

COURTS RESISTING COURTS:

Lessons from the Inter-American Court's Struggle to Enforce Human Rights

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Abstract

Courts Resisting Courts explores a critical tension in international law: the relationship between international and national courts. Leading theorists assume that autonomous national courts heighten compliance with international human rights regimes. This article challenges this orthodoxy. It focuses on the Inter-American Court of Human Rights, an international court unique in that it orders far-reaching, innovative remedies that invoke action not only by the State's executive, but also the legislature and local courts. Original data reveals that national courts, more than any other branch of government, shirk the Court's rulings. This article turns this insight into a prescription for gaining greater compliance: international human rights courts need to directly engage national justice systems, cultivating them into compliant partners. This argument is relevant

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102

not only to the Inter-American Court, but to courts with jurisdiction over human rights across the globe.

[2011]

COURTS RESISTING COURTS

103

TABLE OF CONTENTS

INTRODUCTION	104
I. THE INTER-AMERICAN COURT AND NATIONAL COURTS.....	108
1. THE INTER-AMERICAN SYSTEM IN BRIEF	109
2. THE COURT FORGES A UNIQUE PRACTICE.....	112
3. TELLING NATIONAL COURTS WHAT TO DO.....	114
II. WHEN JUDGES AND PROSECUTORS DISOBEY.....	116
1. WHY COMPLIANCE MATTERS.....	118
2. BREAKING DOWN COMPLIANCE BY DISTINCT STATE ACTORS	121
3. THE LIMITS OF CURRENT THEORIES OF COMPLIANCE	126
4. THE POLITICS OF JUDICIAL ACTORS.....	129
III. IMPLICATIONS: PARTNERING WITH JUSTICE SYSTEMS	135
1. FIRST OPTION: DO NOTHING	135
2. SECOND OPTION: GO EUROPEAN	136
3. THIRD OPTION: COURTING JUDGES AND PROSECUTORS	138
a) <i>Naming Names</i>	140
b) <i>Catering to Courts</i>	144
c) <i>Fostering a Regional Judicial Dialogue on IAS Matters</i>	145
d) <i>The Social Network</i>	149
4. THE LIMITS OF COURTSHIP	151
IV. CONCLUSION: THE AMERICAS AND BEYOND	151

INTRODUCTION

Leading scholars argue that autonomous national courts heighten compliance with international human rights regimes.¹ But the Inter-American Court's ongoing experiments with innovative equitable remedies provide a new window into the challenges faced by international courts in enforcing human rights. An empirical examination of the Court's docket reveals two dynamics. First, in a majority of its contentious rulings, the Inter-American Court demands that some sort of prosecutorial or judicial action be taken, such as an investigation, a hearing, or a trial. Second, the judges and prosecutors of Latin America rarely comply. Latin American constitutions grant prosecutors autonomy from the executive, much like that of judges, to ensure accountability.² But judges and prosecutors are far less likely to undertake the actions demanded by Inter-American Court rulings than are executives. While states implement the majority of orders that primarily require executive action, they implement only one in ten orders that invoke action by justice systems.³

This article will argue that the compliance gap between executives and justice system actors suggests that the Inter-American Court – and international human rights courts more generally – could increase

¹ See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997); Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUDIES Q. 149 (2009); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935 (2002); BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 129-35 (2009); ELIN SKAAR, *JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA: VIOLATIONS, POLITICS, AND PROSECUTION* (2011). *But see* Staton & Romero, *infra* note 106 (noting a correlation between judicial independence and compliance to the Court's remedial orders).

² For a description of the role of the autonomous prosecutor in Latin America, see generally CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS (CEJA) [CENTER FOR JUSTICE STUDIES OF THE AMERICAS], *DESAFÍOS DEL MINISTERIO PÚBLICO FISCAL EN AMÉRICA LATINA* [CHALLENGES OF PUBLIC PROSECUTIONS IN LATIN AMERICA] (2007), available at http://www.cejamericas.org/portal/index.php/es/biblioteca/biblioteca-virtual/doc_details/3314-desafios-del-ministerio-publico-fiscal-en-america-latina [hereinafter CEJA PUBLIC PROSECUTIONS REPORT].

³ This is based on the author's original data. See *infra* note 51.

[2011]

COURTS RESISTING COURTS

105

compliance by more directly engaging national judges and prosecutors, deliberately cultivating national justice systems as partners in compliance.⁴ The reason for non-implementation of court orders is not only, as others have argued, that criminal prosecution of state-sponsored crime is “costly” or “difficult” to undertake,⁵ or that the government as a whole lacks political will.⁶ Nor is it a lack of judicial independence. Drawing on original data, this article shows that the problem is also – and often primarily – that implementation of orders involves disparate state actors whose interests, ideologies and institutional settings differ from those of the executive, and who may be only dimly aware of the Inter-American Court. Prosecutorial and judicial politics must be viewed as separate, vital factors in explaining the performance of supra-national rights regimes and in devising strategies to enhance their effectiveness.⁷

Of course, it is formally incorrect to say that judges and prosecutors disobey the Inter-American Court. International courts

⁴ The argument on compliance partnerships draws especially on the work of Karen J. Alter on the European Court of Justice, and the work by Alter and Laurence R. Helfer on the Andean Court of Justice. Alter argues that the European Court of Justice’s political power can be best explained by its support from sub-state interlocutors, and judges in particular. The Andean Court of Justice, by contrast, has failed to become relevant to national legal fields. See Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Primary Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U. J. INT’L L. & POL. 871, 872, 875 (2009); see also Karen J. Alter & Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT’L ORG. 563 (Fall 2010); see also generally James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court* 102 AM. J. INT’L L. 768 (2008) (arguing that the Inter-American court should consider the interests and strategies of civil society constituencies).

⁵ Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights* 6 J. INT’L L. & INT’L REL. 35-85 (2010).

⁶ Cavallaro & Brewer, *supra* note 4, at 786 n.62; Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT’L L. 195, 200 (2004); Morse H. Tan, *Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights*, 43 TEX. INT’L L.J. 243, 272 (2008).

⁷ See Par Engstrom & Andrew Hurrell, *Why the Human Rights Regime in the Americas Matters*, in HUMAN RIGHTS REGIMES IN THE AMERICAS (Mónica Serrano & Vesselin Popovski eds., 2010) (arguing that judicial politics is an important aspect of the Inter-American System).

formally address themselves to the state, not to distinct actors within the state. And it is the state as a whole that complies or not with Court orders. But this formal legal description falls particularly flat in face of the Inter-American System's unique features. The Inter-American Court is "the only international human rights body with binding powers that has consistently ordered equitable remedies in conjunction with compensation."⁸ Whereas the ECHR typically allows governments to choose how they will remedy their state's violation,⁹ the Inter-American Court, which came of age in a region of dictatorships, prefers to be less deferential. It often requests that the state take specific remedial actions, and it often orders action which the executive cannot take single-handedly. In recent cases it has ordered that judges in Mexico receive instruction in gender rights,¹⁰ that Chile amend its laws on freedom of expression and freedom of information,¹¹ and that Guatemala's judges refrain from applying the death penalty.¹² Notably, since it is not a criminal court but routinely hears cases of mass state-sponsored crimes, the Inter-American Court has ordered states to conduct criminal prosecution in a majority of its rulings.¹³ Full compliance thus typically turns on the will of justice system actors. To explain compliance patterns, we need to pry open the black box of domestic justice systems and examine the motives and institutional settings of judges and prosecutors.

This observation has practical consequences. The Inter-American Court must make itself matter to local state actors beyond the foreign ministry to achieve greater implementation of its rulings. As Lawrence Helfer writes, "compliance with international law increases when

⁸ Thomas Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 355 (2008).

⁹ See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 194-200 (2d ed. 2005) (discussing the remedial powers of the ECHR).

¹⁰ González et al. ("Cotton Field") v. Mexico, 2009 Inter-Am. Ct. H.R. (ser. C) No. 205, at 148 (Nov. 16, 2009). All Inter-American Court of Human Rights judgments are available at <http://www.corteidh.or.cr/casos.cfm>.

¹¹ Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, 2001 Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001); Case of Claude-Reyes v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

¹² Raxcacó-Reyes v. Guatemala, 2005 Inter-Am. Ct. H.R. (ser. C) No. 133 (Sept. 15, 2005).

international institutions – including tribunals – can penetrate the surface of the state to interact with government decision-makers.”¹⁴ One tool that the Inter-American Court has at hand is its self-styled remedial regime that, coupled with the Court’s supervision of compliance with its rulings, establishes a link between the Court and particular state actors. This link provides a unique and so far under-utilized opportunity to deepen relationships with actors beyond the executive and to shape those actors into compliance partners. Specifically, the Court could use its remedial regime to heighten actors’ sense of accountability, and to demonstrate the benefits of partaking in transnational judicial dialogue by deferring to, citing to and otherwise promoting national jurisprudence that embeds the Court and its rulings in national settings.

The argument presented here holds relevance beyond the Americas. Many supra-national institutions find themselves conferring with the foreign ministry when it is *other* state actors who hold the key to their success. Judicial actors, in particular, can foster or flout supra-national rights regimes.¹⁵ Scholars have called for the International Criminal Court (ICC), for example, to proactively use the threat of ICC jurisdiction to press States Parties to prosecute for crimes committed in their territory.¹⁶ Like the Inter-American Court, its success in so doing will depend not only on the will of the executive, its formal interlocutor, but on the will and capacity of diverse justice system actors.¹⁷ The analysis is also relevant to the European and African regional human rights systems. While neither system has a remedial regime as intricately developed as that of the Inter-American System, motivating national justice systems to act – and to learn of and care about regional rights law – is important for both systems’ future

¹³ See generally Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L. L. 1399, 1417-18 (2002).

¹⁴ Lawrence 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. [EJIL] 125, 132 (2008).

¹⁵ See generally BERNARD HOFSTÖTTER, *NON-COMPLIANCE OF NATIONAL COURTS: REMEDIES IN EUROPEAN COMMUNITY LAW AND BEYOND* (2005) (discussing state liability for judicial acts).

¹⁶ See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008). Burke-White also argues that Prosecutor Moreno Ocampo himself at first shared this view. *Id.* at 54-55.

¹⁷ *Id.* at 87-92.

success.¹⁸ Indeed, the analysis is not limited to rights regimes but extends to any transnational regime with supervisory aspirations.

The argument unfolds in four parts. After introducing the Inter-American System, Part One argues that the Inter-American Court has already created a unique relationship to national justice systems through its dual regime of equitable remedies and ongoing supervision of compliance. Part Two analyzes original data drawn from the Court's supervision reports to argue that *the main* reason for infrequent implementation of rulings is inaction by local judges and prosecutors, and explains this inaction as rooted in the institutional constraints, culture and politics of these actors. Part Three outlines a strategy for improving compliance by making the Court matter to local actors. The paper concludes in Part Four by showing the relevance of the Inter-American experience with national justice systems to other international legal regimes, with an emphasis on the International Criminal Court.

I. THE INTER-AMERICAN COURT AND NATIONAL COURTS

The Inter-American System for Human Rights (IAS) of the Organization of American States (OAS) is one of the world's three major regional human rights systems.¹⁹ It has a broad mandate to monitor human rights in all 35 independent states of the Americas, including the United States.²⁰ While all OAS states are subject to this general level of oversight, which takes place through the Inter-American Commission, there is a group of states that has committed to a higher level of supervision by the IAS. Twenty-two states have ratified the American Convention on Human

¹⁸ See generally Helfer, *supra* note 14 (making a similar argument in the context of the European Council System).

¹⁹ There are two other regional rights systems. The first is the European Council System, based on the Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 U.N.T.S. 221. The other regional rights system is the African system, based on the African Charter on Human and Peoples' Rights. African Union [previously Organization of African Unity], African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982).

²⁰ Organization of American States, Member States, http://www.oas.org/en/member_states/default.asp.

Rights and ceded binding jurisdiction to the Inter-American Court.²¹ The dynamics underlying this more tightly drawn legal order, formally excluding the United States, Canada and most of the Caribbean nations, form the focus of this study. This introductory section begins with a brief description of the IAS, and then describes the Court in more depth, with an emphasis on its creative constructive of a unique remedial regime. It closes by presenting data on the Inter-American Court's concern with and relationship to national justice systems through its remedial regime.

1. The Inter-American System in Brief

The Inter-American Human Rights System was formally created in 1948, with the adoption of the OAS Charter and the American Declaration on the Rights of Man and Citizen by the Ninth International Conference of American States.²² During its first decade, however, it was more aspiration than reality. While the OAS Charter provided for the creation of a Commission, and the idea of a Court was already under discussion, the Inter-American Commission, based in Washington D.C., began its work only in 1959.²³ The Commission construes its mission to include monitoring states through on-site visits, shaming through country reports, and vindicating claims through a system of individual petitions.²⁴ Although the Commission's reports are advisory, the act of publicizing egregious state practices has played an important role in the region. During the 1970s in particular, the Commission emerged as an authoritative counterpoint to military dictatorships engaged in practices of disappearance, torture and

²¹ Of twenty-four American nations that have ratified the American Convention, twenty-two have also accepted the binding jurisdiction of the Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, México, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago Uruguay and Venezuela. However, Trinidad and Tobago renounced the Convention, and withdrew from the Court's jurisdiction, in 1999. Inter-American Court of Human Rights, History, <http://www.corteidh.or.cr/historia.cfir> (select "English version" hyperlink) (last visited Feb. 6, 2011) [hereinafter Inter-American Court Information].

²² Inter-American Commission on Human Rights, Brief History of the Inter-American Human Rights System, <http://www.cidh.oas.org/what.htm> (last visited Feb. 6, 2011) [hereinafter Brief History IAHR].

²³ *Id.*

²⁴ *Id.*

extra-judicial killings.²⁵ Today, it receives roughly 1,400 complaints, holds 100 hearings, and issues 20 reports on particular cases (reports on the merits) per year.²⁶

Garnering support for the creation of the IAS's second main institution, a court with binding jurisdiction, took two decades longer. In 1969 the OAS States adopted the American Convention on Human Rights, which in addition to giving legal force to states' rights commitments, provides for the creation of a Court.²⁷ The Court's first set of judges was elected in 1979, in an era of acute state repression and open U.S. intervention in the region.²⁸ The Court has both advisory and contentious jurisdiction. Under the advisory jurisdiction, OAS bodies or member states can request an interpretation of regional human rights instruments, or opinions on the compatibility of specific laws with the American Convention.²⁹ Under the contentious jurisdiction, the Court decides cases between States Parties, or between individuals and a State Party. Individual petitions, however, cannot be filed directly with the Court, but must first go through the Commission.³⁰ The Commission investigates individual claims and guides the claimant and state towards a friendly settlement.³¹ If that fails, the Commission issues a report in which it advises the state to take certain actions.³² If the state does not comply, the Commission may refer the case to the Court.³³ The Commission and Court

²⁵ David J. Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U. J. INT'L L. POL'Y 95, 97 (1993).

²⁶ See INTER-AM. COURT OF HUMAN RIGHTS, ANNUAL REPORT (2009), available at http://www.corteidh.or.cr/docs/informes/eng_2009.pdf [hereinafter 2009 ANNUAL REPORT].

²⁷ See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

²⁸ Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS Q. 856, 869 (2009).

²⁹ The jurisdiction of the Court is set out in articles 61-64 of the American Convention on Human Rights. American Convention, *supra* note 26, arts. 61-64.

³⁰ *Id.* art. 61.

³¹ *Id.* art. 64.

³² For a description of the petition process, see Brief History IAHRs, *supra* note 23.

³³ Rules of Procedure of the Inter-American Commission on Human Rights, arts. 44-46, approved by the Commission at its 137th regular period of sessions held from October 28 to November 13, 2009, available at

[2011]

COURTS RESISTING COURTS

111

have worked hard to coordinate their work and their goals over the years, but their relationship – in which the Commission controls the Court's docket – is an abiding theme in the Court's development. From 2004 to 2009, the Commission submitted an average of 12 cases per year to the Court.³⁴

The Inter-American Court is relatively young, in court years, and faces significant obstacles. Important challenges include its low budget³⁵ and the threat of open confrontations from state parties. In the past, both Peru and Trinidad and Tobago have directly repudiated the Court's jurisdiction.³⁶ Today, the greatest open challenge comes from Venezuela, whose Supreme Court has called on the government to withdraw from the American Convention, and whose president often speaks out against the

<http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm> [hereinafter Rules of Procedure of the Inter-American Commission].

³⁴ See INTER-AM. COURT OF HUMAN RIGHTS, ANNUAL REPORT (2004)-(2009), available at <http://www.corteidh.or.cr/informes.cfm>. A reform in 2001 reshaped litigation before the Inter-American Court in important ways. *see id.*; see also Paolo Carozza, Remarks: Fifty Years of the European Court of Human Rights Viewed by Its Fellow International Courts (Jan. 30, 2009), available at www.nd.edu/~ndlaw/faculty/carozza/Carozza_remarks_final.pdf; see also generally Rules of Procedure of the Inter-American Commission, *supra* note 32. The reform allowed participation by individuals in proceedings before the Court, and thus gave NGOs a greater voice in defining the direction of Inter-American jurisprudence. It also made the process of referring cases to the Court less discretionary. Since the reform, the Court's caseload has grown dramatically. It issued an average of two sentences per year in the 1990s, and an average of ten in the 2000s. INTER-AM. COURT OF HUMAN RIGHTS, *supra* note 25, at 7.

³⁵ The Court's budget for 2010 was \$1,919,500 USD or 2.12% of OAS budget. It also received donations of roughly \$360,000 USD. INTER-AM. COURT OF HUMAN RIGHTS, *supra* note 25, at 20-21.

³⁶ Trinidad and Tobago denounced the American Convention in 1998 over a disagreement with the Court's rulings on the death penalty. For text of the denunciation, see Org. of Am. States [OAS], Dept. of Int'l Law, Multilateral Treaties <http://www.oas.org/juridico/spanish/firmas/b-32.html#Trinidad%20y%20Tobago> (last visited Feb. 6, 2011). The Fujimori government, in response to two cases, declared in 1999 that Peru was withdrawing from the jurisdiction of the Court, effective immediately. The impasse came to an end with the fall of Fujimori: the transitional government of President Paniagua reversed Peru's withdrawal. For text of the denunciation and its withdrawal, see *id.*

Inter-American System.³⁷ A final but critical challenge is the low rate of compliance with its rulings, the focus of this paper.

2. The Court Forges a Unique Practice

From its first case, the Inter-American Court began to develop jurisprudence and institutional practices distinct from those of the ECHR, in response to a radically different political context.³⁸ At least three main features distinguish the practice of the two regional courts. The first is subject matter. While the ECHR came of age overseeing a group of well-functioning democracies committed to the rule of law, the Inter-American Court started life grappling with systematic state-sponsored mass crimes. This context meant that the Court would play a leading role in developing international doctrine on disappearance, amnesties, the victim's right to the truth, the obligation of states to prosecute, and judicial guarantees.³⁹

The second area of distinction is the evolution of the Inter-American Court's jurisprudence on reparations. The Inter-American Court has been celebrated for developing a uniquely "activist" remedial regime: in all its recent rulings it orders extensive and detailed equitable remedies alongside compensation."⁴⁰ While the ECHR is generally content to find a violation of the Convention and allow the state to fashion a remedy emphasizing monetary compensation, the Inter-American Court regularly issues long lists of detailed actions the state must take to repair the violation. In its ruling against Mexico regarding the murders of the women of Ciudad Juarez, for example, it issued 15 separate orders; of these, 14

³⁷ See Tribunal Supremo de Justicia, Venezuela [Supreme Court of Venezuela], Decision No. 1.939 of Dec. 18, 2008 (*Gustavo Álvarez Arias et al.*), available at <http://www.tsj.gov.ve/decisiones/scon/diciembre/1939-181208-2008-08-1572.html> (calling on the Venezuelan executive to withdraw from the American Convention); see also Alexandra Huneus, *Rejecting the Inter-American Court*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 128 (Javier Couso, Alexandra Huneus & Rachel Sieder eds., 2010).

³⁸ *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 1027 (Henry J. & Phillip Alston, eds. 2000).

³⁹ Brian D. Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 *SW. J.L. & TRADE AM.* 429, 438 (2006).

⁴⁰ Antkowiak, *supra* note 8; see also generally *id.* (discussing the regime's unique features in a comparative perspective).

demanded injunctive relief with a high degree of specificity.⁴¹ Again, the regional context is significant. Monetary compensation alone can seem insufficient, and possibly offensive, when a government is responsible for grave crimes such as disappearance, the crimes were committed pursuant to a state policy, and the perpetrators are at large, perhaps still in government positions.⁴²

The third area of distinction is the Inter-American Court's practice of issuing supervisory rulings. After it has issued a reparatory ruling, the ECHR is no longer involved in the case: the Committee of Ministers, a political body, monitors state compliance.⁴³ The Inter-American Court, by contrast, monitors compliance with its own rulings. In the reparations orders, the Court usually orders states to report on their own efforts to comply within a set period.⁴⁴ Once the state sends its report, the Court gives the Inter-American Commission and the victims the opportunity to review and respond to those self-reports.⁴⁵ In recent years, the Court has also begun summoning the parties to participate in closed hearings on compliance.⁴⁶ The Court then usually issues its own compliance report. In these compliance reports, it lists the things the state must do, and orders the

⁴¹ The State of Mexico must erect a monument and hold a ceremony in honor of the victims within one year; provide free medical, psychiatric and psychological services to 23 named persons; provide training to state officials on issues of gender discrimination, create a database with personal information, including DNA data, about the victims; and create an educational program for the "general population of the state of Chihuahua, with the aim of overcoming this situation." The ruling specifies that the training sessions for relevant state officials in gender and human rights should "make special mention" of The Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], the Convención de Belén [The Convention of Belén], and the Campo Algodonero ["Cotton Field"] ruling itself. See González et al. ("Cotton Field"), *supra* note 10.

⁴² The development of the reparatory regime will be discussed in more detail below.

⁴³ James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court* 768, 773 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 09-31, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404608.

⁴⁴ *Id.* at 781.

⁴⁵ See, e.g., Victims of the Tugboat "13 de Marzo" vs. Cuba, Case 11.436, Inter-Am. C.H.R., Report No. 47/96, OEA/Ser.L/V/II.95, doc. 7 (1997).

⁴⁶ The Center for Justice and International Law, Litigation in the Inter-American System, <http://cejil.org/en/categoria/estrategias/litigation-inter-american-system> (last visited July 20, 2011).

114

state to again report on compliance within a set period.⁴⁷ Notably, the Court retains jurisdiction until it deems there has been full compliance with each of its numerous demands, miring it in years of detailed inquiries into the political and legal obstacles to compliance.⁴⁸

3. *Telling National Courts What to Do*

The Inter-American Court, then, has created a unique dual regime of equitable remedies and ongoing supervision of compliance. This article argues that this regime allows the Court to forge relationships with national justice systems. Indeed, it has already begun doing so. In a majority of its cases, the Court issues equitable remedies which require action by local justice systems.⁴⁹ Further, through ongoing supervision, the Court closely monitors the compliance (or lack thereof) of justice system actors to the ruling. Of the 114 contentious cases in which the Inter-American Court issued remedies from its first case in 1979 to December 2009, it issued equitable orders that require action by a national judiciary in 78.⁵⁰ That is,

⁴⁷ U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS: MEXICO, available at

http://w3.uchastings.edu/boswell_01/mexico__country_reports_on_human.htm.

⁴⁸ Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37, 44 (2008).

⁴⁹ Rapporteurship on the Rights of Women of the Inter-American Commission on Human Rights (IACHR), *Access to Justice for Women Victims of Violence in the Americas*, Jan. 20, 2007, available at <http://www.cidh.oas.org/women/Access07/exesummary.htm>.

⁵⁰ A note on methods is due. To decide whether an equitable remedy invokes action by the judiciary is not always easy, as legal systems vary from country to country and across time. Orders to investigate and punish those responsible for a crime were coded as invoking action by the judiciary, as well as the executive and, in most countries, an independent prosecutor. In *Apitz v. Venezuela*, the Court told the state to reinstate three judges who had been fired. *Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 182, at 246 (Aug. 5, 2008). Venezuelan judges are managed by the Supreme Court, and thus this case, too, was coded giving an order to the judiciary. An order that has to do with restructuring the judiciary, on the other hand, might not be coded as giving an order to the judiciary. For example, the Court might order that the criminal procedural code be reformed. If the judiciary does not participate in the legislative process, no judicial action has been ordered. Note that the focus here is on equitable orders, rather than orders to compensate the victims. For more information on the coding process, see *infra* note 84.

[2011]

COURTS RESISTING COURTS

115

in over two-thirds of the cases, a national judge must take action before there can be full compliance with the Court's ruling.

The Inter-American Court requires judicial action in a great majority of its cases, and has done so with growing frequency over the years. The increase in cases in which the Court addresses the national judiciary in a remedial order reflects the general increase in cases with equitable remedial orders (see Table One). The Court began issuing injunctive orders in the mid-1990s, at which point the number of cases with equitable orders increased from zero to eleven.

Table One: Orders to National Judiciaries by Time⁵¹

Year	Total No. of cases	No. of cases with equitable orders that address judiciary	Percentage
Before 1990	2	0	0
1990-1994	2	0	0
1995-1999	15	11	73
2000-2004	29	22	76
2005-2009	66	45	66

In a great majority of its contentious cases, the Court is taking on situations of impunity, invoking violations of the American Convention that are also violations of national and international criminal law. Breaking down the orders to the judiciary by kinds, we find that of the 78 cases in which the Court has spoken to the judiciary, it asks for a (new or renewed)

⁵¹ The data for this table is drawn from the Inter-American Court's web site. See Inter-Am. Court of Human Rights, <http://www.corteidh.or.cr/index.cfm> (follow "English version" hyperlink) [hereinafter IACHR website]. A coder counted the number of reparation rulings that were issued each year, and then the number of cases in which the Court, in its remedial orders, issued at least one equitable order which required action by the judiciary.

criminal investigation to take place in 65.⁵² Of the 13 cases in which the Court is not asking for national courts to prosecute, five are about due process safeguards,⁵³ and in three, the Court requests that the national courts nullify an existing sentence.⁵⁴ In one case, *Apitz v. Venezuela*, the Court asks that the national judiciary reinstate three judges.⁵⁵

Through a unique regime of injunctive relief, then, the Inter-American Court has made justice systems one of its primary interlocutors, placing them center-stage in its regional rights agenda. At one level, this data says nothing new. Those who study and work with the Court know that the Court's docket has focused on cases of state atrocities and transitional justice, and on situations of impunity; and that the Court, in such cases, always orders investigation, trial and punishment. But few scholars have conceptualized the Court's orders as addressing national justice systems. Viewed this way, the orders show that national justice systems have been a central project, and a main interlocutor, of the Court since the mid-90s, when the Court adopted its remedial regime.

Part II, focused on compliance, will show that if the Court has targeted justice systems, it has done so to uncertain effect: Judges and prosecutors have been reluctant compliance partners, foot-dragging or ignoring Court orders altogether, at times in the face of executive will.

II. WHEN JUDGES AND PROSECUTORS DISOBEY

Compliance with the ruling of an international court occurs when a state carries out the actions ordered by a ruling issued against said state, or

⁵² See IACHR website, *supra* note 50.

⁵³ *Castillo Petruzzi v. Peru*, 1990 Inter-Am. Ct. H.R. (ser. C) No. 41 (May 30, 1990); *de la Cruz-Flóres v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 115 (Nov. 18, 2004); *Fermin Ramírez v. Guatemala*, 2005 Inter-Am. Ct. HR, (Ser. C) No. 126 (June 20, 2005); *Yvon Neptune v. Haiti*, 2008 Inter-Am. Ct. HR, (Ser. C) No. 180 (May 6, 2008); *Barreto Leiva v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 206 (Nov. 17, 2009).

⁵⁴ *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004); *Uson Ramírez v. Venezuela*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 207 (Nov. 20, 2009); *Raxcacó-Reyes v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 133 (Sept. 15, 2005).

⁵⁵ See *Apitz-Barbera*, *supra* note 50.

refrains from carrying out actions prohibited by the ruling.⁵⁶ It has been an elusive goal for the Inter-American Court. In 2008, the last year for which the Court reported such data, states had fully implemented only one in ten of the Court's rulings: of the 105 cases that reached a final judgment, 94 were still under the Court's jurisdiction awaiting compliance.⁵⁷ A recent Open Society report refers to the "implementation crisis" of the IAS,⁵⁸ and José Miguel Insulza, the Secretary-General of the OAS, has noted that "noncompliance of the resolutions of the [Inter-American] System...gravely damages it."⁵⁹ They are not alone in their concern.⁶⁰

This Part begins by explaining why compliance matters. The following two sections then critically review current compliance scholarship and re-analyze available data to reveal an important trend: the more orders require action by actors beyond the executive, the less likely

⁵⁶ In this paper, compliance does *not* refer to the more general accordance of a state's behavior to the American Convention, or a state's change in behavior to conform to a ruling of the Inter-American Court against *another* state. American Convention Article 68 stipulates that the Court's rulings have effect *inter partes*. American Convention on Human Rights, *supra* note 26, art. 68. Compliance will also be referred to as 'implementation of a court order.' To avoid the tricky question of true compliance, this paper adheres to the Inter-American Court's judgment on whether its rulings have been adequately implemented. The definition given draws from "Compliance: Conceptualizing and Theorizing Public Authorities' Adherence to Judicial Rulings," by Matthew M. Taylor and Diana Kapiszewski, prepared for the Annual Meeting of the American Political Science Association Washington, D.C., (Sept. 2-5, 2010) at 8, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644462.

⁵⁷ INTER-AM. COURT OF HUMAN RIGHTS, ANNUAL REPORT 60, 63 (2008), *available at* <http://www.corteidh.or.cr/docs/informes/eng2008.pdf> [hereinafter 2008 ANNUAL REPORT].

⁵⁸ DAVID C. BALUARTE & CHRISTIAN M. DE VOS, OPEN SOCIETY JUSTICE INITIATIVE, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS 11 (2010), *available at* http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/from-judgment-to-justice20101122.

⁵⁹ José Miguel Insulza, *Sistema Interamericano de Derechos Humanos: Presente y Futuro* [Inter-American System of Human Rights: Present and Future], in ANUARIO DE DERECHOS HUMANOS [YEARBOOK OF HUMAN RIGHTS] 119, 124 (2006), *available at* <http://www.cdh.uchile.cl/publicaciones/anuarios>.

⁶⁰ Felipe González, *The Experience of the Inter-American Human Rights System*, 40 VICTORIA U. WELLINGTON L. REV. 103, 116-25 (2009-2010); see CEJA PUBLIC PROSECUTIONS REPORT, *supra* note 2, at ¶ 22; 2009 ANNUAL REPORT, *supra* note 26, at 86-91; Goldman, *supra* note 28, at 884-85 (discussing widespread impunity for human rights violations, and its detrimental impact on the credibility and efficacy of the Inter-American Human Rights System).

their implementation. The final section argues, against prevailing theories, that the varying institutional politics of state actors besides the executive, and in particular of justice system actors, are the main contributors to low compliance in the IAS.

1. Why Compliance Matters

Implementation is not the only – and arguably not even the most significant – potential outcome of a court ruling.⁶¹ The ruling itself can be a form of relief to the litigants, with or without implementation.⁶² Further, even if a state fails to comply with the particular demands of a court ruling, there may be ways in which that ruling alters its behavior. Court rulings can also have significant effects on non-state actors beyond the litigants. One of the insights of Law and Society scholars in the United States has been to reveal the myriad and sometimes contradictory effects of a court ruling in action, well beyond the courtroom and other state institutions.⁶³ In this vein, Brewer and Cavallaro write that supranational courts will have greater impact if their rulings are relevant to local groups, “including not

⁶¹ Scholars of international relations in particular have begun to challenge compliance rates as a useful measure of the effects of legal regimes. What interests political scientists is not whether states happen to be in compliance with a legal regime, but the separate question of whether and how the legal regime affects the behavior of the state. By relying on the concept of compliance, political scientists “make errors of both omission and commission – attributing state behavior mistakenly to institutional participation, and underestimating the influence of institutions on states that are not ‘in compliance.’” Lisa Martin & Emily Sellars, Colloquium, *Against Compliance: Conceptualizing and Measuring Institutional Effects*, Political Science Dept. at the University of Wisconsin-Madison (Dec. 8, 2009). The problems are arguably less acute in the setting of compliance with court orders than in compliance with a treaty regime more generally. If a court orders compensation of the victim by a certain amount, and the state compensates by that amount, drawing a causal inference is not particularly fraught. The answer to the counterfactual – would the state have done the same without the order – seems self-evident. See Hawkins & Jacoby, *supra* note 5, at 3; see also Baluarte & De Vos, *supra* note 58, at 13.

⁶² Indeed, the Inter-American Court formally views its own rulings as, in themselves, a form of relief to victims. See, e.g., *Velásquez-Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, at ¶ 36 (July 21, 1989).

⁶³ For a succinct discussion of the kinds of effects courts can have in national setting, see Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 715-43 (1992); Gerald N. Rosenberg, *Hollow Hopes and Other*

only state agents but also human rights organizations, social movements, and the media.”⁶⁴

Nevertheless, the importance of state compliance with rulings cannot be denied. From the point of view of legality, it carries a normative priority: “Compliance by political leaders is by definition a central aspect of the rule of law; it is an essential stepping stone to constructing a basic institutional framework for legality and constitutionality.”⁶⁵ It matters as well for the legal order’s reputation and perceived legitimacy: “The commitment to abide by a judicial (or quasi-judicial) judgment is crucial to the integrity of any legal system, domestic or international.”⁶⁶ Compliance is of particular salience in the Inter-American setting: a human rights court that presides over a region where the rule of law is, by many accounts, not fully entrenched, should push for compliance with its own rulings as a way of constructing a rule of law practice and culture.⁶⁷

Compliance is made an even more crucial concern by three institutional features of the Inter-American Court. First, the Court mostly hears high-profile cases of egregious state violations of fundamental rights.⁶⁸ Many of these cases, moreover, refer not to a single victim, but to groups of victims.⁶⁹ Remediation in politically prominent cases is not only an important act of justice, but one that garners attention at the national and international levels and, in turn, boosts the Court’s legitimacy and

Aspirations: A Reply to Feeley and McCann, 17 LAW & SOC. INQUIRY 761, 761-78 (1992).

⁶⁴ Cavallaro & Brewer, *supra* note 6, at 775.

⁶⁵ Taylor & Kapiszewski, *supra* note 56, at 2.

⁶⁶ Baluarte & De Vos, *supra* note 58, at 12.

⁶⁷ For an evaluation of the rule of law in Latin America, see THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2010, 18-19 (2010) (“The high crime rates in the region may be related to the generally poor performance of the criminal investigation and adjudication systems (police investigators, prosecutors and judges) In addition, the effectiveness of justice systems throughout the region is affected by corruption and improper influence by powerful private and public interests.”)

⁶⁸ Patricia P. Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 7 TEX. J. WOMEN & L. 227, 234 (2008).

⁶⁹ See e.g., *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, at ¶ 2 (Apr. 29, 2004); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 122, at ¶ 2 (Mar. 7, 2005); *González et al. (“Cotton Field”)*, *supra* note 10 (ruling on femicides in the City of Juárez).

influence.⁷⁰ This is particularly true since the small size of the Court's docket gives each case greater visibility. Second, in its reparatory orders, the Court goes beyond simply repairing the harm caused to particular victims. For example, it frequently issues "non-repetition measures," ordering the state to make structural changes to assure that like injuries do not recur.⁷¹ Compliance, then, can refer to important structural changes.

There is a third, peculiarly Inter-American way in which implementation of Court orders matters. As discussed above, the Inter-American Court has forged a practice of keeping jurisdiction of each case until it deems there has been full compliance.⁷² This can mean years of overseeing how state actors carry out detailed injunctive orders, a managerial activity reminiscent of institutional reform litigation in U.S. federal court.⁷³ For better or worse, the Court has formally defined its work to include not only adjudication of cases (like most courts), but also supervising implementation of its remedies.⁷⁴ Compliance is not only an effect the Court may have; it is the work of the Court itself.

⁷⁰ See, e.g., Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274785 (for a debate surrounding Peru's compensation of victims who were also terrorists).

⁷¹ Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents*, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 11, 23 (K. De Feyter et. al., eds., 2005) ("The specific measures [of non-repetition] in the Principles and Guidelines mainly comprise strengthening or national institutions under the rule of law, including independence of the judiciary and civilian control of the military and security forces."); see also THEO VAN BOVEN, REPARATIONS; A REQUIREMENT OF JUSTICE, 653, 655–56 (2003) (describing the kinds of measures guarantees of non-repetition should entail).

⁷² See *supra* Part II.2

⁷³ Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266–68 (1983) ("Structural injunctions, or institutional reform decrees, are orders requiring that governmental bodies reorganize themselves so that their future behavior will comport with standards announced in the underlying judicial decisions Because the decrees call for alteration of an ongoing course of conduct, for a new regime of organizational behavior, they necessitate continuing judicial involvement in the implementation and modification of the decree."). For a classic discussion of institutional reform litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288, 1289, 1304 (1976).

⁷⁴ In the European Council System, it is the Committee of Ministers rather than the Court that monitors compliance. For a comparison of the two monitoring systems,

2. *Breaking Down Compliance by Distinct State Actors*

The Court's compliance reports provide a rich record.⁷⁵ These reports allow one to examine not only whether there has been full compliance in a particular case, but also whether individual orders issued in a particular ruling have been implemented. The Court's rulings typically order monetary compensation, amendment or repeal of offending laws, and a series of other injunctive remedies as varied as adding names to a memorial or re-sentencing in a particular case. If the act in violation of the American Convention is also a crime under national law, rulings demand that the state investigate, prosecute and punish for criminal responsibility.⁷⁶ Several recent studies analyze the orders by the kind of demands they make.⁷⁷ They reveal that all states are most likely to comply with orders for monetary compensation, and least likely to comply with orders that implicate judicial investigation. Orders to provide monetary compensation are implemented over half of the time.⁷⁸ Orders requesting legal reforms

see Courtney Hillebrecht, *Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights*, in 1 J. HUM. RTS. PRAC. 362 (2009); see also Baluarte & De Vos, *supra* note 58; Baluarte & De Vos, *supra* note 66.

⁷⁵ See *supra* Part II.2 for a description of the Court's supervision of compliance. While the compliance reports are a rich source of data on compliance, they are limited by the Court's knowledge, and shaped by its motives. For an example of a compliance report rich in data, see The President, *Resolución del Presidente de la Corte Interamericana de Derechos Humanos: Caso de las Masacres de Ituango v. Colombia*, (Dec. 22, 2010) available at http://www.corteidh.or.cr/docs/supervisiones/ituango_22_12_10.pdf.

⁷⁶ Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM INT'L L.J. 195, 196 (2007).

⁷⁷ See, e.g., Hawkins & Jacoby, *supra* note 5.

⁷⁸ *Id.* at 26 (finding that states most often comply with orders to pay moral and material damages, complying with orders to pay moral damages 47% of the time, and material damages 42% of the time, and that courts have an above-average rate of compliance with paying for Court costs and expenses); see ASOCIACIÓN POR LOS DERECHOS CÍVILES [ASSOCIATION FOR CIVIL RIGHTS], LA EFECTIVIDAD DEL SISTEMA INTERAMERICANO DE PROTECCIÓN DE DERECHOS HUMANOS: UN ENFOQUE CUANTITATIVO SOBRE SU FUNCIONAMIENTO Y SOBRE EL CUMPLIMIENTO DE SUS DECISIONES [THE EFFECTIVENESS OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION: A QUANTITATIVE FOCUS ON ITS OPERATION AND COMPLIANCE WITH ITS DECISIONS], § III, ¶ 5, Table 4 (June 1, 2010) (Argentine NGO similarly found that states are most likely to Court comply with orders for

are implemented roughly 5–11% of the time.⁷⁹ When asked to find criminal responsibility, states simply do not comply: the Court has never declared that a state has fully complied with an order to investigate, try and punish those responsible for the crimes underlying a case.⁸⁰

While previous studies have analyzed the orders by what they request, it is also possible to disaggregate the Court's remedial orders by whom they address.⁸¹ Thus recast, the Court's compliance data reveals a strikingly pronounced trend: the more separate state branches or institutions an injunctive order involves, the less likely its implementation.⁸² (See

monetary compensation, at a rate of 48%) [hereinafter 2010 ASSOCIATION FOR CIVIL RIGHTS REPORT].

⁷⁹ Hawkins & Jacoby, *supra* note 5, at 27 (finding 5% rate of compliance); Baluarte & De Vos, *supra* note 58, at 70 (reporting 14% for Inter-American Human Rights System generally. Note that each of these studies defines the categories of order types somewhat differently, which explains the variation in results.

⁸⁰ Note, however, that states have gone a long way towards compliance in some cases. As Jacoby & Hawkins convincingly show, partial compliance is the main modality of states before Court orders. A limit of this study is that it only takes into account whether the Court has deemed that a state has fully complied with an order. The category non-compliance thus subsumes partial compliance, obscuring variation. In *Castillo Páez v. Perú*, for example, while the Court agreed that the state had found criminal responsibility, it maintained jurisdiction of the case until the State also tried to find the disappeared victim, as part of the duty to investigate. Inter-American Court of Human Rights, *Resolución del Presidente de la Corte Interamericana de Derechos Humanos: Caso Castillo Páez v. Perú*, at ¶ 10, (Apr. 3, 2009), available at

http://www.corteidh.or.cr/docs/supervisiones/castillo_03_04_09.pdf.

⁸¹ See 2010 ASSOCIATION FOR CIVIL RIGHTS REPORT, *supra* note 78, § IV, ¶ 5 (suggesting that the features of different state actors is a possible explanation for compliance patterns, but one that the report itself does not explore).

⁸² The focus here is on equitable remedies, or injunctive orders, rather than orders to compensate victims, as these are the kinds of orders that invoke action by more disparate actors, and wherein compliance is problematic. One could, however, compare compensatory orders in the same way, as they sometimes invoke action by the judicial system, and appropriations by congress. See Viviana Krsticevic, *Reflexiones sobre la ejecución de sentencias de las decisiones del sistema interamericano de protección de derechos humanos [Reflections on the Enforcement of the Decisions of the Inter-American Human Rights System]*, in IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES [IMPLEMENTATION OF THE DECISIONS OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: JURISPRUDENCE, REGULATIONS AND NATIONAL EXPERIENCES] 15 (Viviana Krsticevic & Lilliana Tojo eds., 2007) (discussing challenges of implementation of orders to compensate).

[2011]

COURTS RESISTING COURTS

123

Table Two.) If an injunctive order invokes only executive action, compliance is roughly 44%. But if an order requires action from the executive *and* one other institutional actor, compliance plummets. For orders that invoke action by the executive and the judiciary, compliance is 36%. A new generation of Latin American constitutions typically put prosecution in the hands of a public ministry that is formally independent from the executive and judiciary.⁸³ For orders that invoke action by the executive and the public ministry, compliance is 21.1%. For orders that invoke action by the legislature and the executive, compliance is 22%. Orders requiring action by three autonomous state institutions – the executive, the public ministry and the judiciary – receive 2% compliance. With each new state actor that is called upon to exercise discretion, the prospect of compliance fades.

Table Two: Compliance with Equitable Orders by State Actor⁸⁴

State actor(s) addressed by	Total No. of orders	No. of orders that receive	Percentage compliance

⁸³ CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS (CEJA) [CENTER FOR JUSTICE STUDIES OF THE AMERICAS], *supra* note 2, at 17-44.

⁸⁴ A note on methods is necessary here. The data was drawn from the 60 contentious cases in which (a) the Court's remedial orders invoke some sort of action by the judicial system; *and* (b) at least one supervisory report was received by December 2010. The Court often tells the state what to do in other parts of the opinion, but the official statement of orders lies at the very end of each reparations ruling, and this acts as the reference point. Each reparations ruling contains several orders. The total number of injunctive orders in the set of 60 cases is 285. Note that the Court's own definition of what constitutes a separate order was not always used. The Court has been inconsistent across the years in how it numbers its remedial orders in each ruling. Thus, we chose not to rely on the Court's enumeration but to use consistent criteria to decide where a particular order is a separate order. Each separate order was then categorized by which state actor it addressed; or, put differently, by which state actor has the primary competence to act on the order. This was a challenging step to take. One difficulty lay in coding orders that speak to areas of shared and overlapping competencies, or competencies that the Constitution leaves unspecified. In order to tease out the fine particularities of each constitutional system, I have relied on national constitutions, local legislation, the Court's compliance reports and interviews with local lawyers working in the IAS. The Court's own determination of compliance or non-compliance with each order, as expressed in its compliance reports, was adopted.

Court order		compliance	
Executive	177	77	44
Executive and judiciary	16	6	36
Executive and public ministry	19	4	21
Executive and legislature	23	5	22
Executive, public ministry and judiciary	50	1	2
Total	285	93	125

Some scholars have assumed that those injunctive orders that involve more actors also happen to be more difficult or costly to carry out.⁸⁵ But the difficulty thesis is only part of the story. If we compare injunctive orders addressed primarily to the executive against orders addressed to the executive and one other actor, it is not clear the latter are inherently more difficult, complex or costly. Injunctive orders to the executive include tasks as varied as issuing a formal state apology, erecting a memorial, having hundreds of state officials attend courses on human rights and setting up a DNA database to help identify victims.⁸⁶ Such actions do not seem necessarily less challenging than the kinds of orders that invoke action by the executive and judiciary together. This category includes such actions as abstention from applying the death penalty as punishment, or issuing a pardon and erasing a criminal record and its effects.⁸⁷ Orders addressed to the executive and public ministry typically ask that the state exhume disappeared victims and return them to their families, as an action separate from criminal prosecution.⁸⁸ Again, it is not clear that this is

⁸⁵ See Hawkins & Jacoby, *supra* note 5 (discussing the difficulty thesis).

⁸⁶ See *id.*

⁸⁷ CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS (CEJA) [Center for Justice Studies of the Americas], *supra* note 2, at 17-44.

⁸⁸ *Id.*

[2011]

COURTS RESISTING COURTS

125

inherently more difficult than the types of orders that primarily require action by the executive alone. The orders that *do* seem to be comparatively difficult overall are those that require legislative change. Such orders usually demand that the state amend, repeal or pass new laws. The difficulty, though, has to do with the nature of the actor rather than the action: it is not that it is difficult to re-write the legislation pursuant to the Inter-American Court's demands, or to sit in a parliament and vote for it. The challenge is getting different actors from competing parties to agree to do so.

Once three actors are involved – the executive, the public prosecutor and the judiciary – compliance drops even further to 2%. The orders that demand three actors mostly are comprised of orders to prosecute and punish for the underlying crimes.⁸⁹ No state has ever fully complied with such an order.⁹⁰ Here the thesis of the inherent difficulty of the task – as opposed to the particular disposition of specific actors – may have more force. Often, such prosecutions would implicate actors that those in power prefer to protect, including those serving political office,⁹¹ members of the military,⁹² and others connected to powerful social networks that assure impunity.⁹³ But the explanation of difficulty is again incomplete. Even if we grant that “a climate of impunity characterizes the Americas,”⁹⁴ there is variation among states. Argentina and Chile have prosecuted more human

⁸⁹ *Id.*

⁹⁰ In one case, the Court declared in a compliance report that Peru had tried and punished all those responsible. However, it deemed that the state had the duty to keep investigating as it had not yet found the bodies of the disappeared victims. See Castillo-Páez v. Peru, *supra* note 80.

⁹¹ Tan, *supra* note 6. Also, second-term Peruvian President Alan Garcia, for example, has resented the Court's taking cases of crimes committed under his first term. See Tyler Bridges, *Peru's Former President's Factions Align*, MIAMI HERALD, Jan. 20, 2007, at 2.

⁹² Cavallaro & Brewer, *supra* note 4, at 788 (“[T]he powerful position of the armed forces and police in various Latin American countries mean that the Court often faces particular difficulty in prompting states to punish the authors of past violations.”).

⁹³ See Naomi Roht-Arriaza, *The Long and Winding Road: Trials for Human Rights Abuses in Guatemala and El Salvador 2* (unpublished manuscript) (on file with author) (arguing that, in El Salvador, “one of the fundamental blocks to advancing cases involving the past conflicts is the morphing of many of the high-ranking officials from the military into new, lucrative involvement with organized crime and the drug trade”).

⁹⁴ Cerna, *supra* note 6.

126

rights violators of a former authoritarian regime than any other country in the hemisphere.⁹⁵ Yet when it comes to specific Inter-American Court orders to prosecute, Argentina, Chile and El Salvador have the same record: no compliance. The point is that to understand why prosecution in a particular case is difficult, one must study the politics of the local justice system.

3. The Limits of Current Theories of Compliance

The more separate institutional actors a Court order calls on to act, then, the lower the compliance rate. But current theories on compliance fail to explain this marked trend. Under international law, it is the nation state as a whole that features on the international plane. Most empirical studies of the IAS, and of international human rights regimes more generally, similarly hinge compliance decisions on the interests or capacity of a single actor.⁹⁶ Compliance is explained as reflecting a government's "political will."⁹⁷ In a thoughtful comparative study of the European and Inter-American Systems, Courtney Hillebrecht argues that governments use compliance with regional human rights courts as a signaling mechanism: through compliance, states perform their commitment to human rights on the international stage, proving that their commitment is not mere "cheap talk."⁹⁸ Such a theory speaks well to variation in compliance *between* states: different human rights policies and levels of commitment result in different compliance levels. However, it has little traction explaining, without further elaboration, why *all* states are more likely to comply with some types of remedies than others. Compliance with an order to

⁹⁵ Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 L. & SOC. INQUIRY 99, 99-100 (2010); David Sugarman, *Courts, Human Rights, and Transitional Justice: Lessons from Chile*, 36 J.L. & SOC'Y 273 (2009).

⁹⁶ See, e.g., SIMMONS, *supra* note 1, at 129-35.

⁹⁷ Cavallaro & Brewer, *supra* note 4, at 786 n.62; Cerna, *supra* note 6; Tan, *supra* note 6; Marcie Mersky & Naomi Roht-Arriaza, *Guatemala, in VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA*, 7, 29 (Catherine A. Sunshine ed., July 2007), available at <http://www.dplf.org/uploads/1190403828.pdf> (citing "political cost" as the deciding factor).

⁹⁸ Courtney Hillebrecht, *From Paper Tigers to Engines of Change: The Effect of International Human Rights Tribunals on Domestic Practice and Policy* 21 (May 10, 2010) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author).

investigate would seem to be just as important to signaling commitment to human rights as compliance with orders to compensate. Indeed, all studies that explain compliance through “political will” similarly focus on a single will, that of the executive, or of the government as a single entity.⁹⁹

A second compliance theory focuses not on executive will but procedural ambiguity in working towards implementation. The Center for Justice and International Law, the leading NGO in Inter-American litigation, has published two books on compliance.¹⁰⁰ These analyses argue that states have failed to specify in their internal laws how rulings can be implemented, and the resulting “interpretive and normative grey areas and empty spaces” impede compliance.¹⁰¹ Turning to the judicial arena, for example, Viviana Krsticevic argues that it is often unclear, according to the state’s internal laws, what role judges play in the implementation of orders to compensate, and the ambiguity makes payments lag. In that most problematic type of order – orders to investigate and punish – judges face many obstacles of criminal procedure, such as statutes of limitations, double jeopardy, *res judicata*, and amnesties.¹⁰² Krsticevic argues that legislatures need to rewrite laws so that these criminal procedures no longer impede compliance.¹⁰³ But the procedural argument has limits as a complete explanation for compliance. The lack of clear rules can inhibit compliance, but it can also provide an opening for officials to exercise discretion. Some judiciaries, such as those in Argentina and Bolivia, have overcome procedural hurdles through judicial interpretation, without help

⁹⁹ See generally Cavallaro & Brewer, *supra* note 4; Cerna, *supra* note 12; Tan, *supra* note 12. Some scholars have raised the theory that the level of bureaucratic capacity might explain levels of compliance. Again, however, the focus seems to be on the executive rather than judicial bureaucracy. See, e.g. Hawkins & Jacoby, *supra* note 5.

¹⁰⁰ Krsticevic, *supra* note 81, at 41; VIVIANA KRSTICEVIC, IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: APORTES PARA LOS PROCESOS LEGISLATIVOS [IMPLEMENTATION OF THE DECISIONS OF THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS: SUGGESTIONS FOR LEGISLATIVE PROCESSES] 1, 10 (Center for Justice and Int’l L. ed., 2009).

¹⁰¹ KRSTICEVIC, *supra* note 99, at 10.

¹⁰² See Krsticevic, *supra* note 82, at 41. The Court’s position is that these procedural hurdles cannot impede investigation and punishment of those responsible for the violations of fundamental human rights. This leaves the judge in the position of deciding whether to apply the national law, or adopt the Court’s human rights-based reasoning to overcome it.

¹⁰³ See KRSTICEVIC, *supra* note 100.

128

from the legislature.¹⁰⁴ Others have chosen to shirk Court orders despite national laws that seem to mandate implementation.¹⁰⁵ More is at play here than the law on the books.

A third theory emphasizes not what the remedial order requires or whom it addresses, but rather on its degree of clarity. Jeffrey Staton and Alexia Romero find that “the clarity of IACHR remedies influences reactions of state governments to these remedies.”¹⁰⁶ But this theory, too, cannot single-handedly account for the drop-off in compliance as orders invoke action by more distinct state actors.¹⁰⁷ As the authors note, about half of the orders to prosecute are what they classify as “clear,” and the other half are vague. Yet compliance to such orders does not vary: it is zero.

A final explanation is that States comply with orders that are “easier” to carry out, and balk at more difficult orders.¹⁰⁸ Thus, they do not carry out the tasks that require a greater amount of effort (including cost) on the part of the state. Without more elaboration, however, the so-called difficulty thesis begs the question of what, exactly, makes implementation difficult, for that becomes the true impediment. As noted above, it is not always the case that an order is inherently more difficult to carry out just because it involves action by more actors. Or, put differently, and as will be argued below, it is the coordination of a task between distinct state

¹⁰⁴ Julieta Di Corleto, *El Reconocimiento de las decisiones de la Comisión y la Corte Interamericanas en las sentencias de la Corte Suprema de Argentina*, in IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES [IMPLEMENTATION OF THE DECISIONS OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: JURISPRUDENCE, REGULATIONS AND NATIONAL EXPERIENCES] 105 (Vivana Krsticevic & Lilliana Tojo eds., 2007).

¹⁰⁵ See Tribunal Supremo de Justicia, Venezuela, *supra* note 37.

¹⁰⁶ Jeffrey Staton and Alexia Romero, Clarity and Compliance in the Inter-American Human Rights System (Feb. 12, 2011) (unpublished manuscript), available at

<http://www.saopaulo2011.ipso.org/sites/default/files/papers/paper-883.pdf>. For a related argument about how the level of specificity of court orders affects compliance, see Shai Dothan *Judicial Tactics in the European Court of Human Rights* 12 CHI. J. INT’L L. 1 (forthcoming 2011).

¹⁰⁷ It could be that as an order requires action by more actors, the Court chooses to defer to the state on the question of who, exactly, needs to act. Thus, orders become less specific, and less clear, as they invoke more actors.

¹⁰⁸ See e.g., Hawkins & Jacoby, *supra* note 5, at 45.

[2011]

COURTS RESISTING COURTS

129

actors with differing political wills and institutional settings that poses the challenge to implementation.

4. The Politics of Judicial Actors

The reason prevailing theories cannot account for the drop-off in compliance as orders require action by more distinct actors is that they share a blind spot: they overlook judicial and prosecutorial politics. Compliance with the Inter-American Court's equitable remedial orders, however, depends in great part on the will of distinct institutional actors within the state that the order calls to action. To fully explain compliance, the structural incentives and institutional culture of these state actors must be explored.

Of the distinct state institutions considered here – the executive, the judiciary, the legislature and the public ministry – executives have many reasons to comply with Court orders. The executive is the branch charged with conducting foreign relations and thus is the Inter-American Court's state interlocutor throughout litigation. More than any other branch, the executive is aware of the Court's ruling and its demands, and the executive is the one that has to answer and appear before the Court when it requests an update on compliance. Most importantly, the executive is primarily responsible for conducting foreign relations and shaping a state's foreign policy, and it is most actively concerned with the international reputation of the state.¹⁰⁹ It has a direct interest in showing both to the world and the voters that the government, and the president in particular, respect human rights. This is not to say that all Latin American executives have the same human rights policy, or that legislators and judges do not care about the standing of the state abroad.¹¹⁰ Rather, the point is that the institution of the executive has shared traits across the region, and some of these traits make compliance with the Court particularly attractive.

¹⁰⁹ The Latin American states all have presidentialist constitutions, giving the executive a more expansive role in single-handedly shaping foreign policy. For a general discussion of presidentialism in Latin America, see *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* (Scott Mainwaring & Matthew Soberg Shugart eds., 1997).

¹¹⁰ Indeed, there is significant variation in compliance rates among executives. But our question is about low compliance among all states taken together.

The position of judiciaries is different. First, conducting the state's foreign affairs is not part of their job description. Second, they do not appear before the Inter-American Court, and the Court does not directly engage judges by faxing its orders to them or ordering them to appear in Costa Rica, its headquarters. Indeed (and third), in many states it is unclear exactly what position the rulings of the Court hold in national law, so the mandate to comply is formally weak.¹¹¹ Fourth, judges may feel more threatened by the Court than do other state actors. Executives too resist and resent the intrusion from abroad when a ruling comes down. But for judges, each Court ruling is a direct incursion into their legal terrain. The Inter-American Court only reviews cases after victims have exhausted local judicial resources.¹¹² For the IAS to take a case is thus already a judgment that the local judges got it wrong. Particularly in cases where the Inter-American Court demands a criminal case be re-opened, local procedural rules notwithstanding, national courts may resent the intrusion on their turf. High courts may object to having their status as final instance usurped.¹¹³ Finally, in the many cases that demand states investigate and try the crimes of former authoritarian regimes, it is likely that this demand is made of the same judges that worked under the former authoritarian regime, and were in some ways complicit by failing to try the cases at the time. Whereas congress and the executive will have been renewed, the judges often remain, and the judiciary may be the branch most reluctant to turn against the former regime.¹¹⁴

¹¹¹ This is the procedural objection. See *supra* Part II.3. But the point here is that lack of clarity gives judges discretionary power; it thus provides opening for judges to exert their political will. The Inter-American Court's position is that these procedural hurdles cannot impede investigation and punishment of those responsible for the violations of fundamental human rights. This leaves the judge in the position of deciding whether to apply the national law, or adopt the Court's human rights-based reasoning to overcome it.

¹¹² Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 307 (1995).

¹¹³ These tensions also occur within federalized national systems. The Virginia Supreme Court balked when the U.S. Supreme Court began reviewing its interpretation of Virginia laws in *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813). I thank Anuj Desai for pointing out the parallel.

¹¹⁴ See Huneus, *supra* note 95 (arguing that Chilean judges eventually came to view the judiciary's legacy as tainted by its role during the military regime); Ingo Müller, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 219 (Deborah Lucas Schneider trans., 1991) ("Virtually no professional group emerged from the Nazi

It is true that judiciaries in Latin America have undergone important changes in recent years, following constitutional change and heavy investment in judicial reforms.¹¹⁵ Today's judiciaries enjoy greater autonomy, and are generally more involved in judicial review of rights. This would seem to portend a judiciary more aware of and open to human rights adjudication.¹¹⁶ However, following Court orders is distinguishable from using the Court's rulings as a source in performing judicial review. In citing to the Inter-American Court for purposes of judicial review, national judges use the Court's rulings to fortify their own positions against other

era with so good a conscience as that of the jurists.”); David Dyzenhaus, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* 136 (1998) (explaining the South African judiciary's reason for not appearing before the Truth and Reconciliation Commission).

¹¹⁵ There have been new or heavily reformed constitutions in the following Latin American countries since 1990: Argentina (1994), Bolivia (1994 & 2009), Chile (2005), Colombia (1991 & 2003), Dominican Republic (1994), Ecuador (1998 & 2008), Guatemala (1993), Nicaragua (1995), Paraguay (1992), Peru (1993), Venezuela (1999 & 2007). Detlef Nolte, *Constitutional Change in Latin America: Power Politics or Symbolic Politics*, Paper Before the European Consortium for Political Research: The Politics of Constitutional Change 2 (Apr. 12, 2008), available at http://www.giga-hamburg.de/dl/download.php?d=/content/staff/nolte/publications/constitutional_change.pdf; Peter Deshazo & Juan Enrique Vargas, Center for Strategic & International Studies Americas Program, *Judicial Reform in Latin America: An Assessment 1* (unpublished paper), available at http://csis.org/files/media/isis/pubs/0609_latin_judicial_reform.pdf (“The latest and most concentrated wave of reforms began in the mid-1990s on the heels of democracy throughout the hemisphere During this phase, nearly 1 billion dollars in financial support was forthcoming . . . [from international institutions] for efforts to reform the administration of justice.”).

¹¹⁶ As with executives, there is great variation among judiciaries in the region, and even among different courts within the same national system. While the Colombian, Argentina and Costa Rican judiciaries are open to judicial review of rights, and refer to the Court with some frequency, Chile's judges are shy of rights review, and less familiar with international law and the Court. *See generally* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005); SIRI GLOPPEN, ROBERTO GARGARELLA & ELIN SKAAR, *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN THE NEW DEMOCRACIES* (2007); LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007) (arguing that Chile's judges are reluctant to defend rights due to their institutional structure and culture).

state actors.¹¹⁷ It bolsters their power. But in following Court orders, judges look to be yielding their position as ultimate arbiter, ceding power.¹¹⁸ Further, autonomy cuts two ways: while a more autonomous judiciary is more apt to hold the other branches accountable to the demands of the American Convention, they may also be more equipped to challenge the Inter-American Court and resist implementing orders despite executive pressure.

The underlying point is that executives and judges are in different institutional positions *vis a vis* compliance with the Inter-American Court, and that many institutional factors point to judicial resistance.¹¹⁹ Note the difference with the European Court of Justice (ECJ) system. When scholars of the European Union speak of courts as compliance partners, they refer to national courts fostering legal integration by referring cases to the ECJ and citing its jurisprudence favorably.¹²⁰ In fact, the main interaction between the ECJ and national courts is the referral process, whereby national courts can decide to refer a case to the ECJ for clarification on a matter of EU law.¹²¹ Direct review of national courts is possible, but the ECJ has mostly refrained.¹²² In the ECJ setting, then, national courts choose when to interact with the ECJ, and they do so when it behooves them.¹²³ In the IAS setting by contrast, national courts do not

¹¹⁷ Dinah Shelton, *Judicial Review of State Actions by International Courts*, 12 *FORDHAM INT'L L.J.* 359 (1988).

¹¹⁸ See generally Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 *N.Y.U. L. REV.* 2029 (2004) (presenting a typology of relationships that national courts can have with international courts).

¹¹⁹ It is true that judges carefully consider and often defer to the executive's priorities. If the executive and legislature push compliance with the Inter-American Court, judicial compliance will be more forthcoming. Further, as Eyal Benvenisti argues, the executive may prefer noncompliance and may pressure judges to avoid compliance as a way to avoid political responsibility for non-compliance by the executive. See Eval Benvenisti, *Reclaiming Democracy: The Strategic uses of Foreign and International Law by National Courts*, 102 *AMER. J. INT'L L.* 241 (2008). The other branches' preferences, in other words, influence the judiciary. But it is only one factor of influence.

¹²⁰ See Laurence R. Helfer & Karen J. Alter, *supra* note 4.

¹²¹ Jennifer Henry, *The Referral Procedure: The Jurisdiction, Duties and Obligations of the European Court of Justice and Member States under Article 234E.C.*, 1 *SELECTED PAPERS ON EUR. L. [SPEL]* 1 (2005), available at http://www.elsa.org/fileadmin/user_upload/elsa_international/PDF/SPEL/SPEL05_1_JENNIFER_HENRY.pdf.

¹²² Ahdieh, *supra* note 118.

¹²³ ALTER, *supra* note 168.

refer cases to the Court.¹²⁴ Rather, as this paper has emphasized, the national courts are themselves cast as the subjects who must comply with Court orders.¹²⁵ By prescribing particular remedial actions courts must take, the Court situates itself as hierarchical superior, something local legal actors easily resent.¹²⁶ The Court's remedial regime thus pits it against national high courts.

Prosecutors also have reason to resist implementation. States across Latin America have undergone criminal procedural reforms in recent decades, resulting in a new generation of public ministries and newly empowered prosecutors.¹²⁷ Further, these reforms have made the public ministries formally autonomous from both the judiciary and the executive.¹²⁸ That means they have created yet another separate institution with its own priorities, incentives and culture. Like judiciaries, these prosecutors have a less clear mandate to comply to Court orders, less familiarity with the Court, and less immediate concern with the state's international reputation. Further, the reforms have given them greater

¹²⁴ In the Inter-American System, there is no referral mechanism that directly connects national courts to the Inter-American Court. Instead, the Commission decides when to refer cases to the Court. *See* Brief History IAHRs, *supra* note 23.

¹²⁵ Or, in the terms set out by Robert Ahdieh, there are two ways in which the Court formally linked to national judiciaries: through either dialogic or dialectical review. Ahdieh, *supra* note 118. Note that judicial actors can petition the Inter-American System as individuals whose rights have been violated. At least three such petitions have found their way to the Court's docket. Constitutional Court Case: Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 71 (Jan. 31, 2001); Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, 2008 Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008); Karen Atala and daughters v. Chile, Case 12.502 (application filed with the Inter-American Court September 17, 2010), *available at* <http://www.cidh.oas.org/demandas/12.502ENG.pdf>.

¹²⁶ *Bulacio v. Argentina* is the paradigmatic example. In that case, the Court ordered Argentina to reopen a case which the Supreme Court had closed under the statute of limitations. The Supreme Court argued that the Inter-American Court was wrong on the law, but it nonetheless complied. The legal community in Argentina was indignant, and critical of the Argentine Supreme Court for ceding. *See* Cecilia Cristina Naddeo, *Co-adjudicating Human Rights Conflicts: The Supreme Court of Argentina and the Inter-American System of Human Rights* (2007) (unpublished J.S.M. (Masters of the Science of Law) Thesis, Stanford University Law School) (on file with author).

¹²⁷ CEJA Public Prosecutions Report, *supra* note 2.

¹²⁸ *Id.* at 24. However, there are exceptions. The prosecutor in Costa Rica is still subject to the judicial branch.

discretion to choose among cases and greater democratic accountability.¹²⁹ The reasons for choosing to prosecute a case because the Court demands it might not be as compelling as those underling the decision to pursue competing cases. The crimes underlying Inter-American Court cases are often old, costly and difficult to investigate, and politically volatile. Even before considering the problem of illegal protection of certain actors, it seems clear that the prosecutor would prefer to spend scarce resources on other cases.

The contrast between the executive and legislature are equally strong. Both are concerned with the state's standing abroad. However, there are important differences. Most importantly, legislatures are less apt to act by institutional design. Executives are top-down institutions designed for carrying out action. Legislatures are designed for democratic deliberation and contestation. To pass a law, a majority vote must be negotiated and a series of procedural hurdles passed. One only has to see the differences in structure to predict that legislatures will be slower and less likely to implement Court orders.

The contrasting structures and orientations of different state institutions, then, are important factors in compliance patterns. The data on court orders does not, without further research, allow us to discern what percentage of compliance can be explained by the political will of actors versus the inherent difficulty of the task, insofar as the two are distinct. Nor does it tell us about how judicial politics unfolds on the ground; that is left to future research.¹³⁰ But it does suggest that the political will and institutional setting of actors beyond the executive greatly matters. The separate branches of the state are differently situated *vis a vis* the Inter-American Court, and these differences help explain the drop-off in compliance as more actors beyond the executive are invoked by a Court

¹²⁹ Kirtland C. Marsh, *To Charge or not to Charge, that is Discretion: the Problem of Prosecutorial Discretion in Chile, and Japan's Solution*, 15 PAC. RIM L. & POL'Y J. 543 (2006).

¹³⁰ One study in progress that takes seriously the challenge of studying judicial politics and compliance to the Court's orders is Oscar Parra Vera *The Inter-American System of Human Rights and "Institutional Resistance" in the Domestic Level: Scope and Limits*, presented at the Annual Conference for the Law and Society Association, San Francisco June 2-5, 2011 (showing how local judges use Inter-American Court orders in their struggles with the executive and with other judicial actors) (on file with author). Another scholar whose very interesting work examines judicial politics in the IAS is Cecilia Cristina Naddeo. *See, for example, supra* note 126

[2011]

COURTS RESISTING COURTS

135

order. While this insight may appear self-evident to the lawyers who work towards implementation of Court orders, it had yet to be fully explored by the scholarship on compliance with Court orders, and to receive empirical validation. That has been the task of Part Two. Part Three now turns from the empirical to the normative, arguing that the actor-centered thesis has practical implications.

III. IMPLICATIONS: PARTNERING WITH JUSTICE SYSTEMS

The political will of justice system actors matters to compliance. The previous section showed that, for reasons of institutional culture and structure, these actors often choose to shirk or delay implementation of Inter-American Court orders. What, then, can the Court do? Three possible responses will be discussed below: 1) the Court should do nothing; 2) the Court should move towards a regime similar to that of the ECHR by giving states greater discretion; and 3) the Court should forge closer ties to the state institutions that matter to implementation. This paper argues that the third response, a policy of actively engaging national courts and prosecutors with the Inter-American System, is the best option, and outlines a proposal. Such a policy will not result in full compliance any time soon, if ever. One intractable difficulty is that of trying and incarcerating powerful actors, a rarity in even the most disciplined justice systems. But a policy of active engagement lays the ground for greater awareness of the Court by national judges and prosecutors, and, eventually, greater levels of compliance by national justice systems.

1. First Option: Do Nothing

One could argue that the Court should not yet concern itself with compliance. The Inter-American Court is a young institution. With time, politically savvy rulings and luck, the Court will slowly grow in legitimacy, making it increasingly difficult for states to disregard its rulings. The early years are a time for developing jurisprudence and institutional relationships.¹³¹ Further, the Court plays an important role in articulating

¹³¹ See Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 511-12 (2009), available at http://works.bepress.com/tom_ginsburg/26/ (arguing that international courts, like

136

Inter-American human rights law, and in publicizing gross breaches of its standards. It thus gives civil society tools with which to pursue justice.¹³² A focus on compliance could undermine the Court's successes in these areas, by depicting it as ineffectual where, in reality, it has a more diffuse and symbolic influence.

As argued above, however, non-implementation undermines the Court's legitimacy, and thus lessens its influence even at this more symbolic level.¹³³ The OAS General Assembly, for its part, has proven averse to pressuring states to comply with the Court's decrees, even though this its formal role under the American Convention.¹³⁴ Unless the Court is prepared to risk a loss of legitimacy, it is tied to the project of improving compliance rates on its own.

2. *Second Option: Go European*

Another alternative is for the Inter-American Court to tone down its remedial orders. Arguably, the Court's highly specific regime of injunctive relief, much of it focused on the justice sector, locks the Court into low compliance rates. The ECHR, by contrast, grants states greater discretion to fashion the remedy, subject to the subsequent approval of the Committee of Ministers.¹³⁵ The Inter-American Court could similarly allow states greater discretion and forego including long to-do lists in its

national courts, build up their legitimacy over time, by exercising review cautiously and currying favor with governments).

¹³² See Cavallaro & Brewer, *supra* note 4, at 784.

¹³³ See *supra* Part III.1; see also James Gibson, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM J. POL. SCI. 459 (1995) (arguing that legitimacy is important for compliance).

¹³⁴ The American Convention provides that each year, the Court will report to the OAS General Assembly on its work, and on cases in which states have not complied. See American Convention, *supra* note 29, art. 65. However, the OAS has rarely responded. See also Krsticevic, *supra* note 82, at 37 (“[L]os Estados de la region se han despreocupado de su papel como garantes colectivos del sistema.”) “[T]he States of the region have been unconcerned about their role as collective guarantors of the system.”].

¹³⁵ For a comparison of the two, see Thomas Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008); see also Courtney Hillebrecht, *Domestic Politics, International Human Rights Adjudication and the Problem of Political Will: Cases from the Inter-American Human Rights System*, Presentation at the Midwest Political Science Association (April 2-5, 2009); Hawkins & Jacoby, *supra* note 5.

[2011]

COURTS RESISTING COURTS

137

remedies rulings. Note that if the Court only asked for compensation and no injunctive relief, the compliance rate would be over 50%.¹³⁶ Even if the Court included demands for injunctive relief but only for acts primarily within the competency of the executive, the compliance rate would be 34%.¹³⁷ The Inter-American Court's focus on demanding action from the national criminal justice systems, in other words, is itself the problem. If states had more discretion, it is likely that they would provide monetary compensation and move on. Prosecutions would not take place. But that outcome is no different from what happens now, except that under the current regime cases linger on the Court's docket indefinitely, making the Court appear ineffectual.

The Court's regime of equitable relief, however, is not accidental or peripheral: it is the centerpiece of the IAS's agenda in light of the problems in its jurisdictional territory. Establishing and entrenching the rule of law – conceived as equal application of the law to all – has long been a focus of the OAS and the IAS. By demanding prosecutions for human rights violations, the Court conveys its commitment to this essential project. Further, the regime developed in response to the demands of victims and human rights activists, who prioritized investigation over compensation. It is one thing to accept monetary compensation if the state bars you from screening *The Last Temptation of Christ*,¹³⁸ but quite another thing to simply accept money for the deliberate and ongoing forced disappearance of a loved one.

Of course, if the Court's demands are not carried out, the goals of establishing the rule of law and victim satisfaction are still unmet. However, the Court's articulation of these demands, and its ongoing insistence that they be satisfied, serves an important symbolic function for the victims and others concerned with impunity in Latin America.¹³⁹ It would be a slap in the face if the Court began closing cases before the underlying crimes were investigated and the fate of the disappeared

¹³⁶ 2010 Association for Civil Rights Report, *supra* note 78.

¹³⁷ *Id.*

¹³⁸ Case of "The Last Temptation of Christ", *supra* note 11.

¹³⁹ For a study of the psychological and social effects of the Court's rulings, see CARLOS MARTÍN BERISTAIN, EL MINISTERIO DE JUSTÍCIA Y DERECHOS HUMANOS [THE MINISTRY OF JUSTICE AND HUMAN RIGHTS], *DIALOGOS SOBRE LA REPARACIÓN: QUE REPARAR EN LOS CASOS DE VIOLACIONES DE DERECHOS HUMANOS* [DIALOGUES ON REPARATIONS: WHAT REMEDY IN CASES OF HUMAN RIGHTS VIOLATIONS?] (2009).

revealed. Indeed, rather than the Inter-American Court moving towards the European model, the opposite is occurring. As the jurisdiction of the ECHR expands, the Council System has been “Latin Americanized.”¹⁴⁰ The ECHR’s docket now has many cases involving egregious mass violations of fundamental rights pursuant to a state policy. The European Court, in turn, has moved toward equitable remedies that invoke action by actors beyond the executive.¹⁴¹

One scholar has suggested that the Court should only demand prosecution in cases of the most egregious violations of fundamental rights, or crimes against humanity.¹⁴² This option would curb noncompliance, moving the Court slightly in the European direction while retaining its focus on battling impunity, and will be further discussed below.

3. Third Option: Courting Judges and Prosecutors

Finger-pointing by a human rights institution in Costa Rica will not end impunity in Latin America. The impunity of powerful actors is rooted in entrenched social networks and social norms. But by systematically engaging national justice systems, the Court could enhance its influence, and it could gain compliance in the subset of cases in which the obstacles to prosecution are less deeply entrenched.¹⁴³ To create such compliance partnerships, the Court has to be able to make itself attractive to local actors, fostering a pro-IAS posture beyond the executive. Such a policy would help judges and prosecutors learn about the Inter-American System and its jurisprudence, feel more directly responsible for compliance, and begin to identify as a part of the transnational judicial dialogue on human rights.¹⁴⁴

¹⁴⁰ Cerna, *supra* note 6.

¹⁴¹ See Helfer, *supra* note 14, at 147.

¹⁴² See Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Publish Human Rights Violations and its Dangers*, 23 AM J. INT’L L. 195 (2007).

¹⁴³ See Helfer & Alter, *supra* note 4.

¹⁴⁴ For a discussion of judicial dialogues, see Anne-Marie Slaughter, *Judges: Constructing a Global Legal System*, in THE NEW WORLD ORDER (Princeton University Press 2004); DIEGO GARCÍA-SAYÁN, JUSTICIA INTERAMERICANA Y TRIBUNALES NACIONALES [INTER-AMERICAN JUSTICE AND NATIONAL TRIBUNALS] 377-398; Sergio García Ramírez, *Recepción de la jurisprudencia interamericana sobre derechos humanos en el derecho interno [Reception of Inter-American Jurisprudence on Domestic Human Rights Law]* 354-375, in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO [YEARBOOK OF LATINAMERICAN

Skeptics will argue that there are some high courts in Latin America with whom a human rights court should not partner. Corruption, collusion with de facto powers and other problems plague the region's judiciaries.¹⁴⁵ It will not always make more sense to work with courts as partners rather than as subjects who must be disciplined. Indeed, the question of whether a horizontal or vertical relationship will be most effective will vary from judicial system to judicial system.¹⁴⁶ The main point here, however, is only that potential partnerships with local justices systems should be a primary consideration for the Court as it issues orders and supervises compliance.

This section outlines four components a policy of fostering local partnerships should entail. First, the Court should directly involve actors from the justice system in each stage of the remedy, from the original ruling to the final supervision. Second, the Court should be more deferential to high courts in certain procedural matters so as not to alienate potential compliance partners. Third, the Court should foment regional judicial dialogue by including in its rulings examples of arguments that clarify the legal status of the Court's rulings in the national legal order, generously citing national court jurisprudence supportive of the Court. Fourth, the Court should foster personal contacts between Court actors and national justice system actors. The suggestions are not exhaustive, nor is any individual suggestion, on its own, prerequisite to deepening relationships with local actors. They are meant to highlight steps within

CONSTITUTIONAL LAW] (Konrad Adenauer-Stiftung, Programa Estado de Derecho para Latinoamérica [Rule of Law Program for Latin America] 2008); Carlos M. Ayala Corao, *Recepción de la Jurisprudencia Internacional Sobre Derechos Humanos Por la Jurisprudencia Constitucional [Reception of International Human Rights Jurisprudence By Constitutional Jurisprudence]* 7, in FORO CONSTITUCIONAL IBEROAMERICANO [LATIN AMERICAN CONSTITUTIONAL FORUM] 1-74 (2004), available at <http://dialnet.unirioja.es/servlet/articulo?codigo=2249144>.

¹⁴⁵ Recently, Chavez has come under fire for interfering with the Venezuelan judiciary. See Rory Carroll, *I'm Hugo Chávez's prisoner, says jailed judge*, THE GUARDIAN, Jan. 15, 2011, at 27, available at <http://www.guardian.co.uk/world/2011/jan/14/chavez-prisoner-maria-lourdes-afiuni>. Note that as a response to the ruling in *Apitz v. Venezuela*, the Venezuelan Supreme Court exhorted the government to withdraw from the Inter-American Court's jurisdiction. See Huneus, *supra* note 37.

¹⁴⁶ Ahdieh, *supra* note 118 (creating a typology of international court review powers over national courts).

reach of the Court and its supporters, and to further illustrate the overarching proposal of creating compliance partnerships.¹⁴⁷

a) Naming Names

The Court should aim to make justice system actors more directly accountable for implementation. It should directly involve judges and other actors from the justice system in each stage of the remedy, from the initial order to the final supervision.

A recent study conducted by the Association for Civil Rights in Argentina recommends that the Court “unfold” [*desdoblar*] its orders.¹⁴⁸ In other words, it should disaggregate orders that are more complex – such as orders to “identify, try and punish” those responsible– into smaller units. This menu of simpler (if more numerous) orders would “facilitate control of the various mechanisms through which orders can be implemented.”¹⁴⁹ The findings of this study affirm the suggestion of a breakdown of orders into simpler units, but add that the breakdown should follow the lines of separation of powers: they should be broken down so that a single branch can fulfill them.¹⁵⁰ The work of the prosecutor and the pre-trial judge can be entwined such that it is difficult to clearly separate them in the investigatory phase, but insofar as they can be, they should be. Further, in federal states, such orders should distinguish between state and federal actors called to action by the order.¹⁵¹ The breakdown of the orders by institutional actor would facilitate identification of exactly which actor is failing to bring the state to compliance, and perhaps thereby foster a sense

¹⁴⁷ Note that the suggestions are limited to actions the Court itself can take. They thus do not include actions that the OAS itself could undertake, such as naming judges from the senior ranks of national judiciaries.

¹⁴⁸ 2010 Association for Civil Rights Report, *supra* note 78.

¹⁴⁹ 2010 Association for Civil Rights Report, *supra* note 78, § V, ¶ 2.

¹⁵⁰ In most countries, the order to prosecute, try and punish invokes action by an autonomous public ministry, the judiciary and the executive, in turn. Each of these, then, could be listed as a separate order. Note that criminal justice systems vary, and in some states the prosecution is conducted by the judiciary itself, while in others the prosecutor is technically subsumed by the judiciary. The great majority of countries however, have an autonomous Public Ministry that heads the prosecution, and acts separately (at least formally) from both the executive and the judiciary. For a discussion of the new prosecutors and public ministries, see generally CEJA PUBLIC PROSECUTIONS REPORT, *supra* note 2.

¹⁵¹ 2010 ASSOCIATION FOR CIVIL RIGHTS REPORT, *supra* note 78.

[2011]

COURTS RESISTING COURTS

141

of responsibility among the actors themselves.¹⁵² The Court could go so far as to specify the actor that must implement an order.¹⁵³ The strategy of naming names is supported by a forthcoming article by Jeffrey Staton and Alexia Romero, who find that greater clarity in Court orders yields greater compliance.¹⁵⁴

The Court could also involve these distinct state actors in the supervisory stage. To compile its supervision reports, the Court requests information from the state, usually represented by the foreign ministry (it also requests information from the Commission and the plaintiffs). On reading the reports, however, it often appears that the foreign ministry does not know what is happening on the ground, particularly when the Court has requested that a prosecution take place.¹⁵⁵ The executive may not have in place the know-how and mechanisms to follow a criminal case, and to do so might be in tension with the separation of powers. Further, the executive may have only limited means to pressure judges and prosecutors to action. The current system thus puts pressure on the wrong set of actors. The Court should push for the inclusion of representatives of state institutions beyond the executive in the supervisory stage. Further, representatives of the Public Ministry and Judiciary should appear in supervision hearings before the Court. Whereas in the past, the Court simply asked the state to send a report,¹⁵⁶ it now orders the state to appear before the Court in Costa Rica to report on compliance, and to hold a dialogue with the victims and the Commission, in order for all sides to agree on the details of implementation.¹⁵⁷ If state officials have to come in person, they will be more apt to make sure they have positive advances to

¹⁵² Note that sometimes more than one state actor can initiate the response. When the Court asks for legislative change, either the executive or congress may have the power to initiate legislation. Perhaps the executive as well as the Public Ministry can play a role in initiating an investigation. Here it may seem intrusive for the Court to single out an actor. Perhaps, then, it can single out the two responsible actors, and thus create a sense of shared accountability, as opposed to no accountability.

¹⁵³ The Court has already specified general actors in recent orders. *See, e.g., Barreto Leiva v. Venezuela*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 206, at 160 (Nov. 17, 2009).

¹⁵⁴ Staton and Romero, *supra* note 106.

¹⁵⁵ *See, e.g., Molina Theissen v. Guatemala*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 108 (Nov. 16, 2009).

¹⁵⁶ Rules of Procedure of the Inter-American Commission, *supra* note 33, art. 50.

¹⁵⁷ *Id.*, art. 41.

report. Face-to-face dialogue will also foster a shared and more realistic understanding of what, exactly, the state needs to accomplish and where the challenges lie.¹⁵⁸

It will be objected that by thus naming names, the Court unduly infringes on sovereignty. It is the state as a whole, and not the public ministry or the judiciary, that is party to the American Convention and has granted the Court jurisdiction. The Court, therefore, should only address itself to “the State,” and the state should be able to implement remedies by any means – and through any actor – it sees fit. But this objection rests on a monolithic understanding of sovereignty that the Court has already shown it does not share.¹⁵⁹ These suggestions rest on Court precedent.

In a supervisory hearing for *Molina Theissen v. Guatemala*, the relevant executive agency explained to the Court that the other state actors were not acting on its requests that they implement an order.¹⁶⁰ In response, the Court “took the unprecedented step of ordering Guatemala to name state agents as interlocutors for implementation of orders to investigate and punish those responsible for the violations identified in the cases.”¹⁶¹ The Court asked the State to name a representative from the office of prosecution, and one from the legislature, who would work with other state actors in building a compliance plan that would then be submitted to the Court.¹⁶² By thus singling out specific actors, the Court assures more accountability and, hopefully, buy-in. And by involving them in the supervision of the remedy, it also is able to incorporate their first-

¹⁵⁸ See Antkowiak, *supra* note 8 (arguing that reparations should be fashioned using a more bottom-up approach).

¹⁵⁹ Moreover, one could make the argument that implied in the fictional personhood of the state are the states’ powers – executive, legislative, judicial. By mentioning these specific powers, the Court is not presuming the particular constitutional make-up of any particular state but rather referring to universal attributes shared by all states, and implicit in the concept of state. Thus, the Court is not violating sovereignty by meddling in national law but rather drawing on features of statehood that reside in international law. One can argue, further, that implied in the choice to subject itself to the Court’s supervision, is that the state is submitting its entire person, including its different autonomous actors. I owe these suggestions to James Nickel of University of Miami. However, I have chosen not to further develop these points here, as such an argument would require a paper in itself.

¹⁶⁰ Baluarte & De Vos, *supra* note 58, at 83, n.341.

¹⁶¹ *Id.*

¹⁶² See *Molina Theissen*, *supra* note 155, at 12, ¶ 2.

hand knowledge of the obstacles to implementation into the work of fashioning acceptable and realistic plans for implementation.

It could also be objected that by naming specific actors, the Court runs the risk of getting it wrong.¹⁶³ To correctly identify the relevant actors, the Court's judges would have to learn about the criminal justice system of each country, on the books and in action, at times interpreting unclear constitutional lines of authority. What if the Court charges a wrong or inconvenient actor with an action, and thus further muddies a compliance scenario? This is a real risk, as it is often unclear exactly which state actor an order addresses, and there can be more than one way to comply. However, given high non-compliance and its effects, it is a risk worth taking. To lessen the risk, the Court could be general in naming state actors in situations of uncertainty, pointing, for example, to the judiciary as a whole rather than to a specific court.¹⁶⁴ It is fairly clear – or at least not too difficult to discover – whether an order for a particular action invokes the executive, legislature, judiciary or public ministry.¹⁶⁵ Further, this tactic makes accountable the more powerful actors who head the institution. Finally, the Court could also order the State itself to make particular actors responsible, and only then, with the State's tacit approval, begin to name those actors directly.

Greater specificity also allows the Court to point out a particular path towards compliance, thus overcoming the paralysis states can fall into (or excuse they can use) when it is uncertain, procedurally, what steps can be taken to reach compliance. The Mexican Supreme Court met for four days in September 2010, ostensibly to discuss how to comply with the Inter-American Court's ruling in *Radillo v Mexico*.¹⁶⁶ But the discussion stalled on the question of whether the Supreme Court could even discuss *Radillo*, as the ruling was not directed to the Supreme Court. At one point, a justice jested, "What are we waiting for, really? . . . That an emissary

¹⁶³ I owe this point to Agustina del Campo, American University. See also Staton & Romero, *supra* note 106 (discussing the trade-off courts face when issuing remedies between specificity in means and achieving ends).

¹⁶⁴ For an example of this, see Barreto Leiva, *supra* note 153.

¹⁶⁵ This can be done through consultation with the litigating parties or with an expert. Article 69.2 empowers the Court to request expert opinions about issues that relate to compliance. Baluarte & De Vos, *supra* note 58, at 84 (discussing article 69.2 of the Rules of Procedure of the Inter-American Commission).

144

from Costa Rica notify us?”¹⁶⁷ Short of sending such an emissary, the Court could be as specific as possible in singling out state actors to undertake the demands it makes, thereby fostering compliance.

b) Catering to Courts

As noted above, the Court’s remedial regime pits it against national high courts. The Court issues orders that are difficult to implement and that criticize the work of national justice systems, without offering much in return. To ease the tension, the Court could be more mindful of national high courts, and less quick to impose its judgment on that of a Supreme Court. Argentine scholar Felipe Basch argues that by requiring states to punish and re-open cases regardless of national due process safeguards such as statutes of limitations, the Court rides roughshod over defendant’s rights.¹⁶⁸ He argues that the Court should command prosecution only in cases of violations tantamount to crimes against humanity.¹⁶⁹ In other kinds of violations, it should defer to states, allowing them to decide on the remedy for a violation, more in the style of the ECHR.¹⁷⁰ One might make the same argument, based not only on concern for due process, but on the value of deference to national high courts. If the Court is more respectful of high courts, they, in turn, will look on the Court more favorably, making them more likely to implement the Court’s (now less intrusive) orders, and to bring its jurisprudence into the national realm.

At first blush the suggestion of greater deference to national high courts appears to be in tension with the previous suggestion of naming particular state actors, including high courts, in its remedial orders to

¹⁶⁶ Mins. Suprema Corte de Justicia de la Nacion, Secretaria Ejecutiva de Servicios, Convocatoria para concurso por invitation publica Nacional, Numero SCJN/DGOM/CIP/01/2010.

¹⁶⁷ Debate Corte sentencia de la CIDH: Inicia discusión sobre si el Poder Judicial debe acatar fallo del caso Radilla [Debate on the ruling of the Inter-American Court on Human Rights: Discussion begins regarding whether the Judiciary must follow the Radilla ruling], REFORMA, at 19 (Sept. 1, 2010) (“Qué estamos esperando de verdad? . . . Que venga un notificador de Costa Rica?”).

¹⁶⁸ Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. J. INT’L L. 195 (2007).

¹⁶⁹ *Id.* at 226-27.

¹⁷⁰ *Id.* at 221-22.

[2011]

COURTS RESISTING COURTS

145

heighten accountability. But the idea is that greater deference by the Court in some matters may compensate for the imposition of greater accountability in others. National courts will be more amenable to implementing orders if they view the Inter-American Court as at times also yielding.

Interestingly, there is a line of cases in which national judges petition the Inter-American System for protection from the executive or from their judicial superiors.¹⁷¹ In these cases, the Court, and the IAS more generally, has the opportunity to foster allegiance from local constituents. At times, this will pit the Court against supreme courts. In *Apitz v Venezuela*, for example, the Court ordered the Venezuelan Supreme Court to reinstate three fired judges.¹⁷² The Venezuelan court responded by issuing a ruling in which it urged the executive to withdraw from the Court's jurisdiction.¹⁷³ But the upside is that by defending national judges, the Court builds a key regional constituency.

c) Fostering a Regional Judicial Dialogue on IAS Matters

Courts are increasingly interacting across national borders.¹⁷⁴ Through judicial dialogue and negotiation, judges bolster their own positions within the national system, and at the same time strengthen and legitimate transnational legal regimes.¹⁷⁵ The Inter-American Court should work to foster regional judicial dialogue, particularly on the issues that frequently obstruct compliance.

Legal uncertainty over the status of the Inter-American's Court's rulings, for example, impedes implementation by judges and prosecutors.

¹⁷¹ See *supra* note 125; see also Parra, *supra* note 130.

¹⁷² See *Apitz-Barbera*, *supra* note 50.

¹⁷³ See Gustavo Álvarez Arias et al., *supra* note 37.

¹⁷⁴ For a general discussion of growing interaction between courts across borders, see Anne-Marie Slaughter, *Judges: Constructing a Global Legal System, in THE NEW WORLD ORDER* (Princeton University Press 2004). There is an emerging literature on this more general form of judicial dialogue in the Americas. See GARCÍA-SAYÁN, *supra* note 144; García Ramírez, *supra* note 144; Corao, *supra* note 143.

¹⁷⁵ Slaughter, *supra* note 171; but see Ahdieh, *supra* note 118, at 2053 n.102 (arguing that the term "judicial dialogue" does not capture the power dynamics and mutual accommodation of these judicial interactions, hiding their true nature (citing KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 38 (2001))).

Several constitutions in Latin America clearly make the American Convention self-executing; in other words, it is binding on state actors within the national legal regime even without enabling legislation.¹⁷⁶ Indeed, some constitutions give the American Convention the same status as constitutional law.¹⁷⁷ But few constitutions even mention the status of the rulings of the Inter-American Court, as opposed to the treaty itself.¹⁷⁸ The lack of clarity, and the perception that the rulings have no legal force in states where they arguably do, at times discourages prosecutors and judges from complying.¹⁷⁹ As Viviana Krsticevic argues, the Court and its supporters should push for states to explicitly make the Court's orders self-executing through constitutional amendment or legislation.¹⁸⁰

But the lack of clarity also provides a window of opportunity. In deciding on the justiciability of an Inter-American Court ruling against their states, national courts often face ambiguous legal doctrine. These are moments of discretion, and it would make sense for the Court and its supporters to elaborate arguments and publicize opinions that push for judges to lean towards self-execution and other positions supportive of the Court. The Inter-American Court has already implied that its rulings are self-executing as a matter of Convention law.¹⁸¹ But this is also a question of national constitutional law, and in this sense, the Court should cite to the arguments national courts have made in interpreting their own national law. In 2004, the Argentine Supreme Court ruled that the Court's orders in

¹⁷⁶ See Carroll, *supra* note 145.

¹⁷⁷ Many constitutions in the region articulate the doctrine of *pro humanis*, which says that in a situation of conflicting laws, the law that enhances human rights should trump. This principle, too, can be used to argue for self-executing status of the Court's rulings. See ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS (2008).

¹⁷⁸ Krsticevic, *supra* note 82, at 72-73 (the Ecuadorian and Venezuelan constitutions explicitly mention that the decisions of certain international instances are binding).

¹⁷⁹ See *supra* Part III (for a discussion of the uncertainty thesis).

¹⁸⁰ See KRSTICEVIC, *supra* note 100. The Court could use its annual report and address before the OAS to push such an agenda.

¹⁸¹ Krsticevic, *supra* note 82 (arguing that the Barrios Alto ruling presumes self-execution); American Convention, *supra* note 29. Article 68.2 of the Convention establishes that the monetary compensation shall be paid according to internal law's disposition of claims against the government. American Convention, *supra* note 29. Some interpret this to show that the Convention assumes self-execution of the Court's rulings. See, e.g., Krsticevic, *supra* note 82.

Bulacio v. Argentina were directly binding, even though the Argentine Constitution makes no explicit mention of them, and even though the Supreme Court deemed Bulacio was wrongly decided.¹⁸² Courts in Peru, Costa Rica and Bolivia have also directly implemented Court rulings.¹⁸³ The Court should foment such interpretations by frequently citing to them in its rulings. Note that this has the effect of further fostering a judicial dialogue in the Americas.

Even where courts have assumed the Court's rulings to be non-self-executing, the Court could foster implementation by providing arguments and examples of supportive jurisprudence in its own rulings. A judiciary cannot simply choose to apply international law over national legislation. In some instances where it has been decided that the Court's rulings are not self-executing, this may preclude direct judicial action absent an executive or legislative act – but not always, and probably not even usually. Often what the Court requests of judiciaries – i.e., that they conduct a trial in a particular way, that they allow victim participation in the stages of the trial, that they change their jurisprudence on a particular right in future cases – lies within a national justice system's legitimate discretion. National law might not mandate implementation, but neither does it prohibit it.¹⁸⁴

¹⁸² Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, “Espósito, Miguel Ángel s/incidente de prescripción de la acción penal promovido por su defensa,” La Ley [L.L.] (2004-E-224) (Arg.).

¹⁸³ Krsticevic, *supra* note 82, at 98-104.

¹⁸⁴ The US and ICJ cases dealing with the right to consular notification are relevant here. In *Case Concerning Avena and Other Mexican Nationals (Mex.v. U.S.)*, the ICJ ruled that the US should grant special hearings to 50 Mexican nationals arrested in the US, but not timely given the right to consult their consulates pursuant to the Vienna Convention on Consular Relations. 2004 I.C.J. 12 (March 31). The US Supreme Court ruled in *Medellín v Texas*, 552 U.S. 491 (2008), that the ICJ's rulings were not self-executing. Texas went ahead and executed José Medellín without granting the Avena hearing. However, at least one other state complied with Avena's demands nonetheless. In his concurrence, Justice Stevens emphasized that Texas had a duty, even if not a justiciable one:

“One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of

A particularly vexing area of legal uncertainty is the conflict between the Court's orders to prosecute and punish, on the one hand, and national amnesties. Take *Almonacid v Chile* for example.¹⁸⁵ In that ruling, the Court ordered Chile to ascertain that the Amnesty Decree no longer impede investigation and punishment for the crimes against Luis Almonacid, and other similar Pinochet-era cases.¹⁸⁶ Chile must therefore "leave without effects" the Supreme Court's and the military courts' prior decisions to apply the Amnesty Decree in these cases.¹⁸⁷ But it is unclear how, exactly, this can be done. The Constitution of Chile directly prohibits the executive or legislative branches from re-opening closed cases.¹⁸⁸ Even if Congress repealed the Amnesty, or passed a law guiding interpretation of the Amnesty Decree under the Criminal Code, it is still the judiciary's decision whether this applies to a particular case that has reached final judgment. Scholars have argued that the Chilean judiciary could declare the Amnesty retroactively void, thus erasing its effects in past cases.¹⁸⁹ But this is something it has never done before: there is no law or juridical tradition in Chile on nullifying laws.¹⁹⁰

The Inter-American Court could help national judges and prosecutors navigate this procedural no-man's land by providing examples of how their counterparts in other states have dealt with the same questions. The Peruvian and Argentine Supreme Court have struck down their national amnesties so as to re-open closed cases.¹⁹¹ The Inter-American Court cannot command that the Chilean Court follow the reasoning of those other national courts. But it can, in the course of its ruling on reparations and subsequent supervision, be more persuasive by showing

another." J. Stevens concurring, *Medellín v. Texas*, 552 U.S. 491, 533. (2008).

By "our form of government," Stevens would seem to be referring to federalism, but the same could be argued for separation of powers: each component of the nation state – state government but also the different branches – has a political and moral duty to act.

¹⁸⁵ *Almonacid Arellano and others v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 171 (Sept. 26, 2006). This case was brought against Chile by relatives of victims killed in 1973 by agents of the military regime.

¹⁹¹ *Mera*, *supra* note 193.

[2011]

COURTS RESISTING COURTS

149

how similarly situated prosecutors and courts have overcome these very same due process hurdles. Instead, the Almonacid ruling celebrates the Court's own Barrios Altos ruling as "well-known and renowned within international legal circles,"¹⁹² but fails to credit the Peruvian and Argentine courts for the courageous decisions that made Barrios Altos effective on the ground. One might object that national courts should do their own homework. But many Latin American judges are unfamiliar with or reluctant to rely on foreign or international jurisprudence.¹⁹³ There has been relatively thin development of the jurisprudence on these questions in the American setting.¹⁹⁴ The Inter-American Court could leverage what little there is and foster more of it through citation.¹⁹⁵

d) The Social Network

Courts and prosecutors do not work in isolation: they are embedded in a field of jurists and legal institutions that deeply influences how they view themselves and the law, as well as which cases arrive at their desks. Recent studies have emphasized the political importance of social networks, including not just courts and judges, but a broader array of actors, such as lawyers, legal academics, and groups of legal activists.¹⁹⁶ In particular, they have highlighted the role of lawyers with shared political ideals in fomenting liberalism,¹⁹⁷ human rights,¹⁹⁸ and European legal integration.¹⁹⁹ When such groups take on a cause, be it political liberalism

¹⁹² See *Almonacid v Chile*, *supra* note 182, at 69, ¶ 2 (concurrence of Trinidad, J.).

¹⁹³ Krsticevic, *supra* note 82, at 97.

¹⁹⁴ *Id.*

¹⁹⁵ Note that the Court does just this in one of its recent compliance reports. In urging the Guatemalan courts to prosecute despite procedural impediments such as statutes of limitations, it cites to a long list of national court opinions that have done just that, holding them up as examples. *Bamaca Velasquez v Guatemala*, 2002 Inter-Am. Ct. H.R., (ser. C) No. 91 (Nov. 18, 2010).

¹⁹⁶ FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL CHANGE (Terence N. Halliday, Lucien Karpik, & Malcolm Feeley eds., 2007) [hereinafter FIGHTING FOR POLITICAL FREEDOM]; KAREN ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 63–91 (2009).

¹⁹⁷ ALTER, *supra* note 196.

¹⁹⁸ Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1 (2001).

¹⁹⁹ See Helfer & Alter, *supra* note 4 at 920-28.

or European integration, they can have important effects on the behavior of courts and other state actors.

The Inter-American Court should aim to establish contacts with these potential constituencies as a strategy not only for fostering compliance with particular orders, but also for diffusion of Court rulings in the region more generally. Indeed, the Court already has projects underway to promote closer ties with national legal communities. Twice a year, the Court holds its sessions not in its San José, Costa Rica home, but in another city of a member state. During those visits, the Court's judges meet with local judges, bar associations, legal academics and other state and non-state actors. Further, the Court has a competitive internship program in which lawyers from across Latin America spend a few months working long hours in the top floor of the Court, immersing themselves in the IAS before returning to their own countries.²⁰⁰ The Court also establishes agreements of institutional cooperation with national courts, ministries, universities and NGOs to promote "joint activities in matters of investigation, education, and diffusion" of human rights.²⁰¹ Finally, in 2006 the Court and the Inter-American Institute began publishing the *Diálogo Jurisprudencial*, a journal that reprints national jurisprudence that discusses (usually favorably) the Inter-American System – an importing step in promoting judicial dialogue and further knowledge of the System.²⁰² If successful, such efforts will enhance citation of the Court as well as compliance with its rulings. The suggestion here is only that the Court expand such efforts, and, budget permitting, institutionalize more travel and networking opportunities for its judges and staff.

²⁰⁰ The Inter-American Commission also has a competitive internship program, as does Centro por la justicia y el derecho internacional (Cejil) [Center for Justice and International Law], a Washington DC NGO that focuses on litigation before the IAS. On a more critical note, however, it can be argued that the IAS system lacks long-term career paths, and this weakens the system.

²⁰¹ See 2009 Annual Report, *supra* note 26, at 58.

²⁰² See Inter-American Court of Human Rights, *Diálogo Jurisprudencial* [JURISPRUDENTIAL DIALOGUE] <http://www.juridicas.unam.mx/publica/rev/cont.htm?r=dialjur> (last visited July 21, 2011). It is unclear what the publishing criteria are, but the fact that the journal has not published the opinion in which Venezuela's Supreme Court rejects the Inter-American Court orders in *Apitz*, and calls on the state to withdraw from the American Convention, suggests a pro-Court principle of selection.

[2011]

COURTS RESISTING COURTS

151

4. *The Limits of Courtship*

It would be naïve to think that a tighter relation between the Court and national courts could shape national courts into compliance partners *à la* the European Union. As a matter of structure, the Court simply does not have the ability to offer powerful incentives to national actors. Further, most of the cases in which judges fail to comply are cases in which the Court commands states to investigate, try and punish some of society's most powerful, armed actors, often for acts that took place during times of civil unrest or war. They are the kind of cases that rarely reach prosecution. Prosecution is particularly unlikely in those nations, such as El Salvador, where small groups of elites that hold vast amounts of wealth and power are implicated in the violations.²⁰³ However, there are instances of noncompliance with orders to investigate and punish in entirely different settings. In Chile, hundreds of prosecutions of Pinochet-era cases have moved forward in recent years. The Supreme Court's reluctance to comply in Almonacid cannot be attributed to pervasive impunity. Rather, it seems rooted in a lack of knowledge about the IAS by an insular national judiciary, in protection of national criminal procedural norms and in a Supreme Court jealous of its top-dog status.²⁰⁴ In such a setting, the Inter-American Court could win the alliance of the national judiciary if it were able to cultivate the national legal field, following the strategies outlined above and finding other ways to engage national justice system actors.

IV. CONCLUSION: THE AMERICAS AND BEYOND

Scholars have portrayed the Inter-American Court as unmoored from the political reality of the region. Gerald Neumann argues that the jurisprudence of the Court does not adequately reflect state practice or a

²⁰³ Roht-Arriaza, *supra* note 93, at 2 (“My contention is that one of the fundamental blocks to advancing cases involving the past conflicts is the morphing of many of the high-ranking officials from the military into new, lucrative involvement with organized crime and the drug trade. The extent of penetration of *narcotráfico* and gangs as dominant economic and political forces contributes to an active interest in having the courts not work – not for present cases, not for the massive unsolved killings of women, and not for cases arising from the past.”).

²⁰⁴ See Huneus, *supra* note 37, at 112-38.

regional consensus.²⁰⁵ Stephanie Brewer and James Cavallaro contend that the Court has been out of touch with local political dynamics, and should focus on working with social movements in the different nations of the region.²⁰⁶ This article advocates for more explicit consideration of yet a third national audience that holds a pivotal position in improving compliance: national justice systems. Thus far it seems that the Court's focus on orders that target national courts has not been part of a policy mindful of judicial and prosecutorial politics. That is a mistake: the Inter-American Court should deliberately establish relationships with local institutions, casting courts and prosecutors as partners in compliance. Such partnership will not only improve compliance, but, at times, improve local justice systems, and lead to greater judicial diffusion of IAS norms more generally.

There is a paradox at the core of rights regimes engaged with the developing world. Supra-national human rights systems are designed to be subsidiary: they step in to correct specific failures of national justice systems, but rely on those systems to enforce human rights commitments in general.²⁰⁷ Yet the Inter-American Court was created by states whose justice systems were not only in poor condition, but often complicit in state-sponsored rights violations, failing to investigate and in other ways abetting criminal policies. It may seem naive, then, to advocate that the Court focus on engaging and partnering with these very actors. But the region's justice systems are changing. Latin American nations have invested mightily in sweeping justice system reforms over the past decades.²⁰⁸ Judges and prosecutors throughout Latin America have gained

²⁰⁵ Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. [EJIL] 101 (2008).

²⁰⁶ See Cavallaro & Brewer, *supra* note 4.

²⁰⁷ For a thorough analysis of the principle of subsidiarity, see Paolo R. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 41 (2003); see also Helfer, *supra* note 14, at 128.

²⁰⁸ PETER DE SHAZO & JUAN ENRIQUE VARGAS, CTR. FOR STRATEGIC & INT'L STUDIES AM. PROGRAM, JUDICIAL REFORM IN LATIN AMERICA: AN ASSESSMENT 1 (2006), available at http://csis.org/files/media/isis/pubs/0609_latino_judicial_reform.pdf ("The latest and most concentrated wave of reforms began in the mid-1990s on the heels of democracy throughout the hemisphere. During this phase, nearly 1 billion dollars in financial support was forthcoming . . . for efforts to reform the administration of justice.").

[2011]

COURTS RESISTING COURTS

153

autonomy and are taking on more politically prominent roles.²⁰⁹ High courts have begun striking down laws under lengthy constitutional rights clauses.²¹⁰

The Inter-American Court would be wise to engage these newly empowered actors in a pro-human rights alliance. Even where justice systems are problematic, engagement may be the best option. Scholars have recently argued that “helping construct effective public justice systems in the developing world . . . must become the new mandate of the human rights movement in the twenty-first century.”²¹¹ While the Inter-American Court cannot single-handedly transform justice systems, it can make better use of its remedial regime to partner with and improve them, even as it fosters implementation of its rulings and further embeds itself at the national level.

The arguments made in this article have application beyond the Inter-American setting. A supra-national institution’s formal interlocutor at the national level is the executive, represented by the foreign ministry. Often, however, it is not the foreign ministry that holds the keys to compliance with particular orders. In regimes that protect individual rights, the actor with the power to comply frequently resides outside the executive, forming part of a formally autonomous justice system. But the separation of powers means that the executive’s ability to influence those actors will be constitutionally constrained. Thus, supra-national institutions need to devise ways of more directly engaging autonomous state actors and shaping them into compliance partners.²¹² In most cases of rights regimes, such engagement will have the benefit not only of improving compliance, but of improving local justice systems, and heightening general awareness of the supranational regime.

A case in point is the International Criminal Court (ICC). Under the complementarity doctrine, the ICC can only open a case if the state

²⁰⁹ See generally CEJA Public Prosecutions Report, *supra* note 2.

²¹⁰ See generally THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005); DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN THE NEW DEMOCRACIES (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

²¹¹ Gary Haugen & Victor Boutros, *And Justice for All: Enforcing Human Rights for the World’s Poor*, 89 FOREIGN AFFAIRS 51, 52 (2010).

²¹² The caveat is that it must be done in a way that does not violate sovereignty, either by procuring state consent or by establishing informal ties. See *supra* Part IV.1.

party that has jurisdiction over the case is unable or unwilling to do so.²¹³ Complementarity was meant to be a form of deference to sovereignty: states with working justice systems could keep the ICC at bay by opting to prosecute. But the flip-side of complementarity is that it puts the Office of the Prosecutor (OTP) in the position of supervising whether local prosecutions are taking place, and, more intrusively, assessing whether they meet a vaguely articulated standard.²¹⁴ Much like the Inter-American Court, then, the OTP has to be able to understand and monitor justice proceedings on the ground. Some have argued that the OTP should use complementarity to proactively pressure states towards prosecution, threatening to file a case if the state does not undertake certain actions.²¹⁵ Whether it uses the complementarity doctrine in what William Burke-White dubs a “proactive” or “passive” manner, the OTP will be more effective if it establishes direct links to the relevant local actors.²¹⁶ It can thereby heighten awareness of the ICC, gain a deeper understanding of local impediments to prosecution, and, optimally, help local justice system actors overcome those impediments and move towards prosecution. Other institutions that will find the strategy of deliberately fostering partnerships with local justice systems to enhance compliance and influence useful include the European Council’s Committee of Ministers, the African Court of Human Rights, other international criminal courts that work under a doctrine of complementarity,²¹⁷ and any supra-national rights body with supervisory powers that relies on national justice systems for compliance.²¹⁸

²¹³ Rome Statute of the International Criminal Court art. 17(1)(a), July 17, 1998, 2187 U.N.T.S. 900.

²¹⁴ Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM L.F. 255 (discussing different interpretations of complementarity and article 17).

²¹⁵ See William W. Burke-White, *Proactive complementarity: the International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 54-55 (2008) (arguing that ICC prosecutor Luis Moreno Ocampo originally seemed to share this vision, but has since focused on prosecutions).

²¹⁶ *Id.* at 56, 90 (suggesting that the ICC “must determine the appropriate national interlocutors with whom to interact...the OTP may seek follow-up communication directly with judicial or prosecutorial authorities”).

²¹⁷ The ICC is thus far unique in having a complementarity doctrine, but one can imagine other international or hybrid courts that adopt complementarity emerging.

²¹⁸ For a list of international courts, see PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, <http://www.pict-pcti.org/index.html> (last visited Feb. 12, 2011).

[2011]

COURTS RESISTING COURTS

155

In conclusion it seems noteworthy that the arguments presented in this article suggest new lines of research. While scholars of international human rights acknowledge that national courts play an important role in state compliance, they have neglected to study the politics of judicial actors. The assumption is that independent courts enforce human rights commitments, constraining the executive, and promoting compliance with human rights regimes.²¹⁹ Study of responses to Inter-American Court remedial orders, however, reveals that autonomous courts can be a vexing source of non-compliance when they have institutional reasons to resist. . Therefore, we need to investigate the politics of the national justices systems: why and when, exactly, are judges and prosecutors loath to comply with international institutions?²²⁰ The situation of each national justice system is unique and its relation to law, politics, and civil society varies from state to state. However, there will be general patterns. Understanding these patterns will allow us to foster compliance by developing policies targeted towards particular national justice system types.

²¹⁹ *See supra* note 1.

²²⁰ For an example of such a study, see Parra, *supra* note 130.