–137.

Sungjoon Cho and Jürgen Kurtz, 'International Cooperation and Organizational Identities: The Evolution of the ASEAN Investment Regime' [2016] Northwestern Journal of International Law & Business, Forthcoming <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802628>.

Surya Deva and David Bilchitz (eds.) Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Cambridge University Press, 2013).

Tribunal Constitucional de la República Dominicana Expediente TC-05-2012-0077, Sentencia TC/0168/13, 23 septiembre 2013.

Tribunal Constitucional de la República Dominicana Expediente TC-01-2005-0013, Sentencia TC/0256/14, 04 noviembre 2014.

Tom Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet and Ox' (1997) 19 Human Rights Quaterly 510.

Víctor Abramovich, 'Das violações em massa aos padrões estruturais: novos enfoques e clássicas tensões no Sistema Interamericano de Direitos Humanos' (2009), Sur Revista Internacional de Direitos Humanos, v. 6, n. 11, p. 7-39.

Werner Menski, 'Comparative Law in a Global Context: The Legal Systems of Asia and Africa' (Cambridge University Press, 2006).

William Twining, Globalisation and Legal Theory (Northwestern University Press, 2000).

William Twining, General Jurisprudence: Understanding Law from a Global Perspective (Cambridge University Press, 2009).

Willy Soto Acosta, 'Del Sueño Unitario a La Fragmentación: La República Federal de Centroamérica (1823-1838) [From the One Dream to Fragmentation: The Federal Republic of Central America (1823-1838)]' in Willy Soto Acosta and Max Sáurez Ulloa (eds), Centroamérica: casa común e integración regional [Central America: Common House and Regional Integration] (2014).

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