

## LAW WITHOUT VIOLENCE: HUMAN RIGHTS ADJUDICATION AS WORLD BUILDING

In *Violence and the Word*, Professor Robert Cover describes law as “tak[ing] place in a field of pain and death.”<sup>1</sup> International law and human rights adjudication, in particular, could not be more different. Human rights courts lack the power to compel adherence to their decisions through violence.<sup>2</sup> They are designed for voluntary participation. This poses a problem for those who view compliance as the goal of law. But it is consistent with an alternative account of human rights adjudication as world building — the creation of a normative vision for transforming the status quo. The claim of this Note is that human rights courts can succeed without violence, and that the nonviolent character of human rights courts is perhaps best suited to their liberatory promise. When courts move people to act not out of fear of adverse consequences but from conviction, they can inspire lasting transformation. And human rights courts, unburdened with the restraint appropriate to the use of violence, can make greater moral demands.

This Note proceeds in four parts. Part I describes the problem of violence in human rights and situates the argument within scholarly debate. Part II explains how human rights courts lack coercive enforcement. Part III advances the idea of human rights adjudication as world building. Part IV considers the benefits of law without violence.

### I. THE DEBATE

In the wake of Russia’s invasion, Ukraine brought a suit against Russia before the International Court of Justice (ICJ) under the Genocide Convention.<sup>3</sup> Ukraine argued that Russia had falsely accused it of genocide against the Russian-speaking population in Eastern Ukraine to justify the invasion.<sup>4</sup> The court issued provisional measures ordering Russia to stop the war.<sup>5</sup> But Russia ignored them, continuing a war that has claimed close to two hundred thousand lives.<sup>6</sup> The ICJ has no

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<sup>1</sup> Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

<sup>2</sup> This Note defines violence as the threat or infliction of pain, including through the use of force and economic sanctions, to secure compliance.

<sup>3</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

<sup>4</sup> Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. 211, ¶ 2 (Mar. 16).

<sup>5</sup> *Id.* ¶ 81.

<sup>6</sup> Helene Cooper et al., *Troop Deaths and Injuries in Ukraine War Near 500,000, U.S. Officials Say*, N.Y. TIMES (Aug. 18, 2023), <https://www.nytimes.com/2023/08/18/us/politics/ukraine-russia-war-casualties.html> [<https://perma.cc/M7CP-ZASB>]; Emma Farge, *Civilian Death Toll in Ukraine Tops 10,000 — U.N. Human Rights Office*, REUTERS (Nov. 21, 2023, 10:21 AM), <https://www.reuters.com/world/europe/civilian-death-toll-ukraine-tops-10000-un-human-rights-office-2023-11-21> [<https://perma.cc/4D8U-PX7E>] (figures current as of November 2023).

tools to compel Russia or any other state to follow its judgments: it has no army of its own and cannot conscript domestic armies into its service or even impose sanctions. Under the United Nations (U.N.) Charter, parties may ask the Security Council for enforcement, but the Security Council has declined to play this role.<sup>7</sup> Russia's veto in the Security Council forecloses enforcement in this case,<sup>8</sup> yet the pattern is broader. The Security Council has *never* used its powers to enforce an ICJ judgment.<sup>9</sup> This would appear to be the spectacular failure of international law and human rights in particular. Without enforcement, powerful states, like Russia, can trample on the rights of the weak with deadly consequences. What, then, is the point of adjudicating human rights?

International law and international relations scholars answer a version of the question in various ways. Some, like former National Security Advisor John Bolton, respond in the Coverian vein that international law is not law at all.<sup>10</sup> Realists, like Professors Jack Goldsmith and Eric Posner, argue that international law is weak because it cannot make states comply unless it is in their interest to do so.<sup>11</sup> Human rights, from this perspective, fare even worse. Posner contends that human rights treaties are unenforceable by design and are responsible for the global failure to address human rights violations.<sup>12</sup>

Those who defend international law tend to argue that it can inspire compliance through less coercive means. The managerial approach of Professors Abram Chayes and Antonia Handler Chayes locates the effectiveness of international law in negotiation among treaty members and social pressures created by participation in a global community.<sup>13</sup> Proponents of liberalism look for the internalization of international norms among populations within states, who encourage governments to comply.<sup>14</sup> But effectiveness might be limited by the degree of states'

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<sup>7</sup> Edgardo Sobenes Obregon, *Recourse to the Security Council Under Article 94 (2) of the United Nations Charter* ¶¶ 2, 6, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (2017).

<sup>8</sup> LAURENCE H. TRIBE ET AL., THE LEGAL, PRACTICAL, AND MORAL CASE FOR TRANSFERRING RUSSIAN SOVEREIGN ASSETS TO UKRAINE 41 (2023), <https://rdi.org/wp-content/uploads/2023/09/2023.09.17-MPP-Report.pdf> [<https://perma.cc/8HY7-XJ4D>].

<sup>9</sup> Irène Couzigou, *Enforcement of UN Security Council Resolutions and of ICJ Judgments: The Unreliability of Political Enforcement Mechanisms*, in THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE 363, 375 (András Jakab & Dimitry Kochenov eds., 2017).

<sup>10</sup> John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 7 (2000); see also Cover, *supra* note 1, at 1606–07.

<sup>11</sup> See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3, 9 (2005).

<sup>12</sup> See ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 7 (2014).

<sup>13</sup> Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOT. J. 311, 312, 323–24 (1991); see also Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 204 (1993).

<sup>14</sup> See Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 198–99 (1996).

democratic accountability.<sup>15</sup> Constructivists believe that institutions — including international law — can construct new meanings, changing the norms and culture of a state and, ultimately, its actions.<sup>16</sup>

This Note draws on constructivist ideas, especially those of Professors Jutta Brunnée and Stephen Toope — who understand international law as communication — and reject force and, more radically, power relations as the proper measure of law.<sup>17</sup> Yet, Brunnée and Toope nevertheless embrace ideas of “adherence” and “legitimacy” that recall compliance.<sup>18</sup> So too do constructivist theories of persuasion,<sup>19</sup> derived in large part from managerialism.<sup>20</sup> The trouble with centering compliance, however, is that it easily collapses into coercion. After all, the most foolproof way to achieve compliance is to force rogue states to follow the rules — through violence if necessary. This raises the question of whether human rights adjudication is serving a purpose other than compliance,<sup>21</sup> and if so, whether stripping it of the power of violent enforcement is ever desirable. Here, Professors Natsu Taylor Saito and Robert Cover point to a response. Cover’s *Nomos and Narrative* suggests that law can “invite new worlds.”<sup>22</sup> Saito builds on Cover to describe human rights law as creating “a vision of rights and remedies.”<sup>23</sup>

This Note argues that human rights adjudication is an act of world building. Courts identify the disjuncture between the world as it is and the world as it should be according to the law. Then, they articulate how the world can be transformed to close the gap. Adjudication is, thus, a “creative activity”<sup>24</sup> grounded in a concern for individuals. The point is not, as in the managerial and liberal approaches, primarily compliance. Rather, it is to imagine what a superior world might look like. Communicating this gives satisfaction to victims, unsettles beliefs about the desirability of the status quo, and invites people to reimagine their worlds while becoming co-creators with the law of new ones. Instead of adherence to court-given norms, success in world building is the expansion of individuals’ moral imagination. But such conversion is not

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<sup>15</sup> See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 509 (1995).

<sup>16</sup> Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19, 20–21 (2000).

<sup>17</sup> See *id.* at 51, 60–61.

<sup>18</sup> *Id.* at 66.

<sup>19</sup> See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 625 (2004).

<sup>20</sup> See *id.* at 625 n.7.

<sup>21</sup> Cf. Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB. POL’Y REV. 127, 130 (2010).

<sup>22</sup> Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 68 (1983); see also Cover, *supra* note 1, at 1602 n.2.

<sup>23</sup> NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* 168, 216 (2020).

<sup>24</sup> Brunnée & Toope, *supra* note 16, at 46 (attributing the idea to Professor Lon Fuller).

genuine if it is not free.<sup>25</sup> And judges who do not deal in coercive enforcement have more space for creativity. They can ask more of states than if their judgments were enforceable through violence.

Adjudication as world building advances the study of international law beyond compliance.<sup>26</sup> It articulates a nonhierarchical and participatory model of law that relies on the nonviolent character of human rights adjudication and suggests why the absence of violent enforcement may be a feature rather than a bug of human rights courts.

## II. NO FORCE IN ENFORCEMENT

International courts, particularly those adjudicating human rights, cannot use force to compel compliance with their judgments.<sup>27</sup> The reason is fundamental to the global system, which has no centralized army or police.<sup>28</sup> As Professors Goldsmith and Daryl Levinson put it, international law lacks “enforcement authority capable of coercing powerful political actors to comply with unpopular decisions.”<sup>29</sup> This means that coercive enforcement, if any, is left to states that decide whether to lend their military or economic power, but almost never do.<sup>30</sup> In practice, states that comply, comply voluntarily.

Returning to the International Court of Justice, Article 94(1) of the U.N. Charter requires all U.N. member states to comply with ICJ decisions.<sup>31</sup> At the same time, ICJ jurisdiction is voluntary, meaning that the court can only hear cases against states if they give prior consent.<sup>32</sup> Consent might reflect willingness to comply from the outset, but this is

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<sup>25</sup> Cf. J.B. Schneewind, *Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy*, in *ESSAYS ON THE HISTORY OF MORAL PHILOSOPHY* 248, 249 (2009).

<sup>26</sup> See, e.g., Howse & Teitel, *supra* note 21, at 130; Par Engstrom, *Introduction: Rethinking the Impact of the Inter-American Human Rights System*, in *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: IMPACT BEYOND COMPLIANCE* 1, 1–20 (Par Engstrom ed., 2019); Patricia Palacios Zuloaga, *Judging Inter-American Human Rights: The Riddle of Compliance with the Inter-American Court of Human Rights*, 42 *HUM. RTS. Q.* 392, 400–01 (2020).

<sup>27</sup> This Note acknowledges the complex historical relationship between human rights and colonialism and ways that human rights rhetoric has at times been used to justify violent intervention. See generally BONNY IBHAWOH, *IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY* (2007) (describing how human rights discourse helped to legitimize colonial power in Nigeria); Alice L. Conklin, *Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895–1914*, 103 *AM. HIST. REV.* 419 (1998). But see KATHRYN SIKKINK, *EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY* 55–93 (2017) (describing the often-overlooked role that advocates from the Global South played in the creation of human rights institutions). The focus of the present argument is narrower: the tools of coercive enforcement that are unavailable to human rights courts. Courts can be “bloodless” in practice even if the concept of human rights is not.

<sup>28</sup> Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *HARV. L. REV.* 1791, 1824 (2009).

<sup>29</sup> *Id.* at 1794.

<sup>30</sup> See *infra* notes 42–44 and accompanying text for a rare case.

<sup>31</sup> U.N. Charter art. 94, ¶ 1.

<sup>32</sup> Statute of the International Court of Justice art. 36, ¶¶ 2, 37, June 26, 1945, 59 *Stat.* 1055, 1060, 3 *Bevans* 1179, 1186–87.

not always so. Take Russia, which ignored provisional measures in Ukraine's Genocide Convention suit.<sup>33</sup> Or the United States, which defied the judgment in a case about aiding paramilitary groups in Nicaragua.<sup>34</sup> When states disobey the ICJ, what can be done?

Article 94(2) of the U.N. Charter permits ICJ litigants to seek Security Council action against the recalcitrant party.<sup>35</sup> However, coercive enforcement might be limited. Some scholars argue that Article 94(2) provides for nonforcible measures only, such as economic sanctions.<sup>36</sup> And even if the Security Council could authorize intervention to enforce an ICJ judgment, it cannot compel states to fight. Ultimately, questions about the enforcement power of the Security Council are academic since states have only asked the Security Council to enforce ICJ decisions five times, and the Security Council has never agreed to intervene.<sup>37</sup>

In practice, states can try to enforce ICJ judgments on their own. Winning states may use countermeasures, which would otherwise be violations of international law, but under Article 2(4) of the U.N. Charter, they may not resort to force.<sup>38</sup> They may also request that the U.N. General Assembly ask member states to take diplomatic or economic measures.<sup>39</sup> Yet, General Assembly resolutions are not legally binding.<sup>40</sup> The United States incurred no additional liability when it ignored the Assembly's repeated requests to comply with the ICJ's *Nicaragua* judgment.<sup>41</sup> Finally, states can independently choose to impose sanctions in response to an ICJ decision. In March 2022, the United States recognized Myanmar's treatment of the Rohingya as genocide,<sup>42</sup> a decision possibly influenced by the ICJ's finding of genocidal risk.<sup>43</sup> Four days later, the United States imposed additional sanctions on Myanmar

<sup>33</sup> See *supra* note 6 and accompanying text.

<sup>34</sup> See Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT'L L.J. 15, 37–38, 42 (2001).

<sup>35</sup> U.N. Charter art. 94, ¶ 2. It is unclear whether Article 94(2) applies to provisional measures. Diego Sanchez Borjas, *The ICJ Order in Ukraine v. Russia: Quo Vadis?* VÖLKERRECHTSBLOG (Mar. 28, 2022), <https://voelkerrechtsblog.org/the-icj-order-in-ukraine-v-russia> [<https://perma.cc/WCT5-2JF9>]; Sobenes Obregon, *supra* note 7, ¶¶ 2, 5.

<sup>36</sup> Couzïgou, *supra* note 9, at 375.

<sup>37</sup> Sobenes Obregon, *supra* note 7, ¶ 31. The Security Council only voted on enforcement once in *Nicaragua v. United States*. *Id.* ¶ 33.

<sup>38</sup> U.N. Charter art. 2, ¶ 4; see also Michael N. Schmitt, *Lieber Institute White Paper: Responding to Malicious or Hostile Actions Under International Law*, LIEBER INST. (Apr. 26, 2022), <https://lieber.westpoint.edu/white-paper-responding-malicious-hostile-actions-international-law> [<https://perma.cc/U2XM-6MFU>].

<sup>39</sup> Couzïgou, *supra* note 9, at 375–76, 376 n. 76.

<sup>40</sup> *Id.* at 376.

<sup>41</sup> See *id.* at 376 & n.76; *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 292 (June 27).

<sup>42</sup> *Genocide, Crimes Against Humanity and Ethnic Cleansing of Rohingya in Burma*, U.S. DEP'T ST., <https://www.state.gov/burma-genocide> [<https://perma.cc/P8QX-5GDJ>].

<sup>43</sup> Application of the Covenant on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. Rep. 3, ¶¶ 71–75 (Jan. 23).

officials, but did not reference the ICJ.<sup>44</sup> Even when states take action that in effect contributes to the enforcement of an ICJ judgment, it is neither required by international law nor predictable. The contingent character of this enforcement is far removed from Cover's model of law in *Violence and the Word* where "[j]udges are . . . inextricably linked to[] the acts they authorize," creating a "bond between word and deed."<sup>45</sup>

Similarly, regional human rights courts have no mechanisms for coercive enforcement, however dormant. For instance, the Council of Europe, the political body linked to the European Court of Human Rights (ECtHR), has no authority to impose economic penalties for non-compliance.<sup>46</sup> Still less can it compel states through military force.<sup>47</sup> The Council can only suspend or terminate a state's membership, which releases states from the European Convention's human rights obligations.<sup>48</sup> Similarly, the Inter-American Court of Human Rights has no sticks to compel adherence. It requires domestic courts to construe domestic law in accordance with its jurisprudence.<sup>49</sup> But domestic courts ultimately decide how much to privilege international law.

The approach of the European Union (EU) is notably different. When states ignore EU law, including decisions by the EU's highest court, the Commission of the EU can punish states by withholding subsidies.<sup>50</sup> For example, the Commission froze about 138 billion euros in COVID-19 recovery aid and sustainable development assistance to Poland and Hungary in response to, among other things, violations of LGBTQ rights.<sup>51</sup> Human rights courts do not work this way. If Turkey and Ukraine persist in their failure to recognize same-sex unions in contravention of the ECtHR's jurisprudence,<sup>52</sup> the court will not stop the delivery of KN-95s or the provision of funding to pay for them.

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<sup>44</sup> Press Release, Antony J. Blinken, Sec'y of State, United States and Allies Impose Additional Sanctions on the Burmese Military Regime (Mar. 25, 2022), <https://www.state.gov/united-states-and-allies-impose-additional-sanctions-on-the-burmese-military-regime> [https://perma.cc/T6VL-ZD8M].

<sup>45</sup> Cover, *supra* note 1, at 1619, 1627.

<sup>46</sup> See *The Powers of the Assembly*, PARLIAMENTARY ASSEMBLY COUNCIL EUR., <https://pace.coe.int/en/pages/powers> [https://perma.cc/77V2-MYF7].

<sup>47</sup> *Id.*

<sup>48</sup> Statute of the Council of Europe arts. 8 & 9, May 5, 1949, 87 U.N.T.S. 108; Jannika Jahn, *The Council of Europe Excludes Russia: A Setback for Human Rights*, EJIL: TALK! (Mar. 23, 2022), <https://www.ejiltalk.org/the-council-of-europe-excludes-russia-a-setback-for-human-rights> [https://perma.cc/M7Y7-62LN].

<sup>49</sup> See PABLO GONZÁLEZ-DOMÍNGUEZ, *THE DOCTRINE OF CONVENTIONALITY CONTROL 1-2* (2018).

<sup>50</sup> See, e.g., Zoltan Simon, *How EU Is Withholding Funding to Try to Rein in Hungary, Poland*, BLOOMBERG (Dec. 30, 2022, 2:45 AM), <https://www.bloomberg.com/news/articles/2022-12-30/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland> [https://perma.cc/K7EF-FLWP].

<sup>51</sup> *Id.*

<sup>52</sup> See *Fedotova and Others v. Russia*, App. No. 40792/10, ¶¶ 224-25 (Jan. 17, 2023) (Grand Chamber), <https://hudoc.echr.coe.int/fre?i=001-222750> [https://perma.cc/Q9RJ-MXUB]; *Recent Case, Fedotova v. Russia*, App. No. 40792/10 (July 13, 2021), 135 HARV. L. REV. 1488, 1495 & n.83 (2022).

The result is a kind of bloodless adjudication — separated if not fully removed from violence. Though court decisions are legally binding, states have the practical freedom to defy them. Thus, the choice of whether to follow the law is not based on threat of material loss, but rather on more intangible motivations that cannot be reduced to the carrot or the stick. Human rights adjudication does not, contra Cover in *Violence in the Word*, “take[] place in a field of pain and death.”<sup>53</sup> Instead, it is “something less (or more) than law” according to Cover,<sup>54</sup> or the positivist idea of law as a series of commands secured by sanction — the “evil . . . inflict[ed]” when commands are “disregarded.”<sup>55</sup>

Aggregate studies of compliance paint a mixed picture. Out of twenty-seven ICJ judgments on the merits creating duties of implementation, from the court’s inception to 2003, most were followed, and only four were defied.<sup>56</sup> But the record for provisional measures is poor. Of the eleven cases in which provisional measures were ordered, states complied fully in only one, a 1986 border dispute between Burkina Faso and Mali.<sup>57</sup> Compliance rates of human rights courts appear to be lower. A 2014 study estimated that states implement ECtHR judgments about thirty-seven percent of the time.<sup>58</sup> And of all the Inter-American Court resolutions on compliance issued in 2012, the court found full compliance in only one case.<sup>59</sup> Without enforcement through violence, some noncompliance is guaranteed, and it is often substantial.

This leads to a dilemma. If one assumes that the goal of human rights adjudication is compliance, then the prognosis is discouraging. A solution might involve assessing when states comply and why in order to develop strategies for nudging recalcitrant states in line. Much scholarship on the effectiveness of international law and human rights has centered on these questions.<sup>60</sup> But if we acknowledge that the decentralized character of the global system precludes violent enforcement and, therefore, noncompliance is endemic to human rights courts, then from a compliance perspective, the status quo is fundamentally flawed.

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<sup>53</sup> Cover, *supra* note 1, at 1601.

<sup>54</sup> *Id.* at 1607.

<sup>55</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 118 (Wilfrid E. Rumble ed., 2001).

<sup>56</sup> CONSTANZE SCHULTE, *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* 82, 89, 271 (2004).

<sup>57</sup> *Id.* at 321–24, 399.

<sup>58</sup> Courtney Hillebrecht, *The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change*, 20 *EUR. J. INT’L RELS.* 1100, 1111 (2014).

<sup>59</sup> Cecilia M. Bailliet, *Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America*, 31 *NORDIC J. HUM. RTS.* 477, 494 (2013).

<sup>60</sup> See, e.g., Chiara Giorgetti, *What Happens After a Judgment is Given? Judgment Compliance and the Performance of International Courts and Tribunals*, in *THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS* 324 (Theresa Squatrito et al. eds., 2018); Couzigou, *supra* note 9; Hillebrecht, *supra* note 58; Bailliet, *supra* note 59; SCHULTE, *supra* note 56; Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002).

### III. ADJUDICATION AS WORLD BUILDING

There is, however, a different way to understand human rights adjudication, which is consistent with its nonviolent character and does not view compliance as the sole or primary measure of success. Under this view, the power of human rights courts instead derives from what they communicate.<sup>61</sup> They create images of more just worlds that (1) give relief to victims by affirming that they are entitled to better treatment, (2) educate others about the abuse, and (3) serve as models for transformation. Instead of compelling change through fear of pain, human rights courts spark transformation by imagining alternative worlds and inviting people to take part in building them.

#### A. Justice for Victims

At about 4:00 AM on March 30, 1976, the Paraguayan police woke Dolly Filártiga and forced her to collect the mutilated body of her seventeen-year-old brother, Joelito.<sup>62</sup> He had been whipped and burned to death with electric shocks<sup>63</sup> by Americo Peña-Irala, the Inspector General of Police in Asunción, in retaliation for his father's criticism of President Stroessner's dictatorship.<sup>64</sup> Joelito's back was striped with rows of welts,<sup>65</sup> and a wire had been forced into his penis to apply electric burns.<sup>66</sup> When the Filártigas pressed criminal charges, their attorney was arrested and shackled, and Peña-Irala "threatened him with death."<sup>67</sup>

Dolly fled to the United States.<sup>68</sup> Three years after her brother's murder, she filed a complaint against Peña-Irala under the Alien Tort Statute<sup>69</sup> before the Eastern District of New York.<sup>70</sup> She had discovered that Peña-Irala had come to the United States illegally, reported him to immigration authorities, and served him with process before he was deported.<sup>71</sup> The Second Circuit allowed her suit to go forward, and the

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<sup>61</sup> See Brunnée & Toope, *supra* note 16, at 61 (characterizing Fuller's "understanding of law" as "communicative and interactive").

<sup>62</sup> RICHARD ALAN WHITE, *BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS* 35–36 (2004); WILLIAM J. ACEVES, *THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA IRALA* 17–19 (2007); Dolly Filártiga, Opinion, *American Courts, Global Justice*, N.Y. TIMES (Mar. 30, 2004), <https://www.nytimes.com/2004/03/30/opinion/american-courts-global-justice.html> [<https://perma.cc/H4BU-NNKS>].

<sup>63</sup> ACEVES, *supra* note 62, at 18–19.

<sup>64</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 861–62 (E.D.N.Y. 1984).

<sup>65</sup> WHITE, *supra* note 62, at 22.

<sup>66</sup> ACEVES, *supra* note 62, at 18–19 (quoting Plaintiffs' Post-Trial Memorandum of Law and Facts at 3–4, *Filartiga*, 577 F. Supp. 860 (No. 79-C-917)).

<sup>67</sup> *Filartiga*, 630 F.2d at 878.

<sup>68</sup> See *id.*

<sup>69</sup> 28 U.S.C. § 1350.

<sup>70</sup> See *Filartiga*, 630 F.2d at 878–79.

<sup>71</sup> *Id.*



following year, the Eastern District entered a default judgment against Peña-Irala, finding him liable for torture and extrajudicial killing in violation of customary international law.<sup>72</sup> The court granted Dolly and her father an award of more than ten million dollars.<sup>73</sup>

They did not receive any of it. Peña-Irala's money in the United States ran out before the litigation was over, and because he had been deported to Paraguay, it was impossible for Dolly and her father to collect the judgment from his assets abroad. Because international law limits enforcement jurisdiction by a country's borders,<sup>74</sup> the Eastern District had no power over Peña-Irala in Paraguay. The court was, in *Filártiga*, bloodless, just like the ICJ or the Inter-American Court.

Yet, the Filártigas considered their suit against Peña-Irala to be a success.<sup>75</sup> In a *New York Times* op-ed, Dolly wrote that what mattered most to her was that "truth . . . triumph[ed] over terror."<sup>76</sup> Through the suit, she "obtain[ed] a measure of justice"<sup>77</sup> that would not have been possible in Paraguay. By granting judgment for the Filártigas and awarding multimillion-dollar damages in their favor, the district court gave formal recognition of the gravity of the harms inflicted on Joelito and his family. The Second Circuit affirmed that the right to be free from torture is *jus cogens* — a universal and inviolable rule of international law.<sup>78</sup> Professor William Aceves explains: "For the Filártiga family, the lawsuit was never about money; it was about seeking justice for Joelito and keeping his memory alive."<sup>79</sup> This is so for most Alien Tort Statute plaintiffs because they "seldom expect to collect any money in a successful judgment."<sup>80</sup> For the majority of "victims of human rights abuses, the purpose of these lawsuits is not to seek financial compensation — it is to find justice."<sup>81</sup> They "allow people who were powerless . . . to now turn the tables on those who used to be powerful."<sup>82</sup> Courts do this by building an alternative world to the one in which victims' suffering is inflicted and normalized. In *Filártiga*'s world,

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<sup>72</sup> *Filartiga v. Pena-Irala*, No. 79 Civ 917 (E.D.N.Y. June 23, 1981), reprinted in ACEVES, *supra* note 62, app. at 611–12.

<sup>73</sup> *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

<sup>74</sup> RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 432 (AM. L. INST. 2018).

<sup>75</sup> ACEVES, *supra* note 62, at 76.

<sup>76</sup> *Filártiga*, *supra* note 62.

<sup>77</sup> *Id.*

<sup>78</sup> "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). While the Second Circuit did not explicitly reference *jus cogens* obligations, it has been widely interpreted to imply them. See, e.g., Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 772 n.236 (2003).

<sup>79</sup> ACEVES, *supra* note 62, at 76.

<sup>80</sup> *Id.* at 9 n.41.

<sup>81</sup> *Id.* at 9.

<sup>82</sup> *Id.* at 12 (quoting Letter from Matt Eisenbrandt, Litig. Dir., Ctr. for Just. & Accountability, to William Aceves (June 1, 2006)).

torture lost, and Dolly triumphed. The court's radical promise was that this world was somehow more true than the one that allowed Joelito's murder, and it did not need to make Peña-Irala suffer to prove it.

*Filártiga* echoed in a presentation by the *Boniface v. Viliena*<sup>83</sup> plaintiffs after they won \$15.5 million under the Torture Victim Protection Act.<sup>84</sup> Responding to a question about whether the judgment would ever be recovered,<sup>85</sup> Nissandère Martyr, whose father lost a leg after being beaten by Mayor Viliena and his supporters,<sup>86</sup> said: "We hoped that there would be justice, there was justice, [and] we achieved justice."<sup>87</sup> Martyr would seek to enforce the award, and the money was badly needed — some days during the fifteen-year litigation he and his coplaintiffs had nothing to eat. But money was not their goal.<sup>88</sup> Nicole Phillips, the plaintiffs' attorney, added that with the pervasiveness of gang violence in Haiti, death became normalized.<sup>89</sup> The award mattered, even if it could not be recovered, because it "reminds Haitians their lives are valuable" and "worth as much as lives in Boston."<sup>90</sup>

### B. Education

Human rights courts also speak to bystanders in states responsible for harm who are unaware or indifferent to the abuses taking place. Judicial decisions make the abuse vivid and juxtapose it with alternative worlds. This educational function is particularly important in authoritarian states, where truth about the state is suppressed.<sup>91</sup>

According to Vadim Pak, then the director of the ECtHR's Russia division, the process of adjudication, which required the court to articulate all sides of a contested issue and rigorously justify its conclusions, lent its findings of abuse greater credibility.<sup>92</sup> And the discipline of law challenged the nihilism of state propaganda — the idea that even if the government lied, so did its critics.<sup>93</sup>

<sup>83</sup> No. 17-cv-10477 (D. Mass. Apr. 12, 2023).

<sup>84</sup> 28 U.S.C. § 1350 note; *Boniface*, slip op. at 1.

<sup>85</sup> Nissandère Martyr, Presentation, Litigating International Human Rights in U.S. Courts, Harvard Law School (Mar. 22, 2023).

<sup>86</sup> *Terror Campaign Against Human Rights Defenders: Boniface v. Viliena, CTR. FOR JUST. & ACCOUNTABILITY*, <https://cja.org/what-we-do/litigation/boniface-v-viliena> [<https://perma.cc/CWC5-7WWM>].

<sup>87</sup> Litigating International Human Rights in U.S. Courts, *supra* note 85.

<sup>88</sup> *Id.*

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

<sup>90</sup> *Id.*

<sup>91</sup> States that censor and preclude access to human rights court decisions entirely are harder cases. But the decisions can still play an educational role for bystanders outside the state.

<sup>92</sup> Interview with Vadim Pak, Senior Case Law., Eur. Ct. of Hum. Rts., in Strasbourg, Fr. (July 2021).

<sup>93</sup> See Editorial, *The Guardian View on Russian Propaganda: The Truth Is Out There*, THE GUARDIAN (Aug. 11, 2018, 8:38 PM), <https://www.theguardian.com/commentisfree/2015/mar/02/guardian-view-russian-propaganda-truth-out-there> [<https://perma.cc/E3MR-T478>].

Pak believed that the court changed how Russians saw torture. Before cases like *Mikheyev v. Russia*,<sup>94</sup> he explained, many believed that the use of torture against criminal suspects was justified.<sup>95</sup> Aleksey Mikheyev, a traffic officer, was electrocuted by the ears to make him confess to rape and murder.<sup>96</sup> The interrogators said that the shocks could cause his tongue to fall down his throat and threatened to shock his genitals.<sup>97</sup> When the pain became unbearable, he jumped out of the police station's window, breaking his spine.<sup>98</sup> On the same day, the girl, whom Mikheyev was accused of killing, was found unharmed.<sup>99</sup> Mikheyev became a paraplegic — “confined to bed,” unable to “urinate and empty his bowels” on his own.<sup>100</sup> Russia was found responsible.<sup>101</sup>

The court told many similar stories, which, covered in Russian media,<sup>102</sup> entered public imagination.<sup>103</sup> In 2017, a Russian human rights group found body camera footage showing the torture of a prisoner by eighteen guards in a Yaroslavl penal colony.<sup>104</sup> When it was leaked in the press, the reaction was powerful. A profile frame with the words “#TogetherAgainstTorture” circulated on social media.<sup>105</sup> Criminal investigation followed. In 2020, eleven guards were convicted and received real — albeit short — sentences of three to four years in prison.<sup>106</sup> A second leak revealing the torture of a Muslim prisoner, whose Quran was thrown on the floor, spurred the imprisonment of nine guards in 2022.<sup>107</sup> Even President Putin (cynically) condemned the

<sup>94</sup> App. No. 77617/01 (Jan. 26, 2006), <https://hudoc.echr.coe.int/fre?i=001-72166> [<https://perma.cc/X9LZ-JBD4>].

<sup>95</sup> Interview with Vadim Pak, *supra* note 92.

<sup>96</sup> *Mikheyev* ¶¶ 3, 20.

<sup>97</sup> *Id.* ¶ 20.

<sup>98</sup> *Id.* ¶ 22.

<sup>99</sup> *Id.* ¶ 25.

<sup>100</sup> *Id.* ¶ 75.

<sup>101</sup> *Id.* ¶ 136.

<sup>102</sup> See, e.g., Roman Kirillov, *Aleksey Mikheyev v. Russia*, IZVESTIA (Jan. 22, 2004, 6:08 PM), <https://iz.ru/news/286091> [<https://perma.cc/6Q6P-TT32>]; *Nizhny Resident Wins 250 Thousand Rubles from Russia*, KOMMERSANT (Jan. 26, 2006, 6:25 PM), <https://www.kommersant.ru/doc/988999> [<https://perma.cc/PB9L-NRT4>].

<sup>103</sup> Ariella Katz Miller, *The Cost of Expulsion, Dissent, and Human Rights in Russia*, RUSSIAN POL. (forthcoming Apr. 2024) (on file with the Harvard Law School Library).

<sup>104</sup> Yulia Gorbunova, *Leaked Video Blows Lid off Torture in Russian Prisons*, HUM. RTS. WATCH (July 30, 2018, 9:50 AM), <https://www.hrw.org/news/2018/07/30/leaked-video-blows-lid-torture-russian-prisons> [<https://perma.cc/7F64-TQER>].

<sup>105</sup> See *id.*; see also *Public Verdict Calls to Join Anti-torture Campaign*, HUM. RTS. IN RUSS. (Jan. 23, 2017), <https://hro.org/node/25875> [<https://perma.cc/6QKL-VH87>].

<sup>106</sup> *Court Acquitted Former Head of IK-1 in Yaroslavl and His Deputy in Torture Case*, TASS (Nov. 19, 2020, 8:05 AM), <https://tass.ru/proisshestiya/10045775> [<https://perma.cc/3BTP-XTCS>].

<sup>107</sup> *9 Former Employees of Yaroslavl IK-1 Received Real Sentences in Prisoner Torture Case*, MEDUZA (Apr. 4, 2022, 10:37 AM), <https://meduza.io/news/2022/04/04/devyat-byvshih-sotrudnikov-yaroslavskoy-ik-1-poluchili-sroki-po-delu-o-pytkah-zaklyuchennogo> [<https://perma.cc/Z75Q-FBP6>].

torture: prisoners “are our citizens, they are human beings, and they should be treated with humanity.”<sup>108</sup>

The European Court did not solve the problem of torture in Russia, nor could it have. But it may have sensitized Russians to the existence of the problem and helped to build the moral case for the abolition of torture. By giving the imprimatur of a court to the graphic realities of torture, *Mikheyev* and its progeny laid the groundwork for a domestic movement to improve conditions of interrogation and hold perpetrators accountable.<sup>109</sup> Without the court, survivors may not have had the courage to tell the public what had happened to them, and the videos from Yaroslavl may have fallen on deaf ears. *Mikheyev*’s reception suggests human rights courts can work by empowering victims and bystanders within states to become agents of transformation.

Closer to home, Nicaragua’s ICJ case against the United States changed Americans’ perceptions about the desirability of military intervention in Central America. And — despite the Reagan Administration’s refusal to participate in the merits of the case or comply with the judgment — it helped to establish lasting peace in the region.<sup>110</sup> The Sandinista government knew that as a small country, Nicaragua could not prevail against the United States by force.<sup>111</sup> It was “only in the Hague that Nicaragua [could] face the United States on equal terms.”<sup>112</sup>

On the night before Nicaragua filed suit, the United States tried to withdraw from ICJ jurisdiction with respect to disputes with Central American states.<sup>113</sup> The maneuver backfired. It made the Reagan Administration seem weak, as if it were running away from a case that the U.S. was certain to lose on the merits.<sup>114</sup> American press “overwhelmingly” sided with Nicaragua.<sup>115</sup> Cartoons mocked the administration, and one portrayed Reagan “thumbing his nose at the Court, while . . . international outlaws like Qadhafi and Khomeini called out ‘Ronnie, baby, welcome to the club!’”<sup>116</sup>

From there things got only worse for the United States. By a vote of 14–1 (with the American judge dissenting), the court issued provisional measures ordering the United States to cease all military activities

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<sup>108</sup> “Punishment Is Inevitable”: *Putin on Torture in Russian Prisons*, NEWS.RU (Dec. 23, 2021, 2:18 PM), <https://news.ru/society/nakazaniya-neizbezny-putin-o-pytkah-v-rossijskih-tyurmah> [<https://perma.cc/J87J-HKNC>].

<sup>109</sup> See Katz Miller, *supra* note 103 (manuscript at 109–11).

<sup>110</sup> Reichler, *supra* note 34, at 34.

<sup>111</sup> See *id.* at 18, 21–22, 38.

<sup>112</sup> *Id.* at 38 (quoting Abram Chayes, *Nicaragua, The United States, and the World Court*, 85 COLUM. L. REV. 1445, 1479 (1985)).

<sup>113</sup> Farooq Hassan, *A Legal Analysis of the United States’ Attempted Withdrawal from the Jurisdiction of the World Court in the Proceedings Initiated by Nicaragua*, 10 U. DAYTON L. REV. 295, 295 (1985); Reichler, *supra* note 34, at 30–31.

<sup>114</sup> See Reichler, *supra* note 34, at 31.

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

<sup>116</sup> *Id.* at 31–32.

threatening Nicaragua's sovereignty.<sup>117</sup> Then, Congress voted down aid to the Contras.<sup>118</sup> By the time the case entered the merits phase, the Reagan Administration, fearful that it would lose, withdrew from the case and prospectively left the treaty giving the ICJ jurisdiction.<sup>119</sup> Once again, the American public responded with "outrage."<sup>120</sup> Given the U.S. role in the formation of the ICJ, the about-face looked hypocritical — a result-oriented ploy inconsistent with the rule of law.<sup>121</sup> As expected, Nicaragua defeated the United States on all counts.<sup>122</sup>

The Reagan Administration purported to ignore the judgment, but the tide of public opinion had turned. That year, a CIA contractor was shot down flying a plane over Nicaragua, exposing the Iran-Contra affair.<sup>123</sup> Two years later, Congress voted down military aid to the Contras for the final time.<sup>124</sup> With assurance of U.S. nonintervention, the President of Costa Rica was able to negotiate a peace agreement with Honduras and Nicaragua.<sup>125</sup> The following year, the Sandinistas and Contras brokered what was for the most part a lasting peace.<sup>126</sup>

Although the Reagan Administration refused to comply with the judgment,<sup>127</sup> Nicaragua ultimately came out the winner. The Sandinistas' immediate goal — to stop the flow of congressional funds to the Contras — succeeded. What is more, the judgement "h[eld] up a mirror to America's face and challeng[ed] its image of itself as a law-abiding nation proud of its role in creating, supporting and defending the international legal order."<sup>128</sup> The United States could no longer meddle in the affairs of Latin American states while wearing the mantle of international law. *Nicaragua* became a classic of public international law textbooks, and U.S. intervention, a textbook violation. This is perhaps the most enduring legacy of the case — it framed the history of

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<sup>117</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Provisional Measures, 1984 I.C.J. Rep. 169, ¶ 41 (May 10).

<sup>118</sup> Helen Dewar & Joanne Omang, *House Approves Aid to El Salvador, Not Nicaraguan Rebels*, WASH. POST. (May 25, 1984), <https://www.washingtonpost.com/archive/politics/1984/05/25/house-approves-aid-to-el-salvador-not-nicaraguan-rebels/oeof7542-3fo8-43c2-b169-e047516a807b> [https://perma.cc/8N36-975K].

<sup>119</sup> Reichler, *supra* note 34, at 37–38.

<sup>120</sup> *Id.* at 37.

<sup>121</sup> See *id.* at 37–38 (quoting Chayes, *supra* note 112, at 1446).

<sup>122</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 292 (June 27); Reichler, *supra* note 34, at 41.

<sup>123</sup> Reichler, *supra* note 34, at 43–44.

<sup>124</sup> See Tom Kenworthy, *House Rejects Reagan's Contra-Aid Request, 219 to 211*, WASH. POST. (Feb. 4, 1988), <https://www.washingtonpost.com/archive/politics/1988/02/04/house-rejects-reagans-contra-aid-request-219-to-211/11117b7c-0a78-48e4-86ba-e6a162a2c321> [https://perma.cc/N2WZ-ZYTQ].

<sup>125</sup> Reichler, *supra* note 34, at 44–45.

<sup>126</sup> *Id.* at 45.

<sup>127</sup> *Id.* at 42.

<sup>128</sup> *Id.* at 23.

intervention on the continent and stamped it with the judicial seal of illegality.

### C. *Models for Transformation*

Human rights courts not only spotlight the disjuncture between states' treaty commitments and the realities on the ground, but they can also articulate a positive vision for how states should be transformed to close the gap. No court has done more in this regard than the Inter-American Court of Human Rights, which has become known for its expansive and creative jurisprudence of remedies.<sup>129</sup> By envisioning what must change to ensure that abuses do not happen again, the Inter-American Court creates models for social transformation.

An exemplary case is *González v. Mexico*<sup>130</sup> — also known as the Cotton Field Case. *González* concerned the disappearance and murder of three young women “of humble origins”<sup>131</sup> in Ciudad Juárez: Laura Berenice Ramos Monárrez, a seventeen-year-old high school student; Claudia Ivette González, a twenty-year-old worker at a maquiladora; and Esmeralda Herrera Monreal, a fifteen-year-old “domestic employee.”<sup>132</sup> After the women’s disappearance was discovered, authorities made no effort to search for them,<sup>133</sup> relying on sexist stereotypes to classify their disappearance as “not high risk” because of their sexual preferences and class.<sup>134</sup> The police told Esmeralda’s mother that “if anything happened to [Esmeralda], it was because she was looking for it . . . . [A] good woman, stays at home.”<sup>135</sup> Weeks to months after their disappearances were reported, the women’s mutilated bodies were found in a cotton field in Juárez.<sup>136</sup> Their deaths formed a part of a broader pattern. Between 1993 and 2005, more than four thousand women from the city had disappeared.<sup>137</sup> The Inter-American Court found Mexico responsible.<sup>138</sup>

*González* broke ground as the first decision of an international court to use the term “femicide.”<sup>139</sup> It was also noteworthy for its remedies. In addition to pecuniary compensation for the women’s families, the

<sup>129</sup> See Palacios Zuloaga, *supra* note 26, at 408–09.

<sup>130</sup> *González v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

<sup>131</sup> *Id.* ¶ 168.

<sup>132</sup> *Id.* ¶¶ 113, 165–167.

<sup>133</sup> *Id.* ¶¶ 182–195.

<sup>134</sup> See *id.* ¶¶ 196–208.

<sup>135</sup> *Id.* ¶ 198 (quoting testimony of Mrs. Monreal Jaime).

<sup>136</sup> *Id.* ¶¶ 2, 209–221; Mónica Ortiz Uribe, *Juárez Murder Victims Get a Memorial; Families Still Seek Justice*, KJZZ (Nov. 8, 2011), <https://kjzz.org/content/8060/ju%C3%A1rez-murder-victims-get-memorial-families-still-seek-justice> [<https://perma.cc/G3SL-Z7DT>].

<sup>137</sup> *González* ¶ 119.

<sup>138</sup> *Id.* ¶¶ 279–286.

<sup>139</sup> See *id.* ¶ 143; Dandara Oliveira de Paula, *Human Rights and Violence Against Women: Campo Algodonero Case*, REVISTA ESTUDOS FEMINISTAS, 2018, at 1, 6–7.

court ordered measures of satisfaction including a ceremony with high-ranking officials acknowledging Mexico's international responsibility, organized in consultation with the families, and broadcast on local and national radio and television;<sup>140</sup> publication of the judgment in major newspapers;<sup>141</sup> and erection of a monument in the field where the bodies were found, to "commemorate the women victims of gender-based murder in Ciudad Juárez . . . as a way of dignifying them and as a reminder of the context of violence they experienced."<sup>142</sup> These measures were directed toward the victims, but they also had a systemic purpose. To monumentalize Laura, Claudia, and Esmeralda was to reject the gender- and class-based dehumanization that had led to their murder and the murder of hundreds of women like them. And to give their mothers a voice in deciding how government officials would take responsibility was to invert the subordination that had made them feel powerless in the face of an indifferent and often hostile bureaucracy.

The court also ordered guarantees of non-repetition that expressly called for forward-looking remedies, where the court described in detail how Mexican policy should be transformed. It required Mexico to harmonize procedures for investigating "the disappearance, sexual abuse and murder of women" with international obligations, and to adopt a gender-informed perspective.<sup>143</sup> Responding to the mothers' requests, the court asked Mexico to build a website tracking data about the women that disappeared in Chihuahua;<sup>144</sup> create a database of personal information and tissue samples of all disappeared women in Mexico, their consenting next of kin, and unidentified bodies in Chihuahua, while protecting their personal information;<sup>145</sup> and improve gender training for "police, prosecutors, judges, military officials, [and] public servants."<sup>146</sup> The court felt that the existing training, which focused on law, should be supplemented with training on how "stereotyped ideas and opinions" interfere with women's exercise of human rights.<sup>147</sup> Finally, the court ordered Mexico to create a gender education program for the public of Chihuahua.<sup>148</sup> The goal — to eliminate the entrenched sexism that enabled gender-based killing to proliferate in Juárez and allowed the government to look the other way.

The creativity and precision of the *González* remedies are emblematic of the Inter-American Court's commitment to world building as

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<sup>140</sup> *González* ¶ 469.

<sup>141</sup> *Id.* ¶ 468.

<sup>142</sup> *Id.* ¶ 471.

<sup>143</sup> *Id.* ¶ 502.

<sup>144</sup> *Id.* ¶ 508.

<sup>145</sup> *Id.* ¶ 512.

<sup>146</sup> *Id.* ¶¶ 541–542.

<sup>147</sup> *Id.* ¶ 540.

<sup>148</sup> *Id.* ¶ 543.

a response to harm. Take *Contreras v. El Salvador*,<sup>149</sup> a case about the forced disappearance of children during the Salvadoran civil war. There, the court ordered not only legislation to “define the crime of forced disappearance” in domestic law,<sup>150</sup> but also the naming of three schools after the plaintiffs in locations symbolic to harms they suffered,<sup>151</sup> and the creation of a documentary to “be distributed as widely as possible among the victims, their representatives, and the country’s schools and universities.”<sup>152</sup> *Mack Chang v. Guatemala*<sup>153</sup> ordered the creation of a scholarship memorializing a slain anthropologist “to cover the complete cost of a year of study in anthropology at a prestigious national university.”<sup>154</sup> And *Olmedo-Bustos v. Chile*<sup>155</sup> required amendment of Chile’s constitution to expand freedom of expression.<sup>156</sup>

The almost legislative character of the Inter-American Court’s remedies may seem strange. On the one hand, the court’s orders can be criticized as overreach into states’ domestic spheres that interferes with self-government and autonomy. On the other, their specificity makes it more likely that states do not comply to the letter, reducing — on a compliance-centered view — the court’s legitimacy and power. Indeed, the Cotton Field monument Mexico erected in response to *González* was criticized for papering over a deeper problem. In the two years from the decision in *González* to the monument’s unveiling, the police had failed to adequately investigate the murders in contravention of the court’s orders,<sup>157</sup> and the disappearance of young women in Juárez continued.<sup>158</sup>

To make sense of the Inter-American Court’s remedies is to recognize that they are not a blueprint for compliance, but rather a starting place for citizens to imagine how their societies could be more justly structured.<sup>159</sup> Their precision serves not to dictate the details of a court-ordered scheme, and indeed the court lacks the power to do so. Instead, the detail paints a picture — with tantalizing verisimilitude — of an alternative to the status quo. Precision is needed to make the picture

<sup>149</sup> *Contreras v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232 (Aug. 31, 2011).

<sup>150</sup> *Id.* ¶ 219.

<sup>151</sup> *Id.* ¶ 208.

<sup>152</sup> *Id.* ¶ 210.

<sup>153</sup> *Mack Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003).

<sup>154</sup> *Id.* ¶ 285; see also Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 381–82 (2008).

<sup>155</sup> *Olmedo-Bustos v. Chile (The Last Temptation of Christ)*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2011).

<sup>156</sup> Antkowiak, *supra* note 154, at 382–83 (citing *Olmedo-Bustos* ¶¶ 97–98).

<sup>157</sup> See *González v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 461–462 (Nov. 16, 2009); Ortiz Uribe, *supra* note 136.

<sup>158</sup> See Ortiz Uribe, *supra* note 136.

<sup>159</sup> Cf. Palacios Zuloaga, *supra* note 26, at 393; Engstrom, *supra* note 26, at 1.



seem like an attainable and, ultimately, desirable model for change. But the model need not be copied to the letter for it to be successful. Rather, by picturing an alternative, the model expands people's capacity to imagine just worlds.

Too little (or too much) compliance does not undermine the Inter-American Court because it is arguably *designed* to do something different. Instead of a hierarchical relationship — court orders → state is constrained to obey — the court considers the people within the state to be the agents of change. The court's remedies, therefore, reflect an alternative relationship: the world built by the court inspires people to reimagine their countries → the people build their desired world.

Paradoxically, the outrage that the mothers in *González* felt at Mexico's failure to adequately solve the problem of gender-based violence may have been a sign that the judgment was working. By the time that the Cotton Field monument was unveiled, they had transformed themselves from victims into holders of rights, and their personal tragedies inspired a movement to stop gender-based violence in Latin America and beyond.<sup>160</sup> Today, activists from Austria<sup>161</sup> to Pakistan<sup>162</sup> use the language of femicide, enshrined in *González*, to demand life with dignity.

#### IV. IS NONVIOLENT LAW (EVER) WORTH IT?

There is, however, a cost to bloodless law. Since human rights courts do not have violence at their disposal, victims of human rights abuse cannot use court-sanctioned violence as a shield to protect themselves from further harm. Violence itself may be a cost of renouncing violence. Despite the ICJ's order, Russia's crimes in Ukraine continue and, despite *González*, rates of violence against women in Mexico remain high.<sup>163</sup>

Yet, the alternative, the attempt to secure compliance through violence — whether overt, like military intervention, or more subtle, like the denial of funds for COVID relief<sup>164</sup> — is not a clearly more attractive choice. When states comply with human rights law not because the

<sup>160</sup> See, e.g., Ortiz Uribe, *supra* note 136; Fariba Nawa, "Women Aren't Recognised as Individuals but as Extensions of Men," SISTERS EUR., <https://sistersofeuropa.eu/women-arent-recognised-as-individuals-but-as-extensions-of-men> [<https://perma.cc/GMS9-33C9>].

<sup>161</sup> Aarti Narsee, *Activists Fuel Global Movement to Fight Violence Against Women*, WOMEN'S MEDIA CTR. (Nov. 23, 2021), <https://womensmediacenter.com/news-features/activists-fuel-global-movement-to-fight-violence-against-women> [<https://perma.cc/62QN-4MZG>].

<sup>162</sup> Anmol Irfan, "Women Have to Keep Themselves Safe Because No One Else Will": When Will Pakistan Address Its Femicide Problem?, NEW ARAB (Sept. 30, 2021), <https://www.newarab.com/features/pakistan-needs-address-its-femicide-problem> [<https://perma.cc/9JKU-DGQ2>].

<sup>163</sup> Tom Phillips & Lillian Perlmutter, "Femicide Nation": Murder of Young Woman Casts Spotlight on Mexico's Gender Violence Crisis, THE GUARDIAN (Apr. 26, 2022, 5:11 PM), <https://www.theguardian.com/society/2022/apr/26/murder-young-woman-mexico-femicide> [<https://perma.cc/DXY2-W2UZ>] (reporting 1,015 cases of femicide in Mexico in 2021, an increase following the pandemic).

<sup>164</sup> Simon, *supra* note 50.

people within them believe it is right but because they fear the imposition of painful consequences, their compliance is likely to falter when the threat is gone. By contrast, the law of world building looks beyond compliance to motivate free agents of transformation. Separation from violence also allows law to embrace more capacious goals. In violence-backed law, the evils of violence, which Cover powerfully illustrates,<sup>165</sup> counsel restraint in the substance of legal prohibition. World building, by contrast, is a boldly creative activity because, unlike in totalitarian utopia, if the builders disagree on the vision nobody will get hurt.

In a 408 C.E. letter, Augustine, a Christian theologian, urged the proconsul of Africa to spare heretics' lives because execution would give them — at least from their perspective — the moral upper hand.<sup>166</sup> He concluded that “when people are led through force alone and not through teaching even to . . . embrace a great good, the efforts expended prove burdensome rather than profitable.”<sup>167</sup> The attempt to stamp out heretical ideas through violence would be futile, securing at most outward obedience because forced conversion would not be genuine.

Obedience secured through threat often dissipates when the threat is no longer present. After 9/11, the United States “embraced women’s rights and empowerment” as justification for military intervention in Afghanistan.<sup>168</sup> With the Taliban ousted, women’s lives incrementally improved. Many girls were permitted to go to school, and women returned to work.<sup>169</sup> But when American soldiers withdrew from Afghanistan, the Taliban, whom they had sought to repel through force, returned and reimposed the same draconian restrictions on the rights of women that were in place prior to the invasion.<sup>170</sup> Violence could not fundamentally change the beliefs that led many Afghans to embrace the Taliban. The effect, it appears, was quite the contrary.

Moral imagination, as Cover recognized, cannot be compelled. He observed that “pain and death destroy the world that ‘interpretation’ calls up”<sup>171</sup> and that “meaning-creating activity is not naturally

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<sup>165</sup> Cover, *supra* note 1, at 1602–03, 1603 n.5 (stating that “pain destroys, among other things, language itself,” *id.* at 1602, and “[w]hile pain is the extreme form of world destruction, fear may be as potent,” *id.* at 1603 n.5). *But see id.* at 1608 (“Very often the balance of terror in this regard is just as I would want it.”).

<sup>166</sup> Augustine, Letter 100: Augustine to Donatus (408), *reprinted in* AUGUSTINE: POLITICAL WRITINGS 134, 135–36 (E.M. Atkins & R.J. Dodaro eds., 2001).

<sup>167</sup> *Id.* at 136.

<sup>168</sup> John R. Allen & Vanda Felbab-Brown, *The Fate of Women’s Rights in Afghanistan*, BROOKINGS (Sept. 2020), <https://www.brookings.edu/articles/the-fate-of-womens-rights-in-afghanistan> [https://perma.cc/Y95V-H377].

<sup>169</sup> *Women in Afghanistan: The Back Story*, AMNESTY INT’L UK, <https://www.amnesty.org.uk/womens-rights-afghanistan-history> [https://perma.cc/2Y5M-BDBD].

<sup>170</sup> *See generally* INT’L CRISIS GRP., TALIBAN RESTRICTIONS ON WOMEN’S RIGHTS DEEPEN AFGHANISTAN’S CRISIS (2023), <https://www.crisisgroup.org/asia/south-asia/afghanistan/329-taliban-restrictions-womens-rights-deepen-afghanistans-crisis> [https://perma.cc/4JP2-QGSW].

<sup>171</sup> Cover, *supra* note 1, at 1602.

coextensive with . . . violence.”<sup>172</sup> “[B]ecause law is the attempt to build future worlds, the essential tension in law,” when it is enforced by violence, “is between the elaboration of legal meaning and the exercise of or resistance to the violence of social control.”<sup>173</sup> In other words, because violence destroys meaning, when law relies on violence, its capacity to build new worlds is inherently limited. Imagination requires freedom to depart from the world as it is. Such freedom allows a person to resist and transform their surroundings, sometimes even in the face of pain. Fear of punishment may outweigh a Russian soldier’s fear of Ukrainian guns.<sup>174</sup> But conversion to recognize the evil of the war can inspire the soldier to refuse to fight despite the consequences.

Conversion happens, even in a dictatorship. On August 22, 2022, Senior Lieutenant Dmitry Vasilets — a patriotic twenty-seven-year-old enlistee, who had attended a military boarding school, graduated with honors from one of Moscow’s best military academies, and served in the Russian army for four-and-a-half years — submitted his resignation, and refused to return to Ukraine.<sup>175</sup> Vasilets was a deeply committed soldier. He was known as a person who “followed any order without delay,” and during his years of service maintained a nearly perfect record.<sup>176</sup> But after three months on the front, he “started to realize that something wasn’t right.”<sup>177</sup> In May, two of his closest friends were killed.<sup>178</sup> On a condolence visit to his friend’s parents in Buryatia, he learned about Buddhism and became a pacifist.<sup>179</sup> He would later tell journalists:

And people don’t even know, because [the news] does not talk about it, how people are sitting there in the basements, shelled six times, how a grandfather is looking for a grandmother among the driveways who was killed by a bomb fragment. And it is not always possible to know whose shell it was, but human grief is the same.<sup>180</sup>

Vasilets was sentenced to two-and-a-half years in a penal settlement colony.<sup>181</sup> He chose to be imprisoned rather than take part in a war in

<sup>172</sup> *Id.* n.2.

<sup>173</sup> *Id.*

<sup>174</sup> See UK Ministry of Defence (@DefenseHQ), TWITTER (Nov. 4, 2022, 2:30 AM), <https://twitter.com/DefenceHQ/status/1588418427944898561> [<https://perma.cc/HK5G-2Z6D>] (describing Russia’s use of “barrier troops” to threaten to shoot retreating soldiers).

<sup>175</sup> See Anna Pavlova, “Send Me to Jail, Fire Me, And That’s It.” Senior Lieutenant Vasilets Explains Why He Refused to Go to Ukraine and Chose Prison, MEDIAZONA (Apr. 11, 2023, 12:16 PM), <https://zona.media/article/2023/04/11/vasilets> [<https://perma.cc/PP2A-ZHE8>]; “My Soul Is in My Own Hands”: The Case of the First Russian Officer Charged with a Felony for Refusing to Kill in Ukraine, MEDUZA (Dec. 27, 2022, 2:09 PM) [hereinafter *My Soul Is in My Own Hands*], <https://meduza.io/en/feature/2022/12/27/my-soul-is-in-my-own-hands> [<https://perma.cc/N5KA-BBQ5>].

<sup>176</sup> *My Soul Is in My Own Hands*, *supra* note 175.

<sup>177</sup> Pavlova, *supra* note 175.

<sup>178</sup> *My Soul Is in My Own Hands*, *supra* note 175.

<sup>179</sup> Pavlova, *supra* note 175.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

which he did not believe. While most have not been as vocal in their opposition, since the start of the war, more than three thousand Russian soldiers have been prosecuted for failure to fight.<sup>182</sup>

It is hard to know whether these individual acts of courage will have any effect on lives in Ukraine. Yet it would seem that Russia could not continue the war if enough soldiers, like Vasilets, refused to participate in it. Human rights courts can help people complicit in abuse envision such alternatives. This is not an easy solution. Vasilets remains in prison, and Russia's war continues. Nor does it require Ukrainians to renounce their right to use violence in self-defense. But world building may offer one of the few ways to address the root cause of the war.

Separation from violence also enables law to make greater moral demands. Coverian law must be limited since every prohibition carries with it the latent threat of violence. And in deciding whether to impose Coverian law, the judge must weigh the benefits against the necessary evils of its enforcement. One of Cover's key insights is that even good laws, when enforced, "signal and occasion the imposition of violence upon others."<sup>183</sup> Every law reflects a "balance of terror" even if the balance struck is ultimately desirable.<sup>184</sup> But not all moral norms justify the infliction of violence. Compulsion of virtue beyond what is minimally necessary for society to function can seem cruel, a gratuitous interference into private life by the heavy hand of the state.<sup>185</sup> For this and similar reasons, Thomas Aquinas concluded in the *Summa Theologica* that "human law does not prohibit everything that is forbidden by the natural law."<sup>186</sup> Rather, it ought to prohibit only those vices that "hurt . . . others, without the prohibition of which human society could not be maintained."<sup>187</sup> Nonviolent law, by contrast, does not need to be weighed against the infliction of pain. Its scales tip toward virtue because there is no Coverian "terror" on the other side of the balance. It is appropriate for the Inter-American Court to build detailed visions of remedies because it has no power to compel adherence to them.

Judgments backed by the threat of economic sanction may seem less severe than direct intervention, but they share the disadvantages of blunter expressions of violence. Imagine that the Inter-American Court of Human Rights, like the European Court of Justice, could enforce the remedies it prescribes by cutting COVID recovery aid.<sup>188</sup> Or that the

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<sup>182</sup> Maksim Litvarin & Sergei Golubev, *Not Show Up > Refuse > Run Away*, MEDIAZONA (Sept. 21, 2023, 11:20 AM) <https://zona.media/article/2023/09/21/flee> [<https://perma.cc/WZP9-3AQ5>].

<sup>183</sup> Cover, *supra* note 1, at 1601.

<sup>184</sup> *Id.* at 1608.

<sup>185</sup> *Cf.* THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 96, art. 2, at 2321 (Fathers of the English Dominican Province trans., Benziger Brothers eds., 1947) (c. 1271).

<sup>186</sup> *Id.* at 2322.

<sup>187</sup> *Id.* at 2321.

<sup>188</sup> *See* Simon, *supra* note 50. The European Commission imposes sanctions for noncompliance. *Id.*

court could impose a trade embargo to prevent the sale of masks to states that ignore its judgments. With such forceful levers at their disposal, judges may — and Aquinas suggests ought to — think twice before building new worlds. Judges would have to ask themselves, for example, whether the enforcement of a highly specific program for gender education, as the court ordered in the Cotton Field Case, would be worth the infliction of economic pain. Or, as in *Mack Chang*, whether failure to name a scholarship after a victim of an extrajudicial killing would justify the withholding of aid, which could increase COVID deaths. It would seem perverse to punish states for the failure to film a documentary about the forced disappearance of children, as in *Contreras*, by putting children's well-being during the pandemic in potential danger. Paradoxically, a more powerful human rights court would ask less of states and would, or should, limit the scope of its own remedies.

This then is the hidden power of nonviolent adjudication. By resolving the contradiction between law and violence<sup>189</sup> in favor of law, human rights courts can, as the Inter-American Court does, nudge law closer to justice. Judges have the freedom to imagine just worlds, like prophets — as Max Weber might say<sup>190</sup> — rather than central planners.

The question remains of when the benefits of world building outweigh the risk that abuses not violently checked will lead to further violence. Under international law, violence is available even if courts are not tasked with the role of wielding it.<sup>191</sup> But it is an imperfect remedy. Obedience secured through threat is often fragile. And violence cannot address the root of the problem — the motivation driving perpetrators to harm. Ukraine need not wait for the Vasiletses of Russia to wake up.<sup>192</sup> Yet, without them, it is hard to imagine a lasting peace.

## CONCLUSION

This Note argues that human rights courts can succeed without violence. It is a bold claim. Some critical theorists point to the complex relationship between human rights law and colonial history to conclude that violence is embedded in human rights.<sup>193</sup> Realists, by contrast, warn that human rights law is too weak.<sup>194</sup> Both, perhaps, worry that

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<sup>189</sup> See Cristoph Menke, *Law and Violence*, 22 LAW & LITERATURE 1, 1 (2010); Cover, *supra* note 1, at 1602 n.2.

<sup>190</sup> Cf. Max Weber, *The Three Types of Legitimate Rule*, 4 BERKELEY PUBL'NS SOC'Y & INSTS. 1, 6–10 (Hans Gerth trans., 1958) (1922) (describing prophets' charismatic authority). The analogy to Weber is imperfect, however, because the charisma of human rights adjudication lies in its procedure and judgments rather than the personal charm of adjudicators.

<sup>191</sup> U.N. Charter art. 2, ¶ 4.

<sup>192</sup> Cf. Letter from Martin Buber to Mahatma Gandhi (Feb. 24, 1939), <https://www.jewishvirtuallibrary.org/letter-from-martin-buber-to-gandhi> [<https://perma.cc/QTP8-C2PS>] (arguing that nonviolent resistance does not work in Nazi Germany).

<sup>193</sup> See sources cited *supra* note 27.

<sup>194</sup> See GOLDSMITH & POSNER, *supra* note 11, at 123–26; POSNER, *supra* note 12, at 6–8.

without coercive enforcement international law enables the strong to oppress the weak.<sup>195</sup> Most assume that compliance is the benchmark toward which international law should strive.<sup>196</sup> This Note offers an alternative account of adjudication as world building that articulates how the nonviolent character of human rights courts is consistent with and perhaps best suited to their liberatory promise. Two lessons follow.

If the absence of violent enforcement is a feature and not a bug of human rights courts, then the preoccupation with improving compliance with judicial pronouncements may be misplaced. Instead, scholars and practitioners would be wise to focus their attention on strengthening the moral charisma of human rights courts or, in other words, on making the worlds they build seem desirable. This is not a question of making human rights courts less judicial — quite the contrary. The gravity of judicial proceedings, the pomp,<sup>197</sup> the authority that derives from reasoning that aims toward neutrality, amplifies the power of human rights. Nor should human rights courts — acknowledging their lack of coercive power — soften the language of their judgments to suggestions instead of demands. Rather they should demand their imagined worlds boldly, while strategizing how the demand can best be framed to inspire people outside the walls of the court to take up its call.

There is also a lesson for domestic law. If human rights adjudication can, and does, work without violence, then alternatives to criminal law, like restorative and transformative justice,<sup>198</sup> may not be as radical as they seem. International law, Professor Anne-Marie Slaughter argues, demands “faith in the power of law without force behind it.”<sup>199</sup> Yet it is also a real-world model for how an alternative to Coverian law might succeed. If the power of law can be conceived apart from the threat of violence, and the global system has survived this long without a global police force, how different could we imagine domestic law to be?

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<sup>195</sup> See GOLDSMITH & POSNER, *supra* note 11, at 10, 38; POSNER, *supra* note 12, at 7; cf. Jean Paul Sartre, *Preface to FRANTZ FANON, THE WRETCHED OF THE EARTH*, at xliii, lv (1963).

<sup>196</sup> See sources cited *supra* note 60.

<sup>197</sup> See Reichler, *supra* note 34, at 32 (“‘La Cour,’ called out the Registrar, and all rose while the fifteen black-robed judges filed into the room, stepped up and behind the longest judicial bench in the world, continued in single file . . . , and ceremoniously sat down.”).

<sup>198</sup> See generally HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990); Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 219 (2018).

<sup>199</sup> Anne-Marie Slaughter, *Tribute to Professor Abram Chayes: Foreword*, 42 HARV. INT’L L.J. 1, 1 (2001).