Inter-American constitutionalism and judicial backlash

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I. Introduction

The Inter-American Court of Human Rights has established itself as a prominent legal voice. In more than three decades of existence, its case law is widely cited—both in the Americas as well as in other areas of the world—[1] and its judgments have effectively contributed to the protection of human rights of many people. Yet, like other international tribunals, the Court faces the challenges of a changing legal and political landscape. It must address novel legal issues while at the same time states, advocates and human rights victims all try to influence its decisions—sometimes in conflicting directions.

Recently two conflicting trends in inter-American human rights law are surfacing. On one hand, the Inter-American Court has increasingly adopted the stance of a regional constitutional court, one that aims at transforming social practices through constitutional law, with the decisive support of some legal scholars.[2] On the other hand, some states question the Court's authority, at times in a direct manner—as the cases of the Dominican Republic's Constitutional Court and the Argentinean Supreme Court recently show. In other instances, states use subtle mechanisms to challenge the Court—or, more generally, the inter-American

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[1] *See generally* THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE (Yves Haeck, Oswaldo Ruiz-Chiriboga and Clara Burbano-Herrera eds., 2015).

[2] *See, e.g.,* Armin von Bogdandy *et al.*, *Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism* (forthcoming, 2017).

human rights system's—authority. In all these cases, the Court's legitimacy as a regional human rights tribunal is at stake.

This paper is an initial effort to expose these two approaches and reflect on how they may reshape the contours of inter-American constitutionalism, for which I mean the interaction between domestic constitutional case law and regional, human rights law. At previous SELA conferences, I have examined one salient feature of the Inter-American Court's trend towards judicial maximalism, the conventionality control doctrine, first as a problematic doctrine for the implementation of the dialogic relation among States and the Court—an approach that the Court itself and many commentators fervently embrace—[3] and later as a demonstration of the inter-American human rights system's reluctance to adopting any mechanisms for subsidiarity—a notion that international courts should not rule out *ab initio*.[4] Here I look at the Court's influence on states, through the articulation of the anti-impunity doctrine as reflected in cases on states' self-amnesty laws and the recent judicial pushback that the Court has experienced at the hands of one of its (traditional) strongest allies, the Argentinean Supreme Court.

II. The Inter-American Court's influence on states

The Inter-American Court's authority—as with any international court—rests largely on its ability to confront the resistance that states may exercise. In order to properly scrutinize the extent of the Court's power, it is important to situate its jurisprudence in the political and legal context in which it operates. That context both affects and is affected by the decisions of the

[3] *See* Jorge Contesse, *The final word? Constitutional dialogue and the Inter-American Court of Human Rights* 15(2) INT'L J. CONST'L L. __ (2017).

[4] *See* Jorge Contesse, *Contestation and deference in the inter-American human rights system* 79(2) LAW & CONTEMP. PROBS. 123 (2016).

Court. In one prime example, some states have pushed back in response to the Court's attempt to establish itself as the ultimate authoritative legal voice in the Americas. In 1998, Trinidad and Tobago was the first to denounce the American Convention, a relatively singular move at the time. More recently, however, other states have followed suit: after several years of direct accusations of lack of impartiality against the Court, Venezuela finally withdrew from the American Convention in 2013. A year later, the Dominican Republic's Constitutional Court ruled against its state's acceptance of the Inter-American Court's compulsory jurisdiction. In parallel, the Organization of American States conducted a two-year "strengthening process" of the Inter-American Commission on Human Rights, which most commentators and advocates in the Americas saw as an effort to undermine, rather than enhance, the Commission's powers.[5]

With greater scrutiny upon the Court's work—its judgments, advisory opinions, and even its *in loco* country visits—it is vital now more than ever for the to take special care in justifying the exercise and extent of its legal authority. Identifying part of this justification in the domestic judicial developments of the OAS member states could serve as a legitimacy-enhancing tool that may render the Court less vulnerable to criticism.[6] Similarly, paying attention to how states react to the Court's judgments becomes a critical task to account for the interaction between domestic constitutional law and regional human rights law. In this section, I explore how the Inter-American Court's doctrine on self amnesty-laws influenced the constitutional practice of some Latin American countries, Peru and Argentina. Then, I turn to recent developments in

[5] *See* Gabriela Kletzel, *The Inter-American Commission on Human Rights' new Strategic Plan: an opportunity for* true strengthening, 20 INT'L J. OF HUM. RTS. ___ (2017).

[6] *See* Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRIES IN LAW 455 (2013).

Argentina's case law that cast serious doubts about the country's attitude towards international human rights law.

A. *The* Barrios Altos *anti-amnesty doctrine*

Amnesty laws are common in Latin America. Argentina, Brazil, Chile, Peru, El Salvador, Uruguay and recently Colombia have all enacted amnesty laws, albeit in different forms and under different circumstances.[7] Amnesty laws exempt certain individuals from penalty for certain actions otherwise punishable by law. Because some amnesty laws allow perpetrators of human rights violations to go unpunished, the Inter-American's Court case law has found these laws to be incompatible with states' obligations under the American Convention on Human Rights to investigate, prosecute and punish those responsible.[8] Such laws, the Court has found, even render inapplicable some of the criminal law's most basic principles, such as the prohibition of *ex post facto* laws and the *res judicata* principle.[9]

It was in 2001, in the *Barrios Altos* decision against Peru, where the Inter-American Court first articulated the anti-amnesty doctrine.[10] In *Barrios Altos*, the Court found that Peru bore international responsibility for the violation of the right to life, the right to humane treatment, fair trial and judicial protection of fifteen individuals killed in November 1991 by the

[7] In most cases, the same authoritarian regimes, facing the prospect of criminal prosecution of those responsible for human rights atrocities, enacted such amnesty laws. In other instances, post-authoritarian, transition regimes decided to adopt amnesty laws as a means to ensure political reconciliation among opposing parties. Similarly, some amnesty laws benefit only members of the military involved in human rights violations; others encompass all who have committed human rights violations or criminal offenses during the period covered by the amnesty law.

[8] [Insert cites for *Barrios Altos*, *Almonacid Arellano*, *La Cantuta*, *Gomes Lund*, *Gelman*, *El Mozote*]

[9] For a critique of the Court's doctrine on criminal law, *see* Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT'L CRIM. L. R. 665 (2012).

[10] *See* Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VIRGINIA J. INT'L L. 916 (2009).

"Grupo Colina," a death squad that operated under the autocratic regime of former Peruvian president Alberto Fujimori. The Court found that Peru "was responsible for failing to comply with Article 1(1) (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of the American Convention on Human Rights as a result of the promulgation and application of Amnesty Laws No. 26.479 and No. 26.492."[11] Furthermore, the Court declared,

> all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[12]

In *Barrios Altos*, the Court made the critical pronouncement that amnesty laws "lack legal effect,"[13] a notion that it would reiterate in several judgments, particularly in the context of the conventionality control doctrine.[14] *Barrios Altos* is thus properly viewed as a precursor to the

[11] *Barrios Altos*, para. 39.

[12] *Id*. para. 40.

[13] *Id*. para. 44. In his concurring opinion, judge Cançado Trindade added that "this incompatibility signifies that those laws are *null and void* … [and]

determines the *invalidity* of the act, which signifies that the said act *cannot produce legal effects*." Concurring Opinion by judge Antonio Cançado Trindáde, para. 15 (emphasis added).

[14] Pursuant to conventionality control, in case of conflict between domestic norms and the American Convention on Human Rights, national judges shall give preference to the Convention's norms. The doctrine's first full articulation of the doctrine, in the 2006 decision in *Almonacid Arellano vs. Chile*, set forth no details or mechanics regarding the application of such a broad mandate. Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sep. 26, 2006). Subsequently, the Court has attempted to polish some of the doctrine's nuances. In *Aguado Alfaro*, handed down only two months after *Almonacid*, the Court added an important clause to its initial formula: judges must exercise conventionality control over domestic norms "*evidently* in the context of their respective spheres of competence and the corresponding procedural regulations." Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006), ¶128 (emphasis added). On conventionality control, *see, e.g.*, Laurence Burgorgue-Larsen, *Chronicle of a Fashionable Theory in Latin America: Decoding the Doctrinal Discourse on Conventionality Control*, *in* 35 YEARS OF INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE 637, 653 (Yves Haeck, Clara Burbano Herrera, & Oswaldo Ruiz Chiriboga eds., 2016); Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEXAS INT'L L.J. 45, 52 (2015), Manuel Fernando Quinche Ramírez, *El control de convencionalidad y el sistema colombiano* 12 REV. IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL 163 (2009);

later doctrine. The Court found Peru in violation of its obligation to adopt domestic measures to protect human rights, but it did not yet go as far as to create a positive obligation for domestic authorities to actively strike down domestic norms. That would not happen until *Almonacid*.

What happened, then, between *Barrios Altos* in 2001 and *Almonacid* in 2006 to explain the Court's willingness to so substantially expand the scope of its authority and the extent to which international law must govern state action? The Court, following the lead of judge Sergio García Ramírez, grounded the doctrine of conventionality control in Article 2 of the American Convention and Articles 26 and 27 of the Vienna Convention on the Law of Treaties. But during that time, domestic courts were internalizing the *Barrios Altos* doctrine and, in some cases, articulating their own doctrine of enhanced monism even *before* the Inter-American Court handed down its decision in *Barrios Altos.* These domestic developments should occupy a more important place in the doctrinal evolution of the Court. An exhaustive inquiry into domestic cases and their interactions with the Court's jurisprudence is beyond the scope of this paper, but it is worth looking into two example states that have significantly contributed to the Inter-American Court's ascendance upon states.

B. *Domestic adoption of international law*

The massacre of Barrios Altos triggered a criminal investigation under the direction of Judge Antonia Saquicuray of the Sixteenth Criminal Court of Lima.[15] In 1995, Judge Saquicuray's efforts to hold accountable the members of the *Grupo Colina*, however, faced a seemingly insurmountable obstacle. The military courts filed a petition before the Supreme

[15] [Insert note explaining the facts of the Barrios Altos massacre]

Court claiming jurisdiction,[16] and before the criminal Court could address the issue, the Fujimori administration introduced a bill to Congress to enact an amnesty law—which Congress did in a matter of hours and without any deliberation.[17] The President promulgated the law on the following day, thus thwarting Judge Saquicuray's then-ongoing criminal investigation.

Two days later, however, Judge Saquicuray issued a decision finding Article 1 of the amnesty law unconstitutional. Specifically, Saquicuray relied on provisions of the Peruvian Constitution incorporating international human rights instruments into the Constitution and providing that, in case of incompatibility between a constitutional norm and a legal norm, judges shall give preference to the former.[18] Following additional litigation on the issue, Congress passed a second amnesty law expanding the scope of the first and explicitly establishing that it could not be revised or invalidated by judicial authority.[19] In addition, an appellate court issued a final judgment declaring that the *Barrios Altos* investigation must be quashed; that judges could not rule on the constitutionality of laws, and that Judge Saquicuray should be investigated for misinterpreting the law.[20]

The domestic proceedings were thus terminated and the case made its way up to the inter-American human rights system where,[21] as discussed, the Inter-American Court issued its 2001 judgment finding that Peru's amnesty laws violated the American Convention. What is

[16] Inter-Am. Ct. Hum. Rts., *Barrios Altos v. Peru* (merits), March 14, 2001, ¶2(i).

[17] The law granted an amnesty to "all members of the security forces and civilians who had been accused, investigated, prosecuted or convicted, or who were carrying out prison sentences, for human rights violations." *Id.* ¶2(j).

[18] Sentencia de 16 de junio 1995. Disposición Cuarta Transitoria en relación con Art. 138 (control difuso).

[19] Inter-Am. Ct. Hum. Rts., *Barrios Altos v. Peru* (merits), March 14, 2001, ¶2(m).

[20] Inter-Am. Ct. Hum. Rts., *Barrios Altos v. Peru* (merits), March 14, 2001, ¶2(n).

[21] Notably, article 205 of the Peruvian Constitution establishes the right of all citizens to resort to supranational human rights organs once domestic remedies have been exhausted.

remarkable, however, is that before the Court issued its decision in *Barrios Altos*, at least one Peruvian judge applying domestic law had arrived at the same conclusion as the Inter-American Court later would in *Almonacid*: domestic judges are bound by the norms and judicial interpretation of the American Convention and other international human rights instruments, such as the Universal Declaration of Human Rights and the American Declaration on the Rights of Man and Citizen.

As a consequence of the Inter-American Court's *Barrios Altos* decision, domestic judges in Peru issued several rulings ordering the reopening of criminal investigations in cases where courts had applied the amnesty laws as well as in those in which they had not.[22] The latter group included the criminal case against Santiago Martín Rivas, the leader of the *Grupo Colina*. In 1995, Rivas had been found to have no criminal responsibility for a related massacre known as "La Cantuta."[23] Pursuant to the Inter-American Court's judgment in *Barrios Altos*, however, the Military Court Supreme Council reopened the case against Rivas.[24] Rivas challenged the Military Court's decision before Peru's Constitutional Court, arguing that the decision of the Military Council violate the equal protection clause, the right to due process, the *ne bis in idem* and the *res judicata* principles.[25] In particular, Rivas maintained that the *Barrios Altos* holding—which ordered the state to conduct criminal investigations and punish those

[22] The Peruvian government requested an interpretation decision by the Inter-American Court to determine whether the *Barrios Altos* decision applied only to that actual case or whether the holding extended to other similar cases. In response, the Court said that the case's doctrine —that amnesty laws are inapplicable— encompass all cases, not only the criminal investigations in *Barrios Altos*.

[23] [Insert brief explanation of facts of La Cantuta and related IACtHR's decision]

[24] Exp. No. 4587-2004-AA /TC, Santiago Enrique Martín Rivas, November 29, 2005, ¶52.

[25] *Id.*

responsible—did not apply to his case, as *Barrios Altos* dealt with the application of the amnesty laws and his was a case that fell out of those laws' reach.

The Constitutional Court of Peru took a broad view of *Barrios Altos* and ruled against Rivas. As the Constitutional Court saw it:

> the state's duty to investigate and punish those responsible for the violation of the human rights declared in the Inter-American Court of Human Rights' decision not only includes the annulment of judicial proceedings which applied the amnesty laws No. 26479 and 26492, after the Court's decision that such laws lack legal effects. It also encompasses any practice aimed at impeding the investigation and punishment of those responsible of the violation of the right to life and physical wellbeing. The court's order that petitioner obtained is one of such proceedings.[26]

The Constitutional Court also resorted to a UN Human Rights Committee to find that the impunity that results from the application of the amnesty laws is contrary to Peru's international obligations.[27] In sum, using both domestic and international sources of authority, Peru's national courts on their own articulated a notion akin to conventionality control, without the need for this top-down mandate from the Inter-American Court.

Argentina provides a second example of the Inter-American Court's significant influence upon states—at least until 2017. The country has been known for a strong monist constitutional practice in Latin America—a region where incorporation of international human rights law into domestic constitutional arrangements is already the norm. In 1994, its legislature granted constitutional status to a number of international human treaties. A few years earlier, Argentina's Supreme Court had given direct application to Article 14 of the American

[26] *Id.* ¶63.

[27] *Id.* ¶63 (citing the Human Rights Committee Report on Peru, CCPR/CO/70/PER, Nov. 15, 2000, ¶9).

Convention on Human Rights, thereby putting an end to the country's former legal dualism.[28] The case of *Ekmekdjian*, moreover—concerning the direct application of the American Convention's norms—advanced the theory that Article 27 of the Vienna Convention on the Law of Treaties "imposes the duty upon Argentinean organs to give primacy to an international treaty over a national norm in case such norm is in conflict with the treaty."[29] While this article questioned this justification of conventionality control; it matters that here the hierarchy of international law over national law is grounded in a *domestic*, not an international, decision.

Like Peru, Argentina addressed the issues of domestic and international legal conflict in the context of amnesty laws. In 2005, the Argentinean Supreme Court overruled its 1987 decision in *Camps* to declare unconstitutional several of the country's amnesty laws.[30] Specifically, the Supreme Court addressed the Law of National Pacification (1983), which granted amnesty to members of the army involved in human rights violations, the Full Stop Law (1986), which terminated all pending and future investigations for human rights violations, and the Due Obedience Law (1987), which allowed low-ranking officials to claim that they could not resist orders given by high-ranking officials.[31] As in *Martín Rivas*, *Simón* featured an army official, Julio Simón, accused of serious human rights violations, namely, the abduction of a child later delivered to an army colonel as part of the military's extended practice of child

[28] Supreme Court of Justice of Argentina, *Ekmekdjian v. Sofovich*, Fallos, 315: 1492, July 7, 1992. *See* Víctor Bazán, *El derecho internacional de los derechos humanos desde la óptica de la Corte Suprema de Justicia de Argentina*, 8(2) ESTUDIOS CONSTITUCIONALES 359 (2010).

[29] *Ekmekdjian v. Sofovich*, ¶ 19.

[30] [cite to *Simon* case; cite to *Camps*]

[31] For a detailed analysis of the politics of the Argentinean transitional justice, see ANNELEN MICUS, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A SAFEGUARD FOR JUSTICE IN NATIONAL TRANSITIONS: FROM AMNESTY LAWS TO ACCOUNTABILITY IN ARGENTINA, CHILE AND PERU (2015). For an analysis of the *Simón* decision, *see* Christina A.E. Bakker, *A Full Stop to Amnesty in Argentina: the Simón Case*, 3(5) J. INT'L CRIMINAL JUSTICE 1106 (2005).

abduction during the 1976-1983 dictatorship.[32] Unlike Rivas, however, Simón's defense rested on Argentina's amnesty laws, which exempted military personnel acting in the scope of duty. The district court first hearing the case simply held that Argentina's amnesty laws violate international human rights law.[33] It was the Appellate Court, affirming the lower court's ruling, that included the doctrine from *Barrios Altos* in its decision.[34]

In a landmark 350-page decision affirming the appellate court's ruling, the Argentinean Supreme Court also relied heavily on *Barrios Altos*.[35] The Court referred first to a 1992 report by the Inter-American Commission on Human Rights, which recommended the adoption of all necessary measures to determine the identity of those responsible for the human rights violations.[36] But it was not clear what the Commission meant by "necessary measures." The Court found that "the questions about the actual scope of the Argentinean state's obligations with regards to the full stop and due obedience laws have been addressed by the Inter-American Court's decision in the *Barrios Altos* case."[37] The Argentinean Court cited the Inter-American

[32] Michael J. Lazzara, *Kidnapped Memories: Argentina's Stolen Children Tell Their Stories*, 12(3) INT'L J. HUM. RTS. 319 (3013) ("Approximately 500 children were "transferred" during this period."). *See also* "Children of the Dirty War: Argentina's stolen orphans," *The New Yorker*, March 19, 2012.

[33] Juzgado Nacional en lo Criminal y Correccional Federal No. 4, "*Fallo Simón*." The decision discussed at large the development of international criminal law although it did not use the Inter-American Court's case law.

[34] Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal, Sala 11, "*Incidente de apelación de Simón, Julio*", Decision of November 9, 2001, Case No. 17.899, cited by MICUS, *supra* note ___, at 238.

[35] Supreme Court of Justice of Argentina, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.", causa No. 17.768.

[36] Inter-Am. Comm. Hum. Rts., "Consuelo Herrera v. Argentina," Cases 10.147, 10.181, 10.420, 10.262, 10.309 & 10.311, Report of October 2, 1992, cited by Supreme Court of Justice of Argentina, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.", causa No. 17.768, at 110, para. 20.

[37] *Id*. ¶23.

Court's holding at length before declaring that that decision must govern the present case, thus rendering Argentina's amnesty laws null and void.[38]

III. Times are changing: judicial backlash

But things seem to be changing and the Inter-American Court's influence is now directly challenged. On February 14, 2017, the Argentinean Supreme Court handed down a decision that could send shock waves into the field of regional human rights law. The ruling concerned the implementation of a 2011 Inter-American Court of Human Rights' decision against Argentina, in which the Court found the state in violation of the American Convention on Human Rights. The reason? In 2001, Argentina's Supreme Court affirmed a civil judgment against two publishers, Fontevecchia and D'Amico, for running stories about an unacknowledged child of then-president Carlos Menem.[39] The journalists filed a case against Argentina before the inter-American human rights system. Ten years later, the Inter-American Court ordered the state to "revoke the decision in its entirety."[40] Argentina's executive branch requested the Supreme Court to comply with the Inter-American Court's remedy—that is, to revoke its 2001 ruling.

The Supreme Court, however, declined to do so. It reasoned that the Inter-American Court lacked the authority to order the revocation of a domestic judgment, as doing so exceeded

[38] *Simón* was a step further in a political process that began years earlier. In 2003, the Argentinean Congress had declared that the both amnesty laws were null and void *ab initio*, along the lines of the *Barrios Altos* doctrine. When the Supreme Court handed down *Simón*, it was thus confirming the legislature's decision to not just repeal, but in fact to annul, such legislation. The effects of such annulment were that all those who had benefited from the amnesty could not invoke the prohibition of retroactivity of penal laws and the principle of *res judicata*, and could now be tried. *Id.* ¶31.

[39] Inter-American Court of Human Rights, *Fontevecchia and D'Amico v. Argentina*, Merits, Reparations and Costs, Judgment of November 29, 2011, I/A Court H.R., Series C No. 238 (2011).

[40] *Id*. ¶ 105. The Court also ordered the publication of the judgment in social and official publications (¶¶ 108-110).

its powers under the American Convention.[41] Legal scholars and commentators quickly scrutinized the Court's judgment.[42] Human rights organizations decried the decision, claiming that the Court had "unlatched" Argentina from the inter-American human rights system.[43] And a current member of the Inter-American Court, an Argentinean national who also served on the country's Supreme Court, rebuked the decision in the press.[44]

These criticisms suggest that Argentina, a country once so supportive of the international system, is now abruptly compromising it. Yet, to fully understand the reasoning and impact of Argentina's Supreme Court's decision, we must consider its crucial aspects with more caution. First, the Supreme Court effectively reigns in its otherwise progressive approach toward the incorporation of international law.[45] In a critical passage, the Court declares that "it is beyond discussion that the state is, *in principle*, obliged to comply with decisions by the Inter-American

[41] National Supreme Court of Justice, *Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso 'Fontevecchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos*, February 14, 2017.

[42] Víctor Abramovich, "Comentarios sobre el 'caso Fontevecchia'", *Centro de Justicia y Derechos Humanos UNLa*, Feb. 17, 2017 (*available at* http://cjdh.unla.edu.ar/noticia/126/comentarios-sobre-el-caso-fontevecchia) Gustavo Arballo, "La Corte Argentina frente a la Corte Interamericana: la resolución de no-cumplimiento del caso Fontevecchia," *Saber leyes no es saber derecho*, Feb. 14, 2017 (*available at* http://www.saberderecho.com/2017/02/la-corte-argentina-frente-la-corte.html) Alberto Bovino, "Caso Fontevecchia: la incompetencia de un tribunal", *No hay* derecho, Feb. 24, 2017 (*available at* http://nohuboderecho.blogspot.com/2017/02/caso-fontevecchia-la-incompetencia-de.html), and Roberto Gargarella, "La Corte Suprema y los alcances de las decisiones de la Corte Interamericana," *Seminario de Teoría Constitucional y Filosofía* Política, Feb. 15, 2017 (*available at* http://seminariogargarella.blogspot.com/2017/02/la-corte-suprema-y-los-alcances-de-las.html).

[43] Centro de Estudios Legales y Sociales, "Las consecuencias del fallo de la Corte Suprema para la vigencia de los derechos humanos en la Argentina," *DPLF Blog*, Feb. 23, 2017 (*available at* https://dplfblog.com/2017/02/23/las-consecuencias-del-fallo-de-la-corte-suprema-para-la-vigencia-de-los-derechos-humanos-en-la-argentina/).

[44] Raúl Zaffaroni, "La Corte Suprema declara su independencia del Estado," *Agencia Paco Urondo*, February 15, 2017 (*available at* https://agenciapacourondo.com.ar/secciones/ddhh/22099-zaffaroni-la-corte-suprema-declara-su-independencia-del-estado); Zaffaroni: 'El fallo choca hasta con el Preámbulo', *Página 12*, February 19, 2017 (*available at* https://www.pagina12.com.ar/21115-el-fallo-choca-hasta-con-el-preambulo).

[45] Remarkably, the Court cites cases decided twenty years ago to buttress its claims on subsidiarity. Suprema Corte de Justicia de la Nación, *Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso 'Fontevecchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos*, February 14, 2017, ¶ 9.

Court pronounced in compulsory proceedings against the state."[46] Prior to this decision, compliance with international decisions was mandatory, period. Only now does the court appear to articulate some space between theory and practice, which would allow domestic noncompliance with decisions from the Inter-American Court. How wide that space will be remains to be seen, as the Argentinean Court failed to give more indication about it.

Second, the Argentinean Court's decision to review the jurisdictional powers of the Inter-American Court is itself astonishing, even aside from its surprising conclusion. By purporting to review the powers of an international tribunal, the Supreme Court of Argentina, a domestic body, in fact places itself *above* the international system. The Court thus goes further than merely "unlatching" Argentina from the system of human rights law enforcement, as critics have observed.

Third, the Argentinean Court's decision goes to the core of one critical issue. It resists the Inter-American Court's order to "revoke" a decision, an order that typically only superior courts may give to lower courts. Such pretension, the Argentinean Court observes, would make of the Inter-American Court a "fourth instance" or a court of cassation. But this is not the role of the international tribunal, in the Argentinean Court's (new) view. Rather, in the international plane, the Inter-American Court is the final interpreter of the norms of the American Convention; with respect to domestic law, however, the final interpreter is the Supreme Court, not an international tribunal. It would violate the national constitution, the Court believed, to revoke a judicial decision merely upon order from an international tribunal.

[46] *Id*. ¶ 6 (emphasis added).

Finally, the Argentinean Court takes issue with the nature of the Inter-American Court's order—an important question to the implementation of regional human rights law. When an international court finds that a state has violated a regional human rights treaty, it must order the state in general terms to remedy the violation. But, does it also have to specify how the state is to so remedy the violation? This is, to be sure, what the Inter-American Court has done in its three-decade long jurisprudence—a characteristically detailed and exhaustive remedial jurisprudence. In its decision, the Argentine Court challenges that approach. The Court's claim is simple: the state is limited by its own political structure, and most critically its government's separation and allocation of powers. It is of course possible to challenge the Argentinean Court's interpretation of its constitutional powers, but the nature of this challenge raises an important question: whether or not a state should be allowed to determine, at least to some extent, its means of compliance with the general holding of an international tribunal.

In this case, the Inter-American Court was within its powers to hold that Argentina violated the petitioners' right to freedom of expression; but it does not follow that the international Court may determine the precise means that the state must use to comply with the international court's judgment. By ordering Argentina "to revoke" a judicial decision without consideration of the domestic allocation of powers, the Inter-American Court arms opponents to the Court's judicial activism with solid grounds for critique.[47]

Notwithstanding this potential overreaching, the Argentinean Court in its response missed a valuable opportunity to craft a viable way forward, one that honors the state's international obligations and accords with the country's constitutional practice. For instance, the

[47] *See* Jorge Contesse, *Contestation and deference in the inter-American human rights system*, 79(2) LAW & CONTEMP. PROBS. 123 (2016).

Argentinean Court could have remanded the case back to Argentina's executive—or maybe Congress—requesting that they implement the tribunal's order in a way that achieved international compliance pursuant to constitutional provisions, without violating the judicial supremacy of Argentina's Supreme Court or domestic constitutional law (as a compliant direct revocation of its prior order would have done). Similarly, the Inter-American Court itself could have requested the state to remedy the violation using all domestic means at the state's disposition, not necessarily demanding that it effect one particular remedy.

IV. Conclusion

Questions of authority and enforcement are ripe at what is an increasingly critical time for the inter-American human rights system. For a number of years, the Inter-American Court saw its case law expand and influence several states, with the decisive support of domestic courts. The Court even articulated a doctrine—known as conventionality control—whereby it purports to transform Latin American judges into "inter-American judges."[48] For many commentators, the articulation of such doctrines even leads to the articulation of common Latin American law.[49] How such "*ius constitutionale commune*" actually operates remains, however, to be explained.

Consider judge Ferrer Mac-Gregor's final remarks in his concurring opinion in Gelman v. Uruguay, Monitoring Compliance with Judgment, Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. ¶ 87 (Mar. 20, 2013): "The doctrine does not seek to establish which body has the final word, but to encourage creative, responsible jurisprudential dialogue, committed to ensuring the effective application of fundamental rights. *Domestic judges now become the first Inter-American judges*. It is they who bear the greatest responsibility in harmonizing national legislation within the Inter-American parameters." (my emphasis).

[49] Former judge García Ramírez recently stated: "In my view the nations of the Americas –and I focus, of course, on those of Latin, Ibero- or Hispanic America– have made and are making their own voyage into the wind, from a certain point of departure, toward the common destiny sought by humanity: the arrival port that implies the definitive reign – not merely discursive, but in practice – of human rights." The Relationship Between Inter-American Jurisdiction and States (national systems): Some Pertinent Questions, "The Future of the Inter-American Human Rights System" Working Paper No. 3, The Center for Civil & Human Rights, University of Notre Dame, May 2014, at 4, *available at* https://humanrights.nd.edu/assets/134035/garciaramireziaeng.pdf. Similarly, for some current judges in the Court,

Against these developments there is a pushback trend which calls for careful attention. The Argentinean Court's decision in *Fontevecchia* is in fact the latest development in a trend of growing resistance and even direct backlash from member states: in 2012, after several judgments against the state, Venezuela finally denounced the American Convention; in 2014, the Constitutional Court of the Dominican Republic ruled against its state's acceptance of the Inter-American Court's compulsory jurisdiction; and between 2011 and 2013, states unhappy with some inter-American decisions conducted a so-called "strengthening process" of the inter-American human rights system—in fact understood more as an effort to weaken than to enhance the system's powers.[50]

The Argentine Court's decision to challenge the Inter-American Court's authority, therefore, is emblematic of region-wide tensions, and the legal issues explored above will continue to trouble the balance of power between the international body and its member states. How the Inter-American Court reacts to the Argentine *Fontevecchia* decision will therefore matter significantly.[51] The Court could use this controversy as an opportunity to foster judicial engagement with domestic courts and political authorities. Whether—and how—this will occur remains to be seen.

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doctrines such as conventionality control contribute to the construction of a Latin American common law—a "ius constitutionale americanum." *See* Inter-Am. Ct. Hum. Rts., *Cabrera Montiel*, concurring opinion of judge Eduardo Ferrer-MacGregor.

[50] *See* Gabriela Kletzel, *The Inter-American Commission on Human Rights' new Strategic Plan: an opportunity for* true strengthening, 20 INT'L J. OF HUM. RTS. ___ (2017). [DOI: 10.1080/13642987.2016.1268772]

[51] As a court, not through op-eds or interviews by some its members, as in the criticism levied by Judge Raúl Zaffaroni (*supra* note 6).