THE MINISTRY OF FOREIGN AFFAIRS CASE: A RULING WITH UNFORESEEN CONSEQUENCES IN THE ENFORCEMENT OF HUMAN RIGHTS IN ARGENTINA

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ABSTRACT

A recent decision rendered by the Argentine Supreme Court of Justice breaks the national constitutional framework concerning the relationship between international and domestic law. In the Ministry of Foreign Affairs *case, the Argentine Tribunal rejected the ruling issued by the Inter-American Court of Human Rights in the Fontevecchia and D'Amico case, as it considered that the International Court had no competence to order domestic tribunals to set aside res judicata decisions. The Supreme Court of Justice reached this conclusion despite the fact that the binding nature of the judgments of the Inter-American Court of Human Rights has been incorporated into the national Constitution. This Note will analyze the Argentine constitutional framework and describe the evolution of the jurisprudence of the Supreme Court of Justice to explain the recent and surprising abandonment of the jurisprudence of the highest tribunal. It will challenge the judgment by identifying the legal issues associated with the arguments made by the Supreme Court of Justice and highlight the negative consequences that the ruling may create in the Argentine legal system.*

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I. INTRODUCTION

On February 14, 2017, the Argentine Supreme Court of Justice ("Supreme Court" or "Argentine Court") shocked supporters of the celebrated jurisprudence it had developed over the last thirteen years concerning the relationship between international human rights law and the Argentine legal system. In *Ministry of Foreign Affairs*, the Argentine Court ruled that the Inter-American Court of Human Rights ("Inter-American Court" or "International Court") had no authority to order the setting aside of a res judicata judgment previously rendered by the Argentine Court, as doing so exceeded the "remedial powers" conferred by the American Convention on Human Rights ("American Convention").[1] The Argentine Court's decision thus defied the constitutional position and the legal nature of the judgments of the International Court, as well as the recommendations of other international human rights monitoring bodies.

1. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/2/2017, "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," Fallos (2017-340-47) (Arg.), http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7357162&cache=1502740200611.

In 1992, the Supreme Court began a process of progressive incorporation of international human rights law into Argentina's legal order, later strengthened by the 1994 Constitutional Amendment.[2] The common feature of this movement was the invocation of the principle of *pacta sunt servanda*,[3] enshrined in Article 26 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), by which states are bound to comply in good faith with their international treaty commitments.[4] Therefore, the Supreme Court has developed a gradual jurisprudence intended to harmonize both legal systems and which encompasses the adherence to the doctrine of monism of sources,[5] the supremacy of human rights treaties over domestic laws,[6] the presumption of full compatibility of certain human rights treaties with the national Constitution,[7] the acceptance of the mandatory character of the judgments of the Inter-American Court,[8] the reception of the doctrine of conventionality control,[9] and the recognition of the binding nature of the recommendations of the Inter-American Commission of Human Rights ("Commission").[10]

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2. *See* José Miguel Onaindia, *Un fallo que atrasa*, 10 PENSAR EN DERECHO 81, 86 (2017), http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revistas/10/un-fallo-que-atrasa.pdf; *see also* Lautaro Furfaro, *Las ataduras de Ulises se aflojan: el pronunciamiento de la CSJN frente al caso "Fontevecchia" de la Corte IDH*, 10 PENSAR EN DERECHO 37, 42-43 (2017), http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revistas/10/las-ataduras-de-ulises-se-aflojan.pdf

3. Alfonso Santiago, *¿Desobediencia debida? ¿Quién tiene la última palabra?*, REVISTA JURÍDICA LA LEY AR/DOC/493/2017, 15 (2017).

4. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (ratified by the Republic of Argentina on Dec. 5, 1972).

5. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1992, "Ekmekdjian, Miguel Angel c. Sofovich, Gerardo y otros. s/ Recurso de hecho," Fallos (1992-315-1492) (Arg.).

6. *Id.*

7. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/12/1996, "Monges, Analía M. c. Universidad de Buenos Aires / resol. 2314/95 s/ Recurso de hecho," Fallos (1996-319-3148) (Arg.).

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

9. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/11/2012, "Rodríguez Pereyra, Jorge Luis y otra c. Ejército Argentino s/ Daños y Perjuicios," Fallos (2012-335-2333) (Arg.).

10. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/8/2013, "Carranza Latrubesse Gustavo c. Estado Nacional - Ministerio de Relaciones Exteriores - Provincia del Chubut - s/ Proceso de Conocimiento," Fallos (2013-336-1024) (Arg.).

However, following the *Ministry of Foreign Affairs* decision, the Supreme Court has now affirmed the preeminence of its decisions above the rulings of the Inter-American Court, and in so doing, challenges its earlier decisions, thus generating the surprise of the entire legal community with such a shift in its case law.[11] The judgment further raised serious concerns regarding the impact this may have on future cases, owing to the fact that the ruling redefines the interaction between international human rights law and the Argentine domestic legal system.

Part II of this Note will first describe Argentina's constitutional framework, focusing on the 1994 Constitutional Amendment that granted constitutional status to certain human rights instruments. Part III will then refer to the background of the decision in *Ministry of Foreign Affairs* and briefly explain the former criterion of the Argentine Court concerning the legal value of the rulings of the International Court in those cases in which Argentina was a party. This background will clarify why the decision in *Ministry of Foreign Affairs* constitutes a surprising break in the jurisprudence of the Supreme Court. Part IV will highlight the legal problems arising from the rationale of this decision in order to justify why the Inter-American Court did not act *ultra vires*. Finally, this Note will explain the negative consequences that the domestic decision may generate in the design of the Argentine legal framework.

II. The Argentinean Constitutional Framework

A. *The Historical Constitution and the Doctrine of the Supreme Court*

The 1853 historical Constitution contained only two provisions,[12] both of which are still in force, concerning the relationship between the international legal order and domestic law.[13] Article 27 orders the federal government to strengthen its relationships of peace and trade

11. Hernán Gulco, *La Corte Suprema y los derechos humanos*, Perfil, Feb. 25, 2017, http://www.perfil.com/columnistas/la-corte-suprema-y-los-derechos-humanos.phtml.

12. The term *historical Constitution* refers to the first Argentine Constitution of 1853 passed by the Constitutional Convention gathered in Santa Fe. The original Constitution was amended in 1860 to incorporate the Province of Buenos Aires that remained separated from the Argentine Confederation until 1859. The historical Constitution 1853-1860 was later reformed in 1866, 1898, 1949, 1957 and 1994.

13. María Angélica Gelli, *El alcance de la irretroactividad penal y las fuentes del ordenamiento jurídico en el caso "Arancibia Clavel,"* Revista Jurídica La Ley [L.L.] (2004) (Arg.); Mónica Pinto, Temas de Derechos Humanos 76 (Editores del Puerto 1999); Juan Antonio Travieso, *La Reforma Constitucional Argentina de 1994*, Revista Jurídica La Ley [L.L.], Dec. 1994, at 1.318.

by means of treaties that are "in accordance with the principles of public law laid down by this Constitution."[14] According to Article 31, the national Constitution, the laws enacted by Congress, and the treaties executed with foreign powers are the supreme law of the nation.[15] As there was no specific regulation concerning the relationship between international law and domestic law, the national Constitution had, in all cases, superior status to international treaties,[16] which also required a domestic rule of implementation as treaties were not automatically operative.[17] Therefore, domestic laws and duly incorporated treaties were equally deemed the supreme law of the nation and their relationships were governed by the following general principles of law: *lex posterior abrogat priorem* and *lex specialis derogat legi generali*.[18]

This dualist interpretation of the Constitution was the common understanding of the Supreme Court until 1992.[19] In the well-known *Ekmekdjian* case decided that year, the Supreme Court ruled that the American Convention integrates the Argentine legal order simply because the Republic has become a party to the Convention through the deposit of the instrument of ratification.[20] The Supreme Court clarified that this new criterion modified the former doctrine of the

14. Art. 27, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

15. Art. 31, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). *See also* Silvina S. González Napolitano, *Las Relaciones entre el Derecho Internacional y el Derecho Interno Argentino, in* LECCIONES DE DERECHO INTERNACIONAL PÚBLICO 1, 8 (Silvina S. González Napolitano ed., 2015).

16. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/7/1947, "Chantrain, Alfonso c. Gobierno Nacional s/ recurso de habeas corpus," Fallos (1947-208-84) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/6/1947, "Becker, Juan Sigfrido y otros," Fallos (1947-208-39) (Arg.). *See also* Raúl Emilio Vinuesa, *Direct Applicability of Human Rights Conventions Within the Internal Legal Order: The Situation in Argentina, in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 149, 158-159 (Benedetto Conforti & Franceso Francioni eds., 1997); GUILLERMO MONCAYO, RAÚL VINUESA AND HORTENSIA GUTIÉRREZ POSSE, DERECHO INTERNACIONAL PÚBLICO 60 (1990).

17. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/12/1988, "Ekmekdjian, Miguel Angel c. Neustadt, Bernardo y Otro s/ Amparo," Fallos (1988-311-2497) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/13/1940, "Alonso, Gregorio c. Haras 'Los Cardos' S.A.," Fallos (1940-186-258) (Arg.).

18. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/9/1963, "Martín & Cía. Ltda. SA c. Nación," Fallos (1963-257-99) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/6/1968, "Esso S.A. c. Gobierno Nacional," Fallos (1968-271-7) (Arg.). *See also* González Napolitano, *supra* note 15, at 11.

19. RICARDO ALEJANDRO TERRILE, INTERPRETACIÓN JUDICIAL DE LA CONSTITUCIÓN NACIONAL: SUPREMACÍA CONSTITUCIONAL Y CONTROL DE CONSTITUCIONALIDAD 33-39 (2001).

20. CSJN, 7/7/1992, "Ekmekdjian, Miguel Angel," Fallos (1992-315-1492).

tribunal,[21] and explained that the rights and guarantees enshrined in the American Convention may be invoked and exercised without a legislative act of incorporation.[22]

According to the Supreme Court, "[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."[23] Hence, the Argentine tribunal ruled that a law of Congress cannot repeal a treaty because such an abrogation would violate the distribution of competences among the different state powers.[24] 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.[25] This jurisprudence was later confirmed in *Servini de Cubría* and *Fibraca*,[26] in which the highest tribunal reaffirmed the supremacy of international treaties. In *Fibraca*, however, the Supreme Court clarified that international law has primacy over domestic law "once the principles of constitutional public law had been secured," as required by Article 27 of the national Constitution.[27] Therefore, treaties have to subordinate to those principles of public law, although such precepts are not enumerated or explicitly identified in the national Constitution.

B. *The 1994 Constitutional Amendment*

The national Constitution was reformed in 1994 and the Argentine legal pyramid changed, incorporating the doctrine developed by the Supreme Court in *Ekmekdjian* regarding the primacy of international treaties over domestic laws.[28] The Constitutional amendment, however,

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21. *Id.*

22. *Id.* ¶ 15.

23. *Id.* ¶ 18.

24. *Id.* ¶ 17.

25. *Id.*

26. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1993, "Fibraca Constructora SCA c. Comisión Técnica Mixta de Salto Grande s/ recurso de hecho," Fallos (1993-316-1669) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/9/1992, "Servini de Cubría, M. c. Arte Radiotelevisivo Arg. S.A. y Borensztein, Mauricio," Fallos (1992-315-1943) (Arg.).

27. *Id.* ¶ 3.

28. *See Diario de sesiones de la Convención Nacional Constituyente*, CONVENCIÓN NACIONAL CONSTITUYENTE DE 1994 (Aug. 3, 1994), http://www1.hcdn.gov.ar/dependencias/dip/Debate-

also went one step further when it granted constitutional standing to certain human rights instruments.[29]

Section 22 of amended Article 75 establishes that 1) eleven human rights instruments enjoy constitutional hierarchy, and 2) all other international treaties duly ratified by Argentina have higher standing than domestic laws.[30] The Constituent Assembly also determined that human rights instruments with constitutional status, under the conditions under which they are in force, do not repeal any article of the first part of the Constitution.[31] Accordingly, they must be understood as complementary to the rights and guarantees recognized therein.[32] Lastly, the Assembly established the conditions by which other human rights treaties may acquire constitutional hierarchy in the future: after being approved by Congress, the Constitution requires the vote of two-thirds of the totality of the members of each Chamber.[33]

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constituyente.htm (follow "Art. 75, incisos 22, 23, primer párrafo, y 24 de la Constitución Nacional" hyperlink); *see also* Marcelo Alegre, *Monismo en serio: "Fontevecchia" y el argumento democrático*, 10 PENSAR EN DERECHO 27, 30-33 (2017) http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revistas/10/monismo-en-serio-fontevecchia-y-el-argumento-democratico.pdf; Travieso, *supra* note 13.

29. PINTO, *supra* note 13, at 78.

30. Art. 75, § 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). This provision establishes:

> Congress is empowered to approve or reject treaties entered with other nations and with international organizations, and concordats with the Holy See. Treaties and concordats have higher standing than laws.
>
> The following [international instruments], under the conditions under which they are in force, stand on the same level as the Constitution, [but] do not repeal any article in the First Part of this Constitution, and must be understood as complementary of the rights and guarantees recognized therein: The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the [International] 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 Women; the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. They may only be denounced, if such is to be the case, by the National Executive Power, after prior approval by two thirds of the totality of the members of each Chamber.
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> Other treaties and conventions on human rights, after being approved by Congress, shall require the vote of two-thirds of the totality of the members of each Chamber in order to enjoy standing on the same level as the Constitution.

Id.

31. *Id.*

32. *Id.*

33. *Id.* To date, three human rights treaties have been granted constitutional hierarchy since the 1994 Constitutional Amendment: the Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, O.A.S.T.S. No. 68, approved by Law No. 24556, Oct. 11, 1995, [28251]

Following the 1994 Constitutional Amendment, the Supreme Court interpreted three phrases that were drafted in Section 22 of Article 75. First, the Argentine tribunal held that the phrase, "under the conditions under which they are in force," signifies that international human rights treaties with constitutional standing shall 1) apply in the form in which the treaties have been ratified by Argentina,[34] including the reservations and the interpretative declarations opportunely made,[35] and 2) take into account the "effective application by the international tribunals that are competent for their interpretation and application."[36] This clause has usually been invoked as the constitutional basis that justifies the incorporation of the jurisprudence of the Inter-American System into the Argentine legal regime.[37] According to the Supreme Court, the jurisprudence of the Inter-American Commission and the Inter-American Court serves as a guide for the interpretation of the American Convention because Argentina recognized their competence

B.O. 7 (constitutional hierarchy granted by Law No. 24820, May 26, 1997, [28657] B.O. 1); the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73, approved by Law No. 24584, Nov. 23, 1995, [28281] B.O. 1 (constitutional hierarchy granted by Law No. 25778, Sept. 2, 2003, [30226] B.O. 1); and the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, approved by Law No. 26378, June 6, 2008, [31422] B.O. 1 (constitutional hierarchy granted by Law No. 27044, Dec. 11, 2014, [33035] B.O. 3).

34. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/7/1995, "Giroldi, Horacio David y otros s/ recurso de casación," Fallos (1995-318-514) (Arg.).

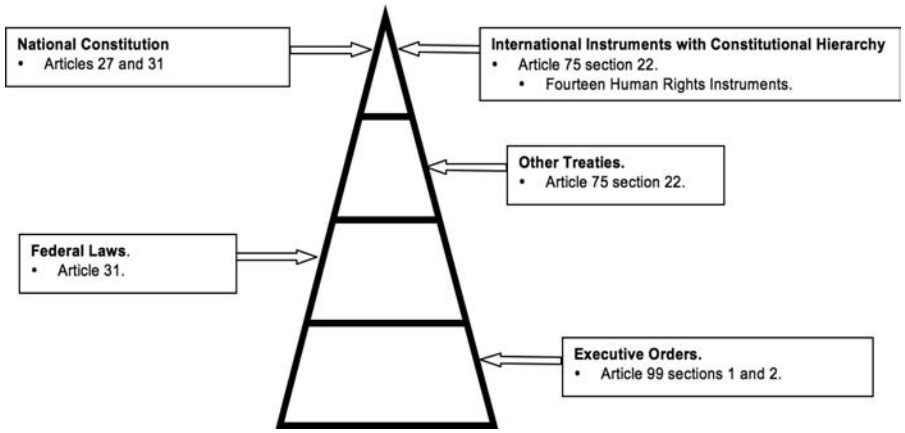
35. *See* Alejandro Turyn, *Artículo 1. Obligación de Respetar los Derechos*, *in* LA CONVENCIÓN AMERICANA DE DERECHOS HUMANOS Y SU PROYECCIÓN EN EL DERECHO ARGENTINO 1, 4 (Enrique M. Alonso Regueira ed., 2013), http://www.derecho.uba.ar/publicaciones/libros/ind-alonso-regueira.php; Arturo Santiago Pagliari, *Derecho Internacional y Derecho Interno. El Sistema Constitucional Argentino*, 7.2 ARS BONI ET AEQUI 17, 30 (2011), https://dialnet.unirioja.es/servlet/articulo?codigo=3700429.

36. CSJN, 4/7/1995, "Giroldi, Horacio David," Fallos (1995-318-514); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/09/1996, "Bramajo, Hernán Javier s/ incidente de excarcelación," Fallos (1996-319-1840) (Arg.). *See also* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad y otros," Fallos (2005-328:2056) (Arg.) (Separate Opinion of Judge Boggiano); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/8/2004, "Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros," Fallos (2004-327:3312) (Arg.) (Separate Opinion of Judge Boggiano).

37. *See* Susana Albanese, *La Corte Suprema y el alcance de las Recomendaciones de la Comisión Interamericana 1994-2014*, 5 PENSAR EN DERECHO 105, 110 (2015); Turyn, *supra* note 35, at 6; Agustín Gordillo, *La obligatoria aplicación interna de los fallos y opiniones consultivas supranacionales*, 215 REVISTA DE LA ADMINISTRACIÓN PÚBLICA 151, 151 (1996); GERMÁN BIDART CAMPOS, MANUAL DE LA CONSTITUCIÓN REFORMADA 1, 31-32 (1996).

to hear cases relating to its interpretation and application.[38]

The tribunal further interpreted the phrases, "do not repeal any article of the first part of the Constitution" and "must be understood as complementary of the rights and guarantees recognized therein," and concluded that the Constituent Assembly made a check of compatibility between these human rights instruments and the norms of the first part of the Constitution, thus verifying that there is no derogation between them, but complementarity.[39] Therefore, the judiciary has a duty to harmonize the international and constitutional provisions because there is a presumption of full compatibility.[40] Hence, the Argentine Constitutional pyramid is now erected as follows:



38. CSJN, 4/7/1995, "Giroldi, Horacio David," Fallos (1995-318-514); CSJN, 12/09/1996, "Bramajo, Hernán Javier," Fallos (1996-319.2-1846). *See also* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/10/1997, "Arce, Jorge Daniel s/ recurso de casación," Fallos (1997-320-2145) (Arg.).

39. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/4/1998, "Petric, Domagoj Antonio c. Diario Página 12," Fallos (1998-321-885) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1996, "Chocobar, Sixto Celestino c. Caja Nacional de Previsión para el Personal del Estado y Servicios Públicos s/ reajuste por movilidad," Fallos (1996-319-3241) (Arg.); CSJN, 26/12/1996, "Monges, Analía M.," Fallos (1996-319-3148).

40. CSJN, 26/12/1996, "Monges, Analía M.," Fallos (1996-319-3148).

III. A Step Back in the Fulfillment of International Human Rights Obligations

A. *Background: The Menem and Fontevecchia and D'Amico Cases*

In 2001, the Supreme Court affirmed a civil judgment in the *Menem* case that condemned two journalists, Jorge Fontevecchia and Héctor D'Amico, for publishing press articles about the existence of an unacknowledged child of Mr. Carlos S. Menem, the then-president of Argentina.[41] While former president Menem alleged that the article published in the magazine *Noticias* affected his right to privacy,[42] the journalists argued that an eventual ruling ordering the payment of pecuniary compensation for damages entailed an indirect violation to their right of freedom of expression.[43]

Following the ruling, both journalists filed a claim before the Inter-American Human Rights System ("System" or "Inter-American System") that culminated in a judgment issued ten years later by the International Court in which the tribunal ruled against Argentina for violating Article 13 of the American Convention,[44] which guarantees the right to freedom of thought and expression.[45] The Inter-American Court ruled in *Fontevecchia and D'Amico v. Argentina* (*Fontevecchia and D'Amico*) that Argentina was required to repair the victims by 1) paying compensation, 2) publishing the international decision, and 3) giving no effect to the civil sentence imposed on Mr. Fontevecchia and Mr. D'Amico.[46]

After Argentina's Executive branch published the judgment and pending the compensation owed to the journalists, the Ministry of Foreign Affairs and Worship asked the Supreme Court to comply, as appropriate and in accordance with its competence, with the judgment of the International Court, giving rise to the *Ministry of Foreign Affairs* decision under commentary.[47]

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41. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/9/2001, "Menem, Carlos Saúl c. Editorial Perfil S.A. y otros s/ daños y perjuicios-sumario," Fallos (2001-324-2895) (Arg.).

42. *Id.* ¶ 1.

43. *Id.* ¶ 2.

44. The Republic of Argentina ratified the American Convention on September 5, 1984. American Convention on Human Rights, art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

45. *See* Fontevecchia and D'Amico v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶¶ 42-47 (Nov. 29, 2011).

46. *Id.* ¶¶ 105, 108, 117.

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

B. *The Ministry of Foreign Affairs Case*

Following the request of the Ministry of Foreign Affairs and Worship, the Supreme Court notified Mr. Menem of the petition filed by the Executive branch. Mr. Menem replied, stating that he had nothing to express as he did not participate in the international proceedings that condemned Argentina.[48] Following Mr. Menem's response, the Argentine Court rejected the Ministry of Foreign Affairs and Worship's request on three grounds. First, it ruled that the judgments of the Inter-American Court are, in principle, mandatory in all cases to which Argentina is a party.[49] However, 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.[50] The Argentine tribunal conducted a literal reading of Article 63 of the Convention, according to which the International Court was required to rule "if appropriate, that the consequences of the measure or situation that constituted the breach of [a] right or freedom be remedied, and that fair compensation be paid to the injured party."[51] Accordingly, it held that the Inter-American Court exceeded its remedial powers and thus acted *ultra vires*,[52] owing to the fact that the American Convention does not grant the International Court the authority to "revoke" a local judgment.[53] Pursuant to the Supreme Court, giving no effect to the *Menem* decision, as required by the Inter-American Court, amounts to a revocation of the domestic judgment.[54]

Second, the Supreme Court referred to the subsidiary character of the Inter-American Human Rights System by quoting the Preamble of the American Convention,[55] as well as the jurisprudence of the International Court,[56] both of which affirm the subsidiary, reinforcing, and complementary nature of the System to local jurisdictions.[57] It,

48. *Id.* ¶ 5.

49. *Id.* ¶ 6.

50. *Id.*

51. *Id.* ¶ 13.

52. *Id.* ¶¶ 7, 12, 13, 20.

53. *Id.* ¶ 13.

54. *Id.* ¶ 11.

55. *Id.* ¶ 8. According to the Preamble, the American Convention "reinforc[es] or complement[s] the protection provided by the domestic law of the American states." *See* American Convention, Preamble, *supra* note 44.

56. Perozo et al. v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶ 64 (Jan. 28, 2009).

57. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

therefore, held that the Inter-American Court is not a tribunal of fourth instance able to review or annul domestic judicial decisions.[58] Setting aside the decision rendered in the *Menem* case would imply converting the International Court to a superior court of fourth instance capable of reviewing the decisions of the Supreme Court and local tribunals.[59]

Finally, the Argentine Court understood that, from a constitutional point of view, the reparation ordered was impossible to comply with because the revocation of a res judicata judgment rendered by the highest tribunal of the Argentine Judiciary is impossible under Argentinean law.[60] It noted that according to Article 27 of the national Constitution, international treaties shall be in accordance with the principles of public law, among which the decisions of the Supreme Court—as head of the Argentine Judiciary—occupy a superior position, as enshrined in Article 108.[61] It concluded by explaining that this approach was reaffirmed by the 1994 Constitutional Amendment when the Constituent Assembly expressly provided that international instruments with constitutional hierarchy do not repeal any article of the first part of the Constitution, which includes Article 27.[62]

Judge Rosatti delivered a separate opinion with similar arguments to the ones developed by the majority.[63] In turn, Judge Maqueda issued a dissenting opinion in which he maintained a consistent approach with the former criteria of the Supreme Court, as explained in the following section.[64]

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58. *Id.*

59. *Id.* ¶ 11.

60. *Id.* ¶ 16.

61. *Id.* ¶ 17. In accordance with Article 108 of the Constitution, "[t]he Judicial Power of the Nation shall be vested in a Supreme Court of Justice, and in such lower courts as the Congress may establish in the territory of the Nation." Art. 108, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

62. *Id.* ¶ 19.

63. *Id.* Separate Opinion of Judge Rosatti. Judge Rosatti referred to the doctrine of the *national margin of appreciation* developed by the European Court of Human Rights in the *Lawless*, *De Wilde, Ooms et Versyp* and *Handyside* cases. *See* Lawless v. Ireland (No. 3), 1 Eur. Ct. H.R. (ser. A) (1961); De Wilde, Ooms and Versyp v. Belgium (No. 12), 1 Eur. Ct. H.R. (ser. A) (1971); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976). He further argued that in a context of *jurisprudential dialogue*, the Inter-American Court is the final interpreter of the American Convention, and the Supreme Court is the last interpreter of the national Constitution. Consequently, it is necessary to complement the criteria of both tribunals without collision. Although the invalidation of the *Menem* decision is not possible under Argentinean law, Rosatti held that the victims found adequate reparation through the publication of the international ruling and the payment of compensation ordered by the Inter-American Court.

64. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47) (Maqueda, J.C., dissenting). Judge Maqueda was of the opinion that in accordance with Article

C. *The Criteria of the Supreme Court of Justice before the Ministry of Foreign Affairs Decision*

Ministry of Foreign Affairs was not the first instance in which the Supreme Court had to implement a decision rendered by the Inter-American Court. The Argentine tribunal first developed a hesitant approach regarding the binding nature of the rulings of the International Court that was later reversed when it recognized that those judgments are also mandatory for the Supreme Court.[65] Such doctrine subsequently became a solid, consistent, and exemplary jurisprudence[66] that is now surprisingly reconsidered.

In 2002, the Inter-American Court condemned Argentina for denying José María Cantos the right of access to the courts when he was charged with disproportionate filing fees (*tasa de justicia*) and excessive professional fees and expenses.[67] The International Court ordered Argentina to refrain from charging filing fees and set reasonable honoraria for the intervention of lawyers and experts.[68] The Supreme Court ruled that the implementation of *Cantos v. Argentina* (*Cantos*) would infringe on the rights of professionals who had no participation in the international proceedings.[69] The Argentine Court understood that compliance with the Inter-American ruling would also imply an abdication of the Supreme Court's role as guardian and final interpreter of the national Constitution.[70] Moreover, the separate opinion of judges Petracchi and López considered that the Inter-American Court had no

68.1 of the American Convention, the judgments of the Inter-American Court in cases in which Argentina is a party must be complied with and enforced because the decisions of the international tribunal are also mandatory for the Supreme Court.

65. *See generally* Mónica Pinto & Nahuel Maisley, *From Affirmative Avoidance to Overriding Alignment: The Engagement of Argentina's Supreme Court with International Law*, *in* PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW (André Nollkaemper, Antonios Tzanakopoulos and Yuval Shany eds., forthcoming), https://www.academia.edu/20225843/From_Affirmative_Avoidance_to_Soaring_Alignment_The_Engagement_of_Argentina_s_Supreme_Court_with_International_Law.

66. Apitz-Barbera ("First court of Administrative disputes") v. Venezuela, Monitoring Compliance with Judgment, Inter-Am. Ct. H.R., ¶¶ 27, 32 (Nov. 23, 2012); Gelman v. Uruguay, Monitoring Compliance with Judgment, Inter-Am Ct. H.R., ¶¶ 74, 75 (Mar. 20, 2013); *see also* Jorge Contesse, *Judicial Backlash in Inter-American Human Rights Law*, INT'L J. CONST. L. BLOG (Mar. 2, 2017), http://www.iconnectblog.com/2017/03/judicial-backlash-interamerican/.

67. Cantos v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 97 (Nov. 28, 2002).

68. *Id.* ¶ 70.

69. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/8/2003, "Procurador del Tesoro de la Nación s/ Presentación," Fallos (2003-326-2968) (Arg.).

70. *Id.* ¶ 3.

jurisdiction to modify judicial decisions that acquired res judicata nature.[71] In doing so, the Supreme Court refused to honor the judgment of the International Court in *Cantos*.

However, the *Cantos* doctrine was rapidly modified one year later by a new composition of the tribunal.[72] In *Bulacio v. Argentina* (*Bulacio*), the Inter-American Court ordered Argentina to complete the investigation of the death of Walter David Bulacio because "no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations."[73] Miguel Ángel Espósito, the police captain at the police station where Mr. Bulacio was arrested and the principal suspect for his illegal detention, torture, and death, benefited from the statute of limitations provisions during domestic proceedings.[74]

In *Espósito*, concerning the implementation of the *Bulacio* decision, the Supreme Court ordered the reopening of those criminal proceedings, although it clarified that it did not "share the restrictive criterion of the right of defense . . . derived from the decision of the international court."[75] The Argentine tribunal stated that there had arisen a paradoxical situation by which it is only possible to comply with the decision of the international jurisdiction by strongly restricting the right of defense of the accused, who also benefits from the guarantees enshrined in the American Convention.[76] Nevertheless, the highest tribunal ruled in application of Article 68.1 of the American Convention affirming that,[77] as an organ of the Argentine state, it "is also bound, in principle, to subordinate the content of its decisions to those of [the International Court]."[78]

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71. *Id.* ¶ 1 (Separate Opinion of Judges Petracchi and López).

72. Juan Carlos Hitters, *¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de derechos humanos?*, 10 REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL 131, 142 (2008).

73. Bulacio v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 117 (Sept. 18, 2003).

74. CSJN, 23/12/2004, "Espósito, Miguel," Fallos (2004-327-5668).

75. *Id.* ¶ 12.

76. *Id.* ¶ 16.

77. According to Article 68.1, "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." *See* American Convention, art. 68, *supra* note 44.

78. CSJN, 23/12/2004, "Espósito, Miguel," Fallos (2004-327-5668).

The *Espósito* decision superseded the *Cantos* doctrine and was further confirmed seven years later in *Derecho*.[79] René Jesús Derecho was accused of the illegal detention and torture of Juan Francisco Bueno Alves and Carlos A. B. Pérez Galindo, however the Argentine appellate court ruled that the statute of limitations had run on the case.[80] Meanwhile, Bueno Alves submitted his case to the Inter-American System where the International Court determined in 2007 that, although the violations did not constitute a crime against humanity, the lack of investigation was a denial of justice that needed to be remedied.[81] The International Court, therefore, ordered Argentina to pay damages, reopen the investigation, and publish the international judgment.[82]

Two months after the international ruling, the Supreme Court confirmed the Argentine appellate decision and made no reference to the *Bueno Alves v. Argentina* (*Bueno Alves*) judgment rendered by the Inter-American Court.[83] The claimants later requested that the Supreme Court explain the jurisdictional scope of its ruling in light of *Bueno Alves*.[84] The Argentine Court noted that when it issued its first ruling, it had not been officially notified of the *Bueno Alves* sentence, which was processed two months after the first judgment.[85] Therefore, as it was already notified of the *Bueno Alves* ruling, the Argentinean Court cited the *Espósito* doctrine and ordered the reopening of the criminal investigation.[86] It held that the recourse filed by the claimants was a "revocation appeal," constituting a case in which the Supreme Court's previous decision could be "exceptionally corrected."[87]

In *Carranza Latrubesse*, decided in 2013, the Supreme Court reinforced its interpretation of the American Convention and issued an unexpected decision concerning the legal nature of the recommendations of

79. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/11/2011, "Derecho, René Jesús s/ incidente de prescripción de la acción penal -causa n. 24.079," Fallos (2011-334-1504) (Arg.).

80. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/7/2007, "Derecho, René Jesús s/ incidente de prescripción de la acción penal -causa n. 24.079," Fallos (2007-330-3074) (Arg.).

81. Bueno Alves v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 164 (May 11, 2007).

82. *Id.* ¶¶ 195, 211, 215.

83. CSJN, 11/7/2007, "Derecho, René Jesús," Fallos (2007-330-3074).

84. CSJN, 29/7/2011, "Derecho, René Jesús," Fallos (2011-334-1504).

85. *Id.* ¶ 5.

86. *Id.* ¶ 4.

87. *Id.* ¶ 3.

the Inter-American Commission of Human Rights.[88] In 1976, Gustavo Carranza Latrubesse was removed from his position as judge by the military government.[89] After the *coup d'etat*, his petition to be reinstated in his position was denied and the Supreme Court rejected his appeal.[90] In 1997, the Commission published its Article 51 report in which it determined Argentina's international responsibility and recommended the adoption of a series of measures in favor of Mr. Carranza Latrubesse.[91]

After years of litigation, the Supreme Court reviewed the decision—this time on grounds of a report rendered by the Commission.[92] The Argentine Court referred to the jurisprudence of the Inter-American Court to affirm that state parties to the American Convention have the obligation to make every effort to apply the recommendations of a protective organ such as the Inter-American Commission.[93] This obligation, interpreted in light of the principles of good faith[94] and *pro homine*,[95] determines "the mandatory nature of the recommendations" of the Commission, and therefore obliged the Supreme Court to rule in the victim's favor.[96] Consequently, the Supreme Court ordered Argentina to compensate Mr. Carranza Latrubsesse for the damages caused by not complying with the Inter-American Commission's report.

The decision rendered after the *Mohamed v. Argentina* judgment is the final instance in which the Supreme Court reaffirmed this well-established jurisprudence concerning the application of the decisions made by the Inter-American human rights monitoring bodies.[97] Following a car accident, Carlos Alberto Mohamed was convicted for homicide after a previous acquittal by the lower court.[98] The conviction was a final judgment that could only be appealed through a special federal recourse and a subsequent motion for review that was ultimately

88. CSJN, 6/8/2013, "Carranza Latrubesse Gustavo," Fallos (2013-336-1024).

89. *Id.* ¶ 1.

90. *Id.*

91. Gustavo Carranza v. Argentina, Case 10.087, Inter-Am. Comm'n H.R., Report No. 30/97, OEA/Ser.L./V/II.95 doc. 7 rev. ¶ 84 (1997).

92. CSJN, 6/8/2013, "Carranza Latrubesse Gustavo," Fallos (2013-336-1024).

93. *Id.* ¶ 3; *see also* Loayza Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 80 (Sept. 17, 1997).

94. CSJN, 6/8/2013, "Carranza Latrubesse Gustavo," Fallos (2013-336-1024).

95. *Id.* ¶ 16.

96. *Id.* ¶ 12.

97. *See* Mohamed v. Argentina, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 255 (Nov. 23, 2012).

98. *Id.* ¶ 2.

rejected.[99] According to the International Court, Mr. Mohamed did not have an ordinary remedy to protect his right to appeal his conviction and have it reviewed.[100] It, therefore, ordered Argentina to take the necessary measures to ensure Mr. Mohamed the right to appeal his conviction.[101] The Supreme Court agreed that, as one of the powers of the Argentine state, it must comply with the judgment of the International Court and consequently ordered the lower tribunal to designate a new chamber to review Mr. Mohamed's res judicata conviction.[102]

IV. The Legal Problems and the Negative Consequences of the Ministry of Foreign Affairs Decision

The change of approach made in the *Ministry of Foreign Affairs* decision is likely explained by the new composition of the Supreme Court. In 2016, Judges Horacio Daniel Rosatti and Carlos Fernando Rosenkratz joined the highest tribunal following the retirement of Judges Eugenio Raúl Zaffaroni and Carlos Santiago Fayt.[103] During the appointment procedure, both Judge Rosatti and Judge Rosenkratz were challenged for having a restrictive position concerning the application of international human rights law,[104] owing to the fact that they had opined that international treaties,[105] as well as the judgments of the Inter-American Court, are subject to their compatibility with the principles of public law of the national Constitution.[106] However, even

99. *Id.* ¶¶ 56-58.

100. *Id.* ¶ 105.

101. *Id.* ¶ 152.

102. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/3/2015, "Mohamed, Oscar Alberto - Homicidio culposo," Resolución N° 477/15 (Arg.).

103. *See* Honorable Senado de la Nación Argentina, *El Senado Aprobó los Pliegos para la Corte Suprema de Rosenkrantz y Rosatti* (Jun. 15, 2016), http://www.senado.gov.ar/prensa/14013/noticias.

104. *See* Centro de Estudios Legales y Sociales, Observaciones en el proceso de selección de integrantes de la Corte Suprema de Justicia de la Nación (Jan. 14, 2016), https://www.cels.org.ar/web/2016/01/el-cels-impugno-ante-el-ministro-de-justicia-la-designacion-de-los-candidatos-a-integrar-la-csjn/.

105. *See* Horacio Rosatti, Derechos Humanos en la Jurisprudencia de la Corte Suprema de Justicia de la Nación (2003-2013) 61-63 (Rubinzal Culzoni 2013).

106. *See* Carlos F. Rosenkrantz, *Against borrowings and other nonauthoritative uses of foreign law*, 1 Int'l J. Const. L. 269, 295 (2003); Carlos F. Rosenkrantz, *Advertencias a un internacionalista (o los problemas de Simón y Mazzeo)*, 6.1 Revista Jurídica de la Universidad de Palermo 203, 213 (2005), http://www.palermo.edu/derecho/publicaciones/pdfs/revista_juridica/n8N1-Sept2007/081Jurica14.pdf. For a description concerning Rosenkrantz's position, *see* Roberto P. Saba, *No Huir de los Tratados*, 10 Pensar en Derecho 111, 127-139 (2017) http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revistas/10/no-huir-de-los-tratados.pdf.

if their positions could have been anticipated, it is difficult to understand the new approach of Judges Elena Inés Highton de Nolasco and Ricardo Luis Lorenzetti because it contradicts the jurisprudence they developed since they joined the Supreme Court in 2004.[107]

Nevertheless, the decision should not only be read in light of a dispute of authority between the newly-composed Supreme Court and the Inter-American Court of Human Rights.[108] Indeed, the arguments employed by the Argentine Court raise serious legal problems that may create negative consequences in the future of human rights law in Argentina. On the one hand, the Supreme Court made a restrictive interpretation of the Constitutional Amendment to subordinate international human rights treaties with constitutional standing. On the other hand, the tribunal imposed a very heavy burden on prospective victims to have their rights enforced if the recognition of such rights derives from a decision rendered in the international arena.

A. *The Legal Problems of the Arguments of the Supreme Court*

1. The Inter-American Court Exceeded its Remedial Powers

In ruling as it did, the Argentine Court reinterpreted Article 63.1 of the American Convention and decided that the Inter-American Court had no power to order the revocation of a domestic ruling.[109] Although it recognized the mandatory character of the judgments of the International Court, it held that the binding nature of those decisions is only limited to those subjects in which the Inter-American Court has competence.[110] This conclusion, however, presents two issues: first, it contradicts the *compétence de la compétence* principle; second, it disputes the existence of legal sources allowing the International Court to order such a remedy.

As to the first issue, it was the Supreme Court that paradoxically exceeded its powers when it analyzed whether the Inter-American Court acted in accordance with the competences granted by the American Convention. It is a well-established principle of international

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107. *See* CSJN, 23/12/2004, "Espósito, Miguel," Fallos (2004-327-5668); CSJN, 29/7/2011, "Derecho, René Jesús," Fallos (2011-334-1504); CSJN, 25/3/2015, "Mohamed, Oscar Alberto," Resolución N° 477/15. It should be highlighted that in the latter, the Supreme Court unanimously decided to comply with the international judgment. *See also* Saba, *supra* note 106, at 131.

108. Roberto Gargarella, *La autoridad democrática frente a las decisiones de la Corte Interamericana*, REVISTA JURÍDICA LA LEY AR/DOC/497/2017, 3 (2017).

109. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

110. *Id.*

law that international tribunals are the masters of their own competence.[111] Therefore, the Inter-American Court, "as with any court or tribunal, has the inherent authority to determine its own competence (*compétence de la compétence/ Kompetenz-Kompetenz*)."[112]

Furthermore, Article 67 of the American Convention establishes that the judgments of the Inter-American Court are final and not subject to appeal.[113] In other words, there is no subsequent review by domestic courts as to whether the Inter-American Court acted within its remedial powers.[114] In short, the Supreme Court is the final interpreter of the national Constitution and the Inter-American Court is the final interpreter of the American Convention.

Under international law, the remedy of *restitutio in totum* has both conventional and customary legal bases.[115] Article 63.1 of the American Convention provides that the Inter-American Court shall rule "that the consequences of the measure or situation that constituted [a] breach of [a] right or freedom be remedied and that fair compensation be paid to the injured party."[116] The provision, therefore, contemplates different means of reparation that are not mutually exclusive but, instead, are cumulative: the obligation to remedy the violation and/or the duty to pay compensation.[117] Certainly, the International Court has

111. Liechtenstein. v. Guatemala, Preliminary Objections Judgment, 1953 I.C.J. 111, 119 (Nov. 18, 1953).

112. *See* Ivcher Bronstein v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 32 (Sept. 24, 1999); Cantos v. Argentina, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 85, ¶ 21 (Sept. 7, 2001).

113. According to Article 67, "The 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." *See* American Convention, art. 67, *supra* note 44.

114. According to the Inter-American Court, states cannot invoke provisions of domestic law to modify, elude or fail to comply with its reparatory obligations, all aspects of which (scope, nature, methods and determination of the beneficiaries) is regulated by international law. *See* Gómez Palomino v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 113 (Nov. 22, 2005); Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 15, 55-56 (1996).

115. *See*, Apitz-Barbera v. Venezuela, *supra* note 66, ¶ 24; Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 302 (Oct. 25, 2012); Castillo Páez v. Peru, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 50 (Nov. 27, 1998).

116. American Convention, art. 63, *supra* note 44.

117. *See* Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 227-229 (Jan. 31, 2006); David L. Attanasio, *Extraordinary Reparations, Legitimacy and the Inter-American Court*, 37(3) U. PA. J. INT'L L. 814, 824-825 (2016);

developed a broad jurisprudence[118] in providing for restitution for the right allegeldy infringed upon,[119] the payment of compensation,[120] and the adoption of different types of satisfactory measures.[121]

These types of remedies are not only fully compatible with Article 63.1, but also with basic customary rules regarding the consequences for a breach of an international obligation.[122] Article 34 of the Articles on Responsibility of States for Internationally Wrongful Acts provides that full reparation "shall take the form of restitution, compensation and satisfaction, either singly or in combination."[123] According to the International Law Commission, "restitution is the establishment or

Raphaële Rivier, *Responsibility for Violations of Human Rights Obligations: Inter-American Mechanisms*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 739, 749-751 (James Crawford, Alain Pellet and Simon Olleson eds., Oxford Univ. Press 2010); Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 360 (2008); Pasqualucci, *supra* note 114, at 23-48.

118. THOMAS M. ANTKOWIAK AND ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS xi (Oxford Univ. Press 2017).

119. *See* Chocrón v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 227, ¶ 153 (Jul. 1, 2011); Ivcher Bronstein v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶¶ 178-180 (Feb. 6, 2001).

120. The Inter-American Court has developed an extensive jurisprudence concerning compensation that includes pecuniary and non-pecuniary damages. *See* SILVINA S. GONZÁLEZ NAPOLITANO ET. AL., LA RESPONSABILIDAD INTERNACIONAL DEL ESTADO POR VIOLACIÓN DE LOS DERECHOS HUMANOS: SUS PARTICULARIDADES FRENTE AL DERECHO INTERNACIONAL GENERAL (SGN Editora 2013), http://www.peacepalacelibrary.nl/ebooks/files/357420772.pdf; CLAUDIO NASH ROJAS, LAS REPARACIONES ANTE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS (1988-2007) (Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Chile 2009), http://www.corteidh.or.cr/tablas/r15428.pdf.

121. In the Reparations Chapter, the Inter-American Court generally includes a section named "Satisfaction and Guarantees of non-repetition," although it does not distinguish which measure fits in each one of the categories. Examples of satisfactory measures include the publication of the judgment as ordered in the *Fontevecchia and D'Amico* case, as well as the granting of scholarships or the construction of monuments. *See* Cantoral Huamaní v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 171 (Jul. 10, 2007); Barrios Altos v. Peru, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 41 (Nov. 30, 2001).

122. *See* Articles on Responsibility of States for Internationally Wrongful Acts with commentaries [hereinafter Articles on Responsibility], U.N. Doc. A/56/10 (2001), art. 34. International jurisprudence and doctrine have recognized the customary nature of the forms of reparation enshrined in Article 34 of the ILC Articles on Responsibility for International Wrongful Acts. *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 273 (Apr. 20); Nykomb Synergetics Tech. Holding AB v. Latvia, Arbitral Award, at 38-39 (Stockholm Chamber of Commerce, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0570.pdf; Yann Kerbrat, *Interaction Between the Forms of Reparation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 117, at 573.

123. *See* Articles on Responsibility, *supra* note 122, art. 34.

re-establishment of the situation that would have existed if the wrongful act had not been committed."[124] If restitution is not possible, or if it is not enough to remedy the breach committed, then other means of reparations enter into play.[125] These reparatory measures are also accompanied by the cessation of the wrongful act and by the guarantee of non-repetition.[126]

The logic behind the combination of these remedies under international human rights law relies on the fact that pecuniary compensation is not always accurate in the face of human rights violations. Consider the following hypothetical scenario: the Supreme Court affirms an appeal in which the accused was illegally detained, tortured, and convicted for a felony that she/he did not commit. The respective trial involved partial judges, fake witnesses, and no evidence of the alleged crime. Having exhausted local remedies, the individual files a petition before the Inter-American Human Rights System that concludes with a ruling of the Inter-American Court condemning Argentina for violating the victim's rights. The International Court consequently orders that the wrongful conviction must be given no effect and the victim be immediately released.[127] According to *Ministry of Foreign Affairs*, such a ruling would exceed the remedial powers conferred by the American Convention because the International Court cannot order the revision of a res judicata judgment, being thus limited to award money payments to compensate what money can never compensate: the physical integrity and the personal liberty of the victim.[128] This similarly holds true for other rights enshrined in the American Convention and already recognized by the Inter-American Court.[129] Examples of this include when the Inter-American Court ordered the revision of the arbitrary cancelation of the citizenship of Haitian immigrants that led

124. *Id.* ¶ 2 (commentary to art. 35).

125. *Id.* ¶ 4.

126. *Id.* art. 30.

127. Eugenio Raúl Zaffaroni, *La Corte Suprema declara su independencia del Estado*, AGENCIA PACO URONDO (Feb. 15, 2017), http://www.agenciapacourondo.com.ar/ddhh/zaffaroni-la-corte-suprema-declara-su-independencia-del-estado.

128. *See* Víctor Abramovich, *Comentarios sobre "Fontevecchia", la autoridad de las sentencias de la Corte Interamericana y los principios de derecho público argentino*, 10 PENSAR EN DERECHO 9, 14 (2017) http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revistas/10/comentarios-sobre-fontevecchia-la-autoridad-de-las-sentencias-de-la-corte-interamericana-y-los-principios-de-derecho-publico-argentino.pdf.

129. *Id.* at 14-15.

to their statelessness in Dominican Republic,[130] or the review of the judgment that prohibited in vitro fertilization in Costa Rica.[131]

Raphaële Rivier argues that the Inter-American Court seems to present restitution as the preferred means of reparation "to demonstrate that the purpose of the Inter-American mechanisms of responsibility is to require the state to erase the consequences of violation and to restore the situation affected by the illegal act as regards the victim."[132] The Supreme Court's interpretation of Article 63.1 of the Convention, however, attacks the entire system of reparations designed by the Convention, thus challenging the same *raison d'être* of the concept of *restitutio in totum* as a means of reparation in international human rights law.

2. The Fourth Instance Formula

The Supreme Court referred to the subsidiary character of the Inter-American Human Rights System and to the doctrine of the fourth instance to justify the rejection of the international decision.[133]

The Inter-American Commission developed this principle in *Marzioni v. Argentina*, in which it determined the inadmissibility of the petition filed, as it understood that the petitioner was seeking a revision of the domestic proceedings instead of a violation to the Convention.[134] Accordingly, human rights bodies, tribunals, and quasi-judicial organs, are banned from reviewing local decisions, either for factual or legal mistakes committed by national courts.[135] The rationale of the doctrine relies on the fact that international organs are not courts of appeals and are not suitable for retrying cases or quashing rulings rendered by domestic

130. Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶¶ 311, 314 (Aug. 28, 2014).

131. Artavia Murillo ("In vitro fertilization") v. Costa Rica, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 157-58 (Nov. 28, 2012).

132. Rivier, *supra* note 117, at 750.

133. According to the Supreme Court, ". . . the Inter-American Court does not constitute . . . a 'fourth instance' that reviews or annuls domestic decisions . . . it is [a] subsidiary, reinforcing and complementary [jurisdiction]." *See* CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

134. Santiago Marzioni v. Argentina, Case 11.673, Inter-Am. Comm'n of H.R., Report No. 39/96, OEA/Ser.L/V/II.95 Doc. 7 rev. ¶76 (1997). The Inter-American Court also developed the fourth instance doctrine in exercise of its contentious jurisdiction. *See* Gomes Lund ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 46-49 (Nov. 24, 2010); Dacosta Cadogan v. Barbados, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶¶ 21-25 (Sept. 24, 2009).

135. Mónica Pinto, *National and International Courts—Deference or Disdain*, 30 LOY. L.A. INT'L & COMP. L. REV. 247, 257 (2008).

tribunals.[136] Indeed, they are supranational entities with delegated powers aimed at ensuring the observance of human rights obligations undertaken by the contracting states.[137]

It is important to note that the fourth instance formula is a procedural defense that all states enjoy in order to prove the inadmissibility of a case if the petitioner seeks the revision of a local verdict.[138] In *Fontevecchia and D'Amico*, Argentina withdrew any defense it may have had concerning a hypothetical intention of the victims to have the domestic decisions reviewed because it never advanced the defense during the appropriate procedural stage.[139] During the international proceedings, Argentina defended itself against the alleged violation to the right of freedom of expression and raised no preliminary objection.[140]

In any event, the formula has two exceptions: 1) when due process is denied or 2) when a violation to a recognized human right, like freedom of expression, occurred as a result of a domestic proceeding.[141] In *Marzioni*, the Inter-American Commission held that it "has full authority to adjudicate irregularities of domestic judicial proceedings which result in manifest violations of due process or of any of the rights protected by the Convention."[142] The Inter-American Court of Human Rights,[143] the European Court of Human Rights,[144] and the Human

136. *See* Council of Europe & European Court of Human Rights, *Practical Guide on Admissibility Criteria*, at 83 (2004), http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

137. *Id.*

138. Gomes Lund, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 48-49; Dacosta Cadogan, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 24.

139. While referring to the fourth instance doctrine, the Inter-American Court stated that "the Court Rules of Procedure establishes that the procedural moment for the interposition of preliminary objections is in the brief *in response to the application*." *See id.* ¶ 47 (emphasis added).

140. *See* Fontevecchia and D'Amico, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶¶ 26-28, 82-83.

141. Marzioni v. Argentina, *supra* note 134, ¶ 61.

142. *Id.*

143. According to the tribunal, "the Court has held that ascertaining whether the State violated its international obligations by means of its actions before its judicial organs, can lead to this Court examining the particular domestic procedures, eventually including the decisions of the higher courts, so as to establish the compatibility with the American Convention." *See* Gomes Lund, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 49; Escher v. Brasil, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 200, ¶ 44 (Jul. 6, 2009); Damian A. Gonzalez-Salzberg, *Do Preliminary Objections Truly Object to the Jurisdiction of the Inter-American Court of Human Rights? An Empirical Study of the Use and Abuse of Preliminary Objections in the Court's Case Law*, 12-2 HUM. RTS. L. REV. 255, 261-262 (2012).

144. In *Sisojeva v. Latvia*, the European Court held that "it is not its function to deal with errors of fact or law allegedly committed by a national court or to substitute its own assessment for that of the national courts or other national authorities unless and in so far as they may have infringed

Rights Committee have taken a similar approach.[145]

The fact that international tribunals confront national law or national judicial decisions to determine whether they meet international standards is also an ordinary feature of other international tribunals, such as the European Court of Justice or the International Centre for Settlement of Investment Disputes.[146] Nevertheless, it should be highlighted that international proceedings constitute a new kind of litigation with different rules and parties, designed to determine the international responsibility of the state.[147] Therefore, even when an international tribunal monitors domestic proceedings, it can never revoke the judgment delivered in the local jurisdiction.

The Supreme Court misunderstood the concept of the fourth instance doctrine. Indeed, the best evidence supporting this conclusion relies on the fact that the Argentine Court invoked this procedural exception to disregard the international decision after the *Fontevecchia and D'Amico* judgment was rendered.[148] In other words, the Argentine Court invoked this procedural exception during the stage of compliance with the Court's judgment,[149] a phase that is not related to the admissibility period of the case or to the International Court's faculty to order reparations.

3. Legal Impossibility of Complying with the International Decision

The Supreme Court highlighted that the reparation ordered was impossible to comply with under Argentinean law, because it is not feasible to revoke the *Menem* decision rendered domestically.[150] Giving

rights and freedoms protected by the Convention . . . . In other words, the Court cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness." Sisojeva v. Latvia, 2007-I Eur. Ct. H.R. ¶ 89.

145. In terms of the Human Rights Committee, the adjudicating body "should refrain from acting as a fourth instance tribunal to re-evaluate facts and evidence before the authorities in the State party in removal proceedings, unless there are clear and specific reasons for doing so." U.N., Int'l Covenant on Civil and Political Rights, Human Rights Committee, Communication Submitted by Ernest Sigman Pillai, at 24, U.N. Doc. CCPR/C/101/D/1763/2008 (May 9, 2011).

146. Pinto, *supra* note 135, at 253.

147. Abramovich, *supra* note 128, at 13.

148. *See* Fontevecchia and D'Amico, Inter-Am. Ct. H.R. (ser. C) No. 238.

149. The Inter-American Court retains jurisdiction and issues periodic orders until there is full compliance with the reparations it had ruled. *See* James L. Cavallaro and Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 09-31 HARV. LAW SCH. PUB. LAW & LEGAL THEORY WORKING PAPER SERIES 768, 781 (2008).

150. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

effect to the international decision would deprive the Supreme Court of its superior character in the Argentine judiciary.[151] Paragraph 15 of the majority's vote affirms the following:

> Although the Inter-American Court has sometimes used **this remedy** as a form of reparation, it has explicitly recognized that in many cases such a remedy is unfounded. Thus, it has held that 'there may be cases in which [the *in integrum restitutia*] is not possible, sufficient or adequate . . . In the opinion of [the Inter-American] Court, Article 63.1 of the American Convention must be interpreted in this way' (IACtHR, September 10, 1993, 'Aloeboetoe and others v. Surinam', Serie C 15, para. 49; emphasis added; in the same sense, IACtHR, 'Blake v. Guatemala', January 22, 1999, Serie C 48, para. 42).[152]

The Supreme Court's usage of the quoted passage from *Aloboetoe and others v. Surinam* (*Aloeboetoe*) and *Blake v. Guatemala* (*Blake*) cases to justify a supposed legal impossibility in order to comply with the international ruling is worrisome. When the Supreme Court mentioned the phrase, "this remedy," it was referring to the possibility of setting aside a civil judgment, as indicated in paragraphs thirteen and fourteen of the ruling. In fact, in Paragraph thirteen, the Supreme Court affirmed that a literal reading of Article 63.1 does not provide for the revocation of a local judgment,[153] emphasizing in Paragraph fourteen that this is not a reparatory mechanism that was even considered in the *travaux préparatoires* of the American Convention.[154]

In contrast, *Aloeboetoe* and *Blake* have no relation to the power of the Inter-American Court to order that a judicial decision be given no effect. The International Court was, in fact, referring to matters involving violations of the right to life, and therefore specified that the *in integrum restitutio* is only one way of repairing an international wrongful act, as there are cases in which returning matters to the previous state is not possible.[155] The Supreme Court attempted to justify that the

151. *Id.* ¶ 17.

152. *Id.* ¶ 15 (bolded emphasis added).

153. *Id.* ¶ 13.

154. *Id.* ¶ 14.

155. The Inter-American Court stated: "The solution provided by law in this regard consists of demanding that the responsible party make reparation for the immediate effects of such unlawful acts, but only to the degree that has been legally recognized. As for the various forms and modalities of effecting such reparation, on the other hand, the rule of in integrum restitutio refers to one way in which the effect of an international unlawful act may be redressed, but it is

remedy ordered in *Fontevecchia and D'Amico* was not adequate by comparing cases that were not comparable due to their intrinsic differences; while *Aloeboetoe* and *Blake* were related to arbitrary executions infringing on the right to life, *Fontevecchia and D'Amico* referred to a civil judgment that violated the right to freedom of expression of two journalists.[156]

Moreover, Article 27 of the Vienna Convention enshrines the principle of international law under which domestic provisions cannot be invoked to justify a breach of an international treaty obligation.[157] Thus, it cannot legitimately be argued that compliance is not possible because the violation comes from a res judicata judgment of the Supreme Court. That claim is invalid under international law,[158] even when practical difficulties may arise from the rules of the internal legal system under which the state organ is bound to operate.[159]

Argentina accepted the jurisdiction of the Inter-American Court and has agreed to accept its judgments, an obligation that also acquired constitutional status after the 1994 Constitutional Amendment. Therefore, the duty to comply with the international ruling implies the obligation to implement, in good faith, a serious and effective review process that ensures the *effet utile* of the international decision.[160] The way in which Argentina complies with the international ruling is a question of domestic law that the state must resolve in the domestic jurisdiction, no matter by which of its organs (judicial, legislative, or executive).[161]

Following *Cantos*, the Argentine Court found no legal impossibility to comply with the rulings of the Inter-American Court, even when it did

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not the only way in which it must be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate. It has already been stated that insofar as the right to life is concerned, it is impossible to reinstate the enjoyment of that right to the victims. In such cases, reparation must take other, alternative forms, such as pecuniary compensation." Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 49-50 (Sept. 10, 1993); *see also* Blake v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 48, ¶ 42 (Jan. 22, 1999).

156. *See* Fontevecchia and D'Amico, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 2.

157. Vienna Convention on the Law of Treaties, art. 27, *supra* note 4.

158. Claudio Nash, *Corte Suprema Argentina y Corte Interamericana. ¿Un nuevo integrante del club de la neo-soberanía?*, DIARIO CONSTITUCIONAL (Mar. 6, 2017), http://www.diarioconstitucional.cl/articulos/corte-suprema-argentina-y-corte-interamericana-un-nuevo-integrante-del-club-de-la-neosoberania.

159. *See* Articles on Responsibility, *supra* note 122, ¶ 1 (commentary to art. 32).

160. Abramovich, *supra* note 128, at 17.

161. Courtney Hillebrecht, *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*, 34 HUM. RTS. Q. 959, 959-85 (2012). *See also* Dia Anagnostou and Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter*, 25, EUR. J. INT'L L. 205, 207-08 (2014).

not agree with the international judgment.[162] In *Espósito*, *Derecho*, and *Mohamed*, the Supreme Court applied Section 22 of Article 75 of the national Constitution and came to the conclusion that it had to give effect to the international rulings, thereby ordering the review of res judicata decisions.[163] In *Ministry of Foreign Affairs*, the Argentine Court reached the opposite determination,[164] even though it previously developed a consistent jurisprudence establishing that it was required to comply with the Inter-American Court rulings to avoid a breach of a treaty obligation that would eventually compromise Argentina's international responsibility.[165]

4. Exhaustion of Local Remedies vis-à-vis the Principle of Res Judicata

As stated by the Argentine tribunal, the Inter-American Court has no authority to revoke decisions of the Supreme Court that were of a res judicata nature.[166] Consequently, such a revocation violates the supreme character of the highest tribunal as head of the Argentine judiciary, which, according to the ruling, is one of the principles of public law contained in Article 27 of the Constitution.[167]

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162. Abramovich, *supra* note 128, at 12.

163. *See* CSJN, 23/12/2004, "Espósito, Miguel," Fallos (2004-327-5668); CSJN, 29/7/2011, "Derecho, René Jesús," Fallos (2011-334-1504); CSJN, 25/3/2015, "Mohamed, Oscar Alberto," Resolución N° 477/15.

164. *See* Saba, *supra* note 106, at 131. It also has to be highlighted that there is vast case law along the history of the Supreme Court by which it recognized rights that were not already *de jure* recognized and provided legal solutions in the absence of exact provisions regulating specific legal problems. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/2/2009, "Halabi, Ernesto c. P.E.N.," Fallos (2009-332-111) (Arg.) (establishing the requisites for filing class actions claims); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1990, "Peralta, Luis Arcenio y otro c. Estado Nacional (Mrio. de Economía - BCRA)," Fallos (1990-313-1513) (Arg.) (recognizing the so-called Decrees of Necessity and Emergency); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/6/1990, "Dromi, José Roberto (Ministro de Obras y Servicios Públicos de la Nación) s/ avocación en autos: 'Fontenla, Moisés Eduardo c. Estado Nacional'," Fallos (1990:313:863) (Arg.) (developing the *per saltum* appeal); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1957, "Siri, Ángel s/ Interpone Recurso de Hábeas Corpus," Fallos (1957:239:459) (Arg.) (creating the *amparo* remedy which, at that time, had no legal basis in the Argentine legal regime). *See also* Zaffaroni, *supra* note 127.

165. CSJN, 23/12/2004, "Espósito, Miguel," Fallos ¶ 10 (2004-327-5668). *See also* CSJN, 29/7/2011, "Derecho, René Jesús," Fallos ¶ 4 (2011-334-1504).

166. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

167. As previously indicated, Article 27 provides the following: "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."

Such a reading by the Supreme Court of the res judicata principle destroys the logic of the machinery of admissibility claims of the entire system of human rights. Article 46 of the American Convention reflects a general principle of international law that requires the exhaustion of local remedies as a precondition to trigger international proceedings, given the subsidiary and complementary character of the Inter-American System.[168] The objective of the rule is to provide a state with the opportunity to remedy any given violation within its own legal framework before they are taken to an international monitoring body.[169] Therefore, the Commission will verify whether the petition lodged exhausted all available local remedies in order to determine the admissibility of the claim.[170] This rule logically implies that the judgments of supreme courts are the best evidence to demonstrate compliance with the exhaustion requirement, thus allowing the Commission to study the merits of the case.

The rule requiring the exhaustion of domestic remedies and the doctrine of res judicata are principles that coexist when the state has accepted an international supervisory mechanism. It would be illogical for the American Convention to require the exhaustion of domestic remedies and then prohibit the Inter-American organs from reviewing the judicial decisions issued in those proceedings.[171] If local judgments were immune from the scrutiny of international organs, human rights victims would be placed in the middle of a perverse trap in which redress is only utopic.[172] Therefore, the acceptance of an international supervisory mechanism that requires the exhaustion of domestic remedies necessarily implies a different reading of the doctrine of res judicata. According to Professor Mónica Pinto, there are two different levels of res judicata: the preliminary res judicata of the domestic arena

Art. 27, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). As it can be noted, Article 27 does not identify which are those "principles of public law laid down" in the Constitution.

168. This rule is also enshrined in Article 35 of the European Convention on Human Rights, 56.5 of the African Charter on Human and People's Rights, 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, and 3.1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. *See also* JO. M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 92 (2d ed. 2013).

169. Brewer Carías v. Venezuela, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 278, ¶ 83 (May 26, 2014); Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 61 (Jul. 29, 1988).

170. *See* American Convention, art. 46, *supra* note 44.

171. Abramovich, *supra* note 128, at 14.

172. *Id.*

and the res judicata of the international field.[173] Accordingly, she concludes that:

> The second level of res judicata comes into play when the local ruling is questioned according to the available international standards and a decision is reached or when the possibility of reaching an international mechanism no longer exists. In such cases, res judicata becomes firm and lasting. To argue that res judicata prevents the enforcement of an international binding decision contradicts the sovereign decision of the political entity that accepted the international jurisdiction.[174]

This reading of the res judicata doctrine does not imply any modification to the way in which res judicata works. Contrarily, it simply means the recognition of the necessary interaction between domestic legal proceedings and international human rights monitoring mechanisms. As such, it avoids the absurd situation of maintaining two rulings with res judicata authority that are contradictory between them. Hence, the Argentine Court's understanding of the res judicata principle contradicts the requirement of the previous exhaustion of local remedies, which, by definition, provides the victim with the possibility to demand the state's international responsibility and thus request an adequate reparation that may encompass the revision of a local judgment that cannot be reexamined domestically.

5. The Supreme Court Failed to Exercise the Conventionality Control

The Supreme Court disregarded the reparation ordered by the Inter-American Court in *Fontevecchia and D'Amico* and defaulted the international ruling by rejecting the petition of the Ministry of Foreign Affairs and Worship, thereby reaffirming the *Menem* decision.[175] In doing so, the Supreme Court failed to comply with the conventionality control doctrine.[176]

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173. Pinto, *supra* note 135, at 251.

174. *Id.*

175. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

176. Some authors argue that the decision implies an unfortunate weakening of the conventionality control doctrine. *See, e.g.*, Marcelo Trucco, *Análisis y proyecciones a partir del caso "Fontevecchia"*, 272 EL DERECHO: DIARIO DE DOCTRINA Y JURISPRUDENCIA [E.D.] 1, 4 (2017) (Arg.).

The International Court first developed this concept in *Almonacid Arellano et al. v. Chile* (*Almonacid Arellano*) in 2006.[177] According to *Almonacid Arellano*, the domestic judiciary is obliged to exercise a sort of "conventionality control" between the domestic legal provisions and the American Convention in order to determine its compatibility.[178] To do so, "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."[179] The Inter-American Court extended the meaning and scope of the doctrine in subsequent cases, establishing that the conformity check must be carried out *ex officio*,[180] by all public authorities at all levels,[181] not only with regard to the American Convention but also to other treaties of the Inter-American Human Rights System.[182] In addition, the conventionality control shall also be carried out based on the considerations of the Inter-American Court in exercise of its advisory jurisdiction.[183]

In 2012, the Argentine Supreme Court adopted the doctrine in *Rodríguez Pereyra* to justify its power to exercise an *ex officio* control of constitutionality.[184] In terms of the Supreme Court:

> The judicial organs of the countries that have ratified the American Convention on Human Rights are obliged to exercise,

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177. Almonacid Arellano v. Chile, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

178. *Id.* ¶ 124-25.

179. *Id.*

180. Aguado - Alfaro v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 128 (Nov. 24, 2006).

181. García v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Judgement, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 225 (Nov. 26, 2010); *see also*, Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 239 (Feb. 24, 2011).

182. The Inter-American Court referred to the Inter-American Convention on Forced Disappearances, the Inter-American Convention to Prevent and Punish Torture, and the Convention of Belém do Pará. *See* Álvarez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 253, 1, 113 (Aug. 28, 2014).

183. Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 31 (Aug. 19, 2014).

184. Until *Rodríguez Pereyra*, the Supreme Court considered that the Judiciary could only exercise the control of constitutionality upon request of one of the parties involved in the dispute. Therefore, an *ex officio* constitutionality check was forbidden. *See*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 30/6/1941, "Los Lagos S.A. Ganadera c. Gobierno Nacional," Fallos (1941-190-142) (Arg.); CSJN, 27/11/2012, "Rodríguez Pereyra," Fallos (2012-335-2333). *See also* FEDERICO G. THEA ET AL., ANÁLISIS JURISPRUDENCIAL DE LA CORTE SUPREMA 105-127 (EDIUNPAZ, 1st ed., 2017), http://unpaz.edu.ar/publicaciones/1240.

> ex officio, the conventionality control . . . . It would . . . be a contradiction to accept that the National Constitution, which, on the one hand, confers constitutional status to the aforementioned Convention (Section 22 of Article 75), incorporates its provisions into the domestic legal system and, therefore, . . . obliges the national courts to exercise an ex officio conventionality control, prevents, on the other hand, the same courts from exercising a similar examination aimed to safeguard their supremacy against domestic provisions of lower-ranking.[185]

Although the reception of the conventionality control doctrine is undeniable, the Supreme Court failed to exercise the compatibility check in *Ministry of Foreign Affairs*. Indeed, there are at least two instances in which the Supreme Court avoided such a control: 1) in 2001 when it ruled in the *Menem* case, as held by the International Court in *Fontevecchia and D'Amico*;[186] and 2) in 2017 when it refused to comply with the *Fontevecchia and D'Amico* decision in the *Ministry of Foreign Affairs* case.

It should be highlighted that the conventionality control doctrine is not only applicable to the substantive rights enshrined in the American Convention, but also to other provisions contained therein, including those relating to the judgments of the Inter-American Court. Certainly, the International Court has already referred to the doctrine during the monitoring stage for the compliance with the judgment rendered in the *Gelman* case.[187] According to the tribunal, the conformity check is an important tool to ensure compliance with, or the implementation of, a judgment of the Court, "especially when that compliance is the responsibility of the domestic courts. In these circumstances, the judicial body has the duty to uphold the American Convention and the rulings of [the Inter-American] Court, over and above domestic regulations, interpretations and practices that impede compliance with its decision in a specific case."[188]

The judgments of the Inter-American Court are international res judicata rulings that cannot be appealed. Given that states parties to the American Convention undertook the obligation to comply in good

185. CSJN, 27/11/2012, "Rodríguez Pereyra," Fallos (2012-335-2333).

186. Fontevecchia and D'Amico, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 93.

187. *See generally* Gelman v. Uruguay, Monitoring Compliance with Judgment, Inter-Am. Ct. H.R. (Mar. 20, 2013).

188. *Id.* ¶ 73.

faith with their judgments and recognized its final character, an appropriate control of conventionality exercised by the domestic judiciary is a key tool to ensure the binding nature of the international rulings and all of its consequences.[189] However, the Argentine Court avoided such a control in *Ministry of Foreign Affairs* and gave no effect to the reparation ordered in the international arena.

B. *The Negative Consequences of the Ruling*

Future cases will determine if the decision in *Ministry of Foreign Affairs* implies a significant change in the interpretation of the constitutional position of certain human rights treaties, which, according to Section 22 of Article 75 of the national Constitution, should have constitutional hierarchy.[190] If the new doctrine is ratified, there is a risk of returning to a dualistic view of the relationship between international law and domestic law that will require some sort of act of incorporation of the rulings of the international tribunals.[191] If such is the case, the emergence of two unforeseen consequences with a negative impact in the enforcement of international human rights law is inexorable. First, the Supreme Court of Justice will become immune to the supervision of supra-national bodies. Second, governmental authorities may require a determination that the international ruling does not violate Article 27 of the national Constitution.

1. The Immunity of the Supreme Court of Justice

The attribution of international responsibility to any organs of the state is a rule of a customary nature which,[192] under the principle of the unity of the state, makes no distinction between the acts or omissions of the legislative, executive, or judicial structures, regardless of how public authority is distributed under domestic public law.[193] Therefore, under

189. *Id.* ¶¶ 69, 73-74.

190. *See* Art. 27, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

191. In *Medellin v. Texas*, for example, the U.S. Supreme Court held that a ruling rendered by the International Court of Justice required an implementing statute to be enforced by federal courts against Texas. It therefore concluded that the decision was not binding federal law. *See* Medellin v. Texas, 552 U.S. 491, 504 (2008); CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 40-41 (2d ed. 2015). *See generally* Foster v. Neilson, 27 U.S. 253 (1829).

192. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62, 87 (Apr. 29).

193. According to Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as

international law, the judgments of the Supreme Court are capable of generating the international responsibility of Argentina.

When a state has freely accepted a supervisory mechanism like the one created by the American Convention, international courts can impose obligations to any of the state organs. International commitments are violated by Argentina and it is Argentina's responsibility to remedy the breach of the obligation through any of its organs.[194] Hence, Congress, the head of the Legislature, may have the duty to modify or suppress a law. The President, the head of the Executive, may be obliged to review an administrative act.[195] The head of the Judiciary may also be forced to review its judgments simply because all Argentinian organs are equally bound by the American Convention.[196]

However, the Supreme Court decided that it is now the only Argentine organ that is detached from compliance with the Inter-American Court decisions.[197] Supreme Court judges may be scrutinized for committing human rights violations through its judgments, but they now enjoy a kind of immunity that prevents any adjustment or

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an organ of the central Government or of a territorial unit of the State." Paragraph 4 of the commentary indicates that this language "allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character." *See* Articles on Responsibility, *supra* note 122, ¶¶ 5, 6 (commentary to art. 4).

194. *Id.* ¶¶ 3-4 (commentary to art. 31).

195. In the context of the American Convention, this obligation does not only emerge from the binding nature of an eventual judgment of the Inter-American Court of Human Rights, but also from Article 2, according to which "the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to" the rights and freedoms recognized therein. *See* American Convention, art. 2, *supra* note 44. Along this line, the Inter-American Court of Human Rights has declared that "[t]he general duty set forth in Article 2 of the American Convention implies the adoption of measures on two fronts. On the one hand, the suppression of rules and practices of any kind that entail the violation of the guarantees set forth in the Convention. On the other hand, the issuance of rules and the development of practices leading to the effective observation of the said guarantees." *See* International Liability for the Issuance and Application of Laws that Violate the Convention (articles 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 36 (Dec. 9, 1994).

196. Abramovich, *supra* note 128, at 13.

197. *See generally* Román De Antoni, *¿Corte Suprema vs. Corte Interamericana de DDHH? Comentarios al fallo "Fontevecchia"*, PALABRAS DEL DERECHO, Feb. 15, 2017, http://palabrasdelderecho.blogspot.com.ar/2017/02/corte-suprema-vs-corte-interamericana.html; CENTRO DE ESTUDIOS LEGALES Y SOCIALES, LAS CONSECUENCIAS DEL FALLO DE LA CSJN PARA LA VIGENCIA DE LOS DD.HH: SOBRE LA DECISION DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN EN EL CASO "FONTEVECCHIA Y OTROS C/ REPÚBLICA ARGENTINA" (2017), http://www.cels.org.ar/common/documentos/cels%20sobre%20fallo%20fontevecchia%20.pdf.

modification in those rulings.[198] By invoking the character of final interpreters of the national Constitution, the Supreme Court can decide which rulings of the Inter-American Court it will accept or defy, ignoring the international responsibility that such decision can generate.[199] Unfortunately, such a breach to a new international obligation will not have legal practical consequences, as one of the largest deficits of the Inter-American Human Rights System is the lack of an effective mechanism to enforce the rulings of the Inter-American Court.[200]

2. The Creation of an *Exequatur* Proceeding

According to *Ministry of Foreign Affairs*, the rulings of the Inter-American Court are, "in principle,"[201] mandatory, owing to the fact that treaties shall be in accordance with the principles of public law laid down in the national Constitution as required by Article 27.[202] To support its contention, the Supreme Court quoted the academic writings of Joaquín V. Gonzalez and Carlos Saavedra Lama.[203] Although the authors' qualified authority is not disputed, the current value is uncertain as they were interpreting a different constitutional text: the 1853 historical constitution and not the text amended in 1994 that granted constitutional status to certain international human rights instruments.[204]

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198. Calógero Pizzolo, *¿Ser "intérprete supremo" en una comunidad de intérpretes finales? De vuelta sobre una interpretación "creacionista" de los derechos humanos*, 39 REVISTA JURÍDICA LA LEY [L.L.] 7, 10 (2017).

199. *Id.*

200. According to Article 65, the Court shall yearly submit to the Organization of American States General Assembly a report on its work, specifying, "in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations." American Convention, Art. 65, *supra* note 44. It should be noted that the OAS has rarely responded or imposed coercive measures to enforce the Court's judgments. S*ee* Cecilia M Bailliet, *Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America*, 31.4 NJHR 477, 479-480 (2013); Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOBAL STUD. L. REV. 639, 664 (2010); VIVIANA KRSTICEVIC AND LILIANA TOJO, IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES, 37-39 (CEJIL, 1st ed., 2007). *See generally* Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44.3 CORNELL INT'L L. JOUR. 494 (2011) (arguing how to gain greater compliance).

201. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

202. *Id.* ¶ 16.

203. *Id.* ¶ 18.

204. Gustavo Arballo, *La Corte Argentina frente a la Corte Interamericana: la resolución de no-cumplimiento del caso Fontevecchia - El caso "Editorial Perfil": el tramo doméstico y el tramo internacional*, SABER LEYES NO ES SABER DERECHO, (Feb. 14, 2017), http://www.saberderecho.com/2017/02/la-corte-argentina-frente-la-corte.html.

Nevertheless, the problems associated with such a conclusion do not rely on the sources used by the Supreme Court, but on the effects that it may generate. First, international human rights decisions can now be scrutinized in the domestic level to determine whether or not they are in conformity with the principles of public law, even when the national Constitution does not identify those principles. Second, public authorities may quote this precedent to ignore international standards set by the Inter-American Court aimed at ensuring the rights and guarantees enshrined in the Convention.

On the one hand, it should be noted that the International Court's rulings cannot be examined internationally or domestically because Article 67 of the American Convention specifically binds it when it indicates that the judgments of the Inter-American Court are final and not subject to appeal.[205] In addition, when Article 68.1 of the Convention mentions the mandatory nature of the judgments of the Inter-American Court,[206] it does not include the term "in principle," a phrase drafted by the Supreme Court to reduce the importance of the compulsory character of the international judgments and review the reparation ordered in *Fontevecchia and D'Amico*.[207] In doing so, the Supreme Court essentially created an *exequatur* proceeding in national courts to discuss whether a ruling of the Inter-American Court was issued in accordance with the principles of Argentine public law and within the competences granted by the American Convention.[208] The conclusion is risky because the executive power itself, or any other organ of the state, might invoke *Ministry of Foreign Affairs* and request a judicial revision of the international ruling to determine whether it adjusts to those principles or whether the International Court has acted *ultra vires*.[209] Therefore, a rule of empowerment or an act of implementation would be required to incorporate the international decision into the domestic legal system, suggesting a return to a dualistic constitutional vision.[210]

This theory confronts the idea that the constitutional reform has created a so-called federal block of constitutionality by incorporating certain human rights instruments into the national Constitution. As

205. Article 67 only establishes that "[i]n 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." *See* American Convention, art. 67, *supra* note 44.

206. *Id.* art. 68.

207. Nash, *supra* note 158.

208. Abramovich, *supra* note 128, at 19-20.

209. Arballo, *supra* note 204.

210. Abramovich, *supra* note 128, at 18.

explained previously in Part II, the 1994 Constitutional Amendment not only recognized the superiority of international treaties over domestic laws, but also granted equal ranking to certain international human rights treaties with the Constitution, creating what the doctrine[211] and jurisprudence[212] named a federal block of constitutionality. Hence, the national Constitution and those human rights instruments were positioned at the top of the Argentine legal pyramid with equal ranking among its provisions. Due to the fact that norms of the national Constitution have the same hierarchy, they cannot invalidate each other, as the opposite determination would imply a recognition of contradictions in the constitutional text. Therefore, the rules of the constitutionality block should be interpreted as a unit in the search of coherence between the international and domestic legal systems.[213] The incorporation of certain human rights treaties to the national Constitution implies that a violation to any of these instruments, including those concerning the decisions of the supranational entities, is not only a breach of an international obligation but also an infringement of the Argentine legal system.

Furthermore, one of the most important problems of the new approach is precisely the identification of the "principles of public law," which are not defined in Article 27 or in any other part of the national Constitution. Such an absence brings great uncertainty for the determination and scope of those principles vis-à-vis Section 22 of Article 75. In the instant case, the Supreme Court specifically identified Article 108 of the Constitution, which assigns it as the head of the judiciary.[214] Certainly, it is undeniable that the superior character of the Supreme Court is one of those fundamental principles of public law, though it is also true that the mandatory nature of the judgments of the Inter-American Court are also part of the constitutionality block and,

211. *See, e.g.*, Pablo Luis Manili, *El bloque de constitucionalidad: la recepción del derecho internacional de los derechos humanos en el derecho constitucional argentino*, 1a. REVISTA JURÍDICA LA LEY [L.L.] (2003); Calógero Pizzolo, *La exigencia de un recurso 'eficaz, sencillo y breve' en el bloque de constitucionalidad federal*, II.3 E.D. 93 (2001); GERMÁN BIDART CAMPOS, MANUAL DE LA CONSTITUCIÓN REFORMADA CAP. V, NO. 9 (Ediar Tomo, 1st ed., 1996).

212. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/8/2006, "Dieser, María Graciela y Fraticelli, Carlos Andrés s/homicidio calificado por el vínculo y por alevosía," Fallos (2006-329-3034) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2005, "Verbitsky, Horacio s/habeas corpus," Fallos (2005-328-1146) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 17/5/2005, "Llerena, Horacio Luis s/abuso de armas y lesiones -arts. 104 y 89 del Código Penal," Fallos (2005-328-1491) (Arg.).

213. Abramovich, *supra* note 128, at 18.

214. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

therefore, a fundamental principle of public law after the 1994 Constitutional Amendment.[215] However, the Supreme Court decided to prioritize some principles of public law and subordinate others, such as the obligatory character of the *Fontevecchia and D'Amico* ruling.[216]

Additionally, the decision is dangerous because international standards for the protection of human rights can now be neglected, or at least questioned, as a result of the Supreme Court's reading of the subsidiary nature of the Inter-American Human Rights System. In fact, on May 4, 2017, the Superior Court of Justice of the Province of Corrientes rejected the review to a life imprisonment punishment imposed on an individual under the age of eighteen,[217] ignoring the decision rendered by the Inter-American Court of Human Rights in *Mendoza et al. v. Argentina*.[218]

In *Mendoza*, the Inter-American Court decided that Argentina was obligated to ensure that life imprisonment punishments are never again imposed on any other person for crimes committed while minors.[219] The International Court added that Argentina must guarantee that anyone serving sentences for crimes committed while they were under the age of eighteen may obtain a review of the sentence adapted to the standards described in the judgment. The justification to such a finding was to ". . . avoid the need for cases such as this one being lodged before the organs of the inter-American system . . . and, instead, . . . be decided by the corresponding State organs."[220] However, the provincial tribunal borrowed from the arguments developed by the Supreme Court in *Ministry of Foreign Affairs*, arguing that "it is not possible to dismiss from the analysis the recent ruling of the Supreme Court [in which] the Tribunal has adopted a position, that, at risk of qualifying it, is at least novel."[221] The majority of the provincial court ignored the standards developed in *Mendoza* and refused to review the life imprisonment punishment previously imposed.

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215. Abramovich, *supra* note 128, at 19.

216. *Id.*

217. Superior Tribunal de Justicia de la Provincia de Corrientes [STJ CTES.] [Superior Court of Justice of the Province of Corrientes], 4/5/2017, "Expediente STP 381/15," Fallos (2017-334-1504) (Arg.), http://www.juscorrientes.gov.ar/seccion/jurisprudencia/fallos-recientes/?tipo=sentencias&fuero=penales#prettyPhoto.

218. *See* Mendoza v. Argentina, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260 (May 14, 2013).

219. *Id.* ¶ 327.

220. *Id.*

221. Expediente STP 381/15, *supra* note 217, at 2.

The case decided by the Superior Court of Justice of the Province of Corrientes in violation of the *Mendoza* judgment constitutes a good example of how the *Ministry of Foreign Affairs* decision can expand the Supreme Court's regressive interpretation of the national Constitution to other cases, and thus restrict rights and guarantees that were constitutionalized through a process of incorporation of international law initiated by the Supreme Court in *Ekmekdjian*, continued by the 1994 Constitutional Amendment, later confirmed by the highest tribunal of Argentina, but now, paradoxically, reconsidered.

V. CONCLUSION

On October 18, 2017, the Inter-American Court issued a new decision concerning compliance with the judgment rendered in *Fontevecchia and D'Amico*, finding that Argentina had not implemented the reparations ordered and requesting the submission of a report, no later than February 28, 2018, detailing the measures adopted for that purpose.[222] Although such a decision could be anticipated,[223] the surprising component of the new ruling relies on the fact that the International Court provided the Supreme Court with important elements to implement the reparation ordered and, therefore, harmonize the international and domestic legal systems.

The Inter-American Court first held that "giving no effect" to the *Menem* judgment, as ordered in *Fontevecchia and D'Amico*,[224] was not a synonym for "revocation,"[225] as ruled by the Supreme Court in *Ministry of Foreign Affairs*.[226] Hence, to comply with *Fontevecchia and D'Amico*, the International Court proposed the adoption of different legal measures

222. Fontevecchia and D'Amico v. Argentina, Monitoring Compliance with Judgement, Inter-Am. Ct. H.R. (Oct. 18, 2017). To reach that conclusion, the Inter-American Court highlighted the mandatory nature of its decisions and criticized the Argentine Court for exercising faculties that it does not have, like analyzing whether the international tribunal acted within its jurisdiction. Among other issues, it also stressed that the *Ministry of Foreign Affairs* decision contradicts its previous jurisprudence by keeping in force a state act (the judgment) that violates the Convention, a determination that was the result of an international process that did not involve a fourth instance appeal for domestic proceedings. *See id.* ¶¶ 7-15.

223. *See, e.g.*, Arballo, *supra* note 204; Pizzolo, *supra* note 211, at 9-10; Alberto L. Zuppi and Rodrigo Dellutri, *Comentario a un Diálogo entre Quienes no se Escuchan: La Decisión de la Corte Suprema en el caso "Fontevecchia y Dámico c. República Argentina*, 39 REVISTA JURÍDICA LA LEY [L.L.], 22, 23 (2017).

224. According to the Inter-American Court of Human Rights, Argentina had to adopt all judicial, administrative, or other measures as may be necessary to give no effect to the domestic ruling rendered in the *Menem* case. *See* Fontevecchia, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 105.c.

225. Fontevecchia and D'Amico v. Argentina, Monitoring Compliance with Judgement, Inter-Am. Ct. H.R. (Oct. 18, 2017), ¶ 16.

226. CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores y Culto," Fallos (2017-340-47).

other than the revocation of the judgment, like the suppression of the *Menem* ruling from the Supreme Court's websites or the incorporation of an explanatory note indicating that said decision was declared in violation of the American Convention.[227] On December 5, 2017, the Argentine Court stated that the Inter-American Court clarified that *Fontevecchia and D'Amico* did not imply the revocation of the res judicata judgment,[228] and that it suggested the inclusion of the explanatory note previously referred.[229] Consequently, the Argentine tribunal ruled that such a proposal is fully compatible with the principles of public law of Article 27 of the Constitution[230] and thus ordered the inclusion of the suggested annotation in the *Menem* case.[231]

The *Fontevecchia and D'Amico* saga will likely conclude when Argentina pays the compensation ordered and informs the International Court of the latest decision of the Supreme Court. However, the legal problems and concerns raised throughout this Note have not been resolved at all, namely because the solution finally adopted in this case to harmonize both legal systems is difficult to replicate in all prospective human rights disputes. *Fontevecchia and D'Amico* was related to a civil judgment that generated no criminal records.[232] The act in breach of the Convention did not restrict, for instance, the personal freedom of the individual, deprive the individual of his/her nationality, or limited his/her reproductive rights. If that had been the case, an explanatory note in the res judicata ruling in violation of the Convention would never constitute an adequate reparation to restore the enjoyment of the victim's rights.

The ultimate judgment by the Supreme Court appears to ratify its inflexible position of revoking res judicata rulings in breach of the Convention. *Ministry of Foreign Affairs* still stands for the proposition that prospective victims have no certainty that a protective or remedial decision from an international monitoring body will be effectivily implemented in the domestic legal order.[233] Accordingly, the actual consequences of *Ministry of Foreign Affairs*, as well as its impact on the Argentine legal system and the decisions of lower tribunals remains to

227. Fontevecchia and D'Amico v. Argentina, Monitoring Compliance with Judgement, Inter-Am. Ct. H.R. (Oct. 18, 2017), ¶ 21.

228. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/05/2017, Resolución 4015/2017 (Arg.), ¶ 1.

229. *Id.* ¶ 3.

230. *Id.* ¶ 4.

231. *Id.*

232. Fontevecchia and D'Amico v. Argentina, Monitoring Compliance with Judgement, Inter-Am. Ct. H.R. (Oct. 18, 2017), ¶ 21.

233. Arballo, *supra* note 204.

be seen. However, it is clear that the Supreme Court's ruling enshrines a regressive interpretation of the national Constitution that clashes with the jurisprudence it has developed in the last thirteen years and with Argentina's international obligations for the protection and promotion of fundamental human rights.

In the international arena, the new doctrine places Argentina in a very delicate position reagarding the Inter-American Human Rights System. Argentina remains bound by international judgments because it accepted the contentious jurisdiction of the Inter-American Court and agreed to comply in good faith with its rulings. In the domestic context, the decision raises significant alarms regarding the constitutional position of human rights instruments that are supposed to have constitutional hierarchy. The 1994 Constituent Assembly embraced a monist constitutional framework that created a federal block of constitutionality, now challenged by the Supreme Court. This would suggest that human rights treaties with constitutional hierarchy are viewed to have a constitutional hierarchy of a second ranking vis-à-vis the principles of public law prioritized by the Argentine tribunal. Thus, the Supreme Court weakens the value of international human rights obligations and the decisions arising from organs created by those instruments.

The decision confronts the integration of both the international and domestic legal systems outlined by the Constituent Assembly in 1994 when it invited international human rights instruments to join the national Constitution. Future case law will determine the impact of the new approach on the rights and guarantees of potential victims and the level of harmony with which both legal regimes will interact.