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Volume 30
Number 3 *Symposium—International Courts
and Tribunals in the 21st Century: The Future of
International Justice*

Article 3

6-1-2008

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Recommended Citation

Monica Pinto, *National and International Courts—Deference or Disdain*, 30 Loy. L.A. Int'l & Comp. L. Rev. 247 (2008).

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National and International Courts— Deference or Disdain?

MÓNICA PINTO*

I. THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

Far beyond the debates and controversies relating to the different statuses and origins of both international and domestic law rules, there is a long standing tradition in the international law arena whereby states exercise their sovereignty when they enter into an international agreement and when they feel bound by the same general practice accepted as law.

International and domestic rules are integrated into the legal order of every given state. The hierarchy and the relationship amongst these rules are normally regulated by the state's Constitution or other fundamental laws. In this context, there is a long standing practice according to which every state has the latitude to choose the means through which international law will become effective internally. In fact, what actually matters is that it be applied.

As early as 1925, the Permanent Court of International Justice (PCIJ) recognized that there was “a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to secure the fulfillment of the

* Professor of International Law and Human Rights Law, University of Buenos Aires Law School. These ideas took shape for the conference on “International Courts and Tribunals in the 21st Century: The Future of International Justice” convened by the Project on International Courts and Tribunals (PICT) at The Hague on 30 November-1 December 2007. I am grateful to my colleagues at PICT and other participants in the conference for conversations and fruitful debates.

obligations undertaken."¹ Shortly thereafter, the same tribunal stated "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."² This same wording can be found in a great number of other decisions by the PCIJ and the International Court of Justice (ICJ).³ In fact, this generally accepted principle has been codified in the Vienna Convention on the Law of Treaties.⁴ Article 27 of the treaty states, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."⁵

Some treaties embody special stipulations dealing with the relationship between domestic and international law. Human rights treaties, for example, usually contain a clause whereby state parties have the duty to take the necessary steps to adopt legislative or other measures as may be necessary to give effect to the protected rights.⁶ The theory behind these provisions is that every state party will take the necessary steps to prepare its legal framework in order to be able to enforce the treaty. Additionally, these treaty provisions usually leave it to the concerned states to determine the method of integrating the relevant treaty "in

1. Exchange of Greek and Turkish Populations, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21).

2. Greco-Bulgarian "Communities," Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17, at 32 (July 31).

3. Free Zones of Upper Savoy and the District of Gex, 1932 P.C.I.J. (ser. A/B) No. 46, 96, at 167 (June 7) ("[W]hile it is certain that France cannot rely on her own legislation to limit the scope of her international obligations . . ."); Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, 4, at 24 (Feb. 4) [hereinafter Treatment of Polish Nationals, Advisory Opinion] ("It should be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."); Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. 77, 12, at 31-32, ¶ 47 (Apr. 26) [hereinafter Obligation to Arbitrate, Advisory Opinion].

4. Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

5. *Id.* at art. 27.

6. International Covenant on Civil and Political Rights art. 2(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 173 [hereinafter ICCPR]; American Convention on Human Rights art. 2(1), July 18, 1978, 1144 U.N.T.S. 143, 145 [hereinafter ACHR].

accordance with its constitutional processes and with the provisions of the present Covenant.”⁷

Merely fulfilling the obligation of adopting treaty measures, however, is not enough. The Inter-American Court on Human Rights (Inter-American Court), for example, stresses that “[t]he obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.”⁸ Similarly, the Committee on Human Rights stated:

[T]he implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction.⁹

It seems that nearly all international rules are conceived to be applied or invoked by individuals or corporations¹⁰ (e.g., treaties dealing with trade and commerce, navigation, taxation, technical cooperation, etc.) even when the issue of implementing international rules at the domestic level becomes more sensitive when the right and/or duty holders are individuals (e.g., human rights treaties). Consequently, there should be a legal possibility to materialize the rights and duties embodied in an international instrument or recognized by an international customary rule.

This article will discuss the relationship between national and international courts, be it deference or disdain, and will advance some thoughts on the treatment of national decisions by international instances and the enforcement of international

7. ICCPR, *supra* note 6.

8. Velásquez Rodríguez v. Honduras Case, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 167 (July 8, 1988), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

9. Office of the High Comm’r for Human Rights, Human Rights Comm., Int’l Covenant on Civil and Political Rights, General Comment No. 3: Implementation at the National Level (art. 2), U.N. Doc. CCPR General Comment No. 3 (July 29, 1981) [hereinafter ICCPR General Comment No. 3] (emphasis in original).

10. I use this term to refer to all sorts of moral persons of private law.

decisions by national instances. Special references will be made to the Human Rights System and to the Inter-American System.

II. NATIONAL DECISIONS BEFORE INTERNATIONAL TRIBUNALS

A. *The Supremacy Feeling: How Supreme Are Supreme Courts?*

The possibility of being able to seize an international instance in order to question the conformity of a national judicial decision—normally from the highest local instance—with the international obligations undertaken by a state, created a sort of traumatic event experienced by some national supreme courts of no longer being supreme. This kind of feeling is usually mixed with arguments concerning the observance of the principle of *res judicata* that has led to peculiar decisions in a great number of cases.

In November of 2002, the Inter-American Court decided in *Cantos v. Argentina* that, “[T]he State [Argentina] shall refrain from charging Mr. José María Cantos the filing fee and fine levied for failure to pay the filing fee on time.”¹¹ In this case, Mr. Cantos sued the federal and the provincial governments of Argentina for money in an amount close to the figures of a national budget and he was required to pay the judicial fees accordingly.¹² He applied for an exemption but was not successful.¹³ In any case, he continued to litigate the issue and reached the highest local instance available, namely the supreme court, without paying any fees; that is, the failure to pay the filing fees was by no means an obstacle to exercising his right to justice. The main point, however, was that the supreme court did not accept the international decision because of the principle of *res judicata*.

In fact, the court refused to follow the requirement to enforce the international judgment by stating that the protection of human rights can be enforced through the amendment of the constitutional or legal rules adopted to protect them, but it cannot take place through acts causing violations of domestic legal order.¹⁴

11. *Cantos v. Argentina* Case, Inter-Am. Ct. H.R. (ser. C) No. 97, ¶ 70(a) (Nov. 28, 2002), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_97_ing.pdf.

12. *Id.* ¶ 53.

13. *Id.* ¶¶ 24(d), 73.

14. Corte Suprema de Justicia [CSJN], 3/9/1996, “Cantos, José María v. Santiago del Estero, Provincia de y/o Estado Nacional / cobro de pesos,” *Revista Jurídica La Ley* [L.L.] (1996-C-1099) (Arg.).

The doctrine of *res judicata* serves an important function in the legal order. The increasing number of exchanges between international and domestic law and the ambiguity as to where each should apply is not meant to introduce any changes in the way *res judicata* works. When a state, however, freely accepts a supervisory mechanism, as in the case of human rights law, or a judicial or quasi-judicial method for the settlement of disputes, as in the investment field, and the requisites for the admissibility of the petitions lodged with the international organs—be them tribunals *lato senso* or quasi judicial bodies—include the exhaustion of local remedies, the scope of the doctrine of *res judicata* is different. That is, whenever the international mechanism is a subsidiary to any local mechanism, *res judicata* requires a different reading.

It should be assumed that *res judicata* has two levels, the first being preliminary or domestic. Whenever local remedies have been exhausted or cannot be exhausted because of an exception or an absence of due diligence, an international instance is available. 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. It also involves a contradiction with the *raison d'être* of law; law actually evolves in order to ensure a better quality of living and fostering justice is a way to accomplish this goal.

B. International Tribunals (Normally) Have No Competence to Rule on National Law

There are some arguments suitable to explain why it is inconvenient to provide international tribunals wide powers to interpret national judicial decisions and/or domestic law.

From a systemic point of view, there are significant differences between national and international courts. Local tribunals exist and work within a judicial context. There is a division of powers in force and the judiciary, the aristocratic power in a democratic scheme, is deemed to be a group of highly qualified men and women, appointed because of their merits and

not because of their popularity.¹⁵ They are nominated through a selection process that takes into consideration different criteria.¹⁶ They are deemed to be impartial and independent.¹⁷ They are expected to enforce the rule of law and their decisions are not necessarily required to meet the standards endorsed by the great majority of the people.¹⁸ They are subjected to close scrutiny in how they perform their duties.¹⁹ Their decisions normally can be questioned before upper instances and there are methods of accountability for those who wish to settle claims with them if necessary.²⁰

International tribunals, on the other hand, do not belong to an international judiciary. There is no formal division of powers in the international society. This by no means can be understood as denying the existence of different entities performing functions analogous to those of the legislative and judicial branches of government.²¹ International tribunals experience the same counter-majoritarian difficulties²² as domestic judiciaries and are deemed to be the holders of the same goods as national judges. The appointment process for international judges, however, is even more discretionary than those of local judges.²³ Additionally, the administrative power is not under any duty to explain the reason behind a nomination.²⁴ International judges are also deemed to be independent and impartial even when they are not subjected to any scrutiny regarding how they perform their duties.²⁵ There are no accountability methods in force for international judges.²⁶ It should be noted, however, that this does not mean that all international judges are uncontrollable. On the contrary,

15. CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 187-88 (1996).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. I have discussed these issues in MONICA PINTO, *EL DERECHO INTERNACIONAL: VIGENCIA Y DESAFÍOS EN UN ESCENARIO GLOBALIZADO* (2004).

22. Term labeled by Alexander Bickel, quoted by NINO, *supra* note 15, at 188.

23. See DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* (2007).

24. *Id.*

25. *Id.*

26. *Id.*

international judges are self-controlled because their job depends on their performance!²⁷

From the point of view of the regime, national and international tribunals are also not alike. In fact, international judges are not empowered to interpret domestic law because domestic rules are beyond their *jurisdiction*.²⁸ This does not mean that they are not allowed to confront national law or national judicial decisions to come to determine whether they meet international standards.²⁹ This is an ordinary feature of international tribunals such as the ICJ, the Committee against Torture, or ICSID panels. It is simply the judicial assertion of the international responsibility of States.³⁰

According to the Basic Documents of the Inter-American System on Human Rights, there should be two supervisory mechanisms, a Commission and a Court, and both must have competence with respect to matters relating to the fulfillment of the commitments made by state parties to the Convention.³¹ The scope of their functions in the petition system, however, is not exactly the same.

The Commission deals with petitions containing denunciations or complaints of violation of the Convention by a state party.³² If a settlement is not reached, the Commission shall, within the time limit established by its statute, draw up a report setting forth the facts and stating its conclusions.³³ In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.³⁴

The Court has jurisdiction over all cases concerning the interpretation and application of Convention provisions that have

27. *Id.*

28. *Id.*

29. *Id.*

30. Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001); Report of the International Law Commission on the work of its Fifty-third session, Report of Int'l Law Comm'n, U.N. GAOR, 56th Sess., Chap. IV.E.1, U.N. Doc. A/56/10 (2001) ("Article 1: Every internationally wrongful act of a State entails the international responsibility of that State . . . Article 2: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State").

31. ACHR, *supra* note 6, at art. 33.

32. *Id.* at art. 44.

33. *Id.* at art. 50.

34. *Id.*

been accepted by each state party.³⁵ If the Court finds that there has been a violation of a protected right or freedom, it shall rule that the injured party be ensured the enjoyment of his or her right or freedom that was violated, and if appropriate, that the consequence of the measure or situation that constituted the breach of such right or freedom be remedied³⁶ and that fair compensation be paid to the injured party.³⁷

In this context there are a few slight differences between the two mechanisms: the Commission always acts first and must set forth the facts and state its conclusions as to the fulfillment of the commitments made by the particular state party to the Convention. That is, according to the Inter-American Court, the Commission shall verify how, when, where, and through which means the concerned state fulfilled its duties to respect the rights and freedoms recognized in the given instrument and to ensure to all persons subject to its jurisdiction the free and full exercise of those rights and freedoms, without any discrimination.³⁸ Summing up, “[t]he Court’s reply, then, must be based upon the Commission’s principal function of promoting the observance and protection of human rights, from which it derives its power to rule, as in the case of any other act, that a norm of internal law violates the Convention, but not that it violates the internal juridical order of a State.”³⁹

The Court deals with the interpretation and application of the provisions of a Convention and if it finds that there has been a violation of a protected right or freedom, it shall rule the re-establishment of the exercise of the right and the compensation for the damage.

Although facts are assigned primarily to the Commission, the Court is not prevented from dealing with them. Both the Commission and the Court have to deal with the performance of their respective duties under the instruments by the State parties, whether the States have satisfied such obligations or not, and if so,

35. *Id.* at art. 62(3).

36. *Id.* at art. 63(1).

37. *Id.*

38. *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 161.

39. Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion, Inter-Am. C.H.R., OC-13/93 (ser. A) No. 13 ¶ 37 (1993), available at http://www.corteidh.or.cr/docs/opiniones/seriea_13_ing.pdf [hereinafter Certain Attributes of the Inter-American Commission on Human Rights].

through which means. This scope does not allow the supervisory organs to decide on internal measures, whether they are legislative or judicial.

International instances, on the other hand, have developed different mechanisms for dealing with national decisions.

1. The Margin of Appreciation

The European System of Human Rights developed the margin of appreciation rule. It has been pointed out that the dialectic of the control by the European judge lies in the intention to make room for national autonomy while preserving the common law.⁴⁰ This control can be synthesized into the notion of margin of appreciation that defines the compatibility relationship between domestic measures and the conventional rule.⁴¹

The margin of appreciation rule is praetorian law created by the European System on the grounds of both the subsidiarity principle and the pluralism deemed to be the feature of the democratic society to which the System applies.⁴²

As early as 1976, in its *Handyside* judgment, the European Court stated:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them. . . . Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. . . .⁴³

The ideological and political component of the margin of appreciation is the observance of European diversity. As underlined by the Strasbourg Court in the *Sunday Times* case:

40. FREDERIC SUDRE, *DROIT EUROPEEN ET INTERNATIONAL DES DROITS DE L'HOMME* 211 (6th ed. 2003) (“Toute la dialectique du contrôle du juge européen réside dans le souci de faire place à l'autonomie nationale tout en préservant le droit commun et se résume dans la notion de “marge d'appréciation” qui vient définir le rapport de compatibilité devant exister entre les mesures nationales et la norme conventionnelle.”).

41. *Id.*

42. See generally, Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *EUR. J. INT'L L.* 907 (2005).

43. *Handyside v. United Kingdom*, 24 *Eur. Ct. H.R.* (ser. A) at 17 (1976).

[T]he main purpose of the Convention is “to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction” (Series A no. 5 p. 19). This does not mean that absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws (see, *mutatis mutandis*, judgment of 23 July 1968 in the “Belgian Linguistic” case, Series A no. 6, pp. 34-35).⁴⁴

What the Court stresses is a margin of appreciation under European control; that is, the nature of the concerned human right leads to stricter control and to a lesser degree of appreciation when privacy or family relations are involved. The existence of common legal principles also reduces the margin of appreciation of States.

Roughly stated, this is a discretionary margin whereby the regional Court views a particular issue through what we might call that country’s cultural, social and political “prism.” Looking through that prism, the regional Court may determine that the domestic court is better situated to make a particular decision and will not review that issue—and possibly not review a case. But the device is basically a pragmatic, post-hoc compromise which only indirectly attacks the problem. And there has been difficulty of consistently defining just how, when and to which specific issues that discretion should be applied.⁴⁵

The above presentation was used during a 1996 seminar at the Organization of American States Headquarters in Washington D.C., by the then secretary-general Cesar Gaviria, to introduce his proposal for strengthening the Inter-American system:

Particular attention needs to be paid to cases that have already undergone a thorough treatment by domestic courts. In these cases, our regional system has a real opportunity to re-connect with domestic judicial systems by articulating a specific jurisprudence of deference to domestic proceedings. What the regional court is entitled to review and what it should accept from a domestic judicial proceeding needs to be clarified. While issues of law specifically keyed to violations of the ACHR or

44. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 37-38 (1979).

45. César Gaviria, *Towards a New Vision of the Inter-American Human Rights System*, 4 J. OF LATIN AM. AFF. 4, 9 (1996).

Charter are thoroughly reviewable by the IACHR, issues of fact might receive greater deference. Note, too, that how a domestic court understands a domestic law is also presumably an issue of fact and should be granted deference.⁴⁶

Needless to say, the first critics of the proposal came from the secretariat of the Inter-American Commission on Human Rights (IACHR)—those who were directly involved in the question. Christina Cerna, having the floor at the referred seminar, argued that if the Commission had deferred to the domestic courts' fact-finding in the thousands of cases of "disappeared" persons that had been brought to the IACHR or those relating to persons tried by "anonymous" judges, (I believe she is pointing to the Peruvian cases relating to what became known as the faceless judges) no state would ever have been condemned.⁴⁷ Moreover, she suggests that the duplication of the fact-finding aspects of the work of both organs is merely theoretical. She argues:

The "New Vision" paper suggests that the Court "should not replicate the IACHR's fact-finding efforts, but instead [should] give the IACHR's fact-finding work greater deference in its own proceedings." The paradox, however, is that currently the majority of the fact-finding is done when the Commission presents the case to the Court and must litigate the facts, present witnesses and prove the allegations before the Court. A similar procedure is not carried out to prove the facts before the Commission, so to eliminate the Court's fact-finding powers would be to severely cut back on the actual fact-finding being done by the system.⁴⁸

In any case, the Inter-American system created its own tool to deal with the increasing number of petitions lodged with the Commission.

2. The Fourth Instance Formula

The tool created by the Inter-American system is the so-called "fourth instance formula." The fourth instance formula prevents human rights bodies—tribunals and even quasi-judicial organs—from reviewing local decisions as it should be the case for a higher jurisdiction.

46. *Id.*

47. Christina Cerna, *Clarifying a Reviewing Standard*, 4 J. OF LATIN AM. AFF. 54, 55 (1996).

48. *Id.*

Based on the subsidiary nature of the international human rights supervisory mechanism, both the European and the Inter-American systems of human rights have rejected any possibility of formally reviewing national decisions unless they believe a violation of a protected right is involved.⁴⁹ The main idea behind the fourth instance formula is that national jurisdictions are in a better position to adjudicate claims according to domestic law, whether or not they are dealing with only normative aspects or rely on the facts.⁵⁰

The Inter-American system initiated the practice in Clifton Wright's case where the Commission stated:

[I]t is not the function of the Inter-American Commission on Human Rights to act as a quasi-judicial fourth instance and to review the holdings of the domestic courts of the OAS member states. It is the function of the Inter-American Commission on Human Rights to act on petitions presented to it pursuant to Articles 44 to 51 of the American Convention as regards those States that have become parties to the Convention (Article 19 of the Statute of the IACHR, approved by Res. No. 447 of the Ninth OAS General Assembly, 1979).⁵¹

That being so, "[o]f course the Commission cannot reverse or set aside a judgment of a Costa Rican Court, but there is no doubt that the Commission can state that a rule of its domestic law or a court judgment in that country violate a human right which it undertook to respect in a treaty to which it is internationally bound."⁵²

In 1996, when dealing with a case relating to Argentina where the argument of the fourth instance formula was put forward by the Government, the Commission recalled that "it may not be assumed that the Commission is a national fourth instance before which it is possible to present and resolve differences in the

49. See *Wright v. Jamaica*, Case 9260, Inter-Am. C.H.R., Report No. 29/88, OEA/Ser.L.V/II.74, doc. 10 rev. 1 Considering ¶ 5 (1988), available at <http://www.cidh.org/annualrep/87.88eng/Jamaica9260.htm>.

50. *Id.*

51. *Id.*

52. *Schmidt v. Costa Rica*, Case 9178, Inter-Am. C.H.R., Report No. 17/84, OEA/Ser.L.V/II.66, doc. 10 rev. 1 Observations of the Inter-American Commission on Human Rights ¶ 4 (1984), available at <http://www.cidh.org/annualrep/84.85eng/CostaRica9178.htm>.

amounts awarded by the Judiciary Branch in application of the law.”⁵³

Later, the Commission resumed,

The Commission is competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other right guaranteed by the Convention. However, if it contains nothing but the allegation that the decision was wrong or unjust in itself, the petition must be dismissed under this formula. The Commission’s task is to ensure the observance of the obligations undertaken by the States parties to the Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. Such examination would be in order only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention.⁵⁴

Ultimately, the Commission relies on the nature and function of the judiciary in democracy and argues

In democratic societies, where the courts function according to a system of powers established by the Constitution and domestic legislation, it is for those courts to review the matters brought before them. Where it is clear that there has been a violation of one of the rights protected by the Convention, then the Commission is competent to review. The Commission 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.⁵⁵

The Commission first established the fourth instance formula with *Clifton Wright*, followed by *Héctor López Aurelli*, and finally, produced a leading case with *Marzioni*. The doctrine was applied consistently in the case of *Jiménez Rueda* (Colombia),⁵⁶ the report on the admissibility of the case lodged by Juan Milla Bermúdez

53. *Marzioni v. Argentina*, Case 11.673, Inter-Am. C.H.R., Report No. 39/96, OEA/Ser.L.V/II.95, doc. 7 ¶ 23 (1996), available at <http://www.cidh.org/annualrep/96eng/Argentina11673.htm>.

54. *Id.* ¶ 51.

55. *Id.* ¶¶ 60-61.

56. *Jiménez v. Colombia*, On Admissibility, Inter-Am. C.H.R., Report No. 4/97, OEA/Ser.L.V/II.95, doc. 7 rev. ¶¶ 23-27 (1997), available at <http://www.cidh.org/annualrep/96eng/Colombia.jimenez.htm>.

(Honduras),⁵⁷ the inadmissibility report in the case of *García Saccone* (Argentina),⁵⁸ and in the report according to article 51 in the case of *Tablada*.⁵⁹

The Inter-American Court also stated that with regard to the fourth instance formula,

Lastly, in accordance with general international law, the Inter-American Court does not act as an appellate court or a court for judicial review of rulings handed down by the domestic courts. All it is empowered to do in this Case is call attention to the procedural violations of the rights enshrined in the Convention which have injured Mr. Raymond Genie-Peñalba, the interested party in the matter; however, it lacks jurisdiction to remedy those violations in the domestic arena, a task, as has been pointed out before, that falls to the Supreme Court of Justice of Nicaragua when it disposes of the application for judicial review which is yet to be resolved.⁶⁰

Later, in the case of *Street Children in Guatemala*, the government used the fourth instance formula as a preliminary objection.⁶¹ The Court decided that the objection should be dismissed as inadmissible because,

[T]he only preliminary objection of any substance brought by Guatemala is essentially that alleging this Court's lack of jurisdiction to examine as a "fourth instance" the judgment rendered by that country's Supreme Court of Justice on July 21, 1993, which upheld the ruling of the Second District Court's Penal Branch of the State of Guatemala of December 26, 1991, acquitting the accused of the murder of the victims indicated by the Commission, with a decision at the highest judicial level, which acquired the authority of a final judgment.

57. *Bermúdez v. Honduras*, On Admissibility, Case 11.206, Inter-Am. C.H.R., Report No. 46/96, OEA/Ser.L.V/II.95, doc. 7 rev. ¶¶ 31-54 (1996), available at <http://www.cidh.org/annualrep/96eng/Honduras11206.htm>.

58. *Saccone v. Argentina*, Case 11.671, Inter-Am. C.H.R., Report No. 8/98, OEA/Ser.L.V/II.98, doc. 6 ¶¶ 51-55 (1998), available at <http://www.cidh.org/annualrep/97eng/Argentina11671.htm>.

59. *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L.V/II.98, doc. 6 ¶¶ 138-145 (1997), available at <http://www.cidh.org/annualrep/97eng/Argentina11137.htm>.

60. *Genie Lacayo v. Nicaragua* Case, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 94 (Jan. 29, 1997), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_30_ing.pdf.

61. "Street Children" (*Villagrán-Morales et al.*) v. Guatemala Case, Inter-Am. Ct. H.R. (ser. C) No. 32 (Sept. 11, 1997), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_32_ing.pdf.

This Court considers that the petition submitted by the Inter-American Commission does not seek to review the judgment of the Supreme Court of Guatemala, but seeks a pronouncement that the State violated several precepts of the American Convention through the death of the aforementioned persons, which it imputes to members of the police force of that State, and that the State is therefore responsible.

Consequently, and as the Commission affirmed in its reply to the brief on preliminary objections, it is a question that concerns the merits of the case; hence the Court considers that the objection is not preliminary, but rather a question directly linked to the merits of the controversy.⁶²

In fact, the genesis of the doctrine should be traced back to the work of the former European Commission on Human Rights which, in its decision in the case of *Alvaro Baragiola v. Switzerland*, stated that

The Commission recalls that it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic law. . . . The Commission recalls that what is decisive is not the subjective apprehensions of the subject concerning the impartiality required of the trial court, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified. . . .⁶³

The European Commission held a similar view when it rejected petitions based on alleged incorrect applications of domestic law, or improper evaluations of facts or evidence. The European Commission has repeatedly stated that it is not competent to review decisions of the domestic courts unless a violation of the European Convention is involved. In the case of *Gudmundur Gudmundson*, the European Commission found that the text of the law that imposed a special property tax was consistent with the "permissible interferences" mentioned in Article 1 of the Protocol to the European Convention, and the alleged discrimination was merely a differential treatment with respect to cooperative societies and joint stock companies.⁶⁴

62. *Id.* ¶¶ 17-20 (emphasis in original).

63. *Baragiola v. Switzerland*, 1993 Y.B. Eur. Conv. on H.R. 90, 103-06 (Eur. Comm'n on H.R.).

64. *Gudmundson v. Iceland*, 1960 Y.B. Eur. Conv. on H.R. 394, 426 (Eur. Comm'n on H.R.).

Finally, it concluded that the petition was manifestly ill-founded and restated the "fourth instance formula" in these terms:

[E]rrors of law or fact, including errors as to the question of the constitutionality of acts passed by a national Parliament, committed by the domestic courts, accordingly concern the Commission during its examination of the admissibility of the application only in so far as they appear to involve the possible violation of any of the rights and freedoms limitatively listed in the Convention. . . . [A]n examination of the case as it has been submitted, including an examination made *ex officio* does not disclose any apparent violation of the rights and freedoms set forth in the Convention.⁶⁵

Put in this way, any review of a local judgment seems very rare; however, a revision should take place if the concerned supervisory organ believes that a violation of protected human rights may be involved. In order to prevent cycling back to the beginning, there should be a well established, well known, set of criteria.

The Inter-American Court has explained, "As the Court has said, the fulfillment of a constitutional requirement 'does not always prevent a law passed by the Legislature from being in violation of human rights'"⁶⁶ This does not mean that the Commission has the authority to rule as to how a legal norm is adopted in the internal order. Rather, the authority belongs to the competent organs of the state. What the Commission should verify in a concrete case is whether the norm contradicts the Convention instead of whether it contradicts the internal legal order of the state. The authority granted to the Commission to "make recommendations to the governments of the member states . . . for the adoption of progressive measures in favor of human rights within the framework of their domestic laws and constitutional provisions . . ."⁶⁷ or the obligation of the States to adopt certain legislative or other measures as may be necessary to give effect to the rights or freedoms guaranteed by the Convention "in accordance with their constitutional processes,"⁶⁸ does not

65. *Id.*

66. Certain Attributes of the Inter-American Commission on Human Rights, *supra* note 39 ¶ 28.

67. ACHR, *supra* note 6, at art. 41(b).

68. *Id.* at art. 2.

authorize the Commission to determine the state's adherence to constitutional precepts in establishing internal norms.

Since 2005, the IACHR has "reiterate[d] that mere disagreement of the petitioners with the interpretation domestic courts have made of pertinent legal provisions does not constitute violations of the Convention. Interpretation of the law, pertinent proceedings, and weighing of evidence is, *inter alia*, the exercise of the domestic jurisdiction function, which cannot be replaced by the IACHR."⁶⁹

III. INTERNATIONAL DECISIONS BEFORE NATIONAL TRIBUNALS

The *raison d'être* of most international law rules is that they be applied in everyday life by concerned persons. As stated above, however, there is no default mechanism for such a relationship to come into being.

The existence of special domestic mechanisms for the implementation of international law rules at the local level is a phenomenon very rarely verified, except in very specific areas, such as integration law, human rights law, and nuclear law. In the great majority of cases, the establishment of specific entities expresses the peculiarities of the subject matter.

With respect to nuclear law, in an area such as safeguards, the International Atomic Energy Agency has established relations with local partners and domestic nuclear energy institutions.⁷⁰ The dialogue between these groups is regulated under provisions adopted by the international organization and, in a way, has become a sort of internal law of the international agency. It is difficult to establish communication beyond these limits because the specificity of the topic requires very detailed regulations and the sovereign equality of states requires a treatment of a fair equitable basis.

Integration mechanisms such as MERCOSUR, for instance, do have their own rules for the blessing of national mechanisms relating to normative or quasi-normative instruments.⁷¹

Human rights treaties, however, do not envisage any form of downloading international decisions in specific cases to the

69. Urquía v. Honduras, On Inadmissibility of Petition No. 644/00, Inter-Am. C.H.R., Report No. 83/05, OEA/Ser.L./V/II.124, doc. 5 ¶ 72 (2005), available at <http://www.cidh.org/annualrep/2005eng/Honduras644.00eng.htm>.

70. See generally International Atomic Energy Agency (IAEA), <http://www.iaea.org>.

71. See generally MERCOSUL/MERCOSUR, <http://www.mercosur.int/msweb>.

operative—political, administrative, or legal—level of a country. In such a case, it seems that there are, at least, two levels of downloading; the first relating to the hierarchy and scope of international legal rules in the legal order in force in a country, and a second, dealing specifically with the decision adopted by an organ in a given case.

The assistance of the Parliament is sometimes required in the first level of downloading. This will depend very much on the need to “nationalize” international.

As far as the decisions of international organs are concerned, the experience is very rich.

A. A Regulated Procedure

In the Inter-American system, only Colombia has a domestic law regulating all the necessary steps for the implementation and enforcement at the domestic level of an international decision awarding compensation or stating that compensation should be paid.⁷² The regulation deals only with written decisions of both the Human Rights Committee of the International Covenant on Civil and Political Rights and the Inter-American Commission on Human Rights.⁷³ Four ministers must approve the decision; the interior minister, the foreign affairs minister, the minister of justice and law, and the minister of national defense.⁷⁴

The decisions of the ministers should be given within forty-five days of the official notification of the pronouncement of an international body in question and is subject to a verification of compliance with all the requisites of fact and law provided for in the political constitution and the applicable international treaties;⁷⁵ to this end, attention should be paid to the evidence presented in decisions made domestically and those before the international instance.

The decision of the ministers against the international decision is effective only if there is an available upper international instance; if not, the international decision should be enforced. After a decision has been made, a conciliation process is opened

72. Law 288/1996, Diario Oficial [D.O.] No. 42.826 (July 9, 1996) (Colom.), available at http://www.secretariasenado.gov.co/senado/basedoc/ley/1996/ley_0288_1996.html [hereinafter Colom. Law 288/1996].

73. *Id.* at art. 2(1).

74. *Id.* at art. 2(2).

75. *Id.* at cl. 3.

where an amount is fixed to compensate the representatives of the victim for their participation.⁷⁶

B. The Suggestion of Enforcement Measures

The European system of human rights evolved from a very broad and flexible practice where states were assumed to have the latitude to enforce international decisions to a practice where the Court asks specific measures that states should be adopting.

In fact, Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that state parties must abide by the final judgment of the Court in cases where they are parties; the execution of the judgment will be supervised by the Committee of Ministers of the Council of Europe.⁷⁷

The specific doctrine of the Strasbourg Tribunal was:

The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.⁷⁸

Further, as pointed out by Judge Caflisch, "as a matter of principle, the obligation to implement the Court's final judgments goes hand in hand with the respondent State's freedom to choose the modalities of implementation."⁷⁹

76. *Id.* at art. 3.

77. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 46, May 13, 2004, 213 U.N.T.S. 262.

78. *Scozzari & Giunta v. Italy*, 2000-VIII Eur. Ct. H.R. 471, 528.

79. Lucius Caflisch, *New Practice Regarding the Implementation of the Judgments of the Strasbourg Court*, 15 ITALY Y.B. OF INT'L L. 3, 8 (2005).

From this original position, the Court turned to the suggestion of the measures that the concerned state could adopt. In a case involving Turkey, dealing with the violation of the right to justice, the Court suggested that the most appropriate form of relief should be to ensure that the applicant is granted a prompt retrial by an independent and impartial tribunal.⁸⁰

These sort of arguments have been put forward by the ECHR when the peculiarities of the case obliged it to do so; that is, as a general principle, the freedom to choose the best measure remains, but the Court feels that it is free to intervene in the sphere of action of a concerned state and of other European organs if it determines that it is necessary.⁸¹

The ECHR began enforcing this new policy because of a consensus reached with the Committee of Ministers on the scope of their mutual powers and the implementation of the judgments that were embodied in Protocol 14.⁸² According to Judge Caflışch,

[A]s long as the Court's participation in the implementation process is tolerated by the Contracting States and remains confined to situations of urgency, and as long as the objective pursued by the Court's judgment—the cessation of the breach—cannot be attained by through remedy offered by the respondent State, the new practice is acceptable and even welcome. What is to be avoided is the transformation of the exceptional practice into a routine. The Strasbourg organisms for the protection of human rights have done well by confining the Court's functions to the taking of judicial decisions and entrusting the supervision of their implementation to the Committee of Ministers, the executive arm of the Council of Europe.⁸³

On the same grounds, the Committee of Ministers passed a resolution—Resolution DH(2004)3—relating to judgments “revealing an underlying systemic problem” and invited the Court to identify such problems and their sources so that the Committee and even other European organs could be in a better position to

80. Gençel v. Turkey, App. No. 53431/99, Eur. Ct. H.R. ¶ 27 (2003) (translated from French), available at <http://www.echr.coe.int>.

81. See Caflışch, *supra* note 79, at 6-7.

82. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 15-16, May 13, 2004, 213 U.N.T.S. 262.

83. Caflışch, *supra* note 79, at 10.

assist the concerned State in the adoption of measures necessary for the enforcement of the judgment.⁸⁴

In fact, the new policies adopted by the European system seem to have different purposes, namely to strengthen the effectiveness of judgments—and accordingly of the system itself—and to reduce the caseload of the tribunal by the way of applying precedents to all serial cases dealing with the same “systemic problem.”⁸⁵

The Inter-American Court has always operated by suggesting the adoption of specific measures. In 1999, when deciding the merits and reparations in the case of five Chilean citizens charged with terrorism in Peru, the Court unanimously found that “the proceedings conducted against Mr. Jaime Francisco Sebastián Castillo Petruzzi . . . are invalid, as they were incompatible with the American Convention on Human Rights, and so order[ed] that the persons in question be guaranteed a new trial in which the guarantees of due process of law are ensured.”⁸⁶ It further ordered that “the State . . . adopt the appropriate measures to amend those laws that this judgment has declared to be in violation of the American Convention on Human Rights and to ensure the enjoyment and exercise of the rights recognized in the American Convention on Human Rights to all persons subject to its jurisdiction, without exception.”⁸⁷

C. The Acknowledgement of a General Opinion

In 2005, both the United States Supreme Court and the Argentine Supreme Court acknowledged the general opinion created by international standards and on such grounds, ruled in favor of changing the previous doctrine. Such an acknowledgement, however, took different formats according to the traditions of either jurisprudences. Namely, the United States judgment mentioned international rules and precedents and based the foundation of its ruling in the “evolving standards of decency”

84. Eur. Consult. Ass., *Resolution Res(2004)3 of Comm. of Ministers*, 114th Sess., (May 12, 2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=743257>.

85. *Id.*

86. Castillo-Petruzzi et al. v. Peru Case, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 226(13) (May 30, 1999), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf.

87. *Id.* ¶ 226(14).

of our society.⁸⁸ The Argentinian decision relied on the binding nature of the decisions by the Inter-American Court of Human Rights.

Both cases are relevant not only because of the subject-matter but also because of their implications. One case dealt with the death penalty for juveniles,⁸⁹ while the other case dealt with pardon laws and amnesties covering serious and systematic violations of human rights.⁹⁰

On March 1, 2005, Justice Kennedy delivered the opinion of the Supreme Court of the United States in the case of Christopher Simmons, who at the age of seventeen committed murder, was tried at the age of eighteen, and was sentenced to death.⁹¹ The issue of applying the death penalty for crimes committed while before the age of majority was permanent in U.S. judicial practice, just as in the practice of the Inter-American System of Human Rights.⁹²

As early as 1987, the IACHR adopted its report in the case of *Roach and Pinkerton* and came to a judgment on the existence of an international customary rule binding the American states and prohibiting the imposition of the death penalty for crimes committed by juveniles.⁹³ Yet, the Commission accepted the argument of the United States that there was no consensus on the age at which majority starts.⁹⁴ Shortly after this decision, the Convention on the Rights of the Child⁹⁵ was adopted and its first article stipulated that "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child,

88. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

89. *Id.*

90. Corte Suprema de Justicia [CSJN], 14/6/2005, "Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor / privación ilegítima de la libertad, etc.," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2056) (Arg.) [hereinafter Simón, Julio Héctor (Arg.)].

91. *Roper*, 543 U.S. at 556.

92. *Id.* at 568.

93. *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Resolution No. 3/87, OEA/Ser.L./V/II.71, doc. 9 rev. 1 (1987), available at <http://www.cidh.org/annualrep/86.87eng/EUU9647.htm>.

94. *Id.*

95. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990).

majority is attained earlier.”⁹⁶ This being so, there is no more room for decisions like the one adopted by the IACHR in 1987.

Justice Kennedy carefully analyzed all the precedents in American judicial practice relating to the issue. He also considered the matter from the standpoint of criminological criteria. He then affirmed, “Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”⁹⁷ Kennedy went on to write:

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. . . . No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. . . . It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.⁹⁸

International human rights law influenced the Court’s decision because it demonstrated evidence of the international community’s opinion against the death penalty.

The argument made by the Argentine Supreme Court, on the other hand, was completely different. The Argentine Supreme Court affirmed the decision of the lower court declaring that pardon laws adopted after a period of gross and systematic violations of human rights in the country conflicted with the constitution as amended in 1994,⁹⁹ because it provided

96. *Id.* at art. 1.

97. *Roper*, 543 U.S. at 575.

98. *Id.* at 576-78.

99. Simón, Julio Héctor (Arg.), *supra* note 90.

constitutional footing to international human rights treaties, including the American Convention on Human Rights and, as decided by the Court in *Giroidi*,¹⁰⁰ the rulings of the Inter-American Court on Human Rights regarding its interpretation on the scope of protected rights.¹⁰¹ As a result of the judgment of San José's tribunal in the case of *Chumbipuna Aguirre et al*—also known as “Barrios Altos”—that declared the incompatibility of amnesty laws with the American Convention,¹⁰² the Argentine Supreme Court declared that the full stop law and the due obedience law were null and void.¹⁰³

Here, the international human rights law argument is explicit. The differences between the approaches of the two supreme courts are rooted in their different traditions; their different positions toward international law in general, specifically regarding international human rights law; the different political performances of the national authorities of both countries; and in the different roles they perform in the international context.

D. When the Enforcement Creates a Sensitive Situation

The standard followed by the Argentine Supreme Court in relying on the binding nature of the Inter-American system as a tool for interpreting the scope of protected rights proved to be problematic in practice. On September 18, 2003, the Inter-American Court ruled on the merits in the case of *Bulacio v. Argentina*.¹⁰⁴ Walter Bulacio, a young man of seventeen years, was detained together with other seventy-nine people by the Federal Police after a rock music concert and was transferred to a police

100. Corte Suprema de Justicia [CSJN], 7/4/1995, “Horacio David Giroidi y otro / recurso de casación,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-514) (Arg.).

101. *Id.*

102. *Barrios Altos v. Peru Case*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf (“This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”).

103. Simón, Julio Héctor, *supra* note 90.

104. *Bulacio v. Argentina Case*, Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_100_ing.pdf.

station.¹⁰⁵ The police released the detainees in short time. Bulacio, however, was beaten by the police; no notice of his detention was given to his family or to the juvenile judge.¹⁰⁶ He felt ill the day after and was sent to a hospital.¹⁰⁷ It was only there that he told a physician of how he had been beaten by the police. He died six days later.¹⁰⁸ One item of reparation related to the investigation and punishment of those directly responsible for the human rights violations. The government alleged that the statute of limitations in the case had passed but the Court, invoking the case of *Barrios Altos* that dealt with self-amnesty in Peru¹⁰⁹ and *Trujillo Oroza* which dealt with enforced disappearance in Bolivia,¹¹⁰ asserted that there existed a situation of grave impunity and that domestic legal rules or institutions could in no way hinder full application of decisions by international bodies for the protection of human rights.¹¹¹

When the local tribunal accepted the statute of limitations defense, the public prosecutor appealed the decision to the supreme court.¹¹² The highest local tribunal analyzed the issue from the constitutional standpoint—the one that defines its jurisdiction *ratione materiae* in the given case—and pointed out that the appeal should be rejected. The immediate effect of such a decision, however, would be to confirm the statute of limitations disregarding the judgment of the Inter-American Court of September 18, 2003 that declared the international responsibility of Argentina in the case of *Bulacio*.¹¹³ The Court went on to emphasize that the Argentinian state, including the supreme court, was under the duty to enforce its international decision.¹¹⁴ That being so, to uphold the appealed decision would amount to a violation of human rights protected by the Inter-American system and would engage the international responsibility of the state.

105. *Id.* ¶ 3.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Barrios Altos v. Peru Case*, Inter-Am. Ct. H.R. (ser. C) No. 75.

110. *Trujillo-Oroza v. Bolivia Case*, Inter-Am. Ct. H.R. (ser. C) No. 92 (Feb. 27, 2002), available at http://www.corteidh.or.cr/docs/casos/articulos/Seriec_92_ing.pdf.

111. *Bulacio v. Argentina Case*, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 110-119.

112. *Id.* ¶ 3.

113. *Id.* ¶ 60.

114. *Id.* ¶¶ 60-61.

Accordingly, the regular standards applied to statute of limitations became inapplicable to the given case.

The supreme court, however, submitted that it did not agree with such a restriction of the right to the defense because it came to the state organ to ensure the due development of proceedings without undue delay, and the prosecuted person should not be charged with the consequences of such a delay.¹¹⁵ Even when the delay is created by the steps taken by the defense counsel, it is up to the state to re-organize the proceedings, but not the prosecuted person.¹¹⁶ The Court came to the conclusion that there was no other way of enforcing the international decision and acted accordingly.¹¹⁷

IV. DISDAIN OR DEFERENCE?

At first glance, the answer is "none of them." No one questions—at least not based on legal arguments—that international law prevails over domestic law or that states are under a duty to enforce their international legal obligations. Additionally, no one questions that international tribunals have been set up in order to satisfy the needs of international relations—mainly among states. The creation of international tribunals was a state decision. In actuality, all international legal rules are law because of the will of the states. It is not surprising then, that decisions adopted by such tribunals are deemed to be enforced in the local context.

In some cases, one of the requisites to seize international tribunals is the exhaustion of local remedies; in other words, the highest domestic instance available must have made a ruling and that ruling did not meet international standards. In regular proceedings, a national supreme court's judgment is considered proof of the exhaustion of local remedies and because of this *res judicata* is only preliminary. In fact, it becomes firm and lasting whenever there is no further possibility of seizing an international instance or whenever such instance has also been exhausted. Consequently, the notion of *res judicata* is two-fold.

The international tribunal examines how local organs satisfy the international obligations of the state but is not allowed to take

115. *See id.* ¶ 3.

116. *Id.*

117. *See id.* ¶ 48.

care of the state's duties. International instances should act as a tool for the strengthening of local conditions, including democracy and democratic institutions, and not as their substitutes.

In order to deal with aspects closely linked to domestic competences, international tribunals developed two different techniques: the margin of appreciation and the fourth instance formula.

Once international decisions are adopted, they must be downloaded at a domestic level. The ways in which this operation takes place are different. The principle of freedom is restricted only if the given system has special requirements.

Since international tribunals do not belong to an "international judiciary," disagreement amongst the international decision and the local operator in charge of implementing the decision on a point of law may be understood as a violation of a given treaty. International judges, their capacities, the procedures associated with their nominations and elections, and judicial accountability become particularly important as the possibility of this sort of disagreement becomes more frequent as a result of the increasing judicialization of international controversies.¹¹⁸ The chapter dealing with the above issues should be drafted together with the relationship between national and international courts.

118. See generally TERRIS, *supra* note 23.

