Trackers and Trailblazers: Dynamic Interactions and Institutional Design in the Inter-American Court of Human Rights

Paula Baldini Miranda da Cruz

ABSTRACT

The Inter-American Court’s negative reputation as a judicial activist is often contrasted with its influence in the Inter-American Human Rights System. Despite often issuing broad judgments, the Court has remained a reference and a standard for human rights in the region. This article aims to examine this phenomenon by examining the Court’s institutional powers. The article claims that the Court’s tendency towards judicial activism does not contradict its functions, but rather reflects domestic judicial tendencies and cultures. Domestic judicial cultures and states’ interactions with the Court provide context for the interpretation of its powers and its role in the Inter-American System. The article, therefore, suggests that argumentative legal exchange engaged by the Court and Member States is a healthy way of promoting mutual accountability, while maintaining flexibility for adaptations by both parties and preserving the internal coherence of the regional system.

1. INTRODUCTION

The Inter-American Court has played an important role in the development of human rights in the American region. By adopting an active approach in developing human rights in the region, the Court not only held states accountable for human rights violations, but also provided them with the judicial and legal apparatus to ensure that they needed to develop the regional human rights system. The Court’s self-proclaimed mission to contribute to the progressive development of human rights was often accomplished by adopting expansive interpretations of legal rules and concepts in the American Convention on Human Rights. The broad judgments over issues that had not been initially covered by the American Convention, including the reforms in domestic legal proceedings, laws and constitutions, attracted mixed reviews: while some commentators praised the Court for the much-needed impulse for the development of human rights in the region, others considered the

* PhD Candidate at the Grotius Centre for International Legal Studies, Leiden University. Email: p.baldini.miranda.da.cruz@law.leidenuniv.nl. I would like to thank Prof. Eric de Brabandere and Dr. Mamadou Hébé for the support and comments when preparing this piece.

1 See, eg Armin von Bogdandy and others, ‘Ius Constitutionale Comune en América Latina: A Regional Approach to Transformative Constitutionalism’ (2016) MPIL Research Paper Series No 2016-21.
Court aggressive and anti-democratic. However, what both sides seemed to agree is that the Court has been constantly pushing the limits of its own powers and jurisdiction.

Despite the consensus about the Inter-American Court of Human Rights operating outside its mandate, Member States seem to nevertheless have a reasonable record of compliance with the Court’s judgments—although, as we will see further, states may justifiably refuse compliance under certain circumstances. As noted by Baillet, the reason why some states take longer to comply with judgments issued by the Court is not because they reject the Court’s judgments, but rather because many of them require policy adaptations or legal reform, both of which take time. But why they do not question these judgments, if the Court seems to be acting outside the scope of its own powers?

In this article, I examine the limits of powers of the Inter-American Court of Human Rights and how they can justify the Court’s law-making and shaping Member States’ domestic policies. I focus on analysing the Court’s functions and the role it was designed to fulfil in the international society. States created international courts to perform certain functions and fulfil societal roles that often go beyond the settlement of disputes among parties and include more systemic goals, such as harmonization of rules or development of law in certain contexts.

The functions and roles of international tribunals are the product of institutional design which is expressed in their constitutive documents and consent to jurisdiction granted by Member States. These documents are norms that guide the actions and powers of tribunals in their work. As such, they must be interpreted in accordance with the legal context in which that tribunal is developed, and based on the interactions and reciprocal legal justification between the court and its Member States (Section 2). I, therefore, propose a phenomenological interpretation of the Court’s mandate and powers. I defend that one of the reasons why the Inter-American Court of Human Rights is more creative than other similar tribunals is because its Member States encourage it to do so by complying with its judgments. Moreover, whenever

2 See, eg Ezequiel Malarino, ‘Judicial Activism, Punitivism, and Supranationalization: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’ (2012) 12 International Criminal Law Review 665; Pablo Contreras, ‘Control de Convencionalidad Fuerte y Débil’ (Corte IdH Blog, 27 August 2012) <http://corteidhblog.blogspot.com/2012/08/bloguero-invitadoel-control-de.html> accessed 14 November 2019; Christina Binder, ‘The Prohibition of Amnesties by the Inter-American Court of Human Rights’ (2011) 12 German Law Journal 1203.

3 Cecilia M Baillet, ‘Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America’ (2013) 31 Nordic Journal of Human Rights 477, 480.

4 On roles played by international courts and tribunals, see Armin von Bogdandy and Ingo Venzke, ‘On the Functions of International Courts: An Appraisal in Light of Their Bourgeoning Public Authority’ (12 June 2012) ACIL Research Paper No 2012-10; Karen J Alter, ‘The Multiple Roles of international Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review’ (2012) Faculty Working Papers Paper 212 <https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/212/> accessed 14 November 2019; Eric A Posner and John C Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 California Law Review 8; Laurence R Helfer and Anne-Marie Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’ (2005) 93 California Law Review 899.
Member States believe that the Court extrapolates its mandate by issuing illegal judgments, Member States respond by legally rejecting those judgments (Section 3).

My goal in this article is not to identify a specific limit for the powers of the Inter-American Court of Human Rights. Instead, I aim to trace an institutional profile of the Court and explain why the Court seems to have been unusually successful in its attempts to engage in law-making. I do so by examining the functional attributions set in the Court’s constitutive documents and Member States’ consent to the Court’s jurisdiction in light of interactions between the Court and its Member States in the context of cases.

2. INTERNATIONAL TRIBUNALS IN GLOBAL SOCIETY

One of the core functions of tribunals is to solve disputes that are brought to them. However, not all disputes are made the same. And neither are tribunals. Tribunals can be specifically designed to deal with certain types of disputes within certain realities. Hence, tribunals, both domestic and international, differ in terms of the issues they deal with, what kinds of evidence and procedures they can collect, on whether judges should be more active or reactive, and what kinds of solutions they can provide. These characteristics are twofold: on the one hand, they represent the institutional design and the powers of the tribunal, and, on the other hand, those characteristics also limit their actions (Section 2.A).

Although tribunals’ powers are determined by their constitutive instruments, the terms used are often vague and require interpretation. Tribunals are the first ones to conduct such interpretation on the limits of their own powers, through the principle of kompetenz-kompetenz. However, they are not the only ones to do so. Under the oversight of their constituents, tribunals’ powers are also interpreted by states, which interact with judgments and shape these interpretations along with courts (Section 2.B).

A. Institutional Design and Tribunal Performance

Tribunals, like any other institution, can be designed to fulfill different roles in a society. Although tribunals exist to settle disputes, there are different approaches that a tribunal can take towards solving disputes. In the beginning of the 20th century, Schmitt and Kelsen engaged in a long debate on what should be the role of constitutional courts in a domestic environment.5 The discussion revolved around whether the legal systems should be primarily controlled by legislative bodies or constitutional courts.

Schmitt defended that tribunals should follow a private-oriented profile, where legislators were the designers and protagonists of legal systems. According to Schmitt, legislators should be presumed competent and capable of producing a coherent system where rules worked efficiently together to improve society. Hence, under Schmitt’s system, it was not necessary to have constitutional courts and judges

---

5 See Carl Schmitt and Hans Kelsen’s discussion on this matter in Carl Schmitt, ‘The Guardian of the Constitution’ (1931), reprinted in Lars Vinx (ed, tr), The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law (CUP 2015) 79; Hans Kelsen, ‘Who Ought to be the Guardian of the Constitution?’ (1931), reprinted in Vinx, ibid.
supervising the work of legislators. Instead, their role should be to only apply laws to specific disputes that were brought before them.\(^6\) Under Schmitt’s logic, judges should be restrained to apply laws, and not review them. Since judges examined laws from the perspective of specific cases, they would most likely miss the broad context in which rules were created. If judges became engaged or creative in reviewing laws on a case-by-case basis, they risked breaking the systemic coherence that legislators created when passing legislation. Therefore, for Schmitt, judges should give maximum deference to legislators and their political choices.

Kelsen, on the contrary, advocated for tribunals having a public-oriented profile, where judges have the role of ensuring that laws are properly integrated and assimilated into society. Kelsen believed that even the most competent legislators would not be able to fully anticipate the practical effects of the laws they enacted—rules are, in the end, texts that can be interpreted in many different ways. Hence, Kelsen argued that the best way of preventing laws from behaving unpredictably is to grant those who apply these laws the power to integrate them into a larger social and legal context.\(^7\) In public-oriented tribunals, decisions and interpretations affect not only the parties who brought that dispute before the tribunal, but also the legal system and society who are bound to respect the precedent created by that decision. In a public-oriented tribunal, judges have the liberty to review laws passed by a legislator, having prominence over the latter.

For Kelsen, the review of laws was made through integration, which is a logical and intuitive process for those who apply the law.\(^8\) It consists of examining a rule and applying it in a way that is consistent and coherent in relation to the other existing rules and reality. If a system is not properly integrated, it will either be detached from reality or internally incoherent.\(^9\) All entities and organs responsible for applying laws and regulations are, intentionally or not, interpreting laws. When they do so, they are adding to these rules by clarifying what is the most coherent and harmonious way of fitting that rule into a larger legal reality. Although rules can be interpreted by all organs and branches of government that are competent to apply them, public-oriented tribunals are usually the protagonists in the process of interpreting

\(^6\) Schmitt, ibid.
\(^7\) Kelsen (n 5). See also Lênio L Streck, *Hermenêutica Jurídica e(m) Crise* (11 edn, Livraria do Advogado 2014) loc 1962 (ebook).
\(^8\) Other scholars have built on ideas similar to Kelsen’s ‘integration’, but from the perspective of interpretation and hermeneutic development of legal rules. While these studies tend to agree with Kelsen in the sense that legal rules are interpreted by lawyers and other members of society, they disagree with how this interpretation should be done—eg whether interpretation should take into consideration values, whether such interpretation should be done from a case-by-case or systemic perspective. For the purposes of this article, however, I wish to focus on ‘integration’ as contextual and systematic interpretation. For more on legal interpretation, see, eg Herbert L Hart, *The Concept of Law* (Claredon Press 1994); Ronald Dworkin, *Taking Rights Seriously* (HUP 1977); Scott Shapiro, *Legality* (HUP 2011). For hermeneutic approaches to systematic communication and interpretation, see Jurgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Thomas McCarthy tr, Vol 1, Beacon Press 1981); *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press 1998); Hans-Georg Gadamer, *Truth and Method* (Joel Weinheimer and Donald G Marshall tr, Bloomsbury 2013).
\(^9\) Hans Kelsen, ‘The Nature and Development of Constitutional Adjudication’ (1929), reprinted in Vinx (n 5).
and integrating rules into the legal system. Hence, for Kelsen, judges have the final say in interpreting law.

The public-oriented profile describes a much broader role to the judiciary. Every decision and interpretation can affect the legal system as a whole because they give meaning to rules within a practical context. Deviations from understandings established by legal precedents must be justified based on new legal rules or contextual elements. Judges, therefore, have some room to legislate because they have the power to stretch and adjust the meaning of certain laws so that they serve their values and purposes within the legal system and society."10

The Schmitt–Kelsen debate was incorporated into modern scholarship to illustrate different ways a tribunal can be designed and the roles that tribunals can play in a society. Today, public and private functioning profiles are still described separately for scientific purposes but, in practice, it is impossible to classify a tribunal being fully private or public oriented.11 All tribunals have a private dimension in the sense that they must be provoked by the parties to apply the law to specific situations brought before them. In contrast, every time a tribunal applies the law to a concrete situation, it must decide how it will interpret a specific legal rule, among a constellation of interpretations available.12 Such decision creates an unavoidable legislative action since it implies a political choice on how to integrate particular rules within the existing legal and social framework. Thus, all tribunals will, at some level, change the way that certain rules are perceived by society.

States originally envisioned international tribunals to be extremely private oriented in order to protect their autonomy and self-determination. In domestic legal systems, individuals are seen as subjects of law. Legal order is centralized and controlled by institutions. In the international order, it is the opposite: states are, at the same time, the masters and main subjects of international law. Although other institutions and actors have been gaining influence in international law, international law is still largely driven by the will of states. Under this logic, international law production is largely guided by the principle of state sovereignty, which protects the autonomy of states and self-determination of their populations. This autonomy is the cornerstone of international law and drives the design of international institutions. Hence, unlike domestic law, where institutions are the main producers and protectors of laws, in international law, institutions have been assigned more peripheral roles focused on solving specific issues and problems and cannot extrapolate them.13

International tribunals were therefore designed to solve the disputes that are brought to them with minimal impact over the international legal system.14 By looking at their constitutive instruments, it is clear these tribunals were designed to be

10 Fuad Zarbyiev, ‘Judicial Activism in International Law – A Conceptual Framework for Analysis’ (2012) 3 Journal of International Dispute Settlement 247, 251; Tom Ginsburg, ‘Bounded Discretion in International Judicial Lawmaking’ (2005) 45 Virginia Journal of International Law 631.
11 Zarbyiev (n 10) 258.
12 Kelsen (n 9) 60. See also, Ginsburg (n 10) 635.
13 Henry G Schermers and Niels M Blokker, International Institutional Law (5th edn, Martinus Nijhof 2011) marginal s 15–16.
14 Armin von Bogdandy and Ingo Venzke, ‘International Courts as Lawmakers’ in Rüdiger Wolfrum and Ina Gätzschmann (eds), International Dispute Settlement: Room for Innovation (Brill 2013) 164–65.
reactive, meaning that they cannot adjudicate on issues that have not been brought before them through the consent of states.\(^{15}\) In addition, they are not authorized to rule on issues that might affect the rights of parties that are not directly involved in a dispute.\(^{16}\) Moreover, the decisions they issue have limited legal effects, since case law is considered only an auxiliary mean to identifying legal rules and consent of states still remains key for international law-making.\(^{17}\)

Despite their restrictive design, the everyday activities of international tribunals show how they also perform some public-oriented activities. The disputes brought before them show that states’ consent is not understood in the same way by parties, showing discrepancies on their meaning. Parties reach for tribunals in search of authoritative interpretations of the contended legal terms, which they can follow as law. Building on these interpretations, tribunals form their case law which becomes part of the legal system.\(^{18}\) Although, in theory, case law plays only a secondary role in the formation of a legal system, in practice, tribunals tend to rely heavily on case law when discussing legal concepts and thresholds. Hence, international tribunals turn to case law when they need to discuss the interpretation of legal concepts.

By resorting to their case law, international tribunals make sure that they are operating within a common language and following coherent patterns of legal decision-making,\(^{19}\) creating an authoritative interpretation of law. Although there is no rule that explicitly requires tribunals to behave coherently and consistently, there is a general expectation that tribunals will at least operate in a single language.\(^{20}\) Tribunals are expected to behave in a predictable manner, which implies coherence and consistency in the way terms are interpreted.\(^{21}\) If a tribunal changes its mind about the meanings of legal terms without providing any justification, it will inevitably face public outcry and scrutiny,\(^{22}\) risking its legal and political authority.

Coherence implies that the interpretations issued by international courts and tribunals will inevitably reflect on future cases. The repetition of interpretations by international tribunals form a body of jurisprudence, creating the expectation on states that, if a dispute is brought before those international tribunals, the settlement of such dispute will be based on past interpretations issued by the judges. Despite the private restrictions imposed over tribunals’ law-making powers and on the effects of their decisions, these tribunals, by having a consistent body of jurisprudence, have

\(^{15}\) ibid.
\(^{16}\) Case of the Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America (Preliminary Question) [1954] ICJ Rep 19, 33).
\(^{17}\) Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945, 59 Stat 1031, 1055 (ICJ Statute), art 38(4).
\(^{18}\) Dworkin (n 8) 85–88. Tom Ginsburg suggests that this kind of interaction would amount to a form of delegated law-making. See Ginsburg (n 10) 637–642.
\(^{19}\) Dworkin, ibid 85–88, 113.
\(^{20}\) On law as language and the importance of linguistic objectivity, see Ronald Dworkin, Law’s Empire (HUP 1986) 81; Ludwig Wittgenstein, Philosophical Investigations (Gertrude Elizabeth Margaret Anscombe tr, Basil Blackwell 1958) para 242.
\(^{21}\) Armin von Bogdandy and Ingo Venzke, ‘The Spell of Precedents: Lawmaking by International Courts and Tribunals’ in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), The Oxford Handbook of International Adjudication (OUP 2014) 507–08.
\(^{22}\) On social acceptance of interpretations in general, see, in particular, Wittgenstein (n 20) para 242–43.
an implicit legislative capacity, inherent to any jurisdictional activity.\textsuperscript{23} The question, then, is not whether international tribunals may engage in international law-making, but how far are they allowed to go.

B. The Limits to International Tribunals’ Powers and Judicial Activism

There is no clear line that establishes what is the limit of international tribunals’ powers and attributions. Although Member States have designed them to be more privately oriented, their constitutive documents do not establish a clear limit to their legislative powers and capacity. These limits must, therefore, be determined in practice. International lawyers, following the domestic debate on the limits of judicial interpretation, discussed the limits of international tribunals under the inescapable dyad of international judges either being judicial activist or not.

Those who complain about international tribunals exceeding their mandate often use the term ‘judicial activism’. The idea of judicial activism was developed in the United States in the context of a general debate on the powers of political institutions (legislative and executive powers) versus those of the judiciary. Traditionally, the term makes reference to the legislative powers of judges.\textsuperscript{24} Whenever judicial decisions result in substantive legal changes, judges are labelled as activists. The first time the expression ‘judicial activism’ was used was in \textit{Fortune} magazine, to illustrate a debate held in the US Supreme Court. The \textit{Fortune} piece described as activists the justices that saw judicial work as an exercise of political choices.\textsuperscript{25} Over time, the expression became a pejorative way of describing the abuse of judicial law-making powers.\textsuperscript{26} As there is no specific legal definition or delimitation of what judicial behaviours may be classified as activist, the term has become a political label that indicates concerns about possible outcomes of certain judicial decisions and attitudes.\textsuperscript{27}

Those who advocate for more public-oriented international tribunals reject the judicial activist label. Instead, they defend that international tribunals should be able to render broad interpretations as a way of containing states’ powers and self-serving behaviours in international society.\textsuperscript{28} Although it is reasonable to assume that no state would engage in actions that would go against its interests, it would be a stretch to classify all state behaviours as abusive or hostile to the international rule of law. Determining whether a state is abusing rights or violating international law requires examining its actions in context, including their consequences and their underlying political intentions—all of which are usually unclear.

The reason why states have chosen not to specify the limits of international tribunals to interpret laws perhaps is grounded in the need to grant tribunals more

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} On this, see Tom Ginsburg suggests that this kind of interaction would amount to a form of delegated law-making. See Ginsburg (n 10) 641–47.
\item \textsuperscript{24} Keenan D Kmiec, ‘The Origin and Current Meanings of Judicial Activism’ (2004) 92 California Law Review 1441, 1471.
\item \textsuperscript{25} ibid 1449–50.
\item \textsuperscript{26} ibid 1477.
\item \textsuperscript{27} Zarbyiev (n 10) 251–53.
\item \textsuperscript{28} Zarbyiev (n 10) 268–69; Jan Klabbers, An Introduction to International Institutional Law (CUP 2002) 340.
\end{itemize}
\end{footnotesize}
flexibility to interpret and adapt their powers to different realities and circumstances, a given in international law. When tribunals interpret their own powers, they are, themselves, legislating by integrating the rules that define these powers into the political, legal and ideological context in which they will be exercised. This includes the development of jurisprudential formulas explaining, for example, what are the requirements for a legal dispute to exist, or the threshold for attribution of conducts to states.

However, international tribunals’ prerogative to determine the limits of their own powers is not absolute or immune to external scrutiny. Although international adjudicative bodies are independent from states, their existence and functioning still depend on external financial and moral support. It is common for states to reject international tribunals’ decisions by, for example, refusing to comply with awards, issuing public declarations, suspending contributions or even exiting tribunals. The choice of means on how a state will reprehend an international tribunal for a decision will depend on how strongly the Member States reject such decision. States’ responses to tribunals decision can, therefore, affect the activities or even the existence of international tribunals.

International tribunals are extremely sensitive to state pressure, especially if such pressure involves threats of withdrawal or suspension of payments. Insufficient funding has been a recognized obstacle in the work of a number of tribunals. The Inter-American Commission was only able to create certain follow-up mechanisms in cases such as the Ayotzinapa thanks to the collaboration of states involved, who agreed to provide specific funding to those initiatives. The potentially disastrous

29 Hart (n 8) 124–28. See also Brian Bix, Law, Language, and Legal Determinacy (OUP 1993) 18–28.
30 Nottebohm Case (Liechtenstein v Guatemala) [1953] ICJ Rep 111, 119.
31 Mavrommatis Palestine Concessions (Greece v UK) [1926] PCIJ Rep Series A No 2, 11.
32 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14.
33 Schermers and Blokker (n 13) marginal ss 48–50.
34 Ginsburg (n 10) 656–68.
35 See, eg how generalized lack of support has impacted the activities of the ECOWAS Court (see Karen J Alter, James T Gathii and Laurence R Helfer, ‘Blaschak Against International Courts in West, East, and Southern Africa: Causes and Consequences’ (2016) 27 European Journal of International Law 293). More recently, there have also been intense discussions on whether the International Criminal Court would be capable of surviving the insurgency of State Parties who complained about bias by the tribunal (Owen Bowcott, ‘Rising Nationalism Leaves International Criminal Court at Risk’ The Guardian (29 December 2016) <https://www.theguardian.com/news/2016/dec/29/rising-nationalism-leaves-inter national-criminal-court-at-risk> accessed 14 November 2019).
36 For more on how states can attempt to obstruct or steer the work of tribunals, see Alter, Gathii and Helfer, ibid.
37 Center for Justice and International Law, ‘Aportes de CEJIL sobre el Adequado Financiamiento del Sistema Interamericano de Derechos Humanos’ Documento de Coyuntura no 11 (2018); African Commission on Human and People’s Rights. Strategic Plan 2015–2019 <http://www.achpr.org/files/page/about/strategic-plan/achpr_strategic_plan_2015_19.pdf> accessed 14 November 2019; United Nations, ‘Facing Political Attacks, Limited Budget, International Criminal Court Needs Strong Backing to Ensure Justice for Atrocity Crimes, President Tells General Assembly’ (29 October 2018) <https://www.un.org/press/en/2018/ga12084.doc.htm> accessed 14 November 2019. See also David Wippman, ‘The Costs of International Justice’ (2006) 100 American Journal of International Law 861.
38 Inter-American Commission on Human Rights, Resolucion de Seguimiento de la Medida Cautelar No 409-14, ‘Asunto Estudiantes de la Escuela Rural “Raúl Isidro Burgos” Respecto de México’ (29 July 2016).
impact of Member States’ refusal to accept decision has led those involved in the
work of international tribunals often interpret any pressure or reprehension by
Member States as an illegal attempt of states to steer the work of international tribu-
nals into the directions they want.39 States may, indeed, be abusing their political
and economic power against international tribunals when they respond aggressively
to a judicial decision that contradicts their political agendas. An aggressive response,
such as suspending contributions to a tribunal or withdrawing altogether, may be an
attempt of intimidating a tribunal to avoid dealing with sensitive issues.

However, another explanation for state complaints against a tribunal’s approach
to a certain question is that the tribunal is simply wrong. Even the most public-orien-
ted tribunal, with broad powers to interpret laws, has some private limits. In the
case of international tribunals, those limits are established by parties, who have the
capacity to limit tribunals’ actions by establishing the limits of their consent to juris-
diction, including what laws should these tribunals apply when solving disputes. If a
tribunal exceeds its powers and issues a decision that is not within its jurisdiction
contradicts the law, that decision is illegal and must be corrected. However, unlike
domestic courts, there are no appellate courts that can remedy wrong decisions nor
any pre-established checks and balances to monitor international courts and tribu-
nals’ work. States only have international tribunals or their own actions to react
against such a wrong interpretation.

The lack of pre-existing checks and balances mechanisms does not imply that
tribunals are operating without oversight. Since states are the ones who provide the
initial terms and limits for the powers of international tribunals, they can—and
should—exercise some oversight over the work of international courts and tribunals.
States exercise oversight over international tribunals on a periodic basis, in assemblies
of State Parties or special committees, and also by interacting with tribunals’ activities
and in cases. States’ reactions to international tribunals’ decisions can clarify
the terms of their consent to these tribunals’ jurisdiction and of the powers that
states conferred to them. These reactions need to be justified on legal grounds and
be consistent with that states’ previous standings.

A common interaction between states and tribunals relates to compliance. When
states grant their consent to international tribunals’ jurisdiction, they also agree to
accept those tribunals’ decisions and to comply with them.40 However, it is very
difficult, if not impossible, for international tribunals to adequately enforce awards
on their own. They, therefore, depend on states’ willingness to comply with their
decisions. There are many reasons that guide states’ decisions to comply with a deci-
sion of an international tribunal or not: the legitimacy and authority of that tribunal,
the public opinion surrounding the tribunal and the case itself, the political and
economic consequences of compliance. From a strictly legal perspective, states’ com-
pliance is also closely linked to the states’ consent to jurisdiction, which is limited
to certain conditions, situations and powers. The obligation to comply with legal

39 This can be seen particularly in the frequent use of the term ‘backlash’ to refer to any resistance to com-
plying with international courts’ judgments. See, in this sense, Mikael Rask Madsen, Pola Cebulak and
Micha Wiebusch, ‘Backlash Against International Courts: Explaining the Forms and Patterns of
Resistance to International Courts’ (2018) 14 International Journal of Law in Context 197.
40 See, eg Charter of the United Nations, 26 June 1945, 1 UNTS XVI.
decisions presupposes that those decisions are issued within those limits. Therefore, decisions that violate those limits (ultra vires decisions or decisions that contradict the law that states established as applicable to that dispute) do not bind states because they are outside the scope of their consent.

In order to distinguish a legally acceptable refusal to comply with a decision that is excessive or wrong and an illegal refusal to comply with a sound decision that dissatisfies a state, we need to examine the justification and understanding behind such refusal. Acceptable refusals to comply usually are legally justified, questioning the decision’s legality or validity. States that justifiably refuse to comply with decisions they deem illegal are not seen as violators of international law—in fact, their refusal often ends up triggering debate in the international legal community and help clarify what are the acceptable interpretations of international laws and principles. States that are illegally refusing to comply with decisions, on the contrary, are often aware that they are violating the obligations they assumed when they became members of that tribunal. As a result, they often provide political or incoherent justifications to not complying with the decision, or even no justification at all.

If a state’s refusal to comply with a decision may, in certain situations, amount to an exercise of oversight over that court’s work, the same can be said of states’ compliance. Consent does not necessarily need to be given expressly. Instead, it is possible to infer consent based on how states react to certain situations or claims. If a state immediately complies with a decision of an international court, we can assume that state considers the decision legally sound—and that the tribunal has issued that decision within its powers. Therefore, even if a tribunal decides to be more creative and innovate in decisions and interpretations, that creativity can be integrated within its framework if states support it.

The powers of international tribunals are, therefore, not necessarily fixed. Just like other norms, their powers must be interpreted and integrated into a larger legal and sociological context. An interpretation that gives new meaning to legal terms may be accepted by states if they are willing to act in compliance with such legal reasoning. Notwithstanding this, tribunals find limits to their powers precisely on the conditions that allow their expansive use: the consent of states. As a consequence, the innovations brought by decisions of international tribunals will only be integrated into that tribunal’s legal framework if the collectiveness of Member States supports that interpretation.

3. JUDICIAL ACTIVISM AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court has the reputation of being activist. Such reputation stems from the Court’s public orientation. Since public-oriented tribunals are more system than individual-oriented, they are granted broader powers to interpret and

---

41 The International Court of Justice has dealt with the implied powers of international organizations in Reparation of Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 182; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion) [1954] ICJ Rep 57; Legality of the Use of a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66. In the Nuclear Weapons in Armed Conflict advisory opinion, specifically, the court noted that, while powers may be implied, they must be consistent with the organization’s constitutive documents.

42 See, eg Malarino (n 2); Binder (n 2).
integrate laws than private-oriented tribunals. More public-oriented courts may therefore make an expansive or creative interpretation that may lead legal systems to rearrange themselves and are, nevertheless, accepted by its constituents. Judicial creativity and broad powers of interpretation do not necessarily equate to judicial activism. Activist courts are those that violate the jurisdictional or interpretational limits of their powers on a routinely basis. The ‘activist’ label carries, today, a derogatory meaning that implies the Court’s creative and sometimes expansive interpretations arise from an excessive exercise of jurisdictional or interpretational powers.\(^{43}\) Therefore, to establish whether the Inter-American Court can be generally classified as an activist one, we need to first establish that it is violating the limits of its powers.

While there is no legal rule explicitly giving the Court powers to legislate when interpreting the American Convention on Human Rights, the Court seems to be part of a regional legal reality that accepts and stimulates similar behaviour by courts. Such reality may push the Court to adopt a more public-oriented profile that authorizes it to modify rules and harmonize legal systems whenever appropriate (Section 3.A). Nevertheless, even the Court’s strongest supporters have kept its powers under scrutiny by rejecting excessive or wrong judgments (Section 3.B).

A. The Inter-American Court of Human Rights’ Powers in Context

(i) The Inter-American System and its context

The Inter-American Court of Human Rights was designed to function in a more public-oriented manner than other international tribunals. Such orientation can be seen in how the Court has assimilated the two core characteristics of Kelsen’s model: first, the Court has great freedom to interpret the rules set by the Inter-American Convention and that freedom is exercised with the goal of creating a coherent and consistent system. Cases are centralized by the Inter-American Commission, who can strategically coordinate these to create a ‘coherent, oft-cited body of jurisprudence’.\(^{44}\) The Inter-American Commission, in this function, works as a gatekeeper of the cases that can be brought before the Inter-American Court of Human Rights. After the petition is filed in the Commission, it then proceeds to examine the petitions and, if necessary, to file and handle procedures against states. Victims can participate in procedures, but they are not required to do so.\(^{45}\) For victims, this may not be ideal, since they must go through a longer road to have their cases heard and depend on the willingness and resources of the Commission. Hence, the Court’s public orientation also reflects on its focus on having a closed coherent system of human rights that can orient states’ actions, rather than privileging individual victims’ access to justice.

---

\(^{43}\) On the activist labelling of international courts, see Zarbyiev (n 10) 247.

\(^{44}\) Alexandra Huneeus, ‘Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights’ in Javier A Couso, Alexandra Huneeus and Rachel Sieder (eds), \textit{Cultures of Legality: Judicialization and Political Activism in Latin America} (CUP 2010) 118.

\(^{45}\) Organization of American States, Inter-American Commission on Human Rights, Rules of Procedure (16–25 November 2000) art 25 <https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm> accessed 14 November 2019.
As a result of having the Commission coordinating its cases, the Inter-American Court has a much smaller caseload than its European counterpart. From a systemic perspective, having a smaller number of cases that are coordinated and developed by a single organ has allowed the Inter-American Court to build a cohesive system with a consistent case law. By having the Commission, rather than victims, as the responsible entity for filing and handling claims, the Inter-American System privileges cohesive and strategic development of cases and jurisprudence, rather than individual access to justice.

The second element where we see the Inter-American Court’s public orientation is on how its individual decisions affect the system as a whole. In Kelsen’s model, a court’s interpretations of a rule on a specific case should change how that rule is interpreted in future situations, thus affecting the system as a whole—meaning that an obligation of a tribunal to follow its own case law is a consequence of the legislative capacity of tribunals. As discussed above, most international courts and tribunals are not formally bound to follow any case law. They do so mostly to maintain coherence, predictability and credibility in their judgments. However, in the Inter-American System, the Court’s past interpretation of the legal framework binds not only its judges, but also Member States. The Court has ruled that its interpretations of the American Convention on Human Rights settle what should be the minimum standards of compliance with such rights which should be observed by all Member States.

The Court’s conclusion that its interpretations should bind all Member States comes from a very broad interpretation of the principles of pacta sunt servanda and good-faith that are contained in Article 2 of the American Convention on Human Rights. As a result, every new case can impact the Inter-American System as a whole, regardless of who were the parties involved in the case. The Court, therefore, sees itself as a guardian of the system and judges believe that the Court’s interpretations of the American Convention on Human Rights are authoritative and binding. Moreover, the Court seems to believe that Member States’ consent to jurisdiction implies accepting to be bound by decisions regardless to them being parties to a specific dispute or not. In Goiburu et al v Paraguay, the Court ordered every Member State, even the ones that were not parties to the dispute, to punish and extradite those responsible for the violations reported in the case.

The Court has issued decisions aiming not only to harmonize the regional human rights system, but also to shape Member States’ domestic policies and behaviours. In Juvenile Re-education Institute v Paraguay, the Court concluded that the right to humane treatment established by Article 5 of the Convention creates an obligation of

46 Huneeus (n 44) 118.
47 See Eric de Brabandere, ‘The Use of Precedent and External Case-Law by the International Court of Justice and the International Tribunal for the Law of the Sea’ (2016) 15 The Law and Practice of International Courts and Tribunals 24, 29–30.
48 ibid.
49 Gelman v Uruguay (Monitoring Compliance with Judgment) IACtHR (20 March 2013).
50 Organization of American States, American Convention on Human Rights (22 November 1969) 1144 UNTS 144, art 2.
51 (2006) IACtHR (ser C) No 153, 103–04.
52 Malarino (n 2) 666.
states taking active measures to provide imprisoned minors with human dignity.\footnote{53} Although the idea of ‘dignity’ is nowhere mentioned in Article 5 of the Convention, the Court decided to implement this concept into its interpretation anyway. In subsequent judgments, the idea of human dignity was assimilated as a reference of minimum standards of rights to be implemented by states and was later used by Court to impose to Member States positive obligations in areas that were not consolidated in the Inter-American System such as social and economic rights.\footnote{54} For example, in case of the \textit{Yakye Axa Indigenous Community v Paraguay}, the Court used the concept of human dignity to impose the obligation to provide basic standards of health, housing and assistance to work.\footnote{55}

The Court also expresses its public character through a tendency of granting reparations in form of policy changes, in addition to monetary compensation.\footnote{56} Other international courts exercise policy control examining if domestic laws and policies are in accordance with international law and order states to adequate them if necessary, giving deference to states’ choices on how to implement their decisions. The Inter-American Court, however, goes beyond the mere scrutiny of domestic law: the Court details how domestic policies should be changed and framed to fit the international legal framework and demand that those changes should be implemented by all Member States.

One of the first cases the Court ordered a state to make comprehensive policy changes as part of reparations is \textit{Palamara-Iribarne v Chile}, where the Court concluded that Chile’s criminal laws on contempt and military jurisdiction were incompatible with the democratic values of equality and freedom of expression.\footnote{57} Some more recent examples involve cases of gender violence. In \textit{Velásquez Paiz et al v Guatemala}, the Court ordered Guatemala to implement policies against discrimination and violence against women such as education programmes, hiring of public servants, access to justice and assistant to victims of gender violence.\footnote{58} In \textit{Campo Algodonero}, the Court ordered Mexico to implement international standards for procedures of investigation of summary executions and disappearances for gender-related crimes and demanded demonstration of Mexico’s compliance through the presentation of annual reports for 3 years.\footnote{59}

\textbf{(ii) Domestic courts as main source of inspiration to the Inter-American Court}

The Court’s behaviour follows the similar tendency of domestic courts of its Member States.\footnote{60} During authoritarian periods, the judiciary was the only institutional
alternative for the preservation of the (few) human rights that were still available for citizens, especially those of political prisoners. This meant, for example, trying to collect information on victims of forceful disappearance to give accountability to their relatives or applying animal rights to protect political prisoners from being tortured. These cases were handled by isolated judges and lawyers who worked under tight governmental surveillance and constant threat. In the 1980s and 1990s, processes of transition to democracy encompassed reforms to ensure the independence of judiciary bodies from governments. Now formally independent from politicians’ oversight, domestic courts moved to address other types of systemic violations.

Despite the end of most totalitarian regimes and efforts for full democratization, processes of democratization still struggle to provide adequate structure and policies to implement human rights. Hence, Latin America is still plagued by radical deprivation of basic human rights either through the adoption of legislation that is aggressive towards its citizens or for extreme inaction of governments. Lawyers and judges have responded to human rights failures by defending the use of broader judgments that try to tackle their causes. From a public-oriented perspective, this means not only the common interpretative integration of norms into society, but also on their practical integration that enabled citizens to secure their unfulfilled rights.

The judiciary became the forum where democracy is fulfilled by providing citizens with means to require compliance with political and constitutional promises. Domestic judges are, therefore, allowed to be creative and to expand interpretations as long as these interpretations provide a solution for systemic violations of human rights.

Since 1997, Colombia has, for example, been issuing decisions declaring ‘unconstitutional state of affairs’ in cases involving structural breaches of human rights—that is, violations involving multiple government agencies and branches that affect a large number a people and which solution by courts requires structural injunctive remedies. These decisions relate to situations such as
as prison overcrowding,\textsuperscript{68} forced displacement of peoples,\textsuperscript{69} health care,\textsuperscript{70} social security,\textsuperscript{71} protection of activists of human rights,\textsuperscript{72} equality of conditions in processes for hiring public servants.\textsuperscript{73} Brazil has also been following a similar rationale, first by having courts providing judicial relief in cases involving the access to medicine and medical care.\textsuperscript{74} Nowadays, the Brazilian Supreme Court has been extremely activist in cases of structural violations, having reformed policies that discriminated LGBT people\textsuperscript{75} and established a general right to compensation to all people subjected to inhumane imprisonment conditions.\textsuperscript{76} The Argentine Supreme Court has also demanded changes in local policies and designed a system of judicial monitoring for their implementation in areas of public interest, such as prisons and the environment.\textsuperscript{77}

It is difficult for judges to detach themselves from the legal and political realities of cases that involve gross violations. In Latin America, however, such engagement does not arise from individual urges of judges, but from a common regional culture that has been developed as part of processes of democratization of these countries.\textsuperscript{78} Such culture of political engagement reflects on some clear political standings by states’ domestic courts. Costa Rican and Colombian courts have developed very clear political positions towards contributing to the progressive development of rights, while Chilean courts have opted for more conservative standings. Politics has, therefore, become a major element in Latin American states domestic judiciaries.\textsuperscript{79}

Domestic court’s tendency to participate in democratization processes and directly engage in policymaking has been replicated in the interpretation methods and guidelines adopted at the Inter-American Court. The Court guides its interpretation of the American Convention on Human Rights by the principles of ‘progressive’ and
‘evolutive’ interpretation.\textsuperscript{80} While to Court does not provide a clear definition of what these principles entail, they seem to imply an authorization for the Court to follow more innovative approaches and use its judicial activity to change rules in the Convention.\textsuperscript{81}

The public-oriented character of the Inter-American Court has, therefore, risen from below. The Inter-American Court was created and consolidated in the same period during which domestic courts were going through democratic reforms.\textsuperscript{82} Moreover, the judges and government officials of the Inter-American Court are educated and trained in domestic legal cultures and carry these cultures with them once they take over their offices at the Court. The Court’s work has, therefore, become part of a larger legal effort to create a legal system that contributes to these processes of democratization by developing democratic values and rights.

The Inter-American Court’s public orientation, therefore, reflects on its mission to push for the progressive development of human rights and democracy among Member States. There is also an expectation that the Court’s decisions will also reflect on the progressive development of human rights domestic systems. The Court has assumed the role of upholding human rights in the region and of pushing Member States to incorporate their rights into their domestic systems by compensating victims and developing new policies.

\textbf{B. Reactions from the Member States and Accountability}

If, on the one hand, the Court role as a human rights’ trailblazer implies some power to make expansive interpretations, on the other hand, the Court must also take into account the limits imposed by Member States in their consent. Even the most public-oriented courts will have private limitations to their activities. It is no different from the Inter-American Court. When a state accedes to the Inter-American Court, they do not give the Court a blank authorization to judge as it pleases. The Court cannot involve third parties into cases and its interpretations—even the broad ones—must be legally justified within the limits of the regional human rights framework.

The Court has shown that it is aware of its own private-oriented dimensions when it recognized limits to its own authority in cases such as \textit{Vargas-Areco v Paraguay} and the advisory opinion on human rights and the environment.\textsuperscript{83} However, identifying the exact limits to state consent is not an easy task. When they accede to the Court, Member States agree to the Court’s jurisdiction under some open terms, but they have little opportunity to clarify what those terms are. Unlike other international tribunals, Member States do not reunite specifically to discuss the performance of the Court, which means that they lack a formal setting where they can voice concerns and positions about the overall legal opinions and directions.

\begin{itemize}
\item \textsuperscript{80} These methods have been mentioned in, eg \textit{Comunidad Mayanga (Sumo) Awas Tingni v Nicaragua} (2001) IACtHR, (ser C) No 79, para 148.
\item \textsuperscript{81} Malarino (n 2) 671–72.
\item \textsuperscript{82} Bailliet (n 3) 478–79.
\item \textsuperscript{83} (Merits, Reparations and Costs) (26 September 2006) para 108 (stating that the Court cannot impose domestic legislation on desertion); \textit{Medio Ambiente e Derechos Humanos} (Opinión Consultiva OC-23-17) (15 November 2019) para 20 (discussing the limits of the Court’s advisory jurisdiction).
\end{itemize}
taken by the Court. In the absence of a general forum to interact and discuss, the interaction between the Court and its Member States is usually done on a case-by-case basis. States, therefore, have limited capacity to engage with the decisions issued by the Court. Nevertheless, the Court has the capacity to interpret its own powers and uses them to advance human rights in the region is still limited by how much its Member States are willing to accept its decisions and catch up with the developments it is trying to push through.

Despite the very creative positions often taken by the Court, Member States generally support the Court’s authority in the region. In fact, Member States have often gone through substantive changes in their domestic policies to comply with the Court’s rulings. In the Last Temptation of the Christ, Chile went as far as to change its constitution to better fit the ruling of the Court in its domestic legal framework. Brazilian Superior Courts have imposed changes in domestic policies regarding contempt and revision of judicial decisions based on the cases of Palamara-Iribarne v Chile and Barreto Leiva v Venezuela. The Constitutional Court of Peru has also consolidated the position that interpretations issued by the Inter-American Court should bind domestic judgments.

Aside from a regional culture that supports the judiciary’s role in pushing human rights forward, membership and compliance with judgments of the Court play a reputational role in Member States’ international relations. Human rights compliance is often associated with democratic regimes that engage and respect civil society. Supporting human rights, therefore, legitimizes political governments’ discourse at a national and community level and cooperating with the Court and complying with its judgments reflects positively in a government’s reputation. Member States have therefore avoided engaging on general or long-standing political conflicts with the Court.

States which chose to be involved in severe political conflicts with the Court did so during periods of democratic deficit. For example, during the Fujimori government, Peru decided to withdraw the Court’s jurisdiction, a decision reversed by in its transition to democracy in the early 2000s. Another example is the Venezuelan

84 Vogelfanger (n 54) 258.
85 Olmedo Bustos et al v Chile (Monitoring Compliance with Judgment) (28 November 2003).
86 Superior Tribunal de Justiça, Resp 1.640.084/SP, Rel Min Ribeiro Dantas, Quinta Turma, 15 December 2016, DJE 13 February 2017 (Braz).
87 Supremo Tribunal Federal, AP 470 AgR-Vigésimo Sexto, Rel Min Joaquin Barbosa, Rel p/ ac Min Roberto Barroso, Tribunal Pleno, 18 September 2013, DJE 17 February 2014 (Braz).
88 Palamara-Iribarne v Chile (n 57).
89 (2009) IACtHR (ser C) No 206.
90 Vogelfanger (n 54) 273–74.
91 It is, however, questionable whether this reputational role reflects reality. See, in this sense, Erik Voeten, ‘Domestic Implementation of European Court of Human Rights Judgements: Legal Infrastructure and Government Effectiveness Matter: A Reply to Dia Anagnostou and Alina Mungiu-Pippidi’ (2014) 25 European Journal of International Law 229.
92 Domingo (n 63) 260.
93 Helfer and Slaughter (n 4) 932–33; Robert E Scott and Paul B Stephan, ‘Self-Enforcing International Agreements and the Limits of Coercion’ (2004) 2004 Wisconsin Law Review 551, 563.
94 ‘Ratifications and Accessions to the American Convention on Human Rights’ (CIDH.org) <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm#21> accessed 14 November 2019.
withdrawal from the Court’s jurisdiction in 2012, the same year when the country was downgraded from a democracy to an authoritarian regime by the Polity Project. In this sense, the acceptance of the Court’s jurisdiction and demonstrations of political support are symbolic of that country’s engagement with the process of democratization and strengthening of human rights in the region and may affect its international reputation within regional and global communities.

However, failing to engage in political conflict with the Court does not necessarily mean that its Member States lend unrestricted support to the Court’s decisions. According to a 2013 study by Baillet, Member States usually comply with 47% of the judgments condemning them to provide symbolic monetary compensations to victims and only with 24% of decisions ordering the investigation and sanctioning of perpetrators of human rights. Although the Inter-American Court usually monitors compliance with its decisions, it can only enforce compliance through political pressure. In cases where such political means fail, the Court depends entirely on the will of domestic courts to assist it with the enforcement of decisions.

Under the public-oriented judicial culture of Latin America, it would be hard to believe, at a first glance, that any domestic judiciary would refuse such assistance to the Court. Nevertheless, this has been the case of the Costa Rica in relation to the decisions issued in Artavia Murillo et al v Costa Rica, where the Court ordered the annulment of a Costa Rican law prohibiting in vitro fertilization. In its judgment, the Court stated that ‘there is no agreed definition of the beginning of life’. Such claim directly contradicts Article 4(1) of the American Convention on Human Rights, which establishes that the right to life starts the moment of conception. The Constitutional Court of Costa Rica dismissed six lawsuits from citizens trying to enforce the Artavia Murillo judgment, stating that it went against its own case law involving Article 4(1), which was favourable to the prohibition of in vitro fertilization and that there was no hierarchy between the Court and the Costa Rican judiciary that would justify changing its position.

In 2017, the Argentine Supreme Court, a traditional supporter of Inter-American Court, issued a decision rejecting the Court’s capacity of reviewing the outcome of domestic cases. The case of Fontevecchia and D’Amico v Argentina involved two journalists who were held liable domestically for publishing information about the former president of Argentina’s family life in a news magazine. The Court ruled that

95 'IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights' (OAS.org, 12 September 2012) <http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp> accessed 14 November 2019.
96 Monty G Marshall and Ted R Gurr, 'Polity IV Project' (Center for Systemic Peace, 2018) <http://www.systemicpeace.org/polityproject.html> accessed 14 November 2019.
97 Baillet (n 3) 480.
98 ibid 478.
99 (2012) IACtHR (ser C) No 257, s 185.
100 Artavia Murillo et al v Costa Rica (Monitoring Compliance with Judgment) (26 February 2016) IACtHR, ss 11–13.
101 Vogelfanger (n 54) 273.
102 CSJN 368/1998 34-M/CS1, Ministerio de Relaciones Exteriores y Culto s/ Informe Sentencia Dictada en el Caso ‘Fontevecchia y D’Amico vs. Argentina’ por la Corte Interamericana de Derechos Humanos, 14 February 2017.
the domestic decision violated the journalists’ right to freedom of expression and ordered the Argentine judiciary to change the outcome of the Argentine Supreme Court judgment. The Argentine Supreme Court and Ministry of Foreign Relations prepared a joint response to the Inter-American Court, where they explained that they would not comply with that order because it was *ultra vires*. According to the response, the Inter-American Court is bound by the principle of legality and could only provide reparations in the forms authorized by its constitutive instruments—which do not include the possibility of changing constitutional courts’ judgments that have the quality of *res judicata*.

Therefore, the Inter-American Court’s position in *Fontevecchia and D’Amico* not only violated the principle of *res judicata*, but also contradicted the Court’s own case law.

More recently, the Court’s Member States have produced more general protests against the Court’s public orientation. In April 2019, Argentina, Brazil, Chile, Colombia and Paraguay—which, together, account for 25% of the cases sent to the Court between 2006 and 2017—issued a joint statement where they explained what they expected from the Court. The five states expressed that desired the Court to interpret human rights standards and other rules of international law more restrictively, and to defer more to domestic authorities in its decisions regarding both, implementation of rights and investigations of violations. Such deference would imply accepting states’ right to integrate international human rights rules into their domestic systems through their own domestic legislative processes, and that states enjoy a margin of discretion when designing such implementation. Although the Court has given no official response, other organizations interpreted the joint statement as an attempt to undermine the Inter-American System of human rights.

The joint statement can also be seen as a legitimate attempt of the five signatories to clarify the limits of their consent. It indicates that the signatories wish the Court to be less public oriented. The system they describe seems to be largely inspired on the European Court of Human Rights, which known for offering more restrictive interpretations of human rights and for granting states more deference through the doctrine of margin of appreciation (explicitly mentioned in the joint statement).

Adhering to those terms might require larger reforms in the Inter-American System,
since the European Court’s private orientation requires in a different way of engaging with states and individuals, and a facilitated access of individuals to the Court. However, it seems that the signatories want the Inter-American Court to move interpretation towards a more private-oriented and restrictive model of its European Counterpart, while keeping the public-oriented procedure it currently has. The preamble of the joint statement mentions private petitions as fundamental pieces to the system, but there is no suggestion to expanding private petitioning or other procedural reforms that would allow the Court to engage more with individuals.

The Court’s public orientation, including its capacity to issue interpretations that bind all Member States and to examine the substance of domestic authorities’ conducts, gives the Court the advantage of establishing standards that are clear to all stakeholders in the system. The Court is, therefore, able to optimize resources and outreach, while maintaining a smaller caseload and structure. Adopting a private-oriented interpretation would imply that judgments would have more restrictive effects, failing to reach stakeholders that are not directly involved in proceedings. At the same time, failing to address the concerns expressed by the signatories might result in justifiable refusals to comply with decisions.

While the Court’s public role may consist of more than just solving and enforcing individual judgments,113 states’ refusal to comply with private dimensions of its judgments may undermine its institutional legitimacy.114 International tribunals who are unable to assert their legitimacy before their Member States face operational challenges: case progress is affected by budgetary issues because Member States are not willing to contribute financially with their work, staff is insufficiently qualified.115 It is, therefore, in the interests of international tribunals to try to identify the limits of their powers in practice.

Under the logic of finding the limits for the power of the Court, it is normal to see Member States such Costa Rica and Argentina, who are usually supportive of the Court’s work, keeping the Court in check by refusing to comply with excessive or wrong decisions. In their refusal, they examine, in different levels of detail, the role played by Court within the region and the limits of its powers in relation to domestic systems to conclude that specific decisions were illegal. Bazañ and Alcalá have both suggested that these responses should be taken into consideration by the Court in the form of suggestions by Member States,116 while Contesse stresses that, while the Court should make a genuine effort to engage in judicial dialogue with domestic
courts, it will still have the final word on what is the applicable human rights standard in any case. From their perspective, it would be desirable for the Court to engage with domestic responses to their judgments, but that the ultimate authority in the system will remain with the Court in any case. These opinions, however, are based on a broad idea that the Court’s existence, power and authority are independent from states. This is not, however, the reality of the Court.

As with any other international organization, the Court was created by Member States to fulfil certain specific functions and its powers only exist while directly linked to those functions. As such, even the Court’s attempts to innovate and be judicially creative must attain to the limits imposed by states or otherwise risk being rejected by states as wrong or excessive. Member State responses that engage in legal discussions with the court and clarify the limits of Member States consent should not be seen as suggestions by Member States that the Court may or may not take into account, but rather exercises of legal oversight over the Court’s work. It is, therefore, the Court’s duty to take these responses into account and to interact with them as part of their judicial activities. Although reactions such as these may sometimes be interpreted as backlash against the Court’s activity, they are actually key to preserving the Court’s legitimacy and institutional credibility, because they help the Court in identifying its own powers and acting within them.

4. CONCLUSION

The legal and political realities surrounding the Inter-American Court of Human Rights grant the Court very broad powers to engage in law-making and act politically. The Court’s role as a trailblazer for human rights in the region therefore reflects the domestic reality of Member States, where transitions to democratic regimes have pushed courts to engage more actively in law-making. However, even trailblazers cannot rush wildly into the woods. They require minimal support—trackers, compasses and maps—when developing new trails.

The Court’s law-making powers are, therefore, developed jointly with Member States and subject to their oversight. Issuing ultra vires decisions will inevitably generate strategic reactions from Member States and ignoring such reactions can jeopardize the Court’s institutional legitimacy and everyday activities. The use of political methods by States to ensure the accountability of international tribunals is usually frowned upon by the international community, being regarded as a backlash or attempts to avoid responsibility for illegal actions that are condemned by the Court. While backlash is, indeed, a reasonable explanation for some reactions to the Court’s work, interpreting every negative reaction to a judgment as a backlash may be an exaggeration. Another possible explanation is that these responses are also an exercise of oversight over the Court’s work. Dismissing these attempts to exercise oversight is not only patronizing, but also puts the Court’s institutional and judicial credibility at risk, since Member States will stop relying on its judgments as standards of human rights.

117 Contesse (n 60) 414.
118 See, in particular, the Court’s reaction to the Argentine response in Fontevecchia y D’Amico, described by the tribunal as ‘worrying’, Fontevecchia y D’Amico v Argentina (Supervisión de Cumplimento de Sentencia) (18 Octobre 2017) IACHHR, paras 30–32.
What distinguishes a backlash from an exercise of oversight by Member States is not the refusal to comply, but also the terms of such refusal. Backlash has the goal of avoiding responsibility for an illegal action. Therefore, when a Member State backlashes against a decision of the Court, it does not question the validity of that decision or whether it is correct or not. The refusal to comply is, in this case, an illegal action on its own. In contrast, a response that results in the exercise of oversight is accompanied by a legal justification that explains why and to what degree the Court has extrapolated its own powers. Moreover, the Member State exercising oversight does not reject the authority of the Court as a whole and will only refuse to comply with *ultra vires* parts of the judgment. Given the legal nature of Member States’ oversight, a better way for states to exercise oversight over the Court’s decisions is through legal justification and evaluation of such decisions by domestic judiciaries.

Falling into extreme private- or public-oriented profiles by establishing either fixed limits to courts or absolute powers for interpreting their legislative framework is contrary to the nature of adjudicatory systems and tends to distort them. The Court is not just a trailblazer, opening new paths for the protection of, and compliance with, human rights in the Inter-American System through legislative powers. The Court is also a tracker of states’ consent, carefully following explicit clues on the American Convention on Human Rights and the rather hidden marks of agreement and compliance with its judgments. In this respect, the Court’s authority and states’ consent with its judgments should not be measured by how the path is created or how these two actors perform their roles in it. The focus should be shifted to how the trail is being built by the interaction between states and the Court while the latter performs its mandate. In this sense, the dynamic argumentative legal exchange engaged by the Court and states is a healthy way of promoting mutual accountability, while maintaining flexibility for adaptations by both parties and preserving the internal coherence of the regional system. The Court and its Member States must become familiar with such interactions and measure the limits of such powers in a case-by-case analysis within their regional political and legal context.