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Article

Undermining the authority of the Inter-American Court of Human Rights: cases of state's weaponization of the value of transparency

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ABSTRACT

Resistance to the Inter-American Court of Human Rights (IACtHR), in recent years, has taken new shapes, as States 'weaponise' the discourse of impartiality, publicity and other judicial values to undermine the authority of the IACtHR through legal criticism, whether ordinary (resistance) or extraordinary (backlash) aiming to demolish the credibility of the IACtHR through manufacturing criticism against its transparency. In this article, based on the recent case law of the Court, we analyse eight cases of this conduct and the Court's reaction to it, and propose four categories of State behaviour of criticism against the transparency of the Inter-American Court, including (i) State attempts to reform to the Court, invoking transparency grounds, (ii) Treaty withdrawal based upon the alleged lack of transparency, (iii) Deliberate non-compliance with reparation measures through non-transparency allegations, and (iv) Direct attack on the authority of the Court through massive disqualification or recusal of judges.

KEYWORDS: Inter-American Court of Human Rights, transparency, resistance, state responsibility, compliance

INTRODUCTION

Analysing the value of transparency in the daily operation of an international organization, a specialized body, or a regional tribunal for the protection of human rights, such as the Inter-American Court of Human Rights (IACtHR) (the main jurisdictional body of the

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Organization of American States)[1] entails addressing a variety of issues such as the procedures during public hearings, the fair use of court rules, transparency in the administration and communication of memorials and other documents submitted by the parties, the democratization of organizational decisions,[2] the timely publication of court decisions and judgments[3] and open access to information on compliance with the ordered reparation measures, among others.

Transparency measures and policies within an international court facilitate the effectiveness of the international procedure (avoiding bases for nullification or public critique) and, at the same time, ensure a minimum level of compliance with decisions.[4] In short, transparency contributes to sustaining the legitimacy and authority of the international tribunal to carry out its treaty-based mandate to control State compliance with its international obligations and impose the corresponding measures and reparations.

As argued by Baetens, 'viewed as a contest for influence between the parties and other interested entities, transparency itself becomes a contested concept';[5] the various interactions between the actors that intervene before the IACtHR (mainly in the context of its contentious jurisdiction) can impact the relationship that exists between transparency, legitimacy, and authority. The cited literature generally considers the discussion around transparency as an organizational governance issue, involving stakeholders[6] in interactions and efforts to enhance the transparency of a given international court. This special issue of the JIDS enshrines several contributions that work towards resolving the question of defining transparency in international adjudication and share, to a large extent, a definition developed during the Translucent Justice Conference hosted by the MPI Luxembourg in October 2023, namely 'access to, and knowledge of, the activity of courts and tribunals for parties, participants and third parties, in the exercise of their functions as judicial bodies as well as institutions generally'. Although this article shares this definition, the focus of this contribution comes from a different question: what happens when the discussion around transparency is manipulated and tailored to resist and undermine the jurisdiction and authority of an international court?

Resistance to the jurisdictional exercise of the IACtHR is one of the most dangerous conduct of States when they 'weaponise' the discourse of impartiality, publicity and other values in order to undermine the legitimacy and authority of the IACtHR through legal criticism, whether ordinary (resistance) or extraordinary (backlash) (concepts we will explain ahead), aimed at demolishing the Court's credibility through the manufacturing of criticism to its transparency. In this article, based on the recent case law before the Court, we will describe cases of this conduct and propose four categories of State behaviour that have led to public criticism against the transparency of the Inter-American Court, including cases of State-proposed reforms to the system, treaty withdrawal, recusal of judges and non-compliance

[1] W Arévalo-Ramírez and A Rousset-Siri, 'Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights (IACtHR)' in A Carty (ed), *Oxford Bibliographies in International Law* (OUP 2021).

[2] A von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations' (2012) 23 European Journal of International Law 315.

[3] A Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in A Bianchi and A Peters (eds), *Transparency in International Law* (2013) 1, 20.

[4] F Baetens, 'Transparency Across International Courts and Tribunals: Enhancing Legitimacy or Disrupting the Adjudicative Process?' (2022) 91 Nordic Journal of International Law 595.

[5] Ibid 597.

[6] OAS consistently uses the term stake-holder to refer to entities interested in the activities of the Inter-American System, including litigating States and interested parties in the IACtHR and has among member States, the civil society, legal counsel organizations, the press and academia (ie OAS, Press Release No 072/24 Conclusion of the 6th IACHR and Inter-American Court Forum on Democracy, Rule of Law, and Human Rights, IACHR Press Office April 2024).

with reparations, and analyse their consequences as means of delegitimizing the authority of the IACtHR.

CRITICISM AGAINST COURTS AND THEIR TRANSPARENCY AS A TOOL FOR DELEGITIMIZATION IN INTERNATIONAL LAW: RESISTANCE AND BACKLASH PROCESSES

The use of the discourse of transparency to undermine an international court, specifically the IACtHR, can be explained from the point of view of the scholarly approaches known as backlash and resistance to the authority of international courts and tribunals.[7] The processes of backlash and resistance in the field of international courts have been studied by several authors who have proposed novel ways of measuring the effectiveness and authority of international tribunals. These approaches have already been applied to a large number of international courts or tribunals.[8] These concepts have also become necessary to overcome the focus on literature that classically studies international courts, especially the IACtHR, only from the perspective of jurisdictional rules and formal hierarchy or bindingness in the face of domestic law.[9]

This approach to international courts and tribunals, based on resistance and backlash behaviours and the assessment of their success or failure, cannot depend solely on the classic concept of bindingness but is better appreciated from the point of view of their public 'authority'.[10] This distinction is fundamental to evaluate how States might manufacture transparency arguments against the IACtHR to undermine its jurisdiction, considering, for example, that all litigating States have formally accepted the obligations regarding the binding nature of the judgments of the Court in Article 68.1 of the American Convention at some point in the proceedings to which they have been party, but still tend to criticize the authority of the Court or its judges publicly.

Backlash and resistance concepts have already been applied to circumstances in which the behaviour of States needs to be appraised or qualified as an attack on the IACtHR or not. Soley and Steininger point out that the exercise of authority by the IACtHR, based on its own assertion of possessing a governing supranational nature, manifested in its powers to order the State to adopt or modify legislation, or through its direct effect on the competences of national authorities through the interpretation of the American Convention, is bound to trigger negative reactions from States occasionally. Sporadic, high-profile, but isolated cases of State criticism are not necessarily evidence of an attack on the existence of an international court.[11] For these reasons, the recent literature in the field distinguishes the most forceful forms of reaction from other 'common' forms of criticism, which correspond to two categories: ordinary and extraordinary criticism. As we explain below, these criticisms and their goals play a fundamental role in the discussion and appraisal of the transparency of international courts.

Ordinary criticism is considered a legal, internal form of criticism within the parameters of judicial activity. It concerns considerations about the essence of the judicial activity and

[7] M Madsen, *International court authority* (OUP 2018).

[8] T Daly and M Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court' (2018) 14 International Journal of Law in Context 294.

[9] W Arévalo-Ramírez and A Rousset-Siri, 'Resistencia y retroceso (backlash) contra las sentencias de la Corte Interamericana de Derechos Humanos: Estudio de 11 casos de reacciones de los Estados a la autoridad del tribunal y la recusación de jueces en el caso "Bedoya Lima' (2023) 16 Anuario Colombiano De Derecho Internacional 5.

[10] A Von Bogdandy and I Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' (2013) 26 Leiden Journal of International Law 49.

[11] X Soley and S Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 International Journal of Law in Context 237.

the activity of the judges; this could include, for example, the tribunal's usage of the applicable law, the activity, tests, and standards applied by the international court in its fact-finding or fact-appraising duties, or the interpretation of its own case law.

On the other hand, extraordinary criticism is characterized as a strong, motivated, and open rejection, falling beyond the parameters of the legal debate between parties of a case, usually fostering political, social, and 'State-interest' considerations: it encompasses an institutional criticism of the structure. It might even go against the existence of the Court. It may include attacks against pillars of the organizational features of a tribunal, such as its financing and budget, the scope of its jurisdiction beyond a given dispute, the composition of the panel of judges, their personal status, and professional qualities. It becomes, incrementally, an open rejection of any form of State participation in the international judicial system in question, justified even through manipulations of domestic law, press, or public opinion outlets.[12] Recently, in Latin America, in cases before the ICJ, this practice has also amounted to accusations about the political position, transparency, or moral legitimacy of members of the Court under false allegations of personal interests, such as in the *Nicaragua v. Colombia* cases.[13] Ordinary criticism is associated with the notion of resistance, and extraordinary criticism with the notion of backlash.

In this sense, 'resistance' in the context of the Inter-American System has been described by such authors as Contesse as an opposition process focused specifically on particular judgments of the international tribunals by a receiving State that, faced with a decision that does not meet its legal[14] or factual expectations, engages in conduct opposed to the decision that may affect the full or timely implementation of that particular decision.[15] It encourages the taking of non-compliant positions by relevant local authorities such as State agents from the agencies involved in the litigation, legislators or the public administration[16] against a particular decision. Still, it does not aim to interfere with the State's participation in the system or the institutional existence of the Court.

On the other hand, 'backlash' behaviour not only constitutes resistance by the State to a particular judgment but also mobilizes social and public opinion resources to counterattack. This behaviour seeks to undermine the institutional structure of the international court and its authority, understood as the legal–political relationship with the States parties under its jurisdiction, and to affect the future participation of the State within that system or even the resources or existence of the Court. An example of this would be the case of Venezuela and its withdrawal from the jurisdiction of the Inter-American Court and, consequently, of the OAS.[17]

Furthermore, a backlash has a greater impact on an international court since by criticizing the institution and not only the legal basis of a certain judgment (which is usually only relevant inter alia), the conduct of a State can gradually or suddenly mobilize the collective action of several States against the Court. As the literature has noted, this occurred with the

[12] M Madsen and P Cebulak, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197.

[13] W Arévalo-Ramírez, 'Resistance to Territorial and Maritime Delimitation Judgments of the International Court of Justice and Clashes with 'territory clauses' in the Constitutions of Latin American States' (2022) 35 Leiden Journal of International Law 185.

[14] J Contesse, 'Contestation and Deference in the Inter-American Human Rights System' (2016) 76 Law & Contemporary. Problems 123.

[15] J Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44 Yale Journal of International Law 179.

[16] W Arévalo-Ramírez and A Rousset-Siri, 'Compliance with Advisory Opinions in the Inter-American Human Rights System' (2023) 117 AJIL Unbound 298.

[17] A Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493.

process of African integration,[18] against the design, jurisdiction, appointment of members of the judiciary, and even the definitive existence of the international court. A method of systematic criticism might include attacks against the institution's transparency. This could come from the State and its agents, as well as from an opposed civil society. It could take the form of a sustained attack against the institutional structure of an international court. Furthermore, backlash extends beyond a single procedure and may be manifested both during proceedings and through serious cases of non-appearance, non-compliance, or against the effects of the (non-)implementation of the Court's judgment. It could also co-opt alleged transparency arguments to oppose other post-adjudicatory instances. An example would be the compliance phase of the Inter-American Court, which is a very particular element of the Inter-American System in which each measure ordered by a merits judgment is supervised annually by the Court until full compliance is achieved.[19]

In the following section, we will study and exemplify how different cases involving criticism regarding the transparency (or lack of) of the IACtHR can form part of agendas of ordinary criticism or extraordinary criticism—of backlash and resistance—and propose to classify these examples within four proposed categories of instrumentalization of the discourse of transparency against the authority of the Court: (i) State attempts to reform the Court, invoking transparency grounds, as a way to constrain its inherent powers, (ii) Treaty withdrawal based on the alleged lack of transparency, independence or diligence of the Inter-American System, (iii) Deliberate non-compliance with reparation measures through non-transparency allegations, and (iv) Direct attack on the authority of the Court through procedural tools: massive disqualification or recusal of judges and the instrumentalizing of the notion of transparency.

CATEGORIZING CASES OF ATTACKS AGAINST THE AUTHORITY AND EFFECTIVENESS OF THE JUDICIAL BODIES OF THE INTER-AMERICAN SYSTEM THROUGH THE ARGUMENT OF TRANSPARENCY

State parties are in continuous legal, administrative, and discursive interaction with the protection bodies of the Inter-American System. These interactions take place not only in court, for example, in contentious procedures (usually led by the specialized agents of the State legal defence before the IACtHR) but also in the political (ie direct relationship between the Government and organs of the Court) and diplomatic (ie State representation within the OAS governing bodies) spheres. In all these spheres, transparency arguments can take the centre of the discussions, for example, during the appointment of commissioners and judges and the review of their personal qualifications, or the consent of a State Party for the entry of protection bodies to carry out on-site (*in-loco*) visits and its views on the legal merits of the visit.

In some cases, State interactions with the Court, invoking transparency issues, really aim to present opposition to the actions of the international protection bodies. This behaviour can take the shape of an omission (being absent from hearings or not informing the Court about compliance with reparation measures by arguing lack of transparency or lack of impartiality) or of specific active actions (denouncing the American Convention or invoking the recusal of IACtHR judges under the umbrella of charges of a lack of transparency).

[18] K Alter, 'Backlash Against International Courts in West, East And Southern Africa: Causes and Consequences' (2016) 27 European Journal of International Law 293.

[19] D Baluarte, 'Strategizing for Compliance: The evolution of A Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives' (2012) 27 American University International Law Review 263.

Based on the concepts described above regarding different types of criticism and the notions of backlash or resistance, we will analyse eight cases of State criticism against the Court during the period between 1978 (entry into force of the ACHR) to 2023 under the four categories, which can be acknowledged as practices that constitute questionings and attacks upon the authority and effectiveness of the judicial bodies of the Inter-American System through the use and abuse of the argument of transparency.

State attempts to reform the Court invoking transparency grounds as a way to constrain its inherent powers

From April 2011 to the end of 2012, a number of States within the governing bodies of the OAS promoted a series of working groups[20] to revise and reform the capacities and powers of the Inter-American Commission of Human Rights (IACHR), the entry step to the Inter-American Court. This was motivated by judicial decisions that at the time were strongly opposed by State parties, such as the precautionary measures ordered by the Commission in the *Bello Monte*[21] (Brazil) and *journalists of Diario el Universo*[22] (Ecuador) cases, along with the very disputed election process of an Executive Secretary for the Commission during that period.

Through what was called 'the process of strengthening the Inter-American System', these States tried to impose a reform of the rules of the Inter-American Commission, arguing that the lack of publicity ('open court' principle) of the reasoning by which that body decides to refer a case to the Inter-American Court or adopts precautionary measures, affected its transparency and subsidiarity.[23] This pressure was accompanied by threats of defunding the system[24] if progress was not made in that direction. This group of States, nonetheless, weaponized the alleged lack of transparency by simultaneously threatening the system with measures such as nominating and electing commissioners prone to following pro-state agendas, defunding the system, or even leaving the system if the reform did not meet their expectations. The reform was achieved on 18 March 2013 with Resolution No. 1/13 *Reform of the Rules of Procedure, Policies and Practices*. Authors like Nikken, Acosta,[25] and Morales argued that the reform, triggered by the rejection posed by States of the precautionary measures taken by the Commission in the *El Universo* and *Bello Monte* cases, created new constraints upon the powers of the Inter-American Commission, requiring it to fulfil cumbersome procedures for urgent actions such as provisional measures. It also imposed burdens on the alleged victims, who were confronted with new procedural duties regarding documentation of facts and became responsible for response requirements posed by the States to the Commission and to the victims regarding the implementation of certain measures. This is seen in the reformed Article 25.11. The motivations of the reform instruments shed light on how States instrumentalized broad and unspecific transparency allegations to foster a restrictive reform:

[20] OAS, SIDH. Informe del grupo de trabajo especial de reflexión sobre el funcionamiento Comisión Interamericana de Derechos Humanos para el Fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente (adoptado por el Grupo de Trabajo en su reunión del 13 de diciembre de 2011) GT/SIDH 13/11, rev 2

[21] IACHR, PM 382-10—Indigenous Communities of the Xingu River Basin, Pará, Brazil.

[22] IACHR, PM 406-11—Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Pérez Barriga, and César Pérez Barriga, Ecuador.

[23] F González-Morales, 'El proceso de reformas recientes al Sistema Interamericano de Derechos Humanos' (2015) 59 Revista IIDH 121.

[24] P Nikken, 'El sedicente "fortalecimiento" del Sistema Interamericano de Derechos Humanos y sus dobles estándares frente a las obligaciones internacionales de los Estados americanos' (2012) 56 Revista IIDH 73.

[25] J Acosta-López and M Dolores Miño, 'la CIDH frente a los desafíos de 2011: oportunidades para el fortalecimiento del SIDH' (2012) Anuario De Derecho Público 540.

> CONSIDERING,
> 2. That the Commission must reconcile juridical certainty with the flexibility necessary to respond to the needs of victims and persons at risk, enhance the transparency of its actions by providing accessible, complete and relevant information in its accountability to all users of the System, and to identify best practices and challenges in the 'protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness', enshrined in the American Declaration of the Rights and Duties of Man.[26]

Surprisingly, in the preamble of the reform, enhancing transparency and juridical certainty is not devised as a means on its own but as a way to empower the 'accountability' of the State parties of the Inter-American Commission. This shows how the transparency argument in the reform served the interests of the States to limit the action of the Commission instead of fortifying legal clarity in its functioning of this human rights protection body, whereas, as noted by Shelton,[27] it has suffered different crises of authority over time. These crises have endured even after the alleged 2011–2013 reform process, which did not manage to improve the Commission's real procedural needs.

Treaty withdrawal is based on the alleged lack of transparency, independence, or diligence of the Inter-American System

Two States that have chosen to denounce the Inter-American Convention on Human Rights, pursuant to Article 78,[28] exemplify challenges to the System through treaty withdrawal based on the alleged lack of transparency or other principles of judicial conduct.[29] Each State's institutional position in their reasoning for leaving the treaty provides an example of the difference between resistance and backlash.

The denunciation instrument of Trinidad and Tobago on 26 May 1998 indicated time limits regarding capital punishment cases as the reason for the treaty withdrawal. It designated the incompatibility of the domestic judicial deadline of around 12 months for implementation of the death penalty for those convicted of the crime of homicide with the allegedly longer and extensive duration of the procedure before the IACHR and the Inter-American Court. Trinidad and Tobago alleged the IACtHR period could exceed five years, a timeframe the domestic legal system considered a lack of judicial diligence and competence. This constituted a delay for the accused that Trinidad and Tobago astonishingly labelled as cruel, inhuman, and degrading treatment. It is plausible to argue that, in this instance, beyond a mere weaponization of the value of transparency demanded of the Court, what is occurring is a lack of transparency in the State's argumentation regarding the rationale for its denunciation of the treaty. The State disguises its genuine reasons for withdrawing from the Inter-American system behind exaggerated and fallacious arguments concerning an unjustified delay by the Court in deciding death penalty cases, which, in turn, affect the authority of the Court.

[26] OAS, Resolution No 1/13 "Reform of the Rules of Procedure, Policies and Practices" 18 March 2013, entry into force August 1, 2013.

[27] D Shelton, 'The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System' (2015) 5 Notre Dame Journal International Comparative Law 1.

[28] American Convention on Human Rights, O.A.S. Treaty Series No 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[29] Soley and Steininger (n 11) 237.

Surprisingly, the State argued in its denunciation instrument that the proper, open and transparent implementation of the death penalty implies celerity from the domestic courts in imposing the measure, a level of certainty to the accused that the 'delayed' time of the Inter-American System cannot guarantee with its extensive periods. According to Trinidad and Tobago, this constituted a human rights violation in the form of cruel treatment, as an unjustified postponement of the waiting time on death row.[30] The wording of the denunciation instrument exemplifies how Trinidad and Tobago shapes a transparency argument as criticism against the IACtHR by presenting its shorter timeframe in implementing death penalties as a transparent measure against the alleged 'uncertainty' of referring to the IACtHR without knowing exactly how long the international procedure could last;

> MINISTRY OF FOREIGN AFFAIRS
> REPUBLIC OF TRINIDAD AND TOBAGO Notification of denunciation of the American Convention Human Rights:
>
> Pursuant to its ruling in Pratt and Morgan v. Attorney General of Jamaica (2 A.C.1, 1994), the Judicial Committee of the Privy Council decided that states must adhere to strict guidelines regarding the hearing and determination of appeals of convicted murderers who have been sentenced to death. In any case in which the execution was to take place more than five years after the sentence of capital punishment was imposed, there would be strong grounds for considering that a delay of such magnitude would constitute 'punishment or other inhuman or degrading treatment.' A State wishing to maintain the death penalty must take responsibility for ensuring that execution takes place as quickly as possible after sentencing, allowing a reasonable period of time for appeal and consideration of postponement. The processing of appeals against death sentences should be expedited, and efforts should be made to ensure that the hearing of such appeals takes place within twelve months of the conviction. It should be possible to complete the entire domestic appeal process (including an appeal to the Privy Council) within approximately two years. It should be possible for international bodies dedicated to the protection of human rights, such as the United Nations Commission on Human Rights and the Inter-American Commission on Human Rights, to dispose of complaints to them in cases that carry the death penalty at most within eighteen months.
> (...) the Government is mandated to ensure that the appellate process is expedited by the elimination of delays within the system in order that capital sentences imposed in accordance with the laws of Trinidad and Tobago can be enforced.
> (...) The Government of Trinidad and Tobago is unable to allow the inability of the Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago. Persons convicted and sentenced to death after due process of law can have the constitutionality of their death sentence determined before the Courts of Trinidad and Tobago. Sufficient safeguards therefore exist for the protection of the human and fundamental rights of condemned prisoners.
> Therefore, in accordance with the provisions of Article 78 of the American Convention on Human Rights, the Government of Trinidad and Tobago hereby notifies the Secretary

[30] N Parassram Concepción, 'The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights' (2001) 16 American University International Law Review 847.

> General of the Organization of American States of the withdrawal of its ratification of the aforementioned American Convention on Human Rights.[31]

This overwhelming yet endogenous systemic criticism, mainly of the procedure before the Inter-American Commission (due to its management of deadlines and procedural judicial readiness), places this case in the area of resistance. It differs from the extraordinary tenor of Venezuela's statements in the following case of denunciation of the American Convention, whose criticism also sought to cast doubt on the legitimacy of the human rights protection system in all cases involving Venezuela and alleged a transparency bias against the State.

The second case of treaty denunciation based on criticism against the transparency, independence, and judicial propriety of the Inter-American Court of Human Rights took place on 10 September 2012, when Venezuela denounced the American Convention. That decision was reinforced by ruling 1175 from the Supreme Tribunal of Venezuela, Constitutional Court,[32] which declared the IACtHR ruling in the *Granier* case (*Radio Caracas Televisión*)[33] unenforceable.[34]

In the denunciation instrument and through the State's institutional channels, Venezuela alleged that the system's protection bodies had become a 'political weapon destined to undermine the stability of certain governments, and especially that of our country, adopting a line of interventionist action in the internal affairs of our government'.[35]

Venezuela's denunciation instrument was accompanied by an annex of four sections that aimed to justify the lack of transparency and the alleged bias of the System's organs against the State in several contentious cases. It argued there was (1) partiality and a lack of precision and transparency in the criteria for the indexation of the State by the Commission in Chapter 5 of the annual report on *grave risks of human rights violation in the region*,[36] (2) discursive vagueness and a lack of precise argumentation in the procedures leading to the declaration of provisional measures and the admission of individual petitions, (3) a lack of due process criteria and transparency in the decision of closure or archival of procedures, and (4) negligence and bias against the Venezuelan government in the denial of measures in favour of the State after the attempted *coup d'État* in April 2002.

In the denunciation instrument, Venezuela not only considers these alleged faults of the Inter-American System as a lack of transparency and as providing clear motives to leave the System but also directly accuses the organs of violation of Article 46 of the Convention, which regulates the procedure and judicial conduct principles required for the admission of individual petitions:

> It is unacceptable that a country like Venezuela, that has taken a historic leap to put an end to the violations of human rights that were systematic before 1999, has to be defamed for reasons of a political nature, through unfounded complaints, lacking evidentiary foundations, coming from politicians linked to acts contrary to the local laws and the

[31] IACtHR, Basic Documents Pertaining to Human Rights in the Inter-American System. Report. July 2003, Denunciations. 72–75.

[32] Venezuela, Sala Constitucional del Tribunal Supremo de Justicia, Rol N° 1175, de 22 de junio de 2015.

[33] IACtHR, Case of *Granier et al (Radio Caracas Television) v Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No 293.

[34] JM Casal, 'The Constitutional Chamber and the Erosion of Democracy in Venezuela' (2020) 80 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law 913.

[35] OAS, 2012.Secretario General de la OEA comunica denuncia de la Convención Americana sobre Derechos Humanos de parte de Venezuela. OAS. Press note. 10 September 2012. <https://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-307/12>

[36] M López Hualde, 'La denuncia de Venezuela a la Convención Americana sobre Derechos Humanos: su impacto sobre el proceso de fortalecimiento del sistema interamericano de protección de derechos humanos' (2014) Boletín Informativo del CENSUD 1.

> Constitution, which receive attention and immediate action and are admitted by the Commission and by the Court, even though, in all cases linked to Venezuela, it is recognized that they do not exhausted the internal remedies, thus violating the article clause 46.1 of the Convention.[37]

Likewise, at the domestic level, these criticisms were supported by the Supreme Tribunal in favour of the denunciation. Paradoxically, the denunciation by Venezuela was revoked in effect by the 2013 parallel government of Guaido. It attempted to re-enter the Inter-American System with a retroactive new ratification of the Convention that the Inter-American Commission has given full effect.[38] The Supreme Tribunal had even supported the denunciation instrument with decisions dating back to 2008 calling for the denunciation,[39] arguing that the Inter-American Court resolves with 'vagueness' and violates—itself—the norms of the Convention it attempts to enforce. On that occasion, the Supreme Tribunal of Venezuela ordered the submission of a copy of that statement to the OAS General Assembly. This was to request the treaty-governing body to analyse the alleged misuse of power of the IACtHR judges.[40]

Venezuela's behaviours (both domestically and internationally) constitute cases of backlash due to the extraordinary criticisms levelled by its authorities that were intended to affect the authority and effectiveness of the regional Court's rulings[41] and its jurisdiction by arguing its lack of transparency. Scholars in Venezuelan constitutional law, such as Marquez de Luzardo,[42] argue that the direct attack on the transparency of the Court and the unfounded allegations of bias against the State allowed both politicians and the Supreme Tribunal to circumvent the application of constitutional norms that should have enforced international law principles such as *pacta sunt servanda.* It justified non-compliance conduct and local judgments against the enforceability of international decisions by accusing the IACtHR of non-transparent behaviour.

Deliberate non-compliance with reparation measures through non-transparency allegations

Several cases before the Inter-American System have seen deliberate non-compliance by the State justified by the lack of transparency of the Court's decision-making process and unfounded accusations against the Court for making uninformed or biased decisions. Additionally, non-compliance behaviours have led States to non-transparent post-adjudicative conduct, including halting every communication with the Court regarding judgments implementation,[43] accelerated and unorthodox denunciations of the Convention, or exacerbated criticism against the Court during the supervision procedures highlighting the superficiality of the argument against the transparency of the Court and the lack of transparency of the State in its criticism against the Court.

States often view transparency, communication, and openness during the monitoring of supervision procedures as a political or diplomatic stage. In several countries in Latin

[37] Venezuela, 2012. Cancillería de la República. Comunicado de la República Bolivariana de Venezuela al secretario general de la Organización de Estados Americanos.

[38] P Tarre, 'Qué está pasando con Venezuela en el Sistema Interamericano?' (2022) Agenda Estado de Derecho.

[39] Venezuela, Sala Constitucional del Tribunal Supremo de Justicia, Rol N° 1939, de 18 de diciembre de 2008.

[40] P Hernandez, 'La obligatoriedad del estado venezolano en el sistema de fuentes y los argumentos de la sala constitucional para inejecutar las sentencias de la corte-idh' (2017) 15 Estudios constitucionales 99.

[41] J Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44 Yale Journal of International Law 179.

[42] CM Márquez de Luzardo, 'La denuncia de la Convención Americana sobre Derechos Humanos y otros casos paradigmáticos. Los precedentes de: Trinidad y Tobago; Perú y Venezuela' (2014) 8 Cuestiones Jurídicas 27.

[43] A Rousset, *Ejecución de sentencias de la Corte Interamericana de Derechos Humanos*, EDIAR, (1st edn, 2018).

America, the State delegates this stage of the procedure to non-judiciary bodies, such as offices within the Ministry of Foreign Affairs. Yet, these elements are as relevant as transparency during pleadings and court procedures before the judgment on the merits. On 4 November 2014, the Constitutional Court of the Dominican Republic, through ruling TC/0256/14, declared unconstitutional and nullified the executive act of the State dictated by the President of the Republic in 1999, recognizing the Inter-American Court's jurisdiction. It held that the procedure of accepting the jurisdiction of the Court by a Declaration of the Executive power should have been notified and ratified by the National Congress and that the direct relationship between the Executive and the Court had led to a non-transparent situation in which the Congress and other bodies were excluded[44] from the process of analysing the constitutionality of extending competence to the Court, which was performed with an 'Instrument of acceptance of the jurisdiction of the court' that should have passed the traditional judicial review process that other acts of international law creating new obligations for the State must undergo.

This domestic ruling, which we could classify as a backlash behaviour against the System, led the State to stop sending information to the Inter-American Court regarding the cases in the compliance monitoring stage, such as the *Dorzema* case.[45] Yet, this is a fundamental international obligation for States under the American Convention. The decision of the Inter-American Court in the case of expelled Dominican and Haitian individuals generated a critical resistance response from the State at the domestic level[46] through the ruling of the Constitutional Court that ignored its treaty obligations, and internationally, leading to the omission of information to the IACtHR on the progress of the declared measures. This post-adjudicatory situation also affects the communication and transparency between the Court and the State. The IACtHR noted that this delay in the submission of information was in breach of the Convention and extended to four other cases, despite the multiple calls to the State by the Presidency of the IACtHR, showing how the resistance behaviour based on non-transparency allegations was used to justify a total disconnection between the State and the Court.

> The Dominican Republic has four cases in the stage of monitoring compliance, in which the Bench of the Court and/or its Presidency have made multiple information requests to the State regarding the implementation of the reparations ordered in the Judgment of each one. However, such requirements have not been met. In July 2014, that is, five years and four months ago, was the last time that the State addressed any writing to this Court related to compliance with the reparations ordered by this Court, which happened in the case of Gonzalez Medina and relatives. In its 2018 report, the Court noted the lack of presentation of reports by the Dominican Republic.[47]

In another case, the *Yvone Neptune* case,[48] within the framework of the monitoring phase and supervision procedures, the Haitian government presented a brief in which it indicated

[44] Dominican Republic. Constitutional Court. Sentencia TC/0256/14. Expediente núm. TC-01-2005-0013, relativo a la acción directa de inconstitucionalidad incoada en fecha veinticinco (25) de noviembre de dos mil cinco (2005) contra el Instrumento de Aceptación de la Competencia de la Corte Interamericana de Derechos Humanos. pp 47–49.

[45] IACtHR, *Case of Nadege Dorzema et al v Dominican Republic*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 22, 2019. Para 4.

[46] A Allori, 'Resisting the Resistance: Dialogues Between the Inter-American Court of Human Rights and the Higher National Courts (The Cases of the Dominican Republic and Argentina)' (2020). PluriCourts Research Paper (Forthcoming) 1.

[47] IACtHR (n 45) para 2.

[48] IACtHR, *Case of Yvon Neptune v Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. French Version. Series C No 180.

that the judgment was unfair and inappropriate[49] for not taking into account the reality of the State,[50] and thereby affecting its transparency as a judicial decision. Haiti questioned the conclusions reached by the Court on the violated rights therein and stated that the execution of the Judgment would expose Haiti to 'permanent destabilization'.[51] It refused to report the progress of the ordered reparations. This was, once again, a decision that, although based on grounds of transparency, in fact (negatively) affected the transparency of the communication between the Court and the State in the monitoring phase. The intensity of the reaction, the terms with which the Inter-American Court is referred to through political statements, and the total abandonment of the compliance supervision procedure are beyond a case of legal criticism of the Court's reasoning. They amount to a case of backlash since the State's behaviour affects not only the implementation of the judgment but the Court more generally.

Also, in a hearing held before the Inter-American Court within the framework of its procedures to supervise compliance in a process called *12 cases with respect to Guatemala*, the State, far from reporting the progress of the measures, emphatically stated that 'The Court, and the Inter-American Commission, in the processing of a petition or case, cannot make accusations to a State and demand reparations if there has been no fault or negligence in the institutional behaviour or in the exercise of public functions by State officials'.[52] By refusing to advance in the monitoring and implementation of the judgments based on the reasoning adopted by the Court, the State partook in a case of resistance against the System, significantly impacting the effectiveness of its decisions, once again, in a post-adjudicative stage. This directly affects the publicity and transparency in the procedures between the parties, considering judicial transparency as not only related to the behaviour of judges but also to the flow of information between parties at all stages, especially in the pos-adjudicatory steps of supervision, where the Court depends on the transparency of the communications of the State and the validity of the evidence and information regarding the implementation of the decision and the reparation measures.

The same pattern could be seen with Nicaragua within the framework of the supervision of the *Acosta* case.[53] The Nicaraguan government expressed its firm decision not to advance in the investigation of the extrajudicial execution of one of the victims of that case.

> In the present case, Nicaragua's refusal to appear at the compliance monitoring hearing because it considered it 'unnecessary,' together with the decision to 'not [give] compliance' with one of the reparations ordered in the Judgment, constitutes a frontal and serious ignorance of the obligations emanating from the Judgment handed down by this Court and the conventional commitments of the State, which prevents the reparation of the human rights violations declared in the Judgment and strips the useful effect (*effet utile*) of the Convention in the specific case. Since the Inter-American Court began to implement the mechanism for holding hearings to supervise compliance with sentences in 2007, only two States have not appeared or participated: Nicaragua and the Dominican Republic. The Court highlights that although the State presented a brief informing its decision not to comply with the measure ordered in the ninth operative paragraph of the Judgment and

[49] IACtHR, *Case of Yvon Neptune v Haiti*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 20, 2015, para 2.

[50] A Paúl, 'El relato de los contextos históricos, sociales y políticos en las sentencias de la Corte Interamericana' (2020) 13 Anuario Colombiano de Derecho Internacional 9.

[51] IACtHR., *Case of Yvon Neptune v Haiti*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 20, 2015, p. 15

[52] IACtHR, *12 Guatemalan's Cases v Guatemala*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 24, 2015.

[53] IACtHR, *Case of Acosta et al v Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 25, 2017. Series C No 334.

> requesting that compliance with the reparation provided in the eleventh operative paragraph be declared, this does not exempt the State from its obligation to attend a hearing that has already been convened. In effect, if Nicaragua considers that it has complied with any or all of the measures on which the hearing called is concerned, what corresponds is for its agents to inform and justify said circumstance in the hearing called for that purpose, but in no way can the State unilaterally determine that said hearing is 'unnecessary.' The opposite would imply completely distorting the meaning of the powers that the aforementioned article 69.3 of the Regulation grants to the Court in matters of compliance supervision in general, and with respect to the figure of hearings in particular.[54]

These cases exemplify how States can elaborate arguments regarding biases or lack of clarity in the reasoning of the Court in their decisions on the merits to affect the supervision and compliance phase of said rulings. Backlash behaviour, by abandoning the supervision stage, affects transparency in two ways: it creates false allegations of lack of transparency by the IACtHR, which are used by local authorities to justify their non-appearance and non-compliance, and it creates a carte-blanche platform for the State to be non-transparent with the Court, by avoiding further communication and disregarding its reiterated calls for information regarding the implementation of judgments.

Direct attack on the authority of the Court through procedural tools: massive disqualification or recusal of judges and the instrumentalization of the notion of transparency

As a final category, we will refer to a case in which a State, by abusing the procedural tools established in the rules of the Inter-American Court, provoked a backlash against the system by instrumentalizing transparency and impartiality allegations to attack the bench of judges and affect the due course of the oral proceedings. Manipulating the notion of transparency through massive disqualification or recusal of judges is still uncommon in the Inter-American System, but its recent occurrence can have fundamental effects on the authority of the Court.

Recusal as a procedural option for the parties in the Inter-American System is recognized as a procedural right but is not widely developed by the Rules of Court. As a general principle, the Inter-American Court has said, in relation to the legal systems of the State parties and its own procedures, that 'recusal is a procedural instrument that allows the right to be tried by an impartial body, to be protected'.[55] Specifically, the Rules of Court deal with the recusal of judges in general terms and do not include specific provisions to apply when dealing with massive recusal of the bench.[56]

The *Bedoya Lima y otra v Colombia* case is related to the kidnapping, torture, and rape of journalist Jineth Bedoya Lima, on 25 May 2000, for reasons linked to her profession and the alleged lack of adoption of adequate and timely measures by the State to protect and prevent the occurrence of such events. Specifically, the reported event (about which there was no controversy between the parties) occurred when Bedoya Lima was investigating the confrontation between paramilitaries and members of gangs in La Modelo prison that ended with the death of 27 detainees. Bedoya Lima was kidnapped and held in a situation of deprivation

[54] IACtHR, *Case of Acosta et al v Nicaragua*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 22, 2019 (footnotes omitted).

[55] IACtHR, *Case of J v Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No 275.

[56] Rules of Court (IACtHR) art 21.2. Motions for recusal or allegations of impediment must be filed prior to the first hearing of the case. However, if the grounds therefore occur or become known after that hearing, such motions may be submitted to the Court at the first possible opportunity so that it can rule on the matter immediately.

of liberty against her will for several hours, during which she was the victim of several acts of violence, which included beatings, threats, insults, and rape.[57]

During the proceedings of the 140th period of sessions of the Inter-American Court, a virtual hearing was held to produce testimonial and expert evidence in which the victim's testimony was prepared to be heard. After listening to her story, the judges of the Inter-American Court asked various questions about the context of this case (and its relationship to other similar cases before the Court). At the end of the testimony, the judges expressed their solidarity and empathy towards the victim for her bravery in publicly explaining the events she suffered. Specifically, the President of the Tribunal, Madame Judge Odio Benito, expressed:

> Mrs. Bedoya, this Court no longer has any more questions to ask you, as my colleagues have expressed, we want to deeply thank you for your appearance, for your testimony that has, of course, provided us with very important elements for this proceeding. In a totally personal way, madam, I want to thank you, express my admiration and my gratitude, I have been fighting for many years along with many other women in the world for this cause of which you are a symbol, we have sometimes carried our voice and the voice of the victims of sexual violence from armed conflicts through all areas of national and international justice to the United Nations. The United Nations Security Council declared not long ago that sexual violence committed against women in armed conflicts is a pandemic, and it is a pandemic that continues to plague the women of the world, that is terribly painful, at the same time, examples like yours, your courage, your bravery, and the fact that in Colombia, that country so loved and to which we wish the best, you have become a symbol of this struggle, gives courage to those who continue in this fight. You and your mother, Mrs. Bedoya, are symbols of that struggle, and I personally, have dedicated many years of my life to these complaints and these processes, I want to thank you (…).

After a short recess, the agent for Colombia challenged and recused the judges who had asked questions to the victim, alluding that empathy with her hid a prejudgment of the State's international responsibility and demonstrated a fault of objectivity, transparency and impartiality of judges. Likewise, he criticized the context-related questions on the grounds that they went beyond the scope of the litigation.

The presidency of the Court invited the State to present its claims in writing for processing and decided to continue with the hearing without obstacle. At that time, the State agent announced the withdrawal of the Colombian Government from the hearing due to lack of transparency and procedural guarantees and proceeded with disconnecting from the remote session that had been established for this purpose. Then, in writing, the State presented (in the same terms) the challenge raised in the public hearing against the majority of the bench judges. It requested the Inter-American Court to refer the present incident of recusal to the General Assembly of the OAS (a procedure not available in the Rules of Court) and to declare null and void the proceedings from the moment when the Inter-American Court learned of the State's challenge in the public hearing on 15 March 2021.

On 17 March 2021, the Inter-American Court (under the signature of judges Vio Grossi and Ferrer Mac-Gregor Poisot—non-recused judges as they had not made any empathic declaration towards the victim during the proceedings) decided to declare inadmissible the recusal made by the State against the president of the Court, Odio Benito, the vice president,

[57] Inter-American Court of Human Rights, *Case of Bedoya Lima et al v Colombia*. Merits, Reparations and Costs. Judgment of August 26, 2021. Series C No 431.

Pazmiño Freire, and judges Zaffaroni and Pérez Manrique. It also rejected the request for annulment and referral of the matter to the OAS General Assembly.

In their written decision regarding the recusal incident, the judges investigated whether the questions asked by the judges constituted a valid and sufficient reason for their exclusion in the present case. They reached the conclusion that their interventions aimed at achieving a precise degree of conviction for the future adoption of a legal decision regarding the facts, the legal foundations, and the eventual reparations, and could not be considered a manifestation of a lack of objectivity and transparency on the part of the judges, or a predisposition against the State.[58] The decision stated that the comments made by the judges (which, according to the State, called into question the impartiality and transparency of the Inter-American Court) respected the Court's own standards[59] regarding the conditions that must be met at the time of receiving a statement or conducting an interrogation of an alleged victim of acts of violence or sexual violation.

In the operative section of the decision, the Inter-American Court highlighted how this temerarious use of arguments claiming the protection of impartiality and transparency, *prima facie*, left the impression of an attempt to protect the procedure, but are clearly manipulative and intended to undermine the jurisdiction and powers of the Court:

> In conclusion, although the procedural incident formulated (by Colombia) had the apparent intention of pursuing the protection of the impartiality and transparency of this court, its effect would be precisely the opposite: to silence the judges, restricting them in the exercise of their freedom of expression in its jurisdictional exercise, so that its actions conform to the opinion or interest of one of the parties, undermine the judicial independence of the Inter-American Court and, in short, weaken the inter-American court and hinder access to justice for the alleged victims of this case.[60]

The judges opposed the State's request that the recusal process should be resolved within the OAS Assembly. In this regard, they pointed out that leaving the decision on the recusal or selection of new judges for the specific case in the hands of a political body, such as the OAS General Assembly, would seriously affect the independence and autonomy of the Inter-American Court as an 'autonomous judicial institution whose objective is the application and interpretation of the American Convention on Human Rights'.[61]

The calm, clear, and legally sound response of the Inter-American Court and its Presidency during the events of the hearing, which amount to some of the greatest attacks by any State to the impartiality and transparency of the Court and the subsequent legal decision concluding with the rejection of the recusal, supported by prior case-law and the interpretation of the general principles of due process, transparency and impartiality, allowed the Court to deactivate, once more, an attempt to affect its authority through unjustified accusations regarding its transparency in the proceedings, hearings and post-adjudicatory supervision. For the Inter-American Court, in the *Bedoya Lima* case, it was essential to avoid a spillover effect of undesired consequences and also to contain any effects on public opinion.

[58] IACtHR, *Case of Bedoya Lima et al v Colombia*. Order (Recusal) of the Inter-American Court of Human Rights of March 17, 2021. <http://www.corteidh.or.cr/docs/asuntos/bedoya_17_03_21.pdf>

[59] IACtHR, *Case of Fernández Ortega et al v Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No 215.

[60] IACtHR, *Case of Bedoya Lima et al v Colombia* (n 58).

[61] ibid.

This goal was achieved not only by its own decision but also by the support of civil organizations[62] and the civil society in general, which rejected the attitude of the State.

IV. CONCLUSION

Transparency regarding international courts and tribunals is usually associated with in-court procedures, the communication of the reasoning of the decision to the parties, the clear and open discussion of policy issues within the court, such as the budget and the origin of resources, the treatment of evidence, or the election of judges. Most of the available literature has undertaken interesting efforts to promote transparency in international judicial processes and define what should be understood as transparency and publicity in international law. Nonetheless, the eight cases described in this article show how transparency as a mandate for the judges and fundamental value for the authority of international courts and tribunals can easily be hijacked and weaponized by States to elaborate complex threats to the authority of international courts. This is seen here, in the case of the IACtHR, through (i) institutional reforms which attempt to reduce the powers of the treaty organs alleging new transparency requisites, (ii) false justifications for the denunciation of the Convention, (iii) withdrawals of jurisdiction based on false accusations of lack of transparency of previous decisions, (iv) promotion of domestic judgments against the enforceability of international decisions based on an alleged lack of transparency, (v) accusations of lack of impartiality in the supervision procedures to stop the communication with the Court, and in the most impactful cases, (vi) mass recusals of judges using unfounded arguments in the hearings to stop the process. Transparency is a new relevant topic in the scholarship regarding the authority of international courts. Still, it needs to be studied considering not only its legal and institutional meaning but also the risk of appropriation and manipulation by the multiple actors within the international legal system.

These incorrect uses of the principle of judicial transparency imply an imaginative reshaping of an international Court's actions in its own defence. The judges decide the usual discussions regarding transparency between the parties, but who decides if an international court is transparent enough when the merits proceedings have ended and the case is in a supervision phase? Or when the Court is massively recused? Furthermore, how can an international court remedy the damage done by these forms of criticism?

The four proposed categories are (i) State attempts to reform the Court, invoking transparency grounds as a way of constraining its inherent powers, (ii) treaty withdrawal based on the alleged lack of transparency, independence or diligence of the Inter-American System, (iii) deliberate non-compliance with reparation measures through non-transparency allegations, and (iv) direct attack on the authority of the Court through procedural tools: massive disqualification or recusal of judges and the instrumentalization of the notion of transparency, represent how easily States can utilize the concept of transparency against international courts. Transparency for international courts is as relevant during the proceedings as it is after the judgment on the merits. For international courts, engaging in activities to defend themselves against false accusations is a new fundamental playing field not only for its own authority threatened by backlash conduct but also for the implementation of particular judgments, in which implementation procedures are delayed by specific acts of resistance behaviours by the involved States.

[62] Foundation for Press Freedom—FLIP, 'Colombia revictimizes and impedes access to justice for Jineth Bedoya Lima' (IFEX Blog, 16 March 2021) <https://ifex.org/colombia-revictimizes-and-impedes-access-to-justice-for-jineth-bedoya-lima/> accessed 10 January 2023.

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