

THE CLASH OF CONSTITUTIONAL AND INTERNATIONAL LAW IN ARGENTINEAN CASE LAW

Hernán Victor Gullco*

I.	INTRODUCTION	315
II.	THE TRADITIONAL CASE LAW OF THE COURT IN RELATION TO INTERNATIONAL LAW	320
III.	THE NEW PARADIGM INITIATED WITH <i>EKMEKDJIAN</i>	323
IV.	THE COURT CHANGES COURSE IN MINISTERIO DE RELACIONES EXTERIORES	327
V.	THE FLAWS IN THE DECISION OF THE COURT	329
VI.	SOME PROBLEMS IN THE INTER-AMERICAN COURT JURISPRUDENCE	335
VII.	AN ATTEMPT TO RECONCILE COMPETING INTERESTS	337
VIII.	CONCLUSION.....	341

I. INTRODUCTION

The Argentinean Supreme Court has recently held that decisions of the Inter-American Court of Human Rights (the Inter-American Court) cannot modify *res judicata* decision of the Argentinean judiciary. This decision overruled prior Supreme Court precedents, and, as this article will demonstrate, ignores both explicit provisions of the American Convention on Human Rights and the provision of the Argentinean Constitution that establishes the constitutional supremacy of international human rights treaties. The Argentinean Supreme Court should have remained faithful to its prior precedents. Nevertheless, it is important to recognize that the Supreme Court's approach was motivated in part by the potential unfairness of the

* Professor of Law, Universidad Torcuato Di Tella, J.D., University of Buenos Aires Law School (1982), LL.M, University of Miami Law School (1992); Doctor in Law, University of Buenos Aires Law School (2013).

Inter-American Court's decisions towards parties not before the Court. Since only the petitioner and the state appear before the Inter-American Court, its decisions required reopening cases where the party who had prevailed in the domestic court system did not enjoy representation before the Court. This is not the typical situation when a tribunal provides additional appellate review. The Inter-American Court needs to modify its procedures if it wishes to protect itself from the attack that it acts as an appellate tribunal, reopening domestic cases without providing full procedural guarantees to all interested parties.

Until 1992, the majority of the Argentinean Supreme Court (the Court) decided, as the United States Supreme Court held, that treaty law had the same status as statutes enacted by Federal Congress. That meant that a subsequent statute could repeal an international treaty. In 1992, the Court decided *Ekmekdjian v. Sofovich*,¹ where it introduced a fundamental change in the Court's case law. The Court posited that international law was supreme in relation to domestic law.² The Court arrived at that conclusion interpreting Article 31 of the Argentinean Constitution, originally enacted in 1853, which states: "This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each province are bound thereby, notwithstanding any provision to the contrary included in the provincial laws or constitutions"³

This change in the case law was ratified by the constitutional reform of 1994.⁴ Article 75, Section 22 of the new constitutional text states that "[t]reaties and concordats have a higher hierarchy than laws."⁵ It further provides that

The Interamerican Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or

1. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1992, "Ekmekidjian, Miguel c. Sofovich, Gerardo / recurso extraordinario" Fallos (1992-315-1492) (Arg.).

2. *Id.*

3. Art. 31, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

4. *Id.* art. 22.

5. *Id.*

Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.⁶

In order to attain constitutional hierarchy, other human rights treaties and conventions require a two-thirds vote of all the members of each House, after their approval by Congress.⁷

The words used in this paragraph, “in the full force of their provisions, they have constitutional hierarchy,”⁸

[S]ignif[y] that international human rights treaties with constitutional standing shall 1) apply in the form in which the treaties have been ratified by Argentina, including the reservations and the interpretative declarations opportunely made, and 2) take into account the “effective application by the international tribunals that are competent for their interpretation and application.”⁹

Therefore, for example in the case of the Inter-American Convention on Human Rights (the Convention) it not only included several human rights protections, but it also incorporated the mechanism for enforcing those guaranties as well: the right of any person or group of persons, or any nongovernmental entity legally recognized in one or more member Organizations, to lodge petitions with the Inter-American Commission of

6. *Id.*

7. Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L.J. 45, 56 (2015) (discussing (1) how the constitutional reform process, accomplished through reformers' political choice and not a legal obligation from the Inter-American Court, gave “international human rights treaties a special status within the constitutional framework” (2) how, in countries where the Convention has constitutional status, the conventionality control “becomes part of the judicial review or constitutionality control” not because of the Court, but because of the constitutional framers (3) how, in these countries, the Convention becomes part of the ‘constitutional bloc’ “composed of the Constitution and those treaties with constitutional status” and “[j]udicial review checks the compatibility of any state action or omission with the ‘constitutional bloc’” and (4) “not all the constitutions of the States Party to the Convention grant special status to the Convention or to human rights treaties in general”).

8. Isaias Losada Revol, *The Ministry of Foreign Affairs Case: A Ruling with Unforeseen Consequences in the Enforcement of Human Rights in Argentina*, 49 GEO. J. INT'L L. 461, 468 (2018).

9. *Id.* (quoting Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/7/ 1995, “Giroldi, Horacio David / recurso de casación,” Fallos (1995-318-514) (Arg.)).

Human Rights containing denunciations or complaints of violation of this Convention by a state party.¹⁰

The Convention also provides that the Commission is enabled, after failing to arrive at “a friendly settlement” between the Petitioner and the State to bring the case before the Inter-American Court, which has the right to decide whether the defendant state has breached a provision of the Convention involved in the petition.¹¹ According to Article 63.1 of the Convention:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.¹²

Article 68.1 further states that “The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”¹³

After the constitutional reform of 1994, the Argentine Supreme Court adopted a notably compliant stance towards the decisions of the Inter-American Court. An example of this attitude can be found in the *Espósito*¹⁴ case decided by the Court in 2004, where the majority complied with a ruling of the Inter-American Court, which ordered in *Bulacio v. Argentina*,¹⁵ among the other remedies mentioned by Article 63 of the Convention, that the Argentinean Judicial System had to reopen the criminal case against Espósito.¹⁶

Espósito was a chief of the police station where Bulacio died under murky circumstances while held in custody.¹⁷ The majority had qualms about reopening the case, which domestic courts had extinguished due to the

10. Organization of American States, American Convention on Human Rights art. 44, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

11. *Id.* art. 48.

12. *Id.* art. 63.

13. *Id.* art. 68.

14. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, “Espósito, Miguel Angel / incidente de prescripción de la acción penal promovido por su defensa,” Fallos (2004-327-5668) (Arg.).

15. *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003).

16. *Id.* ¶ 121.

17. *Id.* ¶¶ 2–3.

operation of the statute of limitations of the Argentinean Criminal Code.¹⁸ The Court reasoned that reopening the case could violate Espósito's rights under the Due Process Clause of the Argentinean Constitution.¹⁹ Nevertheless, under the express provisions of Article 68.1 of the Convention, the Court accepted the ruling of the Inter-American Court and ordered the lower courts to reopen the criminal case against Espósito.²⁰

A partial change in the composition of the Court in 2016²¹ brought about a fundamental development in its case law pertaining to the relationship between domestic constitutional law and international law. This change happened in *Fontevicchia, D' Amico*, and *Ministerio de Relaciones Exteriores*.²²

In *Fontevicchia*, decided on November 29, 2011, the Inter-American Court ruled that Argentina violated Article 13 of the American Convention, which guarantees the right of freedom of expression,²³ when its courts granted the civil lawsuit brought by then Argentinean President Menem against two Argentinean journalists (*Fontevicchia* and *D' Amico*), because of a series of articles and photos that dealt with Menem's extramarital son.²⁴ The complaint was based on the alleged violation of Menem's right to privacy resulting from the publication.²⁵ After exhausting all domestic remedies, the two journalists brought their case before the Inter-American Court. In its decision that the domestic courts violated complainants' rights under Article 13 of the Convention, the Inter-American Court ordered, *inter alia*, as a remedy owed by Argentina to the complainants. It vacated the

18. CSJN, 23/12/2004, "Espósito," Fallos (2004-327-5679).

19. *Id.* at 5682.

20. *Id.* at 5683.

21. Corte Suprema de Justicia de la Nación, *Ministros de la Corte Suprema de Justicia de la Nación Argentina*, <https://www.csjn.gov.ar/> (identifying the five current members); Gustavo Ybarra, *Carlos Rosenkrantz y Horacio Rosatti serán los nuevos jueces de la Corte Suprema*, LA NACION (June 15, 2016), <https://www.lanacion.com.ar/politica/carlos-rosenkrantz-y-horacio-rosatti-fueron-avalados-por-el-senado-para-ocupar-las-vacantes-en-la-corte-suprema-nid1909342/> (discussing the two Supreme Court Justices, Carlos Rosenkrantz and Horacio Rosatti, who were sworn in 2016).

22. *Fontevicchia v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238 (Nov. 29, 2011), https://www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/2/2017, "Ministerio de Relaciones Exteriores y Culto / informe sentencia dictada en el caso 'Fontevicchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos," Fallos (2017-340-47) (Arg.).

23. American Convention on Human Rights, *supra* note 10, art. 13 ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.").

24. *Fontevicchia*, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 75.

25. *Id.* ¶ 37.

domestic courts' decisions, including the decision of the Court, against the two journalists.²⁶

In its decision from February 14, 2017,²⁷ the Court ruled that the Inter-American Court had no power to revoke its decisions as it was the supreme judicial authority of the Argentine Republic. This decision was the cause of a conflict between the Court and the Inter-American Court, which insisted on its power to revoke decisions of domestic courts.²⁸

This article will evaluate the reasons given by both the Court and the Inter-American Court to determine which had a better argument in this conflict. After, there will be an analysis of whether the Court breached some basic principles of public international law with this decision and, if so, whether that breach can be justified with arguments based upon domestic constitutional law. Finally, this article will try to prove that the decisions of the Inter-American Court ordering the reopening of domestic criminal cases against officials presumed to have committed serious human rights violations show troubling aspects, which the same Court should correct.

II. THE TRADITIONAL CASE LAW OF THE COURT IN RELATION TO INTERNATIONAL LAW

Since the Argentinean Court began its activities in 1863, it adopted a stance towards public international law that followed the United States Supreme Court case law: both statutory law and treaty law are the “supreme law of the land.”²⁹ Thus, the United States Supreme Court’s “last in time” or “later-in-time” rule controlled:

[W]hen there is a conflict between a self-executing treaty and a federal statute, U.S. courts are to apply whichever is last in time. When the Court has applied this rule, it has been in the context of giving effect to a statute that is inconsistent with an earlier treaty.³⁰

In Argentina, Article 31—which is based on Article VI of the U.S. Constitution—provides that the national Constitution, the laws enacted by

26. *Id.* ¶ 110.

27. CSJN, 14/2/2017, “Ministerio de Relaciones Exteriores,” Fallos (2017-340-61).

28. *Fontevicchia*, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 75.

29. U.S. CONST. art. VI, cl. 2. Professor Alberto F. Garay explains that the U.S. exerted a strong influence in the framing of the Argentine Constitution of 1853-1860. Alberto F. Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. INT'L L. 258, 262-63 (2019). This Constitution created a republican form of government based on the principle of separation of powers, and the federal system adopted by the Argentine Constitution is an attenuated version of the American system. *Id.*

30. CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 55 n.126 (3rd ed. 2020) (citing several SCOTUS decisions); see also Emily S. Bremer, *The Dynamic Last-in-Time Rule*, 22 IND. INT'L & COMP. L. REV. 27 (2012).

Congress, and the treaties executed with foreign powers are the supreme law of the nation.³¹ However, this article did not establish an order of prevalence between statutory law and treaties. That is why, in its case law, the Court decided that both had the same status and, therefore, a law could repeal a treaty.³²

A typical example of the Court's jurisprudence during this period is *Martín y Cía*.³³ In that case, the Court decided that Argentinean Constitution allowed Congress to repeal a treaty concluded with Brazil.³⁴ The Court reasoned that, as Article 31 of the Argentinean Constitution did not give international treaties precedence over domestic law, the latter could repeal a provision included in the treaty law.³⁵ Therefore, international law was not considered to be "supreme" in relation to domestic law.

In the Argentine Supreme Court, this stance was closely related to the traditional doctrine of dualism in public international law. According to Professor Ian Brownlie:

[Dualism] points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject-matter. International law is between sovereign states: municipal law applies within a state and regulates the relationship of its citizens with each other and with the executive. On this view neither legal order has the power to create or alter the rules of the other.³⁶

The opposing doctrine is called monism which "is represented by a number of jurists whose theories diverge in significant respects."³⁷ In the

31. Art. 31, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

32. Revol, *supra* note 8, at 466 (quoting several decisions of the Court). Nevertheless, in the "Raffo" case, in a dissenting opinion by Justice Bacqué of the Court it was argued, contrary to the then accepted doctrine, that treaties had primacy before statutes enacted by Congress. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 28/04/1988, "Raffo, Jose Antonio / Tormentos," Fallos (1988-311-600) (Arg.). This Justice supported his conclusion partially in a citation of *The Federalist Papers*. *Id.* (citing THE FEDERALIST NO. 64 (John Jay)). Justice Bacqué used in his opinion the Spanish translation of "The Federalist Papers" published by the "Fondo de Cultura Económica," Mexico, 1974. *Id.* A caveat in the "last in time rule" has been "The Charming Betsy" doctrine created by U.S. Supreme Court in the case *Murray v. The Schooner Charming Betsy*. According to this doctrine, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also BRADLEY, *supra* note 30, at 17 (interpreting this doctrine and its contemporary impact).

33. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/11/1963, "S.A. Martín & Cía Ltda. c. Nación / repetición de pago," Fallos (1963-257-99) (Arg.).

34. *Id.* at 101-02.

35. *Id.* at 102.

36. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 31-32 (7th ed. 2008).

37. *Id.*

United Kingdom, Hersch Lauterpacht has been “a forceful exponent of the doctrine.”³⁸ In his hands, the theory has been no mere intellectual construction. In his work, monism takes the form of an assertion of the supremacy of international law even within the municipal sphere, coupled with a well-developed view on the individual as a subject of international law.³⁹

Another important practical consequence of the application of dualism is that an international treaty, duly ratified by the constitutional procedure,⁴⁰ cannot be applied by domestic judges and other officials if it is not previously “transformed” into domestic law by Federal Congress. Such can be “transformed” through the constitutional procedures prescribed for the approval of statutes.⁴¹

38. *Id.*

39. *Id.* Professor Brownlie adds that an “increasing number of jurists wish to escape from the dichotomy of monism and dualism, holding that the logical consequences of both theories conflict with the way in which international and national organs and courts behave.” *Id.* at 33.

40. Article 75.22, of the Argentinean Federal Constitution, accords Federal Congress, among several others, the power to “approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See.” Art. 75.22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Treaties and concordats have a higher hierarchy than laws.” On the other hand, Art.99.11. states that the President “concludes and signs treaties, concordats and other agreements required for the maintenance of good relations with international organizations and foreign powers, he receives their ministers and admits their consuls.” *Id.* at 99.11. For the equivalent provisions in the U.S. Constitution, see U.S. CONST. art. II, cl. 2.

41. See Vicki C. Jackson, *The U.S. Constitution and International Law* 921, 931, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION (Mark Tushnet et. al. eds., Oxford University Press 2015). The author cites several decisions of the U.S. Supreme Court which took that position. Nevertheless,

[i]n its earliest mayor federalism decisions, the [U.S.] Supreme Court gave self-executing effect to treaty provisions designed to secure British owners of their rights in property. As Carlos Vázquez has shown, among the earliest justices, both James Iredell, the most skeptical of national power on the Marshal Court, and the more Federalist Joseph Story, were in agreement that the effect of the supremacy clause was to require that treaties be treated as law, enforceable by courts, rather than as executory contracts dependent on later action by the legislators.

Id. That is why in many early cases, the U.S. Supreme Court decided that treaties were self-executing in litigation, especially where the treaties conferred rights on or protected individuals. *Id.* But in recent decisions, dealing with detainee rights under Article 36 of the Vienna Consular Convention (VCC), the U.S. Supreme Court adopted a strong position against the presumption in favor of treaties being self-executing. *Id.* (quoting Carlos Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Enforcement of Treaties*, 122 HARV. L. R. 599 (2008)). In its case law prior to 1992, the Argentinean Court took the same stance when it decided that the rights accorded to extramarital children by the “Convention on the Rights of the Child” were non-self-executing. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 09/06/1987, “Eusebio, Felipe Enrique,” Fallos (1987-310-1080) (Arg.). Article 75 sets out all the legislative powers of the Argentinean Congress. One of the most important of these powers is found in Section 12, which has no equivalent in U.S. Constitution, empowers Congress:

Monism, instead, views international law that has been ratified by national authorities as domestic law. According to André Nollkaemper, some countries have decided to make international law automatically part of the 'law of the land' in their national legal orders. The author mentions Argentina, Belgium, Brazil, the Dominican Republic, France, and the Netherlands as examples of this approach.⁴² Professor Nollkaemper cites a case from the Dominican Republic which stated that it was clear from Article 3 of its constitution that international law was part of the national legal order, rendering it binding on the Dominican Republic.⁴³ The Court, thus, did not accept the Superior Land Court's interpretation that the treaties in question were foreign legislation (*legislación extranjera*).⁴⁴

By holding that the Superior Land Court should have applied the treaties relied on by the plaintiff, the Supreme Court clarified that treaties adopted by the Dominican Republic form part of Dominican law. Such treaties are, thus, applicable in the national legal system and it is not necessary to enact specific implementing legislation to that effect.⁴⁵

As we will see below, the Argentinean Supreme Court has adopted a similar course in recent years.

III. THE NEW PARADIGM INITIATED WITH *EKMEKDJIAN*

As mentioned before, the Court changed this doctrine with its 1992 decision in *Ekmekdjian*.⁴⁶ There, the Court decided that the American

To enact the Civil, Commercial, Penal, Mining, Labor and Social Security Codes, in unified or separate bodies, provided that such codes do not alter local jurisdictions, and their enforcement shall correspond to the Federal or Provincial courts depending on the respective jurisdictions for persons or things; and particularly to enact general laws of naturalization and nationality for the whole nation, based on the principle of nationality by birth or by option for the benefit of Argentina; as well as laws on bankruptcy, counterfeiting of currency and public documents of the State, and those laws that may be required to establish trial by jury.

Art. 75.12, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). This provision has been interpreted giving Argentine provinces and the City of Buenos Aires (which enjoys a home rule form of government) to have their own judicial systems and to enact their codes of procedure. For further details on this question, see *infra* note 51.

42. André Nollkaemper, *General Aspects*, in INTERNATIONAL LAW IN DOMESTIC COURTS 1, 1-2 (André Nollkaemper et. al. eds., 2018).

43. *Id.* at 2.

44. Nollkaemper, *supra* note 42, at 2.

45. *Id.*

46. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1992, "Ekmekidjian, Miguel c. Sofovich, Gerardo / recurso extraordinario" Fallos (1992-315-1492) (Arg.).

Convention integrates the Argentinean legal order simply because the Republic became a party to the Convention through the deposit of the instrument of ratification.⁴⁷ The Court explained that this new criterion modified the former doctrine of the tribunal and ruled that the rights and guarantees enshrined in the American Convention could be invoked and exercised by individuals without a legislative act of incorporation.⁴⁸

Thus, the Court ruled that “[t]he Vienna Convention . . . gives primacy to conventional international law over domestic law. . . . The [Vienna C]onvention is a constitutionally valid international treaty that assigns priority to international treaties over internal laws within the domestic legal order, that is, a recognition of the primacy of international law over domestic law.”⁴⁹ The Argentinean tribunal explained that a law of Congress cannot repeal a treaty because such an abrogation would violate the distribution of competencies among the different state powers. “The conclusion of a treaty constitutes a ‘federal complex action,’ crystallized by a proceeding by which both the Executive and the Legislative branches act in accordance with their constitutional mandates.”⁵⁰

After the *Ekmekdjian* decision, the Court gradually began to accept the primacy of international law in general and the decisions of the Inter-American Court in particular. That meant that, in cases where the Inter-American Court found that Argentinean law had breached the Convention, the remedies it ordered were implemented by the Court and the inferior Argentinean courts.⁵¹

47. *Id.* at 1511-13.

48. *Id.*

49. *Id.* at 1512.

50. Revol, *supra* note 8, at 466. As I will explain later, I agree with the result of this decision. Nevertheless, I find that the rationale is defective because it is based on Vienna Convention prescriptions which states the superiority of international law over domestic law. That reasoning takes for granted the supremacy of international treaties over national law which was the point which had to be proved by the Court. It is a typical “circular reasoning”: “This fallacy occurs when a premise and conclusion are actually rewordings of the same proposition. In other words, when making the argument, we assume the truth of our conclusion than offering proof for it.” JUDITH A. BOSS, *ETHICS FOR LIFE: A TEXT WITH READINGS* 62 (4th illustrated ed. 2007).

51. See Revol, *supra* note 8, at 467-68. The author mentions several decisions of the Court which formulated these principles based upon the Interamerican Court case law. At this point it is necessary to make a distinction which is not always present in the Interamerican Court case law. While it is evident that, according to Article 68.1 of the Convention (“The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”), the decision of the Interamerican Court is binding in the particular case, it is not obvious that its rulings are mandatory for different parties in *future* cases. The reason for this is that the principle of “*stare decisis*” has not been expressly incorporated in the text of the American Convention. THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, *THE AMERICAN CONVENTION ON HUMAN RIGHTS* (2017); see also, Marisa Elisa Zavala Achurra, *Atrapada entre sistemas legales: valor del precedente para la Corte Interamericana de Derechos Humanos*, 48

A typical example of the Court's compliance with the Inter-American Court rulings is the *Espósito* case. The Inter-American Court's decision in *Bulacio* prompted that of the Argentinean Court in *Espósito*. The Inter-American Court had held the Argentine State liable for not bringing to justice a police station chief accused of being criminally liable for the death of a youngster under his custody.

In Paragraph 70 of its decision, the Inter-American Court noted:

[The Argentine State] acknowledged its international responsibility for the violation of Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to Fair Trial), 19 (Rights of the Child) and 25 (Right to Judicial Protection), in combination with non-compliance with the obligation to respect rights (Article 1(1)) and with the obligation to adopt domestic legal measures (Article 2), to the detriment of Walter David Bulacio, and

REVISTA DE LA FACULTAD DE DERECHO (June 2020),
http://www.scielo.edu.uy/scielo.php?pid=S2301-06652020000103114&script=sci_arttext. In the abstract, the author states:

This article seeks to determine whether the rulings of the Inter-American Court of Human Rights constitute primary or subsidiary sources of law. For that purpose, the precedent system, characteristic of the Anglo-Saxon tradition, is contrasted with the way in which said tribunal rules. The article analyzes, first, how the precedent system works, focusing in the concept of *stare decisis*. Then a contrast between the way in which the Inter-American Court and the tribunals in the precedent system rule, is made, in order to determine why the Court in question refers in its decisions to its own jurisprudence. The analysis deals with this issue both from a theoretical and normative perspective, as well as from a case law and practical one. The states part of the Inter-American system should not be indifferent to the answer to the question presented in this paper, since they have surrender part of their sovereignty to a supranational institution and understanding how it decides is the minimum than can be expected from it.

Id. Notwithstanding the lack of normative support for the “*stare decisis*” rule, the Interamerican Court has been emphatic in defending this doctrine in its case law:

The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.

Almonacid-Arellano v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006). The Argentinian Court cited approvingly this doctrine in its decision in *Mazzeo*. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/7/2007, “*Mazzeo*, Julio Lilo / rec. de casación e inconstitucionalidad,” Fallos (2007-330-3248) (Arg.).

for violation of the same Articles 8 and 25 to the detriment of the next of kin of youth Walter David Bulacio, all of them in connection with Article 1(1) and 2 of the American Convention. This Court has reiterated, in its case law, that it is a principle of international law that any violation of an international obligation that has caused damage involves a new obligation: to adequately redress the damage caused.⁵²

Among the “non-monetary compensations” owed by Argentina to Bulacio’s relatives under Article 63.1 of the Convention, the Inter-American Court ruled:

[It was] necessary for the State to continue and conclude the investigation of the facts and to punish those responsible for them. The next of kin of the victim must have full access and the capacity to act at all stages and levels of said investigations, pursuant to domestic legislation and the provisions of the American Convention. The results of the aforementioned investigations must be made known publicly, for Argentinian society to know the truth about the facts.⁵³

The majority of the Court accepted this decision and consequently ordered the lower courts to reopen the criminal case against the police station chief Espósito. Nevertheless, the majority of the Court considered that the Inter-American Court’s decision critically affected Espósito’s rights under the Due Process Clause of the Argentinean Constitution:

[T]he paradox that arises is that the only possible way to comply with the duties imposed on the Argentine State by the international jurisdiction of human rights is by strongly restricting the rights of defense and to a pronouncement within a reasonable period, guaranteed to the accused by the American Convention.⁵⁴

But, as Professor Orunesu explains, the international tribunal responsible for ensuring effective compliance with the rights recognized by the Convention ordered the restrictions.⁵⁵ Therefore, despite the indicated reservations, it is the Court’s duty as part of the Argentinian state to comply within the framework of its jurisdictional power.⁵⁶ That meant that, although

52. *Bulacio*, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 70 (citation omitted).

53. *Id.* ¶ 121 (citation omitted).

54. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, “Espósito, Miguel Angel / incidente de prescripción de la acción penal promovido por su defensa,” Fallos (2004-327-5691) (Arg.); Claudina Orunesu, *Conventionality Control and Judicial Supremacy. Some reflections on the Interamerican System of human rights*, 40 J. CONST. THEORY & PHIL. LAW 45, ¶¶ 25-26 (2020).

55. Orunesu, *supra* note 54, ¶¶ 25-26.

56. *Id.*

the Argentinean Supreme Court considered that the Inter-American Court decision was wrong, to avoid international responsibility, it held that the interpretations of the Inter-American Court should be followed in the internal domain.⁵⁷

IV. THE COURT CHANGES COURSE IN MINISTERIO DE RELACIONES EXTERIORES

As explained earlier, the Court adopted a notably different stance towards the decisions of the Inter-American Court in *Ministerio de Relaciones Exteriores*. In that case, the majority of the Court⁵⁸ stated unequivocally that the Inter-American Court lacked the authority to set aside the decisions of domestic courts. Thus, as Luciano Revol explains,⁵⁹ although the Court ruled that “the judgments of the Inter-American Court are, in principle, mandatory in all cases to which Argentina is a party, that mandatory character only applies to those cases in which the International Court performs its duties within the framework of the ‘remedial faculties’ that are conferred by the American Convention.”⁶⁰ Based upon its literal interpretation of Article 63 of the Convention, the Court maintained that the Inter-American Court exceeded its remedial powers and, thus, acted *ultra vires*, since the American Convention does not grant the International Court the authority to revoke a local judgment.⁶¹

As part of its reasoning, the Court referred to the subsidiary character of the Inter-American Human Rights System by quoting the Preamble of the American Convention.⁶² Therefore, it held that the Inter-American Court was not a tribunal of fourth instance able to review or annul domestic judicial decisions.⁶³

The core of the Court’s arguments can be summarized as follows:

57. *Id.* ¶ 26.

58. There is a single opinion drafted by Justices Lorenzetti, Highton de Nolasco and Rosenkrantz and a concurring opinion by Justice Rosatti. Justice Maqueda filed a dissenting opinion in which he argued, as the majority had done in “Espósito,” that the Court had the legal duty to comply with the judgement of the Interamerican Court. CSJN, 14/2/2017 “Ministerio de Relaciones Exteriores,” Fallos (2017-340-68) (Maqueda, J. dissenting).

59. Revol, *supra* note 8, at 470-71. For a defense of the majority’s ruling, with arguments which are similar to those used by it, see generally Alberto F. Garay, *La Corte Interamericana no puede ordenar que se dejen sin efecto sentencias firmes*, in ANALES DE LA ACADEMIA NACIONAL DE CIENCIAS MORALES Y POLÍTICAS 415 (2017).

60. Revol, *supra* note 8, at 449-50.

61. *Id.*

62. CSJN, 14/2/2017, “Ministerio de Relaciones Exteriores,” Fallos (2017-340-58).

63. *Id.*

- (1) Article 63 of the Convention did not authorize the Inter-American Court to vacate decisions of domestic courts.⁶⁴
- (2) That procedure was contrary to the supremacy clause of the Argentinean Constitution⁶⁵ and to the role of the Court as the supreme interpreter of that Constitution.⁶⁶ It also contravened Article 27 of the Constitution which states that international law must comply with public law principles enacted by the Constitution.⁶⁷
- (3) The decision of the Inter-American Court violated the “fourth instance” doctrine, according to which international courts lacked the power to review domestic courts’ interpretation of the national law.⁶⁸
- (4) It also contravened the “subsidiary” role of the Inter-American Court.⁶⁹

The stance of the Court was not accepted by the Inter-American Court.⁷⁰ In its ruling of October 18, 2017, based upon Articles 67 and 68.1 of the Convention, it stated that the Argentinean Court had to comply with its decision “unconditionally,” and that national states could not invoke domestic provisions to justify the lack of compliance.⁷¹

The Inter-American Court added that the solution adopted by the Court disregarded fundamental principles of international law and it showed a strong departure from the Court’s previous conduct regarding the decisions of the Inter-American Court.⁷² To soften the clash with the domestic court, the Inter-American Court pointed out that, inasmuch as the decision in

64. *Id.* at 65; American Convention on Human Rights, *supra* note 10, art. 63.

65. Art. 31, CONSTITUCIÓN NACIONAL, [CONST. NAC.] (Arg.).

66. CSJN, 14/2/2017, Ministerio de Relaciones Exteriores,” Fallos (2017-340-67).

67. *Id.* at 66; art. 27, CONSTITUCIÓN NACIONAL, [CONST. NAC.] (Arg.) (“The Federal Government is under the obligation to strengthen its relationships of peace and trade with foreign powers, by means of treaties in accordance with the principles of public law laid down by this Constitution.”).

68. CSJN, 14/2/2017, Ministerio de Relaciones Exteriores,” Fallos (2017-340-58), For further explanation of the “fourth instance doctrine,” see *infra* note 76.

69. CSJN, 14/2/2017, Ministerio de Relaciones Exteriores,” Fallos (2017-340-59).

70. *Fontevecchia v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238 (Nov. 29, 2011)*, https://www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf. For a brief account of the decision of the Inter-American Court, see HERNÁN VÍCTOR GULLCO, *LOS DERECHOS EN LA CONSTITUCIÓN NACIONAL: CASOS Y MÉTODOS* 97, 115 (2019).

71. *Fontevecchia v. Argentina, Monitoring Compliance with Judgment, “Considering” ¶¶ 13-14 (Inter-Am. Ct. H.R. Oct. 18, 2017)*, https://www.corteidh.or.cr/docs/supervisiones/fontevecchia_18_10_17.pdf.

72. *Id.* ¶¶ 25, 28 (recalling several decisions of the Court where it had accepted the binding force of its rulings).

Fontevicchia did not deal with a criminal conviction, which implicated the existence of a criminal record, to comply with the Inter-American Court, it was sufficient for the Court to either erase its decision from their webpage or include the Inter-American Court's decision.⁷³

In its ruling of December 5, 2017, the Court conceded that the solution proposed by the Inter-American Court "did not violate Article 27 of Argentinean Federal Constitution."⁷⁴

V. THE FLAWS IN THE DECISION OF THE COURT

There are major problems with the aforementioned decision. In the first place, as Victor Abramovich pointed out in a critical article about the Court's ruling,⁷⁵ the Inter-American Court did not contravene the "fourth instance" doctrine in *Fontevicchia*,⁷⁶ as it did not decide questions of domestic law,

73. *Id.* ¶ 21.

74. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores," Fallos (2017-340-47). On the same date, the Court issued a ruling that seems to be more compliant with the Interamerican Court's authority. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/12/2017, "Sala, Milagro Amalia Ángela / p.s.a. asociación ilícita, fraude a la administración pública y extorsión," Fallos (2017-340-1756) (Arg.). In the *Milagro Sala* case, four justices, using different rationales, decided that domestic courts had to comply with the "provisional measure" (Article 63.2 of the Convention), *id.* at 1773, adopted by the Interamerican Court, on November 23, 2017, ordering defendant's release from preventive detention and its replacement with home detention, *id.* at 1771; *see also*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/12/2017, "Sala, Milagro Amalia Ángela / p.s.a. asociación ilícita, fraude a la administración pública y extorsión," Fallos (2017-340-1794) (Arg.). Nevertheless, it is doubtful whether this decision implies an abandonment of plurality's position in "Ministerio de Relaciones Exteriores," GULLCO, *supra* note 70.

75. Víctor Abramovich, *Comentarios sobre "Fontevicchia", la autoridad de las sentencias de la Corte Interamericana y los principios de derecho público argentino*, 10 PENSAR EN DERECHO 12-13, 22 (2017).

76. In summarizing its case law on the "fourth instance doctrine," the Interamerican Court stated:

[It] cannot act as a higher court or as an appeal court in settling disputes between parties, on some aspects of the assessment of evidence, or of the application of the domestic law to certain matters not directly related to compliance with international human rights obligations. Thus, this Court has held that, in principle, "the courts of the State are called upon to examine the facts and evidence submitted in particular cases." This implies that when assessing compliance with certain international obligations, such as ensuring that a detention was lawful, there is an intrinsic interrelationship between the analysis of international law and domestic law.

García v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 16 (Nov. 26, 2010) (footnote omitted) (quoting Nogueira de Carvalho v. Brazil, Preliminary Objection and Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 161, ¶ 80 (Nov. 28, 2006)).

but it limited its ruling to the interpretation of Articles 11 and 13 of the Convention.⁷⁷

Secondly, it was erroneous for the Court to assume that *Fontevicchia* involved just a conflict between national constitutional law and international law. The Convention is part of constitutional law in Argentina because it has been incorporated (among other several international covenants on human rights) into the Argentinean Constitution's Bill of Rights. Its recognition "as binding, *ipso facto*, and not requiring special agreement, [of] the jurisdiction of the Court on all matters relating to the interpretation or application of th[e] Convention" has also incorporated into the constitutional text.⁷⁸ Moreover, Argentina included a proviso:

[That t]he judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.⁷⁹

Lastly, nothing in the text of Article 63.1. of the Convention suggests that the payment of monetary damages is the only remedy provided by that provision for human rights violations.⁸⁰ It is clear from the text that damages are just *one* of the remedies provided by that provision.⁸¹

It is also obvious that most of the domestic court decisions under review by the Inter-American Court are *res judicata* under national law standards. The examination of Article 46 of the Convention explains why that is so: complaints against a State Party for violations against it must be lodged before the Commission in accordance, *inter alia*, with the following requirements:

(a) that the remedies under domestic law have been pursued *and exhausted* in accordance with generally recognized principles of

77. American Convention on Human Rights, *supra* note 10, art. 11 ("1. Everyone has the right to have his honor respected and his dignity recognized. "2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. "3. Everyone has the right to the protection of the law against such interference or attacks."). For the text of Article 13, *see id.*, art. 13.

78. American Convention on Human Rights, *supra* note 10, art. 62(1).

79. *Id.* art. 67.

80. *Id.* art. 63(1).

81. This provision states:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied *and that fair compensation be paid to the injured party.*"

Id. (emphasis added).

international law; [and] (b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.⁸²

That is, under the usual provisions of a national code of procedure, when a complaint is filed before the Inter-American Commission of Human Rights, the decisions of domestic courts which are being challenged already enjoy the status of *res judicata*.

This situation is compounded by the fact that usually the Inter-American Court decides a case on the merits many years after it has been decided by national courts.⁸³ That means that it is factually impossible for the Inter-American Court to furnish a meaningful remedy for human rights violations without disturbing in some way the *res judicata* effect of domestic courts' judgments. The only way to avoid this effect on the decisions of national courts would be to restrict the remedies granted by the Inter-American Court to monetary compensations or to legal reforms adopted by national legislative bodies in order to comply with the Inter-American Court ruling.

But as we have already seen, nothing in the Convention forces the Inter-American Court to adopt such a restrictive view of its powers. It is true that in *Fontevicchia* the flawed position adopted by the Court did not have major detrimental effects; this is because the national courts ordered the journalists to pay damages to the plaintiff Menem.⁸⁴ Therefore, the violation of their rights under Article 13 of the Convention could have been redressed with the payment of monetary compensation to them by the Argentine State.

The situation would be entirely different in a criminal case. Imagine the following scenario: a criminal defendant is convicted to a life term for murder. The main evidence against the defendant is a police confession obtained by torture. After exhausting every national remedy, the defendant files a complaint before the Inter-American System. The Inter-American Court decides that the conviction was based upon a violation of Articles 8.2(g) and 8.3 of the Convention.⁸⁵ If the Court's position in *Fontevicchia* is

82. *Id.* art 46 (emphasis added).

83. A typical example of the significant temporal gap between the decisions of domestic courts and the judgment of the Interamerican Court can be found in the case of Fernández Prieto and Tumbeiro v. Argentina, where the Court found that Argentina had violated the right against illegal police detentions: the final decisions by national courts regarding both applicants were rendered in 1998 and 2002 while the judgment of the Interamerican Court was adopted on September 1, 2020. Prieto v. Argentina, Case 12.315, Inter-Am. Comm'n H.R., Report No. 129/17, OEA/Ser.L/V/II.165, doc. 155 (2017).

84. See CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores," Fallos (2017-340-47).

85. Article 8.2(g) states:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every

correct, the only remedy at the defendant's disposal would be monetary compensation but he would not be entitled to a revision of his conviction by national courts.

That solution, however, could hardly be considered the right "to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."⁸⁶ Furthermore, it seems unlikely that, in the case of Argentina, this lack of judicial redress could be corrected by the power of the President to "grant pardons or commute punishments for crimes subject to federal jurisdiction"⁸⁷ This is a discretionary power of the Executive Branch and, therefore, cannot be considered a right belonging to a defendant.⁸⁸

That is why it is not surprising that when the Inter-American Court had found due process violations in domestic criminal procedures, it issued orders "to reverse criminal convictions, grant retrials, cancel death sentences, expunge criminal records and waive fines. On only rare occasions have due process violations led the Court to demand the release of detainees."⁸⁹

Secondly, it must be stressed that nothing in the Inter-American Court's decision in *Fontevecchia* contravenes its "subsidiary" role. According to Ariel Dulitzky:

Procedurally, the main manifestation of the principle of subsidiarity is the requirement that a petitioner exhaust all domestic remedies prior to accessing the Interamerican bodies. The State must have the possibility to resolve matters at the domestic level before being sued internationally. The subsidiarity principle stems from the idea that States have the primary responsibility to protect the rights of individuals through their domestic legal systems and practices, and in case they fail to do so, the Interamerican Convention and the organs that it creates (the Court and the Interamerican Commission)

person is entitled, with full equality, to the following minimum guarantees: . . . [t]he right not to be compelled to be a witness against himself or to plead guilty"

American Convention on Human Rights, *supra* note 10, art. 8. Article 8.3 reads: "A confession of guilt by the accused shall be valid only if it is made without coercion of any kind." *Id.*

86. *Id.* art. 25. This example is not merely theoretical. See *Hilaire v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002), ¶¶ 196-200.

87. Art. 99.5, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

88. In the same way, the Interamerican Court did not accept in *Hilaire* that the discretionary power of Trinidad and Tobago's President "to pardon those sentenced to death" and the existence of "an Advisory Committee on the Power of Pardon, which is charged with considering and making recommendations to the relevant Minister as to whether an offender sentenced to death should benefit from discretionary pardon" was an adequate substitute to the Interamerican Court power to quash defendants' death convictions. *Hilaire*, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 84.

89. ANTKOWIAK & GONZA, *supra* note 51, at 302-03.

act as a complement to domestic laws and practices in redressing victims. Importantly, subsidiarity is also premised on the understanding that local actors, including legislators and judges, are in the best position to appreciate the complexity of circumstances on the ground. Those local actors are better suited to understand what measures may be most effective for internalizing human rights norms in distinct social, economic, cultural, historical, and political contexts.⁹⁰

In *Fontevecchia*, the Inter-American Court did not disregard this principle as it got involved only after national judicial authorities, including the Court, had not fulfilled their duty in protecting freedom of speech under the Convention. The journalists filed their complaint for violation of those rights before the Inter-American System after exhausting domestic legal remedies.

Finally, even in countries where international covenants are not incorporated into the constitutional text, the notion of the domestic constitution as the supreme law of the land has been questioned. As Professor Rett R. Ludwikowski points out, the emergence of the supranational entities, such as the European Community, signaled the changing role of the constitutions of the member states. It is clear that, from the perspective of the Community, the principle of supremacy of its law rules out the recognition of the supremacy of any components of domestic legal systems, including constitutions.⁹¹ The author adds that the status of the constitutions in the new East-Central European democracies is not much different. Some countries already drafted their constitutions in a way that would let them easily incorporate the principle of supremacy of supranational law; some others recognized the prevailing position of international law, including the elements of customary international law, in their national legal systems. He concludes that both tendencies result in the creation of the web of interdependencies, which might undermine the supreme position of the constitutions.⁹²

The examination of the case law of the European Court of Human Rights (ECtHR) and of some decisions of national courts, which have implemented its rulings, confirms this conclusion:

In the last years, the ECtHR has to some extent followed the path of the IACHR as it has become more direct with respect to what means states have to use in their domestic legal order to discharge their

90. Dulitzky, *supra* note 7, at 52-53.

91. *Id.*

92. Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. 253, 294 (2001).

obligation to comply with a decision of the court, stating that: ‘in certain cases, the nature of the violation found may be such as to leave no real choice as to measures required to remedy it and the Court may decide to indicate a specific measure.’ With the same argument, the ECtHR has decided on specific measures, such as . . . release from custody as soon as possible, that a state must replace detention on remand with other reasonable and less stringent measure of restraint. The reopening of domestic proceedings has become of fundamental importance for the execution of the ECtHR’s judgments. Indeed, in some cases, this is the only form of *restitutio in integrum* possible, i.e., the only effective means of redressing the convention. In response to execution problems, caused in certain cases by the lack of appropriate national legislation on the reopening proceedings, the Committee of Ministers adopted a recommendation to member states on the reexamination or reopening of certain cases at the domestic level following judgments of the ECtHR, inviting them to ensure that there existed at national level adequate possibilities for achieving, as possible, *restitutio in integrum*, including the reopening of proceedings. Building on the practice of the committee, the court itself is more and more deciding on such measures. In *Dorigo Paolo*, the [Italian] Constitutional Court stated in clear terms that in cases involving violations of Article 6 of the ECtHR, the state had an obligation, pursuant to Article 46, to reopen criminal proceedings, as a form of *restitutio in integrum*, in accordance with what was affirmed by the Court of Cassation in *Somogyi and Dorigo* . . .⁹³

It must be noted that, at federal level at least, Argentina’s statutory system provides “adequate possibilities,” as mentioned by the European Committee of Ministers, for enforcing the Inter-American Court decisions: Article 366(f) of the new Federal Criminal Procedure Code⁹⁴ provides, as one

93. Thordis Ingadottir, *Enforcement of Decisions of International Court at the National Level*, in *INTERNATIONAL LAW IN DOMESTIC COURTS* 349, 383-85 (André Nollkaemper, et al. eds., 2018). Nevertheless, the decisions of some European superior courts do not show complete compliance to European Court of Human Rights’s rulings. For example, the German Constitutional Court, after the European Court had decided that the former court had disregarded the prohibition of retroactive criminal legislation (Article 7 of the European Convention on Human Rights), argued nevertheless that the decision of the European Court did not “...require the interpretation of Art. 103. Basic Law [the equivalent provision to Article 7 in German Constitution] to be brought completely into line with that of art.7 para.1. ECHR...” (BVerfGE 128, 326, decision of May 4, 2011). The decisions of the German Constitutional Court and the European Court of Human Rights are transcribed and commented by MARKUS D. DUBBER & TATJANA HOERNLE, *CRIMINAL LAW: A COMPARATIVE APPROACH* (2014).

94. Int’l Comm’n of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, 165 (Oct. 2018), <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>. The Code is only partially

of the motives for setting aside *res judicata* criminal decisions, the existence in a particular case of a ruling of the Inter-American Court or a decision of a body charged with the application of an international treaty.⁹⁵

VI. SOME PROBLEMS IN THE INTER-AMERICAN COURT JURISPRUDENCE

This piece has demonstrated that the Court's stance in *Fontevicchia* was untenable. Nevertheless, the Inter-American Court case law has also shown major problems regarding the protection of due process rights. A typical example of these shortcomings can be found in *Bulacio*, where the Inter-American Court ordered the reopening of criminal proceedings against former police official Esposito.⁹⁶ Although the majority of the Court accepted that ruling in *Espósito*,⁹⁷ it showed deep misgivings about the implications of enforcing the Inter-American Court's decision.

The main point of disagreement with the Inter-American Court's ruling was its disregard of Esposito's due process rights under the Argentinean Constitution.⁹⁸ It was not acceptable for the Court that the Inter-American

in force now. CÓDIGO PROCESAL PENAL DE LA NACIÓN [CÓD. PEN.], [Criminal Procedure Code] art. 366 (Buenos Aires, 2019) (Arg).

95. I have made the caveat "at the federal level."

[D]ue to the federal political organization expressed in the National Constitution, Argentinean State possesses a Federal Justice with jurisdiction in the whole country and it may try cases about narcotics, smuggling, tax evasion, money laundry, and other crimes that affect the security of the Nation. Simultaneously, there is a Provincial Justice which has in charge the treatment of the common crimes (also called ordinary justice) whose procedural legislation and the organization of the judicial organs are constitutionally reserved to the government of each one of the twenty-three counties (articles 5, 121, 123 of the National Constitution).

General Brief about Argentinean Justice System and the Fiscal Public Ministry, Secretary of Institutional Coordination, Office of the Attorney General, Section II.2., <https://www.mpf.gob.ar/Institucional/Funciones/ING.pdf> (last visited Mar. 26, 2021). It must be added, that after the 1994 Constitutional Reform, the Capital City of Buenos Aires enjoys a similar constitutional status.

96. See generally *Bulacio*, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 121.

97. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, "Espósito, Miguel Angel / incidente de prescripción de la acción penal promovido por su defensa," Fallos (2004-327-5683) (Arg.). There is a dissenting opinion by Justice Fayt who argued that the Interamerican Court lacked in most cases the power to order the reopening of domestic criminal cases. The reasons used on that occasion by Justice Fayt were similar to those employed by the plurality in "Ministerio de Relaciones Exteriores." The opinion of Justice Fayt distinguished "normal criminal cases" (like "Espósito" who had been benefited by the application of the ordinary provisions of the Criminal Code on statutory limitation), from those where the Interamerican Court had invalidated domestic provisions enacted with the specific goal of exculpating the perpetrators of human rights violations. Regarding this latter type of cases, Justice Fayt had no quarrel with the decisions of the Interamerican Court. *Id.* at 5686-95.

98. An earlier example of a conflict between the American Convention and a national constitution can be found in the Case of "The Last Temptation of Christ" v. Chile, Merits,

Court assigned responsibility to defendant Espósito for the delay of the criminal proceedings against him. The Inter-American Court stated as follows:

The Court notes that since May 23, 1996, the date on which the defense counsel was notified of the request by the public prosecutor of a 15 year prison sentence against Police Captain Espósito, for the reiterated crime of aggravated illegal imprisonment, *the defense counsel for the accused filed a large number of diverse legal*

Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, (Feb. 5, 2001). On that occasion, the Interamerican Court stated the following about this question:

In the instant case, it has been proved that, in Chile, there is a system of prior censorship for the exhibition and publicity of cinematographic films and that, in principle, the Cinematographic Classification Council prohibited exhibition of the film 'The Last Temptation of Christ' and, reclassifying it, permitted it to be exhibited to persons over 18 years of age. Subsequently, the Court of Appeal of Santiago decided to annul the November 1996 decision of the Cinematographic Classification Council, owing to a remedy for protection filed by Sergio García Valdés, Vicente Torres Irrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, "for and in the name of [°] Jesus Christ, the Catholic Church and themselves;" a decision that was confirmed by the Supreme Court of Justice of Chile. Therefore, this Court considers that the prohibition of the exhibition of the film 'The Last Temptation of Christ' *constitutes prior censorship in violation of Article 13 of the Convention.*

This Court understands that the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention. That is, any act or omission that may be attributed to the State, in violation of the norms of international human rights law engages the international responsibility of the State. In this case, *it was engaged because article 19(12) of the Constitution establishes prior censorship of cinematographic films and, therefore, determines the acts of the Executive, the Legislature and the Judiciary*"

Id. ¶¶ 71-72 (emphasis added). For the text of Article 13 of the Convention, see *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003). In the operative section of its ruling, the Interamerican Court ordered:

[T]hat the State must amend its domestic law, within a reasonable period, in order to eliminate prior censorship to allow exhibition of the film 'The Last Temptation of Christ,' and must provide a report on the measures taken in that respect to the Inter-American Court of Human Rights, with six months of the notification of this judgment.

Id. ¶ 103. On July 10, 2001, "[t]he Chilean National Congress adopted the draft constitutional reform introduced by President Frei Ruiz-Tagle in 1997." Jessica McCormick, "The Last Temptation of Christ" (*Olmedo Bustos et al.*) v. *Chile*, 38 LOY. L.A. INT'L & COMP. L. REV. 1189, 1199 (2016). In this occasion, the Chilean courts missed an opportunity to carry out an interpretation of the national Constitution consistent with Article 13.4. of the Convention, applying a solution similar to the one of the "Charming Betsy Canon." Thus, they could have decided that the "prior censorship" mandated by the Constitution only referred to prior restraints introduced to protect children and not adult viewers. The Argentinean Supreme Court has attempted in some cases to "harmonize" the text of the historical Constitution of 1853/1860 with the provisions of the American Convention. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/2003, "Brusa, Victor Hermes / Pedido de Enjuiciamiento," Fallos (2003-326-4816) (Arg.).

questions and remedies (requests for postponement, challenges, incidental pleas, objections, motions on lack of jurisdiction, requests for annulment, among others), which have not allowed the proceedings to progress toward their natural culmination, which has given rise to a plea for extinguishment of the criminal action.

This manner of exercising the means that the law makes available to the defense counsel has been tolerated and allowed by the intervening judiciary bodies, forgetting that their function is not exhausted by enabling due process that guarantees defense at a trial, but that they must also ensure, within a reasonable time, the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.

The right to effective judicial protection therefore requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights.⁹⁹

This line of reasoning was not acceptable for the Court because it put the duty to accelerate the proceedings against defendants on themselves. This task belonged to the trial judges. It was their duty to apply disciplinary measures against Espósito's defense lawyer if they believed that he had employed illegal tactics to delay the procedure.¹⁰⁰

The Court was wary of the consequences of the Inter-American Court decision. It placed Espósito in jeopardy of being prosecuted twice with the possibility of being convicted for criminal charges for which the national courts had already freed him.¹⁰¹ Moreover, the Inter-American Court's decision followed from the proceedings where the defendant did not have any chance to defend himself as the only parties in *Bulacio* were the victim's relatives and the Argentine State.¹⁰²

VII. AN ATTEMPT TO RECONCILE COMPETING INTERESTS

The majority's conclusion in *Ministerio de Relaciones Exteriores*, regarding the supposed lack of power of the Inter-American Court to revoke decisions of national courts, presented a deep misunderstanding first, of the

99. *Bulacio*, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 113-15 (emphasis added).

100. CSJN, 23/12/2004, "Espósito," Fallos (2004-327-5681).

101. Article 8.4 of the American Convention on Human Rights states "[a]n accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause." The Court has adopted a broader notion of the "double jeopardy guarantee" which is more akin to that applied by the U.S. Supreme Court. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 31/8/2010, "Sandoval, David Andres / homicidio Agravado por ensañamiento," Fallos (2010-333-1687) (Arg.).

102. CSJN, 23/12/2004, "Espósito," Fallos (2004-327-5683).

Argentinean Constitution and, second, of the interplay between domestic and international human rights law.¹⁰³ On the other hand, it could be argued that decisions of the Inter-American Court, like in *Bulacio*, encroach on due process rights of criminal defendants before national courts.¹⁰⁴

This misunderstanding can be traced to the development of the Inter-American Court's case law regarding the punishment for the perpetrators of gross human rights violations. Thus, in the original understanding of the Convention's drafters,¹⁰⁵ the rights enshrined in Articles 8.1, 8.2, and 25 were likely conceived, in criminal cases, as the rights of the *defendants* of a criminal charge and not of the victims of an offense.¹⁰⁶ That meant that, according to this interpretation, the criminal cases before the Inter-American Court had to be viewed as exclusive conflicts between individuals accused of committing crimes before the domestic courts and state parties to the Convention accused of disregarding their rights in these criminal proceedings.

However, the systematic human rights violations in Latin America in the 70s and 80s forced the organs of the American Convention to adopt a tough stance when protecting victims of crimes committed by state authorities. Thus, as Antkowiak and Gonza explain, “[i]n cases regarding violations of

103. See generally CSJN, 14/2/2017, “Ministerio de Relaciones Exteriores,” Fallos (2017-340-58).

104. See generally *Bulacio*, Inter-Am. Ct. H.R. (ser. C) No. 100.

105. The notion that constitutional and legislative provisions should be interpreted according to their original meaning is currently accepted by many scholars and courts in the United States. For a typical example of this approach, see dissenting opinion of Justice Scalia (one of the most important partisans of this position) in *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting). For a collection of articles discussing Originalism, see ANTONIN SCALIA, ORIGINALISM. A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed. 2007). The Interamerican Court has also occasionally applied an originalist method of interpretation. See *Artavia Murillo v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 257, ¶ 223 (Nov. 28, 2012). But on most occasions, it has employed what in the United States is known as the “living Constitution” method of interpretation. As it said in *Atala Riffo*:

The Court has established, as has the European Human Rights Court, that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolving interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.

Atala Riffo v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 83 (Feb. 24, 2012). See GULLCO, *supra* note 70, at 24, 27 for an attempt to reconcile these two methods of interpretation which seem at first glance inconsistent.

106. This conclusion flows, I think, from the text itself of Article 8.2. of the American Convention on Human Rights. The same conclusion can be gleaned from its drafting history. See *Actas y Documentos* [Acts and Documents], *Conferencia Especializada* [Specialized Conference], *Interamericana sobre Derechos Humanos* [Inter-American Commission on Human Rights], Secretary General, OEA/Ser.K/XV1/1.2 at 199-204 (Nov. 22, 1969).

the right to life and ‘other grave human rights violations,’ the State has the obligation ‘to institute, *ex officio* and immediately, a genuine, impartial and effective investigation.’ Key objectives include the prosecution of all those with criminal responsibility and the elucidation of the truth.”¹⁰⁷ The authors add that “[i]n the Inter-American experience, there have been many situations of active obstruction of justice. State agents and accomplices have not only manipulated evidence, but also have threatened, killed, or forced into exile petitioners, attorneys, investigators, and judges seeking to hold rights abusers accountable.”¹⁰⁸

The practical consequence of this stance is that, as we have seen in *Espósito*, the Inter-American Court ordered the reopening of criminal procedures against individuals accused of committing serious violations of human rights.¹⁰⁹

On the national level, compliance with these rulings may mean an individual accused of human rights violations is convicted years after being acquitted of the same criminal charges before national courts.¹¹⁰

A clear example of the need to reconcile the two competing interests of the victims’ rights to bring the perpetrators of human rights violations to justice and the rights of non-state parties to have their due process rights respected before international courts, can be seen in *Atala Riffo and Daughters v. Chile*. In that case, before the Inter-American Court, Ms. Atala separated from her husband in 2002 and reached an agreement that she would retain custody of their three daughters, M., V., and R.¹¹¹ Later that year, Ms. Atala’s same sex partner moved in with her and her children.¹¹² In 2003, the father filed a custody suit, and the juvenile court awarded him provisional custody.¹¹³ In May 2004, the Supreme Court of Chile granted permanent custody to the father, on the basis that Ms. Atala’s sexual orientation and

107. ANTKOWIAK & GONZA, *supra* note 51, at 69.

108. *Id.* at 180.

109. *Bulacio*, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162.

110. Precisely that happened in *Espósito* case. In 2013, he was convicted to three years suspended sentence for the crime of illegal imprisonment suffered by *Bulacio* in a criminal trial held before a Buenos Aires City Criminal Court. See Tribunal Oral en lo Criminal y Correccional Nro. 29 de la Capital Federal [Oral Criminal and Correctional Court No. 29 of the Federal Capital], 15/11/2013, “Asignación Tribunal Oral TOO1 – Espósito, Miguel Angel / privación ilegal de libertad,” (Arg.); see also *Condenaron al ex comisario Espósito a 3 años de prisión por el Caso Bulacio*, LA NACION, (Nov. 8, 2013, 2:47 PM), <https://www.lanacion.com.ar/seguridad/condenaron-al-ex-comisario-esposito-a-3-anos-de-prision-por-el-caso-bulacio-nid1636492/>.

111. *Riffo*, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 30.

112. *Id.*

113. *Id.* ¶¶ 39, 41.

cohabitation with a same sex partner would cause harm to her three daughters.¹¹⁴

In November 2004, Ms. Atala lodged a petition before the Inter-American Commission on Human Rights (the Commission), which approved a Merits Report in July 2008.¹¹⁵ In September 2010, the Commission filed a claim against Chile in the Inter-American Court.¹¹⁶ When the case was pending before that Court, several communications concerning the case were forwarded to the court on behalf of Jaime López Allendes, the father of the daughters.¹¹⁷ In these briefs, the following requests were made: (i) participation of the minors and legal representation by their father in the proceeding before the Inter-American Court; (ii) *request to include an intervener in the proceeding*; (iii) request to annul the proceedings before the Commission and the Inter-American Court; and (iv) request to collaborate with the State's brief.¹¹⁸

The Court rejected the request of the father. "Given that Mr. López is not a party to this case and that his participation as a third intervener has not been accepted, he does not have legal standing to present arguments as to the merits or evidence."¹¹⁹ Notwithstanding the correctness of the Inter-American Court's decision on the merits of Ms. Atala's claims,¹²⁰ the rejection of Mr. López's bid seems incorrect, especially when such decision would apply to individuals like Esposito. It does not coincide with the traditional notion of due process accepted not only in the United States, but also in Argentina and in the Inter-American System.¹²¹

114. *See id.* ¶¶ 54–57.

115. *Id.* ¶¶ 1, 2.

116. *Id.* ¶ 2.

117. *Id.* ¶ 8.

118. *Id.* (emphasis added).

119. *Id.* ¶ 9 (emphasis added) (footnote omitted); *see also id.* n.10 ("Notwithstanding the foregoing, the Court confirmed that the evidence furnished by Mr. Bustamante, concerning psychological expert opinions on the three girls and statements rendered by several people, were forwarded by the parties as appendices to their main briefs, which included a copy of the main documents of the custody proceeding.").

120. *Id.* ¶ 314(1) ("The State is responsible for the violation of the right to equality and non-discrimination enshrined in Article 24, in conjunction with Article 1(1) of the American Convention on Human Rights, to the detriment of Karen Atala Riffo.").

121. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (*quoting Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.")); *see generally* Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], 31/8/1942, "Adolfo E. Parry / recurso extraordinario," Fallos (1942-193-408) (Arg.); *see also* Baena-Ricardo v. Panama, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶¶ 133–34 (Feb. 2, 2001) (Article 8.1. of the Convention expressly incorporates this guarantee and it has also been adopted by the Interamerican Court).

That is why it is imperative to give similarly situated individuals the right to intervene in the proceedings before the Inter-American Court affording them the opportunity to argue that their conduct did not violate human rights standards. That is especially important in cases where, as in *Bulacio*, the State accepted its responsibility before the Inter-American System¹²² and the domestic court convicted and sentenced Espósito to a prison term as a result.¹²³ Allowing domestic defendants the right to argue their case before the Inter-American Court would not disturb its procedures and would minimize criticism against it in cases like *Espósito*.

VIII. CONCLUSION

The decision in *Ministerio de Relaciones Exteriores* came as a shock to a great part of Argentina's legal community because it represented a sharp departure from the Court's previous exemplary conduct of compliance with the Inter-American System's decisions pertaining to human rights violations.¹²⁴ This represents a dangerous example to countries that are considering defying and even leaving the System.¹²⁵ Hopefully, the Court will not change its course now, but rather stick to its previous decisions which showed the due respect to the Inter-American Court's decisions.

That does not mean that the case law of the Inter-American Court. As we saw in *Bulacio*, is without its own problems regarding the due process rights of the accused of committing human rights violations. This problem could be remedied by giving those defendants the right to appear before Inter-American Court and to plead their case.

122. See *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 31 (Sept. 18, 2003).

123. Tribunal Oral en lo Criminal y Correccional Nro. 29 de la Capital Federal [Oral Criminal and Correctional Court No. 29 of the Federal Capital], 15/11/2013, "Asignación Tribunal Oral TOO1 – Espósito, Miguel Angel / privacion ilegal de libertad," (Arg.).

124. Raffaella Kunz, *Judging International Judgments Anew? The Human Rights Courts before Domestic Courts*, 30 EURO. J. INT'L L. 1129, 1129-30 (2020) ("In the Americas, the Dominican Republic is about to leave the system over a politically sensitive judgment. Venezuela already turned its back on the IACHR in 2012, possibly inspiring other states where the Court faces discontentment, such as Ecuador, Bolivia and Nicaragua. Apart from that, the Organization of American States, and, with it, the Inter-American Commission on Human Rights and inevitably, also the Court, have lately been shaken by a serious financial crisis.").

125. *Id.*