

**TO SPEAK WITH ONE VOICE: THE POLITICAL EFFECTS OF CENTRALIZING THE  
INTERNATIONAL LEGAL DEFENSE OF THE STATE**

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**TABLE OF CONTENTS**

ABSTRACT .....	558
I. INTRODUCTION .....	558
II. SPEAKING WITH ONE VOICE BEFORE THE US SUPREME COURT .....	564
A. Litigation Strategies to Represent Inter-Branch Interests .....	566
1. Defending Congress: Congressional Standing, Amicus Brief, and Private Parties .....	570
III. POLITICAL EFFECTS OF THE CENTRALIZATION OF THE LEGAL DEFENSE OF GOVERNMENT ACTS .....	573
A. Executives Using Judicial Supremacy to Expand their Powers.....	574
B. Adjudication as an Instrument of Political Coalitions.....	576
IV. THE INTER-AMERICAN SYSTEM.....	580
A. Intro to the Operation of the IACtHR .....	583
1. The Origins: Sovereignty First.....	583
2. The 1969 Structure for a New Political Context: The Rise of Military Coups .....	587
B. Becoming a Politically Consequential Court at the Domestic Level .....	591
1. The Influence of US Legal Liberalism in the New Constitutional Landscape .....	591
2. The Period of Expansion .....	595

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V. THE EFFECTS OF THE EXPANSION OF THE IACtHR ON DOMESTIC INTER-BRANCH POLITICS .....	601
A. From Opposition to Government in Power .....	602
B. Venezuela as a Case of Study: The Caracazo Case.....	606
1. The Early Months of Chavez in Power .....	607
2. The Recognition of Responsibility before the IACtHR .....	608
C. Chile as a Case of Study: The Last Temptation of Christ Case .....	610
1. The 1980 Constitution and Transition.....	610
2. The Inter-American Process: Declining to Defend the Decisions of the Judiciary and the Constitution.....	614
D. Costa Rica as a Case of Study: The Artavia Case Saga.....	617
1. The Constitutional Balance of Powers in Costa Rica.....	617
2. Human Rights and the Constitutional Order. ....	619
3. The Constitutional Chamber and the Right to Life .....	620
4. The Proceedings Before the Inter-American System .....	623
5. Imposing an Unconstitutional Executive Decree .....	628
VI. LESSONS FROM THE UNITED STATES AND INTER-AMERICAN EXPERIENCE ....	630
VII. CONCLUSION .....	633

### ABSTRACT

When a government official defends a case before an international court, whose interest should he/she be representing? In today's era of expanding international treaties that give standing to individual claimants, international courts review the actions of different government actors through the yardsticks of international law. The state is not unitary; alleged victims can bring international claims against various government entities including the executive, the legislature, the administrative branch, and the judiciary. Yet, the international legal defense of government actions is in the hands of the executive power. This paper focuses on the consequences of this centralization for inter-branch politics. It explores the lessons learned in US constitutional law concerning the role that executive power plays in defending the interests of the federal government before the Supreme Court, and compares them with the experience of Latin American executives in litigating cases before the Inter-American Court of Human Rights (IACtHR).

### I. INTRODUCTION

International judicial proceedings are structured so that governments speak to courts with one voice.<sup>1</sup> And in most, if not every state, the executive branch is

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<sup>1</sup> Section 2 of Article 7 of the Vienna Convention on the Law of Treaties crystalized the custom in international law of assuming that the State is represented by a single voice mostly commonly expressed by the executive power in the form of Heads of State, Heads of

this voice.<sup>2</sup> Judicial proceedings typically do not allow other branches or government officials to participate in the process. Yet, the governments of many democracies, just as in the United States, operate under a system of formal separation of powers and independent administrative agencies. State interests are composed of a plethora of agendas formulated by diverse government actors.<sup>3</sup> In judicial proceedings the state may still be treated as a unit, but in practice the vast majority of contemporary states are not close to “unitary.”<sup>4</sup> Moreover, international courts have moved beyond resolving exclusively inter-state conflicts involving boundary disputes or war-related settlements.<sup>5</sup> International judicial proceedings today give individuals standing to bring claims that question the exercise of public power at the domestic level.<sup>6</sup> Presidents, legislative bodies, domestic courts, and government agencies take actions that can be considered contrary to international

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Government, and Ministers of Foreign Affairs. (“In virtue of their functions and without having to produce full powers, the following are considered as representing their State: a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purposes of performing all acts relating to the conclusion of a treaty.”), Vienna Convention on the Law of Treaties, Vienna Convention on the Law of Treaties, art. 7, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. See also Mary Ellen O’Connell & Leonore VanderZee, *The History of International Adjudication*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 40, 46-60 (Oxford Univ. Press, 1st ed. 2014). When the Permanent Court of International Justice, the first permanent international adjudicative body, was designed in 1920, the rules of its proceedings assumed that when the representative of the state appears before the court he/she would be defending the interest of the “state/nation.” See Karen J. Alter, *The Multiplication of International Courts and Tribunals After the End of the Cold War*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 63, 63-87 (Oxford Univ. Press, 1st ed. 2014). The international courts that have followed since then have replicated this general organization of the proceedings. Cesare P.R. Romano, *Progress in International Adjudication: Revisiting Hudson’s Assessment of the Future of International Courts*, in PROGRESS IN INTERNATIONAL LAW 433, 433-50 (Russell Miller & Rebecca Bratspies eds. 2008); ADVISORY COMMITTEE OF JURISTS, DOCUMENTS PRESENTED TO THE COMMITTEE RELATING TO EXISTING PLANS FOR THE ESTABLISHMENT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE 379 (1920).

<sup>2</sup> Vienna Convention, *supra* note 1, Art. 7; Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT’L. DISPUTE SETT. 241, 275 (2011); MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 128 (1944).

<sup>3</sup> Erwin N. Griswold, *The Office of the Solicitor General-Representing the Interests of the United States before the Supreme Court*, 34 MO. L. REV. 527, 530 (1969) (stating how Solicitor General Erwin Griswold’s experience in the office was a “vivid realization of how disparate the government’s legal interest have become.”).

<sup>4</sup> By unitary I make reference to the idea that States behave like single units, as opposed to being composed of different actors, sectors, agencies, regions, etc.

<sup>5</sup> O’Connell & VanderZee, *supra* note 1, at 47-48; Alter, *supra* note 1, at 64; HUDSON, *supra* note 2, at 18-31; Romano, *supra* note 1, at 438.

<sup>6</sup> KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 107-08 (Princeton Univ. Press 2014); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, LAW CONTEMP. PROBL. 15, 56-57 (2005).

law and are subject to challenge before a supranational court.<sup>7</sup> Yet, only the presidents have the power to defend these actions. The officers who represent the country have to decide how to put all those interests together and their litigation strategies could leave some of those voices without a defense.

The primary claim of this paper is that the authority to argue the international legality of government acts before international courts has an important national political dimension rooted in present-day divisions of power between an executive and other government actors. Executives can use their authority to present claims in court in the name of the government to try to maximize their power or advance their policy agenda. They can downplay certain arguments or decline to defend certain acts at the expense of other branches' interests.

The system of supranational human rights adjudication in Latin America offers an opportunity to study the political tensions that emerge among branches when the authority to present arguments in court is in the hands of the executive power. For a few years now, the IACtHR has been acting as a supranational constitutional court that seeks to impose an *ius constitutionale commune* on the region.<sup>8</sup> Part of this expansion includes an assertion of judicial supremacy that has transformed it into a politically consequential court for the exercise of governmental power at the domestic level. The IACtHR gives direct orders to domestic courts, and leaves the acts of other government actors without legal effects.<sup>9</sup> In other words, it is assuming similar functions to the ones performed by supreme or constitutional courts.<sup>10</sup> The court has used the American Convention of Human Rights as an exemplar to which constitutional rights and doctrines in the region

<sup>7</sup> ALTER, *supra* note 6, at 112; Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 YALE L. J. 1490, 1501–02 (2006); Stephan Schill, *International Investment Law and Comparative Public Law: An Introduction*, 22 EUR. J. INT'L L. 909, 919–20 (2010). See generally Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 147–48 (1st ed. 2007); Kingsbury et al., *supra* note 6. The United States has also faced international cases dealing with acts of different government authorities. See e.g., Ted Cruz, *Defending US Sovereignty, Separation of Powers, and Federalism in Medellin v. Texas*, 33 HARV. J. L. PUB. POL'Y 25 (2010).

<sup>8</sup> Ariel E. Dulitzky, *An Inter-American Constitutional Court-The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L.J. 45, 68 (2015); Armin von Bogdandy, *Ius Constitutionale Commune en América Latina: Una Mirada a un Constitucionalismo Transformador*, 34 Rev. Derecho del Estado 3, 30 (2015); EDUARDO F. MAC-GREGOR & ALFONSO H. GARCIA, *DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES* 350–51 (Tirant lo Blanch 2013).

<sup>9</sup> Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 355–87 (2008); Gerald L. Neuman, *Bi-Level Remedies for Human Rights Violations*, 55 HARV. INT'L L. J. 323, 325 (2014).

<sup>10</sup> Dulitzky, *supra* note 8, at 46.

should be compared. In this process of expansion, the most affected branch has been the local judiciary.

To address the political impact of judicial proceedings, this paper builds on US literature about socio-legal traditions and comparative constitutional politics.<sup>11</sup> It analyzes the adjudicatory systems from the perspective of the politics behind the legal process, of the parties involved in it, and how this shapes the way the system operates.<sup>12</sup> The literature in US constitutional law on the different political variables that surround the Department of Justice's (DOJ) defense of the legal actions and interpretations of the executive branch before the Supreme Court offers analytical tools that can be deployed to help understand similar phenomena in international proceedings.<sup>13</sup> At the heart of this US constitutional debate lies the question of whether the President can be said to represent the interests of the entire government, or even the entire executive branch. The officers at the DOJ may be some of the most qualified legal experts, but "knowledge of the law does not equate to knowledge of the interests of the United States."<sup>14</sup> In both the domestic US proceedings and the international proceedings we can focus on the way that executives present legal arguments in court and review which branches benefit.<sup>15</sup>

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<sup>11</sup> See e.g., Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. SOC. REV. 95 (1974); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 1–28 (2007); CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds., 2013) [hereinafter CONSEQUENTIAL COURTS].

<sup>12</sup> Galanter, *supra* note 11; WHITTINGTON, *supra* note 11; CONSEQUENTIAL COURTS, *supra* note 11.

<sup>13</sup> Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1073, 1076 (2001); Griswold, *supra* note 3, at 531; Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One among Many?* 46 FORDHAM L. REV. 1049, 1066 (1978); Todd Lochner, *The Relationship between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 49 VA. L. REV. 549 (1993); Neal Devins & Saikrishna B. Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 275–78 (1993) [hereinafter Devins, *Political Will and the Unitary Executive*]; Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994) [hereinafter Devins, *Unitariness and Independence*]; Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558 (2002) [hereinafter Devins & Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*]; Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205, 208–15 (1998) [hereinafter Devins & Herz, *The Battle That Never Was*]; Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012); Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014).

<sup>14</sup> Lochner, *supra* note 13, at 572.

<sup>15</sup> By having a monopoly over the defense, executive powers can play for long-term results—for decisions that have an impact on the internal distribution of power—rather than

A comparative analysis of the Inter-American system and US constitutional proceedings offers new answers to academic debates on the separation of powers, the expansion of judicial supremacy, and the relations between supranational and domestic courts. For comparative constitutional law scholars who focus on the development of judicial supremacy, the findings presented in this paper confirm research showing that political actors promote the expansion of judicial supremacy as a way to advance their own agenda.<sup>16</sup> Courts become politically consequential institutions because other government branches benefit from having a judicial body translate constitutional provisions into guidelines for public life.<sup>17</sup> This paper adds to this literature by finding that domestic political actors can also use the expansion of supranational adjudication to limit the work of domestic judges.<sup>18</sup> This finding controverts the seminal literature on judicial dialogues.<sup>19</sup> Most studies on this subject suggest that the existence of supranational judicial bodies helps domestic judiciaries become more independent and enhance their role in governance at the domestic level.<sup>20</sup>

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for outcomes in favor of the state/federal government in each particular case. Bell, *supra* note 13, at 1056; Waxman, *supra* note 13, at 1074–76.

<sup>16</sup> RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 35 (2007) [hereinafter HIRSCHL, TOWARDS JURISTOCRACY]; Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT'L J. CONST. L. 1, 5–7 (2013) [hereinafter Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*]; Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 721–23 (2006); WHITTINGTON, *supra* note 11, at 230–84; MARTIN M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981) [hereinafter SHAPIRO, COURTS]; Martin Shapiro, *Judicial Review in Developed Democracies*, 10 DEMOCRATIZATION 7 (2003) [hereinafter Shapiro, *Democracies*].

<sup>17</sup> HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 16, at 100–48; Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, *supra* note 16, at 1; CONSEQUENTIAL COURTS, *supra* note 11, at 67–92.

<sup>18</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 289–93; J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

<sup>19</sup> The first articles on judicial dialogues were written by Anne-Marie Slaughter, *A Global Community of Courts*, 44.1 HARV. INT'L L. J. 191 (2003); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997); Karen J. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, THE EUROPEAN COURTS AND NATIONAL COURTS 228 (1998). For the contemporary views that build on the literature see ALTER, *supra* note 6, at 112; see generally Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17, 110 (2014); Vicki C. Jackson, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (Oxford Univ. Press 2010).

<sup>20</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 24; J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 523 (1994); Helfer & Slaughter, *supra* note 19, at 282–84; Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT'L ORG. 183 (1995); Anne-

According to this literature, supranational courts such as the European Court of Justice or the European Court of Human Rights have made it difficult for domestic political actors to “retaliate” against domestic judges for expanding their powers.<sup>21</sup>

The findings of this paper also show that the way the system operates today upends the original impetus for the Inter-American system of human rights. In the 1980s, Latin America was slowly abandoning authoritarian regimes in which executives and military governments had abused their powers.<sup>22</sup> The designers of the new constitutions—NGOs, academics, and officials—were highly influenced by the European experience and by US legal liberal academics of the 1970s.<sup>23</sup> Following the same logic of the European-centered literature, they believed that the constitutionalization of international human rights treaties and the creation of the IACtHR would help domestic judges become more independent, and prevent executive power from expanding again. The experience of the IACtHR presented here reveals a different story—one in which the interests of the international court, under certain circumstances, align with those of domestic executive actors to control the domestic judiciary. The judicial proceeding before the IACtHR and the centralization of the defense of the state are tools that allow these actors to restrain local judges.

The organizational plan of the paper is as follows. Section I details the theories of US constitutional adjudication that discuss the advantages and disadvantages of centralizing the defense of the government into a single voice.<sup>24</sup> Section II analyzes the consequences for inter-branch politics of this centralization. The parallel of this story in the international context is the subject of the next two sections. Section III begins with an assessment of the contours of the Inter-American System of Human Rights and shows how its Court is assuming some of the functions the US Supreme Court performs. The focus narrows in Section IV to the cases in which the executives have decided not to defend acts of other

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Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 (Winter) INT'L ORG. 41, 42 (1993).

<sup>21</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 24.

<sup>22</sup> Diana Kapiszewski & Matthew M. Taylor, *Doing Courts Justice? Studying Judicial Politics in Latin America*, 6 PERSP. POL. 741, 741 (2008); ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION 148-49 (2013); Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 141 (2010).

<sup>23</sup> Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425, 464 (1997) [hereinafter Esquirol, *The Fictions of Latin American Law (Part I)*]; Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 51 (2003) [hereinafter Esquirol, *Continuing Fictions of Latin American Law*]; Diego Eduardo & López Medina, *Teoría Impura del Derecho: la Transformación de la Cultura Jurídica Latinoamericana*, 4 CRITERIO JURIDICO 273 (2004); David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present and Future*, THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (2006); Couso, *supra* note 22, at 156.

<sup>24</sup> This paper does not focus on the constitutional grounds of the centralization for the legal defense government programs and actions.

government branches or to downplay their defenses. This Section gives three concrete cases of study that exemplify this phenomenon: the *Caracazo* case in which the incoming President, Hugo Chavez Frias, recognized in the proceeding the full responsibility of the state and used the decision of the IACtHR to begin a series of domestic prosecutions against the previous political regime;<sup>25</sup> the *Last Temptation of Christ* case in which the executive of Chile declined to defend the content of the constitution and the doctrines of the domestic supreme court, and as a consequence invited the IACtHR to order the state to modify domestic constitutional order;<sup>26</sup> and the *Artavia v. Costa Rica* case in which the IACtHR, as a way to force compliance with its remedies, ordered reinstatement of an executive decree that had previously been declared as unconstitutional by the supreme court of Costa Rica.<sup>27</sup> The concluding Section assesses the contribution of doing a comparative analysis between the US constitutional system of adjudication and the IACtHR's proceedings.

## II. SPEAKING WITH ONE VOICE BEFORE THE US SUPREME COURT

The view that the executive branch is the most adequate branch to speak on behalf of the government is often linked to the separations of powers doctrine. According to historical accounts, the US founding fathers' intention was to place a single president at the head of the executive branch in order to ensure both its vigor and political accountability.<sup>28</sup> There are many ways in which the unitariness of the executive is reflected in the powers of the president, but one is of stark importance for our analysis. As part of the White House's duty to execute the law, the defense of the federal government before the Supreme Court is done by an officer in the executive branch, the Solicitor General of the United States.<sup>29</sup> When the DOJ was created in 1870, there was a clear intention to centralize the legal activity of the federal government into one office.<sup>30</sup> The debates in Congress at that time show

<sup>25</sup> *Caracazo v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 58, ¶ 2 (Nov. 11, 1999) [hereinafter *Caracazo Merits*].

<sup>26</sup> "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, 18 (Feb. 5, 2001) [hereinafter *The Last Temptation of Christ Merits*].

<sup>27</sup> *Artavia Murillo y Otros ("In vitro fertilization") v. Costa Rica*, Monitoring Compliance with Judgment, Order of the Court, "Desarrollo del Caso," ¶ 13 (Inter-Am. Ct. H.R. Feb. 26, 2016), <http://www.corteidh.or.cr/tablas/fichas/artaviamurillo.pdf> [hereinafter *Artavia Monitoring Compliance*] (available only in Spanish).

<sup>28</sup> MARK V. TUSHNET, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS* 94 (2015). This at least was Alexander Hamilton's position in Federalist No. 70, where he defends the unitariness needed in the executive power in order to ensure energy, efficiency, and accountability in the federal government. *THE FEDERALIST* NO. 70, 423–24 (Alexander Hamilton).

<sup>29</sup> Bell, *supra* note 13, at 1050–60; Officer of the Solicitor General: General Functions, 28 C.F.R. §§ 20–21 (2000).

<sup>30</sup> Bell, *supra* note 13, at 1053.



that centralization was perceived as a way to make the government's legal affairs more efficient, reduce expenses, and especially to "insure that the federal government spoke with one voice in its view of and adherence to the law."<sup>31</sup>

Four common contemporary arguments are made in literature in favor of centralizing the defense of the government in one department.<sup>32</sup> First, it is argued that centralization helps avoid conflicting arguments from all the government actors involved.<sup>33</sup> Second, the executive is in the best position to determine the "long-range interest of the United States."<sup>34</sup> This point assumes that the interests of the other agencies or powers are more parochial and individual.<sup>35</sup> Third, the DOJ can serve both as a mediator of interagency disputes and as a gatekeeper of cases for the Supreme Court.<sup>36</sup> In sum, the Attorney General can help to filter disputes and thereby aid the highest court.<sup>37</sup> Lastly, centralization in the executive power benefits the entire federal government and its branches because the DOJ can build a reputation and litigation expertise that will result in more beneficial decisions.<sup>38</sup> In this view, the Solicitor General is not only an individual lawyer representing a client, but also a repeat player who has an "institutional relationship of a continuing nature" with the Court.<sup>39</sup> This is positive in the long-term, even if the Solicitor General must at times decide not to defend the interest of some governmental actors in order to preserve it.<sup>40</sup>

Contemporary arguments against centralization are given by federal agencies and Congress, which feel that at times their interests are not being represented well or even taken into consideration. Congress has written letters to

<sup>31</sup> Bell, *supra* note 13, at 1053; Griswold, *supra* note 3, at 529–30.

<sup>32</sup> George F. Fraley III, Note, *Is the Fox Watching the Henhouse: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L. J. AM. U. 1215, 1255–56 (1995) (Fraley in addition to the four advantages also argues that the "expertise of the Solicitor general in Supreme Court litigation benefits the agency it represents." In this point, as it will be discussed in the article, international litigation departs, since at the international level the conflicts that arise are between branches of government and not between agencies of the same branch."); Lochner, *supra* note 13, at 572.

<sup>33</sup> Lochner, *supra* note 13, at 571; Bell, *supra* note 13, at 1058, 1060.

<sup>34</sup> Bell, *supra* note 13, at 1059–60; Lochner, *supra* note 13, at 571; Griswold, *supra* note 3, at 528, 535.

<sup>35</sup> Lochner, *supra* note 13, at 572; Bell, *supra* note 13, at 1058–59.

<sup>36</sup> Bell, *supra* note 13, at 1058; Waxman, *supra* note 13, at 1076–77.

<sup>37</sup> Bell, *supra* note 13, at 1060–61; Griswold, *supra* note 3, at 535.

<sup>38</sup> Bell, *supra* note 13, at 1061–62.

<sup>39</sup> Griswold, *supra* note 3, at 534.

<sup>40</sup> *Id.* (according to Griffin Griswold, the Solicitor General "must make a rather difficult judgment: What *should* he ask the Court to decide; how much ought he to prevail upon; what will be the effect of a particular position or decision in the case, not only upon the government's interest, narrowly considered, but upon the values and principles that underlie and animate our system and upon the development of the law in general. These are considerations which rarely enter into the professional processes of private litigation, but they are factors which must always be carefully considered by the Office of the Solicitor General.")

the DOJ complaining about the “lackluster and unenthusiastic”<sup>41</sup> defense of federal legislation and deploring the practice of defending the interest of the executive over those of the other branches of government.<sup>42</sup> As Griffin Bell, a former Attorney General, explained, “the DOJ’s efforts to ensure uniformity in government litigating postures can constitute a real threat to them.”<sup>43</sup>

The following subsections make the case that the DOJ has developed certain practices to try to mediate the conflicting interests of the federal branches, but that the President always retains the upper hand in defining the litigation strategies in those cases in which he has a special interest. Yet, this has not prevented the Supreme Court from hearing arguments in favor of other branches of government. In many cases members of Congress have presented *amicus* briefs expressing opposing views to the ones presented by the DOJ. Moreover, private litigants, when arguing against actions taken by the President, have based part of their claims on the fact that the actions needed congressional approval or that the powers belonged to Congress.

#### **A. Litigation Strategies to Represent Inter-Branch Interests**

There are different ways in which conflicting views among the Administration, Congress, and the federal agencies can be manifested in the DOJ’s litigation strategies. For example, the Solicitor General might present a brief on behalf of the United States, but the DOJ might also submit an *amicus* brief with a different position more aligned with the executive’s interest. The Solicitor General might decide not to appeal a case where an agency is involved or even petition for a *writ of certiorari* to the Supreme Court, leaving the agency’s interests without an opportunity to be considered by the highest court.<sup>44</sup> The Solicitor General might

<sup>41</sup> Waxman, *supra* note 13, at 1082 n. 35 (citing the remarks of Sen. James Abourezk regarding the Solicitor General’s defense of the Voting Rights Act).

<sup>42</sup> *Id.* at 1082 (documenting the statements against Solicitor General Bork and his defense in *Buckley v. Valeo*).

<sup>43</sup> Bell, *supra* note 13, at 1058. *See also* CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 55–56 (1992) (“The majority of recent Solicitors General would agree that the office owes allegiance to the Supreme Court as well as to the executive . . . . The court reciprocates this relationship. The Solicitor General provides accurate and complete representations and assistance in selecting meritorious cases; the Supreme Court extends to the Solicitor General special privileges and confidence that no other litigant enjoys. This commonality of interest between the Solicitor General and Supreme Court led Professor Kathryn Werdagar to describe the Solicitor General as the Court’s ‘ninth and a half Justice.’”)

<sup>44</sup> Bell, *supra* note 13, at 1066 (“He is also responsible for deciding whether lower court decisions adverse to the Government should be appealed, and whether the Government should file *amicus curiae* briefs in cases to which it is not a party.”); Griswold, *supra* note 3, at 531; Adam D. Chandler, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L. J. 725, 725 (2011) (“Acting as the final ‘decider’ on the

present a brief with certain arguments on behalf of the United States, but also express his concerns with them in sections of the brief, such as footnotes,<sup>45</sup> or in oral argument.<sup>46</sup>

In the most extreme cases, the executive branch can decline to defend, or downplay certain defenses, if an act of Congress or an agency is constitutionally challenged.<sup>47</sup> For example, the Solicitor General can present the two views, Congress' or the agency's, and the President's, signaling the Court that there is disagreement among branches; or, the Solicitor General actively and exclusively argues against the constitutionality of the congressional act.<sup>48</sup> Regarding the first

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overwhelming majority of federal appeals, the Solicitor General has a vast and underscrutinized amount of discretion over the federal government's legal agenda.”).

<sup>45</sup> Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L. REV. 1187, 1187 (arguing that in the 1983 case of *Bon Jones University v. United States* the Solicitor General's contradictory roles were reflected when he stated, in a footnote to the government's brief, his disagreement with the administration's position). See also Brief for the United States at 1, *Goldboto Christian Schools, Inc. v. United States*, 454 U.S. 892 (1981) (No. 81-1); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3); CLAYTON, *supra* note 43, at 54–55 (arguing that this practice started with Solicitor General Thomas Thatcher who would insert footnotes in the briefs to disassociate himself from the arguments presented by the agencies or the Justice Department as a way to “clue in the justices;” also an excellent example for him was the *Bob Jones University* where Solicitor General Wallace's note was caught by the Justices as a “red light and, by an eight-to-one margin, rejected the administration's argument and upheld the IRS's position.”).

<sup>46</sup> Waxman, *supra* note 13, at 1082 n.35 (citing Solicitor General James M. Baker's brief in *Miles v. Graham*: “The Solicitor General takes no satisfaction in presenting this argument for the consideration of the court . . . Congress, however, has shown its unmistakable intention to subject these inadequate salaries to a tax. As able counsel have and will argue the invalidity of the tax, it is fair to Congress—and, indeed, it is fair to this court—that the other view of constitutional power should be fully and fairly presented, and this I have endeavored to do.”).

<sup>47</sup> WHITTINGTON, *supra* note 11, at 207–10 (discussing the example of the Telecommunications Act of 1996 where President Clinton decided not to veto the last minute amendment (Communications Decency Act), and waited for the case to reach the Supreme Court to instruct the Department of Justice to defend the case only as long as it was “consistent with Supreme Court rulings in this area,” in other words it downplayed the defenses of the Act—*Reno American Civil Liberties Union*, 521 U.S. 844 (1997)); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 13 (2000) (another example is given by Johnsen when President Clinton decided not to veto the National Defense Authorization Act for Fiscal Year 1996 that included a provision requiring the armed forces to discharge individuals infected with HIV, and instead announced that it would not defend the bill before the Supreme Court); Griswold, *supra* note 3, at 535 (“In providing for the Solicitor General, subject to the discretion of the Attorney General, to attend to the ‘interest of the United States’ in litigation, the statutes have always been understood to mean the long-range interest of the United States . . . . Occasionally, the Solicitor General finds it necessary to ‘confess error,’ when he concludes that he cannot defend a judgment in favor of the government.”).

<sup>48</sup> Waxman, *supra* note 13, at 1080–81 (giving an example of a case against provisions of the Medicare and Medicaid Acts that gave a special treatment to Christian

category of cases, presenting both positions, the White House might have been in disagreement with the content of the law when it was being negotiated but did not have the political capital to exercise his veto power.<sup>49</sup> In these cases, the Administration might have even signed and executed a law that he considered to be unconstitutional.<sup>50</sup> When the case reaches the Supreme Court, the Solicitor General not only gives arguments defending the constitutionality of the law, but also informs the Court of the White House's views questioning the statute's constitutionality.<sup>51</sup> The Solicitor General can do so either in oral arguments (i.e. *Oregon v. Mitchell*),<sup>52</sup> or in two separate briefs (i.e. *Buckley v. Valeo*).<sup>53</sup>

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Science nursing services in which the district court found the provisions unconstitutional, even though the DOJ Civil Division had defended their constitutionality, and when the Solicitor General had to decide on whether or not to appeal, "he considered it a bridge just too far to cross.").

<sup>49</sup> Waxman, *supra* note 13, at 1079 n.14 ("Unlike a decision not to enforce a statute at all, the practice of 'enforce but decline to defend' permits the will of Congress to be honored in the first instance, allows the Executive Branch to make its views known to the Court, and ordinarily places before the court the opportunity to resolve the constitutional dispute between the other two branches. Some commentators, argue that the enforce-but-decline-to-defend equilibrium represents in many cases constitutionalism at its best, because it forces the Executive Branch to put its money where its (constitutional) mouth is and test those views in the crucible of Supreme Court litigation.").

<sup>50</sup> Devins & Prakash, *supra* note 13, at 514–15.

<sup>51</sup> Waxman, *supra* note 13, at 1081–82 ("On a rare occasion the President may sign, and even execute, a law he considered to be unconstitutional. When that happens, the Solicitor General is in an odd position.").

<sup>52</sup> *Id.* ("In *Oregon v. Mitchell*, for example, Solicitor General Erwin Griswold has to determine whether to defend a provision of the Voting Rights Act that lowered the voting age to eighteen in state and local elections. President Nixon strongly favored lowering the voting age, but as his signing statement reflected, he 'believe[d] – along with most of the National's leading constitutional scholars – that Congress has no power to enact [the eighteen-year old voting age] by simple statute.' Griswold concluded that reasonable arguments could be made for the statute's constitutionality, and he defended the voting age provision in the Supreme Court accordingly. He began his oral argument, however, by informing the Court of the views of the President and of the Department of Justice questioning the statute's constitutionality and urged the Court to 'give consideration to these views.' In a close vote, the Court struck down the law. Griswold's approach was lauded by some as admirable candor; it was attacked by others as half-hearted advocacy."); 400 U.S. 112 (1970).

<sup>53</sup> Waxman, *supra* note 13, at 1082 ("*Buckley v. Valeo*—the Court's landmark decision on campaign finance regulation—cast Solicitor General Griswold's successor in an even more unusual posture. In that case, Solicitor General Robert Bork and Attorney General Edward Levi filed an eighty-five page brief in the Supreme Court on behalf of the Attorney General and the Federal Election Commission as parties. The brief elegantly put forward the best First Amendment defense of the contribution and expenditure limitations of the Federal Election Campaign Act. Simultaneously, however, the Attorney General and Solicitor General filed a separate brief, also persuasive, on behalf of the Attorney General as appellee and the United States as amicus curiae, presenting a different, ninety-five page discussion of

Regarding the second type of cases, the Solicitor General declines to make respectable arguments defending the constitutionality of the law even when these are available.<sup>54</sup> According to former Solicitor General, Seth Waxman, this typically occurs “in cases in which it is manifest that the President has concluded that the statute is unconstitutional.”<sup>55</sup> Some of the cases that fall under this category are those where the president’s veto was exercised but Congress was able to override.<sup>56</sup> Litigation before the Supreme Court becomes a second chance for the White House to confront its policy views with the ones taken by the majority in Congress.<sup>57</sup> It is common to find in these type of situations that the underlying conflict is not only policy related, but also involves the interpretation of each branches’ powers.<sup>58</sup> These cases tend to leave the road open for the Supreme Court to expand its views because it knows that at least one other branch will agree with its interpretation.<sup>59</sup> Finally, another extreme position can be found in cases in which the Solicitor General openly “confessing error” in a case previously won by the government and requests the Supreme Court to overturn the lower court or its own decision.<sup>60</sup> This

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the First Amendment issues in a manner that ‘attempt[ed] to assist in analysis without pointing the way to particular conclusions’); 424 U.S. 1 (1976).

<sup>54</sup> Waxman, *supra* note 13, at 1083 (giving first an example of a 1990 *amicus* brief filed by the United States in the *Metro Broadcasting v. FCC* case where instead of defending the constitutionality of statutory provisions regarding the regulatory preferences of the Federal Communications Commission; the second example he gives is brief filed by the DOJ in the *Turner Broadcasting System, Inc. v. FCC* regarding the constitutionality of the “must-carry” provisions of the Cable Television Act of 1992).

<sup>55</sup> *Id.* (“[T]he Department of Justice has occasionally declined to make professionally respectable arguments, even when available, to defend a statute—typically, in cases in which it is manifest that the president has concluded that the statute is unconstitutional.”).

<sup>56</sup> *Id.* at 1084.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (“[I]t is not surprising that the President and Congress occasionally find themselves at odds regarding the proper interpretation of their own, and each other’s, constitutional powers [and] [i]n that event, the Solicitor General ordinarily defends the President’s powers and prerogatives.”).

<sup>59</sup> Griswold, *supra* note 3, at 536.

<sup>60</sup> Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3030–31 (2012) (explaining how the confession of error is not a rare practice of the solicitor general: “[s]ince Taft, all Solicitors General—it doesn’t matter whether they are appointed by a Republican or a Democrat—have confessed error, roughly at the pace of two to three times per Supreme Court term.”); CLAYTON, *supra* note 43, at 56 (“Confession of error often places the Solicitor General in a delicate position. He must betray both the government lawyers who won the case in the lower courts and the judge whose decision the Solicitor General wants reversed. The practice, however, underscore the relationship between the Solicitor General and Court. Confessing error, Archival Cox said, ‘tests the strength of our belief that the office has peculiar responsibility to the Court.’ Cox took this responsibility so seriously that, in one antitrust suit, he amazed the Justices by arguing both sides of the case.”).

later case to some may be considered “the noblest function of the office,” but to others, especially judges, “is the lowest trick one lawyer can play on another.”<sup>61</sup>

### 1. Defending Congress: Congressional Standing, Amicus Brief, and Private Parties

As mentioned in the previous section, Congress has tried to exercise pressure on the DOJ to defend its interest, but the influence of the President is greater than the individual and divided voices of the members of Congress. Perhaps the fact that Congress has been constantly divided between parties weakens its possibility of enhancing its voice. It is hard to find examples in history when all members of the House of Representatives and the Senate have agreed on what needs to be defended in a particular case. Most of the briefs presented on behalf of the legislative branch recognize that the positions are taken on a “majoritarian basis when consensus cannot be achieved.”<sup>62</sup> The fact remains that when the DOJ declines to defend an act from Congress, the only defense left available to the members of this body who disagree with the DOJ’s position is to file an *amicus* brief.<sup>63</sup>

The first time Congress was forced to voice its interest in an *amicus* brief was in 1926 in *Myres v. United States*.<sup>64</sup> This case involved a statute that limited the president’s power to remove officials in the federal government. When the Solicitor General declined to defend the statute, the Supreme Court appointed Senator George Wharton Pepper to present an *amicus* brief in favor of the legislative branch’s interest. But Chief Justice Taft concluded that the power to remove appointed officers is vested in the president alone.<sup>65</sup> According to Justice Taft, a contrary interpretation would not allow him to “discharge his own constitutional duty of seeing that the laws be faithfully executed.”<sup>66</sup>

Another widely cited example of a “decline to decide” situation that involved a separation of powers issue is *INS v. Chadha*.<sup>67</sup> In this particular case,

<sup>61</sup> Griswold, *supra* note 3, at 535–36 (“This authority is, of course, sparingly exercised. Confessing error is a little bit like taking medicine: its basic purpose and ultimate effect are highly salubrious, but it may have a bitter taste for a moment going down. Judge Simon Sobeloff, who is a former Solicitor General, and now a distinguished circuit judge, is quoted as saying: ‘when I was Solicitor General, I thought that confessing error was the noblest function of the office. Now that I am a Circuit Judge, I know it is the lowest trick one lawyer can play on another.’ Other circuit judges who, at the urging of the government in their court, have delivered an opinion which the Solicitor General refused to defend, sometimes react somewhat more vigorously, I may add.”); Katyal, *supra* note 60, at 3030.

<sup>62</sup> Brief for the Bipartisan Legal Advisory Groups of the United States House of Representatives, at 3 n.\*, *Windsor v. United States*, 833 F. Supp. 2d 394 (2012) (No. 12-307).

<sup>63</sup> Waxman, *supra* note 13, at 1084.

<sup>64</sup> *Id.* at 1085. *See also* *Myers v. United States*, 272 U.S. 52 (1926).

<sup>65</sup> *Myers*, 272 U.S. at 119.

<sup>66</sup> *Id.* at 115.

<sup>67</sup> *INS v. Chadha*, 462 U.S. 919 (1983); Waxman, *supra* note 13, at 1084.

the DOJ declined to defend the constitutionality of a provision that gave Congress a one-House veto over the Immigration and Naturalization Service's decisions on deportable aliens.<sup>68</sup> There, the Court sided with the executive, and held that the legislative act violated the standards set up by the Constitution regarding lawmaking and congressional authority. In the end, the President and Attorney General retained their discretion to deport foreign nationals as part of its duty to execute the law.

Most recently, the DOJ under the Obama administration filed a brief against the Defense of Marriage Act (DOMA) in *United States v. Windsor*, openly contradicting Congress's position.<sup>69</sup> Through the enactment of DOMA Congress decided to define "marriage" and "spouse" as excluding same-sex couples.<sup>70</sup> In practice this act amended Chapter 1 of title 1 of the United States Code, which provides rules of construction for all federal legislation and regulation—including the tax code.<sup>71</sup> The case arose when a widow of a same-sex couple tried to claim a federal estate tax exemption for surviving spouses and the Internal Revenue Service denied the refund based on DOMA. One of the key issues in this case discussed before the Supreme Court dealt precisely with the scope of Congressional standing when the executive decides not to defend an act of Congress.<sup>72</sup> This was generated by the fact that while the case was pending in a District Court, the Attorney General notified the Speaker of the House of Representatives that the DOJ would no longer defend the constitutionality of the section of the bill that prevented same-sex spouses from claiming federal estate tax exemptions.<sup>73</sup> The Bipartisan Legal Advisory Group of the House of Representatives, that did not include the support of the Democratic Party leadership, decided then to present a brief defending Congress's act.<sup>74</sup> The lower courts permitted the congressional intervention, but ruled in favor of the claimant and ordered the Treasury to refund Ms. Windsor. In this case, two of the questions that the Court had to decide was whether the

<sup>68</sup> Waxman, *supra* note 13, at 1084 n.53.

<sup>69</sup> Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 473 (2011).

<sup>70</sup> Richard Epstein, *Dumb on DOMA*, RICOCHET (Feb. 24, 2011), <https://ricochet.com/archives/dumb-on-doma/>; Michael Klarman, *Commentary: The Supreme Court and marriage for same-sex couples - Part I*, SCOTUSBLOG (Apr. 15, 2015), <http://www.scotusblog.com/2015/04/commentary-the-supreme-court-and-marriage-for-same-sex-couples-part-i/> (describing the history in the United States surrounding DOMA and same-sex marriage).

<sup>71</sup> DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife").

<sup>72</sup> Devins & Prakash, *supra* note 13, at 508–10; Grove & Devins, *supra* note 13, at 628.

<sup>73</sup> Devins & Prakash, *supra* note 13, at 508 & n.1.

<sup>74</sup> Brief for the Bipartisan Legal Advisory Groups of the United States house of Representatives, at 3 n\*, *Windsor v. United States*, 833 F. Supp. 2d 394 (2012) (No 12-307).

bipartisan group had standing in the case and whether the executive branch's agreement with the lower court's decision regarding the unconstitutionality of DOMA deprived the Supreme Court of jurisdiction to decide the merits of the case.<sup>75</sup> In a divided opinion, the majority of the Court agreed that the US government retained a significant stake in the issue because it could suffer a real economic injury and therefore it supported its jurisdiction. On the merits of the case, the Supreme Court ruled in favor of the claimant, and consequently agreed with the executive's position regarding the unconstitutionality of DOMA.<sup>76</sup>

Finally, private parties can also present arguments in favor of congressional power when challenging actions from the executive power. One of the most famous cases where this issue was present is the 1952 case of *Youngstown Co. v. Sawyer*, also referred as the *Steel Seizure Case*.<sup>77</sup> There, the Court had to decide whether the president's war power as commander-in-chief of the armed forces included the possibility of seizing private property.<sup>78</sup> In 1950, President Harry Truman sent troops to Korea without asking for a Congressional declaration of war. As part of the war effort, Truman created a Wage Stabilization Board to avoid inflation and labor disputes during the armed conflict. The major steel producers disagreed with the board's proposed wage and threatened to strike. The White House, through an executive order, decided to seize and operate the main production facilities in order to prevent dislocations in the fabrication of all weapons and war materials necessary for the troops in Korea.<sup>79</sup> The owners of the steel mills brought a claim against the executive action and argued that the President lacked the power to seize their property absent a Congressional approval or an enumerated authority under Article II of the Constitution.<sup>80</sup> Congress did not present an *amicus* brief in this case nor react after the President issued the executive order that seized the steel mills. Yet, the arguments in favor of Congress presented by the private litigators were an indirect defense of Congressional powers.<sup>81</sup> The Court's final decision sided with the claimants and argued that the President had not been authorized by the Constitution or by a Congressional act to take such actions.<sup>82</sup>

Even though Congress's power was defended in this case, it is also important to note that the potential for private litigants to become the defenders of

<sup>75</sup> United States v. Windsor, 133 S. Ct. 2675, 2684 (2013).

<sup>76</sup> Bethany R. Pickett, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 463 (2015); Frost, *supra* note 13, at 952; Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 2 (2015); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L. J. 1183, 1195 (2011); Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1343 (2013); Grove & Devins, *supra* note 13, at 596; Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 577 (2012).

<sup>77</sup> *Youngstown Sheet & Tube Co. Sawyer*, 343 U.S. 578, 582 (1952).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 583.

<sup>80</sup> *Id.* at 587–89.

<sup>81</sup> *Id.* at 588–89.

<sup>82</sup> *Youngstown*, 343 U.S. at 588–89.



Congress's powers is contingent on the strategy that serves the private actors best interest. The fact that at times private actors can use a separation of powers defense does not entail that Congress will always be defended or that its agenda will be reflected in the private actor's defense. The private litigators at the end do not have to consult Congress or prepare a joint defense with its member when drafting their arguments. In these cases, the defense of Congress is a byproduct of the defense of private interest, not an end in and of itself.

### III. POLITICAL EFFECTS OF THE CENTRALIZATION OF THE LEGAL DEFENSE OF GOVERNMENT ACTS

The previous section explained how the US system of constitutional adjudication centralizes the legal defense of the interest of the state in one branch of government, the tensions that emerge, and its manifestations in the litigation strategies of the DOJ. Even though Congress or the agencies can participate in the adjudicatory process by voicing their concerns in *amicus* briefs, and even though private parties can also present arguments in their favor, the executive has ultimate control of the official position of the government. This branch can decide to decline to defend an act from another branch if it serves its interest. The following section seeks to explain the political effects of this executive power. It reviews the judicial proceeding from the eyes of the players and how they can shape the way constitutional adjudication develops.

Regardless of whether a judicial body is international or national, its decisions are not only the result of the judge's interpretation, but also reflections of the litigation process, the parties involved in it, and the political context in which they operate. Judicial orders depend partly on the arguments brought by the parties and are somewhat controlled by them. A bad defense or a mild argument in constitutional adjudication can be considered as invitations for judicial expansion. What is defended is in itself a strategic choice by the parties who tend to be repeat players,<sup>83</sup> especially if we consider that the political actor that is affected by the decision is not the party defending the actions but rather another government branch. As mentioned in the introduction, there is a troubling assumption in the constitutional and international adjudicatory system that it is always in the interest of the defending party to make the best arguments available. Yet when it comes to defending governments in the contemporary constitutional and international regimes, many institutions are involved but not all of them participate in a given case.

The idea that litigation strategies explain the decisions rendered by courts builds on American socio-legal traditions that view litigation as an opportunity for participants to gain advantages.<sup>84</sup> Courts and rules are just one part of the story. What the parties win or lose, even by losing the case, is the other part of the power

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<sup>83</sup> Galanter, *supra* note 11, at 98.

<sup>84</sup> *Id.* at 99–100.

of litigation.<sup>85</sup> It is an analytical switch from reviewing how the law is drafted and applied to how the characteristics of the parties affect how the legal system works.<sup>86</sup> Under this approach winning a case might not always be in the best interest for the litigating party.<sup>87</sup>

#### **A. Executives Using Judicial Supremacy to Expand their Powers.**

According to political scientist and judicial historian Professor Keith Whittington, what has made the US Supreme Court a politically consequential institution is its assertion of judicial supremacy.<sup>88</sup> This is the power to be the ultimate actor to define “effective constitutional meaning such that other government officials are bound to adhere not only to the Court’s disposition of a specific case but also to the Court’s constitutional reasoning.”<sup>89</sup> Judicial review is the power to refuse to give force to an act of other government actors in the context of a particular case.<sup>90</sup> Judicial supremacy “requires deference by other government officials to the constitutional dictates of the Court, even when other government

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<sup>85</sup> Galanter, *supra* note 11, at 113–14.

<sup>86</sup> Alvaro Santos, *Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 VA. J. INT’L L. 551, 572 (2012).

<sup>87</sup> *Id.* at 571–77 (discussing the same approach with WTO cases where states seek to change the international rule that would reflect its interest, even if they lose the particular case).

<sup>88</sup> WHITTINGTON, *supra* note 11, at 6–7 (“The concept of judicial supremacy does not focus on the specific act of review itself. Judicial supremacy refers to the ‘obligation of coordinate officials not only to obey that [judicial] ruling but to follow its reasoning in future deliberations.’ A model of judicial supremacy posits that the Court does not merely resolve particular disputes involving the litigants directly before them or elsewhere in the judicial system. It also authoritatively interprets constitutional meaning. For the judicial supremacist, the Court defines effective constitutional meaning such that other government officials are bound to adhere not only to the Court’s disposition of a specific case but also to the Court’s constitutional reasoning. Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review. Judicial supremacy asserts that the Constitution is what the judges say it is, not because the Constitution has no objective meaning or that courts could not be wrong but because there is no alternative interpretive authority beyond the Court. As Justice Robert Jackson once ironically noted to somewhat different effect, ‘We are not final because we are infallible, but we are infallible only because we are final.’”).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 6 (“The doctrine of judicial review refers to the authority of a court, in the context of deciding a particular case, to refuse to give force to an act of another governmental institution on the grounds that such an act is contrary to the requirements of the Constitution.”).

officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review.”<sup>91</sup>

Using historical examples, Whittington argues that the expansion of judicial supremacy was made possible by the acquiescence of other government officials who benefited from having the Supreme Court impose particular constitutional understandings on the legislative branch or state governments.<sup>92</sup> According to his analysis, the Supreme Court’s assertion of judicial supremacy has helped the executive to maintain political coalitions and face complications for political action created in a system of fragmented power.<sup>93</sup> This is clear in what Whittington classifies as “preemptive presidencies.”<sup>94</sup> These are oppositional presidents who face strong political obstacles and have a hard time asserting their authority to define the content of the Constitution in order to advance their policy objectives.<sup>95</sup> Lacking the political capital to do so, they “borrow from the authority of the courts in order to hold off their political adversaries . . . . [R]ather than challenge judicial authority, these presidents have often bolstered judicial authority and then sought to align themselves with the courts against Congress.”<sup>96</sup>

This is where the monopoly over the defense of the state as described in the previous section is key. As mentioned above, one political tool available to the Administration is its control of the official position of the federal government on the issues being discussed in the federal courts.<sup>97</sup> The President might reach a compromise with Congress on certain policy issues, but then downplay certain defenses and hope that the Supreme Court might be more sympathetic with his position and strike down the sections that he had to approve in the compromise but was never really committed to.<sup>98</sup> Moreover, the White House can instruct the DOJ to decline to defend the act of Congress or the agency arguing that it considers the defense as constitutionally questionable, sending a clear signal to the Court that it can expand its judicial supremacy powers.<sup>99</sup> For the reasons expressed in the

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<sup>91</sup> WHITTINGTON, *supra* note 11, at 7.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 27.

<sup>94</sup> *Id.* at 195.

<sup>95</sup> *Id.*

<sup>96</sup> WHITTINGTON, *supra* note 11, at 195.

<sup>97</sup> *Id.* at 196.

<sup>98</sup> *Id.* at 206–09 (using the example of Clinton’s position to the CDA in the telecommunications reform). The CDA was a section of the Bill that Clinton disapproved of but had to agree to in order to pass the rest of the legislation, and when it eventually reached court, the DOJ even considered not appealing the decision but downplayed the defenses. *Id.* The case eventually was decided by the Supreme Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down the particular sections of the telecommunications act).

<sup>99</sup> Devins & Prakash, *supra* note 13, at 510. If the DOJ had the obligation to always make the best argument before the Supreme Court, regardless of the President’s opinion or whether the act originated in another branch, Congress and the DOJ bureaucracies would benefit. *Id.* The latter would expand its authority and independence from the White House, and the former would make sure that its interests are always being defended. *Id.*

previous section, the possibility of voicing Congress' concerns via an *amicus* brief does not have the same strength in the constitutional adjudicative process as using the institutional relationship and prestige built by the DOJ with the Court. Repeat players have advantages over the one-time shooter.<sup>100</sup> Under Whittington's political reading of constitutional adjudication, one could argue that the authority of US judicial supremacy has not been exclusively a consequence of doctrinal formalistic interpretations; but it rather exists because other political actors have had reasons of their own to recognize it.<sup>101</sup>

### **B. Adjudication as an Instrument of Political Coalitions**

The constitutional interplay between executive and judicial powers in the United States is not unique in the world. According to comparative studies, the general trend in constitutional democracies is for the highest courts to become politically consequential institutions.<sup>102</sup> Beyond resolving disputes or enforcing laws, they are playing an expanded role in governance.<sup>103</sup> By judicial role I make reference here to the functions they play in politics, governance, and society.<sup>104</sup> Martin Shapiro, for example, identifies at least four sociopolitical roles that high courts play in governance:<sup>105</sup> (1) they resolve disputes, which translates into maintaining order; (2) they legitimize government law and policies, and control local authorities, police, and bureaucrats; (3) they can legitimize the existing systems of economic power by enforcing contractual rules, property rights, and in some cases protect monopolies (of state companies, unions, etc.); and (4) through interpretation they become lawmakers.<sup>106</sup>

All of these sociopolitical roles share a common element: high courts can act as agents of dominant political coalitions.<sup>107</sup> By enacting legislation and amending constitutions, these coalitions create a set of constitutional understandings of how to distribute power among themselves.<sup>108</sup> Such constitutional understandings are not static. The US examples described above and the studies by comparative constitutional law scholars show that judges can slightly modify the political leaders' agenda through legal interpretation when pushed to do

<sup>100</sup> Galanter, *supra* note 11.

<sup>101</sup> WHITTINGTON, *supra* note 11, at 26, 285.

<sup>102</sup> See generally CONSEQUENTIAL COURTS, *supra* note 11.

<sup>103</sup> *Id.* at 6. The term "role" used in this context is not intended to be a reference to judicial roles in connection to the way judges reason in particular cases. In jurisprudential terms judges can have a legalistic/formalistic role (adhere to the text and precedents); an activist role (prioritizing flexibility and substantive justice); or a deferential role (to the democratically elected powers or specialized agencies).

<sup>104</sup> *Id.* at 3.

<sup>105</sup> SHAPIRO, COURTS, *supra* note 16.

<sup>106</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 3–4.

<sup>107</sup> *Id.* at 4; HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 16.

<sup>108</sup> HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 16, at 3.

so by new political coalitions or social pressures.<sup>109</sup> Examples of the influence judges can have on political coalitions' constitutional understandings are their faculty of defining the powers of each branch of government; breaking deadlocks, and forcing bureaucracies to comply with statutory or constitutional law.

This does not mean that judges will always align with the reconstructive agenda proposed by an incoming coalition. In many cases, judges were nominated by the preexisting political regime.<sup>110</sup> Moreover, judicial changes are limited by a set of characteristics of the legal process: (1) the legal culture of the state, the constitutional texts, and precedents control part of their reasoning, and departing from them is not an easy task;<sup>111</sup> (2) judges also have a set of preconceptions guided by their own political, professional and philosophical commitments;<sup>112</sup> and (3) assertive courts are conscious of the political and social backlash to their decisions.<sup>113</sup>

Then why would the legal process be an adequate avenue to try to change a preexisting constitutional understanding? Law, as opposed to politics, has certain characteristics that insulate the judiciary from fully defending the existing regime's understandings.<sup>114</sup> For instance, judges have to work with statutory and precedential bases of discretion. They "cannot readily afford to ignore the long-term

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<sup>109</sup> HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 16, at 3; TOM GINSBURG & TAMIR MOUSTAFA, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 207–34 (2008); Tom Ginsburg et al., *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 3 NAT'L TAIWAN U. L. REV. 143 (2008); CONSEQUENTIAL COURTS, *supra* note 11, at 4 ("Traditionally, courts are expected to faithfully enforce the laws, not make or change them, for in principle law is to be made by political leaders, embodying those leader's policy preferences. However, as both established and newer democracies have empowered courts to declare laws and executive orders unconstitutional, there has been a marked increase in courts' potential to assume new roles—to make new law and apply law in new ways. When courts play these new roles in ways that depart from political leaders' preferences, they can exert a significant, independent, and distinctively judicial influence on broad realms of public policy, redistributing political authority.").

<sup>110</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 5; WHITTINGTON, *supra* note 11.

<sup>111</sup> DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997); Alexandra Huneeus et al., *Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America*, CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN CONTEMPORARY LATIN AMERICA 3, 3–25 (2013) [hereinafter Huneeus, *Cultures of Legality*]; Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 LAW & SOC. INQUIRY 99, 99 (2010) [hereinafter Huneeus, *Judging from a Guilty Conscience*].

<sup>112</sup> Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64 WORLD POL. 587, 587 (2012); Duncan Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RESEARCH L. & SOC. 3 (1980) [hereinafter Kennedy, *Towards an Historical Understanding of Legal Consciousness*]; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, THE NEW LAW AND ECONOMIC DEVELOPMENT 19 (2006).

<sup>113</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 5; ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (2004).

<sup>114</sup> WHITTINGTON, *supra* note 11, at 167.

and wide-ranging implications of its decisions affecting the current occupant of a government office.”<sup>115</sup> Hence, even if they are part of the dominant constitutional understanding that the incoming President opposes, they know that setting precedent that widely restricts the exercise of power could eventually backfire once the dominant coalition regains the control of the administration.<sup>116</sup>

A number of commentators on judicial politics have identified that in new or restored democracies the “winds” that force courts to become politically consequential institutions are stronger than in well-settled democracies.<sup>117</sup> Pressure is placed on the highest courts to define the abidingness to the laws and constitutional understandings of the replaced political regimes. Moreover, the institutions and legislation that provide immunities to former members of the coalitions are questioned in court. Accordingly, “judges face a choice between ruling for regime stalwarts or challengers, between strengthening or weakening aspirations for constitutional democracy, and between entrenching the interest and values for incumbent or of new majorities.”<sup>118</sup> In the eyes of the incoming political coalitions, judges become bystanders too or perpetrators of the crimes committed by the previous regime.<sup>119</sup> In the same vein, judges can be used to advance legal or policy incentives that the political coalitions find difficult to impose on their own either due to the preexisting constitutional constraints or to lack of political capital.<sup>120</sup> Yet, the winds might not be enough to persuade the court to modify the preexisting constitutional understandings.<sup>121</sup>

According to Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, the national institutional and political structures such as the constitutional design or the scope of judicial institutions have to be in place to allow the change.<sup>122</sup> Moreover, the self-perception or legal consciousness of the judiciary matters in terms of the incentives and individual motives to adopt a new constitutional

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<sup>115</sup> WHITTINGTON, *supra* note 11, at 169.

<sup>116</sup> *Id.* at 168.

<sup>117</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 21 (“[A change in role] is determined by multiple and interacting opportunities and risks, generated by structural factors and short-term political currents and winds, and ultimately on the skill and capacity of the judges who confront these challenges and embrace (or ignore) these opportunities.”).

<sup>118</sup> *Id.* at 8.

<sup>119</sup> Huneeus, *Cultures of Legality*, *supra* note 111, at 10.

<sup>120</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 14 (“Political scientists often point out that constitutional decisions in which high courts ‘make policy’ are not necessarily or even usually countermajoritarian. Judges take legal or policy initiatives that political leaders support but find difficult to launch on their own owing to constitutional restrictions or political constraints”); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993). See generally GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009).

<sup>121</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 19–20.

<sup>122</sup> *Id.*

understanding.<sup>123</sup> In the same vein, the internal struggle among the members of the highest courts might impede the institution from adopting them.<sup>124</sup> In states that adopt democracy for the first time or that restore democracy after an authoritarian regime, it is not enough that the political forces in the face of divided government invite the courts to restructure the constitutional understandings; all of the above mentioned factors can resist such an effort.

In the case of Latin America, after the fall of the authoritarian regimes in the late 1980s and early 1990s, the region experienced several episodes where the incoming presidency faced opposition from the previous political coalition. Former coalitions might maintain control over the bureaucracies, the judiciaries, or congress.<sup>125</sup> Transitions to democracy do not imply that the pre-existing regime disappears fully. In many cases key government players were confirmed by the previous political coalitions. In fact, in a region where most of the governments of the transitions reached power opposing the excesses of presidentialism and the control of the executive power of courts and congress, the traditional instruments to stir preexisting institutions are difficult to employ.<sup>126</sup> For example, an incoming president who tries to force the highest court, through appointment procedures or through budget constraints, to adopt an expansion of presidential powers can be politically attacked for using the same instruments that the overthrown military junta or semi-dictator president used in the past.

Note the paradox that Latin America represents for our comparative analysis. Both the US and the Latin American experience show scenarios of fragmented governments, with institutions that respect the preexisting constitutional understandings. However, in the United States, the president can borrow the powers of the Supreme Court in order to advance his agenda. This benefits the Supreme Court because it reaffirms its judicial supremacy, and benefits the executive because it gives the expansion of presidential powers a judicial legitimacy. As we will see in the next sections, in the case of Latin America, many of the highest courts have resisted the winds of change. Due to the historical and political context of the region, it has become difficult for the incoming president to convince the highest courts to modify the preexisting regime. Yet, in the case of Latin America there is still one open avenue that the president could take. The next sections will show how the proceedings before the IACtHR can become an instrument to achieve the same reconstructive goal without having to bear the political costs of being accused of expanding presidential powers.<sup>127</sup>

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<sup>123</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 21; Kennedy, *Towards an Historical Understanding of Legal Consciousness*, *supra* note 112, at 10; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

<sup>124</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 21.

<sup>125</sup> Huneeus, *Judging from a Guilty Conscience*, *supra* note 111.

<sup>126</sup> GARGARELLA, *supra* note 22.

<sup>127</sup> *Id.* (explaining how even with the constitutional reforms that empowered the judiciary and that constitutionalized human rights treaties, hyper-presidentialism is still present in the region).

#### IV. THE INTER-AMERICAN SYSTEM

This section examines how Latin America executive powers use the Inter-American System of Human Rights' litigation process to bypass local judiciaries and legislative bodies. In a way, Latin American presidents confronting cases before the IACtHR regarding acts of previous governments or of other powers face choices similar to those faced by the US executive when determining the government's position for the Supreme Court.

I begin this section's inquiry by highlighting that presidents in this region have a monopoly over the defense of their states before international tribunals. Most Latin American countries are presidential or semi-presidential systems of government that maintained the US constitutional formula of giving full control of foreign affairs to the executive branch.<sup>128</sup> The common practice in litigation before the IACtHR is for the state to appoint the sitting ambassador in Costa Rica as the initial agent of the government.<sup>129</sup> As the case progresses, states usually appoint an

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<sup>128</sup> GARGARELLA, *supra* note 22.

<sup>129</sup> Although the rules of procedure of the Court do not specify that the Agent of the State must be from the Ministry of Foreign Affairs or another executive branch official, the common practice has been to nominate as an Agent of State someone from the executive power or a special counsel designated by the Executive power. *See e.g.*, *The Last Temptation of Christ Merits*, *supra* note 26, ¶ 23 ("On May 27, 1999, the State appointed Edmundo Vargas Carreño, Chilean Ambassador to Costa Rica, as its agent and indicated that it would receive notifications at the Chilean Embassy in Costa Rica"); *Radilla Pacheco v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 6 & n.5 (Nov. 23, 2009) ("The following appeared at this hearing . . . for the State: Fernando Gómez-Mont, Secretary of the Interior of Mexico; Daniel Francisco Cabeza de Vaca Hernández, Sub-secretary of Legal Issues and Human Rights of the Secretariat of the Interior; Juan Manuel Gómez-Robledo Verduzco, Sub-secretary of Multilateral Issues and Human Rights of the Foreign Affairs Secretariat; José Luis Chávez García, Attorney General of Military Justice of the National Defense Secretariat; Pablo Ojeda, Coordinator of Advisors of the Secretary of the Interior; María Carmen Oñate Muñoz, Ambassador of the Mexican Embassy in Costa Rica, Secretariat of Foreign Affairs; Alejandro Negrín Muñoz, General Human Rights and Democracy Director of the Secretariat of Foreign Affairs; Jaime Antonio López Portillo Robles Gil, Human Rights Director of the National Defense Secretariat; Ricardo Trejo Serrano, General Director of Criminal Procedures of the Attorney General of the Republic; Guillermo Leopoldo Mendoza Argüello, Representative of the 5<sup>th</sup> Section of the General Staff of the National Defense Secretariat; Francisca Méndez Escobar, Head of the State Department and In Charge of Economic, Political, Legal, and Press issues, Mexican Embassy in Costa Rica, and José Ignacio Martín del Campo, Case Director of the Secretariat of Foreign Affairs"); *Atala Riffo & Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 6 & n.9 (Feb. 24, 2012) ("The State appointed Mr. Miguel Angel Gonzalez [Ambassador of Chile in Costa Rica] and Ms. Paulina Gonzalez Vergara [Undersecretary at the Ministry of Justice of Chile] as Agents); *La Cantuta v. Peru*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 19, 32 (Nov. 29, 2006) ("On September 29, 2006, during its LXXII Regular Session, the Court held the public hearing which had been summoned (*supra* para. 23), and at which there



additional agent or advisor from the ministry of foreign affairs.<sup>130</sup> The envoy might be another member of the foreign service who specializes in international litigation, a special advisor of the ministry of foreign affairs, or the attorney general office.<sup>131</sup> At the end the control of the defense is on the hand of governmental entities that are part of the executive branch.<sup>132</sup>

All communications between the state and the Court are channeled through and conducted by the ministry of foreign affairs of the state and its embassy in Costa Rica. Considering this fact, my working hypothesis is that when the case deals with acts of other authorities or previous governments, such as judicial decisions or legislation passed by congress, the executive can decide if it is in its interest to allow other governmental actors to participate in the proceedings. There is no procedural mechanism in which the court could directly communicate its decisions, hear the testimony, or receive arguments from other government actors not recognized by the agents of the state in the case. This was particularly clear in the cases of *Artavia v. Costa Rica*,<sup>133</sup> and the *Last Temptation of Christ v. Chile*.<sup>134</sup>

From this perspective, perhaps one of the most important differences between the US national and the international adjudicatory system is that in the former Congress and federal agencies could still voice their concerns in the proceeding through an *amicus* brief or private litigants could present arguments that favor the underrepresented branch.<sup>135</sup> In the international system, other branches of government without the consent of the central government cannot present briefs and victims do not frame their claims as a separation of power issue, but rather as violations of the state as a unit.<sup>136</sup> In the majority of the cases, it is the sole

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appeared . . . for the State: Ivan Arturo Bazar-Chacon [Deputy Attorney General for Supranational Affairs of the Ministry of Justice of Peru], Agent, and Alberto Gutierrez-La Madrid, Ambassador of Peru in Costa Rica"); *Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 8 (Nov. 28, 2012) ("The State appointed Ana Lorena Brenes Esquivel, Attorney general, as its Agent and Magda Ines Rojas Chaves, Depute Attorney General, as co-agent") [hereinafter *Artavia Merits*]; *Fontevicchia and D'Amico v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 4 & n.6 (Nov. 29, 2011) (only available in Spanish).

<sup>130</sup> *Supra* note 129.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See infra* Section V.D.

<sup>134</sup> *See infra* Section V.C.

<sup>135</sup> Waxman, *supra* note 13, at 1085 (discussing the power of agencies and Congress to present amicus briefs in the US context); Bell, *supra* note 13, at 1060; Lochner, *supra* note 13, at 551; Devins & Prakash, *supra* note 13, at 571–72; Devins, *Political Will and the Unitary Executive*, *supra* note 13; Devins, *Unitariness and Independence*, *supra* note 13; Devins & Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, *supra* note 13, at 579; Devins & Herz, *The Battle That Never Was*, *supra* note 13; Frost, *supra* note 13, at 914; Grove & Devins, *supra* note 13.; Myers, 272 U.S. at 52; Chadha, 462 U.S. at 919; Windsor, 833 F. Supp. 2d at 394.

<sup>136</sup> This follows from the same logic of Article 7 of the Vienna Convention, which only recognizes delegates as representing the State when they are the Head of State, Heads

prerogative of the executive to determine the legal position of the state, regardless of the fact that the violation might have originated in an act of the legislative body, a decision of the judiciary, or policies of local authorities. It is not unusual to find declarations of the representatives of the state in the proceedings in which they concede that a judicial decision or a law passed by Congress is in fact a violation of an international human rights treaty, and then invite the Court to move to the remedies stages.<sup>137</sup> My contention is that these acceptances are not necessarily out of a human rights commitment; rather, they are motivated by the executive benefits of imposing a policy he could not have imposed at the domestic level due to political or legal constraints. This is consistent with statistics presented by Professor Alexandra Huneeus, which show how executive powers in Latin America have been more willing to comply with the decisions of the IACtHR than the domestic legislative or judicial powers.<sup>138</sup>

In at least five cases reviewed in the next Section, local executives at the time of the defense of the case agreed with the agenda pushed by the supranational court and allowed it to be intrusive.<sup>139</sup> A Court's expansion gave the executive the pretext to impose an agenda that domestically could have been harder to achieve with political parties or social opposition. Moreover, the cases are an example of the evolution of the Court into a more politically consequential court at the domestic level through its reasoning: the *Caracazo v. Venezuela* case took place in the early stages of the expansive moment of the Court;<sup>140</sup> the *Last Temptation of Christ v. Chile* case was one of the first cases in which the Court ordered a State to modify its constitution on issues not related to amnesties;<sup>141</sup> and the *Artavia v. Costa Rica* case offers the opportunity to review the latest effort of the Court to make its remedies more expansive at the domestic level and to modify the way domestic constitutional courts reason about rights.<sup>142</sup>

Before moving to the concrete cases, the following subsections are intended to describe how the IACtHR has evolved from a judicial mechanism to

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of Government and Ministers for Foreign Affairs—all of them traditionally corresponding to the executive branch. They can be considered as representing the state in question only if these authorities give appropriate full powers to other branches of government. Vienna Convention, *supra* note 1, Art. 1. *Amicus* briefs in the system are allowed in certain judicial procedures, but they have not been used by branches of government. They have mostly been presented by academic institutions individuals or NGOs.

<sup>137</sup> See *infra* Sections V.B, V.C, V.D.

<sup>138</sup> Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L. J. 493, 508–09 (2011).

<sup>139</sup> See *infra* Sections V.B, V.C, V.D. Other cases not covered within where the Court was over intrusive in its orders are *Barrios Altos v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83 (Sept. 3, 2001); *Almonacid Arellano et al. v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006). See also Dulitzky, *supra* note 8, at 54 (critiquing the Court's over expansive remedies jurisprudence).

<sup>140</sup> See *infra* Section V.B.

<sup>141</sup> See *infra* Section V.C.

<sup>142</sup> See *infra* Section V.D.

avoid diplomatic intervention from Western powers in the region to a court that analogizes its role to the powers of a constitutional court. The IACtHR has become politically consequential at the domestic level.<sup>143</sup> Subsection A describes the bases of its operation and its connection with the American Convention on Human Rights. Subsection B then analyzes the transformation of the Court into an international body that reasons as a supranational constitutional court. Subsection B focuses on the political context that motivated the change. At the end of the Section, the reader will be able to identify clearly how the Court depicts its functions and the type of jurisprudence that it has created in order to support its constitutional role.

## **A. Intro to the Operation of the IACtHR**

### **1. The Origins: Sovereignty First.**

The idea of creating an Inter-American Court is older than the 1969 American Convention of Human Rights (the “Convention”), and it even predates the creation of the European Court of Human Rights.<sup>144</sup> Contrary to what some commentators assume, Latin American countries were the first regional block to propose in 1945 a system where individuals could bring claims against states for rights violations.<sup>145</sup> The origins of the institution also show a stark contrast with

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<sup>143</sup> Dulitzky, *supra* note 8; Antônio Augusto Cançado Trindade, *Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights*, in 202 COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L. 9, 93, 99 (1987); Sergio García Ramírez, *La Jurisprudencia de la Corte Interamericana de Derechos humanos en Materia de Reparaciones*, in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS. UN CUARTO DE SIGLO: 1970-2004 1, 4 (2005) (arguing that human rights treaties should be interpreted as living texts, and constitutions are to be interpreted in an evolutionary way; “[the IACtHR] fulfills an analogous role as the one from the constitutional and supreme courts under their own competences, this role is to fix, according to an inexorably progressive criteria—that systematically re-interprets, with a contemporary view, the texts written in the past, under different circumstances—the meaning of the supreme formulas of domestic law. This re-interpretation of the text through progressive constructions is necessary in light of the need for these formulas to lead, in each new condition, the life of the nation.”).

<sup>144</sup> G.L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 102 (2008). Most commentators reviewing the IACtHR begin with the American Convention and how the ECtHR model influenced Latin America. *Id.* (“The Court corresponds to the European Court of Human Rights within the regional system of the Council of Europe. Indeed, the drafters of the ACHR substantially modeled the Court and its relationship with the Inter-American Commission on Human Rights on the structure of the European human rights system as it existed in the 1960s.”).

<sup>145</sup> Kathryn Sikkink, *Latin American Countries as Norms Protagonists of the Idea of International Human Rights*, 20 GLOB. GOV. 389, 390–91 (2014) (arguing that “Latin American countries were protagonists of the idea of ‘international human rights’; that is, the idea that there should be international involvement in formulating and enforcing international human rights norms and law, and the related idea that there should be international involvement in democracy promotion.”). *See also* Mary Ann Glendon, *The Forgotten*

the narrative presented by the advocates of international human rights regimes that see in them a supranational judicial system that helps pierce state sovereignty.<sup>146</sup> In fact, the system was designed to preserve the sovereign rights of the Latin American states.<sup>147</sup>

The first time Latin American governments proposed such a mechanism, it was not considered as a way to give up sovereignty, but rather a way to reinforce it by precluding foreign military interventions.<sup>148</sup> According to Tom J. Farer, at the end of World War II Latin American countries were very sensitive to potential interventions based on the diplomatic protection of US citizens abroad.<sup>149</sup> The decision to promote the creation of the Inter-American institutions was a way to constrain expanding power of the North Americans.<sup>150</sup> In other words, “[c]ontainment was their dominating purpose” and the Organization of American States (OAS) institutions “were its imperfect expressions.”<sup>151</sup>

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*Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 27 (2003); HUDSON, *supra* note 2, at 169–80, 252–53.

<sup>146</sup> Harold Hongju Koh, *How Is International Human Rights Law Enforced*, 74 IND. L. J. 1397 (1998); Anne-Marie Slaughter, *Liberal Theory of International Law*, 94 AM. J. INT’L L. 240, 241 (2000); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 538, 538; José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory*, 12 EUR. J. INT’L L. 183 (2001).

<sup>147</sup> SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 176–211 (2010) (identifying how non-intervention, sovereignty, and self-determination were all components of the early years of the human rights movement).

<sup>148</sup> This is clear from the reading of Resolution XL of the Act of the Inter-American Conference on Problems of War and Peace of 1945, which instructed the Inter-American Judicial Committee to present a draft Declaration that would ensure that the “international protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens.” Pan-American Union, *Inter-American Juridical Committee “Draft Declaration of the International Rights and Duties of Man and Accompanying Report”* 40 AM. J. OF INT’L L. 93, 114–15 (1946). This was consistent also with the whole Inter-American System that was planned partly with the new expansion of the American hegemony after WWII in mind. On the one hand, the Latin American States wanted to curtail the expansion of the American influence, but the United States also wanted to maintain the Latin Americans in line to avoid the soviet influence. Tom J. Farer, *The Changing Context of the Inter-American Relations*, FUTURE INTER-AM. SYST. xv, xvii (1979) [hereinafter Farer, *The Changing Context of the Inter-American Relations*]; TOM J. FARER, *THE UNITED STATES AND THE INTER-AMERICAN SYSTEM: ARE THERE FUNCTIONS FOR THE FORMS?* 4 (1978) [hereinafter FARER, *THE UNITED STATES AND THE INTER-AMERICAN SYSTEM*]; Richard J. Bloomfield, *Inter-American System: Does It Have a Future*, FUTURE INTER-AM. SYST. 1, 6 (1979).

<sup>149</sup> FARER, *THE UNITED STATES AND THE INTER-AMERICAN SYSTEM*, *supra* note 148, at 4–5.

<sup>150</sup> *Id.*

<sup>151</sup> Farer, *The Changing Context of the Inter-American Relations*, *supra* note 148, at xvii.

The envisioned formula of the Latin American delegations was to establish, in an international declaration, a set of rights that would fix a minimum standard of justice across the region.<sup>152</sup> By doing so, the Latin American states that had suffered Western interventions under the pretext of diplomatic protection would dissuade foreigners from arguing that they were not being given a minimum standard of protection.<sup>153</sup> The Final Act of the Inter-American Conference on Problems of War and Peace of 1945 included a declaration inviting the Council of Inter-American Jurists to draft an American declaration of universal rights and a statute for a Latin American Court of Justice that would have jurisdiction only for cases in which foreign nationals were involved.<sup>154</sup>

A year later, in 1946, the Inter-American Judicial Committee presented a Draft Declaration of the International Rights and Duties of Man.<sup>155</sup> Draft Article XXI of the American Declaration reflected the preoccupation with the abuse of diplomatic protection and the intention to contain it through the creation of an international court:

In the case of aliens alleging violation of the foregoing fundamental rights by the state in which they are resident, the complaint shall be decided first by the courts of the state itself; and in cases in which a denial of justice is alleged by the state of which the alien is national, the case, failing diplomatic settlement, shall be submitted to an International Court, the statute of which shall be included as an integral part of the instrument in which the present Declaration is to be adopted.<sup>156</sup>

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<sup>152</sup> According to the reports of the 1945 Conference on Problems of War and Peace, "A special feature of the Mexican project was the suggestion that the Declaration, 'by establishing a minimum standard of civilized justice', might do away with the necessity of the diplomatic protection of citizens abroad which had led frequently to the violation of the principle of nonintervention. To this end the project recommended the creation of an Inter-American organ which would have the special duty of watching over the regulation and practical application of the principles which were to be proclaimed in the declaration." Pan-American Union, *Inter-American Juridical Committee "Draft Declaration of the International Rights and Duties of Man and Accompanying Report"* 40 AM. J. OF INT'L L. 93, 104 (1946).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 114–15 (1946) (containing Resolution XL adopted by the States in the Final Act of the Inter-American Conference on Problems of War and Peace of 1945 included the Mexican proposal and stated that the "[i]nternational protection of essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of principles of non-intervention and of equality between nations and aliens, with respect to the essential rights of man.").

<sup>155</sup> *Id.* at 110 (discussing the administration of an international standard of fundamental rights).

<sup>156</sup> *Id.* at 99.

In 1948, the American nations met again, this time for the Ninth Conference in Bogota, Colombia, and adopted the OAS Charter and the American Declaration on Human Rights. According to the reports of the Convention, the delegations were divided into three postures regarding the effectiveness that the Declaration should have.<sup>157</sup> The delegates discussed heavily whether the Declaration should have been a traditional treaty with concrete obligations or a general abstract declaration, whether the protection of the rights should have been left to state authorities recognized by domestic constitutions or by an international judicial body, and whether it should have a legal guarantee to make its provisions enforceable.<sup>158</sup>

A year after the Bogota Conference and the adoption of the American Declaration of Human Rights, the Inter-American Juridical Committee met in Rio de Janeiro to study a draft statute of the Inter-American Court.<sup>159</sup> It first recognized the dual intention of the American Declaration to become an instrument for avoiding diplomatic interventions and for recognizing the international protection of a set of shared rights by all American States.<sup>160</sup> The Committee then was compelled to recognize that the American Declaration “did not create a legal contractual obligation.”<sup>161</sup> Yet, according to the Committee, it served as a “well defined guide” towards the aspiration of having an international protection of those fundamental rights.<sup>162</sup> Under the Committee’s views, for the system to become effective, Latin American states needed to “radically transform their constitutional systems.”<sup>163</sup> According to the Committee, the domestic constitutional systems would need to “adapt” to the new international jurisdiction so that the domestic and the international courts could operate in coordination, because they would “share” the function of protecting the same rights.<sup>164</sup>

In 1948, the year when the Bogota Conference adopted the American Declaration, only two Latin American States had fallen victims of dictatorships: the Dominican Republic with General Trujillo and Honduras with Tiburcio Carias

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<sup>157</sup> Documento CB-445/C.VI-36 de la Comisión Sexta, Novena Conferencia Internacional Americana, Informe del Relator de la Comisión Sexta, at 512 (1948) [hereinafter Informe Relator Novena Conferencia].

<sup>158</sup> *Id.* See also, Documento CB-147/C.VI-Sub A-4 de la Comisión Sexta, Novena Conferencia Internacional Americana, Minuta de la Primera Sesión de la Subcomisión A, at 613 (1948).

<sup>159</sup> *Inter-American Juridical Committee "Informe Al Consejo Interamericano de Jurisconsultos Sobre La Resolución XXXI de La Conferencia de Bogota"* (Recomendaciones e Informes. Documentos Oficiales. 1949–1953, 1955) 105 [hereinafter *Inter-American Juridical Committee*].

<sup>160</sup> *Id.* at 106.

<sup>161</sup> *Id.* at 107.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 109.

<sup>164</sup> *Inter-American Juridical Committee, supra* note 159, at 109.

Andino.<sup>165</sup> The political landscape began to change in the 1950s. In 1959, when the ministers of foreign affairs met for an extraordinary session of the OAS, Fidel Castro had overthrown President Batista in Cuba;<sup>166</sup> in 1954, General Stroessner had taken power by military force in Paraguay;<sup>167</sup> General Gustavo Rojas Pinilla had successfully orchestrated a coup d'état in Colombia against President Laureano Gómez Castro;<sup>168</sup> Anastasio Somoza García had ruled Nicaragua under his grip from 1936 until his assassination in 1956;<sup>169</sup> Argentina suffered a military coup in 1955 to overthrow President Juan Domingo Perón;<sup>170</sup> and in 1954, with the help of the US Carlos Castillo Armas in Guatemala, they orchestrated a military coup and ruled until his assassination three years later.<sup>171</sup> These events dramatically changed the tone and issues discussed in the OAS. Suddenly the most significant regional problem was the preservation of democracy and its connection with human rights treaties and the right of non-intervention by neighboring military States.

## 2. The 1969 Structure for a New Political Context: The Rise of Military Coups

As stated above, the rise of military dictators in the 1950s and 1960s changed Inter-American politics. The incident that marked the future of the Inter-American system and triggered a desire to create regional mechanisms that would ensure that states would not intervene in the affairs of their neighbors was the rise of General Trujillo in the Dominican Republic.<sup>172</sup> This time the fear was not only of US intervention but also of dictators with nationalistic views that would try to disrupt democratically elected government in order to expand their presence in the region.<sup>173</sup>

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<sup>165</sup> Frank Moya Pons, *The Dominican Republic since 1930*, 7 CAMBRIDGE HISTORY OF LATIN AMERICA 509, 509 (1990); Victor Bulmer-Thomas, *Honduras since 1930*, 7 CAMBRIDGE HISTORY OF LATIN AMERICA 283, 289–311 (1990).

<sup>166</sup> Louis A. Perez, *Cuba, c. 1930–59*, 7 CAMBRIDGE HISTORY OF LATIN AMERICA 419, 452–55 (1990); Jorge Domínguez, *Cuba since 1959*, 7 CAMBRIDGE HISTORY OF LATIN AMERICA 457, 457 (Leslie Bethell ed., 1990).

<sup>167</sup> Paul H. Lewis, *Paraguay Since 1930*, 8 CAMBRIDGE HISTORY OF LATIN AMERICA 233, 252–66 (1991).

<sup>168</sup> Christopher Abel & Palacio Marco, *Columbia, 1930–58*, 8 CAMBRIDGE HISTORY OF LATIN AMERICA 587, 616–27 (1991).

<sup>169</sup> Victor Bulmer-Thomas, *Nicaragua since 1930*, 7 CAMBRIDGE HISTORY OF LATIN AMERICA 317, 333–44 (1990).

<sup>170</sup> Juan Carlos Torre & Liliana de Riz, *Argentina since 1946*, 8 CAMBRIDGE HISTORY OF LATIN AMERICA 73, 92 (1991).

<sup>171</sup> James Dunkerley, *Guatemala since 1930*, 7 CAMBRIDGE HISTORY OF LATIN AMERICA 221, 228–30 (1990).

<sup>172</sup> Moya Pons, *supra* note 165, at 509.

<sup>173</sup> KLAAS DYKMANN, *PHILANTHROPIC ENDEAVORS OR THE EXPLOITATION OF AN IDEAL?: THE HUMAN RIGHTS POLICY OF THE ORGANIZATION OF AMERICAN STATES IN LATIN AMERICA (1970–1991)* 53–55 (2004).

The incident that triggered the fear of intervention was the sponsored assassination attempt by General Trujillo of the Venezuelan President Romulo Betancourt in 1960.<sup>174</sup> By the late 1950s, General Trujillo established a regime of oppression in the Dominican Republic. As a way to control domestic opposition, Trujillo shifted national attention to the neighboring governments, especially to Venezuela, and associated them with the domestic dissenters.<sup>175</sup> President Romulo Betancourt was an outspoken opponent of Trujillo and its oppressive regime.<sup>176</sup> After the failed assassination attempt, Betancourt raised the issue at the OAS.<sup>177</sup> The Latin American states of the time believed that the expansion of dictators in the region could become a threat to the sovereignty of democratically elected governments and proposed to continue with the original project to create an Inter-American Court.<sup>178</sup>

In addition to the Court, the states created another body to spread the ideals of the American Declaration of Human Rights: an Inter-American Commission of Human Rights.<sup>179</sup> This body was originally not authorized to examine specific cases but rather, had the task of spreading information and promote the 1948 American Declaration of Human Rights.<sup>180</sup> This included on-site visit to the members of the OAS to promote the ideals of the Declaration.<sup>181</sup> As more people would be acquainted with the Declaration's content, it was believed that pressure would prevent dictators from emerging and disseminating fear against the neighboring states. As expected, the Commission's first on-site visit was in 1961 to the Dominican Republic.<sup>182</sup> The Commission's visit was such a success in reporting the situation in Trujillo's Dominican Republic, that in 1965 it was expressly authorized to examine complaints or petitions regarding specific cases.<sup>183</sup> Notwithstanding these advancements, in the late 1960s military coups d'état kept expanding in the region: Argentina suffered them in 1962, 1966, and 1976;<sup>184</sup> Peru also followed the same path with the military regime of Juan Velasco Alvarado from 1968 to 1975;<sup>185</sup> and Brazil suffered a coup in 1964 against president Joao Giullart that would impose a military rule until 1985.<sup>186</sup>

In this political context, the American Convention on Human Rights was adopted in 1969. This now binding treaty also gave life to the contemporary

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<sup>174</sup> DYKMANN, *supra* note 173, at 53–55.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 54–55.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 53–55.

<sup>179</sup> DYKMANN, *supra* note 173, at 55–57.

<sup>180</sup> *Id.* at 57–59.

<sup>181</sup> *Id.* at 57–58.

<sup>182</sup> *Id.* at 59.

<sup>183</sup> *Id.* at 59–61.

<sup>184</sup> Torre & Riz, *supra* note 170, at 115–58.

<sup>185</sup> Julio Cotler, *Peru since 1960*, 8 CAMBRIDGE HISTORY OF LATIN AMERICA 451, 464–72 (1991).

<sup>186</sup> Leslie Bethell & Celso Castro, *Politics in Brazil under Military Rule, 1984-1985*, 9 CAMBRIDGE HISTORY OF LATIN AMERICA 165, 165–68 (2008).



structure of the Inter-American System of Human Rights by establishing the IACtHR. The Court began its regular operations in 1980 after the Convention entered into force (1978) and its Statute was approved by the OAS General Assembly (1979).<sup>187</sup>

According to the American Convention, the Court's jurisdiction comprises "all cases concerning the interpretation and application of the provisions of [the] Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction."<sup>188</sup> In addition to disputes, the member states may consult the Court regarding the interpretation of the Convention, other human rights treaties, or the compatibility of domestic law with the international covenant.<sup>189</sup> In cases where a violation of the Convention has been proven, the Court "shall rule that the injured party be ensured the enjoyment of his rights or freedom that was violated."<sup>190</sup> Moreover, it can rule that the "consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured" if appropriate.<sup>191</sup> As will be discussed more fully in Subsection III.B.2, this power has been interpreted by the Court as including the possibility of ordering measures that will ensure the non-repetition of the violation of the right in the future; not only to the concrete victim in the case, but also, to other citizens of the state. This implies that the Court can order structural remedies to state authorities.<sup>192</sup> The judgment of the Court is "final and not subject to appeal"<sup>193</sup> and the parties according to the Convention "undertake to comply with the judgment of the Court in any case to which they are parties."<sup>194</sup> The Convention is silent regarding whether the jurisprudence abides for the states that did not participate in the concrete case.

In terms of structure, the Court is composed of seven Judges, all nationals of the OAS member states, elected by an absolute majority of its General Assembly.<sup>195</sup> The judges serve for a term of six years, may be reelected once, and are partially renewed every three years.<sup>196</sup> The Court requires a quorum of five judges for its deliberations, and only meets an average of four times a year in San Jose, Costa Rica for its regular sessions and twice a year for special sessions in

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<sup>187</sup> Organization of American States, American Convention on Human Rights, art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The Court did not begin its operation until 1980 and did not adopt its Rules of Operation until August 1980. See Antônio Augusto Cançado Trindade, *The Operation of the Inter-American Court of Human Rights*, INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 133 (1998).

<sup>188</sup> American Convention on Human Rights, *supra* note 187, art. 62, at 159.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* art. 63, at 159.

<sup>191</sup> *Id.*

<sup>192</sup> Antkowiak, *supra* note 9, at 355–57.

<sup>193</sup> American Convention on Human Rights, *supra* note 187, art. 67, at 160.

<sup>194</sup> *Id.* art. 68, at 160.

<sup>195</sup> *Id.* arts. 52–53, at 157–58.

<sup>196</sup> *Id.* art. 54, at 158.

different jurisdictions.<sup>197</sup> It is not a sitting body, and by holding hearings outside the jurisdiction of the involved state, it is arguably highly insulated from the politics and pressures of local actors.

Only the Inter-American Commission or the member states can bring cases before the Court.<sup>198</sup> In cases regarding human rights violations, the victims must first exhaust domestic remedies and be heard by the Commission before the Court obtains jurisdiction.<sup>199</sup> In this “pre-trial,” the Commission reviews the case, requests information from the government of the state, ascertains the grounds of the petition, hears oral statements, and helps the parties reach a friendly settlement.<sup>200</sup> If a settlement is not reached or if the state refuses to cooperate, the Commission assesses whether there are enough merits to bring the case before the Court.<sup>201</sup>

Using the analytical tools described in the previous sections—thinking of the parties, the procedure and the strategies—the above mentioned structural and procedural elements allow us to identify certain trends regarding actors and issues involved in all the cases. The fact that the victims have to exhaust all available local remedies before bringing the case to the Commission places judicial powers on the “accused stand” regardless of the issue being discussed. Either the local judges were unable to properly address the victim’s claims, or the judicial system with its actions or omissions actively violated the rights of the accused. Judges become bystanders or perpetrators in the majority of cases. Secondly, as stated above the executive through its ministry of foreign affairs is always the coordinating authority in the defense of the case. Regardless of where and how the violation occurred, the executive branch decides the defense’s arguments, chooses which government actors can participate in the proceedings, and decides if the state will offer reparation to the victims. In every case, the judiciary and the executive are always involved in one way or another. Hence, the focus in the next section is on how the litigation of human rights cases in the region and the decisions of the IACtHR affect domestic judicial-executive relations.

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<sup>197</sup> See Inter-American Court of Human Rights, *Session Dates*, CORTE INTERAMERICANA DE DERECHOS HUMANOS, <http://www.corteidh.or.cr/index.php/en/court-today/fechas-de-sesiones> (last visited Sept. 9, 2017); American Convention on Human Rights, *supra* note 187, art. 56, at 158 (“Five judges shall constitute a quorum for the transaction of business by the Court”).

<sup>198</sup> American Convention on Human Rights, *supra* note 187, art. 61, at 159 (“Only the State Parties and the Commission shall have the rights to submit a case to the Court.”).

<sup>199</sup> *Id.* art. 46–48, at 156 (“[R]emedies under domestic law have been pursued and exhausted . . . . The Commission shall consider . . .”).

<sup>200</sup> *Id.* art. 48, at 156.

<sup>201</sup> *Id.* art. 50, at 157.

## **B. Becoming a Politically Consequential Court at the Domestic Level**

### **1. The Influence of US Legal Liberalism in the New Constitutional Landscape**

The fall of authoritarian regimes in the 1990s changed the Latin American domestic constitutional landscape. NGOs, practitioners, governments that negotiated the transition, and academics fostered a change in the role played by constitutional law and human rights treaties.<sup>202</sup> The movement was characterized by a particular view of constitutional law. Constitutions were to be regarded “as embodying universal principles (human rights) deemed to be above statutory law and susceptible to be directly applied by the judiciary, even at the cost of trumping the sovereign decisions of the democratically elected branches of government.”<sup>203</sup>

Post-dictatorship-Latin-American constitutions reflected this vision.<sup>204</sup> They first promulgated additional powers to constitutional courts.<sup>205</sup> Secondly, they included new social, economic, cultural and civil rights.<sup>206</sup> Third, and hand in hand with these two changes, they assigned human rights covenants an express constitutional hierarchy—some countries even placed them above it.<sup>207</sup>

The reforms were targeted at strengthening domestic constitutional courts vis-à-vis the excesses of authoritarianism, traditionally exercised through the abuses of presidential power.<sup>208</sup> The region was, and to a certain extent is today, still perceived as one where “the survival of the rule of law seems to be fundamentally threatened by the constant attempts of the executive to expand its powers.”<sup>209</sup> Given the hyper-presidential nature of the political regimes in the region, the prescription in the last decades has given the courts the ability “to say ‘no’ to the executive and

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<sup>202</sup> Huneus., *Cultures of Legality*, *supra* note 111, at 4 (explaining how the shift of ideas on the role of actors in the Latin American legal elite is key in understanding the political changes of the region).

<sup>203</sup> Couso, *supra* note 22, at 154 (“The works of scholars such as [Carlos] Nino, [Carlos] Peña, and others introduced into Latin America what Alec Stone Sweet (2000) has labeled ‘higher-law constitutionalism’; that is, a theory that regards the Constitution as embodying universal principles (human rights) deemed to be above any statutory law and susceptible to be directly applied by the judiciary, even at the cost of trumping the sovereign decisions of the democratically elected branches of government. This approach, continues Stones Sweet, amounts to a postmodern version of natural-law thinking.”).

<sup>204</sup> See generally Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America, Trends and Challenges*, 89 TEX. L. REV. 1587 (2011).

<sup>205</sup> Huneus, *Cultures of Legality*, *supra* note 111, at 3.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> GARGARELLA, *supra* note 22, at 155–62; Roberto Gargarella, *Recientes Reformas Constitucionales en América Latina: Una Primera Aproximación*, 36 DESARROLLO ECONÓMICO 971, 971 (1997).

<sup>209</sup> Siri Gloppen et al., *The Accountability Function of the Courts in New Democracies*, DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 1, 1 (2004).

make it ‘stick.’”<sup>210</sup> In line with this constitutional transformation the region saw an effort from NGOs, the IACtHR, opposition parties and international agencies to promote an independent judiciary.<sup>211</sup> Judicial reform in Latin America has been continuous since then, and in most jurisdictions, courts, including constitutional and supreme courts, have achieved a formal level of independence.<sup>212</sup> Most Latin American judiciaries now have judicial counsels that oversee the work of judges and allow the pursuit of a judicial career without a political intervention.<sup>213</sup> In some jurisdictions, such as Argentina, other branches of government have very little authority over the courts, to the point that they are considered to be “dangerously removed from the will of the people,” too detached from the real political and social problems of the nation, and representative of an “explosive formula for new democracies.”<sup>214</sup>

In addition to reforming the judiciary, Latin America has also faced a shift of traditional doctrinal scholarship.<sup>215</sup> This has had an impact on the way the judiciary and practitioners perceive the role of judges.<sup>216</sup> According to Eduardo Lopez Medina, the genealogy of a new orthodoxy of Latin American constitutionalism can be found in the influence of US scholars such as Ronald Dworkin, H.L. Hart, and John Ely, and from continental Europe Robert Alexy and Luigi Ferrajoli.<sup>217</sup> Most US scholars can be identified as liberal legal thinkers of

<sup>210</sup> Gloppen et al., *supra* note 209, at 2.

<sup>211</sup> Cf. Trubek, *supra* note 23.

<sup>212</sup> ELIN SKAAR, JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA: VIOLATIONS, POLITICS, AND PROSECUTION 3–4 (2011).

<sup>213</sup> Cf. Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189, 205–09 (2005) (explaining . . . and showing that there are natural variances among jurisdictions that employ this model, but most of them share similar stages in the process enabling them to stop atrocities); Hector Fix-Fierro, *Judicial Reform in Mexico: What Next?*, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 240, 263–65 (2011).

<sup>214</sup> Gloppen et al., *supra* note 209, at 4; Roberto Gargarella, *In Search of Democratic Justice-What Courts Should Not Do: Argentina, 1983-2002*, DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 132, 1 (2004).

<sup>215</sup> Couso, *supra* note 22, at 141 (“The focus on legal scholarship as a factor contributing to the shape of the legal cultures of Latin America derives from the conviction that it represents one of the most important sites for the configuration of an understanding of the nature, sources, and the role of the law, as well as conceptions about the judiciary and legal interpretation.”).

<sup>216</sup> *Id.* at 144 (“Legal scholarship in civil law countries is not merely a heuristic tool but—more importantly—a way of shaping the representation that legal actors maintain concerning the very nature of the enterprise of law. This is typically implicit because—while explaining the law of the country—jurists help to constitute a discourse about the very nature of law and of the legal system. This discourse is then transmitted to judges, legal academics, and litigants through the medium of legal education, which in civil law regimes makes an intensive use of legal scholarship as a pedagogical tool.”).

<sup>217</sup> Eduardo & Medina, *supra* note 23, at 124–25, 412–13; Miguel Carbonell, *Luigi Ferrajoli: Teórico del Derecho y de la Democracia*, MIGUELCARBONELL.COM,

the 1970s.<sup>218</sup> The US liberal academics developed scholarship that praised the activism of the federal judiciary and particularly of the US Supreme Court during the tenure of Chief Justice Earl Warren.<sup>219</sup> For the liberal US scholars, the significance of the judiciary “was reinforced by the enhanced role judges were starting to play in the broadening field of public-law litigation.”<sup>220</sup> These views, and particularly the role of the judge in public law adjudication, were key in laying the foundation for the new movement of Latin American constitutionalism.<sup>221</sup> In Latin America, the judicial activism that US liberal scholars were trying to square with US democratic values was interpreted as a benchmark of judicial work for modern democracies.

These scholars’ presence had an important impact on the evolution of the legal system because in Latin America doctrinal scholarship is a formal source of law quoted as a basis for the decisions of the court.<sup>222</sup> The new Latin American progressive literature would argue, almost as an orthodoxy, that the new constitutions should not be interpreted as a set of rules that should distribute powers among political actors, but as:

being full of principles that could, and more often than not, be used to limit or overcome the codified or legislated rules . . . [I]t was considered more adequate for the Court to give moral or

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[http://www.miguelcarbonell.com/docencia/sobre\\_Ferrajoli\\_printer.shtml](http://www.miguelcarbonell.com/docencia/sobre_Ferrajoli_printer.shtml); Esquirol, *The Fictions of Latin American Law (Part I)*, *supra* note 23, at 447.

<sup>218</sup> David Kennedy, *Ronald Dworkin*, CANON AM. LEG. THOUGHT 552, 551–57 (2006) [hereinafter Kennedy, *Ronald Dworkin*]; Trubek, *supra* note 23; David Kennedy, *The “Rule of Law,” Political Choice, and Development Common Sense*, THE NEW LAW AND ECONOMIC DEVELOPMENT 95 (2006).

<sup>219</sup> Kennedy, *Ronald Dworkin*, *supra* note 218, at 551.

<sup>220</sup> *Id.*

<sup>221</sup> Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 136 (1978); Eduardo & Medina, *supra* note 23, at 412–13; Couso, *supra* note 22, at 165–66 (“A good indicator of the prevalence achieved in recent years by the new constitutional orthodoxy is the sudden popularity within Latin America’s constitutional academic community of three important global exponents of higher-law constitutionalism: Ronald Dworkin (from the Anglo-American academic world); and Robert Alexy and Luigi Ferrajoli (from the Continental European one). The interesting prominence of these authors among Latin American constitutional scholars is that it suggests that a kind of natural-law perspective is permeating the region.”). *See generally* RONALD DWORKIN, LAW’S EMPIRE (1986).

<sup>222</sup> Couso, *supra* note 22, at 159–60 (“This is particularly the case in a region where like other places with a civil law background - legal scholarship, or la doctrina, is considered a formal source of law, and where it plays a critical role in socializing students into the legal field. Not all scholarship on law carries this formal status; only scholarship that specifically interprets and develops legal doctrine . . . [C]onstitutional discourse experiences a revolutionary transformation over the last few decades. I argue that this dramatic shift facilitates the introduction of processes of judicialization of politics in the region by changing traditional understandings of the status of legislated law and the role of courts in democracy.”).

political decisions a judiciable solution than to give predictability and formalism to the decisions; it was better to reach substantive results that were considered just and equitable than to focus on procedural subtleties; ‘justice’ as a concept had a specific judicial meaning and was more important than legality,<sup>223</sup>

The “conceptual revolution” was accompanied by a particular version of constitutional law that promoted judicial activism, fostered the use of international human rights instruments, and rejected formalism.<sup>224</sup> According to Javier Couso, “this paradigm shift owes much to the reception in Latin America of a global doctrine affirming that human rights constitute the central category of constitutionalism,” and that “inspiration came from the scores of Latin American academics who started to pursue graduate training in law in the United States in the late 1970s, where they were socialized by their liberal North American law professors into the virtues of the legendary Warren Court.”<sup>225</sup> An important source of funding in the 1990s in favor of this constitutional orthodoxy came from US-based foundations that “built a powerful network that regularly published works that combine constitutional theory and human rights with different aspects of the public interest law agenda in Latin America.”<sup>226</sup> The effort to embrace judicial activism was accompanied with placing blame on traditional formalism for the atrocities committed under the name of the law during the authoritarian regimes.<sup>227</sup>

<sup>223</sup> Eduardo & Medina, *supra* note 23, at 412–13 (translation by author).

<sup>224</sup> Couso, *supra* note 22, at 164–65.

<sup>225</sup> *Id.* at 163 (“Furthermore, it is also a result of the importation to the region of doctrines legitimizing judicial control of the constitutionality of law, either in its Continental European version (that is, thought the introduction of constitutional courts), or in its American version (which gives the power to the regular courts). In the case of the reception of the European model, the borrowing was to some extent natural, as the latter had been the regular source of doctrinal change in Latin America. In the case of the US model of judicial review, the inspiration came from the scores of Latin American academics who started to pursue graduate training in law in the United States in the late 1970s, where they were socialized by their liberal North American law professors into the virtues of the legendary Warren Court.”).

<sup>226</sup> *Id.* at 166 (“Given this bleak diagnosis, proponents of this approach to legal action and teaching openly embraced the US model of constitutional discourse and practice, which most of them had experienced firsthand as Master of Laws LLM students. At this point it is relevant to point out that the transformation of Latin America’s constitutional scholarship has not been confined to public law. In fact, it has affected the general outlook of legal theory. One example of the effect of the growing acceptance of higher-law constitutionalism is the decline on the degree of formalism exhibited by the judges of the region.”). Other authors have expressed a skeptical view on how much foreign agency’s influence has had on the reform. See Fix-Fierro, *supra* note 213, at 231 (“It should be fairly evident from the previous sections that judicial reform in Mexico is not primarily the result of foreign pressures or of the intervention of international development agencies: neither has played a significant role so far. Its roots run much deeper, and that is a source of both weakness and strength in the reform process.”).

<sup>227</sup> Couso, *supra* note 22, at 163.

In the words of Javier Couso, “the very formalism and judicial deference to legislated law that characterized the previous paradigm was being blamed for the passivity exhibited by the judiciaries in the face of the massive human rights violations perpetrated during the authoritarian wave.”<sup>228</sup>

As will be analyzed in the next section, the work of the IACtHR during this period of expansion also reflects this influence.<sup>229</sup> To the IACtHR, judges, and the advocates of judicial reform, if the region wanted to overcome the existing social and political problems left after the fall of the dictators, domestic legal systems needed judges that would reason the consequences and distributional effects of the law.<sup>230</sup> This view represents a paradox for our comparative analysis. The experience in the US constitutional system of adjudication shows that executive power can also benefit from the judicial expansion in public authority.<sup>231</sup> It is not necessarily true that courts will always control executives when they assert the power of judicial supremacy. An “alliance” between the court and the executive could emerge to jointly expand their powers.

## 2. The Period of Expansion

In the late 1990s, while domestic judiciaries were facing a process of transformation, the IACtHR began to reconstruct its functions. It stopped functioning as a Court that would work as a complementary system to the domestic judicial institutions and began to operate as a supranational “constitutional” court.<sup>232</sup> As opposed to a court limited to determining whether states violated international law, it sees itself as a court empowered to define how domestic authorities, including the highest courts, should exercise their constitutional powers.<sup>233</sup> This effort was reflected by several jurisprudential strategies. First, the Court interpreted the Convention to include rights that were not expressly contemplated in the text of the treaty.<sup>234</sup> It then reinterpreted the remedies section

<sup>228</sup> Couso, *supra* note 22, at 163.

<sup>229</sup> See *infra* Section IV.B.2.

<sup>230</sup> See generally Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. CRITIQUE 91 (2014) [hereinafter Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*]; David Kennedy, *Abram Chayes, THE CANON OF AMERICAN LEGAL THOUGHT* 605, 606 (2006) (describing how in the 1950’s this is the role that the US legal academia had identified in the Warren Court).

<sup>231</sup> See generally WHITTINGTON, *supra* note 11.

<sup>232</sup> Dulitzky, *supra* note 8, at 68 n.150.

<sup>233</sup> Ezequiel Malarino, *Activismo Judicial, Punitización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de la Corte Interamericana de Derechos Humanos [Judicial Activism, Punitivism, and Supranationalization: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights]*, SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL 25, 25 (2010).

<sup>234</sup> See *id.* (giving a list of examples of rights not expressly contemplated in the Convention). See, e.g., *Barrios Altos v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶¶ 41–44 (Sept. 3, 2001) (the prohibition of amnesties

of the Convention to include structural remedies and not only those involving the particular victim.<sup>235</sup> Moreover, the IACtHR expanded its interpretative powers by modifying the rules of the Court to include the supervision of its own judgments; further, it expanded its power to review cases that had happened before the entry into force of the Convention.<sup>236</sup>

All of these jurisprudential moves reflect a concrete intention to abandon its foundational logic of subsidiarity or auxiliary to domestic institutions, and adopt a model in which the Court signals concrete responsibilities of particular governmental actors, including domestic judiciaries.<sup>237</sup> An element of this second stage was the transformation of the traditional principles of interpretation of international law to more expansive interpretations that included policy analysis and

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for human rights violations); *Almonacid Arellano et al. v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, §§ 105–29, 151–54 (Sept. 26, 2006) (the prohibition of amnesties against international crimes, the non-prescription of international crimes, the prohibition on the use of the rule of non-retroactivity in criminal cases, the prohibition on the use of the rule *ne bis in idem* in cases where new evidence has been found after the judgment, and rights of the family victims to know the truth through a judicial process); *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, §§ 116–17 (Sept. 18, 2003) (the non-prescription of human rights violations); *Alban Cornejo et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 171, § 111, (Nov. 22 2007) (the non-prescription of grave human rights violations); *La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, §§ 149226 (Nov. 29, 2006) (the prohibition on the use of the rule of non-retroactivity in criminal cases and the prohibition on the use of the rule *ne bis in idem* in cases where new evidence has been found after the judgment); *Velasquez Rodriguez v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, § 181 (July 29, 1988) (the right of the families of the victims to know the truth); *Godinez Cruz v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, §191 (the right of the families of the victims to know the truth).

<sup>235</sup> See, e.g., Salvador Herrera Carrasco, *Las Reparaciones en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, 2 GRUPO LATINOAMERICANO DE ESTUDIOS SOBRE DERECHO PENAL INTERNACIONAL: SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL TOMO 372 (2010), (“[I]t is important to note that the rules on remedies that the Court could order have been created via jurisprudence, because they cannot be found in any literal way in the text of the Convention.”). The Convention never allowed expressly for such an expansive type of remedies. It is the consensus of literature that they were created mainly through the expansion of the IACtHR’s jurisprudence. *Id.*

<sup>236</sup> See, e.g., *Almonacid Arellano et al. v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006). The crimes had been committed in 1973 and the amnesty laws had entered into force in 1978. *Id.* The American Convention for Chile entered into force in 1990. The court argued that since the State had not prosecuted the alleged criminals, the violations of the victims’ rights was present in the time of the case; hence, it argued that it had jurisdiction since the crime was still being committed against the family members. *Id.* §§ 42–50.

<sup>237</sup> Neuman, *supra* note 9.



consequentialist review.<sup>238</sup> The use of methods of interpretation that included policy analysis and the consequences of the implementation of the law was the very same type of reasoning that the constitutionalist movement of the 1990s was pushing for at the domestic level.

An example of this type of reasoning is the Court's construction of the principle of "effectiveness" or *effet utile*.<sup>239</sup> The Court has argued that it has the

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<sup>238</sup> Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, *supra* note 230, at 95–96 ("Doing teleological reasoning requires consideration of the consequences of adoption of a particular interpretation of the ambiguous norm. One should not choose a particular alternative unless applying it will serve its purpose in facts . . . This makes teleological interpretation dramatically different from induction/deduction, at least in form, because the older method made a great point precisely of refusing the consideration of either purposes or effects. [In 'policy analysis', 'balancing', 'proportionality'] the gap or conflict or ambiguity in the system of norms is resolved by a process of 'weighting', which can involve any and all types of legal values, concepts, norms or instrumental purposes.").

<sup>239</sup> The original version of the *effet utile* principle was created to avoid absurd textual interpretations in light of the treaty text. For example, in the words of the *Chile v. Peru* tribunal of 1875 cited by these authorities, "the verb to charge has here no technical meaning in the absence of other stipulations, and must be taken in its usual sense . . . . If the words 'shall charge' have not this meaning, they have none; and having none, there can be no resulting effect. Hence, according to a recognized rule of interpretation, that signification should be adopted which will permit the provision to operate [*l'interprétation qui permet à use stipulation du prouder ses effects*]." Award of the *Chile v. Peru* Tribunal, April 7 1875, as cited by G. Berlia, *Contribution a l'Interpretation des Traites*, RECUEIL DE COURS DE LA ACADEMIE DE DRIOT International, (1965), pp. 306. (The same meaning was given in another case in the Permanent Court to Arbitration in 1910: "Because it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose and the interpretation referred to would lead to the consequence . . . . It is an acknowledged rule of interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others." ). Award in the *Affaire des pecheries des cotes septentrionales de L'atlantique*. CPA, Septembre 7, 1910 as cited by G. Berlia, *Contribution a l'Interpretation des Traites*, Rcucl de Cours, 1965, pp. 306. See also Dionisio Anzilotti, *COURS DE DROIT INTERNATIONAL*, Vol. I, (Paris, 1929), p.112-13. The *effet utile* principle was then connected to the Anglo-Saxon common law doctrine of implied powers that favored an interpretation of a text that would give powers to a particular institution to achieve its goals. Ludwik Ehrlich, *L'Interpétation des Traités*, RECUEIL DE COURS DE LA ACADEMIE DE DRIOT INTERNATIONAL, Vol. IV Tome 24, (1928) p. 84-5; Charles de Visscher, *PROBLÈMES D'INTERPÉTATION JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC*, (Éditions A. Perdone Paris, 1963), 84-85. From these two doctrines the IACtHR created the principle of *effet utile*/effectiveness: the Court is to review the consequences of the enforcement and if the chosen policy is the most effective in achieving the goals of the Convention as defined by the IACtHR. *Garrido and Baigorria v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶¶ 68–74 (1998); *Durand and Ugarte v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, ¶¶ 136–37 (Aug. 16, 2000); *Castillo Peruzzi et al. v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 50, ¶¶ 205–07 (1999);

power to review not only if domestic legislation is compatible with the Convention, but also its “effectiveness.”<sup>240</sup> This implies the power to order the structural remedies necessary to achieve that effectiveness and monitor its compliance.<sup>241</sup> An example of the structural approach can be found in *Barrios Altos v. Peru*, a case where the Court departed from exclusively signaling that domestic legislation was incompatible with the Convention and asserted a power to directly invalidate domestic law. The Court expressly stated that once domestic legislation is found incompatible with the Convention it “lack[s] legal effects”<sup>242</sup> and that the scope of this decision is “general in nature.”<sup>243</sup>

Recently, the Court has also stated that domestic judiciaries have an obligation to exercise a: “‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the [Convention]. To perform this task, the [domestic] Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the [IACtHR], which is the ultimate interpreter of the [Convention].”<sup>244</sup> This duty is in addition to traditional constitutionality control or judicial review within their respective jurisdictions.<sup>245</sup>

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Suarez Rosero v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35, ¶¶ 97–98 (1997); International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, Advisory Opinion OC-14/97, Inter-Am. Ct. H.R. (ser. A) No. 14 (Dec. 9, 1994), ¶ 23.

<sup>240</sup> *Supra* note 239.

<sup>241</sup> Baena Ricardo v. Panama, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 104, § III (Nov. 28, 2003); James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court* 768, 781 (Harv. L. Sch. Pub. L. & Legal Theory Working Paper Series, Paper No. 09-31, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1404608](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404608) (explaining that on the basis of its own interpretation of its mandate, the Court retains jurisdiction to monitor compliance with its judgments and issues periodic compliance orders).

<sup>242</sup> *Barrios Altos v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 51 (Sept. 3, 2001) (finding that Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect).

<sup>243</sup> *Compare id.* ¶ 18 (“[T]he effects of the decision in the judgment on the merits of the Barrios Altos Cases are general in nature”), with Dulitzky, *supra* note 8, at 67 (“The invalidation of national norms with general effects is a typical power of a constitutional court exercising judicial review, not of an international tribunal determining international responsibility of a State.”).

<sup>244</sup> Almonacid Arellano et al. v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, 124 (Sept. 26, 2006).; Dulitzky, *supra* note 8, at 58 (“In the past, the Court consistently insisted that domestic norms, including a State’s constitution, need to conform to the Convention. But up to Almonacid, it never required judges to directly apply the Convention. It always left it to the judicial authorities’ discretion how to secure such compatibility. Of course, the wide latitude simultaneously requires full compliance with the treaty.”).

<sup>245</sup> Dulitzky, *supra* note 8, at 70 (“In this metamorphosis of the Convention from an international treaty to a hierarchically superior domestic norm, the Court is asking local

In 2006, the Court mandated that the control must be done *ex-officio* using the principle of *effet utile* of the Convention.<sup>246</sup> In 2012, it continued expanding the content of the test by mandating local judiciaries to include it in their reparation stages.<sup>247</sup> In other words, domestic high courts have a duty to use the Convention as the baseline of their constitutional powers, and in doing so they are bounded by the jurisprudence and the remedies orders of the IACtHR. If the domestic constitutional jurisprudence contradicts the decisions of the IACtHR, the supranational standard must be upheld even above the constitutional traditions of the highest courts.<sup>248</sup>

To some commentators, the Court's expansive jurisprudence is ungrounded in the text of the Convention.<sup>249</sup> The conventionality control has recently transformed the Convention into "a text that is very different from the one that the States that participated in the San Jose Conference approved."<sup>250</sup> The Court's aggressive work has transformed it into an antidemocratic institution.<sup>251</sup>

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tribunals to exercise both judicial review and conventionality control even if those tribunals are not constitutionally authorized to perform them.").

<sup>246</sup> The Dismissed Congressional Employees (Aguado Alfaro et.al) v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, at 128 (Nov. 24, 2006) ("When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them [judges] to ensure that the *effet util* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose.").

<sup>247</sup> Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, at 281, 284 (Feb. 24, 2012) (dealing with the illegal use of the sexual orientation of a mother to determine the custody of her daughters after her divorce).

<sup>248</sup> Oswaldo Ruiz-Chiriboga, *The Conventionality Control: Examples of (Un) Successful Experiences in Latin America*, 3 INTER-AM. EUR. HUM. RTS. J. 200, 203–04 (2010) (arguing that "national authorities have a narrow discretion, and therefore they should carry out a *narrow conventionality control*, since the matter has been already decided by the IACtHR. On the contrary, in [cases that have not been decided by the IACtHR], national authorities have a broad margin of appreciation, and consequently they are entitled to proceed with a *broad conventionality control*."); Humberto Nogueira Alcalá, *Diálogo Interjurisdiccional, Control de Convencionalidad y Jurisprudencia Del Tribunal Constitucional En Período 2006-2011*, 10 ESTUD. CONST. 57, 531–40 (2012). According to Professor Ariel Dulitzky, most of these contradictions might not resolve in the long-term due to the requirement to exhaust domestic remedies at the local level. Ariel E. Dulitzky, *An Inter-American Constitutional Court-The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L.J. 45, 72–73 (2015) ("[T]he Latin American [local] interpretation of the Convention could be consistent with, partially consistent with, or contradictory to current or future Inter-American case law or among other domestic Latin American decisions . . . the potential for intra-judicial conflict is omnipresent in a pluralistic system where multiple high courts and judges assert jurisdiction over the Convention.").

<sup>249</sup> Malarino, *supra* note 233, at 26–27.

<sup>250</sup> *Id.* at 27–28.

<sup>251</sup> *Id.* at 29.

The Court has become an activist court that is aiming “judicially to modify the law with the intention of adapting it to the social needs of the moment (naturally, those social needs that are identified as desirable by the judges).”<sup>252</sup> Moreover, the Court may have recognized new rights, but it also has ignored the expressly recognized rights in the Convention of those who are accused as perpetrators of rights violations. Finally, the Court, through its jurisprudence on remedies, has invaded the functions of the domestic judiciaries, legislative, and executive branches.

Regardless of the underlying flaws or merits on the doctrinal work of the Court, it is safe to conclude that this international body has tried to emulate constitutional courts. The supranational body has been aiming at domestic judiciaries to harness their power, and it has tried to make the Convention a component of the domestic legal system in which its final interpreter is the IACtHR itself.<sup>253</sup> That is, the IACtHR has asserted judicial supremacy in very similar terms to the US Supreme Court. It is the ultimate interpreter of how power is to be exercised by domestic authorities. In this effort, the highest courts are to be the domestic enforcers of the IACtHR.

We can conclude that the IACtHR treats the Convention in a formalistic way, as the highest court of the land would treat its constitution.<sup>254</sup> Yet, there are no other branches with elected officials controlling its functions, nor a sovereign state that recognizes it as a constitutional court, or a global executive power that will enforce all of its decisions. Moreover, building on the arguments described in previous sections, maintaining a constitutional adjudicatory system, supporting its institutions, and financing its task, depends ultimately on political actors. It is unrealistic to assert that the survival of the Inter-American system depends solely on adequate legal reasoning. Just as the maintenance of a constitutional system is a political task, so is the maintenance of a Conventional human rights system. Expansive international human rights treaties or constitutions “cannot survive if they are too politically costly to maintain, and they cannot survive if they are too distant from normal political concerns.”<sup>255</sup> These political instruments thrive when they are “embraced and reenacted” by the operators of the system, such as judges,

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<sup>252</sup> Malarino, *supra* note 233, at 29.

<sup>253</sup> Helfer & Slaughter, *supra* note 19; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, CAL. L. REV. 899 (2005).

<sup>254</sup> Contrary to what some commentators argue, this doctrinal expansion is not exclusively an influence from the European institutions, mainly the ECtHR. It is my contention that to see the expansion as merely mimicking the European process is to misread what motivates the Court’s jurisprudence. Yes, Europe influenced some of the IACtHR’s substantive interpretations, but its remedies jurisprudence and the conventionality control are unparalleled in international adjudication. For example, the ECtHR has mainly awarded monetary compensations. It did not engage in other type of remedies until very recently as a way to reduce the number of applications. Compare Antkowiak, *supra* note 9, at 355, with G. L. Neuman, *supra* note 144, at 101–123, 101–02, and L. Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT’L L. 585, 585–604 (2010).

<sup>255</sup> WHITTINGTON, *supra* note 11, at 26.

government officials, citizens, and practitioners.<sup>256</sup> They cannot serve as guardians of the government's acts if they stand outside of politics. In the words of Keith Whittington, "the crucial problem is not that judicial interpretations cannot remain 'objective' and 'neutral' and sealed off from political considerations. The more fundamental problem is that the Court's judgments will have no force unless other powerful political actors accept the importance of the interpretative task and the priority of the judicial voice."<sup>257</sup> Just as such an understanding is necessary at the domestic level, we need to understand why government officials who have no strings attached to the international system and can intimidate, co-opt, ignore, or dismantle the IACtHR, would be willing to use the Inter-American system and defer to the judicial authority of the Court. When the IACtHR has been able to establish its authority successfully, other political or judicial actors must have had reasons for allowing the supranational court to assert its authority. This is the subject to be analyzed in the next section.

## V. THE EFFECTS OF THE EXPANSION OF THE IACtHR ON DOMESTIC INTER-BRANCH POLITICS

This paper has asserted that executives use their prerogative of being the official representative of the state in the IACtHR adjudicatory system and control which cases and arguments will be defended. For example, the executive decides whether the judiciary will participate in the defense of the state when the case is about judicial processes. The executive decides if the state will defend the acts of judges and prosecutors, or concede that they are insufficient and invite the supranational court to order domestic judges to take a different approach. Based on the arguments expressed in previous sections, we can conclude that when a Latin American state decides not to defend its case before the IACtHR, this strategy may invite the Court to adopt expansive measures and order policies and legislative changes agreeable to the executive.

This section overviews the cases in which Latin American presidents have decided not to defend the state or downplay certain defenses. The section begins with an overview of the domestic political contexts in which this has happened: mainly contexts of politically divided governments that prevent the incoming coalitions from modifying preexisting constitutional understandings. It then turns to three cases of study involving Venezuela, Chile and Costa Rica. In these cases, local executives agreed with the supranational court's agenda and allowed its influence. The Court's expansion gave the executive the pretext to impose an agenda that domestically could have been harder to achieve with political parties or social opposition. Moreover, the cases are an example of the evolution of the Court to a more politically consequential court at the domestic level through its reasoning. The Venezuelan case took place in the early stages of the expansive movement of the Court; the Chilean case was one of the first cases in which the Court ordered a

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<sup>256</sup> WHITTINGTON, *supra* note 11, at 26.

<sup>257</sup> *Id.*

state to modify its constitution on issues not related to amnesties; the Costa Rican case offers the opportunity to review the latest effort of the Court to make its remedies more expansive at the domestic level and to modify the way domestic constitutional courts' reason about rights.

### **A. From Opposition to Government in Power**

The cases in which executives have used the IACtHR to impose a particular political agenda are frequently cases in which the incoming government faces opposition from a previously dominant political coalition. The strong resistance of political coalitions to new governments is not uncommon in Latin America where politics are highly polarized in ideological terms.<sup>258</sup> The incoming governments reach power with a "reconstructive agenda," with ambitious political projects that seek to articulate new ways for the government to function under a "progressive" understanding of the constitutional order.<sup>259</sup> Presidents that emerged out of opposition parties determine that it is in their best interest to allow the expansion of the IACtHR's influence. Instead of imposing a new political agenda expanding their own constitutional powers, and consequently reviving the

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<sup>258</sup> See generally Angel Oquendo, Address at Yale Latin American Seminar on Constitutional and Political Theory: The Politicization of Human Rights (2013). It is not uncommon in Latin America to find that government from the right—in favor of free market, neoliberal in terms of social policies, and linked to the Catholic church—are followed immediately by governments from the left—in favor of state intervention, popular in their social policies, linked to Marxist or guerilla groups of the 1970s. See Guillermo O'Donnell, MODERNIZATION AND BUREAUCRATIC-AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS, Chapter II, (international studies, University of California Berkley) (1973). See generally David Collier ed., THE NEW AUTHORITARIANISM IN LATIN AMERICA, (Princeton Univ. Press, 1980) (providing a review of the Catholic church and its role in politics); Harry E. Vanden & Gary Prevost, POLITICS OF LATIN AMERICA, Chapter Six, (NY, Oxford Univ. press, 2002) (providing a review of the use of human rights narratives by the political spectrum from the right and left); LUIS RONIGER & MARIO SZNAJDER, THE LEGACY OF HUMAN-RIGHTS VIOLATIONS IN THE SOUTHERN CONE: ARGENTINA, CHILE AND URUGUAY, Ch. I (Oxford. Univ. Press, 1999) (discussing how former guerilla fighters were elected to office in Brazil); Paulo Prada, *Ex-Guerrilla on Cusp of Power in Brazil*, WALL STR. J. (Sept. 30, 2010), <http://www.wsj.com/articles/SB100014240527487047910045755201713955955>. For example, in the recent presidential election in Argentina, after the government of Nestor and Kristina Kirshner that was strongly in the left spectrum, and that rose into power after the debacle of the Menem neoliberal administration in the late 1990s, which was followed by the government of Macri, who is linked to the right oriented political parties in favor of neoliberal policies. Simon Romero & Jonathan Gilbert, *In Rebuke to Kirchner, Argentines Elect Opposition Leader Mauricio Macri as President*, N. Y. TIMES (Nov. 22, 2015), <https://www.nytimes.com/2015/11/23/world/americas/argentina-president-election-mauricio-macri.html>.

<sup>259</sup> WHITTINGTON, *supra* note 11, at 286. In a way these governments are closer to the reconstructive presidencies in the United States in terms of their ambitious projects against the existing governing coalitions. *Id.*

sentiments of presidential authoritarianism or hyper-presidentialism—something that they themselves rejected when being in the opposition—they have the potential to impose their agendas using the IACtHR interpretative authority.<sup>260</sup>

These incoming governments gain authority by repudiating what came before them; their political power emerges from their reconstructive agenda. In these cases, the displaced regime, which could be the one established by the military juntas (i.e. Chile and Argentina) or a right-neoliberal oriented government (i.e. Peru and Venezuela in the early 1990s), is still vibrant, popular, and resilient to changes.<sup>261</sup> The opposition might have been able to win the election, but once it gets into power it has few initial resources to restructure preexisting governmental practices, structures, or policies.<sup>262</sup>

If the previous coalition in power remained in control for long enough, there are high chances that the domestic judiciary and the bureaucracies will be reluctant to cooperate with the incoming coalition.<sup>263</sup> Judicial-executive relations are less than ideal in this context.<sup>264</sup> The incoming president is likely to disagree with the constitutional understandings of the highest court of the time.<sup>265</sup> If their

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<sup>260</sup> GARGARELLA, *supra* note 22 (arguing that Latin American constitutionalism has always been a continuous fight over the control of hyper-presidentialism, and even with the emergence of liberal constitutions that give additional powers to congress and the judiciary, the president has always retain a central position of the political process).

<sup>261</sup> WHITTINGTON, *supra* note 11, at 161 (“Not all oppositional leaders who gain power can claim the authority to reconstruct the inherited constitutional order. Their claims on political leadership are more modest and more tenuous. Unlike presidents such as Jefferson, Jackson, Lincoln, and Franklin Roosevelt, who stand in opposition to a vulnerable set of constitutional commitments ready to be toppled over, other oppositional presidents merely ‘preempt’ a continuing partisan and political order. Such oppositional candidates may manage to win election, but they come to office with relatively little authority and few resources with which to increase their authority. The regime they oppose is still vibrant, popular, and resilient to pressure. Such presidents must learn to accommodate themselves to the dominant regime in order to be successful.”).

<sup>262</sup> *Id.*

<sup>263</sup> Nuno Garoupa & Maria A. Maldonado, *The Judiciary in Political Transitions: The Critical Role of US Constitutionalism in Latin America*, 19 CARDOZO J. INT’L & COMP. L. 593, 596 (2011) (“On the other hand, the judiciary has largely been appointed, influenced, and dominated by the previous political regime, and has therefore been suspected of potentially undermining the foundations of the new democratic regime. The respect for the rule of law and the proper adherence of the judiciary to the new political regime create a conceptual and practical problem.”); Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FL. J. INT’L L. 745, 758 (2006).

<sup>264</sup> WHITTINGTON, *supra* note 11, at 161; Garoupa & Maldonado, *supra* note 263, at 758.

<sup>265</sup> WHITTINGTON, *supra* note 11, at 161 (“Judicial authority to interpret the Constitution within the politics of opposition is likely to be secure, but the relationship between the Court and the president in such situations is hardly idyllic. Reconstructive presidents are likely to disagree with the constitutional understandings of the Court, and they

political power is insufficient to displace the existing understanding, it has the capacity to do so using its powers to control the official defense of the state in the Inter-American System.<sup>266</sup>

As explained above, the role of judges in the local judicial system forms part of the claims in most of cases decided by the IACtHR. In principle, victims must exhaust domestic remedies before bringing the case to the Inter-American system. Hence, the presidents have a monopoly over the type of arguments that will be made at the international level regarding the domestic legal system's compliance with international standards. This prerogative is similar to the one found in the United States regarding the president's influence on the DOJ in determining the official position of the federal government in judicial proceedings.<sup>267</sup> Instead of accommodating the existing regime, these types of governments have used the cases in the IACtHR to advance their agenda. In fact, it is not uncommon to find in the Court's caseload many cases that may have been initiated by the entering coalition when they were part of the opposition.<sup>268</sup> It takes so many years for the system to process the cases that by the time they reach the IACtHR the incumbent government may have been the opposition when the case was generated and the responsible actors may no longer be in power.<sup>269</sup>

In sum, if the incoming presidential coalition is ambitious enough to try to modify the existing constitutional understanding protected by the highest court, it still has one way to go if its efforts fail at the domestic level. Naturally, this situation is also dependent on the fact that the incoming presidency is sympathetic with the conventional understanding of the IACtHR. If this happens, the executive will find ways to support the independent authority of the Court to act on those understandings at the domestic level.<sup>270</sup> The different ways in which this has happened are: (1) a downplay of the plausible defenses by the state in the concrete case; (2) the open recognition of the violations in the proceedings; (3) an invitation to move to the remedies stages; (4) a non-defense of the domestic judicial process or the decisions of domestic courts; and finally; (5) in the most extreme cases, a non-defense of the State. These types of responses become opportunities for the IACtHR to display and enhance its role in restructuring what the Court considers to

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have the ambitions and capacity to displace the judicial authority to interpret the Constitution with their own."); Garoupa & Maldonado, *supra* note 263.

<sup>266</sup> WHITTINGTON, *supra* note 11, at 161.

<sup>267</sup> *Id.* at 196 ("The president has nearly a free hand in determining the official position of the federal government on issues that come before the bench. Through control over the Justice Department, the president can exercise significant influence over what cases are moved through the appellate process and what arguments are presented before the Court. In other words, federal government is a powerful and often successful litigant, and the president has almost exclusive control over that dimension of the government.").

<sup>268</sup> See *infra* Sections V.B. and V.C. (exemplifying Venezuela and Chile).

<sup>269</sup> *Id.*

<sup>270</sup> WHITTINGTON, *supra* note 11, at 161 ("Presidents who are more sympathetic with the constitutional understandings of the Court are likely to find reason to support the independent authority of the Court to act on those understandings.").



be deficient aspects of domestic legal systems.<sup>271</sup> They are invitations from the executives to the supranational court to “put its stamp” on the domestic constitutional order.<sup>272</sup>

When the case exclusively involves actions of the administration in power, the opposite might happen. The defense of the state is a defense of the sitting executive and becomes a direct confrontation to the Inter-American System.<sup>273</sup> The point here is that one cannot establish *a priori* that it will always be in the interest of the executive to defend the state in the international forum; to the contrary losing the case or giving an official recognition of a violation to the Convention might be the best strategy available to the executive for promoting its agenda at the domestic level.<sup>274</sup>

The unfolding tensions in Latin America are consistent with the cases identified by Whittington regarding US “preemptive” presidencies and by comparative constitutional law scholars in new democracies.<sup>275</sup> As mentioned before, these types of presidencies and their political coalitions take power by opposing the existing regime, and carrying few partisan commitments or political expectations that they must satisfy with the status quo.<sup>276</sup> Yet, in order to sway public policy towards their agenda, they rely on the power of the Supreme Court.<sup>277</sup> In reaffirming judicial supremacy over defining the constitutional understandings of the state, they can try to convince the Court to work in their favor.<sup>278</sup> The existence of structures that guarantee fragmented political authority, such as democratic systems of government with formal separations of power and/or with divided authority between central and local governments, becomes a variable that helps to explain the expansion of political consequential courts. These systems tend to face scenarios in which it becomes difficult for political leaders to challenge

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<sup>271</sup> WHITTINGTON, *supra* note 11, at 161, at 229. (arguing that the preemptive presidents “create opportunities for the Court to display and enhance its own independent, leadership role within American constitutional development. Whether they are actively turning new problems over to the courts or simply expressing their willingness to live with whatever decisions that the Court might make, these presidents invite the Court to actively put its stamp on the Constitution.”).

<sup>272</sup> *Id.*

<sup>273</sup> See *infra* Section IV.B.

<sup>274</sup> See generally WHITTINGTON, *supra* note 11; Galanter, *supra* note 11.

<sup>275</sup> WHITTINGTON, *supra* note 11, at 164; CONSEQUENTIAL COURTS, *supra* note 11, at 23 (“It is taken as a truism among public law scholars that the fragmentation of political authority (divided government in a separation of powers system, weak multiparty coalitions, or fractionalized ruling parties) decreases the likelihood that political leaders can swiftly nullify or reverse assertive judicial ruling, thus offering courts greater opportunity to play active role in governance.”).

<sup>276</sup> WHITTINGTON, *supra* note 11, at 229 (“For preemptive presidents, who often find themselves at odds with Congress and standing on a fragile electoral base, picking fights with the judiciary would be self-defeating. The independence and supremacy of the judiciary is as much a strategic asset for these presidents as it is for affiliated leaders.”).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

judicial power, but also to impose their own agenda.<sup>279</sup> The existence of politically divided governments offers courts an opportunity to redefine constitutional understandings, and consequently expand their power. When the political forces are divided, judges have an opportunity to become more politically consequential.<sup>280</sup> When the political forces are united behind a strong leader or a political movement or coalition, all the formal structural elements that fragment authority can be used to constrain courts.

The following subsections will show three cases in which the executive used its monopoly over the defense of the state to stir domestic constitutional and political understanding in its favor. The analysis will begin with an overview of the political contexts in which the case emerged, the constitutional provisions that regulate international human rights treaties, and the key legal aspects that surround the controversies. The analysis will then turn to the proceedings before the Inter-American Commission of Human Rights, how this body interacted with the state, and how the case was framed before the IACtHR. The overview of the cases will conclude with the decisions of the IACtHR and their effects on inter-branch politics, particularly on the relationship between the executive and the domestic judiciary. I must clarify that the emphasis in the analysis of the cases will be placed on the parties and on the orders from the international bodies. The section will focus on the actors involved, the arguments presented, and who benefits from the Court's decisions. The doctrinal evolution of the rights discussed by the Court will only be analyzed in this context.

### **B. Venezuela as a Case of Study: The Caracazo Case**

The case of Venezuela is an example of how constitutional and legal structures that are textually favorable for a good interaction with the IACtHR can be manipulated, using a human rights discourse, to reject the imposition of particular views from the San Jose Court. Before the Chavez Constitution entered into force in 1999, the judiciary in Venezuela tended to be very passive and played a limited role in the institutional arrangements of the country. After the 1999 Constitution, the Supreme Tribunal has become a very active body, settling disputes among branches, restructuring social policies, and even challenging the IACtHR. For some commentators, it has become a politically consequential court for the wrong reasons to advance the particular ideological agenda of the Chavez regime.<sup>281</sup>

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<sup>279</sup> WHITTINGTON, *supra* note 11, at 229.

<sup>280</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 24. Regardless of the tradition of independence that courts might have, which is in itself a difficult variable to measure, the consensus in case studies is that "fragmentation in ruling parties and coalitions appears to be an important factor stimulating and sustaining judicial role expansion." *Id.*

<sup>281</sup> Garoupa & Maldonado, *supra* note 263, at 602–03; Lauren Castaldi, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT'L L. 477, 477–78 (2005). See generally ALLAN-RANDOLPH BREWER CARÍAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT (2010).

Furthermore, the case of Venezuela shows how even a left oriented populist government can use the system to its advantage to dismantle previous political coalitions when coming into power. A central element of this strategy is the power of the executive to defend the State in international proceedings. As the political coalitions abandon their position as opposition groups and become the ruling power, then the system can be used against them.

### 1. The Early Months of Chavez in Power

In 1999, Hugo Chavez Frias, a former military officer who was once imprisoned for having led a failed coup d'état, won the presidency of Venezuela. He was the first president of Venezuela since 1958 that did not come from the two traditional parties (*Copei* and *Acción Democrática*).<sup>282</sup> In the ten years before Chavez's arrival into power these two parties tried to implement a series of neoliberal economic reforms in Venezuela, but the economy stagnated due to the fall of oil prices and production.<sup>283</sup> Millions of Venezuelans were in poverty and blamed the pre-existing political coalition for it.<sup>284</sup> President Chavez's agenda was openly socialist and aimed at reforming the existing institutions and neoliberal policies.<sup>285</sup>

During the first months of this presidency, Hugo Chavez held personal meetings with the Inter-American Commission of Human Rights.<sup>286</sup> This was the first time that a sitting president in Latin America went to visit the Commission at its headquarters in Washington D.C., let alone a mere couple of months after taking office.<sup>287</sup> After the meeting with the members of the Commission, who at that time were investigating crimes committed in 1989 by the previous political regime in the *Caracazo* case, President Chavez invited the Commission to do an *in loco* visit and

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<sup>282</sup> Judith Ewell, *Venezuela since 1930*, 8 CAMBRIDGE HISTORY OF LATIN AMERICA. 727, 785–90 (1991) (providing a history of the distribution of power between the two main powers up to the early 1990s).

<sup>283</sup> Osmel Manzano & Francisco Monaldi, *The Political Economy of Oil Production in Latin America*, 9 ECONOMÍA 59, 86–87 (2008); DANIEL YERGIN, *THE QUEST: ENERGY, SECURITY AND THE REMAKING OF THE MODERN WORLD* 122 (2011).

<sup>284</sup> YERGIN, *supra* note 283, at 122.

<sup>285</sup> Daniel Hellinger, *When “No” Means “Yes to Revolution”: Electoral Politics in Bolivarian Venezuela*, 32 LAT. AM. PERSP. 8, 14 (2005); Cristóbal Valencia Ramírez, *Venezuela's Bolivarian Revolution: Who Are the Chavistas?*, 32 LAT. AM. PERSP. 79, 84 (2005); Carles Muntaner et al., *Venezuela's Barrio Adentro: An Alternative to Neoliberalism in Health Care*, 36 INT'L J. HEALTH SERV. 803 (2006).

<sup>286</sup> Press Release, Inter-Am. Comm'n H.R., Press Release No. 24/99, Inter American Commission Press Release No 24/99 (1999), <http://www.cidh.org/Comunicados/Spanish/1999/Comunicado%2024-99.htm>; Capítulo II Bases Jurídicas y Actividades de la Cidh Durante, Inter-Am. Comm'n H.R., Activity Report (1999), <https://www.cidh.oas.org/annualrep/99span/capitulo2.htm>.

<sup>287</sup> *Supra* note 285.

praised its work in defending human rights in the region.<sup>288</sup> The *Caracazo* case dealt directly with decisions made by the previous President of Venezuela, Carlos Andres Perez (the same President that Chavez tried to remove in the failed coup d'état).<sup>289</sup> The claims involved the suppression of a popular uprising against the structural adjustment measures ordered as part of a deal to refinance the external national debt.<sup>290</sup> During the revolts, then-President Carlos Andres Perez suspended constitutional rights to repress riots in the major cities of Venezuela. The measures included a general curfew and security operations by the National Guard and Army.<sup>291</sup> The suspension of rights lasted for several weeks; by the time order was restored, hundreds of individuals died and an unspecified number of citizens were wounded, disappeared, or suffered major material losses.<sup>292</sup>

## 2. The Recognition of Responsibility before the IACtHR

Chavez' eagerness to cooperate with the system and put the previous regime on trial was reaffirmed a couple of months after his Washington visit when the Inter-American Commission brought the *Caracazo* case to the IACtHR. In its first hearing before the Court, the Chavez regime conceded all the alleged facts and took full responsibility for the Venezuelan government's actions taken against the citizens of Caracas in 1989.<sup>293</sup> The Chavez regime requested the Court to proceed to the remedies stage and offered to comply with all reparations and compensation orders from the Court.<sup>294</sup> Moreover, it offered to pay compensation to the victims—not only the ones included in the claim before the Court, but also any other victims or their relatives.<sup>295</sup> It created a special prosecution unit to continue the investigation against the officers responsible for the actions and filed a request before the Supreme Court of Venezuela to assert jurisdiction over the criminal

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<sup>288</sup> *Supra* note 285.

<sup>289</sup> *Caracazo Merits*, *supra* note 25, at ¶ 2.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*; *Caracazo v. Venezuela, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 66.2 (Aug. 29, 2002) [hereinafter *Caracazo Reparations*].

<sup>292</sup> *Caracazo Reparations*, *supra* note 291, ¶ 66.3 (“[A]ccording to the recount of the facts the official figure of 276 civilian deaths was contested by the fact that years later several common graves were found in the surroundings with unidentified bodies. The vast majority of the killings were done by the military forces and caused by random shot fires or extrajudicial executions.”).

<sup>293</sup> *Caracazo Merits*, *supra* note 25, ¶ 39.

<sup>294</sup> *Id.*; *Caracazo Reparations* *supra* note 291, ¶ 19. In a subsequent declaration during the reparation stages the regime even stated that it “accepted the case law of the Court regarding reparations” and that it “could provide whatever necessary information was requested by the Court and would ‘in good faith, accept the truthfulness of all information submitted by the applicants or their representatives, with prior sworn statements that the content of said information is truthful, so as to accelerate this case inasmuch as possible.’” *Id.*

<sup>295</sup> *Caracazo Merits*, *supra* note 25, ¶ 39; *Caracazo Reparations* *supra* note 291, ¶ 19.

investigations in military tribunals.<sup>296</sup> The IACtHR also ordered a reform of the criminal code, the military code, and any other regulation or measure that prevented the state from investigating and prosecuting those responsible for the acts committed.<sup>297</sup>

After the decision of the Court, a new constitution was adopted in December 1999 by national referendum.<sup>298</sup> The new constitutional text contained a set of provisions that gave constitutional hierarchy to human rights treaties signed and ratified by Venezuela (Article 19 and 23).<sup>299</sup> Moreover, Article 31 recognized the right of any Venezuelan to bring claims against the state in supranational human rights bodies.<sup>300</sup> The IACtHR's decision also helped President Chavez reform the Military Justice Code so that the President could exercise exorbitant powers in the ambit of military jurisdiction.<sup>301</sup> Human rights covenants and the proceedings before the IACtHR became two of the instruments of the incoming Chavez regime to reform the state, control the military institutions that had been loyal to the previous regime and establish his Bolivarian revolution. This same government in 2013 denounced the American Convention and the jurisdiction of the Court.<sup>302</sup>

<sup>296</sup> *Caracazo Reparations*, *supra* note 291, ¶ 66.12.

<sup>297</sup> *Id.* ¶¶ 119–20.

<sup>298</sup> REPÚBLICA BOLIVARIANA DE VENEZUELA CONSTITUCIÓN [CONSTITUTION], Dec. 30, 1999. See also Michael A. Lebowitz, *Venezuela: A Good Example of the Bad Left of Latin America*, 59 MONT. L. REV. 38 (2007) (discussing the contradictions of the Chavez Constitution).

<sup>299</sup> REPÚBLICA BOLIVARIANA DE VENEZUELA CONSTITUCIÓN [CONSTITUTION], *supra* note 298. “The State shall guarantee to every individual, in accordance with the progressive principle and without discrimination of any kind, no renounceable, indivisible and interdependent enjoyment and exercise of human rights. Respect for and the guaranteeing of these rights is obligatory for the organs of Public Power, in accordance with the Constitution, the human rights treaties signed and ratified by the Republic and any laws developing the same.” *Id.* art. 19. “The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power.” *Id.* art. 23.

<sup>300</sup> *Id.* art. 31 (“Everyone has the right, on the terms established by the human rights treaties, pacts and conventions ratified by the Republic, to address petitions and complaints to the intentional organs created for such purpose, in order to ask for protection of his or her human rights. The State shall adopt, in accordance with the procedures established under this Constitution and by the law, such measures as may be necessary to enforce the decisions emanating from international organs as provided for under this article.”).

<sup>301</sup> *Caracazo Merits*, *supra* note 25, ¶ 39; *Caracazo Reparations*, *supra* note 291, ¶ 44.

<sup>302</sup> Press Release, Organization of American States, IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention (Aug. 1, 2009) (on file at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/064.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp)); Diego German Mejia-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights* | ASIL,

This happened after the Chavez regime faced several cases brought against it by the opposition.<sup>303</sup> The decision to abandon the system was also fueled by a series of bad experiences with the Commission.<sup>304</sup> For example, the Commission failed in 2002 to order immediate provisional measures to ensure the safety of imprisoned Chavez officials during a three-day coup attempt against the regime.<sup>305</sup>

Two more detailed examples will be discussed in the following subsections, but the case of Venezuela shows how even the most politically radical governments, when entering into power after facing long periods of a pre-existing political regimes, can use the system to their advantage and dismantle previous constitutional and political understandings.

### **C. Chile as a Case of Study: The Last Temptation of Christ Case**

#### **1. The 1980 Constitution and Transition**

From 1973 to 1990, Chile was governed by a military *junta* under the leadership of General Augusto Pinochet. During the authoritarian times, the judiciary “capitulated to, and in some ways colluded with, the Pinochet dictatorship.”<sup>306</sup> According to recent studies and reports of the Truth Commission, judges denied around 8,000 *habeas corpus* claims during the dictatorship.<sup>307</sup> This judicial passivity allowed the military to continue their practices of forced disappearance, torture, and extrajudicial executions.<sup>308</sup>

Due in part to international pressures and social opposition, in 1980 the regime adopted a new constitution, but allowed Pinochet to remain in power until 1989.<sup>309</sup> After a series of negotiations between the existing military government and the opposition coalition of center-left and Christian Democrats, the *concertación*, Pinochet agreed in 1988 to a poll on whether he should stay in power as the President of the Republic. The *concertación* coalition won the referendum. In 1990, Patricio Aylwin, one of the leaders of the *concertación*, became the first

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ASIL INSIGHTS (Jan. 9, 2013), <https://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights>; Oquendo, *supra* note 258.

<sup>303</sup> Oquendo, *supra* note 258.

<sup>304</sup> Letter from Nicolas Maduro, the President of Venezuela, to the Secretary General of the OAS (Sept. 6, 2012) (on file at <http://www.minci.gob.ve/wp-content/uploads/2013/09/Carta-Retiro-CIDH-Firmada-y-sello.pdf>).

<sup>305</sup> *Id.* at 5.

<sup>306</sup> Huneeus, *Judging from a Guilty Conscience*, *supra* note 111, at 100.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> Jan Eckel, “Under a Magnifying Glass” *The International Human Rights Campaign Against Chile in the Seventies*, HUMAN RIGHTS OF THE TWENTIETH CENTURY 321, 321 (2010) (describing how the bloody takeover of the military in Chile “gave rise to one of the longest and most intense human rights campaigns ever rise to be waged against a single regime. It stretched over the entire sixteen years of the military junta’s existence, from 1973 to 1989, flaring up every time new shocking details reached the media.”).

transition president of Chile.<sup>310</sup> This coalition ruled for the next ten years. Although some elements of the 1980 Constitution were amended in 1989 after the fall of Pinochet, its structure remained very close to what the military regime had approved. Moreover, regarding structure and appointments, the judiciary remained untouched by the transition of power.<sup>311</sup> As part of the transition agreement, the new administration maintained an Amnesty Law passed in 1978 (1978 Amnesty Law) by the Pinochet regime for all the crimes committed during the first years of the military coup by both army officers and the opposition.<sup>312</sup> Instead of prosecutions, President Aylwin created a truth commission.<sup>313</sup>

The fact that the 1980 Constitution was adopted by the Pinochet military regime does not mean that it lacked the essential elements of what the progressives would consider a modern constitution, mainly the incorporation of an elaborate system of judicial review of legislation and administrative acts.<sup>314</sup> The constitution established a mixed or disseminated system of control of the constitutionality of laws and administrative acts. On the one hand, the Constitutional Court exercised an abstract control, or preventive control, of the constitutionality of legislation or executive decrees before they enter into force. On the other hand, the Supreme Court and the Appellate Courts exercise a regular judicial review, or concrete *a posteriori* review, of all laws, decrees, and administrative acts in force that violate individual rights.<sup>315</sup>

<sup>310</sup> Javier Couso, *The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002*, DEMOCRATIZATION AND THE JUDICIARY 1, 75 (2004).

<sup>311</sup> Garoupa & Maldonado, *supra* note 263, at 623.

<sup>312</sup> Ruiz-Chiriboga, *supra* note 248, at 212; Huneeus, *Judging from a Guilty Conscience*, *supra* note 111, at 103; Almonacid Arellano et al. v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 82.10 (Sept. 26, 2006).

<sup>313</sup> Huneeus, *Judging from a Guilty Conscience*, *supra* note 111, at 103.

<sup>314</sup> Couso, *supra* note 310, at 72 (“The history of judicial review in Chile is relatively new, effectively dating from 1980. The new charter incorporated a complex system of judicial review of both legislation and administrative acts. This represented a significant change in the country’s legal tradition, which had lacked a meaningful system of judicial review of the constitutionality of laws.”).

<sup>315</sup> *Id.* at 72–73 (“Chile’s system of judicial review is peculiar. It consists of a number of mechanisms spread among different constitutional bodies, representing what Chilean legal scholars call a ‘mixed’ or ‘disseminated’ system of control of the constitutionality of laws and administrative acts. The system is thus characterized by a division of labor between a Constitutional Court (Tribunal Constitucional) in charge of the ‘preventive’ control of the constitutionality of laws and executive decrees; the superior courts of the regular judiciary (the *Cortes de Apelaciones* and *Corte Suprema*), with jurisdiction over a newly devised constitutional injunction, the writ of protection (*recurso de proteccion*); a rarely used writ of non-applicability of laws (*recurso de inaplicabilidad*); and a special body endowed with the power to exercise control of the constitutionality of administrative acts (*Contraloria General de la Republica*). According to this scheme, the Constitutional Court performs an ‘abstract’ (or *a priori*) review of the constitutionality of legislation, that is, the review of bills approved by Congress but not yet promulgated, while the regular judiciary performs the ‘concrete’ (or ‘*a posteriori*’) review of already existing laws and executive decrees violating individual rights through the writs of protection and non-applicability.”).

Regarding the hierarchy of human rights treaties in the constitutional system, the Constitution of 1980 only stated in Article 5 that the “the exercise of sovereignty recognizes as a limitation the respect for the essential rights which emanate from human nature.”<sup>316</sup> In 1989, as part of the negotiations of the transition into democracy, a second paragraph was added to include that “it is the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, and by the international treaties ratified by Chile and which are in force.”<sup>317</sup> There is nothing in the Constitution that clarifies the hierarchy of rights in the Constitution vis-à-vis those in international treaties. It was left to the Chilean courts to decide how to solve a conflict among them.<sup>318</sup> Moreover, there is nothing in the Constitution that forces the Chilean judges to consider as binding the interpretation of international courts as binding.

Article 19 of the 1980 Constitution recognized, among other rights, the right to protect the privacy and honor of the individual and the family, especially against defamation from public media.<sup>319</sup> The same article protects freedom of expression.<sup>320</sup> In order to regulate freedom of expression, the Constitution also established a “system of censorship for the exhibition and publicity of cinematographic productions.”<sup>321</sup> The system was regulated by Decree Law No. 679, which authorized the Cinematographic Classification Council of the Ministry of Education to supervise the exhibition and classification of films in Chile.<sup>322</sup>

In 1988, when the military junta was still in power, the Cinematographic Classification Council refused to allow the exhibition of the film “The Last Temptation of Christ.”<sup>323</sup> The decision was appealed and confirmed by the Chilean judiciary in 1989.<sup>324</sup> In 1996, with the election of President Eduardo Frei from the *concertación* coalition, the Council revoked its previous decision and allowed the exhibition of the film.<sup>325</sup> A group of Catholic lawyers filed a remedy of protection

<sup>316</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CONSTITUTION] Oct. 24, 1980, art. 5.

<sup>317</sup> *Id.*

<sup>318</sup> The Last Temptation of Christ Merits, *supra* note 26, at 18 (citing the opinion of expert Francisco Cumplido: “With the exception of the modification concerning artistic entertainment that goes beyond the American Convention, the position was adopted that the human rights embodied in the international treaties ratified by Chile in force should be incorporated into the Constitution. Cinematographic censorship was left in force and the possibility of establishing norms on the public expression of other artistic activities was eliminated. It was argued that, should there be a contradiction between a right established in the Constitution and a right established in an international treaty, the courts would resolve it.”).

<sup>319</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE Oct. 24, 1980, art. 19; The Last Temptation of Christ Merits, *supra* note 26, at 21, ¶ 60.

<sup>320</sup> The Last Temptation of Christ Merits, *supra* note 26, at 21, ¶ 60.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> The Last Temptation of Christ Merits, *supra* note 26, at 21, ¶ 60(d).



in the Court of Appeals of Santiago against the Council's decision.<sup>326</sup> The Court of Appeals admitted the remedy of protection and annulled the Council's decision based on a balancing test between the right to freedom and the right to protect honor.<sup>327</sup> This decision was then appealed to the Supreme Court of Chile and reaffirmed by this body in 1997.<sup>328</sup> The Chilean judges found that the Constitution gave higher priority to the protection of privacy and honor because they were linked to the dignity of the human being, while the right to freedom of expression was not absolute and subject to constitutional restrictions.<sup>329</sup> This conclusion was supported by jurisprudential criteria of the Chilean superior courts in previous cases in which the judges gave predominance to the right to honor over freedom of expression.<sup>330</sup> The Chilean Supreme Court's reasoning did not take into consideration human rights treaties or the jurisprudence of the IACtHR. In reaction to the decision made by the judiciary, President Frei submitted a draft constitutional reform to the Chamber of Deputies that would eliminate the prior censorship of the exhibition and publicity of cinematographic production.<sup>331</sup> The draft was adopted in 1999 by the Chamber of Deputies, but due to the constitutionally required amendment process it remained in discussion on the Senate floor.<sup>332</sup> In Chile, a constitutional amendment can take up to seven years to be fully adopted.<sup>333</sup>

The facts surrounding the case show all the elements described in the previous section: an incoming governing coalition controlling the executive faced the opposition of the preexisting constitutional understanding—in this case, embedded in the Constitution of 1980 and the reasoning of the Supreme Court of Chile. The Executive then tried to modify the constitutional understanding through legislative power, but politics and constitutional amendment requirements halted the process. As it will be explained below, the Inter-American system helped the executive advance its agenda and bypass the decision of the domestic judiciary.

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<sup>326</sup> The Last Temptation of Christ Merits, *supra* note 26, at 21, ¶ 60(e).

<sup>327</sup> See generally *id.* at 17 (citing the opinion of expert Francisco Cumplido).

<sup>328</sup> *Id.* at 21, ¶ 60(f).

<sup>329</sup> *Id.* at 17 (quoting the opinion of expert Francisco Cumplido: “[t]he difficulty that arose with the Supreme Court was due to a problem of interpretation, inasmuch as that Court gave preference to applying the right to honor over freedom of opinion, following the trends of some foreign courts and doctrine that makes a distinction between human rights that correspond to the dignity of the individual such as the right to life, to honor and to intimacy, and human rights concerning means, such as freedom of opinion and information.”).

<sup>330</sup> The Last Temptation of Christ Merits, *supra* note 26, at 13 (citing the opinion of expert Humberto Nogueira Alcala).

<sup>331</sup> *Id.* at 24–25, ¶ 62.

<sup>332</sup> *Id.* at 16, 24–25, ¶ 62.

<sup>333</sup> *Id.* at 16 (quoting the opinion of expert Francisco Cumplido: “[s]ome reforms have taken two years, others seven. Some have required extensive negotiations. Negotiations and agreements have been necessary for most constitutional reforms, owing to the integration of the political majorities.”).

## 2. The Inter-American Process: Declining to Defend the Decisions of the Judiciary and the Constitution

After the Supreme Court of Chile reaffirmed the decision to ban the screening of the film, a group of lawyers brought a complaint on September 3, 1997 before the Inter-American Commission.<sup>334</sup> A year later, the Commission issued its report.<sup>335</sup> It made reference to both the initiative of the executive to amend the Constitution and the decision of the Chilean Supreme Court.<sup>336</sup> Regarding the Supreme Court's decision, the Commission found its reasoning "incompatible" with the American Convention and that Chile should abolish the censorship over its exhibition.<sup>337</sup> Moreover, it argued that the Chilean constitutional provisions on the restriction of the freedom of expression were also "incompatible" with the Convention.<sup>338</sup> The Commission also explicitly "evaluat[ed] positively the democratic Government of Chile's initiatives aimed at the adoption by the competent organs of the necessary legislative or other measures . . . to make effective the rights to freedom of expression."<sup>339</sup> The Commission was describing the Supreme Court of Chile as the actor responsible for the international responsibility of the state for balancing the conflicting rights incorrectly. Yet, the Commission was also giving a positive classification to the executive power for sharing the same view as the Commission on how to balance the same rights. The representatives of the state, as opposed to defending the government's efforts to comply with and explain to the Commission the legislative process that was underway, failed to submit any information on how they were planning to comply with its recommendations.<sup>340</sup> The lack of response from the government triggered the Commission to bring the case before the IACtHR in January 1999.<sup>341</sup>

In the early stages of the proceeding, the IACtHR constantly requested and granted extensions to the state to present any objections to the application made by the Commission.<sup>342</sup> In several instances the state failed to present any brief, and when it finally decided to do so, the Court rejected their brief because the statutory time limit had expired.<sup>343</sup> Notwithstanding this fact, the records in the decision show that the state did not contradict the Commission's report.<sup>344</sup> The state explicitly alleged in its brief that "it ha[d] no substantive discrepancies with the

<sup>334</sup> *The Last Temptation of Christ* Merits, *supra* note 26, at 24, ¶ 5.

<sup>335</sup> *Id.* at 3, ¶ 10.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *The Last Temptation of Christ* Merits, *supra* note 26, at 3, ¶ 10.

<sup>340</sup> *Id.* at 3, ¶ 11.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 4–7, ¶¶ 13, 18, 19, 24, 25, 30, 41.

<sup>343</sup> *Id.* at 4–6, ¶¶ 18, 19, 20, 24, 25, 28, 30.

<sup>344</sup> *The Last Temptation of Christ* Merits, *supra* note 26, at 24–25, ¶ 62.

Commission.”<sup>345</sup> Its only response to the Commission was an effort to clarify who was the appropriate actor to blame at the domestic level for the violation.<sup>346</sup> The state argued that:

[i]n a message to the Congress, President Eduardo Frei ha[d] indicated the Chilean Government’s position against prior censorship . . . [and that] the government [did] not share the jurisprudence of the Supreme Court of Chile that gives preference to the right to honor over freedom of expression . . . [a]n act of the Judiciary that is contrary to international law may engage the State’s international responsibility, provided that the State as a whole assumes the criteria issues by the Judiciary; . . . the acquiescence of the organ responsible for international relations, which is the Executive Power, is required, and this ha[d] not occurred in the instant case.<sup>347</sup>

In other words, the state did not present a defense on the arguments being made by the Commission. Its defense rested on the fact that the President was in general agreement with the Commission, and that there was no “acquiescence” from the executive regarding the actions of the Judiciary.<sup>348</sup> As such the President should not be blamed for the violations committed by the judges.<sup>349</sup> As mentioned above, the main arguments against the state were not related to the actions taken by the administration that was in power at the time, but rather were all related to the domestic judiciary and the 1980 Constitution of the military junta. The administration of President Frei had political reasons to not defend the judicial actions and the constitutional provisions in the case. This same governmental actor was fighting in the domestic political arena to leave both the decision of the local high court and the constitutional provision without effect.

On February 5, 2001, when the Court issued its ruling, it had only taken into consideration the brief presented by the Commission praising the efforts of the Chilean executive branch and arguing that the Constitution and the decisions of the Chilean Supreme Court were contrary to the Convention.<sup>350</sup> In fact the Court recognized that “the State did not submit any type of evidence in answer to the [Commission’s] application” and that “[d]uring the public hearing on the merits of the case, Chile concentrated its defense on the argument that it had submitted a draft reform to article 10(12) of the Constitution.”<sup>351</sup> The expert opinions presented by the Commission emphasized this fact by constantly making reference to the “good faith of the State of Chile” with regard to its efforts to reform the constitution, and

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<sup>345</sup> The Last Temptation of Christ Merits, *supra* note 26, at 24, ¶ 62

<sup>346</sup> *Id.* at 24–25, ¶ 52.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> The Last Temptation of Christ Merits, *supra* note 26, at 19, ¶¶ 52, 53.

<sup>351</sup> *Id.*

the Chilean domestic judiciary's "evident" disregard of international law due to its lack of sophistication and understanding of international law.<sup>352</sup> This critique was stark, notwithstanding the fact, as mentioned above, that the Chilean Constitution of 1980 does not establish a constitutional rank to human rights treaties in relation to domestic constitutional law.

In this context the IACtHR had to ultimately decide whether the Supreme Court of Justice of Chile had violated the Convention by delivering a judgment consistent with its own constitutional traditions but contrary to the Inter-American System. The IACtHR concluded that the prohibition established in the judicial power's decision "constitut[ed] prior censorship in violation of Article 13 of the Convention."<sup>353</sup> It clarified that "the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank."<sup>354</sup> It also recognized that the origin of the violation rested in the text of the Constitution that allowed the prior censorship because the text "determined the acts of the Executive, the Legislature and the Judiciary."<sup>355</sup> Yet, the Court also "valuated and underline[d] the importance of the Government's initiative in proposing the constitutional reform, because it may lead to adapting domestic laws to the content of the American Convention."<sup>356</sup> As a remedy, the Court ordered the State to modify its Constitution in order to comply with the Convention, eliminate prior censorship, and allow the film's exhibition.<sup>357</sup>

Judge Cançado Trindade's concurring opinion was even more explicit on the role that international courts should play regarding domestic jurisprudence that contradicts the Convention and the decisions of the IACtHR.<sup>358</sup> To him, it was the duty of the Court "to keep insisting on the [State's] legislative and judicial obligations, besides the executive ones."<sup>359</sup> Recognizing the separation of powers issues that could arise, Judge Trindade explicitly stated that "[a]lthough independent from the Executive Power, the Judicial Power is not independent from the State, but quite on the contrary, it is part of the State, for international purposes, as much as the Executive Power."<sup>360</sup> To him, "the question of the distribution of competences, and the basic principle of the separation of powers, are of the greatest relevance in the ambit of constitutional law, but in that of international law they are

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<sup>352</sup> The Last Temptation of Christ Merits, *supra* note 26, at 11 (citing expert Report of Jose Zalaquett Daher).

<sup>353</sup> *Id.* at 27, ¶ 71.

<sup>354</sup> *Id.* at 27–28, ¶ 72.

<sup>355</sup> *Id.* at 27–28, ¶ 72.

<sup>356</sup> *Id.* at 33–34, ¶ 89.

<sup>357</sup> The Last Temptation of Christ Merits, *supra* note 26, at 36, ¶ 103.

<sup>358</sup> "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 6 (Feb. 5, 2001) (J. Cançado Trindade, concurring) [hereinafter Opinion Cançado *Last Temptation*].

<sup>359</sup> *Id.* at 4, ¶ 10.

<sup>360</sup> *Id.* at 7, ¶ 18.

nothing but facts, which have no incidence on the configuration of the international responsibility of the State.”<sup>361</sup>

A few years later, after the decision of the IACtHR, Congress passed the amended bill as presented by President Frei.<sup>362</sup> The amendment substituted the prior censorship mechanism for a system of cinematographic classification in order to protect the rights of children to not be exposed to films that are not appropriate for their age.<sup>363</sup> Yet, films could not be forbidden from being screened in Chile.<sup>364</sup> In the end, the decision helped the legitimacy of the new governments to modify the constitution, and also helped to send a signal to the domestic high courts that they could be, through their interpretation of the constitution, internationally responsible for human rights violations.

#### **D. Costa Rica as a Case of Study: The Artavia Case Saga**

##### **1. The Constitutional Balance of Powers in Costa Rica**

In contrast with the previous two cases, in the case of Costa Rica the democratic system of government has not been affected by recent military coups. The last time the constitutional order was threatened was in a failed military coup in 1949.<sup>365</sup> In fact, after the orchestrators of the coup were imprisoned the President and the National Assembly modified the constitution to officially abolish the armed

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<sup>361</sup> Opinion Cançado *Last Temptation*, *supra* note 358, at 9, ¶ 22.

<sup>362</sup> “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile, Monitoring Compliance with Judgment, 2003 Rep. Order of the Court, Inter-Am. Ct. H.R. 4 ¶19 (Nov. 28, 2003) (“The fifth report of the State of March 19, 2003, in which it declared that ‘on July 10, 2001, the National Congress adopted the draft constitutional reform designed to establish the right to freedom of artistic creation and the elimination of cinematographic censorship, substituting this by a classification system which w[ould] be regulated by law’; this draft was promulgated and incorporated into the Constitution [Carta Fundamental] on August 25, 2001, by publication of Act No. 19,742 in the Official Gazette of Chile. Chile also advised that Act No. 19,846 (the Classification of Cinematographic Production Act) was published and entered into force on January 4, 2003; its first article established a system to classify cinematographic productions by age groups, designed to guide the adult population with regard to the contents of cinematographic productions and to protect children and adolescents, pursuant to the contents of various international treaties concluded by the State.”).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> Rodolfo Cerdas Cruz, *Costa Rica since 1930*, 7 CAMBRIDGE HISTORY OF LATIN AMERICA 357, 385–86 (1990). The failed military coup was orchestrated by the Minister of Security, Edgar Cardona, with a group of military officers who took the Bellavista Fort. *Id.* They demanded the destitution of President Jose Figueres, the elimination of the 10% income tax and the nationalization of the banks. The President, with the help of loyal military officers, was able to regain control the same day that the coup started. *Id.*

forces, making this country one of the few around the world without an army.<sup>366</sup>

Despite the fact that Costa Rica, unlike most of Latin America, did not have a military regime during the 1960s and 1970s, the country has had internal political conflicts regarding the existing constitutional understandings.<sup>367</sup> Costa Rican political parties have had deep political and ideological divisions since the 1940s.<sup>368</sup> The biggest division has been between the National Liberation Party that has a long history of center-left oriented policies (i.e. nationalization of banks, enabling women and illiterates to vote, welfare legislation, constitutionally guaranteed public education for all, guaranteed citizenship to black immigrants' children) and the center-right party, the Social Christian Unity party, that is traditionally connected with the coffee oligarchy and has an open Christian democratic ideology (i.e. the party supported neoliberal economic reforms in the late 1990s, it is in favor of the reduction of government's spending, and it is openly against abortion rights and same-sex marriage).<sup>369</sup>

The political polarization of Costa Rica has translated into four key characteristics that affect presidential power, its relationship with the National Assembly, and its ability to implement policy objectives.<sup>370</sup> First, there is a constitutional prohibition on reelection for legislators, which also included the presidency until 2003.<sup>371</sup> Second, legislators are not elected directly by voters, but rather by a proportionality system that allocates seats to the parties depending on a formula linked to the overall percentage of votes received in the election.<sup>372</sup> Third, there is a limitation on the president's veto authority over the budget law.<sup>373</sup> Fourth, the president is barred constitutionally from legislating by decree.<sup>374</sup> Any type of legislation must be negotiated with the Legislative Assembly, and as a consequence "the most significant policy changes require legislative action, especially if they are to be sustained over the long term."<sup>375</sup>

Another consequence of these formal requirements is that congressional

<sup>366</sup> David P. Barash, *Costa Rica's Peace Dividend: How Abolishing the Military Paid Off*, L.A. TIMES (Dec. 15, 2013), <http://articles.latimes.com/2013/dec/15/opinion/la-oe-barash-costa-rica-demilitarization-20131208>.

<sup>367</sup> Fabrice Edouard Lehoucq, *Costa Rica: Paradise in Doubt*, 16 J. DEMOCR. 140, 140–42 (2005).

<sup>368</sup> See generally Cerdas Cruz, *supra* note 365.

<sup>369</sup> *Id.*

<sup>370</sup> John M. Carey, *Strong Candidates for A Limited Office: Presidentialism and Political Parties in Costa Rica*, PRES. DEMOCR. LAT. AM. 199, 202 (Scott Mainwaring & Matthew Soberg Shugart eds., Cambridge Univ. Press 1997) ("The constitution of 1949 provides the Costa Rican president with complete authority over creation and maintenance of the executive, but scant formal authority to influence legislation.").

<sup>371</sup> *Id.* at 205–06.

<sup>372</sup> Lehoucq, *supra* note 367, at 144.

<sup>373</sup> Carey, *supra* note 370, at 202–03.

<sup>374</sup> *Id.* at 202.

<sup>375</sup> *Id.*

and presidential relations depend highly on partisan relations.<sup>376</sup> The fact that legislators cannot be reelected makes it easier for them to aspire to careers outside the legislature, and hence, it reduces their responsiveness to party leaders.<sup>377</sup> Moreover, the Legislative Assembly, due to the proportional system of election, will always tend to be divided; the president's party will not have full control of the legislative body because the formula will always ensure that the opposition has some proportional representation. Presidents will tend to face divided governments and at the same time have few constitutional tools to force the legislative body into adopting its policy objectives.<sup>378</sup>

## 2. Human Rights and the Constitutional Order.

The Inter-American system has a strong presence in Costa Rica. San Jose, Costa Rica is where the IACtHR holds its regular sessions and the headquarters of its staff. It is also the place where the American Convention was negotiated and signed in 1969. Hence, it is of no surprise that the provisions of the Constitution and the interpretation of the Supreme Court for the most part have been consistent with the Latin American human rights movement of the late 1980s and early 1990s. For example, Article 7 of the Constitution states that all international treaties that have been duly approved by the Legislative Assembly have “authority superior to that of the laws.”<sup>379</sup> Moreover, Law No. 6889, adopted in September 1983, states that the decisions of the IACtHR, once they have been transmitted to the domestic judicial and administrative authorities, will have “the same executive force” as the decisions of the Costa Rican courts.<sup>380</sup>

According to a 1995 decision of the Constitutional Chamber of the Supreme Court, human rights treaties have the “same normative force” as the constitution.<sup>381</sup> This Chamber has also recognized that “Human Rights treaties in

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<sup>376</sup> Carey, *supra* note 370, at 205 (“The effectiveness of presidents or any other party leader to shape policy is largely dependent on their ability to influence the actions of legislators. This influence, in turn, is based on the ability to control the political careers of legislators.”).

<sup>377</sup> *Id.* (“[P]rohibitions on presidential reelection, which exist throughout most of Latin America, undermine presidential authority over legislative copartisans, because legislators know that incumbent presidents will not continue to hold their current position and so will exert less control over legislator’s career prospects after a specified date.”).

<sup>378</sup> *Id.* at 200 (“The shape of modern Costa Rican presidency is the result of a series of events at midcentury: activist presidents, a brief civil war, and the subsequent Constituent Assembly that codified strict limitations on presidential power.”).

<sup>379</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, Artículo 7, 7 November 1949, *translated in* CONSTITUTIONPROJECT, COSTA RICA’S CONSTITUTION OF 1949 WITH AMENDMENTS THROUGH 2011, [https://www.constituteproject.org/constitution/Costa\\_Rica\\_2011.pdf?lang=en](https://www.constituteproject.org/constitution/Costa_Rica_2011.pdf?lang=en).

<sup>380</sup> *Artavia* Monitoring Compliance, *supra* note 27, at 5.

<sup>381</sup> Sentencia de 9 de mayo de 1995 emitida por la Sala Constitucional de la Corte Suprema de Justicia de Costa Rica. Acción Inconstitucional. Voto 2313-95 (Expediente

force in Costa Rica, not only have a similar value to the Political Constitution, but also, when they give broader rights or guarantees to the person, they are above the Constitution.”<sup>382</sup> On the relationship between the powers of the Constitutional Chamber and the powers of the IACtHR to interpret the American Convention, the Chamber stated in 1995 that it is just “natural and absolutely consequential” that the reasoning of the IACtHR is binding on its own interpretation when it analyzes violations to constitutional and universal human rights.<sup>383</sup> Years later this was confirmed by the same Constitutional Chamber by arguing that “the decisions of the [IACtHR] have full effect in our country.”<sup>384</sup> In sum, the Constitutional Chamber of the Supreme Court of Costa Rica in the early years of the Inter American System gave full force, even constitutional effects, to the American Convention and the interpretations of the IACtHR.

The constitutional system forbids the president from regulating rights through executive decrees in order to force him to reach a compromise with the legislative assembly and ensure that there is no overreach of executive power.<sup>385</sup> The two provisions could be considered acceptable controls of presidential authority and a positive engagement with international law and human rights treaties.<sup>386</sup> As it will be explained below, this positive engagement backfired recently in *Artavia v. Costa Rica*, in which instead of strengthening the role and work of the Constitutional Chamber, the interaction ended up weakening the local court’s discretion and expanding the power of the Costa Rican executive branch.

### 3. The Constitutional Chamber and the Right to Life

In 1995, President Jose Filgueres Olsen (1994-1998) from the center-left National Liberation Party passed an Executive Decree regularizing the medical practice of *in vitro* fertilization.<sup>387</sup> After the executive decree entered into force a group of conservative organizations challenged it on several grounds, including that the president was regulating rights by decree and that they considered that the technique did not protect the life of the embryos being used in the procedure.<sup>388</sup> The case reached the Costa Rican Supreme Court in the year 2000. By then the country had been ruled for two years by the center-right party, the Social Christian

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0421-S-90), considerando VI, <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2012/2844.pdf?view=1>.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at considerando VII.

<sup>384</sup> *Artavia* Monitoring Compliance, *supra* note 27, at 5.

<sup>385</sup> Carey, *supra* note 370, at 202.

<sup>386</sup> See generally Koh, *supra* note 146; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB L. REV 181 (1996) (arguing that international law, by being integrated into the domestic legal system, can reach high levels of positive engagement).

<sup>387</sup> *Artavia* Merits, *supra* note 129, ¶ 68.

<sup>388</sup> *Id.* ¶ 71.



Unity party.<sup>389</sup>

The Constitutional Chamber of the Supreme Court first declared that the executive decree was unconstitutional because by regulating rights through an executive decree it exceeded its constitutional powers.<sup>390</sup> Secondly, the Court applied a “conventionality test” and held that the decree was unconstitutional on an additional ground: it violated the American Convention.<sup>391</sup> According to Article 4 of the Convention, life “shall be protected by law and, in general, from the moment of conception.”<sup>392</sup> After analyzing conflicting medical reports, the Constitutional Chamber concluded that there was no clear answer to whether the embryos created in the laboratory were human beings and whether the medical procedure in the laboratory could be analogized to the moment of conception.<sup>393</sup> Following a progressive interpretation of rights, which implied always looking for the most expansive protection, the Court concluded that the right to life meant extending the protection to all those embryos created in the laboratory.<sup>394</sup> It was safer to assume

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<sup>389</sup> THE STATESMAN’S YEARBOOK 2017: THE POLITICS, CULTURES AND ECONOMIES OF THE WORLD, 364-65 (Pelgrave Mcmillan, 2016). This was not the first time the party had ruled Costa Rica; it had done so from 1990 to 1994, yet this time it was able to remain in power until 2006. *Id.*

<sup>390</sup> *Artavia Merits*, *supra* note 129, ¶ 72; Corte Suprema, Sala Constitucional [Supreme Court, Constitutional Chamber], Mar. 15, 2000, Sentencia: 02306, Expediente: 95-001734-0007-CO, Considerando III. [hereinafter Costa Rica Constitutional Chamber Sentencia 02306].

<sup>391</sup> *Artavia Merits*, *supra* note 129, ¶ 72; Costa Rica Constitutional Chamber Sentencia 02306, *supra* note 390, Considerandos V, VI, VII.

<sup>392</sup> American Convention on Human Rights, art. 4, Nov. 22, 1969 (“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”).

<sup>393</sup> Costa Rica Constitutional Chamber Sentencia 02306, *supra* note 390, Considerando V.

<sup>394</sup> *Id.* (“The question on when does life begins has a transcendental importance in the issue being discussed here, because it forces us to define when a human will be subject to the legal protection of our system. [A] person, the moment it has been conceived, is a person and we are in front of a living being, and has to be protected by our legal system”) (my translation); Costa Rica Constitutional Chamber Sentencia 02306, *supra* note 390, Considerando VI (“Person is every human being (article 1.2) and ‘every person has the right to recognition as a person before the law’ (article 3), both norms are of the [American Convention] . . . . There is no other category for human being, we are all persons and the first thing that our legal recognition as person demands is the recognition to the right to live, without it there is no way to exercise our personality). Costa Rica Constitutional Chamber Sentencia 02306, *supra* note 390, Considerando VII (“[F]rom the quoted norms and especially from articles 21 of the Constitution, 4.1 of the American Convention on Human Rights and 6.1 of the Convention of the Right of the Child it is clear that human life is protected from the moment of conception, this has already been confirmed by this Chamber in its earlier jurisprudence (674-90). This is the second premise [the first was the legality of the executive order] on which we will analyze the constitutionality of the Decree on the Technic of In Vitro Fertilization and Embryo Transfer (FIVET). The cited norms impose an obligation to protect the embryo against any abuse to which it could be subjected to in a

that there was life in the embryos until scientific tests could unanimously agree on the question.<sup>395</sup> The state had an international obligation to “protect the embryo against any abuse to which it could be subjected to in a laboratory, and especially the gravest one of them, the possibility of eliminating its existence.”<sup>396</sup> Under the Constitutional Chamber’s construction, the *in vitro* fertilization technique as regulated by the decree did not provide those appropriate protections.<sup>397</sup> To the contrary, the medical reports analyzed by the court showed that the existing *in vitro* technique jeopardized the life and dignity of the human being by subjecting the embryos to a process of selection, experimentation, and by exposing them to a disproportional rate of mortality.<sup>398</sup> The objectives pursued by the regulation, to give a child to a family, were not justified because the “technique implicate[d] an elevated loss of embryos . . . whose life is first induced and then is frustrated in the process.”<sup>399</sup>

Having determined that the decree was unconstitutional, the Constitutional Chamber nonetheless recognized that “science and biotechnology is rapidly evolving and that the technique could reach a more effective procedure, and the problems identified here be solved.”<sup>400</sup> Yet the conditions in which it was being practiced at that time, led the Constitutional Chamber “to conclude that the elimination or destruction of the conceived beings—voluntarily or as a consequence of the malpractice of someone who employs the technique or out of its inaccuracy—violates the rights to life.”<sup>401</sup>

Regardless of the normative position that one can have on the substance of the decision, one cannot fail to recognize that in the eyes of the Constitutional

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laboratory, and especially the gravest one of them, the possibility of eliminating its existence.”) (my translation).

<sup>395</sup> Costa Rica Constitutional Chamber Sentencia 02306, *supra* note 390, Considerando VIII (my translation).

<sup>396</sup> *Id.* at Considerando VII (my translation).

<sup>397</sup> *Id.* at Considerando VIII.

<sup>398</sup> *Id.* at Considerando IX (my translation).

<sup>399</sup> *Id.*

<sup>400</sup> Costa Rica Constitutional Chamber Sentencia 02306, *supra* note 390, at Considerando IX (my translation).

<sup>401</sup> *Id.* (determining that “not even by enacting legislation, is it possible to authorize legally the application of IVF, at least, as long as its scientific developments have not evolved in the way that this decision has already explained and entails a conscious damage to human life.”) (my translation). A minority of two Justices, Arguedas Ramirez and Calzada Miranda, voted against the decision and presented a joint dissenting opinion. Costa Rica Constitutional Chamber Sentencia 02306, *supra* note 390, Votos Disidentes Magistrados Arguedas Ramirez y Calzada Miranda. They did so because, although they agreed that life in the Costa Rican and Inter American system is recognized from the moment of conception, they considered that the technique was the only way in which life could be protected when the parents had a physical impossibility to have children. *Id.* The parents had a right to procreate, and they considered that the technique did not violate the right to life of the embryos as long as they are only used for the purposes of transferring them into the mother’s uterus. *Id.* The rights to procreation to them, was a right to life in itself; and those who seek to give life, should be able to do so by using all available techniques, including those that science offers them. *Id.*

Chamber of Costa Rica, the court was exercising a progressive control of conventionality. It was using the international treaty in its constitutional reasoning to protect in the most expansive way the interest that it believed had to be protected. The text of the American Convention was key for its identification of the moment at which life is to be protected. Moreover, in the view of the Constitutional Chamber, by recognizing that science could eventually protect the embryo in an effective way, it construed the right to life in the most protective and progressive way possible.<sup>402</sup> It is safe to argue that the Court was not ignoring international treaties or sticking to formalist interpretations to avoid resolving the issue; rather, the court was being “progressive” by including additional sources like human rights treaties and medical reports. Yet, it reached what some would classify as an ideologically conservative conclusion.

#### 4. The Proceedings Before the Inter-American System

A group of families that suffered from infertility alleged that the decision of the Constitutional Chamber violated their right to procreate and their rights to privacy.<sup>403</sup> They brought a claim to the Inter-American Commission of Human Rights in 2001. After a long period of discussions among the state, the victims, and conflicting medical reports from witnesses, the Commission issued its merits report in July 2010.<sup>404</sup> It explained that the absolute prohibition of in vitro fertilization established by the decision of the Constitutional Chamber was a violation of the rights to privacy and to found a family.<sup>405</sup> It then recommended that the state, among other things, enact legislation that would allow the practice.

By the time the state was notified of the merits reports in 2010, after almost a decade of being out of power, the center-left National Liberation Party had regained control of the presidency under the leadership of President Oscar Arias (2006-2010).<sup>406</sup> His party won control of the Legislative Assembly; it obtained 25 of the 57 seats.<sup>407</sup> In 2010, President Arias presented a bill to the Legislative Assembly to comply with the recommendations of the Commission.<sup>408</sup> In an effort to address the concerns of the Constitutional Chamber, the bill included a

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<sup>402</sup> See generally Álvaro Paúl, *Controversial Conceptions: The Unborn and the American Convention on Human Rights*, 9 LOY. UNIV. CHIC. INT'L L. REV. 209, (2012) (arguing that the IACtHR committed several interpretative mistakes in order to impose a particular protective view, but that the same arguments made by the court could yield to another protective result in favor of the embryos).

<sup>403</sup> *Artavia Merits*, *supra* note 129, ¶ 126.

<sup>404</sup> *Id.* ¶ 1.

<sup>405</sup> *Id.* ¶¶ 1–2.

<sup>406</sup> Oscar Arias, *Two-time President of Costa Rica and 1987 Nobel Peace Laureate*, HUFFPOST, <http://www.huffingtonpost.com/author/oscar-arias> (last visited Nov. 2, 2017).

<sup>407</sup> Inter-Parliamentary Union [IPU], *COSTA RICA Asamblea Legislativa (Legislative Assembly): Elections in 2006*, Doc. 01.01.2008 (Feb. 5, 2006), [http://www.ipu.org/parline-e/reports/arc/2073\\_06.htm](http://www.ipu.org/parline-e/reports/arc/2073_06.htm).

<sup>408</sup> *Artavia Merits*, *supra* note 129, ¶ 84.

prohibition of experimenting with and freezing embryos, and required all fertilized eggs to be implanted without allowing the doctor to make a selection.<sup>409</sup> The bill received criticism from the legislative opposition and from the Pan-American Health Organization (PAHO), which argued that the proposed regulation, by forcing the doctors to implant all the embryos, would “increase the risk of spontaneous abortions, obstetric complications, premature births and neonatal morbidity,” thus endangering “the woman’s right to life, and even cause a therapeutic abortion which, in turn, negatively affects the enjoyment of the rights to health and other related human rights.”<sup>410</sup> The bill was rejected by the legislative body leaving the Constitutional Chamber’s ban in force.<sup>411</sup>

In light of the failure of the state to allow for the practice to take place in Costa Rica, the Commission then took the case to the IACtHR.<sup>412</sup> The Commission argued that the victims’ suffering “[was] a fundamental and decisive consequence of the Constitutional Chamber’s judgment.”<sup>413</sup> It further described the result of the Constitutional Chamber’s decisions as a prohibition of an “absolute nature” that constituted a restriction of the rights to found a family.<sup>414</sup> In terms of remedies, the Commission requested the Court to order, among other things, “lift[ing] the ban on in vitro fertilization”<sup>415</sup> and that “the Constitutional Chamber of the Supreme Court of Justice carry out a public act in order to apologize to the victims for the violation of their human rights and for the pain and suffering caused to them, acknowledging publicly that, because of its judgment, this judicial organ thwarted the life project of the victims.”<sup>416</sup>

The State designated two officers of the Attorney General’s Office (*Procuraduría General de la República*) as its representatives.<sup>417</sup> The State’s response to the claims by the Commission were mainly based on the medical reports analyzed by the Constitutional Chamber and their conflicting results on the plausible health effects on both the mother and the embryos.<sup>418</sup> On the issue of the ruling of the Constitutional Chamber, the state argued that the decision was a “relative ban” on the practice because it “did not annul definitely the possibility of practicing in vitro fertilization in Costa Rica, [but] only banned a specific technique that had existed since 1995.”<sup>419</sup> It further added that as soon as the “state considers that a technique is compatible with those parameters [the ones set by the Constitutional Chamber on reducing percentage of failure cases], it may permit and

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<sup>409</sup> *Artavia Merits*, *supra* note 129, ¶ 156.

<sup>410</sup> *Id.* ¶ 84.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* ¶¶ 126–7.

<sup>413</sup> *Id.* ¶ 127.

<sup>414</sup> *Artavia Merits*, *supra* note 129, ¶ 152.

<sup>415</sup> *Id.* ¶ 330.

<sup>416</sup> *Id.* ¶ 342.

<sup>417</sup> *Id.* ¶ 8.

<sup>418</sup> *Id.* ¶ 128–9.

<sup>419</sup> *Artavia Merits*, *supra* note 129, ¶ 155.

regulate it.”<sup>420</sup> In sum, the State did not defend the fact that the Constitutional Chamber was arguing for a more extensive protection of the right to life than the one considered by the Inter-American Commission.

The IACtHR agreed with the Commission’s assessment that the case rested on determining “whether [the] decisions by the Constitutional Chamber entailed the State’s international responsibility,”<sup>421</sup> and “resulted in a disproportionate restriction of the rights of the presumed victims.”<sup>422</sup> It even argued that there was no need to review the evidence presented by the State regarding the scientific and medical consequences of the technique because the merits of the case were based on the effect of the decisions of the Costa Rican Supreme Court.<sup>423</sup> That is, it was a procedure focused on analyzing whether or not the Constitutional Court had correctly interpreted the American Convention in light of the facts presented to it. Yet, the State did not present a full defense of the Constitutional Chamber’s reasoning. The IACtHR reviewed the ruling of the highest court of Costa Rica as an appellate court would review the work of a trial court.

The IACtHR first stated that the Constitutional Chamber’s standard implied that for the technique to be constitutional it would need to ensure that there was no embryonic loss whatsoever.<sup>424</sup> In practice, this would entail “a prohibition of IVF, because the evidence in the case file indicated that, to date, there is no option for practicing IVF without some possibility of embryonic loss.”<sup>425</sup> In other words, “it would be impossible to comply with the condition imposed by the Chamber.”<sup>426</sup> The IACtHR criticized the decision of the Constitutional Chamber for not having “sufficient precision” and making it difficult for the plaintiffs and other authorities to follow.<sup>427</sup>

The IACtHR first reviewed the definitions of the term “conception” as established both in scientific affidavits and in the dictionary of the Spanish language.<sup>428</sup> It concluded that conception should be understood as the moment in which embryos are implanted, not when they are created as argued by the Constitutional Chamber.<sup>429</sup> The Convention could not extend its protection to the embryos in the laboratory.<sup>430</sup> The Court could have stopped its analysis there but it

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<sup>420</sup> *Artavia Merits*, *supra* note 129, ¶¶ 155-6.

<sup>421</sup> *Id.* ¶ 26.

<sup>422</sup> *Id.* ¶ 171.

<sup>423</sup> *Id.* ¶ 26 (“[I]n order to analyze their merits, the Court will only take into account the evidence and allegations related to the arguments explicitly used in the reasoning of the Constitutional Chamber’s judgment.”).

<sup>424</sup> *Id.* ¶¶ 76, 157-59.

<sup>425</sup> *Artavia Merits*, *supra* note 129, ¶ 159.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* ¶ 160.

<sup>428</sup> *Id.* ¶ 178.

<sup>429</sup> *Id.* ¶ 189 (“[T]he Court understands the word ‘conception’ from the moment at which implantation occurs, and therefore considers that, before this event, Article 4 of the American Convention cannot be applied.”).

<sup>430</sup> *Artavia Merits*, *supra* note 129, ¶ 189.

then reviewed the level of protection that the Convention gives to the right to life.<sup>431</sup> It took the position that the Convention does not give an absolute protection to life.<sup>432</sup> It eventually reached the conclusion that “it is not feasible to maintain that an embryo is the holder of and exercises the rights established in each of these articles. Also, taking into account, as indicated previously, that conception can only take place within a woman’s body [through implantation].”<sup>433</sup> Consequently, “the direct subject of protection is fundamentally the pregnant woman, because the protection of the unborn child is implemented essentially through the protection of the woman.”<sup>434</sup>

The IACtHR then applied a proportionality test to the decision of the Constitutional Chamber of Costa Rica. It explained that it was not admissible that the chamber argued in its decision that its constitutional norms “grant a greater protection to the right to life and, therefore, proceed to give this right absolute protection . . . this approach deni[ed] the existence of rights that may be the object of disproportionate restrictions owing to the defense of the absolute protection of the right to life, which would be contrary to the protection of human rights.”<sup>435</sup> On the issue of the risks of high embryonic death, the IACtHR argued that it was “disproportionate to aspire to an absolute protection of the embryo in relation to a risk that is common and even inherent in process where the IVF technique has not been used.”<sup>436</sup> The IACtHR found that the decision of the Constitutional Chamber was an “arbitrary and excessive interference in private and family life” because it had failed to take into consideration other competing rights.<sup>437</sup>

The *Artavia* decision is a clear example of a conflict of interpretation

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<sup>431</sup> *Artavia Merits*, *supra* note 129, ¶ 189 (affirming that “the term ‘in general’ infers exceptions to a rule.” At points in the decision the IACtHR seemed to imply that the original intent of the drafters of the American Convention was to let the state decide the scope of this protection).

<sup>432</sup> *Id.* ¶ 220 (referencing further the fact that the Inter-American Commission had previously declared in two cases brought against the United States’ Supreme Court’s decisions to legalize abortion in the sense that “the protection of the rights to life was not absolute.”).

<sup>433</sup> *Id.* ¶ 222.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* ¶ 259.

<sup>436</sup> *Artavia Merits*, *supra* note 129, ¶¶ 311, 313–14 (“[T]aking into account that embryonic losses that occur in a natural pregnancy and in other reproduction techniques permitted in Costa Rica, the protection of the embryo sought by banning IVF has a very limited and moderate scope . . . a weighting up of the severity of the limitation of the rights involved in this case as compared to the importance of the protection of the embryo allows it to be affirmed that the effects on the rights to personal integrity, personal liberty, private life, intimacy, reproductive autonomy, access to reproductive health services, and to found a family is sever and entails a violation of these rights because, in practice, they are annulled for those persons whose only possible treatment for infertility is IVF. In addition, the interference had a differentiated impact on the victims owing to their situation of disability, gender stereotypes and, for some of the victims, to their financial situation.”).

<sup>437</sup> *Id.* ¶ 189.

between courts. This was not a case in which a domestic court was ignoring human rights and the international court needed to enforce them; rather, this case exemplified a conflict between courts on what was the best way to interpret human rights and the most effective way to protect them. The IACtHR disagreed with the highest Court of Costa Rica on how to interpret the Convention in the most protective way possible. For the highest court of Costa Rica, the most expansive protection included the embryo; for the IACtHR the most expansive interpretation could not entail “absolute” protection, but rather balancing the right to life with those of other victims.

The IACtHR ordered state authorities to “take the appropriate measures to ensure that the prohibition of the practice of IVF is annulled as rapidly as possible.”<sup>438</sup> As part of its remedies, the Court ordered the Costa Rica Social Security Institute to “make IVF available within its health care infertility treatments and programs, in accordance with the obligation to respect and guarantee the principle of non-discrimination.”<sup>439</sup>

When the decision of the IACtHR was issued in 2012, Costa Rica was still governed by a president from the center-left party, Laura Chinchilla (2010-2014), and the Legislative Assembly remained divided (President Chinchilla’s party had only 24 of the 57 seats in the Assembly). In the two years after the decision of the IACtHR, President Chinchilla presented several drafts to the Legislative Assembly to regulate the in vitro fertilization procedures.<sup>440</sup> All of those projects failed to become legislation.<sup>441</sup> Moreover, the victims presented several local judicial *amparo* proceedings to have the decision of the IACtHR recognized by the judiciary and requested them to leave without effects the 2000 decision of the Constitutional Chamber.<sup>442</sup> A majority of the Constitutional Chamber rejected the *amparo* requests.<sup>443</sup> In a clear departure from its previous attitude towards the Inter-American system, the Constitutional Chamber argued that it was not its duty to order or supervise compliance with the IACtHR’s decisions.<sup>444</sup>

In June 2015, the President decided to enact another executive decree to regulate the IVF technique.<sup>445</sup> This time, the executive argued that the decree was the only available means for the State to comply with the decision of the IACtHR.<sup>446</sup> The decree was once again challenged in the Constitutional Chamber with similar arguments to the ones expressed in the 2000 decision, and the decree was declared as unconstitutional.<sup>447</sup> The Constitutional Chamber recognized “the effort of the

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<sup>438</sup> *Artavia Merits*, *supra* note 129, ¶¶ 336–37.

<sup>439</sup> *Id.* ¶ 338.

<sup>440</sup> *Artavia Monitoring Compliance*, *supra* note 27, at 9.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 7.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Artavia Monitoring Compliance*, *supra* note 27, at 9.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* The Constitutional Chamber argued that the executive decree “violated and/or threatened the fundamental right to life of the unborn” and it also exceeded the powers of the

Executive Power to give full compliance to the decisions of the IACtHR” but noted that “the means are not justified by the ends, especially when these means breach in an open and manifest way values, principles and nuclear norms of [the Costa Rican] republican order.”<sup>448</sup> The inter-branch political conflict was clear from this decision. The Constitutional Chamber was asked to modify the constitutional rules that balanced the political forces’ powers. Setting a precedent in which the president can regulate rights through decrees was more dangerous for the constitutional order than ignoring the decisions of the supranational human rights court.

### 5. Imposing an Unconstitutional Executive Decree

In February 2016, the IACtHR monitored the compliance with the decision and found that its orders had not been fully implemented.<sup>449</sup> It criticized the Constitutional Chamber for not taking the opportunity to reverse its own decisions when the victims requested an *amparo* to execute the IACtHR’s decision.<sup>450</sup> It further argued that the Constitutional Chamber, as the highest court in Costa Rica, has “the important role of complying or implementing the decision of the IACtHR.”<sup>451</sup> The IACtHR noted the different attitudes from local powers towards the supranational system. It “value[d] positively the effort of the Executive Power to leave without effect the IVF prohibition through the emission of a legal norm, and consider[ed] that that effort represent[ed] a clear and concrete will to comply with the decision of the IACtHR.”<sup>452</sup>

In its latest decision, the IACtHR left without “any legal effects” the decision of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica.<sup>453</sup> Moreover, it affirmed that:

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executive by regulating rights in executive orders, a power only granted to the legislative assembly. *Id.* It even argued that the American Convention by stating that the rights to life should be regulated “in general by law” confirms the view that it cannot be regulated through an executive decree. *Acción de Inconstitucionalidad Presentada en contra del Decreto Ejecutivo No. 39210-MP-S*, (Sept. 21, 2015); *Artavia Monitoring Compliance*, *supra* note 27, at 9.

<sup>448</sup> *Artavia Monitoring Compliance*, *supra* note 27, at 10.

<sup>449</sup> *Id.*

<sup>452</sup> *Id.* at 7–8.

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* at 9.

<sup>453</sup> *Artavia Monitoring Compliance*, *supra* note 27, at 12–13 (“According to what was declared by this Court in its resolution, the prohibition to practice IVF is manifestly incompatible with the American Convention due to the fact that it violates those rights [to privacy and family], and as such, it cannot have any legal effects in Costa Rica nor constitute an impediment for the exercise of such a right protected by the Convention. Consequently, in accordance with the American Convention and the remedies ordered in the Decision, it must be clear that IVF from now on is authorized in Costa Rica and, in an immediate way, the exercise of the right to decide to have biological sons or daughters through the assisted



it must be clear that FIV from now on is authorized in Costa Rica and, in an immediate way, the exercise of the right to decide to have biological sons or daughters through the assisted technic must be allowed, both at the private and public level, without the need to have any additional legal act or decision.<sup>454</sup>

With regard to the executive decree that regulated the practice, the IACtHR ordered to “keep in force the Decree so that there is no illusory exercise of the rights . . . this does not imply that the legislative power could enact eventually some type of regulation that complies with the standards of the decision of the IACtHR.”<sup>455</sup>

Eduardo Vio Grossi was the only dissenting judge in the decision.<sup>456</sup> He argued that the IACtHR had very limited powers to monitor compliance with its decisions and that in this case it was exceeding them by signaling concrete responsibilities to domestic actors.<sup>457</sup> He even made reference to the need to give a “margin of appreciation” to the domestic authorities to comply with the state’s international obligations.<sup>458</sup> Without the “margin of appreciation,” the court would be invading the scope of domestic legal actors in a way contrary to international law.<sup>459</sup> Moreover, Judge Vio Grossi identified the risk of getting the Court involved in a separation of powers issue between the local high court and the executive power.<sup>460</sup> In practice, the international resolution classified local courts as human rights violators, and at the same time, legitimized the acts of the executive.<sup>461</sup> In his view, the IACtHR should not be in the business of resolving internal struggles among powers on how best to comply with international decisions.<sup>462</sup>

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technic must be allowed, both at the private and public level, without the need to have any additional legal act or decision that recognizes this possibility or that regulates the implementation of such a technique. No one can impose a penalty to engage in the practice of IVF.”) (my translation).

<sup>454</sup> *Artavia Monitoring Compliance*, *supra* note 27, at 12–13.

<sup>455</sup> *Id.* at 15 (arguing that the Decree should stay in force because neither the victims nor the Commission had argued that the decree violated any rights and that in fact it was an appropriate way to comply with the IACtHR decision).

<sup>456</sup> I/A Court HR. Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica. Monitoring Compliance with Judgments. Order of the Inter-American Court of Human Rights of February 26, 2016. (Only in Spanish), Dissenting Opinion Eduardo Vio Gorssi, at 1 [hereinafter *Artavia Monitoring Dissent*].

<sup>457</sup> *Id.* at 2–3, 8.

<sup>458</sup> *Id.* at 6.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 9–10.

<sup>461</sup> *Artavia Monitoring Dissent*, *supra* note 456, at 9–10.

<sup>462</sup> *Id.* at 10.

## VI. LESSONS FROM THE UNITED STATES AND INTER-AMERICAN EXPERIENCE

The comparative analysis presented in the previous sections between the US system of adjudication and the Inter-American system of human rights confirms the claim that judicial supremacy has not only resulted from courts' doctrinal interpretations, but also from political actors' incentives to recognize and promote it.<sup>463</sup> High courts at the domestic level and international tribunals rely on political, social and economic actors to enforce their decisions. At the international level, the lack of a political entity or a strong economic integration process, such as in the European Union, lowers the costs for presidents to dismiss the authority or ignore the opinions of supranational courts.<sup>464</sup>

The first lesson from the comparative analysis is that the expansion of the IACtHR has been possible in some Latin American states because recognizing such an authority has been politically beneficial to executive powers and their political coalitions. The IACtHR's authority has helped presidents overcome a variety of political dilemmas inherent in emerging democracies. It has helped to dismantle conservative judiciaries, bypass gridlock in congresses, impose agendas on pre-existing coalitions, and generally divert the political costs of certain decisions into the international system as opposed to facing them directly.

This lesson does not imply that all domestic judiciaries have been passive in this process. There are several examples of constitutional judges who have contested the conventional authority of the supranational court.<sup>465</sup> They have had to grapple simultaneously with both the requirements of the Constitution and of the Convention; in some cases they have tried to reach an understanding with the supranational court. The IACtHR is not the only voice that speaks in the name of human rights, and for some judiciaries the IACtHR has failed to be an adequate voice. The example of the Chilean Supreme Court and the Constitutional Chamber of the Supreme Court of Costa Rica presented in previous sections serve as testimonies to these tensions.

The second lesson that emerges from the comparative findings of this paper is that the use of the supranational adjudication system to expand executive powers brings into question existing assumptions on the need to make international law directly enforceable at the domestic level.<sup>466</sup> In the context of the US constitutional system, this lesson is a call for caution to the proponents of giving self-executing power to decisions of international courts in the domestic legal system.<sup>467</sup> If the decisions from international courts are given direct legal effect,

<sup>463</sup> WHITTINGTON, *supra* note 11, at 27, 285.

<sup>464</sup> See generally SHAPIRO, COURTS, *supra* note 16 (United States). See generally Alter, *supra* note 19 (Europe); Burley & Mattli, *supra* note 20 (Europe); STONE SWEET, *supra* note 113 (Europe).

<sup>465</sup> See generally Huneeus, *supra* note 138.

<sup>466</sup> See generally Koh, *supra* note 386; Koh, *supra* note 146.

<sup>467</sup> *Supra* note 466; Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599–695 (2008) (arguing

like the Costa Rican case, they can substantially affect the balance of power among governmental actors. Just as the US Supreme Court's judicial supremacy can be used by actors to bypass politics and advance agendas, so too can the decisions of international courts be used to impose policies on Congress, the highest court of the land, the states, and federal agencies. In the context of comparative law and new democracies, existing theories argue that supranational adjudicative institutions can help domestic judiciaries become more independent and enhance their role in governance.<sup>468</sup> To reach this conclusion, they build on studies focused on the experience of the European Court of Justice and European Court of Human Rights.<sup>469</sup> In the case of Europe, scholars argue that the fragmentation of judicial authority between national and supranational courts made it difficult for governments to "retaliate" the expansion of judicial power at the domestic level.<sup>470</sup> The commentators of this literature insist that international institutions are a structural factor that helps expand judicial power by "protecting and fostering democracy and expanding human rights."<sup>471</sup> Yet, as the comparative analysis between the United States and the Inter-American system shows, supranational judiciaries can also have the opposite effect.

When a domestic political coalition or incoming political leaders disagree with the existing constitutional understandings or the policy preference of the domestic court, they may use the supranational proceeding to steer the direction of the domestic court. The new government can use the IACtHR's expansive jurisprudence as a tool to impose a different understanding coated under the narrative of international judicial supremacy, and avoid criticism for expanding presidential powers. Cloaked by a human rights narrative is an assailment of judicial discretion and an expansion of presidential power. The European based literature has failed to recognize this fact. By relying exclusively on the experience of European countries and their interaction with the European Union institutions, they generally see an ally of domestic judiciaries in the supranational system.<sup>472</sup>

In the view of the European-centered literature, when courts and the political coalitions in power do not have the same policy agenda, political actors

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that the Supremacy Clause of the US constitution should be interpreted as establishing a default rule that treaties should be directly enforceable in domestic courts like other laws).

<sup>468</sup> See generally L.R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 132 (2008); Helfer & Slaughter, *supra* note 19; Helfer & Slaughter, *supra* note 253; Laurence R. Helfer et al., *Do European Court of Human Rights Judgments Promote Legal and Policy Change?* (Working paper 2011); Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 LAW & CONT. PROBS. 1 (2015); Burley & Mattli, *supra* note 20.

<sup>469</sup> *Supra* note 468.

<sup>470</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 24. See generally Weiler, *supra* note 18; Weiler, *supra* note 20; Helfer & Slaughter, *supra* note 19; Helfer & Slaughter, *supra* note 253; Slaughter, *supra* note 19.

<sup>471</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 25.

<sup>472</sup> See generally Helfer & Slaughter, *supra* note 19; Burley & Mattli, *supra* note 20; Alter, *supra* note 19.

will downplay the role of domestic courts by replacing judicial personnel, altering appointment procedures, or introducing changes in the court's jurisdiction.<sup>473</sup> The conclusions presented in this paper contradict this view in two ways. First, there might be cases in which the conflict between the existing judiciary and an incoming political coalition is not one of judiciaries expanding their role in politics, but rather regards a substantive disagreement on which agenda to pursue. This is not an attack on judicial power itself, but rather an attack on the use of judicial activism to impose a squarely progressive or conservative agenda. Secondly, as mentioned in the previous sections, it might be politically costly for the new coalitions to constrain judicial powers in regions where hyper-presidentialism or a history of authoritarianism is still present in the minds of the general population. NGOs, political opposition, and political parties, among others, would reject an upfront attack to the judiciary. Moreover, in cases in which the government is divided there might be some domestic political actors that are in line with the court's policy position. The other political coalitions or leaders might have a harder time using these traditional mechanisms to downplay the role of domestic courts.

The final lesson that can be learned from this paper's comparative analysis is that allowing other branches of government to express their concerns in the judicial system does not necessarily lead to negative results. In the United States, the possibility of allowing some type of participation, even if it is only in the form of an *amicus* brief, leads the court to consider all the interests of the parties that are affected by its decisions. In the long run, this makes the court a more conscientious institution regarding the limits of its powers. In the words of former Attorney General Griswold, the "judicial system presupposes that the clash of arguments presented by professional adversaries is the most reliable process for determining the legality of any activity."<sup>474</sup> Courts reach better decisions when more arguments are considered, and especially when the voices of everyone involved in the process are heard.

One of the critiques of the Inter-American system is its lack of sensitivity regarding the local political, legal, and social realities,<sup>475</sup> especially through its remedies orders.<sup>476</sup> Perhaps listening to all of the government actors involved in the case would enhance the Court's sensitivity and invite it to make decisions more attuned to the realities of the state. Today, the IACtHR judges are only getting to know the country through the lenses of the NGOs representing the victims, the Inter-American Commission, and the executive powers. We must recognize that

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<sup>473</sup> CONSEQUENTIAL COURTS, *supra* note 11, at 26 ("[G]overnment and political leaders—driven by immediate political desires—can move aggressively to prevent, discourage, or limit judicial role expansion. Beyond overriding high court rulings that do not match their policy preferences in hopes of swatting back judicial reach into political affairs, they may seek to replace judicial personnel or alter appointment procedures, or introduce changes in a court's jurisdiction.").

<sup>474</sup> Griswold, *supra* note 3, at 528.

<sup>475</sup> Oquendo, *supra* note 258, at 27; Neuman, *supra* note 144, at 346; Neuman, *supra* note 9.

<sup>476</sup> Neuman, *supra* note 9, 106. *See generally*, Neuman, *supra* note 144.

these are only depicting the story that serves their strategic interests. The rest of state actors, including the high courts, are left without a defense.

## VII. CONCLUSION

This paper considered an assumption about contemporary international adjudicatory proceedings involving governmental acts, which government representatives will always defend the state in the best way possible, and found it to be contradictory, or at least uneasy. The comparison of the defense of the US federal government before the Supreme Court and of the Latin American states in the IACtHR shows that the assumption only holds true when the interest of the executive aligns with the interest of the other branches being defended. In many occasions at the international level, this has not been the case. Today the interest of the state is composed of diverse agendas and it is not clear how to synthesize and reconcile them, particularly in the face of salient cases that define key constitutional understandings.

As this paper explained, the US constitutional litigation system has developed a set of strategies to mitigate advantages that come with the monopoly of the executive power over the defense of the state.<sup>477</sup> The US Supreme Court has not been prevented from hearing diverse interests involved in the cases. Congress has filed *amicus* briefs, granted litigating authority to independent federal agencies, and pressured the DOJ to include its interests.<sup>478</sup> Moreover, in some cases, private litigants have framed their claims against executive authority using arguments that defend congressional powers.<sup>479</sup> In other cases, the litigation strategies of the DOJ have also reflected an effort to represent the interest of all branches.<sup>480</sup> This office has presented the views of different branches in briefs or in footnotes or in oral argument. However, as this paper explained, in salient cases it has also been persuaded by the White House to decline to defend other branches, confessed errors in court, or argued directly against the acts of other branches. The latter consists of few cases in the life of US constitutional adjudication, yet they reveal the impact that the authority to present arguments in court has for inter-branch politics.

Once the analysis is broadened to include the political effects of the litigation strategies, it becomes immediately clear that in the contexts of divided government, presidents can use the judicial process to expand their agenda.<sup>481</sup> In the face of congressional opposition these presidents can try to modify political

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<sup>477</sup> See generally Waxman, *supra* note 13; Devins & Prakash, *supra* note 13; Devins, *Political Will and the Unitary Executive*, *supra* note 13; Devins, *Unitariness and Independence*, *supra* note 13; Bell, *supra* note 13; Griswold, *supra* note 3; Lochner, *supra* note 13.

<sup>478</sup> Waxman, *supra* note 13, at 1084.

<sup>479</sup> See *supra* Section I. B.

<sup>480</sup> *Id.*

<sup>481</sup> WHITTINGTON, *supra* note 11, at 164.

understandings by seeking an alliance with the judiciary.<sup>482</sup> The monopoly over the defense of the government in constitutional adjudication and the reaffirmation of judicial supremacy by the court can be used to expand the power of the executive. As this paper explained, this does not always happen, as there are some mitigation mechanisms available to Congress.<sup>v</sup> Yet, the potential for the expansion is clear.

This paper also made the case that supranational adjudication in the Inter-American System of Human Rights shares some of the characteristics of the US system of constitutional adjudication. This paper discussed how the IACtHR is assuming constitutional functions, especially through its assertion of judicial supremacy over human rights litigation in the region.<sup>483</sup> This assertion is manifested when it strikes down domestic legislation, constitutional norms and acts of different branches; it is also manifested by the decisions in which it reviews the work of constitutional courts as if they were lower courts and it affirms the superior hierarchy of its decisions over domestic constitutional doctrines. This supranational judicial expansion runs contrary to the original vision of the institution to cooperate with domestic judiciaries, and to foster the empowerment of domestic high courts.

There are many reasons why this doctrinal expansion has been possible, including the fact that Latin American constitutions have given the highest deference to human rights covenants. Yet, there is also a political variable on the expansion of the court. There has been a willingness of some executives to use the monopoly of the defense of the state and the IACtHR's assertion of judicial supremacy to impose policy agendas in scenarios of divided governments, and against previous political coalitions.

In sum, just as in the US domestic system the Supreme Court can be used to expand executive powers over Congress or independent agencies, the IACtHR can be used to expand Latin American executive powers over local judiciaries. The centralization of the defense of the state is one of the political tools that allow this to happen. The centralization takes away the power of certain branches or agencies to uphold their agenda before a judicial body. In the most extreme cases, the executive could decline to defend the interest of the other branches of government when the issues discussed in court can help this branch expand its own powers, ignore the constitution, or impose its policy agenda. Note the paradox here. In the US system, the acquiescence of the executive serves also the Supreme Court because it reaffirms its judicial supremacy over the Constitution.<sup>484</sup> When we add to the adjudicatory process a supranational court, the power of the domestic high court is supplanted by the supremacy of an international body. Constitutional courts lose their control over the content of the constitutions and of rights litigation, a control than now is asserted by a supranational court.

The IACtHR's experience shows the success and tragedy of the assertion of international judicial supremacy by a supranational court. As the international human rights adjudication system expands its influence, behaving more as a

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<sup>482</sup> WHITTINGTON, *supra* note 11, at 167.

<sup>483</sup> See generally Dulitzky, *supra* note 248.

<sup>484</sup> WHITTINGTON, *supra* note 11.

constitutional court than as a dispute resolution body, the political actors that control the judicial process are the ones who can manipulate it on their behalf.<sup>485</sup> The rest of the state actors, including the high courts, are left without a defense, and the expansion of the international judiciary has the potential of expanding the agenda of the domestic executive instead of the power of local high courts.

This conclusion contradicts liberal international law scholars who would predict that the expansion of international judiciaries would come hand in hand with the expansion of domestic judiciaries' powers and discretion.<sup>486</sup> In this scholarly literature, independent local judiciaries are supposedly a precondition for an effective international judiciary.<sup>487</sup> The story of the IACtHR shows that the expansion of the international judiciary has the potential of expanding the agenda of the domestic executive instead of the power of local high courts.<sup>488</sup> Instead of engaging in a dialogue in which the domestic and the international courts nurture each other, a process of imposition and submission is emerging in which the domestic high court loses independence and discretion in rights interpretation.<sup>489</sup>

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<sup>485</sup> ALTER, *supra* note 6 (discussing how international courts can perform other functions beyond dispute resolution).

<sup>486</sup> See generally Koh, *supra* note 146; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (1999); Helfer & Slaughter, *supra* note 253; Helfer & Slaughter, *supra* note 19.

<sup>487</sup> Helfer & Slaughter, *supra* note 19; Helfer & Slaughter, *supra* note 253; Koh, *supra* note 386; Koh, *supra* note 146.

<sup>488</sup> *Contra supra* note 486.

<sup>489</sup> Huneeus, *supra* note 138 (discussing a view on how domestic courts resist international ones, yet the author takes the position that their resistance can be explained as a lack of adequate international persuasion by arguing that local courts need to be "nurtured" into a human rights culture).

