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HEALTH V. INDIVIDUAL FREEDOM: IS THAT THE QUESTION? (A RE-EXAMINATION OF REASONABLE SCRUTINY DURING COVID-19)

Alberto B. Bianchi* & Estela B. Sacristán**

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I. INTRODUCTION

The most sensitive aspect of the imperfection of our earthly life, as opposed to the perfection that we believe our spiritual life will involve, lies in the fact that, while we can enjoy every possible right, we cannot exercise them all in an absolute fashion. We need to give up or sacrifice certain rights in order to be able to exercise others either fully or partially.

Certainly, there is a crucial difference between voluntarily giving up a right and having its exercise forbidden by others. When the prohibition arises

* Doctor in Laws, Universidad de Buenos Aires; Titular member of the National Academy of Law and Social Sciences of Buenos Aires and of the National Academy of Sciences of Buenos Aires; Professor, Argentine Catholic University and Universidad Austral, Argentina.

** Doctor in Laws, Universidad de Buenos Aires; Member of the Administrative Law Institute and member of the Constitutional Law Institute, National Academy of Law and Social Sciences of Buenos Aires; Professor, Argentine Catholic University and Universidad Austral, Argentina.

from an emergency and our personal freedom is adversely affected, we are bound to become alarmed, and a conflict will probably emerge that is to be finally determined by the courts of law. It should be remembered here that personal freedom, as Linares Quintana points out, is enshrined in the Preamble to the Argentine Constitution, which pledges to secure “the blessings of liberty.”¹

As a result, despite their intrinsic worth, certain values may become opposites in real life, due to juridical reasons. In fact, all Western democracies have been built on the basis of the opposition between liberty (in the sense of civil or political liberty) and authority. Both are necessary for the common good, but they need to be reasonably limited so that neither will suppress or obliterate the other. Life is not a binary dialectic, with mutually exclusive pairs of options.

Maybe there is nothing new in all of this. However, in certain exceptional circumstances, the aforementioned suppression or obliteration takes on a dramatic quality (or at least, we perceive it as such). It would seem as if, in order to preserve one value or asset, it becomes necessary to stifle the other.

That is the case with COVID-19, a pandemic that has brought humankind face to face with a dilemma where, in the absence of an antidote or vaccine, individual freedom has become subject to extraordinary sacrifices in the altar of health.

Argentina has certainly not been spared. Rather, our personal freedom has been severely restricted by certain decisions unilaterally and discretionally adopted by the Executive branch of government in an environment characterized by lack of information due to insufficient testing for the virus.²

1. 4 SEGUNDO V. LINARES QUINTANA, *TRATADO DE LA CIENCIA DEL DERECHO CONSTITUCIONAL ARGENTINE Y COMPARADO* 104 (2d ed. 1978) (discussing the institutionalization of liberty in the Argentine Constitution); see also Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641 (1949).

2. *Compare Argentina: Cuántos test de coronavirus se realizaron hasta el momento?*, IMPULSO (Jan. 31, 2021), <https://www.impulsonegocios.com/argentina-cuantos-test-de-coronavirus-se-realizaron-hasta-el-momento/>, and Fabiola Czubaj, *Covid-19. Muchas muertes y pocos tests: la Argentina, cada vez peor en los rankings*, LA NACION (Oct. 10, 2020), <https://www.lanacion.com.ar/sociedad/covid-19-muchas-muertes-pocos-tests-argentina-cada-nid2473798>, and Nora Bär, *González García: “Quizás, tendríamos que haber empezado antes con el rastreo,”* LA NACION, June 14, 2020, at 15, with *Germany to expand coronavirus testing for people without symptoms*, THE LOCAL (June 10, 2020, 12:19 CEST), <https://www.thelocal.de/20200610/germany-to-expand-coronavirus-testing-for-people-without-symptoms>.

These decisions were inaugurated, in March 2020, by an urgent and necessary executive order³ that established a temporary suspension of international flights to prevent any passenger from returning from the so-called “affected zones,” thus creating myriads of stranded Argentines in the European Union (EU), United Kingdom, United States, China, or Iran, among other countries, and in some cases, it took them months to return to their homeland. There were many other restrictions via executive order, such as the one issued at the beginning of the mandatory preventive social isolation⁴ that kept us all, for approximately eight weeks, confined to our homes, unauthorized to step on the sidewalk or street and exceptionally authorized to do so only in order to purchase food, cleaning articles or medicines. Restrictions were also adopted by local governments, such as the one of the Autonomous City of Buenos Aires. It is worth mentioning that, in April 2020, the government of City of Buenos Aires made it compulsory, for those above seventy years old, to make a phone call to a “citizen care hotline” to furnish the local authorities with the “reasons” for their need to leave their home or site of confinement to fulfill some errand and to listen to advice given by the operator (who had been instructed, under the resolution in force, to convince the elderly person of the cons involved in leaving home and to offer the assistance of local volunteers).⁵ This severe measure was almost immediately declared unconstitutional by the local courts of law due to its discriminatory finality as compared to the situation of the other inhabitants,⁶ and subsequently abrogated. Within the federal organization of the country, some provinces, boasting their constitutionally long-recognized autonomy,⁷

3. Decree No. 260/2020, Mar. 12, 2020, [34327] B.O. 1 (Arg.).

4. Decree No. 297/2020, Mar. 20, 2020, [34334] B.O. 3 (Arg.).

5. See Joint Resolution No. 16/MJGGC/20, B.A., Apr. 19, 2020, [5851] B.O., https://documentosboletinoficial.buenosaires.gob.ar/publico/ck_PE-RES-MJGGC-MSGC-MJGGC-16-20-5851.pdf.

6. Juzgado de Primera Instancia en lo Contencioso Administrativo y Tributario Nro. 14 [First Instance Administrative and Taxing Judgeship No. 14], 20/4/2020, “Lanzieri, Silvia c. GCBA,” / amparo, <http://www.sajj.gob.ar/juzgado-contencioso-administrativo-tributario-nro-14-local-ciudad-autonoma-buenos-aires-lanzieri-silvano-gcba-amparo-fa20370011-2020-04-20/123456789-110-0730-2ots-eupmocsollaf?> (select “Ver archivo adjunto”); see also *Declaran inconstitucional el permiso para circular a los mayores de 70 años que dispuso el gobierno de Horacio Rodríguez Larreta*, CLARÍN (Apr. 21, 2020, 8:03 AM), https://www.clarin.com/sociedad/piden-declare-inconstitucional-resolucion-mayores-70-anos-capital-federal_0_zMHY_29cm.html.

7. See arts. 121-29, CONSTITUCIÓN NACIONAL [CONST. NAC.] (The Argentine juridical system differentiates between sovereignty (an attribute of the Argentine Republic, especially before other countries), and autonomy (an attribute of the provinces ever since the Constitution was signed, in 1853, and of the municipalities since the 1994 constitutional amendment)). The main differences between (national) sovereignty and (provincial) autonomy can be inferred from the Argentine Constitution, art. 126, CONSTITUCIÓN NACIONAL [CONST. NAC.], and the municipal autonomy is established in the Argentine Constitution, *id.* art. 123).

have even endeavored to isolate themselves, banning incomers, a restriction that, in some cases, has hindered patients from accessing medical treatment.⁸

These measures, among others, have put us all to the test on every imaginable front. One of them is obviously the legal front, where one of many matters to be considered is the constitutionality of confinement-related restrictions. As usual, we can count on the reasonable scrutiny enshrined in Article 28 of the Argentine Constitution, which has been analyzed in depth by Juan Francisco Linares, a scholar who has found an equivalence between reasonableness and due process.⁹

This is a time-proven tool used by the courts of law to examine the proportionality between the ends sought and the means chosen to achieve those ends.¹⁰ We must ask ourselves, however, if that theoretically simple tool¹¹ is sufficient when it comes to assessing the extraordinary restrictions currently imposed on individual freedom.

From that perspective, it is our understanding that there are two sides to reasonableness and the related scrutiny that should be analyzed here: (a) the need for the relevant regulations to be enacted in accordance with the “due

8. See Corte Suprema de Justicia de la Nación [CSNJ] [National Supreme Court of Justice], 10/9/2020, “Maggi, Mariano c. Corrientes, Provincia de / medida autosatisfactiva,” Fallos (2020-343-930) (Arg.); see also Leonel Rodríguez, *Murió Abigail, la niña de 12 años que no habían dejado cruzar a Santiago del Estero*, LA NACION (Jan. 31, 2021), <https://www.lanacion.com.ar/sociedad/murio-abigail-la-nina-de-12-anos-que-no-habian-dejado-cruzar-a-santiago-nid31012021/> (In this decision, the Argentine Supreme Court ordered the Province of Corrientes to develop the necessary measures to allow the plaintiff to enter the province on a daily basis in order to assist his mother as long as her oncological treatment lasted. In another case that never reached the courts, a girl, aged 12, from the province of Tucumán was inexplicably delayed at the border of province of Santiago del Estero, a province she was trying to enter on foot, together with her father, to access oncological treatment in November 2020).

9. See generally, JUAN FRANCISCO LINARES, RAZONABILIDAD DE LAS LEYES: EL “DEBIDO PROCESO” COMO GARANTÍA INNOMINADA EN LA CONSTITUCIÓN ARGENTINA (1970); see also Estela B. Sacristán, *El virus de Wuhan y la libertad religiosa. El aporte de dos decisiones jurisprudenciales extranjeras*, 130 DERECHO ADMINISTRATIVO—REVISTA DE DOCTRINA, JURISPRUDENCIA, LEGISLACIÓN Y PRÁCTICA 250, 254-57 (2020) (From the methodological perspective, equating between reasonableness and substantive due process, as posed by Linares, allows for the consideration of recent COVID-19 pandemic judgements, such as the one rendered by the Supreme Court of the United States in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), not in the light of the free exercise of religion—as any U.S. law student would do—but mainly within the requirements of substantive due process. Following the equivalence between reasonableness and due process in the field of religious celebrations).

10. See generally JUAN CIANCARDI, EL CONFLICTIVISMO EN LOS DERECHOS FUNDAMENTALES 300 (2000) (The Supreme Court of Argentina “has carefully avoided to give a precise definition of reasonableness; rather, in most cases the Supreme Court has chosen to state generally that this principle calls for an adequate or reasonable relation between the means used and the ends sought by a legislator.”)

11. *Id.*

process of substantive law,”¹² in order to enable a more stringent and effective scrutiny than the mere adequacy of means and ends, and (b) the matter of the burden of proof in connection with the reasonableness of any given restriction.¹³

It should be borne in mind that reasonable scrutiny starts with a heavily restrictive premise; namely, according to a number of legal precedents, the courts of law should not look into the timing, merit, or convenience of the law¹⁴ or its effectiveness.¹⁵ In other words, when conducting reasonable scrutiny (as the process of checking the means used against the ends sought), the courts of law will not check whether the ends sought by the legislator are lawful, or whether the means selected are convenient. They will just verify the adequate proportionality between means and ends.

In our opinion, that approach is insufficient, for there are at least three sides to reasonable scrutiny: (1) determining who is to bear the burden of proof; (2) the fact that it serves as a mandate addressed to government agencies; and (3) the fact that it is inseparably linked to the notion of proportionality.¹⁶ As far as proportionality is concerned, legal scholars have stated that proportionality can be arithmetic or substantive and that, in its substantive version, it involves three determinations: adequacy or indispensableness, necessity, and proportionality *strictu sensu*.¹⁷

As a result, whenever the courts of law carry out that very limited scrutiny into a given regulation’s adequacy, it turns out that: (a) in order to act reasonably, the legislators simply need to enunciate a theoretical lofty goal so that any means will be found to be proportional and adequate, and (b) the burden of proof regarding the unreasonable nature of a regulation will

12. JUAN CARLOS CASSAGNE, DERECHO ADMINISTRATIVO Y DERECHO PÚBLICO GENERAL 681-82 (2020).

13. *Id.*

14. *See generally* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/7/2012, “Minera del Altiplano SA c. Estado Nacional–PEN / amparo,” Fallos (2012-335-1315) (Arg.).

15. *See generally* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/10/2013, “Grupo Clarín S.A. c. Poder Ejecutivo Nacional / acción meramente declarativa,” Fallos (2013-336-1774) (Arg.).

16. Estela B. Sacristán, *Control de razonabilidad en Argentina (en especial, en la jurisprudencia de la Corte Suprema de Justicia de la Nación)*, 485 REVISTA ARGENTINA DEL RÉGIMEN DE LA ADMINISTRACIÓN PÚBLICA 43, 52-55 (2019).

17. *See* CIANCIARDO, *supra* note 10, at 322-52; JUAN CIANCIARDO, EL EJERCICIO REGULAR DE LOS DERECHOS 283-87 (2007); JUAN CIANCIARDO, PRINCIPIO DE PROPORCIONALIDAD Y CONCEPTO DE DERECHO 59-71 (2009); JUAN CARLOS CASSAGNE, EL PRINCIPIO DE LEGALIDAD Y EL CONTROL JUDICIAL DE LA DISCRECIONALIDAD ADMINISTRATIVA 23 (2009).

always lie with the party alleging that the regulation is unreasonable;¹⁸ as a result, the State will generally be relieved from any obligation to prove that any such regulation is reasonable, except in the case of the so-called “suspicious categories,” which are quite exceptional in nature.¹⁹

In summary, reasonable scrutiny, in its traditional definition and outside the limited field of suspicious categories, has always been more formal than real.

In light of the above, can reasonable scrutiny be regarded as an effective tool when the end sought is to preserve people’s health in the face of COVID-19 and the means selected to do that is by suffocating individual freedom?

We believe that it cannot, and we intend to look into the matter below.

II. THE FLAWS OF REASONABLE SCRUTINY IN THE ARGENTINE SUPREME COURT’S CASE LAW

Article 28 of the Argentine Constitution provides that “[t]he principles, guaranties and rights acknowledged in the preceding articles shall not be altered by the laws that regulate their exercise,”²⁰ This general principle must be implemented by means of some control system designed to check whether or not a constitutional right is “altered” by a general law or regulation.

For that purpose, the Supreme Court has established the so-called “reasonable scrutiny,” that was first expressly mentioned in the case *Avico c/ De la Pesa*²¹ in the field of the judicial review of a mortgage moratorium law

18. See David Kenny, *Proportionality, the Burden of Proof, and Some Signs of Reconsideration*, 52 IRISH JURIST 141 (2014) (discussing the Canadian rules regarding the burden of proof of reasonableness, which is borne by the State, and the Irish system, where the burden of proof is borne by the party alleging unreasonableness of the law).

19. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/12/2017, “Castillo, Carina Viviana c. Provincia de Salta Ministerio de Educación de la Prov. de Salta / amparo,” Fallos (2017-340-1795) (Arg.) (the so-called “suspicious categories” are comprised of certain laws that operate to generally restrict equality before the law and require the “defendant [to] prove that a different treatment is warranted in the case at hand, because it is the least restrictive means to achieve a substantive end); see also MARIANA SÁNCHEZ CAPARRÓS, CATEGORÍAS SOSPECHOSAS (2020).

20. Art. 28, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

21. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/12/1934, “Avico c. De la Pesa,” Fallos (1934-172-21) (Arg.) (the court used “reasonable scrutiny” to examine the events that gave rise to the law, not whether the ends sought by the law were lawful, but whether the law itself was reasonable and fair, and they found “that the Act was amply justified by the seriousness and scope of the economic crisis; that all the provisions of the Act sought to safeguard a lawful purpose, namely, the public interest compromised by the crisis; and that the means used—a three-year moratorium for payment of principal, and a six-month moratorium for payment of interest, as well as a 6% cap on interest rates—[were] fair and reasonable as a regulation of contractual rights”); see also Jonathan Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century*

enacted under emergency powers and was further developed in *Pedro Inchauspe Hnos. c/ Junta Nacional de Carnes*,²² relating to emergency powers aimed at the creation of a regulatory entity to control the beef business, in the following terms:

By means of Act No. 11.747, Congress sought to prevent monopolies and arbitrary maneuvers or proceedings by industrial companies when buying livestock; create an instrument to fight the organization that dominated beef sales at the time; increase domestic and international beef sales; lower domestic prices by closing the distance between farmers and consumers and enhancing the quality of beef sold. . . . the actions taken consisted of allowing farmers to be directly involved in the control of beef sales, by means of a Board established as an autonomous entity an analysis of the effectiveness of the means selected in order to reach the goals sought, and the matter of whether those or other procedures should have been chosen, escape the jurisdiction and competence of this Supreme Court. The Supreme Court should only find on the matter of the reasonableness of the means chosen by Congress; that is to say, whether those means were proportional to the goals sought by the legislators, and accordingly the Court should decide whether or not the resulting restrictions on individual rights are admissible. [T]his Supreme Court has never believed that its own notions of economic or social convenience or effectiveness should replace the criteria used by Congress in order to decide upon the constitutional validity or invalidity of the law . . . the Supreme Court's analysis and findings should be based on whether or not the laws are in line with constitutional provisions, as provided by Articles 26 and 31 of the Constitution. [I]n actual fact, it does not seem, and plaintiff has not proved, that the means used by the Executive branch and Congress are out of proportion with the purposes sought by them in defending domestic production of beef. On the contrary, the reasons alleged by members from both Chambers of Congress; the heated defense of the law publicly made by all associations of beef producers of Argentina; the fact that no other lawsuits have been filed and no other voices have been heard, except in defense of the law and in repudiation of the actions taken by a few dissenting farmers, and the increase in beef prices that came in the wake of application of the law . . . all

Argentina and the Argentine Elite's Leap of Faith, 46 AM. U.L. REV. 1483, 1568 (1997) (the *Avico* decision followed a similar basis as *Home Building v. Blaisdell*, 290 U.S. 398 (1934)).

22. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/9/1944, "Inchauspe Hnos., Pedro c. Junta Nacional de Carnes / recurso extraordinario," Fallos (1944-199-483) (citations omitted) (Arg.).

these circumstances have convinced this Supreme Court about the reasonableness of the actions implemented by the law in question.²³

This lengthy transcription contains two notions that are necessary for purposes of this analysis: (1) reasonable scrutiny consists of examining whether the “means” chosen by law are proportional to the goals sought by the law; and (2) an analysis of the “effectiveness” of the means used to achieve those goals goes beyond the scope of judicial scrutiny, for the courts of law cannot replace Congress’ “economic or social convenience or effectiveness” criteria in order to make a determination regarding the constitutional validity or invalidity of the laws.

As a result of those principles—regardless of how elevated they may seem, reasonable scrutiny became actually useless and ineffective from the very onset and was reduced to a merely formal verification of the proportionality between means and ends, a test that will always give a favorable result, as it will suffice for a law to declare a very lofty “goal,” which cannot be scrutinized by the courts of law, in order to render any “means” proportional to that goal. This in turn will only allow the courts of law to look partially into the matter, as they are not allowed to look into the means selected, even though both means and ends are factors that need to be jointly analyzed.²⁴

The above notwithstanding, *Inchauspe* findings were replicated by the Supreme Court in a number of subsequent cases, with the monotony that arises from invoking an already established principle. One such example is *Cine Callao*,²⁵ relating to the compulsory hiring of actors by movie theaters to provide live shows between the first and the second movie show, in which the Supreme Court stated that:

[B]y application of the precedent set in Fallos, book 199, page 483, an analysis of the merit or effectiveness of the means selected in order to reach the goals sought, and the matter of whether the means selected by Act No. 14.226 or other means should have been chosen, go beyond the competence of this Court. The Supreme Court should only find on the matter of the reasonableness of the means chosen by Congress; that is to say, whether those means were proportional to the goals sought by the legislators, and accordingly the Court should decide whether or not the resulting restrictions on individual rights are admissible. [T]his Supreme Court has never believed that its own

23. *Id.* at 529-31.

24. See Jake Jabes, *Individual Decision Making* (1978), as reprinted in, *DECISION MAKING APPROACHES AND ANALYSIS* 53 (Anthony G. McGrew & Michael J. Wilson eds., Manchester Univ. Press, 1982).

25. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/6/1960, “Cine Callao,” Fallos (1960-247-122).

notions of economic or social convenience or effectiveness should replace the criteria used by Congress in order to decide upon the constitutional validity or invalidity of the law [T]he Supreme Court's analysis and findings should be based on whether or not the laws are in line with constitutional provisions, as provided by Articles 26 and 31 of the Constitution.²⁶

Thirty years later, in *Peralta c/ Estado Nacional*,²⁷ the Supreme Court resorted to the same principles in order to justify the measures adopted in the context of the so-called "Bonex Plan," an emergency measure (Executive Order 36/1990) which converted time deposits into public bonds (the 1989 Bonos Externos de la República Argentina or BONEX).²⁸ The Supreme Court did that by elevating the goals sought by that restrictive regulation to the level of "preserving the life itself of the Nation and the State,"²⁹ In other words, no matter how stringent and restrictive the means, they will always be adequate and proportional in the light of such any lofty goal. The Supreme Court in fact pointed out that any means resorted to will always be subordinated to that paramount goal; otherwise, according to the Supreme Court, "the State would be deprived of the ability to take measures regarded as useful to bring relief to the community."³⁰ The Supreme Court insisted that

26. *Id.* at 131-32 (citations omitted).

27. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1990, "Peralta, Luis Arcenio c. Estado Nacional (Mrio. de Economía – B.C.R.A.) / amparo," Fallos (1990-313-1513); Miller, *supra* note 21, at 1568 n.603; *see also* Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 291 n.103 (2003).

28. Decree No. 36/1990, Jan. 5, 1990, [26795] B.O. 9 (Arg.); *see generally* Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129, 136 (2008) (The measure did not imply the conversion of all the time deposit; only any amount above USD 1.000 was converted into bonds. Albeit its effects, the measure was aimed at "reducing the burden of the increasing internal public debt.").

29. CSJN, 27/12/1990, "Peralta, Luis A.," Fallos (1990-313-1540) ("The transparency of governmental decisions, which makes part of the republican form of 'government' may thus be confronted with the need to preserve the life itself of the Nation and the State. This does not mean to say that the goals should be subordinated to the means, an axiological preference that is admittedly a source of the worst evils that may befall society; but it does mean that the timing of transparency needs to be adjusted; otherwise, any other remedy could prove ineffective.").

30. *Id.* at 1545-46 ("In principle, Congress has the power to enact any and all laws and regulations as convenient to exercise the powers vested on the Federal Government. In line with the principles established in the Preamble to the Constitution, Congress has the necessary constitutional powers so as to meet society's requirements, put an end to emergency situations, and deal with any threats against the survival of the State. Whenever a crisis or a situation of public need demands that action be taken in order to safeguard the common interest, Congress may 'postpone, within reasonable limits, performance of obligations arising from vested rights, without violating or eliminating the guaranties that protect property rights.' It is not a matter of making Congress all-powerful or excluding Congress from constitutionality checks; rather, it is a

“[i]t is not up to the courts of law to determine which measures should have been taken; all the courts of law can do is verify that the actions actually taken were necessary and reasonable. The former has been sufficiently proved; the latter is evidenced by the fact that the means selected do not seem excessive in the light of the goals sought.”³¹

Even if it is merely anecdotal, it is worth mentioning that, in the last recital, the Supreme Court referred to the economic crisis prevailing at the time by using a phrase that still rings true today, thirty years later: “[A]rgentine society displays certain features that have been regarded as pathologic, such as the constant deterioration of the economy, which has been going on for decades and is known by all, plus a stubborn state of denial on the part of Argentine society, which clings on to systems that were once viable, to the point of breaking the most basic ties of solidarity that are required in order to maintain the community’s indispensable cohesion.”³² Among those “once viable systems” denounced by the Supreme Court, we can mention unbridled government spending, the resulting need to issue additional banknotes, and a lack of fiscal discipline, three endemic evils of Argentine economic and financial public policies.

During the course of the following economic crisis, which broke out in 2001/2002, the Supreme Court heard and determined the case of *Smith c/ Poder Ejecutivo Nacional*,³³ brought as a result of certain banking restrictions (“*corralito bancario*”) established by Executive Order No. 1570/2001 and related provisions.³⁴ Without disregarding the existing principles, the Supreme Court was more decisive in its application of reasonable scrutiny this time, even though the measure involved was an injunction.

So much can be seen in the relevant portion of the decision’s recitals transcribed below:

It is necessary to remember here the traditional position of this Court in the sense that the reasons of timing, merit or convenience taken into account by the other branches of government when making their own decisions are not subject to judicial scrutiny . . . in principle, all matters associated with the exercise of governmental powers are

matter of not depriving the State of the ability to take measures regarded as useful in order to bring relief to the community.”).

31. *Id.* at 1552.

32. *Id.* at 1556.

33. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/2/2002, “Banco de Galicia y Buenos Aires / solicita intervención urgente en autos: ‘Smith, Carlos Antonio c. Poder Ejecutivo Nacional o Estado Nacional / sumarísimo,’” Fallos (2002-325-43).

34. Decree No. 1570/2001, Dec. 3, 2001 [29787] B.O. 1.

excluded from judicial review. The courts of law, however, will vigorously exercise their constitutional scrutiny into the reasonableness of the laws and administrative acts³⁵ . . . it is not for the court of laws to question the correctness or convenience of the measures implemented by the State. But that does not mean that the courts will simply admit the reasonableness of each and every action taken in order to mitigate the impact of the crisis . . . The restrictions imposed by the State on individuals' ability to exercise their property rights should be reasonable and limited in their duration; those restrictions should be a remedy and not a mutation of the substance or essence of the rights vested under a judgment or contract; and they should be subject to judicial review in terms of their constitutionality, as an emergency—unlike the martial law—does not operate to suspend constitutional guaranties³⁶ . . . while it is true that extraordinary situations authorize the use of extraordinary remedies, the mechanisms designed to overcome an emergency are subject to a limit, namely, the limit of their reasonableness, and accordingly may not alter or lessen the economic value of individual rights. The limitations established by the laws and regulations referred to above constitute an unreasonable exercise of the regulatory powers designed to mitigate the crisis³⁷ . . . a person's right to freely dispose of their funds invested or deposited in a banking or financial institution, irrespective of any legal provisions whereby that right is acknowledged, is based on Constitutional principles; there can be no doubt that, when that right is conditioned or limited, property rights are adversely affected and so is the goal of establishing justice. When those constitutional principles are adversely affected as explained above, given the seriousness of the matter and the absence of decisive reasons to justify the legal need to do so, the related laws and regulations cannot possibly be regarded as reasonable, and accordingly are not supported by the provisions of Article 28 of the Constitution.³⁸

At the time, we had our hopes up when we read the phrase “that does not mean that the courts will simply admit the reasonableness of each and every action taken.” We believed that the Supreme Court was about to overcome the self-limitations created in *Inchauspe* and would move on to an in-depth scrutiny into the proportionality between means and ends. However, in *Smith*—where the Supreme Court ratified the lower court's judgment, which had granted injunctive relief as sought by plaintiff, in a clear property

35. CSJN, 1/2/2002, “Banco de Galicia y Buenos Aires” Fallos (2002-325-36).

36. *Id.* at 37-38.

37. *Id.* at 38.

38. *Id.*

rights protection attitude³⁹—the Supreme Court did not specifically consider the matter of the lack of proportion or the unreasonableness of the means used in the light of the ends sought.⁴⁰

As a result, all the judicial energy deployed in *Smith* did not operate to change the standards of reasonable scrutiny originally established in *Inchauspe*. Those standards have been repeatedly used in recent cases, such as *Asociación Francesa Filantrópica y de Beneficencia / quiebra*,⁴¹ where the Supreme Court held that:

[I]n line with the principle of separation of powers enshrined in the Argentine Constitution, it is not up to the courts of law to determine how a juridical institution should be actually realized, as that is a prerogative of political powers. Judicial review should be substantially limited to checking that the exercise of the powers of the other branches of government stays within the confines of reasonableness and does not breach the specific prohibitions established in the Constitution or, where applicable, in the law. The courts of law are not competent to judge the correctness or convenience of the means used by the other branches of government, within the scope of their own prerogatives, to reach the goals sought.⁴²

This confirms that the courts of law in Argentina will not look into the goals sought or the means selected in order to reach those goals. The courts of law will determine whether the means are proportional to the goals established in the law. In those conditions, reasonable scrutiny is a weak and fragile tool used by the Supreme Court in the discretionary manner permitted by its own legal precedents. Within those limitations, reasonable scrutiny conducted by the Supreme Court is often purely formal, for the means selected are always subordinated to a public interest need that is often established by the Supreme Court itself. For example, by alleging “times of

39. Spector, *supra* note 28, at 140 (quoting Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/2/2002, “Smith, Carlos Antonio c. Poder Ejecutivo Nacional / medidas cautelares,” Fallos (2002-325-28) (pointing out how that *Smith* represents “a curious return to *Lochner*-type jurisprudence”).

40. See generally Juan Cianciardo, *Una aplicación cuestionable del principio de razonabilidad*, LA LEY (Mar. 14, 2020), <http://www.saij.gob.ar/juan-cianciardo-una-aplicacion-cuestionable-principio-razonabilidad-dacf020011-2002-03-14/123456789-0abc-defg1100-20fcanirtcod>.

41. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/11/2018/ “Asociación Francesa Filantrópica y de Beneficencia / quiebra / incidente de verificación de crédito por L.A.R.,” Fallos (2018-341-1511) (Arg.).

42. *Id.*

dramatic institutional and social crisis in the life of the Republic.”⁴³ As a result, even though the Supreme Court claims to be responsible for verifying the existence of a “direct, actual and substantial relationship between the means used and the goals sought,”⁴⁴ the room for reasonable scrutiny is extremely small.

The reasonableness of arrests ordered by the Executive branch of government under the *état de siege* (“*estado de sitio*”) has weakened as well, even though the related precedents were established by a Supreme Court whose members were different from the Justices currently in office. In this field, Supreme Court case law had made major strides in the cases of *Jacobo Timerman*⁴⁵ and *Benito Moya*,⁴⁶ but the case of *Jorge H. Granada*⁴⁷—at the legislative stage—was a step back, even though the then recently enacted Habeas Corpus Act (Act No. 23.098)⁴⁸ authorized an enhanced judicial scrutiny.⁴⁹ In hearing the case, the Supreme Court understood that Act No. 23.098 had not intended to stray from the traditional standard of the courts’ inability to look into the decision to instate the martial law.⁵⁰ As far as the

43. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/8/2016, “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería,” Fallos (2016-339-1077) (Arg.).

44. *Id.*

45. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería,” Fallos (1978-300-816) (Arg.).

46. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/8/2016, “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería,” Fallos (1981-303-696) (Arg.).

47. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/12/1985, “Granada, Jorge Horacio / recurso de hábeas Corpus,” Fallos (1985-307-2284) (Arg.).

48. Law No. 23098, Oct. 25, 1984, [25528] B.O. 1 (Arg.).

49. Estela B. Sacristán, *Control judicial del estado de sitio y de la intervención federal*, 1 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS (2014), §§ 3.2-3.4 (Habeas Corpus Act No. 23098 was enacted in 1984. Pursuant to the provisions of Section 4 of the Act, the courts of law were authorized, among other things, to look into the legitimacy of a decision to instate the martial law, *id.* art. 4.1, and the correlation between an arrest warrant and the state of affairs that gave rise to the martial law in the first place, *id.* § 4.2. Thus, Congress expanded the scope of judicial powers, by allowing the courts of law to review not only the acts of application of the martial law, but the very instatement of the martial law in terms of its legitimacy.).

50. *Id.*; CSJN, 3/12/1985, “Granada, Jorge Horacio,” Fallos (1985-307-2308) (“This Court does not believe that Congress intended to stray from the Supreme Court’s long-standing precedents, according to which the legislative and executive branches of government have the exclusive power to assess the factual circumstances that make it advisable to instate the martial law. . . The Court’s decision regarding legitimacy, referred to in Section 4 of Act No. 23.098, is not about the nature of the situation in which the martial law is instated, but about other elements that are really associated with the notion of legitimacy.”).

substantive matter is concerned, the majority of Justices⁵¹ rejected the habeas corpus by using a water-downed reasonable scrutiny. This weak scrutiny meant, in fact, that the Supreme Court missed a “persuasive opportunity,” granting the government “substantial latitude,” as Miller has affirmed.⁵² While the Supreme Court admitted that such scrutiny existed in the terms of the *Timerman* case as later ratified by Section 4(2) of Act No. 23.098,⁵³ the Court failed to look deeply into the facts of the case in order to determine whether the governmental decision involved was proportional to the ends sought by instating the martial law. The Supreme Court in short alleged that the arrest was not free from an actual connection between the cause of arrest and the causes for instating the *état de siege*.⁵⁴

III. THE MATTER IN COMPARATIVE LAW

It is worth considering, albeit briefly, the state of the matter in comparative law. For that purpose, we have selected two foreign legal systems which have been resorted to by Argentine case law and in which reasonable scrutiny appears to be more effective than it is in Argentina.

The first such system is the U.S. legal system, where substantive due process involves three instances of judicial scrutiny, one of which can be linked to the balancing test, which in certain aspects resembles the proportionality scrutiny.⁵⁵

The second legal system considered here is the German legal system, where: (i) proportionality is regarded as a protection against the power of the State;⁵⁶ (ii) it is taken for granted that certain means are categorically forbidden, and that the end sought is lawful;⁵⁷ (iii) the abovementioned scrutiny involves three steps (adequacy, necessity, and balance or

51. See CSJN, 3/12/1985, “Granada, Jorge Horacio,” Fallos (1985-307-2312) (Fayt, J. disagreed with the court’s rationale).

52. Johnathan M. Miller, *Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983-1999)*, 7 SW. J.L. & TRADE AM. 369, 390 (2000).

53. Law No. 23098, Oct. 25, 1984, [25528] B.O. 1 (Arg.).

54. CFed, 28/10/1985, “Granada, Jorge Horacio,” Fallos (1985-307-2308) (Belluscio, J. dissenting) (reasoning the report submitted by the Ministry of Homeland Security was not enough to determine the cause of arrest, and accordingly a reasonableness scrutiny was impossible and demanding that notice be served on the President of Argentina, asking him to provide additional information).

55. See Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT’L J. CONST. L. 263, 265 (2010).

56. THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718-37 (Michel Rosenfeld & Andras Sajó eds., 2012).

57. Compare *id.*, with Gertrude Lubbe-Wolff, *The Principles of Proportionality in the Case-Law of the German Federal Constitutional Court*, 34 HUM. RTS. L.J. 1, 1-6, 13-14 (2014).

proportionality in strict sense),⁵⁸ which must be taken in that order;⁵⁹ (iv) the problem created by the burden of proof is solved on a case-by-case basis,⁶⁰ or else, the State is burdened with the obligation to prove the existence of proportionality.⁶¹ On the other hand, the principle of reasonableness, which is applicable to all government branches, encourages legislators to be reasonable.⁶²

It should be noted, however, that the German system starts from completely different constitutional principles, for the scrutiny entrusted to the Federal Constitutional Tribunal is not the same scrutiny utilized by the Argentinian Supreme Court and judges. As a result, the reference to the German system made here is merely aimed at understanding the intensity that reasonable scrutiny has in other legal systems. The U.S. system, on the other hand, is a different story, as their constitutional model has been generally followed by Argentina, even though both constitutions are not identical.⁶³

A. *United States*

Due process of law is guaranteed by the Fifth⁶⁴ and Fourteenth Amendments to the Constitution;⁶⁵ where the former is binding on the federal government, the latter is applicable to state governments. Using similar language, both Amendments provide that no person shall be deprived of life, liberty or property without due process of law. This resulted in development of procedural due process and substantive due process. As the name suggests, the former guaranties that any deprivation of life, property, or liberty will take place under legally established proceedings.⁶⁶ This applies not only to

58. Jan Sieckmann, *Legislation as Implementation of Constitutional Law*, in THE RATIONALITY AND JUSTIFICATION OF LEGISLATION, ESSAYS IN JURISPRUDENCE 107, 112 (Luc J. Wintgens & A. Daniel Oliver-Lalana eds., 2013).

59. Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 TORONTO U.L.J. 383, 397 (2007).

60. See THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 56, at 733-34.

61. Cohen-Eliya & Porat, *supra* note 55, at 267.

62. See Sieckmann, *supra* note 58, at 118 (“[I]mplementation of constitutional law is bound together by the principle of proportionality, which is nothing by a demand for rationality in the decisions made and the rules enacted, phrased in legal terminology”).

63. *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, *supra* note 1, at 645; see also Franklin D. Rogers, Jr., *Similarities and Differences in Letter and Spirit Between the Constitutions of the United States and Argentina*, 40 GEO. L.J. 582, 607 (1952).

64. U.S. CONST. amend. V.

65. U.S. CONST. amend. XIV, § 1.

66. Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J. L. & PUB. POL’Y 283, 330 (2012).

the judicial and administrative authorities, but also to the legislative authorities. The latter in turn demands, from both the federal and state governments, that any such deprivation have a rational basis, that is to say, it must be reasonable. In summary, the substantive due process looks into the “substance” of the law, in terms of its consistency with the Constitution.⁶⁷

Historically, that rational basis scrutiny is clearly divided into two different stages. Until 1937, it was intensely exercised on laws that restricted rights of an economic nature. The most emblematic case of that period was probably *Lochner v. New York*,⁶⁸ where a state law (the Bakeshop Act) that limited working hours at bakeries up to a maximum of sixty hours a week or ten hours per day was found to be unconstitutional. The Supreme Court found that the Bakeshop Act violated the freedom to contract; a decision that contributes to the so-called “formalism” a context of which the courts of law protected individual natural rights (the right to life, liberty and property).

In 1937 the Supreme Court changed course and ceased to look into laws of an economic nature, focusing instead on laws that operated to restrict non-economic rights. While this trend was already present in cases such as *Adkins v. Children’s Hospital*⁶⁹ and *West Coast Hotel v. Parrish*,⁷⁰ where the Supreme Court ratified certain laws that imposed payment of minimum wages, this new stage formally began with *United States v. Carolene Products Company*,⁷¹ where the Supreme Court declared the constitutionality of a federal law that prohibited interstate sales of a certain type of milk (filled milk). More specifically, footnote 4 to Justice Harlan Fiske Stone’s vote provides that, from then onwards, the presumption of constitutionality of any law that operates to limit personal rights, such as religious rights, or laws affecting racial minorities, was to be much more limited in scope.⁷²

67. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE §15.4(a), (Thompson-Reuters-West ed., 5th ed. 2012).

68. 198 U.S. 45 (1905).

69. 261 U.S. 525 (1923).

70. 300 U.S. 379 (1937).

71. 304 U.S. 144 (1938).

72. *Id.* at 152 n.4 (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”) (citations omitted).

Under those principles, scrutiny of the law takes place at three levels of intensity. The first such level is the notion of “rational basis,” according to which a law is constitutional if it is “rationally related to a legitimate government purpose.”⁷³ In this case, it is not necessary for the law to have that goal specifically; what matters is that the means employed should be reasonable. The “rational basis” test requires the challenger to prove the unconstitutionality of the law. In other words, a law will be found to be constitutional, unless the challenger proves otherwise.

The second level of scrutiny is the so-called intermediate scrutiny. This test demands that a law be “substantially related to an important government purpose.”⁷⁴ Let us consider the differences between the first and second level of scrutiny. At the first level, the law needs to be “rationally” related to a “legitimate” government purpose. At the second level, it must be “substantially” related to an “important” government purpose. As can be seen, the relation between the means used and the ends sought by a law is much closer under the second test than it is under the first. Under this test, the government or whoever seeks to uphold a law needs to prove that the law is in fact constitutional.⁷⁵ The “intermediate scrutiny” has been used in cases involving discrimination⁷⁶ or restrictions against freedom of speech.⁷⁷

Finally, the most intense form of scrutiny is “strict scrutiny,” under which a law will be deemed constitutional only if it is necessary to further a “compelling government purpose.” Accordingly, the Supreme Court must verify that the purpose sought by the government when imposing a restriction

73. See *Pennell v. City of San José*, 485 U.S. 1 (1988); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

74. *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 317 (2d Cir. 2003) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976))

75. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (The Supreme Court stated: “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.”).

76. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (discrimination based on gender); *Plyler v. Doe*, 457 U.S. 202, 248 (1983) (discrimination against foreign children in connection with education); *Lehr v. Robertson*, 463 U.S. 248, 266 (1988) (discrimination against children born out of wedlock).

77. *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001) and freedom of speech in public fora, *United States v. Virginia*, 518 U.S. 515, 529 (1996).

is imperative and crucial.⁷⁸ It is up to the government to prove as much;⁷⁹ also, the government must prove that the law is “necessary” as a means to achieve that goal.⁸⁰ In this case, the burden of proof is more demanding, as the government needs to prove that the least restrictive means or alternative has been selected; otherwise, it would not be “necessary.”⁸¹ Accordingly, under this test, the Supreme Court will consider not only the purpose, or goal, sought but also the means used. It has been said that, once “strict scrutiny” is mentioned, a law is unlikely to escape a judicial finding of invalidity; when a judge embarks on a search for a compelling government purpose, they have probably made up their mind already.⁸²

B. *Germany*

In Germany, the proportionality scrutiny has a rich history that, after the Second World War, eventually led to the constitutional status of the respective principle (not because it is actually enshrined in the Constitution, but rather, because it can be implicitly derived from the Constitutional principle of *Rechtsstaat*).⁸³ The proportionality test is used to check the imposition of limitations on rights, and not only to promote them as it happened in the past; and the Federal Constitutional Tribunal has shifted attention from the two first subtests (adequacy and necessity) to the third one (proportionality in a strict sense).⁸⁴

Additionally, the Federal Constitutional Tribunal has developed a rather stringent doctrine that allows judicial review of what could be regarded as the substantive procedural aspects of the law (as opposed to the merely formal procedural aspects). The matter has been exhaustively analyzed in

78. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Sherbert v. Verner*, 374 U.S. 398 (1963).

79. *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest”) (citing *Shaw v. Reno*, 509 U.S. 630, 653-57 (1993)).

80. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (“Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”).

81. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 106 (1991).

82. Kenneth L. Karst, *Compelling State Interest*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 477 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

83. Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union* 23-31 (NYU School of L. Jean Monnet Working Paper Series, Working Papers No. 04/09, 2009), <https://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf>.

84. Cohen-Eliya & Porat, *supra* note 55, at 263-86.

Argentina by Rodolfo Barra,⁸⁵ Santiago Carrillo and Mariano L. Cordeiro.⁸⁶ In a few words, according to these authors, through that doctrine the Constitutional Tribunal demands (a) public justification of the laws that regulate fundamental individual rights, (b) that any such laws be supported by the facts or evidence considered, and (c) an assessment of their impact. In accordance with those standards, a law may be found to be unconstitutional where its rationality cannot be proven, to the extent that any such law is contrary to the Constitution. The basic notion behind this doctrine is that legislators' discretionary powers do not operate to release them from the obligation to act rationally. This doctrine seeks to overcome the dichotomy between judicial review based on the contents or substance of the law, and judicial review based solely on the procedural aspects of the law.

One instance of judicial scrutiny under this standard can be seen in the case *Hartz IV* determined in 2010,⁸⁷ where the parties disagreed as to the constitutionality of an unemployment benefit scheme known as “*Arbeitslosengeld II, ALG II* or *Hartz IV*.” The German Constitutional Tribunal found that, under the *Hartz IV* law, the amount of the unemployment benefit had not been determined in accordance with the Constitution, for its calculation had deviated from the statistical model “with no factual justification.”⁸⁸

In other words, the Court did not reject the calculation method used, but concluded that the formula used in order to update the benefit over time was not rationally related to the cost of living for people close to the poverty line, while the formula employed to calculate benefits per child lacked any methodological justification. The law was invalidated on the grounds that it was based on an inadequate data collection process that failed to ensure due transparency. It should be noted, however, that Barra expressed some

85. See generally 2 RODOLFO CARLOS BARRA, *DERECHO ADMINISTRATIVO: ACTO ADMINISTRATIVO Y REGLAMENTOS* 174-82 (2018).

86. See generally SANTIAGO R. CARRILLO & MARIANO L. CORDEIRO, *Foundations for the Development of Rational Lawmaking in Argentina*, in 4 *THE THEORY AND PRACTICE OF LEGISLATION* 237 (2016), <https://www.tandfonline.com/eprint/nBgN2s35iFMV97AHZ7a5/full>; SANTIAGO R. CARRILLO, *La racionalidad del proceso legislativo como estándar de control judicial (legisprudence)*, *LA LEY*, at 635-47 (2016); SANTIAGO R. CARRILLO, *La racionalidad del proceso legislativo como estándar de control judicial (legisprudence)*, 483 *REVISTA ARGENTINA DEL RÉGIMEN DE LA ADMINISTRACIÓN PÚBLICA*, 21-38 (2018).

87. zum Urteil des Ersten Senats vom 9. Februar 2010 [*Hartz IV* GFCC, Judgment of the first senate dated Feb. 9, 2010] 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09, https://www.escribnet.org/sites/default/files/caselaw/hartz_iv_judgment_german_1s20100209_1bv1000109.pdf (last visited Dec. 27, 2021); *SOZIALGESETZBUCH [SGB] [SOCIAL CODE]*, § 12, http://www.gesetze-im-internet.de/sgeb_2/_12.html.

88. *Id.*

reservations regarding judicial review of the economic issues considered by Congress, based on the notion of separation of powers.⁸⁹

IV. THE CURRENT SITUATION IN ARGENTINA

A. Before COVID-19

While COVID-19 has monopolized everyone's attention, we should not forget that, in December 2019, as soon as the new president-elect had taken oath of office, a new emergency law delegated every imaginable power unto the Executive branch of government, except for the powers associated with a sanitary emergency arising from the coronavirus, a pandemic which was, at the time, completely unknown.

As soon as the new administration took office, the Argentine Congress handed all legislative powers over to the Executive branch, by declaring a state of emergency that exceeded any prior declaration in that regard, both in terms of its scope and its intensity.

By adding and building on all previous experiences—which were numerous⁹⁰—the so-called “Ley de Solidaridad Social y Reactivación Productiva en el Marco de la Emergencia Pública,” declared a state of economic, financial, fiscal, administrative, social security, public-utility-rate, energy, sanitation and social emergency, and delegated unto the Executive branch “all the powers covered in this Act.”⁹¹

89. BARRA, *supra* note 85, at 181-82. (In his opinion, “The proportionality scrutiny, if taken to the extreme of assessing the economic issues considered (or not considered) by Congress when enacting a law, can put legislative powers in the hands of judges that are not elected (in their origin and responsibility) and accordingly are not direct representatives of the people, and who are not involved in the play of political forces of any truly democratic system. The danger here is to delegate ultimate governing powers unto a group of toga-wearing aristocrats, who in the case of Argentina remain in office for life . . . and may only be held liable and removed if they commit a crime or other equally serious wrongdoing. Naturally, this criticism will not apply where judicial review is limited to the merely administrative activities of either Congress or the public administration, as those activities as ‘sublegal’ in nature, that is to say, they are subject to the sovereignty of the law, which the courts of law have an obligation to guaranty.”).

90. We have to bear in mind that, at least ever since democracy was reinstated in Argentina, i.e., ever since 1983, the following (mainly economic) emergency measures were adopted: Decree No. 1096/1985, June 17, 1985, [25699] B.O. 1 (Arg.) instating the “Austral” currency; Law No. 23696, Aug. 23, 1989, [26702] B.O. 2 (Arg.); Law No. 23697, Sep. 25, 1989, [26725] B.O. 1 (Arg.) declaring the economic and administrative emergencies; Law No. 25344, Nov. 21, 2000, [29530] B.O. 1 (Arg.) declaring the emergency of the public sector (except for the Law 23696, *supra*, privatization contracts, i.e., public services concessions and licenses); Law No. 25561, Jan. 7, 2002, [29810] B.O. 1 (Arg.) declaring the public emergency in social, economic, administrative, financial and exchange matters.

91. Law No. 27541, art. 1, Dec. 23, 2019, [34268] B.O. 1 (Arg.).

While the Act pretended to meet the requirements set forth in Article 76 of the Argentine Constitution by setting the “conditions” or grounds for this delegation of powers, that was a mere formality.⁹² The powers delegated were so numerous and the “conditions” established in the law were so vague that the separation between Congress and the Executive branch of government was actually reduced to an imaginary line. Every substantial power vested on Congress by the Constitution has been handed over to the Executive branch ever since December 2019.

For example, as the only “condition” for all the powers delegated in connection with tax matters, the Act asked the Executive branch to “generate the conditions to achieve fiscal sustainability.”⁹³ That extremely broad goal has the power to invalidate the principle of tax legality (no taxation without representation) and, at the same time, wipes out the constitutional prohibition to issue Executive Orders in tax matters.⁹⁴ From now on, the Executive branch of government will be amply authorized by Congress to issue any sort of tax regulations designed to achieve “fiscal sustainability,” that is to say, to capture as many resources as the Executive sees fit in order to spend as much as they believe to be necessary. This wide delegation scenario may have implicitly allowed the Federal Taxing Administration to discretionary demand, from taxpayers’ accountants, a disclosure of the formers’ tax

92. Art. 76, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (“The legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress.”).

93. Law No. 27541, § 2(d), Dec. 23, 2019, [34268] B.O. 2 (Arg.).

94. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/10/2003, “Selcro S.A. c. Jefatura Gabinete Ministros / amparo,” Fallos (2003-326-4251) (Arg.) (holding that the constitutional prohibition to issue Urgent and Necessary Executive Orders on tax matters is also applicable to Delegated Decrees); Art. 99, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), regulating Urgent and Necessary Executive Orders (“The President of the Nation has the following powers: . . . 3. The Executive Power shall in no event issue provisions of legislative nature, in which case they shall be absolutely and irreparably null and void. Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties, he shall issue decrees on grounds of necessity and urgency, which shall be decided by a general agreement of ministers who shall countersign them together with the Chief of the Ministerial Cabinet. Within the term of ten days, the Chief of the Ministerial Cabinet shall personally submit the decision to the consideration of the Joint Standing Committee of Congress, which shall be composed according to the proportion of the political representation of the parties in each House. Within the term of ten days, this committee shall submit its report to the plenary meeting of each House for its specific consideration and it shall be immediately discussed by both Houses. A special law enacted with the absolute majority of all the members of each House shall regulate the procedure and scope of Congress participation.”).

avoidance schemes,⁹⁵ a measure that clearly affects the confidentiality between client and accountant.⁹⁶

Additionally, rather than limiting fiscal indiscipline—an endemic problem that has long plagued Argentina—the Law 27.541 tends to increase it, as the extraordinary tax burden imposed by said Law has fallen on productive sectors that are already heavily taxed. These are the same sectors that systematically move the economy forward and bear the cost of Argentina’s extraordinary government spending—yet another endemic problem. Instead, a priority for any emergency law should include taking steps to ensure a fair distribution of the tax burden and reduce government spending. However, Congress has chosen to ignore the problem, as nothing in the Act is designed to reach that very crucial goal.

The same can be said about the remaining grounds for the delegation of powers established in Law 27.541, all of which involve a vague notion of “sustainability,” for instance, in the case of public indebtedness (Section 2 (a)) or “productive sustainability,” in the case of public utility rates (Section 2 (b)).

On the other hand, we must not be deceived by the limited term of validity of the Law 27.541 (until December 31, 2020);⁹⁷ experience has shown that a single provision, added right before a law is enacted by Congress or hidden somewhere in the Budget Act, is enough to extend the term of validity of an emergency law for an indefinite period of time.⁹⁸

While the wording of the Act is quite detailed in some respects—a detailed analysis certainly exceeds the scope of this article—what is most important is not what the Act expressly provides, but rather, the extraordinary

95. Resolución General No. 4839/2020, Oct. 23, 2020, [34504] B.O. 66 (Arg.).

96. Juzgado Federal [Juzg. Fed.] 20/1/2021, “Consejo Profesional de Ciencias Económicas de la Provincia de Santa Cruz c. Administración Federal de Ingresos Públicos - Dirección General Impositiva / medida cautelar autónoma,” <http://www.saij.gob.ar/juzgado-federal-federal-santa-cruz-consejo-profesional-ciencias-economicas-provincia-santa-cruz-administracion-federal-ingresos-publicos-direccion-general-impositiva-medida-cautelar-autonoma-fa21840000-2021-01-20/123456789-000-0481-2ots-eupmocsollaf?&o=2&f=Total%7CFecha/2021/01%7CEstado%20de%20Vigencia%5B%2C1%5D%7CTema%5B%2C1%5D%7COrganismo%5B%2C1%5D%7CAutor%5B%2C1%5D%7CJurisdicci%F3n/Federal/Santa%20Cruz%7CTribunal%5B%2C1%5D%7CPublicaci%F3n%5B%2C1%5D%7CColecci%F3n%20tem%E1tica%5B%2C1%5D%7CTipo%20de%20Documento/Jurisprudencia&t=3> (select “Ver archivo adjunto”) (Courts have been receptive to the confidentiality grievance: see the injunction granted by the Juzgado Federal de Primera Instancia de Río Gallegos [First Instance Federal Judgeship of Río Gallegos]).

97. Law No. 27541, § 2(d), Dec. 23, 2019, [34268] B.O. 1 (Arg.).

98. The social emergency declared by Law No. 25561, Jan. 7, 2002, [29810] B.O. 1 (Arg.), was in force until December 31, 2019, creating an overlapping with the social emergency declared in Law No. 27541, § 2(d), Dec. 23, 2019, [34268] B.O. 1 (Arg.).

accumulation of implicit powers handed over to the Executive branch of government, to the detriment of the principle of separation of powers.

Thanks to this Act, there is no limit on the Executive's power to handle the Nation's foreign debt, regulate all public utility rates, fix the amount of salaries and pensions, handle distribution of medicines, and generally do anything as the Executive in its sole discretion may deem necessary in order to "foster economic reactivation"⁹⁹ which is a way of delegating the "Clause of Progress" fully unto the President and his Ministers.¹⁰⁰

We must not be misled: this is no emergency law. It is an elaborate scheme designed to transfer all Congressional power to the Executive branch in one single move, with the excuse of an emergency that, in any case, should have been tackled from the opposite side: by cutting down on government spending and creating economic incentives that this Act in actual practice has eliminated, as it has created broad areas of Presidential discretion, which is absolutely unpredictable.

While it is true that "hyper-presidentialism" is one of Argentina's long-standing problems, which in fact was targeted in the context of the 1994 Constitutional reform to no avail,¹⁰¹ Law 27.541 only aggravates the problem exponentially. Once again, the President has been conferred extraordinary legislative powers by an Act of Congress that will be the "law of all laws" and will prevail for an indefinite period of time, as the Constitution is sacrificed on the altar of emergency.

On top of it all, before the COVID-19 pandemic broke out, the President of Argentina had issued twelve "Urgent and Necessary" Executive Orders ("Decretos de Necesidad y Urgencia" or DNUs) in less than three months in office. The first such Executive Order was DNU No. 7/2019,¹⁰² signed on the very same date when the President took office, which operated to amend the Ministries Act. There was also DNU No. 214/2020,¹⁰³ which operated to amend the Federal Intelligence Act. Considering that Congress had held ordinary sessions only a few days earlier, that particular matter could not possibly be regarded as so necessary or urgent that Congress could not attend to it.

We cannot and should not forget any of this, for it will remain a permanent question during the health emergency and once Argentina's "aislamiento social" or "social distancing" is over.

99. Law No. 27541, § 2(c), Dec. 23, 2019, [34268] B.O. 1 (Arg.).

100. *See generally id.*

101. *Id.* § 2(d).

102. Decree No. 7/2019, Dec. 11, 2019, [34258] B.O. 6 (Arg.).

103. Decree No. 214/2020, Mar. 5, 2020, [34322] B.O. 3 (Arg.).

B. After COVID-19

In addition to all of the above, there is now the matter of COVID-19, which has resulted in a new, far more intensive and extensive wave of Urgent and Necessary Executive Orders, including a few that have severely restricted individual freedom by imposing the so-called “Mandatory Social and Preventive Confinement,” originally established by DNU 297/2020¹⁰⁴ and subsequently extended, as of the date of this article, until October 26, 2020 by DNU 814/2020.¹⁰⁵ This mandatory confinement, which has been in force for over 200 days now, currently intermingled with “Social, Preventive and Mandatory Distancing,” will probably be extended further, as a result of the development of the hospital (and especially intensive care unit) bed demand.

In summary, by October 2020, (a) we were indefinitely condemned to living a virtual life, allowed by the laws to travel interjurisdictionally to our law firm once a week, perhaps to return and pick up books;¹⁰⁶ (b) the Judiciary—a conservative surrounding in which the Electronic Filing System Law (“ley de expediente electrónico”)¹⁰⁷ was slowly being materialized—had to shift, by virtue of agile Supreme Court regulations (“acordadas”), from being on permanent leave since the confinement started on March 20, 2020, to a ban on paper filings and the implementation of mandatory judicial email addresses to initiate the process of remotely filing lawsuits and submitting other briefs and, in general, an enhancement of the file management system that homes thousands of cases across the different courts of appeals and their first instance judgeships,¹⁰⁸ and (c) the main legislative duties have been entrusted by Congress to the Executive branch of

104. Decree No. 297/2020, Mar. 20, 2020, [34334] B.O. 3 (Arg.).

105. Decree No. 814/2020, Oct. 26, 2020, [34505] B.O. 12 (Arg.).

106. Nevertheless, there is an injunction that has been granted in Cámara Nacional de Apelaciones en lo Federal y Contencioso Administrativo de la Capital Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation of the Federal Capital], 23/10/2020, “Incidente de Medida Cautelar en autos: Colegio Público de Abogados de la Capital Federal c. E.N. / amparo ley 16986,” (2020-10.068/2020/2) (Arg.). The Court of Appeals for Administrative Litigation found the one-day-per-week cap, depending on the last digit of the personal identification number (“document nacional de identidad”) “evidently insufficient.” *Id.*

107. Law No. 26685, July 7, 2011, [32186] B.O. 1 (Arg.).

108. The Public Lawyers’ Bar (“Colegio Público de Abogados de Capital Federal”) has published fifteen guides regarding the most varied aspects of electronic filings, such as how to electronically serve a notice; how to scan briefs and documents; how to submit a filing in portable document format (PDF); how to convert a Word document into a PDF; how to electronically submit a case to labor law mediation; how to obtain the lawyers’ authorization to circulate in the streets; how to electronically pay the filing fee; etc. See *Guías prácticas. Ejercicio profesional*, COLEGIO PÚBLICO DE ABOGADOS DE LA CAPITAL FEDERAL, <https://www.cpacf.org.ar/noticia.php?id=7704&sec=39> (last visited Dec. 27, 2021).

government, which now rules our destiny, in every area, as virtually the sole and paramount legislator. On top of it all, Congressional review of DNUs, initially established as an extremely weak tool by Act No. 26.122, has been statistically non-existent.¹⁰⁹

At the same time, amidst the pandemic, the Executive branch submitted a bill to reform the Judicial branch;¹¹⁰ is witnessing the occupation of private lands;¹¹¹ while the Central Bank of the Argentine Republic's reserves are nearing the exhaustion level, and the monetary expansion is notorious.¹¹² All these serious matters pose questions regarding their timing, not to mention their wisdom and coherence and, eventually, their ability to find their way to the judicial arena, an area in which, again, the loftiest aims may be validated by means of the lenient scrutiny test depicted in Part II.

Of course, a different course of events could be achieved if there was a vigorous control of DNUs on behalf of the respective Bicameral Committee and especially if the law established, instead of a House plus Senate rejection requirement to strike them down, a less demanding method, such as a House plus Senate requirement to allow them to enter into force. The Judicial branch, and especially the Supreme Court, could be reorganized by the Congress, but within the limitations set by the Constitution and the Supreme Court case law that interprets it. Property rights—already damaged by COVID-19 restrictions, like price-fixing and private production controls—demand a strong reaction, especially on behalf of the courts, not only for the sake of current property right holders but also for the establishment of the minimum necessary legal certainty that can enable the return of capital and investment. Finally, at the bottom of almost every right, in a country in which the volume of public employment and the amount of services to be provided on a gratuitous basis by the State—be it national, provincial or municipal—is outstanding, fiscal discipline in a corruption-free environment becomes a most vital goal that cannot, certainly, be achieved by increasing the fiscal

109. See ALFONSO SANTIAGO ET AL., *EL CONTROL DEL CONGRESO SOBRE LA ACTIVIDAD NORMATIVA DEL PODER EJECUTIVO* 100 (2019).

110. *Proyecto de Ley de Reforma Judicial*, SISTEMA ARGENTINO DE INFORMÁTICA JURÍDICA, (July 30, 2020) <http://www.saij.gob.ar/proyecto-ley-reforma-judicial-proyecto-ley-reforma-justicia-federal-nv25102-2020-07-30/123456789-0abc-201-52ti-lpsedadevon>; see also Decree No. 635/2020, July 30, 2020, [34437] B.O. 6 (Arg.), creating, in the Argentine Presidency, a consultation council for the strengthening of the Judiciary and of the Ministerio Público.

111. Gabriel Podestá, *Las 12 provincias donde hay ocupaciones ilegales de tierra*, LA NACION (Oct. 25, 2020), <https://www.lanacion.com.ar/politica/las-12-provincias-donde-hay-ocupaciones-ilegales-nid2488716>.

112. Compare the reserves on October 28, 2020 (39,886 million U.S. dollars) against the reserves on June 25, 2018 (63,313 million U.S. dollars). See *Reservas internacionales del BCRA en millones de dólares*, BANCO CENTRAL DE LA REPÚBLICA ARGENTINA, http://www.bcra.gov.ar/PublicacionesEstadisticas/Principales_variables_datos.asp (latest visited Dec. 23, 2021).

pressure or by means of new taxes—not even constitutionally dubious taxes aimed at overcoming the COVID-19 pandemic.

V. CONCLUSION

It seems obvious to us that the flaws of reasonable scrutiny referred to in Part II above render it completely ineffective when it comes to facing the challenges currently prevailing in Argentina. Suffice it to say that, if someone challenges any law or regulation enacted either before or after the COVID-19 pandemic, they will have to prove that any such law or regulation is unconstitutional, which is a tall order indeed, considering the irreproachable goals enunciated by those laws and regulations. Cases like the ones reviewed in Part II, above, could perhaps have been solved by the Supreme Court in a different way if the Argentine State, as defendant, had to prove, before the Judiciary, the reasonableness of the measure. The reader can mentally envisage the amounts of information that the State would have had to submit to the courts to make evident, in *Cine Callao*, the rationale for the declaration of the emergency in the specific actors' sector as well as the proportionality of their compulsory hiring in the light of the property rights of the movie theater owners, among other aspects. The same line of reasoning could be adopted in all the emergency cases, including the ones triggered by the COVID-19 restrictions. The verifiable data provided by the defendant as author of the restriction, would allow the court of law to see beyond—and perhaps pierce—the presumption of constitutionality that seems to bless laws and even executive orders alike,¹¹³ in order to perform a different level of scrutiny.

While the emergency continues to exist, if the Argentine courts of law really want to exercise the powers vested on them by the Constitution, they should never use reasonable scrutiny in the conditions currently in force. Rather, they should use “strict scrutiny,” where every rule that operates to deprive people of their individual freedom is deemed to generate a “suspicious category,” as the Supreme Court has maintained in certain cases,¹¹⁴ and where the burden of proving that any such rule is constitutional lies with the Executive branch of government. The Executive branch of government should be required to prove not only the compelling need for the actions taken, but also, as a minimum, that the least restrictive means have been chosen.

113. LINARES, *supra* note 9, at 213-15.

114. Kenny, *supra* note 18, at 141-52.

THE PUBLIC’S RIGHT TO HEALTH AND SAFETY TRUMPS AN INDIVIDUAL’S RIGHT TO FREEDOM: THE ROLE OF GOVERNMENT AND COURTS TO PROTECT HEALTH DURING PANDEMICS

Mehrnaz M. Hadian*

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I. INTRODUCTION

In their article, “Health v. Individual Freedom: Is That the Question? (A Re-examination of the Reasonableness Scrutiny in COVID-19 Times),” Professors Alberto B. Bianchi and Estela B. Sacristán analyzed whether the scrutiny applied by Argentine courts to measures implemented during the COVID-19 pandemic is an appropriate standard of review to approve or overrule government actions that restrict individual freedom during national emergency health crises.¹ They concluded that while the COVID-19 pandemic is an ongoing health emergency, “the courts of law...should never use the reasonableness scrutiny” to determine the constitutionality of

* Mehrnaz Hadian is a practicing Intensive Care Unit (ICU) physician and healthcare lawyer dedicated to improving quality of care for patients through advocacy for safe and free-from-retaliation work environment for physicians and nurses. She has worked as a frontline practitioner throughout COVID-19 pandemic in the intensive care units and represented doctors and nurses in their dispute with hospitals for the lack of PPE, creating unsafe work environment and retaliation against healthcare providers who advocate for better patient care.

1. Alberto B. Bianchi & Estela B. Sacristán, *Health v. Individual Freedom: Is That the Question? (A Re-examination of Reasonable Scrutiny during COVID-19)*, 27 SW. J. INT’L L. 227, 246-52 (2021).

a government emergency order or law “in conditions currently in force” to deprive people’s individual freedom.² While “reasonableness scrutiny,” as currently defined by the Argentine Supreme Court, seems to rubberstamp “Urgent and Necessary” Executive Orders as constitutional, so long as the government sets a “lofty” goal as important as a nation’s health, I disagree that “suspicious category[ies] or “strict scrutiny” should be the standard of review in such circumstances.³

As a disclaimer, my opinions are undoubtedly influenced by my viewpoint as a practicing Intensive Care Unit (ICU) physician. As someone who has been on the forefront of the COVID-19 crisis from the beginning treating patients and witnessing the devastation of the pandemic. Seeing politicians, government officials, and courts continue to politicize this global health disaster in the U.S. and around the world is nothing short of maddening. Despite this disclaimer, I attempt to remain objective in my commentary about the appropriateness of different levels of scrutiny in such circumstances and proposing what should be the standard of review applicable to an extraordinary set of circumstances such as the COVID-19 pandemic.

If, in early 2020, the U.S. government had preemptively acted upon Chinese intelligence reports of a respiratory disease in China, COVID-19 would likely not have become a pandemic.⁴ In the past two decades, the United States has experienced similar cycles of novel viral infections (including H1N1, SARS, MERS, and Ebola, to name a few) popping up around the globe.⁵ Every time, the U.S. government responded swiftly, decisively, and apolitically. It mobilized all the necessary public health, medical, and logistical expertise and resources to help contain any such infectious outbreaks in its local origin. Unfortunately, this time, the public health matter was politicized, which resulted in a global disaster of unimaginable proportion and an enormous amount of death, destruction, and human suffering for the entire world.⁶

2. *Id.* at 253.

3. *Id.* at 249-53.

4. Shane Harris et al., *U.S. Intelligence Reports from January and February Warned About a Likely Pandemic*, WASH. POST (Mar. 20, 2020), https://www.washingtonpost.com/national-security/us-intelligence-reports-from-january-and-february-warned-about-a-likely-pandemic/2020/03/20/299d8cda-6ad5-11ea-b5f1-a5a804158597_story.html.

5. Dennis Wagner & Donovan Slack, *The US Had a Chance to Learn from Anthrax, SARS, H1N1 and Ebola. So Why Is the Federal Coronavirus Response So Messy?*, USA TODAY (Mar. 23, 2020, 12:22 PM), <https://www.usatoday.com/story/news/nation/2020/03/23/coronavirus-shows-trump-administration-problems-with-biodefense-plan/2896252001/>.

6. See generally, P. Sol Hart et al., *Politicization and Polarization in COVID-19 News Coverage*, 42 SCI. COMM., 679, 685-92 (2020).

In March 2020, when the existence of a pandemic and the urgency of dealing with it could no longer be denied, the U.S. President finally and grudgingly acknowledged the problem before declaring that it would “disappear” one day “miraculously.”⁷ At this point, many countries had applied strict quarantine rules, travel restrictions, stay-at-home orders, mask mandates, and other preventive measures through executive orders and emergency laws.⁸ In some countries, there was even use of military forces to curb the global wildfire of COVID-19.⁹ Meanwhile, the U.S. federal government tried to find a way to reopen the economy, insisting that COVID-19 was no worse than the seasonal flu.¹⁰

Not only was there a lack of a coherent national federal response to the COVID-19 crisis, the U.S. federal government, in the name of individual freedom, encouraged and assisted with legal challenges to undermine states’ stay-at-home orders and mask mandates, interfering with states’ rights as sovereign under the constitutional separation of powers between the state and federal governments.¹¹ As a result, hospitals were filled with COVID-19 patients.¹² Medical personnel struggled with a lack of personal protective equipment (PPE), fell ill while caring for the patients, and

7. Nancy Dillon, *10 Times President Trump Downplayed Coronavirus*, N.Y. DAILY NEWS (Oct. 2, 2020), <https://www.nydailynews.com/news/politics/ny-president-trump-repeatedly-downplayed-coronavirus-before-infection-20201002-5tsqhvqjhjzafzrorg22vqdy-story.html>.

8. See *Coronavirus: The World in Lockdown in Maps and Charts*, BBC NEWS (Apr. 7, 2020), <https://www.bbc.com/news/world-52103747>.

9. Kevin Sieff, *Soldiers Around the World Get a New Mission: Enforcing Coronavirus Lockdown*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/world/coronavirus-military-enforce-soldiers-armed-forces/2020/03/25/647cbbb6-6d53-11ea-a156-0048b62cdb51_story.html.

10. Tommy Beer, *All the Times Trump Compared Covid-19 to the Flu, Even After He Knew Covid-19 Was Far More Deadly*, FORBES (Sept. 10, 2020, 10:14 AM), <https://www.forbes.com/sites/tommybeer/2020/09/10/all-the-times-trump-compared-covid-19-to-the-flu-even-after-he-knew-covid-19-was-far-more-deadly/?sh=5c22b034f9d2>.

11. Memorandum on Balancing Public Safety with the Preservation of Civil Rights from Att’y Gen. to Assistant Att’y Gen. for Civ. Rts. & All U.S. Att’ys (Apr. 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download> [hereinafter *Memorandum on Balancing Public Safety*]; Michael D. Shear et al., *Inside Trump’s Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html>; Lisa Lerer & Kenneth P. Vogel, *Trump Administration Signals Support for Allies’ Fight Against Virus Orders*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/us/politics/coronavirus-trump-justice-department.html?smid=em-share>.

12. *COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/04032020.html> (last updated Apr. 4, 2020).

tragically died as a result.¹³ The President refused to issue a federal mask mandate, social distancing requirements, and a stay-at-home order for non-essential purposes.¹⁴ He unnecessarily delayed invoking the Defense Production Act¹⁵ to order the manufacturers to produce adequate supplies of sanitizers and PPE, until it was too late. This was perhaps motivated by political expediency amid the greatest health crisis of the century.¹⁶

At least in part, many tragedies of the COVID-19 crisis were preventable had the U.S. federal government not deliberately denied the pandemic's existence early on and acted swiftly and decisively without minimizing its gravity or politicizing the health crisis.¹⁷ A public health matter is not a political matter, and it should not be dealt with as such. Rather, the solution must be driven solely by the relevant medical expertise and proven scientific methods. Unfortunately, the politicization of this pandemic rose to such a degree that wearing a mask, practicing social distancing, getting vaccinated, and even denying COVID-19 as a hoax all have become associated with certain political viewpoints. This politicization of a health crisis should have never happened.¹⁸

II. HEALTH V. INDIVIDUAL FREEDOM BEFORE COVID-19 VACCINES

At the beginning of the pandemic, many countries scrambled to figure out how to control the spread of the disease. With a highly contagious virus, anyone that comes in close proximity (of six feet or less) with an infected person is at high risk of contracting the virus and spreading it to others. Since the virus is airborne and transmitted through respiratory droplets, wearing masks will significantly reduce its transmission.¹⁹ Furthermore, one must understand the virus's nature to spread exponentially—each

13. Jane Spencer & Christina Jewett, *More than 3,600 US Health Workers Died in COVID's 1st Year*, ABC NEWS (Apr. 8, 2021, 7:50 AM), <https://abcnews.go.com/Health/3600-us-health-workers-died-covids-1st-year/story?id=76944085>.

14. *Coronavirus: Donald Trump Vows Not to Order Americans to Wear Masks*, BBC NEWS (July 18, 2020), <https://www.bbc.com/news/world-us-canada-53453468>.

15. Defense Production Act of 1950 (as amended at 50 U.S.C. §§ 4501-4568 (2018)).

16. Priscilla Alvarez et al., *Trump Administration's Delayed Use of 1950s Law Leads to Critical Supplies Shortages*, CNN (July 14, 2020, 8:57 AM), <https://www.cnn.com/2020/07/13/politics/delayed-use-defense-production-act-ppe-shortages/index.html>.

17. Spencer & Jewett, *supra* note 13.

18. Ali Haif Abbas, *Politicizing the Pandemic: A Schemata Analysis of COVID-19 News in Two Selected Newspapers*, INT. J. FOR SEMIOTICS LAW (July 3, 2020), <https://link.springer.com/content/pdf/10.1007/s11196-020-09745-2.pdf>.

19. Hiroshi Ueki et al., *Effectiveness of Face Masks in Preventing Airborne Transmission of SARS-CoV-2*, AM. SOC'Y MICROBIOLOGY: MSPHERE (2020), <https://journals.asm.org/doi/10.1128/mSphere.00637-20>.

infected person can infect three or more persons in close contact.²⁰ This spread thus affects the public's health and safety at a rapid rate. From a purely biological perspective, if all people infected with COVID-19, whether symptomatic or asymptomatic, could be simultaneously isolated for a duration equal or longer to the course of the disease, then the virus could, at least theoretically, be eradicated.²¹

At the beginning of the pandemic, when early eradication was still possible, the United States was unwilling to implement a strict and simultaneous isolation and quarantine of all the COVID-19 cases. Certain countries, however, like New Zealand, controlled COVID-19 by aggressively testing the population, identifying and isolating infected people, enforcing contact barriers (i.e., masks, social distancing, and stay-at-home mandates), and by closing their borders to prevent new cases of COVID-19 entering the country.²²

Alternatively, the Chinese police and military forcibly closed all businesses and quarantined residents in certain cities—effectively enforcing a complete lockdown.²³ Such measures may seem like a clear violation of individual freedom, but given the large population of China, its government was effective in controlling the spread of the disease during those early stages of the pandemic.²⁴ Therefore, the choice is not simply between health and individual freedom. The question is to what degree sacrificing individual freedom should be acceptable to maintain the health of a population and what balancing test should be used to determine that degree.

The United States is a nation built on freedom of choice, so some argue they should have a choice of whether to follow the COVID-19 measures.²⁵

20. *Scientific Brief: SARS-CoV-2 Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html (last updated May 7, 2021).

21. Anna Jones, *How Did New Zealand Become Covid-19 Free?* BBC NEWS (July 10, 2020, 12:22 PM), <https://www.bbc.com/news/world-asia-53274085>.

22. *Id.*

23. VOA News, *Chinese Police Force Family into Coronavirus Quarantine*, YOUTUBE (Feb. 9, 2020), <https://youtu.be/rKek0Y30Ctw>; Emma Graham-Harrison & Lily Kuo, *China's Coronavirus Lockdown Strategy: Brutal but Effective*, GUARDIAN (March 19, 2020, 1:07 PM), <https://www.theguardian.com/world/2020/mar/19/chinas-coronavirus-lockdown-strategy-brutal-but-effective>.

24. *Id.*

25. On March 24, 2020, Dan Patrick, Lieutenant Governor of Texas said in an interview with Fox News “as a senior citizen, are you willing to take a chance on your survival in exchange for keeping the America that all America loves” suggesting elderly may be willing to die to keep the economy open. Vontux, *Tx Lt Gov Dan Patrick Says Grandparents Should Be Willing to Die to Save the Economy*, YOUTUBE, (Mar. 24, 2020), <https://youtu.be/IK0xtQpe-7M>.

Some wanted to exercise their First Amendment right to worship by attending religious services without restriction.²⁶ Yet this freedom to choose is made irrespective of the fact that the virus will spread to others who may not have the same personal choices.

On April 27, 2020, U.S. Attorney General William Barr issued a memorandum directing U.S. Attorneys to watch for “state or local ordinance[s that] cross[] the line from an appropriate exercise of authority to stop the spread of COVID-19 into an overbearing infringement of constitutional and statutory protections.” It essentially announced that the Department of Justice could bring actions in federal courts against state and local governments over COVID-19 restrictions.²⁷ Following this memorandum, the DOJ supported many court challenges to state and local COVID-19 restrictions across multiple states, which resulted in conflicting rulings in lower courts.²⁸

Two such cases against the states of California²⁹ and Nevada³⁰ reached the U.S. Supreme Court. The Court ruled in May and July 2020, respectively, that state restrictions on the number of attendees at religious services, to decrease the risk of spreading COVID-19, were constitutional.³¹ In both cases, Chief Justice John Roberts joined the four liberal members of the Court, and in a five to four vote, ruled in favor of the state imposed restrictions.³² However, a change in the political balance of the Supreme

26. Many such lawsuits have been brought in federal courts across the U.S. against several states that had enacted gathering bans or restrictions on the number of people attending indoor activities. For example, three churches have sued Governor of California along with the state public health officials for alleged violation of First and Fourteen Amendments and 42 U.S.C. § 1983: Civil action for deprivation of rights and other statutory federal laws and asked for injunctive relief. Verified Complaint for Declaratory and Injunctive Relief, Calvary Chapel of Ukiah v. Newsom, No. 20-CV-01431, 2020 WL 6483099, at *1 (E.D. Cal. Nov. 4, 2020); 42 U.S.C. § 1983 (2021); Chace Beech, *Three California Churches Sue Newsom over Singing Ban*, L.A. TIMES (July 16, 2020), <https://www.latimes.com/california/story/2020-07-16/california-churches-sue-newsom-singing-ban>.

27. Memorandum on Balancing Public Safety, *supra* note 11.

28. *See id.*; Shear et al., *supra* note 11; Lerer & Vogel, *supra* note 11.

29. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

30. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

31. *See id.* at 2604 (Alito, J., dissenting); *Newsom*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

32. In his concurring opinion Justice Roberts wrote:

Although California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.

Court resulted in a contrasting ruling against the state of New York.³³ In November 2020, the Court ruled that New York's emergency order, which imposed a cap on the number of attendees in houses of worship, was unconstitutional.³⁴ This ruling indicated that the politics of COVID-19 pandemic could spill into the highest court of the land,³⁵ and highlights how the government's responses to the pandemic can become political dividing lines.³⁶

The country's division over COVID-19 created an environment where people who followed the COVID-19 restrictions were labeled as liberals and mocked by the highest level of government officials.³⁷ Even the President of the United States went as far as saying that the COVID-19 surges in the United States were due to "fake news media conspiracy" and

And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

Newsom, 140 S. Ct. at 1613 (Roberts, C.J., concurring). In his dissent for the case in Nevada, Justice Alito, joined by Justices Thomas and Kavanaugh, reasoned that the restrictions were unconstitutional because they preferentially treated casinos compared to churches:

Claiming virtually unbounded power to restrict constitutional rights during the COVID-19 pandemic, he has issued a directive that severely limits attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed. . . . We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

Sisolak, 140 S. Ct. at 2604 (Alito, J., dissenting).

33. Following the death of Justice Ruth Bader Ginsburg and confirmation of Justice Amy Coney Barrett, the Supreme Court obtained a conservative majority. Nicolas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html>.

34. *Roman Cath. Diocese of Brooklyn, N.Y. v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

35. Adam Liptak, *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/11/26/us/supreme-court-coronavirus-religion-new-york.html?smid=em-share>.

36. Joe Walsh, *Poll: Most Republicans Say Covid Threat Overblown, U.S. Handled Outbreak Well*, FORBES (Oct. 19, 2020), <https://www.forbes.com/sites/joewalsh/2020/10/19/poll-most-republicans-say-covid-threat-overblown-us-handled-outbreak-well/?sh=5f37a8b549d4>.

37. Chris Cillizza, *Donald Trump's Latest Attack on Mask-Wearing May Be His Worst Yet*, CNN: THE POINT (Sept. 4, 2020, 3:52 PM), <https://www.cnn.com/2020/09/04/politics/donald-trump-joe-biden-masks/index.html>.

excessive testing.³⁸ He also encouraged people to protest and defy local COVID-19 restrictions put in place to protect the public health.³⁹

By the spring and summer of 2020, hospitals were overwhelmed beyond their capacity with patients, and healthcare professionals were exhausted, both physically and emotionally, from their often futile attempts to save the many patients battling the illness.⁴⁰ The U.S. federal government soon after declared that dealing with COVID-19 was the responsibility of the states, and “referred to this as ‘state authority handoff,’”⁴¹ while encouraging the public to protest and to bring constitutional challenges against state imposed restrictions.⁴² These contradictory policies, people’s science defying attitudes, PPE shortages, failures to test early for new cases, and constant disregard of healthcare professionals’ advice and CDC guidelines, resulted in an unmitigated healthcare disaster of an epic proportion. Despite its resources, the United States ranked repeatedly at the top of the chart for new COVID-19 cases and deaths for many months during 2020 and early 2021.⁴³

III. HEALTH V. INDIVIDUAL FREEDOM AFTER COVID-19 VACCINES

After December 2020, when several effective COVID-19 vaccines became available in the United States, the constitutionality question shifted to a question of to what degree public and private entities could mandate vaccinations for the employees, patients, visitors, students, customers, and citizens.⁴⁴ During a period of time between mid-December 2020 and late February 2021, when the vaccine supplies were inadequate whilst the demand was very high, vaccinations were rolled out in phases. High risk

38. Berkeley Lovelace Jr., *Trump Claims the Worsening U.S. Coronavirus Outbreak is a ‘Fake News Media Conspiracy’ Even as Hospitalizations Rise*, CNBC (Oct. 26, 2020, 10:38 AM), <https://www.cnbc.com/2020/10/26/coronavirus-trump-claims-the-worsening-us-outbreak-is-a-fake-news-media-conspiracy-even-as-hospitalizations-rise.html>.

39. Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 19, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html>.

40. Francesca Trianni, *Doctors and Nurses Talk About Burnout as Another Wave of COVID-19 Hits U.S.*, TIME (Nov. 23, 2020, 1:55 PM), <https://time.com/5914409/covid-19-health-care-worker-burnout/>.

41. Shear, *supra* note 11.

42. Lerer & Vogel, *supra* note 11.

43. *Covid Map: Coronavirus Cases, Deaths, Vaccinations by Country*, BBC NEWS, <https://www.bbc.com/news/world-51235105> (last updated Sept. 10, 2021, 11:33 AM).

44. Wen W. Shen, Cong. Rsch. Serv., R46745, *State and Federal Authority to Mandate COVID-19 Vaccination 2* (2021).

adults, such as the elderly and nursing home residents, and healthcare workers were able to receive the vaccination first.⁴⁵

However, in March 2021, despite the U.S. federal government announcing an adequate supply of the vaccines to inoculate every eligible person with the first dose by July 2021, the number of people who were willing to take the vaccine hit a ceiling—less than 60% of the U.S. adult population were willing to be vaccinated.⁴⁶ Now, the choice between health and individual freedom has shifted to whether, *in the face of a pandemic*, the vaccine should be mandatory. Forced vaccination clearly seems unconstitutional, or at least its constitutionality would be challenged in the U.S. courts, if a government at any level attempted to do so.⁴⁷ However, the government may fine citizens, or impose other restrictions on those who refuse to get vaccinated.⁴⁸ With emergence of new COVID-19 variants, doctors are anticipating that even if at least seventy percent of a population is vaccinated, the so-called “herd immunity” will not be achieved.⁴⁹

In the months to follow since July 2021, the courts have been dealing with cases brought mainly by citizens and local officials against the state governments that banned local municipalities, school boards, and private businesses from requiring proof of vaccination from their employees, students, and customers or from imposing mask mandates and frequent testing in lieu of vaccination.⁵⁰

45. Peter Loftus, et al., *CDC Panel Recommends Giving First Covid-19 Vaccines to Health Workers, Nursing Homes*, WALL ST. J. (Dec. 1, 2020, 8:08 PM), <https://www.wsj.com/articles/cdc-panel-recommends-giving-first-covid-vaccines-to-health-workers-nursing-homes-11606862069>.

46. *US Coronavirus Vaccine Tracker*, USA FACTS, <https://usafacts.org/visualizations/covid-vaccine-tracker-states/> (last updated Aug. 28, 2021, 8:04 PM).

47. See Eric Tucker & Alanna Durkin Richter, *Biden’s Vaccine Rules to set Off Barrage of legal Challenges*, ASSOCIATED PRESS (Sept. 10, 2021), <https://apnews.com/article/joe-biden-health-lawsuits-business-coronavirus-pandemic-0f668373b0a2f0f6af6e5b39e2ceaae9>.

48. *Jacobson v. Massachusetts*, 197 U.S. 11, 37 (1905).

49. Gypsyamber D’Souza & David Dowdy, *What is Herd Immunity and How Can We Achieve It with COVID-19?*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Apr. 6, 2021), <https://www.jhsph.edu/COVID-19/articles/achieving-herd-immunity-with-COVID19.html>.

50. Nick Anderson, *Federal Judge Upholds Coronavirus Vaccine Mandate for Indiana University Students*, WASH. POST (July 19, 2021), <https://www.washingtonpost.com/education/2021/07/19/iu-vaccine-lawsuit-mandate-judge/>; Press Release, White House, *President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant* (July 29, 2021), <http://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/>; *Bridges v. Houston Methodist Hosp.*, No. H-21-1774, 2021 WL 2399994 (S.D. Tex. Jun. 12, 2021), *appeal filed*, No. 21-20311 (5th Cir. June 14, 2021). In one example, the governor of Florida issued an executive order (EO) on July 30, 2021, under the title of “Ensuring Parents’ Freedom to Choose” effectively blocking mask mandate for school students by

On August 12, 2021, Justice Coney Barrett rejected the Indiana University (IU) students' emergency application for writ of injunction, upholding the university vaccination requirement, allowing the lower court's rulings to stand.⁵¹ Both the federal court and the U.S. Court of Appeals for the 7th Circuit had ruled in favor of the university.⁵² The emergency injunction presented two questions: (1) whether heightened scrutiny applies to Indiana University's mandate that all IU students take the COVID-19 vaccine in violation of their constitutional rights to bodily integrity and autonomy and medical treatment choice so that IU must prove that its mandate is justified, which the courts below erroneously failed to do; and (2) whether IU failed to prove that its mandate is justified under heightened scrutiny.⁵³ The Supreme Court's decision to reject the petition may imply that schools requiring proof of vaccination for COVID-19 is constitutional. It may also be interpreted to mean that heightened scrutiny is not required in the circumstances of a public health crisis. On September 9, 2021, through an executive order, the U.S. President required COVID-19

withholding school funds from those districts where the school boards had voted to enforce a mask mandate. Fla. Exec. Order No. 21-175 (July 30, 2021), <https://www.flgov.com/wp-content/uploads/2021/07/Executive-Order-21-175.pdf>. In response to a legal action against the Governor's EO, a circuit court judge sided with the parents holding that the governor has exceeded his constitutional authority under the state law. See Rozsa & Strauss, *Florida School Mask Fights Heat up Again as Appeals Court Backs DeSantis and Biden Administration Opens Civil Rights Investigation*, WASH. POST (Sept. 10, 2021, 9:32 PM). However, a Court of Appeal reversed the lower court ruling reinstating the anti-mask mandate Executive Order on September 10, 2021. See Order Granting Appellants' Motion to Quash, *DeSantis v. Scott*, No. 1D21-2685 (Fla. Dist. Ct. App. Sept. 10, 2021). The parents now want to appeal the ruling to Florida Supreme Court that had declined in July 2021 to hear a challenge brought by anti-mask advocates against Palm Beach County in Florida. *Machovec v. Palm Beach County*, No. SC21-254, 2021 WL 2774748 (Fla. July 2, 2021); *Florida Parents Want to Speed Mask Mandate Case to Supreme Court*, CBS MIAMI (Sept. 13, 2021, 3:17 PM, <https://miami.cbslocal.com/2021/09/13/florida-parents-want-to-speed-mask-mandate-case-to-supreme-court/>). In other legal actions, the State of Florida challenged "the Conditional Sailing Order" imposed by the CDC (Center of Disease Control) on the cruise ship industry, which required COVID-19 testing, mask mandate and social distancing for passengers. Emergency Application to Vacate the Eleventh Circuit's Stay of the Preliminary Injunction Issued by the United States District Court for the Middle District of Florida, *Florida v. Becerra*, No. 21-12243 (U.S. July 23, 2021). The State of Texas has been also involved in several legal challenges regarding school mask mandates. These have also brought a federal civil right violation investigation by the U.S. Department of Education against the state for attempting to ban school mask mandate. Joshua Fechter, *Gov. Greg Abbott and Local Officials are Fighting Several Legal Battles over Mask Mandates. Here's What You Need to Know.*, TEX. TRIB. (Sept. 21, 2021), <https://www.texastribune.org/2021/09/21/texas-school-mask-mandates/>.

51. John Kruzel, *Supreme Court Leaves Intact Indiana University's Vaccination Requirement*, HILL (Aug. 12, 2021), <https://www.thehill.com/regulation/court-battles/567676-supreme-court-leaves-intact-indiana-universitys-vaccination>.

52. Emergency Application for Writ of Injunction, at 2, *Klaassen, v. Tr. of Ind. Univ.*, No. 21-2326 (U.S. Aug. 12, 2021).

53. *Id.*

vaccination for all federal employees and contractors, prompting states to bring constitutional challenges in courts.⁵⁴

IV. CONCLUSION

If we live in a free society, with the expectation that the government, employers, and businesses can be held civilly, and sometimes criminally, liable for negligence if infected persons are allowed to spread the virus to others,⁵⁵ then we cannot argue that our individual freedom during a deadly and highly contagious pandemic must be absolute. In fact, none of our individual rights enshrined in the Constitution are absolute. An absolute individual freedom for one person or group of people in a society undoubtedly infringes on individual freedom of other members of the society.

As such, the courts should not apply the traditional and stringent strict scrutiny standard of review that is reserved for the analysis of an infringement on fundamental rights or for a suspect classification in situations where emergency public health crises may temporarily interfere with individual freedoms. The reasonableness scrutiny, under the Argentine courts' standard of review (or rational basis review under the American courts standard) should suffice as long as the courts demand that the government show the reasonableness of the law or the restriction imposed to achieve the goal necessary to protect the public health.⁵⁶ If there is a desire to provide a slightly higher level of protection given the enormous deference that a rational basis standard of review gives government, the rational basis test can be strengthened by shifting the burden on to the government to show the reasonableness of the means chosen, by presenting relevant facts and expert opinions to the court. Such heightened standard review seems to be equivalent to a modified "reasonableness scrutiny" under the Argentine courts' standard, where the courts must do a substantive review of the law and its factual justifications, in addition to the proportionality between the end goal and the means, before ruling on its constitutionality.⁵⁷ The burden should be on the government to prove that the means is reasonable based on objective and scientific facts.

54. Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021). On September 14, 2021, Arizona became the first state challenging the Biden Administration's vaccine mandate. Complaint for Declaratory Relief, *Brnovich v. Biden*, No. 21-cv-01568 (D. Ariz. Sept. 14, 2021).

55. Amanda Robert, *What Types of Lawsuits Were Filed over COVID-19 in 2020?*, A.B.A. J. (Jan. 4, 2021, 1:15 PM), <https://www.abajournal.com/news/article/law-firms-schools-identify-lawsuits-filed-over-covid-19-in-2020>.

56. Bianchi & Sacristán, *supra* note 1.

57. *Id.* at 1.

Whether the Argentine and the U.S. courts can adopt a judicial review standard reserved specifically for major public health crises of a pandemic magnitude is up to the respective courts and is a topic for constitutional scholars, the legislature, and public health policymakers to discuss. However, a crisis-specific standard of review seems to be the appropriate step to avoid giving the executive branch unlimited power over individual freedom in the name of preserving citizens' health, as it seems to have been the case in Argentina.⁵⁸ In contrast, such an approach may prevent the courts from intervening unnecessarily with the government's obligations and reasonable actions to preserve citizens' health and safety, in the name of defending individual freedom, politicizing a public health crisis in the process, as it has become the case in the United States.⁵⁹

58. Bianchi & Sacristán, *supra* note 1, at 228-31.

59. In September 2021, multiple states in the U.S. have prepared for or activated statewide emergency-level rationing of care for all patients. That is so, because about 30% of the U.S. adults refuse to receive a very effective and safe vaccine that is free and readily available to them based on "personal freedom of choice." As a result, they have created a crisis for everyone in the community, by becoming ill with COVID-19 and going to the hospitals utilizing all the limited healthcare resources that should have been reserved for and available to all other patients. Other patients, who may unexpectedly suffer medical emergencies, such as heart attacks, strokes, surgeries, and accidents, do not receive the care they need, timely or at all, to save their lives, because of the "personal choices" of their fellow citizens caused no ICU bed or personnel remain available to care for them. The question is, therefore, if citizens defy medical professionals' advice to get vaccinated based on "personal freedom," then shouldn't they be the ones who are denied the life-saving care when the limited resources caused by their "personal choices" force the healthcare professionals to ration care?

THE NEXUS ELEMENT IN THE DEFINITION OF CRIMES AGAINST HUMANITY: AN ANALYSIS OF ARGENTINE JURISPRUDENCE

Mariano Gaitán*

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* LL.M., Southwestern Law School (Los Angeles). Fulbright-Siderman Scholar. Professor, Universidad Nacional de José C. Paz (Argentina). I am grateful to Florencia Ini for research assistance and to Amanda Gutiérrez for text and footnote review. I also thank Alexis Álvarez Nakagawa and Agustín Cavana for their comments on the draft. I thank Pablo Parenti for providing me with some sources. Finally, I thank Florencia Sotelo for her support and the discussions on central ideas developed in this article.

I. INTRODUCTION

The question of how to distinguish crimes against humanity from common crimes has been present since the origin of this category of international crimes. Both types of crimes can be heinous and injure victims in a brutal way. What distinguishes a crime against humanity from a common crime is not its cruelty, but the fact that it forms part of a broader context of human rights violations that are promoted or tolerated by a state or an organization that exercises *de facto* power on a territory. To constitute a crime against humanity, a specific inhumane act such as murder, torture, or rape, must be committed “as part of” a widespread or systematic attack against a civilian population, pursuant to a policy of a state or an organization to commit such an attack.¹ It is the fact that the crime occurred within that context that makes it an issue of global concern. Thus, the nexus between an individual act and the attack is a vital element to determine whether it constitutes a crime against humanity or a violation of domestic criminal law.

However, the nexus element has not been thoroughly examined and properly defined in international criminal law. International criminal tribunals have made great efforts in defining other elements of crimes against humanity, such as “attack,” “widespread or systematic,” and “against any civilian population.” However, they have paid little attention to the requirement that the specific act be committed “as part of” an attack. One possible explanation for the under-explored nature of the nexus element is that the cases that reach international criminal tribunals are typically at the core of widespread or systematic attacks against civilian populations. United Nations *ad hoc* tribunals and the International Criminal Court (ICC) usually do not deal with borderline situations because they have a mandate to focus on major criminals and the gravest offenses.² In these cases, the nexus between specific acts and the attack is obvious and it does not require much elaboration.

Unlike international criminal tribunals, Argentine courts have faced numerous situations in which they had to decide whether an individual action was part of an attack. Argentine courts have been applying international criminal law for almost three decades, mainly in cases related to the immense violations of human rights committed during the last military dictatorship (1976-1983). As of December 2020, Argentine courts have handed down 250

1. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. See S.C. Res. 1534, ¶ 5 (Mar. 26, 2004) (mandating that *ad hoc* Tribunals “concentrate on the most senior leaders suspected of being responsible”); Rome Statute, *supra* note 1, art. 17(1)(d) (stating that a case is inadmissible before the ICC when it “is not of sufficient gravity”).

sentences, and 1177 perpetrators have been convicted for crimes against humanity.³ As the prosecution of these crimes deepened, courts were required to judge events that were not typical instances of the criminal plan implemented by the military regime; they differed in some relevant respects from other acts that clearly formed part of the attack. These borderline cases were situated in the outer limits of the attack or in a grey area between the attack and isolated events. In addressing these cases, Argentine courts have elaborated different criteria to determine whether the acts formed part of an attack.

In this article, I pursue three goals. First, I review the most relevant cases in which Argentine courts have analyzed the nexus element of crimes against humanity. These cases may be of interest not only for their rationales, but also for the variety of situations examined therein. Argentine case law on the nexus requirement is quite unique but mostly unknown at international forums. For this reason, I briefly narrate the facts that prompted discussions on their link with the attack. While Argentine courts have addressed other contexts, elements and even the underlying acts of crimes against humanity,⁴ in this article I only comment on cases dealing with the nexus element. Second, I show that Argentine jurisprudence on this issue heavily relies on the correlation between the specific act and the policy behind the attack. When the act injures a victim or a group of victims who belonged to the targeted population, courts tend to consider that the specific act formed part of the attack, regardless of other circumstances that may differ from typical cases. Conversely, when victims had no political affiliation, and the acts seemed to have been committed for motives other than the regime's repressive policy, courts have concluded that those acts constitute common crimes, despite any similarities to other cases undisputedly within the scope of the attack. Third, I do not intend to establish a test to identify when an

3. *See generally* Ministerio Público Fiscal, Procuración General de la Nación, "Informe Estadístico Sobre el Estado de las Causas por Delitos de Lesa Humanidad en Argentina [Statistical Report About the State of Cases Concerning Crimes Against Humanity in Argentina] (2020) (Arg.), <https://www.fiscales.gob.ar/wp-content/uploads/2020/12/Lesa-informe-diciembre-1-2020.pdf>.

4. *See, e.g.*, Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 19/3/2014, "Paccagnini, Norberto Rubén / recurso de casación," sala III, No. 346,14 (Arg.) (analyzing the attack); Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 3/22/3011, "Salgado, José María / recurso de casación," sala II, No. 222/16 (Arg.) (analyzing the organization policy requirement); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/8/2004, "Arancibia Clavel, Enrique Lautaro / homicidio calificado y asociación ilícita," Fallos (2004-327-3312) (Arg.) (considering the crime of illegal association as a crime against humanity); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/05/2005, "Lariz Iriondo, Jesus María / solicitud de extradición," Fallos (2005-328-1268) (Arg.) (analyzing whether terrorist acts constitute crimes against humanity).

individual act forms part of an attack; rather, I pursue a more modest objective, which is to show some flaws in the dominant criterion followed by most Argentine courts.

In my view, this policy-focused criterion (a) is not coherent with the current development of the law of crimes against humanity because it demands that the punishable act be committed on discriminatory grounds; (b) is burdensome and difficult to apply because, in certain contexts, it may be difficult to prove the precise content and scope of the policy behind the attack and delimit the targeted population; and (c) underestimates other factors that should be considered to determine whether the act is sufficiently connected to the attack, thus making it a crime against humanity, such as the guarantee of impunity granted to perpetrators.

This article is organized as follows. Section II sets out the legal framework of crimes against humanity. It briefly explains the meaning of the *chapeau* elements and shows how they reflect the collective dimension of crimes against humanity. Then, it reviews the construction of the nexus element in the case law of international criminal tribunals and shows the importance of this element to tie the collective dimension of crimes against humanity to specific acts committed by individuals. Section III provides some theoretical and historical background to the application of the law of crimes against humanity in Argentine jurisprudence. It explains that Argentine courts apply international criminal law in domestic cases and how historical development led to the current discussion of the nexus requirement. Section IV analyzes the Argentine jurisprudence on the nexus element. It discusses the leading cases that have established the dominant legal standard on this matter, which, as I mentioned, is strongly tied to the policy element. Section V develops the three critical remarks to the dominant Argentine jurisprudence on the nexus element listed in the previous paragraph. Finally, Section VI summarizes and highlights the key ideas advanced in this article.

II. THE DEFINITION OF CRIMES AGAINST HUMANITY AND THE NEXUS ELEMENT IN INTERNATIONAL CRIMINAL LAW

Crimes against humanity have a collective nature in two senses. On the one hand, they are mass crimes because they are perpetrated on a large scale—against populations, not isolated individuals. On the other hand, they are systemic crimes, promoted or tolerated by states or organizations that exercise similar power in a territory. This characteristic makes them international crimes and thus justifies the international community's interest in their prosecution over the will of the states where they are committed.⁵ At

5. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 86, 95 (2004).

the same time, however, crimes against humanity are committed by individuals against other people, in the same manner in which common crimes are committed. Thus, in applying international criminal law, courts adjudicate criminal responsibility to individuals, not abstract entities, for their concrete acts.⁶ Likewise, victims suffer injury to their fundamental rights in their own flesh, not only because they belong to a particular community or humankind. The nexus element is the glue that holds together the collective and the individual dimensions of crimes against humanity. It allows the connection between the abhorrent conduct of an aggressor and a broader context of human rights violations promoted or tolerated by a higher authority. Ultimately, the nexus between the individual act and that context is what makes it a crime against humanity and a matter of international concern.

This modern formulation of crimes against humanity is the result of a complex evolution in international custom. Initially, the distinctive element of crimes against humanity was the link with war. The first positive definition of crimes against humanity established in the Charter of the International Military Tribunal of Nuremberg (IMT) requires that they be committed in connection with war crimes or crimes against peace.⁷ The war nexus is the element that turned into international crimes acts that would otherwise be considered ordinary crimes of domestic jurisdiction. However, this requirement was quickly dropped from the definition. In fact, a nexus with war is not required by the Allied Control Council's definition of crimes against humanity, which laid the basis for numerous trials in Germany after the Nuremberg trial.⁸ The nexus with an armed conflict reappeared in the

6. The International Military Tribunal ("IMT") of Nuremberg famously held: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The Trial of German Major War Criminals, Proceedings of the International Military Tribunal of Nuremberg, Germany 223 (Oct. 1, 1946), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

7. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 280 (Aug. 8, 1945) [hereinafter IMT Charter], which defines crimes against humanity as follows:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id. art. 6(a).

8. Article II (1)(c) of Control Council Law No. 10 defined crimes against humanity as follows: "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated." Punishment of Persons Guilty of

definition included in Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).⁹ However, early ICTY case law dismissed this requirement as a jurisdictional element and not an element of the contemporary definition of crimes against humanity under customary law.¹⁰ The definition adopted in Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) did away with the war nexus and instead introduced the key contextual element of the modern definition of crimes against humanity, that is, the “widespread or systematic attack against any civilian population.”¹¹ Nevertheless, it added a requirement of discriminatory intent (“on national, political, ethnic, racial or religious grounds”), which has also been dismissed as a jurisdictional element in ICTR case law.¹²

In the absence of a specific convention on crimes against humanity, the definition adopted in Article 7 of the Rome Statute for the International Criminal Court (ICC) can be regarded as the crystallization of the contemporary definition of this international crime, which has reached broad consensus in the international community.¹³ Accordingly, Article 7 sets out the *chapeau* of the definition of crimes against humanity as follows:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with

War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50 (1946), *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XVI-XIX (1949).

9. Article 5 defines crimes against humanity as: “the following crimes when committed in armed conflicts, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial and religious grounds; (i) other inhumane acts.” S.C. Res. 827, art. 5 (May 25, 1993), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute].

10. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 140 (Int’l. Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

11. Article 3 of ICTR Statute defines crimes against humanity as follows:

The [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

S.C. Res. 955 (Nov. 8, 1994), https://unictr.irmct.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf [hereinafter ICTR Statute].

12. Prosecutor v. Akayes, Case No. ICTR-96-4-A, Appeals Chamber Judgment, ¶ 464, (June 1, 2001).

13. Rome Statute, *supra* note 1, art. 7.

knowledge of the attack . . . For the purpose of paragraph 1: (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack¹⁴

These context elements reflect the collective nature of crimes against humanity, and they seek to exclude isolated or random acts from the scope of this category of international crimes. The term “attack” refers to the event where individual acts must form part. It has been defined as a course of conduct, a campaign, or an operation. The ICC Trial Chamber in *Bemba*¹⁵ emphasized “[t]he requirement that the acts form part of a ‘course of conduct’ shows that the provision is not designed to capture single isolated acts,¹⁶ but ‘describes a series or overall flow of events as opposed to a mere aggregate of random acts.’”¹⁷ The term “population” also conveys the idea of mass crimes. Crimes against humanity are directed against populations, not to one individual or a group of randomly selected individuals. As Werle and Jassberger point out, “this criterion emphasizes the collective nature of the crime, thus ruling out attacks against individuals and isolated acts of violence.”¹⁸

Furthermore, attacks are characterized as widespread or systematic. “Widespread” refers to the attack’s “large-scale nature” and “the number of targeted persons.”¹⁹ Unlike “systematic,” which “reflects the organised nature of the acts of violence and the improbability of their random occurrence.”²⁰ These terms are directed to exclude ordinary criminality. As Margaret McAuliffe deGuzman explains, “[i]t is this element that turns these crimes into attacks against humanity rather than isolated violations of the rights of

14. *Id.*

15. Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.

16. *Id.* ¶ 149 (citing Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3436, Judgment pursuant to article 74 of the Statute, ¶ 1101 (Mar. 7, 2014), https://www.icc-cpi.int/courtrecords/cr2015_04025.pdf).

17. *Id.* (citing Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo (June 12, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04777.PDF).

18. GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 380 (4th ed. 2020).

19. *Bemba*, Case No. ICC-01/05-01/08-3343, ¶ 163 (citing *Katanga*, Case No. ICC-01/04-01/07-3436, ¶ 1123).

20. *Katanga*, Case No. ICC-01/04-01/07-3343, ¶ 1123 (citing Prosecutor v. Harun, Case No. ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 62 (Apr. 27, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02899.PDF).

particular individuals.”²¹ The ICC in *Katanga* expressed that “the attack must be widespread or systematic, implying that the acts of violence are not spontaneous or isolated.”²²

In addition, the attack must be carried out in pursuance of a policy of a state or an organization. The policy element is controversial and has motivated intense debates in international tribunals case law²³ and among scholars.²⁴ Nevertheless, this requirement has entered positive law under Article 7(2)(a) of the Rome Statute. As the drafting history of the Rome Statute shows, this element was included as a complement to the disjunctive characterization of the attack as generalized or systematic to prevent isolated events from falling into the category’s scope.²⁵ The requirement of systematicity excludes common and random crimes since it requires the acts to be connected and organized. However, this is not the same case with the widespread requirement, which is satisfied with the mere accumulation of a significant number of cases. Without any additional requirement, this characterization would allow an isolated act, such as a murder, committed in a context of high crime rates to be considered a crime against humanity.²⁶ However, some early ICC decisions practically assimilated the policy requirement to the concept of systematicity by demanding the demonstration of a “regular pattern” between the different acts.²⁷ In *Katanga*, the ICC Trial Chamber expressly revised that assertion. It established that “[p]olicy,” within the meaning of Article 7(2)(a) of the Statute, refers essentially to the fact that a State or organization intends to carry out an

21. Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RIGHTS Q. 335, 375 (2000).

22. See *Katanga*, Case No. ICC-01/04-01/07-3436, ¶ 1123.

23. See generally *Tadić*, Case No. IT-94-1-AR72, ¶ 653 (expressing crimes against humanity warrant intervention by international community). *But cf.* Prosecutor v. Kunarac, Case No. IT-96-23-T& IT-96-23/1-T, Judgment, ¶ 104 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (rejecting the assertion that a policy element is required under customary law).

24. See generally deGuzman, *supra* note 21; Guénaël Mattraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leyla Nadia Sadat, ed. 2011) (opposing the policy element). *Cf.* William A. Shabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 958 (1978); Darryl Robinson, *Crimes Against Humanity: A Better Policy on ‘Policy,’* in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carlsen Stahn, ed. 2014); Kai Ambos & Steffen Wirth, *The Current Case Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L. F. 1 (2002) (supporting the policy element).

25. See deGuzman, *supra* note 21, at 372.

26. See generally Robinson, *supra* note 24; Ambos & Wirth, *supra* note 24, at 30.

27. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11-9-Red, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Laurent Koudou Gbagbo, ¶ 37 (Nov. 30, 2011).

attack against a civilian population, whether through action or deliberate failure to take action.”²⁸ In this way, the ICC made it clear that this requirement establishes a low threshold and simply implies that the acts that make up the attack must be in some way connected to the designs of a state or organizational entity.

As noted above, the *chapeau* elements describe the broader context within which a specific act must take place to constitute a crime against humanity. These elements reflect the collective dimension of this type of international crime. However, a court may hold a person liable for a crime against humanity for committing a single act against a single victim, if act is part of a widespread or systematic attack against a civilian population.²⁹ Thus, it is the attack, not the individual act, which has a necessary collective dimension. Certainly, in most cases, the link between the individual act and the attack will be apparent and will not require much examination. However, in borderline cases, the question of how to establish that the individual act genuinely forms part of an attack becomes crucial.

The statutory definitions of crimes against humanity offer little guidance on interpreting the nexus element. The IMT Charter is silent on this issue because it was aimed to hold accountable the highest leaders of the Nazi regime.³⁰ The ICTY Statute requires the crimes be “committed in armed conflict . . . and directed against any civilian population.”³¹ The ICTR³² and Rome Statutes³³ only require the punishable act to be committed “as part of” the attack.

The *ad hoc* tribunals jurisprudence on the nexus element is scarce compared to other elements of the definition of crimes against humanity. The early ICTY decisions focused on the analysis of the nexus with the armed conflict and the characterization of the attack as generalized or systematic.³⁴ The Appeals Chamber in *Tadic* briefly mentioned that “the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population,”³⁵ seemingly establishing a low threshold for the

28. *Kantanga*, Case No. ICC-01/04-01/07-3436, ¶ 1108.

29. *See Kumarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 418; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 147 (May 21, 1999); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 243-244 (2014).

30. *See* IMT Charter, *supra* note 7.

31. ICTY Statute, *supra* note 9.

32. ICTR Statute, *supra* note 11.

33. *See* Rome Statute, *supra* note 1.

34. Göran Sluiter, “*Chapeau Elements*” of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 139 (Leila Nadya Sadat ed., 2011).

35. *Tadić*, Case No. IT-94-1-AR72, ¶ 255; accord Sluiter, *supra* note 34.

required connection between the act and the attack. It was not until *Kunarac* when the Trial Chamber seriously examined the nexus requirement and held:

There must exist a nexus between the acts of the accused and the attack, which consists of: (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.³⁶

This two-pronged test has the merit of recognizing that the nexus element requires the verification of an objective connection between the act and the attack in terms of *actus reus*. However, it fell short in elaborating the criteria to establish this objective connection. In particular, the expression “by its nature and consequences” is too vague to serve as a proper guideline in difficult cases. For its part, the ICTR Trial Chamber in *Semaza*³⁷ advanced a few more criteria to determine the link between the act and the attack, holding: “[a]lthough the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the . . . attack.”³⁸

The ICC case law on the nexus element is slightly more precise. In the *Katanga* judgment, the ICC Trial Chamber provided further guidance to establish the nexus between a punishable act and the attack:

[T]he individual act must be committed as part of a widespread or systematic attack. In determining whether an act within the ambit of article 7(1) of the Statute forms part of a widespread or systematic attack, the bench must, with due regard for the nature of the act at issue, the aims it pursues and the consequences it occasions, inquire as to whether it is part of the widespread or systematic attack, considered as a whole, and in respect of the various components of the attack (i.e. not only the policy but also, where relevant, the pattern of crimes, the type of victims, etc.). Isolated acts that clearly differ in their nature, aims and consequences from other acts that form part of an attack, fall out with article 7(1) of the Statute.³⁹

Rather than strict criteria, these are general guidelines to examine the nexus on a case-by-case basis. According to the ICC, no one element determines whether an act is part of the attack. However, courts must consider, on the one hand, the nature, objectives, and consequences of the

36. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 418 (footnote omitted).

37. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (May 15, 2003), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-97-20/trial-judgements/en/030515.pdf>.

38. *Id.* ¶ 326.

39. *Katanga*, Case No. ICC-01/04-01/07, ¶ 1124.

act, and on the other, the characteristics of the attack as a whole and in relation to each of its components. While the policy behind the attack is a particularly important factor, other circumstances must also be considered, including the pattern of crimes (*modus operandi*) and the type of victims.

III. THE APPLICATION OF THE LAW OF CRIMES AGAINST HUMANITY IN ARGENTINE JURISPRUDENCE

During the past three decades, Argentine courts have gradually applied the category of crimes against humanity in cases referring to human rights violations committed during the last military dictatorship (1976-1983), to other events that occurred before and after that time, and in extradition cases.⁴⁰ This trend is part of a progressive opening of the Argentine legal system towards international law, specifically regarding the protection of human rights. This process began with the ratification of human rights conventions at the outset of the democratic restoration in 1983 and deepened after the reform of the National Constitution in 1994, which granted constitutional hierarchy to a series of international human rights instruments.⁴¹ In this context, driven by the intense activism of human rights organizations,⁴² the judiciary progressively turned to international criminal law to address the crimes committed during the last military regime.

The application of the law of crimes against humanity in domestic cases in Argentina has some peculiarities. At the time of the events, Argentine law did not strictly describe these crimes as an autonomous category.⁴³ For this reason, local courts developed a complex and original interpretation of the applicable law, which has been described as a process of “double classification.”⁴⁴ On the one hand, they affirmed that the arbitrary detentions, tortures, homicides, and forced disappearances committed during the dictatorship constituted crimes against humanity under international customary law and that neither statutory limitations nor amnesties or pardons could prevent their prosecution. Based on a progressive interpretation of a

40. See Pablo F. Parenti, *The Prosecution of International Crimes in Argentina*, 10 INT'L CRIM. L. REV. 491 (2010).

41. See Jose Sebastian Elias, *Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty" Laws*, 31 HASTINGS INT'L & COMP. L. REV. 587, 627 (2008).

42. Francesca Lessa, *Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina Between 1976 and 2010*, 3 J. HUM. RTS. PRAC. 25, 34-35 (2011).

43. Crimes against humanity entered Argentine positive law in January 2007. Law No. 26.200, Jan. 9, 2007, [31.069] B.O., <https://www.boletinoficial.gov.ar/detalleAviso/primera/9108731/20070109?busqueda=1> (last visited Aug. 4, 2021) (implementing the Rome Statute).

44. Parenti, *supra* note 40, at 503.

clause of the National Constitution, they concluded that this norm of customary international law was part of the Argentine legal system.⁴⁵ On the other hand, courts found these acts were prohibited by the Argentine Penal Code in force at the time of their commission. The Argentine Penal Code criminalized the illegal deprivation of liberty,⁴⁶ and the application of torture and murder.⁴⁷ In this way, the *nullum crime sine lege* principle was fulfilled since the conduct and penalty were previously described in the law in a formal sense.⁴⁸ In short, through this process of double classification of the acts, the international customary law of crimes against humanity provided the rule of non-applicability of the statute of limitations and amnesty laws; and the Argentine criminal law described the prohibited conduct and the penalty.

The current stance of Argentine courts *vis-à-vis* international criminal law is the result of three decades of debate. During the first years after the democratic transition of the 80s, Argentine courts were reluctant to consider arguments of international law; they did not classify the human rights violations committed during the dictatorship as crimes against humanity.⁴⁹ In the *Trial of the Juntas*,⁵⁰ held in 1985, the Federal Court of Appeals of Buenos Aires convicted former dictator Jorge Rafael Videla and other members of the military juntas for human rights abuses.⁵¹ The Court found that the military government implemented a systematic plan to kidnap thousands of people, detain them in clandestine centers, interrogate them under torture, and finally kill them and disappear their bodies, all with the alleged purpose of fighting subversion. Despite these findings, the Court did not consider the events to be crimes against humanity. For this reason, some

45. Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

46. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 144 (Arg.).

47. *Id.* art. 80.

48. Parenti, *supra* note 40, at 501 (explaining that Argentine case law “has generally stressed the existence of legal crime definitions that already prohibited certain conducts at the moments of the crimes” and arguing that “the legal principle established in Article 18 of the National Constitution is undoubtedly satisfied in its more noticeable spheres: the *legal crime definitions* and the *penalty*”).

49. *See generally*, SEBASTIAN BRETT, HUM. RTS. WATCH, VOL. 13, ARGENTINA: RELUCTANT PARTNER: THE ARGENTINE GOVERNMENT’S FAILURE TO BACK TRIALS OF HUMAN RIGHTS VIOLATORS (2001).

50. Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal [CNCrim. y Corr.] [National Court of Criminal and Correctional Appeal of the Federal Capital], sala 2, 9/12/1985, “Videla, Jorge Rafael / homicidio, privación ilegal de la libertad y tormentos,” Fallos, (1985-309-33), <https://www.mpf.gov.ar/Institucional/UnidadesFE/Tomo309-005-completo.pdf>.

51. *Id.*

defendants were acquitted on some counts by application of statutory limitations.⁵²

Furthermore, Argentine courts initially upheld the Full Stop Law and the Due Obedience Law⁵³ passed during President Raúl Alfonsín's administration and under pardons⁵⁴ granted by President Carlos Menem. These laws foreclosed the prosecution of the dictatorship's crimes. The Supreme Court upheld the constitutionality of the Due Obedience law in the *Camps* case.⁵⁵ It affirmed that Congress was authorized to enact amnesty laws without considering whether it was admissible under international law to pass an amnesty law for such crimes as those committed during the dictatorship. In the *Hagelin* case,⁵⁶ the Supreme Court again confirmed the validity of the Due Obedience law. It expressly rejected the claim for the application of the Convention on the Non-Applicability of War Crimes and Crimes Against Humanity because Argentina had not ratified that treaty. In the same way, in the *ESMA* case,⁵⁷ the Supreme Court affirmed that the Convention against Torture did not affect the constitutionality of the Due Obedience law since it was an *ex post facto* norm with more burdensome consequences. Finally, in the *Riveros*⁵⁸ and *Aquino*⁵⁹ cases, the Supreme Court upheld pardon decrees and expressly rejected the claim that they granted impunity to "those responsible for crimes against humanity [in

52. CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 90-93 (1998).

53. See Law No. 23.492, Dec. 23, 1986, [26.058] B.O. (precluding any prosecution after a short period from the entry into force of the law); Law No. 23.521, June 8, 1987 [Suplemento Especial] B.O. (barring the prosecution of low and medium ranked members of armed and security forces who committed abuses during the dictatorship under the assumption that they acted in compliance of superior orders).

54. Decreto No. 1002/1989, Oct. 6, 1989, [26.736] B.O.

55. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/06/1987, "Camps, Ramón Juan Alberto / Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional," Fallos (1987-310-1162) (Arg.).

56. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/02/1988, "Hagelin, Ragnar c. teniente de navío Alfredo Ignacio Astiz / Recurso de hecho deducido por Ragnar Erland Hagelin en la causa Hagelin, Ragnar / denuncia c. Tte. de Navío Alfredo Ignacio Astiz," Fallos (1988-311-175) (Arg.).

57. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/03/1988, "Escuela De Mecanica de la Armada / ESMA – Hechos que se denunciaron como ocurridos," Fallos (1988-311-401) (Arg.).

58. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1990, "Riveros, Santiago Omar / privación ilegal de la libertad, tormentos, homicidios, etc.," Fallos (1990-313-1392) (Arg.).

59. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/10/1992, "Aquino, Mercedes / plantea inconstitucionalidad del decreto 1002/89," Fallos (1992-315-2421) (Arg.).

violation] of the norms and principles of contemporary international criminal law.”⁶⁰

Though Argentina had not ratified that treaty, international criminal law slowly made its way into Argentine jurisprudence through extradition cases. These precedents provided arguments that would later be decisive in annulling the amnesty laws and allowing the prosecution of past human rights violations. The *Schwammburger* case,⁶¹ ruled upon by the Federal Court of Appeals of La Plata in 1989, was one of the first to introduce arguments of international criminal law. This case consisted of an extradition request of an alleged Nazi criminal for crimes committed during World War II. The issue was whether statutory limitations barred the prosecution of those events under Argentine law. In the leading opinion, Judge Leopoldo Schiffrin explained how the acts constituted crimes against humanity, international customary law mandates their prosecution regardless of statutory limitations, and this obligation took precedence over Argentine domestic law.⁶² This precedent is relevant because, for the first time, it established the supremacy of international law over Argentine law.⁶³

The Supreme Court acknowledged the non-applicability of statutory limitations to international crimes in the *Priebke* case,⁶⁴ held in 1995. This case concerned the extradition of the German army officer Erich Priebke, accused of the massacre of 335 people in the Ardeatine Fosses, Italy, in 1944. The members of the Supreme Court disagreed on whether the acts constituted genocide, war crimes, or crimes against humanity. However, they all agreed that statutory limitations did not apply under international law and that this rule was part of the Argentine legal system.⁶⁵ The next step in the reception

60. *Id.*

61. Cámara Federal de Apelaciones de La Plata [CFed.] [Federal Court of Appeals of La Plata], 30/8/1989, “Schwammburger, Josef / extradición,” J.A. (1989-XII-27) (Arg.).

62. *Id.*

63. Judge Schiffrin states:

“In sum, I believe that the National Constitution submits the Argentine state to the supremacy of the law of *ius gentium* (article 102 [current 118]), which is the source of criminal law in the international sphere, in which the principle of *nullum crimen nulla poena sine lege* does not apply in a strict sense; that under that law, crimes against humanity are not subject to statutory limitations, and that because of this, Argentine courts must recognize the formally retroactive effects of laws sanctioned by other countries in order to guarantee the inapplicability of statutory limitations to those crimes.”

Id. at 3.

64. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/11/1995, “Priebke, Erich / solicitud de extradición – causa nro. 16.063/94,” Fallos (1995-318-2148) (Arg.).

65. *Id.*

of international criminal law was the *Arancibia Clavel* case,⁶⁶ decided in 2004. The case was about the extradition of a member of the Chilean intelligence accused of conspiracy and the murder of two political dissenters to General Augusto Pinochet's regime who were granted asylum in Argentina in 1974.⁶⁷ Departing from previous precedents, the majority of the Supreme Court classified the acts as crimes against humanity under international criminal law and applied the Convention on the Non-Applicability of War Crimes and Crimes Against Humanity.⁶⁸ Justices Zaffaroni and Highton, in the leading opinion, stated that this convention only affirmed the non-applicability of statutory limitations, which was a rule already in force under international customary law.⁶⁹

Argentine courts finally applied the category of crimes against humanity to human rights violations committed during the dictatorship in the *Simón* case.⁷⁰ This case constitutes a milestone in the process of truth and justice in Argentina. Julio Simón was a member of the Federal Police responsible for the illegal detention and torture of José Poblete and Gertrudis Hlaczik, two members of the Peronist Youth. Both members were held captive in the clandestine detention center known as "El Olimpo" [the Olympus] and remain *desaparecidos* [disappeared]. Abuelas de Plaza de Mayo and the Center for Legal and Social Studies (CELS), two leading human rights organizations in Argentina, chose this case to challenge amnesty laws' constitutionality and reopen the path for the prosecution of human rights violations. In 2001, a federal judge in Buenos Aires declared, for the first time, the Full Stop law and the Due Obedience law to be unconstitutional.⁷¹ In 2005, the Supreme Court confirmed this ruling. It held that these laws violated the Inter-American Convention on Human Rights and the Argentine Constitution because they prevented the prosecution of gross violations of human rights committed during the military regime.⁷² Most justices relied on the Inter-American Court of Human Rights (IACHR) ruling in the *Barrios*

66. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/8/2004, "*Arancibia Clavel*, Enrique Lautaro / homicidio calificado y asociación ilícita," Fallos (2004-327-3312) (Arg.).

67. Lisl Brunner, *Leaning on International Law to Prosecute the Past: The Arancibia Clavel Decision of the Argentine Supreme Court*, 10 OR. REV. INT'L L. 243, 249 (2008).

68. CSJN, 23/8/2005, "*Arancibia Clavel*," Fallos (2004-327-3350).

69. *Id.* at 3355.

70. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, "*Simón, Julio Héctor / privación ilegal de la libertad, etc. causa no. 17.768*," Fallos (2005-328-2056) (Arg.).

71. *Id.* at 2153.

72. *Id.*

Altos v. Peru case⁷³ and international criminal law arguments. The majority classified the crimes committed during the military regime as crimes against humanity and declared that neither the Full Stop Law, the Due Obedience Law, nor statutory limitations could obstruct their investigation and prosecution.⁷⁴

However, in *Simón*, the Supreme Court did not conduct a thorough analysis of the elements of crimes against humanity or explain why the acts fell into this category. Seemingly, most justices assumed that this conclusion was obvious since the facts referred to gross human rights violations committed by a state agent against political dissenters as part of the plan of illegal repression implemented by the military government. Only two justices provided some foundation for the classification of the acts as crimes against humanity. Justice Lorenzetti stated that illegal detentions, tortures, and forced disappearances fall into the category of crimes against humanity because these crimes contain the following elements: (1) they affect the person as a member of “humanity,” and (2) they are committed by a state agent in the execution of a governmental action, or by a group with the capacity to exercise state-like dominion over a territory.⁷⁵ Likewise, Justice Argibay stated:

[T]he criterion most compatible with the development and current state of international law characterizes a crime against humanity as an action committed by a state agent in the execution of a government action or program. The description of the conduct attributed to the defendant Julio Simón includes the circumstances of having acted in his capacity as a member of the Argentine Federal Police and within the framework of a systematic plan aimed at the persecution of people for political reasons.⁷⁶

In the *Mazzeo* case,⁷⁷ the Supreme Court reversed its rulings in *Riveros* and *Aquino* and struck down the pardons that have benefited hundreds of perpetrators of human rights abuses. Again, the Court relied on the IACHR’s jurisprudence and international criminal law arguments to conclude that pardons were unconstitutional because they barred the investigation of crimes against humanity and the prosecution and punishment of those

73. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, (Mar. 14, 2001), https://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf.

74. CSJN, 14/6/2005, “Simón,” Fallos (2005-328-2153).

75. *Id.* at 2296 (Lorenzetti, R., concurring).

76. *Id.* at 2318 (Argibay, C., concurring) (citation omitted).

77. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/7/2007, “Mazzeo, Julio Lilo / recurso de casación e inconstitucionalidad,” Fallos (2007-330-3248) (Arg.).

responsible for their commission. But as in *Simón*, the Court did not elaborate upon why the acts constituted crimes against humanity.

The Supreme Court did address the elements of crimes against humanity in the *Derecho* case.⁷⁸ There, it had to decide whether the illegal detention and torture inflicted upon an individual in a police station in 1988, during the democratic ruling, constituted a crime against humanity.⁷⁹ Endorsing the Attorney General's opinion, the Supreme Court refused to characterize the events as crimes against humanity. The decision is built on two main arguments. First, it analyzes the foundation of the international community's interest in prosecuting this type of crime. Relying on David Luban's theory of crimes against humanity,⁸⁰ it argues that the distinctive feature of these crimes is that they injure the universal characteristic of humans as "political animals" because the political organizations that should allow human beings to coexist in society become perverse machineries against them.⁸¹ From there, the Court posits that a general test to determine whether an atrocious act is a crime against humanity could be to ask if it "can be considered the product of a despotic and depraved exercise of governmental power."⁸² Applying this test to the case, the Court concluded that, in 1988, no state or organization that would be protected from the test stated above if it had "become a perverse machine of systematic and organized persecution of a group of citizens."⁸³ Second, the sentence analyzes the requirements of crimes against humanity under Article 7 of the Rome Statute:

- (1) they are acts of extreme cruelty such as murder, extermination, slavery, torture, rape, forced disappearance of people, among others;
- (2) that were carried out as part of "a widespread or systematic attack;"
- (3) that this attack was directed against a civilian population;
- and (4) that it was carried out in accordance with a policy of a state or an organization, or to promote that policy.⁸⁴

Then, the Court examined whether these requirements were fulfilled in the case and concluded that the crimes committed against the victim did not form part of an attack carried out as a state policy and, therefore could not be classified as crimes against humanity.⁸⁵

78. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/7/2007, "Derecho, René Jesús / incidente de prescripción de la acción penal causa No. 24.079," Fallos (2007-330-3074) (Arg.).

79. *Id.*

80. *See* Luban, *supra* note 5.

81. CSJN, 11/7/2007, "Derecho," Fallos (2007-330-3083).

82. *Id.*

83. *Id.*

84. *Id.* at 3084-85.

85. *Id.* at 3086.

The *Simón* and *Mazzeo* cases concerned paradigmatic acts of state terrorism: illegal deprivations of liberty, tortures, murders, and forced disappearances committed by state agents against political dissidents, in conformity with the policy of illegal repression implemented by the military government. These events were at the core of the widespread and systematic attack deployed against a portion of the civilian population in the '70s. For this reason, the Supreme Court classified them as crimes against humanity without an in-depth analysis of the elements of this category, and without examining the required nexus between the specific acts and the broad context of the attack. Conversely, in *Derecho*, it was clear that the event was an isolated act of torture committed during the democratic regime, outside the context of a widespread or systematic attack on civilians. Nor in this case did the Court need to consider the nexus element because it had previously concluded that there was no attack of which the single event could form part.

IV. THE NEXUS ELEMENT OF CRIMES AGAINST HUMANITY IN ARGENTINE CASE LAW

As the process of truth and justice for the dictatorship's crimes deepened, Argentine courts were confronted with cases situated in a grey area between *Simón/Mazzeo* and *Derecho*. They shared features with cases that formed part of the attack but, at the same time, they differed in some relevant respects. In these cases, the events presented one or more of the following distinctive characteristics: (a) they injured victims that did not belong to the targeted population of the attack; (b) they did not follow the same pattern of the attack or were beyond the plan; (c) they were committed on the particular grounds of the perpetrators and not pursuant to the repressive policy that inspired the attack; (d) they were perpetrated by individuals who did not belong to the criminal apparatus created by the regime to carry out the attack; and (e) they were committed out of the apparent temporal scope of the attack.

In these borderline situations, courts had to thoroughly analyze the nexus element and develop different criteria to determine when an individual inhumane act was part of the widespread and systematic attack against civilians deployed by the military government. The dominant criterion applied by the Federal Cassation Chamber, and arguably by the Supreme Court, focuses on the correspondence between the specific act and the policy element of the attack. It gives decisive weight to the fact that the victim belongs to the targeted population of the attack. The leading cases establishing this criterion are discussed below.

A. *The Federal Chamber of Cassation and the Supreme Court Rulings in the Levín Case*

The leading case on the nexus element is *Levín*,⁸⁶ and it is so far the only case in which the Supreme Court has seriously examined the issue. In this case, the Supreme Court highlighted the importance of an act's conformity with the policy behind the attack to determine the nexus yet set a low evidentiary requirement to prove this fact.⁸⁷ The case concerned the illegal imprisonment and torture of sixteen workers of the transportation company La Veloz del Norte in the province of Salta, committed by agents of the local police between December 1976 and January 1977.⁸⁸ The victims were held captive in inhumane conditions in a police station, tortured with *picana eléctrica* [electric shocks], and severely beaten.⁸⁹ This case was peculiar because these events occurred in the context of a criminal investigation where the owner of the company, Marcos Levín, filed a complaint accusing his employees of fraud.⁹⁰ Thus, the issue was whether these crimes were part of the attack carried out by the military government, at that time or whether they were isolated abuses committed in the exercise of police duties.⁹¹

The procedural history of the *Levín* case is complex and shows the struggle of Argentine courts in discerning when an act is part of the attack. In 2012, Federal Judge No. 1 of Salta indicted Levin and two policemen for the crimes committed against only one of the victims, Víctor Cobos.⁹² The court understood that this case could only be classified as a crime against humanity because Cobos was a union representative, and his family was persecuted on political grounds during the military regime.⁹³ Regarding the torture of the remaining victims, the judge concluded that they were not crimes against humanity because they had been carried out “on occasion and as a consequence of the fulfillment by the police forces of tasks related to the repression of common crimes, without a pattern or a widespread or systematic attack against a certain group of citizens.”⁹⁴ Therefore, the federal

86. Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/9/2018, “Levín, Marcos Jacobo / imposición de tortura,” Fallos (2018-341-1207) (Arg.).

87. *See, e.g., id.* at 1215.

88. *Id.* at 1217.

89. *Id.* at 1218.

90. *Id.*

91. *Id.* at 1210-11.

92. Juzgado Federal de Salta N° 1 [Juzg. Fed. Sta. N° 1] [Federal Court of Salta No. 1], 15/10/2012, “Cobos, Victor Hugo / su denuncia / apremios ilegales,” <http://www.cij.gov.ar/http://www.cij.gov.ar/d/doc-5600.pdf>.

93. *Id.* at 28.

94. *Id.* at 82.

court referred the proceedings to an ordinary court of the province of Salta.⁹⁵ From that moment on, the case split into two parts and, eventually, both reached the Federal Chamber of Cassation. First, the prosecutor's appeal of the referral of the investigation of torture against the remaining victims to an ordinary court; and second, the defendants' appeal of their conviction for torture against only one victim (V́ctor Cobos). In two separate decisions, Chamber III held that neither of those events constituted crimes against humanity and confirmed the lower court's finding that it lacked federal jurisdiction.⁹⁶ The court reversed the conviction of Levin and the other defendants.⁹⁷

The jurisdictional decision in the *Levín* case was handed down in 2014.⁹⁸ In his leading opinion, Judge Riggi relied on the Supreme Court precedent in *Derecho* to establish an "objective and general criterion"⁹⁹ to distinguish common crimes from crimes against humanity. He recalled that the Supreme Court highlighted the distinctive characteristics of crimes against humanity as such: (a) they are serious crimes listed in Article 7(1) of the Rome Statute, (b) committed as part of a widespread or systematic attack, (c) directed against a civilian population, and (d) carried out in accordance with a state policy.¹⁰⁰ Applying these guidelines to the case, Judge Riggi concluded that "the sole motive of the arrests suffered by the employees of *La Veloz del Norte* was the investigation of an [ordinary] crime"¹⁰¹ and that the torture of the detainees "aimed to obtain information on the people involved in a fraud."¹⁰² For this reason, "[these crimes] do not have the characteristics of a generalized or systematic attack, nor are they in conformity with a state policy,"¹⁰³ but rather "constituted isolated events guided by the executors' personal interest, and unrelated to the policy of repression carried out during the last military government."¹⁰⁴ In her dissenting opinion, Judge Figueroa pointed out how the detainees were interrogated for their political and union activity, one of the defining characteristics of the repressive activity of that

95. CSJN, 18/9/2018, "Levín," Fallos (2018-341-1225).

96. *Id.* at 1217.

97. Cámara Federal de Casación Penal [CFPC] [Federal Court of Appeal on Criminal Matters], 20/11/2014, "Levín / recurso de casación," sala III, No. 2495/14 (Arg.); Cámara Federal de Casación Penal [CFPC] [Federal Court of Appeal on Criminal Matters], 4/10/2017, "Levín / recurso de casación," sala III, No. 1112/17 (Arg.).

98. CFPC, 4/10/2017, "Levín," sala III, No. 1112/17.

99. *Id.* at 11.

100. *Id.* at 11-12.

101. *Id.* at 14.

102. *Id.*

103. *Id.* at 13.

104. *Id.* at 14.

time.¹⁰⁵ She concluded that the acts of torture were committed through the systematic and generalized attack against workers suspected of having any trade union activity and using the repressive apparatus (the Police of the Province of Salta) set up for those purposes.¹⁰⁶

In 2017, the Federal Chamber of Cassation III issued the Decision on the Merits of Levin's conviction for the Cobos' case.¹⁰⁷ Judge Riggi also wrote the leading opinion. He once again relied on the Supreme Court precedent in *Derecho* and concluded that the events suffered by Cobos were not committed in the context of a widespread or systematic attack, nor in accordance with the policy of the last military government.¹⁰⁸ He reiterated that the crimes were motivated by the personal interest of the perpetrators in investigating an alleged fraud against the company.¹⁰⁹ He added that although Cobos was a union representative, that fact was insufficient to contradict the conclusion since the prosecution did not prove that the actual reason for his arrest had to do with his political activity.¹¹⁰ Then, Judge Riggi highlighted that Cobos' arrest was not handled clandestinely, but on the contrary, the detention was reported to a court and a proceeding was initiated.¹¹¹ The Chamber regarded this feature as a significant difference with regard to other acts classified as crimes against humanity. In those typical cases, the events included "plural and successive criminal behaviors . . . carried out by members of the armed and security forces, among them, breaking and entering, kidnapping people from their homes or on public areas, torturing detainees, committing homicides and disappearances of massive numbers of human beings."¹¹² In short, Judge Riggi advanced two arguments for which he considered that the acts were not part of the attack. First, the perpetrators acted out of motivations linked to the investigation of a common crime, and not pursuant to the repressive policy promoted by the military government.¹¹³ Second, the *modus operandi* of the acts significantly differed from other cases considered part of the attack, particularly because they were not

105. *Id.* at 17-18 (Figuerola, J. dissenting).

106. *Id.* at 18 (Figuerola, J. dissenting).

107. Cámara Federal de Casación Penal [CFPC] [Federal Court of Appeal on Criminal Matters], 4/10/2017, "Levin / recurso de casación," sala III, No. 1112/17 (Arg.).

108. *Id.* at 23.

109. *Id.*

110. *Id.* at 18.

111. *Id.* at 25.

112. *Id.* at 27.

113. *Id.* at 23.

committed clandestinely.¹¹⁴ The Prosecution filed an appeal of the decision, which is pending before the Supreme Court.¹¹⁵

In the meantime, the Supreme Court reversed the jurisdictional decision in the *Levin* case in 2018.¹¹⁶ In a tight decision, the Court concluded that the crimes committed against *some of the victims* could be classified as crimes against humanity, and therefore, the federal court of Salta was competent to continue the proceedings.¹¹⁷ The Supreme Court rejected the assertion that the events could not be considered part of the attack carried out during the dictatorship because they originated in a complaint concerning the commission of a fraud. It cited a precedent stating that “the denunciation of crimes against property was a way of concealing other real motivations” of some arrests during the military regime.¹¹⁸ Then the Court admonished the Federal Chamber of Cassation for having conducted an overly-formalistic assessment of the evidence, ignoring “the specific circumstances” of the case, particularly that the victims also alleged they were interrogated for their political and union activities.¹¹⁹ According to the Supreme Court, the repression of trade unions was precisely one of the objectives pursued by state terrorism. The Court conducted its own analysis of various elements of proof to conclude that the policy behind the attack was not directed exclusively against subversive organizations but also included workers organized in unions.¹²⁰ The Court then held:

[W]hat is decisive is that, starting from the premise that the policy of state terrorism motivated a systematic attack that included all kinds of violations of the human rights of those who were linked to political and union activities . . . and considering that in this particular case some victims reported having been tortured to obtain information regarding their connection and that of their

114. *Id.* at 27.

115. *Causa Marcos Levín: siguen los procesamientos por torturas en la dictadura*, EL TRIBUNO (Dec. 17, 2020, 4:53 PM), <https://www.tribuno.com/salta/nota/2020-12-17-10-49-0-siguen-los-procesamientos-por-torturas-en-la-veloz-en-la-dictadura>.

116. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/9/2018, “Levin, Marcos Jacobo / imposición de tortura,” Fallos (2018-341-1207) (Arg.).

117. *Id.* at 1224-25. (The majority was confirmed by Justices Lorenzetti, Highton, and Maqueda. Justices Rozenskratz and Rosatti were absent and did not issue an opinion).

118. *Id.* at 1220-21.

119. *Id.*

120. *Id.* at 1221-22. (The Court looked at the “Plan del Ejército” [Military Plan], a secret plan set out by dictator General Videla prior to the coup of 1976, which identified the actions to be carried out in the following month, and specifically listed some political and union organizations as priority “opponents.” The Court also relied on different regulations of the military government against unions. Finally, it cited the sentence in the Trial of the Juntas, where it was proven that through internal orders, the military directed its attack on the workers of the companies, among other objectives).

acquaintances with these activities, it cannot but be concluded that these facts could constitute concrete executive acts of the attack deployed by the last military government.¹²¹

In the Supreme Court's view, if the act is directed against a person who belongs to the population selected as the target of the repressive policy, then it constitutes "an executive act of the attack," so it is undoubtedly part of it. Executive acts of the attack directly aim to comply with or advance the policy that inspires the attack. To determine the correspondence between the act and the political objectives of the attack, the Court regarded the "specific circumstances" and the "real nature of the facts."¹²² In the case, the Court considered decisive victims' testimony that they were questioned for their political and union activities during torture.¹²³ In this way, the Supreme Court intended to establish an objective test that does not depend on the motivations of individual perpetrators.

Regarding the torture of the remaining victims who did not claim to have been questioned about their union or political affiliation, the Court briefly affirmed that the investigation should also continue before the same federal court for a "more effective and efficient administration of justice."¹²⁴ In other words, the Court did not analyze whether these events were also part of the attack. This omission is striking because if it were concluded that acts not "concrete executive acts of the attack" do not form part of such attack, then they would be ordinary crimes and any criminal prosecution would be precluded by the statute of limitations. One possible interpretation is that the Court ordered the investigation to continue to determine whether in those cases the victims were also arrested and tortured because of their union or political activities. Yet another possibility is that the Court did not feel the need to address the difficult question of whether those cases still could be sufficiently connected to the attack as to be considered crimes against humanity, because it could dispose of the case in a simpler way by means of a legal *cliché* ("more effective and efficient administration of justice"). In this last scenario, the connection of these events to the attack despite their not being executive acts of it would still need to be discussed and analyzed on other grounds. In Section IV, I will advance some arguments in that direction.

The Federal Chamber of Cassation and the Supreme Court's interpretations of the relevant legal standard in the *Levin* case are not as far apart as they may appear. The difference lies more in their assessment of the

121. *Id.* at 1224.

122. *Id.* at 1221.

123. *Id.*

124. *Id.* at 1224.

evidence than in their interpretation of the nexus element of crimes against humanity. Both courts agreed that the events must follow the pattern of other acts that form the attack, but they disagreed on the extent of this coincidence and on the required showing of evidence to prove this fact. The Chamber regarded as a distinctive feature that the events were not committed clandestinely but in the context of a criminal investigation, whereas the Supreme Court pointed out that the illegal detentions under the repressive plan could be masked as arrests for common crimes. Certainly, the Supreme Court established a lower threshold regarding the *modus operandi*. It was satisfied with detentions disguised as legal proceedings for victims in other cases, but it did not deepen the analysis of other characteristics of the events to determine whether they fit the pattern of the attack.

Furthermore, the Chamber of Cassation and the Supreme Court also agreed on the need for the acts to be carried out in accordance with the state policy behind the attack. But they disagreed on two relevant points. First, in assessing the correspondence between the act and the policy, the Chamber focused on the motivations of the perpetrators and concluded that they were related to the investigation of a common crime and not to the regime's repressive plan.¹²⁵ The Chamber established a high threshold by requiring the Prosecution to prove that the actual reason for the arrest was the victim's union activity.¹²⁶ In contrast, the Supreme Court highlighted the specific circumstances reported by the victims; they had also been questioned about their political and union activities. Second, the Chamber adopted a narrow view of the scope of the repressive policy, limiting it to the persecution of subversive organizations, while the Supreme Court held that the scope of the repressive policy was broader and included the persecution of workers organized in trade unions. However, as I will later argue, the reasoning of the Supreme Court can also be criticized for being too narrow, since it is not easy to establish the precise scope of the repressive policy.

125. Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 20/11/2014, "Levin / recurso de casación," sala III, No. 2495/14 at 14 (stating "the arrests suffered by the employees of 'La Veloz del Norte' had as their sole motive the investigation of a crime of a patrimonial nature for which they had been denounced; the constraints and torture inflicted on the police station were guided to the collection of information on the people involved in the fraud maneuver, as well as to obtain confessions").

126. Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 4/10/2017, "Levin / recurso de casación," sala III, No. 1112/17 (Arg.), at 23 (stating "the mere character of a trade union representative of Cobos is not enough to frame the events . . . as crimes against humanity").

B. *The Federal Chamber of Cassation Rulings in the Saravia Case*

The Federal Chamber of Cassation has consistently refused to consider acts that injured people who were not persecuted on political grounds as part of the attack.¹²⁷ The most recent case holding this criterion is *Saravia*,¹²⁸ decided in 2019. The facts are as follows: José Salvatierra and Oscar Rodríguez were shot to death on the night of May 9, 1977, while they were driving a truck in a rural area in the province of Salta.¹²⁹ Their bodies were removed and placed side by side on a public road with a sign reading “because of thief and rustler.”¹³⁰ Andrés Del Valle Soraire and Fortunato Saravia were pointed as the authors of the crime. They were members of the “*Guardia del Monte*,” a Salta police unit formed primarily to combat cattle rustling.¹³¹ During the military regime, members of this police unit were actively engaged in the persecution of political opponents. In fact, Del Valle Soraire had been indicted for crimes against humanity in other proceedings.¹³² In this case, however, there was no evidence suggesting that the victims belonged to the targeted population of the attack, but the crime seemed to have been committed for motives unconnected to the regime’s repressive policy.

In a jurisdictional decision issued in 2009, the Supreme Court perfunctorily addressed the issue of the nexus of these acts with the attack.¹³³ Endorsing the Attorney General’s opinion, the Supreme Court held that a federal court should continue the investigation because the acts could be

127. Cámara Federal de Casación Penal [Federal Chamber of Criminal Cassation], 13/11/2009, “Taranto, Jorge Eduardo,” L.L. (2009-30) (In the *Taranto* case ruled in 2009, Federal Chamber of Cassation I analyzed whether the inhumane treatments inflicted on conscripts by commanding officers during the Islas Malvinas [Falklands] War in 1982 were part of the widespread and systematic attack against the civilian population carried out by the military government. A total of seventy-four cases were reported in which conscripts had hands and feet tied to stakes in the frozen ground for several hours; standing buried in pits that the victims themselves had to dig; severely beaten; or deliberately deprived of food. Jorge Taranto was a second lieutenant accused of five of these cases. The Chamber found that these crimes did not constitute crimes against humanity because they were not “the consequence of a specific policy or plan of attack against a population or group in the war scenario.” Judge Fégoli, in a concurring opinion, added that the victims “did not possess special characteristics nor were they subject to said suffering by virtue of any political or ideological tendency.”).

128. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 14/2/2019, “Mulhall, Carlos Alberto / recurso de casación,” sala I, No. 84/19 (Arg.).

129. *Id.* at 146-47.

130. *Id.* at 147.

131. *Id.*

132. *Id.* at 149.

133. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice] 5/5/2009, “Saravia, Fortunato / homicidio calificado y amenazas,” Fallos (2009-332-1029) (Arg.).

classified *prima facie* as crimes against humanity.¹³⁴ The Court affirmed that “[t]he act under investigation took place during the military dictatorship and that the accused was a member of a police group suspected of crimes against humanity, acting in a context of impunity that allowed him to ‘execute one and others.’”¹³⁵ The expression “execute one and others” apparently refers to political enemies and people who had no ties to political organizations targeted by the regime. This reasoning seems to be in tension with *Levin’s* focus on the policy element of the attack. However, this two-page decision is too poorly reasoned to establish a criterion on the nexus element.

In 2014, the Trial Court of Salta classified the acts as crimes against humanity and convicted Del Valle Soraire to life imprisonment.¹³⁶ The court held that the act was part of the “extermination” of individuals considered “undesirable” or “inconvenient” for the national reorganization process intended by the military regime.¹³⁷ It pointed out that the victims of state terrorism were not only political activists or subversives but also individuals without any political affiliation.¹³⁸ In addition, the Trial Court highlighted the context of impunity in which the murders were perpetrated. It found that immediately after the events, the Police of Salta conducted a summary investigation aimed to exonerate Del Valle Soraire and to plant the alternative version that the crimes had been commissioned by local farmers as revenge for the acts of cattle rustling that they had suffered from Salvatierra and Rodríguez.¹³⁹ To the court, the events were characterized by “abuse of power, secrecy, concealment of evidences, [and] obstruction of the investigation by the military and police authorities.”¹⁴⁰ Based on that, the trial court concluded that the victims were persecuted by the police not on political grounds but because “the police had complete freedom to act with impunity against people who for any reason disturbed the “imposed order.”¹⁴¹

134. *Id.* at 1030-32.

135. *Id.* at 1031.

136. Tribunal Oral en lo Criminal Federal de Salta [Federal District Criminal Court of Salta], 29/9/2014, “Soraire, Andres Del Valle / coautor del delito de homicidio agravado por haberse cometido con alevosía y con el concurso premeditado de dos o mas personas, does ehcones en concurso real, en perjuicio de José Lino Salvatierra y Oscar Ramón Rodríguez,” 3921/13 (Arg.); *see also*, *Condenaron a prisión perpetua a los seis acusados en un juicio oral en Salta por crímenes de lesa humaniad*, CENTRO DE INFORMACIÓN JUDICIAL (Sept. 29, 2014), <https://www.cij.gov.ar/nota-14139-Condernaron-a-prisi-n-perpetua-a-los-seis-acusados-en-un-juicio-oral-en-Salta-por-cr-menes-de-lesa-humanidad.html>.

137. *See* 14/2/2019, “Mulhall,” CFCP, No. 84/19 at 195-96.

138. *Id.* at 198.

139. *Id.*

140. *Id.*

141. *Id.* at 199.

The Federal Chamber of Cassation I, in a 2-1 decision, reversed Del Valle Soraire's conviction for the murders of Salvatierra and Rodríguez.¹⁴² The majority opinion by Judges Petrone and Barrotaveña establishes a restrictive criterion on the nexus element, which resembles Judge Riggi's opinion in *Levin*. It relies on two main arguments: (1) the acts do not fit in the pattern of the attack and (2) the victims were not killed for political reasons. First, the Chamber cited the famous ruling in the *Trial of the Juntas*¹⁴³ to describe the common features of the crimes committed during the military regime. In short, it affirmed the victims were kidnapped at night in their homes, immediately taken to clandestine detention centers where they were tortured and questioned about their political activities, murdered and disappeared.¹⁴⁴ Then, the Chamber concluded that "none of this occurred in the event that concern us"¹⁴⁵ in which "the victims were murdered while they were traveling in a truck"¹⁴⁶ and abandoned on the side of the road with a sign reading "because of thief and rustler."¹⁴⁷ It added that "the death of the victims was not handled clandestinely."¹⁴⁸ This conclusion deserves criticism. The majority's narrow description of the attack is ill grounded. It relies on one precedent from 1985 and does not take into account the evidence showing that the attack included several cases of murders in public areas.¹⁴⁹ Besides, the quote from the *Trial of the Juntas* judgment is misleading because it does not actually describe the attack but the "systematic practice of kidnapping of people with common characteristics"¹⁵⁰ found at that particular trial.¹⁵¹ Finally, the majority disregarded the characteristics of the crimes that did fit into the pattern of the attack, in particular, that they were committed under a cloak of impunity by

142. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 14/2/2019, "Mulhall, Carlos Alberto / recurso de casación," sala I, No. 84/19 (Arg.).

143. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 9/12/1985, "Videla, Jorge Rafael / homicidio, privación ilegal de la libertad y tormentos," (1985-13) (Arg.).

144. 14/2/2019, "Mulhall," CFCP, No. 84/19 at 350.

145. *Id.* at 351.

146. *Id.*

147. *Id.*

148. *Id.* at 352.

149. Secretaría de Derechos Humanos de la Nación [Human Rights Secretariat], Registro unificado de víctimas del terrorismo de Estado, *Anexo IV: Cuadros estadísticos sobre víctimas y hechos del accionar represivo ilegal del Estado* (2015), https://www.argentina.gob.ar/sites/default/files/5_anexo_iv_cuadros_estad_sticos-investigacion_ruvte-ilid.pdf (showing that 18.4% of victims of state terrorism were murdered and of these cases, 62.2% were committed in public spaces.).

150. CFCP, 9/12/1985, "Videla," (1985-13).

151. *Id.* In the *Trial of the Juntas* the Prosecution filed 709 cases and the Court examined only 280. *Id.*

members of security forces who formed part of the criminal apparatus that carried out the attack.

The majority's second argument is straightforward:

Nor was any element mentioned that would make it possible to affirm that the victims were politically persecuted either for partisan, union, religious, student or related reasons. On the contrary, the evidence gathered points to a particular motive held by the authors, linked to an assignment to two policemen who served in the so-called "Guardia del Monte" to repress behaviors linked to cattle rustling and, therefore, detached from the purpose of the systematic attack.¹⁵²

Judges Petrone and Barrotaveña openly required that the victims be persecuted on political grounds to consider that their murders formed part of the attack.¹⁵³ In support of this assertion, they narrowly read the Supreme Court's holding in *Levin* as requiring that victims "were linked to political, trade union and guild activities."¹⁵⁴ Next, they presented a sort of parade of the horrible arguing that the criterion followed by the Trial Court "would imply expanding the category of crimes against humanity to any act committed by a member of the security forces during the last military dictatorship, that is, between 1976 and 1983, regardless of the reasons that guided their actions."¹⁵⁵ In this way, the majority turned to the perpetrators' motivations to determine the link between the act and the attack.¹⁵⁶

C. *The Federal Chamber of Cassation ruling in the Molina Case*

The discussion about the nexus also arose regarding acts that exceeded the repressive plan, such as sexual assaults against people held captive in clandestine detention centers. Since the repressive plan did not include raping, the question was whether those sexual assaults committed at the initiative of the perpetrators could still be considered as part of the attack. The Federal Chamber of Cassation IV addressed this issue in the *Molina* case decided in 2012.¹⁵⁷ Gregorio Molina was an air force member in charge of the clandestine detention center known as "La Cueva" [the cave], in the province of Buenos Aires.¹⁵⁸ In 2010 he was sentenced to life imprisonment

152. 14/2/2019, "Mulhall," CFCP, No. 84/19 at 352.

153. *Id.* at 353.

154. *Id.* (citing CSJN, 18/9/2019, "Levin," Fallos (2018-341-1207)).

155. *Id.* at 354.

156. The Prosecution filed an extraordinary appeal against this ruling which is pending at the Supreme Court (CSJN, 18/9/2019, "Levin," Fallos (2018-341-1207)).

157. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 17/2/2012, "Molina Gregorio Rafael / recurso de Casación," sala IV, No. 162/12 (Arg.).

158. *Id.* at 33.

on multiple charges of illegal deprivation of liberty, torture, murder, and rape.¹⁵⁹ This was the first conviction for sexual aggressions during the dictatorship. The Defense argued that the rapes were not crimes against humanity because they were not part of the widespread and systematic attack but a “spontaneous and autonomous action by the aggressor.”¹⁶⁰

The Chamber rejected this claim and confirmed the rapes did form part of the attack. However, the members of the Chamber presented notably different grounds to reach this conclusion. Judge Borinsky’s leading opinion recalled that, according to the repressive plan, military commanders had a wide discretion to execute the attack in the geographical areas under their control. Thus, the key was to determine “whether in the clandestine detention center known as ‘La Cueva’ . . . sexual assaults were a common practice in order to be considered a component of the widespread attack on the population.”¹⁶¹ However, inasmuch as this test requires that the rapes attributed to Molina were themselves widespread, it confuses the attributes of the attack with the attributes of the specific punishable acts. It is only the attack that must be widespread or systematic; individual acts need only be part of that broader context, and there is no requirement that they share those characteristics as well.¹⁶²

Judge Hornos’ concurrent opinion followed a different approach. First, he rejected the claim that the defendant’s individual conduct must be widespread, habitual or large in scale to constitute a crime against humanity.¹⁶³ He correctly noted that the widespread or systematic nature corresponds only to the element “attack on the civilian population” and not to individual acts.¹⁶⁴ Therefore, it was irrelevant whether the sexual assaults attributed to the accused were widespread even within the detention center he ran.¹⁶⁵ Then, Judge Hornos articulated the following set of criteria or “conditions” to establish when an individual act is part of an attack:

159. *Id.* at 34.

160. *See id.* at 1-2.

161. *Id.* at 21.

162. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 417; CRYER, *supra* note 29, at 199 (“The rigorous requirements relating to the attack must be distinguished from the requirements relating to the accused’s conduct. With respect to the individual accused, all that is required is that the accused committed a prohibited act, that the act objectively falls within the broader attack, and that the accused was aware of this broader context. Only the attack, not the acts of the individual accused, needs to be widespread or systematic. A single act by the accused may constitute a crime against humanity if it forms part of the attack.”); CFCP, 17/2/2012, “Molina Gregorio Rafael,” sala IV, No. 162/12 (Hornos, J. concurring).

163. *Id.* at 66-67 (Hornos, J. concurring).

164. *Id.* (Hornos, J. concurring).

165. *Id.* at 73 (Hornos, J. concurring) (stating “whether or not [the facts attributed to Molina] have been carried out ‘on a large scale,’ ‘in a generalized or systematic way,’ ‘regularly,’ or any

(i) The act, at the time of its commission, was recognized by the international community as one of those which could form part of a widespread or systematic attack against civilians. (ii) The act occurred concomitantly in space and time to the attack. (iii) The aggressor was a member or acted under the acquiescence of the organized apparatus of power which collectively perpetrated the attack. (iv) The agent carried out the act, at least in part, motivated by the guarantee of impunity that being part (or having the acquiescence) of the apparatus of power responsible for the attack. Conversely, it would be unreasonable to assume that the aggressor acted as he did, had it not been for that guarantee of impunity. (v) The victim (or victims) of the misconduct belongs to the set of victims against whom the attack was directed (a set whose definition must be sensitive to the discretion available to the agent to select the victims: at greater discretion, the more difficult it will be to object that a particular victim was not part of that set).¹⁶⁶

The first criterion aims to exclude acts of insufficient entity to be crimes against humanity. However, the inclusion of this criterion for the assessment of the nexus element is misleading. As explained above, the structure of crimes against humanity consists of two distinguishable parts: a catalog of inhumane acts, such as murder, torture, or enslavement, and a broader context of an attack on civilians. The nexus element is what connects individual behaviors with that context. Then, if an act is not included in the catalog of possible crimes against humanity, the analysis of the nexus would be redundant because the act would have already fallen outside the category.

The second criterion focuses on space and time coincidence between the act and the attack, but it is rather loose and provides little guidance in borderline cases. The act is not required to be committed during the attack, and events that occurred before or after the main attack or in a different location may still form part of the attack if they are sufficiently connected.¹⁶⁷ Therefore, this criterion only excludes acts that occur in such a remote time or place that it would be unreasonable to conclude that they were part of the attack.

The third and fourth criteria are so closely related that they converge into one—because the first is a condition of the second. They both focus on whether the attack increased the dangerousness of the aggressor's conduct. In Judge Hornos' view, the perpetrator does not need to share the objectives or purpose of the global attack but must know that their acts are committed

other equivalent expression, does not constitute any obstacle to their classification as crimes against humanity").

166. *Id.* at 75-76 (Hornos, J. concurring).

167. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 100.

in the context of the attack, and, for that reason, they are more likely to go unpunished. This idea is based on a test developed by Ambos and Wirth.

If the dangerousness of an individual criminal is increased because his or her conduct occurs in such a context the act must be regarded objectively as a part of the attack. . . . Thus, an adequate test to determine whether a certain act was part of the attack is to ask whether the act would have been less dangerous for the victim if the attack and the policy had not existed.¹⁶⁸

But while Ambos and Wirth present this test as the only criterion to determine the nexus between the act and the attack, Judge Hornos includes it in a set of five cumulative conditions.

Finally, the fifth criterion requires the victim of the specific act to be part of the civilian population against whom the attack was directed. In other words, it excludes acts that were directed against people who did not belong to the attacked population and those committed for purely random reasons. Judge Hornos carefully avoids relating this criterion with the repressive policy behind the attack. Indeed, based on the ICTY case law, he expressly rejects the existence of the policy element.¹⁶⁹ However, without resorting to the policy, it is impossible to determine the scope of the attack and against whom it was directed. The policy element connects a multiplicity of acts with the designs of a higher entity, be it a State or an organization, and turns them into an attack.¹⁷⁰ This situation is particularly true in Argentina, where human rights violations were committed over almost a decade and against a wide variety of victims. Despite Judge Hornos' refusal, this criterion ultimately requires determining if the victim was targeted for the same political reasons that inspired the attack.

Applying these criteria to the case, Judge Hornos readily concluded that the acts were part of the attack.¹⁷¹ In particular, he considered that "Molina benefited from the total impunity he enjoyed as manager of 'La Cueva' to commit the sexual abuses."¹⁷² Further, he concluded that it would be "unreasonable to maintain that Molina would have acted as he did if he had not been in that situation and [took] advantage of the position of power he held."¹⁷³ Regarding the characteristic of the victims as members of the attacked population, he affirmed that it was clear because "they were first abducted and held in a detention center for the same reasons that, more

168. Ambos & Wirth, *supra* note 24, at 36.

169. CFCP, 17/2/2012, "Molina," No. 162/12, at 66-67 (Hornos, J. concurring).

170. Robinson, *supra* note 24, at 3-4.

171. CFCP, 17/2/2012, "Molina," No. 162/12, at 78-84 (Hornos, J. concurring).

172. *Id.*

173. *Id.*

generally, the perpetrators of the attack selected their victims.”¹⁷⁴ Although Judge Hornos avoided mentioning it, his reasoning was related to the policy of illegal repression promoted by the military regime.¹⁷⁵

V. CRITICAL REMARKS TO THE ARGENTINE DOMINANT CRITERION ON THE NEXUS ELEMENT

The dominant criterion on the nexus element in Argentine case law focuses on the conformity of the individual act with the policy behind the attack. In determining the nexus, most courts give decisive value to whether the specific act was committed pursuant to, or in furtherance of, the policy of extermination of “subversives” (those that inspired the attack carried out by the military government). In assessing the nexus, the courts first check if the victim had any political affiliation with the groups persecuted by the regime and, based on that, they establish if the victim belonged to the population against which the attack was directed. When the victim belonged to the targeted population, courts tend to conclude that the act was committed as part of the attack, regardless of other circumstances that may differ from typical acts within the attack (e.g., the specific act did not follow the pattern of the attack or exceeded the plan). To the contrary, when the victim did not belong to the targeted population and the act seemed to have been committed for purposes other than the repression of political opponents, most courts consider that the acts constitute ordinary crimes. Below I will make three critical remarks to this criterion.

First, this analysis of the nexus element is not consistent with the current development of the law of crimes against humanity. First, it conflates the characteristics of the attack with those of the individual act. It is the attack that must be committed pursuant to or in furtherance of a policy of a state or an organization. The individual act must be part of that attack, but it must not necessarily be committed to advance the policy. This has been clearly established by ICTY Appeals Chamber in *Kunarac*:

174. *Id.*

175. Judge Hornos applied the criteria developed in *Molina* in the *Liendo Roca* case decided in 2012. Arturo Liendo Roca was a judge in the province of Santiago del Estero between 1975 and 1976, accused of having neglected the investigation of tortures and inhumane treatment of political prisoners. Judge Hornos concluded that these acts formed part of the attack. In particular, he considered that the victims belonged to the group of victims targeted for the attack because they were illegally detained in inhumane conditions for the same motives that the perpetrators of the attack selected their victims, that is, for being considered “subversives.” Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 1/8/2012, “Liendo Roca, Arturo / recurso de casación,” sala IV No. 1242/12 (Arg.).

[T]he accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.¹⁷⁶

Furthermore, the dominant criterion ends up demanding that the punishable act be committed on political grounds, which is a discriminatory element not required by the definition of crimes against humanity. As explained above, in assessing the nexus, most courts identify the targeted population based on the regime's policy of illegal repression and check if the victim of the act belongs to that population. This equates to requiring that the victims be persecuted on political grounds. This is evident in the *Saravia*¹⁷⁷ and the *Taranto* cases.¹⁷⁸ In those cases, the Federal Chamber of Cassation expressly considered that the victims did not have any connection with subversive groups and that they were not killed or tortured for political reasons.¹⁷⁹ Currently, it is beyond doubt that crimes against humanity are not required to be committed on discriminatory grounds or with a discriminatory intent, except for the crimes of persecution.¹⁸⁰ This is not to say that these crimes are directed against randomly selected groups of people. The policy that ties the different acts and turns them into an attack can be inspired by different political, religious, ethnic, or other discriminatory motives. Identifying these motives may serve to prove the policy of committing an attack. Moreover, proving that a particular act was committed to further that policy will be useful to show that the act was part of the attack, but that does not mean that this showing of proof is a necessary requirement. Argentine courts have gone too far in demanding that individual acts be committed against political enemies to consider them part of the attack.

Second, although Argentine courts have used this criterion as a bright-line rule, its application is not straightforward. Determining the precise scope of the policy on which the attack was based is a burdensome task and, in many circumstances, maybe impossible. As noted by the ICC Trial Court in *Katanga*, it is rare that "a State or organization seeking to encourage an attack against a civilian population might adopt and disseminate a pre-established

176. Prosecutor v. Kunarac, Case No. IT-96-23-T& IT-96-23/1-A, Appeals Judgement, ¶ 103 (June 12, 2002) (footnote omitted), <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

177. See *supra* Section B.

178. See *supra* note 127.

179. *Id.*; CSJN, 5/5/2009, "Saravia," Fallos (2009-332-1033).

180. Rome Statute, *supra* note 1; deGuzman, *supra* note 21, at 353; Robinson, *supra* note at 12. 24,

design or plan to that effect.”¹⁸¹ Particularly in cases such as those in Argentina, where the attack developed over several years and was redefined as it was carried out, it is difficult to delimit against whom the attack was directed.¹⁸² In fact, courts applying this criterion have held different views on the scope of the attack. In *Levin*, the Federal Chamber of Cassation understood that the attack was directed against “subversives,” whereas the Supreme Court affirmed that it also targeted unionized workers.¹⁸³ However, even the concept of “subversive” is too loose to delimit a population. As the *Saravia* trial court did, it may be interpreted to include any person “inconvenient” or “undesirable” to the regime.¹⁸⁴

Besides, this criterion is not as objective as the Supreme Court intended. In certain situations, it is impossible to determine if the act fits into the policy without inquiring into the motives of the perpetrators. Several victims of state terrorism had no connection with subversive or political organizations of any kind, but they were kidnapped and tortured because the perpetrators mistakenly attributed these links to them.¹⁸⁵ If a court only looks at the exterior features of these events, it might conclude that the victims did not belong to the targeted population and that these crimes did not form part of the attack, which is clearly not the case. However, a nexus criterion that depends on the perpetrators’ grounds, motives, or intents is problematic because it requires proof of mental elements that exceed the *mens rea* requirement of crimes against humanity. Since the Nuremberg trials, it has been clearly established that the motive of the aggressor for committing the specific act is irrelevant and that a crime against humanity may be committed for purely personal reasons.¹⁸⁶

Third, the dominant criterion gives excessive weight to the policy and does not consider other circumstances that may also show the link between the act and the attack. For instance, in the *Saravia* case discussed above, the

181. *Katanga*, Case No. ICC-01/04-01/07, ¶ 1109.

182. Gen. Ibérico Saint Jean’s infamous quote, pronounced in a speech as Governor of Buenos Aires on May 26, 1997, illustrates this point: “First we will kill all the subversives; then we will kill their collaborators; then . . . their sympathizers; then . . . those who remain indifferent; and finally we will kill the timid.” See Jerry W. Knudson, *Veil of Silence: The Argentine Press and the Dirty War, 1976-1983*, 24 *LATIN AM. PERSP.* 93, 93 (1997).

183. CFPC, 4/10/2017, “Levin,” No. 1112/17.

184. *Id.*

185. For instance, Eduardo Covarrubias was a psychiatric member of the FAP (Federación Argentina de Psiquiatría) [Argentine Federation of Psychiatry]. On April 17, 1977, he and his wife were kidnaped and tortured because the executors of the attack wrongfully assumed that he was affiliated with the “Fuerzas Armadas Peronistas” [Peronist Armed Forces]. Tribunal Oral en lo Criminal Federal Nro. 1 de San Martín [Federal District Court No. 1 for San Martín], 18/05/2010, “Riveros, Santiago Omar / privación ilegal de la libertad, tormento, etc.” (Arg.).

186. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 418; CRYER, *supra* note 29, at 243-44.

Chamber disregarded that the murders were committed by members of the criminal apparatus that carried out the attack and that, after the events, the authorities actively obstructed the investigation.¹⁸⁷ Unlike most Argentine courts, the ICC Trial Chamber in *Katanga*¹⁸⁸ made clear that in determining whether an act forms part of the attack, not only is the policy relevant, but also other circumstances, such as the pattern of crimes, the types of victims, and so on.

In my view, a useful criterion to assess the nexus is to inquire whether the perpetrators committed the specific acts under a cloak of impunity, because of their link with the state or organization promoting or tolerating the attack.¹⁸⁹ This circumstance will be clear when there are concrete actions to ensure impunity, such as the destruction of evidence.¹⁹⁰ But in most cases, it may be inferred from the authorities' unwillingness to conduct a serious investigation. Likewise, it could be deduced from the characteristics of the events and the totality of the circumstances when it is not reasonable to assume that the author would have acted as they did, but the *de facto* immunity enjoyed.

According to this criterion, not only would acts that directly advance the policy fall within the attack, but also those foreseeable and tolerated during events. Rarely will a widespread or systematic attack consist solely of acts aimed at complying with the policy of the state or the organization launching the attack. Large-scale attacks on civilians generally include excesses and opportunistic acts. The ICC Trial Chamber recognized this situation in *Bemba*.

[T]he course of conduct must reflect a link to the State or organizational policy, in order to exclude those acts which are perpetrated by isolated and uncoordinated individuals acting randomly on their own. This is satisfied where a perpetrator deliberately acts to further the policy but *may also be satisfied by a perpetrator engaging in conduct envisaged by the policy*, and with knowledge thereof.¹⁹¹

Thus, the dominant criterion fails when it excludes from the attack those acts tolerated although not directly intended. For instance, in the *Saravia*

187. See *supra* Section B.

188. *Katanga*, Case No. ICC-01/04-01/07.

189. This criterion is in line with the increased risk test developed by Ambos and Wirth, but in my opinion, it may be more precise and easier to apply in concrete cases. See Ambos & Wirth, *supra* note 24.

190. This was the case in *Saravia* as correctly noted by the Trial Chamber. See Procuración General de la Nación [National Prosecutor's Office], 10/6/2008, "Saravia, Fortunato / homicidio calificado," <http://www.cij.gov.ar/http://www.cij.gov.ar/d/doc-526.pdf>.

191. *Bemba*, Case No. ICC-01/05-01/08-3343, ¶ 161 (emphasis added) (footnotes omitted).

case,¹⁹² it is likely that the perpetrators did not kill the victims to advance the regime's repressive policy. It is more likely that they were linked to the criminal apparatus set up to carry out the attack and knew that they would not be prosecuted. Nevertheless, these crimes were sufficiently connected to the authority encouraging the attack as to regard them as isolated or random.

The alternative criterion I suggest places the focus on the impunity guaranteed to perpetrators; this is consistent with the *raison d'être* of crimes against humanity. As Dubler and Kalyk explain, "the concept of 'crimes against humanity' . . . is not just about describing evil conduct, it is equally about piercing the veil of state sovereignty and invoking an international criminal jurisdiction because the perpetrators enjoy impunity due to state complicity, impotence or indifference."¹⁹³ The Supreme Court for the British Zone advanced this idea in *Weller*,¹⁹⁴ a case handed down in 1948. This case concerned three German soldiers who, acting in a private capacity and, on their own initiative, committed atrocities against Jewish civilians. The Supreme Court held that crimes against humanity do not only include "actions which are ordered and approved by the holders of hegemony" but also:

[W]hen those actions can only be explained by the atmosphere and conditions created by the authorities in power. The trial court was [thus] wrong when it attached decisive value to the fact that the accused after his action was 'rebuked' and that even the Gestapo disapproved of the excess as an isolated infringement. That this action nevertheless fitted into the persecution of Jews affected by the State and the party, *is shown by the fact that the accused . . . was not held criminally responsible in proportion to the gravity of his guilt.*¹⁹⁵

Therefore, the fact that the aggressor acted with a guarantee of impunity is a clear indicium that his or her act was part of the attack, because even if not aimed at advancing the policy, it was at least tolerated by the authority backing the attack.

192. See CSJN, 5/5/2009, "Saravia," Fallos (2009-332-1029).

193. ROBERT DUBLER SC & MATTHEW KALYK, CRIMES AGAINST HUMANITY IN THE 21ST CENTURY: LAW, PRACTICE, AND THREATS TO INTERNATIONAL PEACE AND SECURITY 34 (2018).

¹⁹⁴ See 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE IN STRAFSACHEN [Judgements of the Supreme Court for the British Zone] 206-07 (1948-1949), translated in Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 555 (Int'l. Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

195. *Id.* n. 816 (emphasis added).

VI. CONCLUSION

The most evident conclusion about the nexus element is its significance. The Argentine cases analyzed show that, in certain situations, the discussion about whether an act constitutes a crime against humanity, or a common crime is reduced to determining whether it was indeed committed as part of an attack. Depending on what is decided on this issue, a defendant may be considered a criminal against humanity and sentenced to severe penalties, or a common offender and may go unpunished due to the application of statutory limitations.

The importance of the nexus element has not been completely noted in international jurisprudence, probably due to the type of cases dealt with in international tribunals. However, in the last decades, more and more decisions for this type of crime have been carried out in domestic courts, particularly in Latin America. In these contexts, discussions about the nexus element of crimes against humanity will likely become more frequent.

This discussion is relevant for the interests at stake and the implications of the possible outcomes. In processes before international courts, states have a stake in their sovereignty, while in trials before domestic courts, other interests take center stage. On the one hand, the principle of *nullum crime nulla poena sine lege*, which mandates a strict interpretation of criminal norms, prevents an overinclusive construction of the category of crimes against humanity. On the other hand, the interest of the victims and humanity, that criminals against humanity be held accountable, is a form of rehabilitation for the victims and a guarantee that atrocities will not be repeated. An underinclusive construction of crimes against humanity could curtail this interest. Thus, a proper definition of the nexus and the elaboration of clear criteria to establish when an individual act forms part of an attack is both crucial and urgent.

Argentine courts have done a good job at identifying this problem, but less so in developing the criteria to assess the link between the act and the attack. Although the cases analyzed have nuances, they all give decisive weight to the correspondence between the act and the policy that inspired the attack. In the end, this implies checking whether the victim belonged to the political group persecuted by the regime. Not only is this criterion contrary to the current law of crimes against humanity, but it also leads to undesirable results. It rules out of the scope of the attack, and from the category of crimes against humanity, acts committed under the protection of the state.

Undoubtedly, the act was committed pursuant to or in furtherance of the policy underlying the attack and is a clear sign that it was part thereof. However, this does not mean it is the only relevant circumstance. An adequate analysis of the nexus should also consider whether the perpetrator

acted under a cloak of impunity due to the general context of widespread or systematic abuses. Inhumane acts tolerated by the state or the organization promoting an attack on civilians are not isolated and unconnected crimes. Rather, they are linked to a higher authority and should be considered crimes against humanity to prevent their perpetrators from benefiting from *de facto* immunity.

MINDING THE IMPUNITY GAP IN DOMESTIC PROSECUTIONS OF CRIMES AGAINST HUMANITY UNDER CUSTOMARY INTERNATIONAL LAW: REFLECTIONS ON MARIANO GAITÁN'S ANALYSIS OF ARGENTINE JURISPRUDENCE

Melanie Partow*

Professor Gaitán's paper provides an excellent contribution from the Argentine legal perspective to existing scholarship on the definition of "crimes against humanity."¹ The Argentine example demonstrates some of the difficulties encountered during the truth and justice process when domestic prosecutions of serious human rights violations apply yet-to-be codified standards of international criminal law. In particular, Gaitán highlights the lack of uniform criteria used by Argentine courts in "crimes against humanity" prosecutions involving atypical links between the criminal conduct and the underlying widespread or systematic attack.² Gaitán argues that the Argentine courts place too much emphasis on analyzing the nexus between the underlying act and the state or organizational policy, and notes that the victim's membership in the targeted population should not be the sole factor used to determine whether the act constitutes a crime against humanity.³ Rather, Gaitán suggests that courts take a flexible approach and

* M.St., International Human Rights Law, University of Oxford. J.D., Southwestern Law School. Ms. Partow is a civil rights and international human rights lawyer in Los Angeles, where her practice focuses on civil prosecutions of extrajudicial killing by law enforcement. She is a Professor in the UC Irvine School of Law Civil Rights Litigation Clinic. She also represents one of the capitally-charged Guantanamo Bay detainees in the 9/11 case pending before the U.S. Military Commissions.

1. Mariano Gaitán, *The Nexus Element in the Definition of Crimes Against Humanity: An Analysis of Argentine Jurisprudence*, 27 SW. J. INT'L L. 265 (2021).

2. *Id.*

3. *Id.* at 30.

consider multiple factors, some of which may be more relevant to the analysis depending on the facts of the case.⁴ Through his own experience and knowledge of how this international crime is adjudicated in the Argentine courts, Gaitán echoes the sentiments of eminent scholars who advocate for a liberal interpretation of the crime's relevant provisions,⁵ so as to lend credence to "the overall trend in international humanitarian law toward expanding the scope of protection of the basic values of human dignity."⁶

Professor Gaitán's article highlights a tendency by legal practitioners, jurists, and scholars, both in the United States and abroad, to confine themselves to the elements of the crimes set forth in the Rome Statute, based on the misperception that the Statute constitutes customary international law. This tendency understandably occurs, in part, as a celebration of what the Rome Statute represents. But limiting how a sovereign state applies a principle of international criminal law in its own domestic courts to the verbatim definition of the crime as set forth in the Rome Statute is bound to yield unintended consequences and it may even limit that state's ability to adjudicate international human rights violations. Professor Gaitán depicts some of those problems in the Argentine experience.

In this short comment, I hope to explain why domestic courts should not consider themselves bound by customary international law to apply the specific language of the definitions of the crimes in the Rome Statute, particularly when doing so fails to meet the needs or fit the facts and circumstances of human rights violations that would otherwise go unpunished. I also hope to provide further support for Professor Gaitán's criticism that the application of a more flexible and multi-factored analysis of the elements of "crimes against humanity" will better bridge the impunity gap and further the rule of law.⁷ The prohibition of crimes against humanity is a complex and multi-layered subject and I purposefully focus on the policy element set forth in Article 7(2)(a) of the Rome Statute,⁸ since this element is also the focus of Professor Gaitán's remarks.

I appreciate why practitioners and courts look to the Rome Statute as a source of customary international law. Emerging principles of customary international law are hard to identify. Unless an international consensus as to the status of a norm is already memorialized by way of judicial opinion,

4. *Id.*

5. ANTONIO CASSESE, *Crimes Against Humanity: Comments on Some Problematic Aspects*, in *THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS* 463, 471 (2008).

6. *Id.* at 470.

7. Gaitán, *supra* note 1.

8. Rome Statute of the International Criminal Court, art. 7(2)(a), July 17, 1988, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

scholarly writing, multilateral treaty, or otherwise,⁹ identifying a principle of customary international law typically involves surveying the practices of a sufficient number of states, identifying a pattern of consistent and uniform conduct,¹⁰ and proving that the conduct occurs under the *opinio juris* obligation.¹¹ Given the number of states in the international community, the varying forms of legal systems, the number of judiciaries that are politicized, corrupt, or that lack independence, and the lack of access to national records, this is a daunting task. Identifying a true principle of customary international law is even more difficult considering that international consensus has historically excluded the jurisprudential principles and practices of Muslim, African, Asian, and other regimes outside Western Europe and the United States, as well as those nation-states who persistently object to the liberal international legal order.

Also, it typically takes time before a principle of customary international law becomes “settled practice.”¹² The twentieth century saw grave events that significantly impacted the sovereignty and conscience of a handful of the then most economically developed states, such as the abuses of force and violations of human dignity committed by nation-states during, among others, the First and Second World Wars, and the Bosnian and Rwandan genocides. Events such as these prompted a proliferation of multilateral efforts to codify rules that hoped to prevent such abuses of power in the future. However, in the absence of an event that successfully sparks a call to action by those few states who are privileged to act with strong influence over the international community, the natural progression of a legal principle to the customary international law status is generally considered a slow one.¹³

I acknowledge the above difficulties in identifying emerging principles of customary international law to establish that these attributes serve a purpose. They reflect the desire to preserve an important balance between supranational legal institutions and state sovereignty. It is important to remember that a successfully negotiated multilateral treaty, even a law-

9. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 8-10 (6th ed. 2003) (discussing International Court of Justice jurisprudence in which the Court has accepted varying forms of proof of general state practice under the *opinio juris* obligation).

10. MALCOLM N. SHAW, *INTERNATIONAL LAW* 75-76 (6th ed. 2008).

11. *See id.* at 75 (tracing the origin of *opinio juris sive necessitatis* to “the French writer François Géný as an attempt to differentiate legal custom from mere social usage.”); BROWNLIE, *supra* note 7, at 8 (noting the minority of scholars who do not consider *opinio juris* a required element when identifying a principle of customary international law).

12. *See* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 207 (June 27).

13. *But see* *North Sea Continental Shelf Cases, (Ger. v. Den.)*, Judgement, 1969 I.C.J. 3, ¶ 74 (Feb. 20); SHAW, *supra* note 10, at 76-78 (providing cases that show that “[d]uration is . . . not the most important component of state practice.”).

making treaty such as the Rome Statute,¹⁴ constitutes a source of international law that is distinct from customary international law,¹⁵ particularly when the treaty is not widely ratified. In addition, it is important to note that some states, scholars, and jurists take the position that customary international law is distinct from international humanitarian law and human rights law. The distinction is that customary international law serves as a reference for assessing the content and applicability of international humanitarian law and human rights instruments.¹⁶

In the context of the definition of crimes against humanity as set forth in the Rome Statute, the potential to conflate its terms with principles of customary international law is understandable. Western states made accelerated efforts over the last century to codify normative humanitarian principles into law,¹⁷ discussions of which date back to early centuries B.C.¹⁸ One result is that “crimes against humanity” as an offense has reached *jus cogens* status and its prevention and punishment is an obligation *erga omnes*.¹⁹ Moreover, the proposition that the general prohibition against acts that constitute “crimes against humanity” is a principle of customary international law is beyond reproach.²⁰ Furthermore, the adoption of the Rome Statute was an extraordinary accomplishment by state delegations, civil society, and international law scholars, that was decades in the making.²¹ Referring generally to the Rome Statute as customary international law avoids the weighty endeavor of identifying an emerging principle of customary international law by more traditional means. However, the desire

14. See generally, BROWNLIE, *supra* note 9, at 13-14 (discussing the attributes and obligations created by law-making treaties and the relationship with customary international law).

15. Vienna Convention on the Law of Treaties art. 38, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; BROWNLIE, *supra* note 9, at 14 (“even if norms of treaty origin crystallize as new principles or rules of customary law, the customary norms retain a separate identity even if the two norms appear identical in content”).

16. BROWNLIE, *supra* note 9 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 86 (July 9)).

17. See SHAW, *supra* note 10, at 265-67; HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 68-72 (1968).

18. See Prosecutor v. Tadić, Case No. IT-94-1-A, Separate Opinion of Judge Shahabuddeen, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

19. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 32, ¶ 2 (Feb. 5) (referring to obligations *erga omnes* in contemporary international law). See generally Michael P. Sharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 68, 80 n.67 (2001).

20. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 623 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 58 (Mar. 2, 2009).

21. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 391 n.37, 395 (2000) (commenting on Richard Falk’s reference to the creation of the ICC as a “Grotian moment”).

to identify *the precise elements* that comprise the definition of “crimes against humanity” is a fairly recent development.²² Thus, I hesitate to conclude unequivocally that the version of the definition that exists in the Rome Statute necessarily constitutes customary international law.

Therefore, I echo my concern that judges and practitioners both in the United States and abroad continue to refer generally to the Rome Statute as a source of codified customary international law. First, as states undertake the process of drafting any multilateral treaty, even a law-making treaty, such as the statute of the International Criminal Court (ICC), the negotiations over language that occur often reflect efforts to reach a political compromise.²³ Thus, during the Rome Conference and subsequent sessions of the Assembly of States Parties, the process by which a consensus was reached over what constituted the elements of a crime was likely less indicative of *opinio juris* and more indicative of concessions that were required in order to reach the agreement necessary to finalize the statute.

Second, as Professor Sadat recalls, while the criminality of the conduct enumerated in Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) of the Rome Statute reflects customary international law,²⁴ the specific elements set forth in the Rome Statute for each crime do not necessarily reflect customary international law.²⁵ The elements of the crimes were determined by a legislative process that only required a two-thirds majority of the Assembly members for adoption.²⁶ Further, “amendments to the Elements of Crimes may be proposed by [a]ny State Party, the judges acting by absolute majority, or the Prosecutor,”²⁷ irrespective of whether the proposed amendment reflects customary international law.

Third, the plain language of the Rome Statute itself states that its statutory provisions are distinct from customary international law and are not intended to alter existing principles of international law.²⁸ “[E]ach crime is defined ‘[f]or the purpose of th[e] Statute’”²⁹ only. “[T]he Statute does not, by its terms, purport to be a codification of international criminal or international humanitarian law.”³⁰ As Professor Sadat recalls, “the intent was

22. *Id.* at 422 (noting that “crimes against humanity, [are] not yet precisely defined in international law”).

23. *See id.* at 425.

24. Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2, 7 n.19 (1999).

25. Sadat & Carden, *supra* note 21, at 406–07.

26. Rome Statute, *supra* note 8, art. 9; *id.* at 406–09.

27. Rome Statute, *supra* note 8, art. 9.

28. *See id.* art. 10.

29. Sadat & Carden, *supra* note 21, at 422.

30. *Id.*

to prevent the Statute's restrictive definitions from creeping into customary international law."³¹

To be clear, this is not to say that the Rome Statute and ICC jurisprudence should be ignored as a reference or source of international criminal law, that there are no principles of customary international law interwoven among its articles, or that domestic courts should refrain from looking to the Rome Statute for guidance when enacting laws that bridge the impunity gap³² or provide domestic remedies for human rights violations.³³ The Rome Statute's contribution to international criminal law cannot be understated. However, the practical reality is that ending impunity for *jus cogens* violations requires national jurisdictions to prosecute offenders where the ICC cannot.³⁴ It would therefore be counterproductive to this endeavor were the Rome Statute to impose a restrictive definition of international crimes that prevented domestic courts from effectively applying principles of international criminal law.

Turning now to the definition of "crimes against humanity" in the Rome Statute, Professor Sadat beautifully summarizes the challenges presented at Rome to reaching a consensus on the elements,

Defining crimes against humanity presented one of the most difficult challenges at Rome, for no accepted definition existed, either as a matter of treaty or customary international law. Indeed, of the several definitions that have been "promulgated," no two are alike. The Tokyo Charter and Control Council Law No. 10 differed slightly from the Nuremberg version; the ICTY provision on crimes against humanity differs from all of its predecessors; and the ICTR version is different from the ICTY version. Municipal law applications of the crime have also varied from State to State. Finally, the International Law Commission has adopted various formulations, none of which has been particularly well-received.³⁵

31. *Id.* at 423.

32. See Int'l Crim. Ct., Off. of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 7 (Sept. 2003), https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf [hereinafter ICC-OTP].

33. Alien Tort Statute, 28 U.S.C. § 1350 (2011); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718-20 (2004) (finding that while the Alien Tort Statute does not create a cause of action under international law, courts may exercise common-law authority under the Statute to create jurisdiction under very limited circumstances, when the acts committed are universally accepted as crimes in international common law, also known as the law of nations). See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (1980) (reasoning that the law of nations is part of federal common law, and among the rights that are universally supported by the international community is the right to be free from brutal violence and torture).

34. See ICC-OTP, *supra* note 32.

35. Sadat & Carden, *supra* note 21, at 426-27; Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, Apr. 29-June 7, July 8-Aug. 9, U.N. Doc. A/74/10, at 10-140 (2019).

The resulting definition of crimes against humanity in the Rome Statute is a hodgepodge; “it differs from its predecessors significantly, although it borrows from each.”³⁶ As to the state policy requirement, which is the focus of Professor Gaitán’s article, Professor Sadat explains that the Rome Statute’s version of crimes against humanity includes an iteration of this element that reflects a compromise between case law and international law scholars’ reasoning.³⁷ At present, the state or organizational policy element is not a component of a definition of crimes against humanity that is required by customary international law.

The International Law Commission’s (ILC) mandate is to codify existing principles of customary international law.³⁸ It has included “crimes against humanity” in its program of work for just under a decade. The Commission ultimately intends to introduce a Convention on the Prevention and Punishment of Crimes Against Humanity, to “help promote the investigation and prosecution of such crimes at the national level.”³⁹ In its 2015 First Report, the Commission’s Special Rapporteur on Crimes Against Humanity summarized the current lack of uniformity among the legislation in national jurisdictions concerning the definition of the crime.⁴⁰ Citing a 2013 study,⁴¹ the report notes that only fifty-four percent of UN member states and sixty-six percent, at best, of state parties to the Rome Statute have some national legislation *relating* to crimes against humanity.⁴² The 2013 study also sampled eighty-three states, only thirty-four of whom had a national law *specifically* on “crimes against humanity,” and of those thirty-four states, only ten adopted the verbatim text of Article 7 of the Rome Statute when defining the crime.⁴³ The remaining twenty-four states deviated from the Rome Statute’s version of the crime by omitting components,⁴⁴

36. *Id.*; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827; Statute of the International Criminal Tribunal for Rwanda, art. 3, Nov. 8, 1994, S.C. Res. 955, annex, U.N. Doc. S/RES/955.

37. Sadat & Carden, *supra* note 21, at 432.

38. BROWNLIE, *supra* note 9, at 28-29 (noting the ILC’s codification efforts).

39. See Sean D. Murphy (Special Rapporteur), Int’l Law Comm’n, *First Rep. on Crimes Against Humanity*, ¶¶ 4, 10-15, U.N. Doc. A/CN.4/680 (Feb. 17, 2015) [hereinafter Special Rapporteur].

40. See generally *id.*

41. Arturo J. Carrillo & Annalise K. Nelson, Int’l Hum. Rts. L. Clinic, George Washington Univ. L. Sch., Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction (2013), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/CAH_Final_Web.pdf [hereinafter GWU Clinic Study].

42. Special Rapporteur, *supra* note 39, ¶ 58 (citing *id.* at 3).

43. GWU Clinic Study, *supra* note 41, at 12.

44. *Id.*

“including the component relating to . . . ‘a State or organizational policy.’”⁴⁵ The Special Rapporteur conceded that Article 7 of the Rome Statute “might be improved” and acknowledged “disagreements . . . regarding whether it reflects customary international law.”⁴⁶

Notwithstanding the “wide range of minor to major substantive differences”⁴⁷ found among the relatively small number of national laws with provisions specific to “crimes against humanity,”⁴⁸ the Special Rapporteur’s first report recommends that the Convention adopt the verbatim definition of the crime as set forth in the Rome Statute.⁴⁹ In support of his proposal, the Special Rapporteur cited a number of concerns, including fragmentation in the field of international criminal law, and he echoed the view of six states that work on the topic must avoid the unintended consequence of interfering with the ICC’s system of complementarity.⁵⁰

In what may potentially serve as a counterbalance to the Special Rapporteur’s argument to adopt the language that he concedes does not represent customary international law, he seems to suggest that ICC jurisprudence interpreting the definition of crimes against humanity establishes a low threshold.⁵¹ As to the policy element that is the subject of Professor Gaitán’s article,⁵² the Special Rapporteur’s first report extracts a series of factors from which a court can choose when determining whether the policy element is met.⁵³ These factors are additional examples of what could be listed in the alternative and could, similarly to what Professor Gaitán proposes, aid Argentine and other national courts in a more flexible application of the elements of the crime.⁵⁴ According to the Special Rapporteur, the policy element might be satisfied by deliberate actions as

45. Special Rapporteur, *supra* note 39, ¶ 60.

46. *Id.* ¶ 122.

47. *Id.* ¶ 60.

48. *Id.*

49. *Id.* ¶ 122.

50. *Id.* ¶ 19. The Special Rapporteur highlighted the positions of Chile, Italy, Mongolia, Romania, Trinidad and Tobago, and the United Kingdom, which can be found respectively in U.N. GAOR, 69th Sess., 24th mtg. ¶¶ 52-53, 94-95, 147, 119, 160, U.N. Doc. A/C.6/69/SR.24 (Dec. 3, 2014).

51. *See id.* ¶¶ 20-26.

52. *See* Gaitán, *supra* note 1, at 296-300.

53. *See* Special Rapporteur, *supra* note 39, ¶¶ 141-44.

54. *Id.*

well as a failure to act,⁵⁵ a showing of policy at the municipal level,⁵⁶ and a showing of motive, common features, and links between acts.⁵⁷ The element does not need to be formally established in advance of the attack;⁵⁸ it can be deduced from the repetition of acts, preparatory activities, or from a collective mobilization.⁵⁹ It can be established by showing a pattern,⁶⁰ does not need to be accurate or precise,⁶¹ may evolve over time,⁶² and need not be carried out by a State actor.⁶³ Also, the prosecutor must prove the individual defendant's *mens rea* as "knowledge," but need not prove that the individual defendant "had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization."⁶⁴

By this comment, there are four points with which I hope to have succeeded in persuading practitioners and jurists to find comfort, without feeling like they are somehow betraying the nature and purpose of the ICC or the general progression of human rights and international criminal law. First, the entirety of the Rome Statute is not a general codification of customary international law (and so stating does not undermine its capacity for or contribution to ending impunity for the crimes enumerated in the Statute). Second, the lack of international consensus on the elements of the crime, "crimes against humanity," precludes, at present, the existence of any customary definition of the crime that states and tribunals are obligated to apply under international law. Third, conceding that there is a lack of international consensus on the elements of an act that constitutes "crimes against humanity," does not dilute the customary international law or *jus*

55. *Id.* ¶ 141 (citing International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 at 5 (2000)).

56. *Id.* ¶ 142 (citing Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 89 (Mar. 31, 2010)).

57. *Id.* ¶ 144 (citing Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, ¶¶ 211-12, 215 (June 12, 2014)).

58. *Id.* ¶ 143 (citing Prosecutor v. Katanga, ICC-01/04-01/07, Pre-Trial Chamber Decision on the Confirmation of Charges, ¶ 394 (Sept. 30, 2008)).

59. *Id.* (citing Katanga, ICC-01/04-01/07, ¶ 1109).

60. *Id.* (citing Prosecutor v. Jean-Pierre Bemba Gombo, U.N. Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 115 (June 15, 2009)).

61. *Id.* (citing Katanga, ICC-01/04-01/07, ¶ 1109).

62. *Id.*

63. *Id.* ¶¶ 147-48 (citing Katanga, ICC-01/04-01/07, ¶ 396; Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic, ICC-01/09, ¶ 90 (Mar. 31, 2010)).

64. *Id.* ¶ 144 (citing Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, ¶ 214 (June 12, 2014)).

cogens status (or the *ergo omnes* obligations of states to prevent and punish) of the crime. Fourth, the definition of “crimes against humanity” can be flexible, yet firm. It can preserve the core elements of the crime so as to avoid fragmentation and conflict with the complementarity regime of the ICC, while fostering national laws that enable effective prosecution of cases with unique factual circumstances that would otherwise land beyond the scope of the ICC’s jurisdiction. After all, empowering states to apply the law in a way that responds to their relative needs and avoids marginalizing minority communities, while yielding effective prosecutions in their respective jurisdictions, is what will bridge the impunity gap. This is equally, if not more, important to the work of the ICC than pursuing what may be an unrealistic expectation that a majority of states will or should adopt the word-for-word definition of “crimes against humanity” set forth in the Rome Statute.⁶⁵

When unshackled by the perception that a state is bound by customary international law to apply the particular definition⁶⁶ of crimes against humanity that was negotiated into the Rome Statute, states would be free to legislate and their courts free to apply a definition that retains the core elements of the crime, yet includes a series of factors to apply when relevant to the factual circumstances of the widespread and systematic attack that is the backdrop against which the individual crimes were perpetrated. Such an approach would both preserve the rule of law in customary international law and promote the effective adoption and implementation of customary international law principles by domestic legal systems. As a civil rights litigator in American courts, it has been my experience, when civilly prosecuting abuses of force under color of law in violation of the United States Constitution, that a core set of elements defining the violation, accompanied by a series of factors to consider when probative to the particular circumstances of the case, is a useful methodology that promotes uniformity and predictability among judicial decisions. At the same time, it

65. In his first report, the ILC Special Rapporteur reasons that “the unevenness in the adoption of national laws relating to crimes against humanity has collateral consequences with respect to inter-State cooperation in seeking to sanction offenses” such as the creation of sanctuary states where perpetrators might go to avoid prosecution or extradition. *See id.* ¶ 64. Cooperation in this regard among states is integral to the functioning of the ICC and required given the limitations of complementarity. It is my opinion that a multi-factor approach to the definition of the crime at the domestic level does not necessarily implicate the important risks about which the Special Rapporteur warns.

66. *See* Sadat & Carden, *supra* note 21, at 427 (noting that “the definition adopted in Rome . . . is quite restrictive in overall character”).

accounts for the broad scope of factual scenarios in which a violation might occur.⁶⁷

Lawmakers and jurists at the national level should, therefore, incorporate a degree of flexibility to how the elements of “crimes against humanity” will be applied domestically, given its applicability to a broad scope of factual scenarios, in light of the composition and context of the crime. Distinct from genocide, which is characterized by the requisite *mens rea* element of specific intent, and from war crimes, which require a nexus to an armed conflict, crimes against humanity are defined by their commission “in connection with other crimes,”⁶⁸ and cover a broad range of conduct “often where the elements of genocide prove lacking.”⁶⁹ It is well-established that at the core of the definition of crimes against humanity—that which imputes criminality beyond what would ordinarily be punishable under domestic criminal law—is the requirement that the conduct be committed in the context of a widespread or systematic attack and the *mens rea* requirement. The latter links the defendant’s state of mind to the underlying attack so as to “ensure[] that acts contemporaneous with, though unrelated to, the underlying attack are not the basis for prosecution.”⁷⁰ Whether the prosecution needs to prove that the underlying attack was pursuant to or in furtherance of a State or organizational policy is a factor that may be useful in limited and less-than-obvious cases. Other factors that the courts might consider when analyzing whether conduct constitutes a crime against humanity could include the status of the victim, the mental intent of the perpetrator, and whether the act of the defendant was accomplished as part of a larger plan.⁷¹

Impunity for crimes against humanity cannot not prevail simply because there is a lack of international consensus on the elements of the crime. This would indeed yield an absurd result. However, fulfilling a state’s obligation to prevent and punish the crime need not and should not necessarily rely on stretching the definition of customary international law to encompass principles that have not yet reached that status. Nor should a state adhere to a definition that does not suit the courts in which the crime will be prosecuted or does not fit the factual circumstances of the underlying widespread and systematic attack. As Professor Gaitán demonstrates through his account of

67. *See generally*, Ninth Circuit Jury Instructions Committee, Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 9.25 (2017 ed., 2021) [hereinafter Civil Jury Instructions].

68. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 47 (2d ed. 2001).

69. *Id.* at 49.

70. *Id.* at 62; Sadat & Carden, *supra* note 21, at 429.

71. Sadat & Carden, *supra* note 21, at 431-32.

the Argentine approach, the test of whether a crime was committed “pursuant to or in furtherance of a State or organizational policy”⁷² may not be “capable of precise definition or mechanical application.”⁷³ Therefore, a flexible approach to the definition that combines certain core elements with a number of additional factors to consider, as, for example, those enumerated by the Special Rapporteur concerning the policy element, would also enable courts to apply the core elements of the crime with uniformity, while effectively adjudicating the unique factual circumstances of each particular case.

72. Rome Statute, *supra* note 8.

73. Civil Jury Instructions, *supra* note 67, §9.25 cmt. 195.

THE CLASH OF CONSTITUTIONAL AND INTERNATIONAL LAW IN ARGENTINEAN CASE LAW

Hernán Victor Gullco*

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I. INTRODUCTION

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

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

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

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

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

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

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

2. *Id.*

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

4. *Id.* art. 22.

5. *Id.*

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

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

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

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

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

6. *Id.*

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

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

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

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

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

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

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

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

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

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

11. *Id.* art. 48.

12. *Id.* art. 63.

13. *Id.* art. 68.

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

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

16. *Id.* ¶ 121.

17. *Id.* ¶¶ 2–3.

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

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

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

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

19. *Id.* at 5682.

20. *Id.* at 5683.

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

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

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

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

25. *Id.* ¶ 37.

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

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

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

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

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

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

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

26. *Id.* ¶ 110.

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

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

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

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

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

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

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

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

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

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

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

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

34. *Id.* at 101-02.

35. *Id.* at 102.

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

37. *Id.*

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

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

38. *Id.*

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

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

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

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

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

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

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

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

III. THE NEW PARADIGM INITIATED WITH *EKMEKDJIAN*

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

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

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

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

43. *Id.* at 2.

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

45. *Id.*

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

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

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

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

47. *Id.* at 1511-13.

48. *Id.*

49. *Id.* at 1512.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53. *Id.* ¶ 121 (citation omitted).

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

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

56. *Id.*

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

IV. THE COURT CHANGES COURSE IN MINISTERIO DE RELACIONES EXTERIORES

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

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

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

57. *Id.* ¶ 26.

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

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

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

61. *Id.*

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

63. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. THE FLAWS IN THE DECISION OF THE COURT

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

73. *Id.* ¶ 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

79. *Id.* art. 67.

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

81. This provision states:

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

Id. (emphasis added).

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

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

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

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

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

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

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

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

85. Article 8.2(g) states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

91. *Id.*

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

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

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

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

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

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

VI. SOME PROBLEMS IN THE INTER-AMERICAN COURT JURISPRUDENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. AN ATTEMPT TO RECONCILE COMPETING INTERESTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

108. *Id.* at 180.

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

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

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

112. *Id.*

113. *Id.* ¶¶ 39, 41.

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

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

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

114. *See id.* ¶¶ 54–57.

115. *Id.* ¶¶ 1, 2.

116. *Id.* ¶ 2.

117. *Id.* ¶ 8.

118. *Id.* (emphasis added).

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

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

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

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

VIII. CONCLUSION

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

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

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

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

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

125. *Id.*

**ADDING SOME BABY TEETH TO U.S.
PARTICIPATION IN THE INTER-
AMERICAN HUMAN RIGHTS SYSTEM: A
U.S. COROLLARY TO HERNÁN GULLCO’S
OBSERVATIONS**

Jonathan M. Miller*

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I. INTRODUCTION

For a U.S. scholar, two points jump out from Hernán Gullco’s description of Argentine debates over how decisions by the Inter-American human rights system should be treated by Argentine courts.¹ First, after hearing the debate over Argentina’s relationship with the Inter-American Court of Human Rights (Inter-American Court) and the Inter-American

* Professor of Law, Southwestern Law School, J.D., Columbia Law School (1985), B.A., Columbia College (1982). The Author would like to thank his research assistant, Adam Tobal, for exceptional help on many parts of this article, and particularly for the painstaking task of assembling a list of International Human Rights clinics at U.S. law schools. Also, thank-you to the editors and staff of the Southwestern Journal of International Law for their work in preparing this article for publication and for the being such a pleasure to work with as an academic advisor.

1. Hernán Gullco, *The Clash of Constitutional and International Law in Argentinean Case Law*, 27 SW. J. INT’LL. 315 (2021).

Commission on Human Rights (Inter-American Commission), I cannot help but note how far away the United States is from incorporating decisions of international bodies into its domestic law compared with Argentina and much of the Americas, where the trend is towards treating the American Convention on Human Rights as having constitutional hierarchy and decisions of the Inter-American Court as domestically enforceable.² The United States, if anything, has been moving in the opposite direction. Aside from constitutional problems with U.S. courts setting aside *res judicata* federal judgments because of an order from an international tribunal or commission, the U.S. Supreme Court in *Medellin v. Texas*,³ in 2008, prevented even a minimal level of respect for an international judgement. The Court refused to give effect to a decision of the International Court of Justice (ICJ) that only required a limited review of State death penalty

2. Alejandro Chehtman, *International Law and Constitutional Law in Latin America*, THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA (forthcoming Feb. 2022) (manuscript at 2), <https://ssrn.com/abstract=3207795> (developing “the trend to constitutionalize international human rights law, and in particular, to give decisions of the Inter-American Court of Human Rights. . . a pedigree often not even reserved to national high courts,” using Argentina, Colombia, and Mexico as case studies); Antonio Moreira Maues et al., *Judicial Dialogue between National Courts and the Inter-American Court of Human Rights: A Comparative Study of Argentina, Brazil, Colombia, and Mexico*, 21 HUM. RTS. L. REV. 108, 111 (2021) (noting the constitutionalization of Inter-American human rights law in Argentina, Colombia, and Mexico); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1592 (2011). See also Robert S. Barker, *Inverting Human Rights: The Inter-American Court versus Costa Rica*, 47 U. MIAMI INTER-AM. L. REV. 1, 3-4 (2016) (noting that the Constitution of Costa Rica provides that treaties prevail over statutes and the Constitutional Chamber of the Costa Rican Supreme Court has held both that the Inter-American Court is the definitive interpreter of the Convention and that the Court’s interpretations bind Costa Rican courts); 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, 983-84 (2012) (noting paradoxically that Brazil has been questioned for noncompliance with Inter-American Court decisions even under progressive governments, but the country amended its Constitution in 2004 to allow Congress to elevate international human rights treaties to the same level as the Constitution, Emenda Constitucional No. 45, de 30 de Dezembro de 2004 (Braz.), which added Constituição Federal [Constitution] tit. II, ch. I, art. 5, LXXVIII, § 3 (Braz.), though this has not yet been done for the American Convention on Human Rights); see also Antonio Moreira Maues et al., *supra*, at 111, 113-15, 121, 127-29 (discussing the tendency to the Brazilian Supreme Federal Tribunal to sometimes elevate the American Convention above ordinary legislation and to pay special respect to Inter-American Court decisions, but only in a scattered fashion or show resistance); Marcia Nina Bernardes, *Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions*, 8 SUR INT’L J. HUM. RTS. 131, 136, 138 (2011). But cf. Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 CORNELL INT’L L.J. 493, 494-495 (2011) (analyzing the difficulty that the Inter-American Court has had in getting prosecutors and judges to actively comply with its decisions, particularly when it calls for prosecutions.)

3. 552 U.S. 491 (2008).

decisions by State judges,⁴ instead applying a restrictive understanding of when courts should treat treaties as self-executing,⁵ and blocking the President's attempt to implement the ICJ's decision.⁶ Moreover, the United States' reluctance to treat decisions of international bodies as binding and self-executing applies with particular strength to the Inter-American system.⁷

Second, U.S. scholars will be struck by the fascinating indispensable party problem that Professor Gullco sets out. Inter-American Court decisions have taken an expansive approach toward its remedial powers, including sometimes requiring domestic measures that affect the rights of individuals not before the Court. As Professor Gullco indicates, this has occurred not only in the criminal context, where the Court has required the setting aside of applicable statutes of limitation and judgments that benefitted criminal defendants,⁸ but also implicitly in *Atala Riffo v. Chile*,⁹ a child custody dispute, where the Court questioned a decision of the Chilean Supreme Court that ended a mother's custody and that awarded custody to the father because of the mother's same-sex relationship.¹⁰ As Professor Gullco points out, both in the cases involving the rights of victims of criminal violence and that of a same-sex couple to equal treatment, the problem is not that the rights of the complaining petitioners did not merit respect, but that the Court never heard

4. *Id.* at 497-99.

5. *See id.* at 505-10; *see also, e.g.*, John O. McGinnis, *Medellin and the Future of International Delegation*, 118 YALE L.J. 1712, 1730-31 (2009); David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 162 (2012).

6. 552 U.S. at 526.

7. *See infra* pp. 353-54.

8. Gullco, *supra* note 1, at 315, 318-19 (2021) (discussing *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 10 (Sept. 18, 2003)). It is important to note that this indispensable party issue is not in the context of crimes against humanity, where there is no statute of limitations under international law, and hence, the absent criminal defendant is not deprived of a right of repose. As an example, see the *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (May 14, 2001).

9. *Atala Riffo v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

10. Gullco, *supra* note 1, at 339-40 (discussing *Riffo*, Inter-Am. Ct. H.R. (ser. C) No. 239). The Inter-American Court in *Riffo* did not determine custody between the mother and the father, *Riffo*, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 66, which would have been especially problematic given the Inter-American Court's decision to exclude the father from the proceedings, *id.* ¶ 9. However, the Inter-American Court clearly repudiated the Chilean Supreme Court's decision in a way that one would expect would impact future proceedings, finding that the Chilean Supreme Court's decision contained multiple elements that violated the mother's right to equality and constituted discriminatory treatment based on her sexual orientation, *id.* ¶ 146. The Chilean Supreme Court decision was horrific, but that does not answer the question of why the father was not permitted to participate in the Inter-American Court's proceedings.

arguments that might have been presented by the absent party, since only the State appears before it as a defending party.¹¹

Professor Gullco, looking at the situation of a country like Argentina that incorporates international human rights law directly into its Constitution, essentially calls for treating the Inter-American Court like a supervising appellate court for exceptional human rights cases, while also recognizing its shortcomings. He would treat Argentine cases as subject to reopening by the Inter-American Court, setting aside any domestic *res judicata* effect; however he also criticizes the Inter-American system for its failure to allow either the previously successful criminal defendant or the father awarded custody to appear before it in addition to the petitioner who lost domestically and the State. If the Commission and the Court act with the powers of an appellate tribunal and not merely as tribunals awarding compensation against the State, then all the parties must be heard.

Yet Professor Gullco never implies that the Argentine debates have relevance for U.S. practice—and he cannot, at least if one is to pay any heed to existing U.S. case law and its understanding of U.S. treaty obligations. As will be seen, even the most progressive U.S. courts have refused to treat the Inter-American human rights system as creating domestically enforceable treaty obligations for the United States, given that it has not ratified the American Convention on Human Rights.¹²

Nevertheless, there is a cost to the United States' arms-length approach towards the Inter-American human rights system and there are ways to minimize this cost. In her book, *Constitutional Engagement in a Transnational Era*, Vicki Jackson describes a spectrum of attitudes of domestic courts toward the transnational system. The spectrum runs from the resistance toward international influences that one sees in conservative judges and scholars in the United States¹³ to the desire for convergence that one sees in Argentina's incorporation of diverse international human rights instruments as enjoying domestic constitutional status.¹⁴ Lying in between is what Jackson calls "engagement," the idea that interpretation of national

11. Gullco, *supra* note 1, at 337. The question of an indispensable party is underdeveloped in international human rights law. The European Court of Human Rights has not dealt with the indispensable party problem in the context of absent private parties, *see* Beatrice Bonafè, *Indispensable Party*, MAX PLANCK ENCYCLOPEDIA OF INT'L PROC. LAW ¶¶ 24-30 (Hélène Ruiz Fabri ed., 2018), perhaps because it has not gone as far as the Inter-American Court in developing remedies that might affect absent parties. The doctrine has been developed by the International Court of Justice and arbitral tribunals. *Id.* ¶¶ 10-19.

12. *See infra* pp. 349, 351, 354.

13. VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 8 (2010).

14. *Id.* at 8-9.

fundamental law can be improved through engagement with transnational norms.¹⁵ Engagement, the position favored by Jackson, carries advantages in managing U.S. legal relations within the international legal environment.¹⁶ Failure by U.S. courts to give respectful consideration to transnational legal sources “may impose subtle costs.”¹⁷ Foreign perceptions of the United States’ indifference to international standards may lead to backlash,¹⁸ likely make it harder for the United States to have influence on other states,¹⁹ and “over time the Court’s failure to consider the approaches of international instruments, or of other constitutional systems, on analogous constitutional questions may appear less a matter of ignorance, and more a deliberate affront.”²⁰ She concludes that “[w]e have no choice but to influence and be influenced by others, and doing so consciously enables us to have greater control over what we choose to be influenced by, the accuracy of our understandings, and how our actions are perceived.”²¹

Jackson does not offer specific practical steps to increase engagement; her book is part of the broad intellectual debate over the different jurisprudential positions that scholars have taken toward use of foreign and international law in constitutional interpretation.²² However, Hernán

15. *Id.*

16. *Id.* at 107. See also Tom Ginsburg, *Substitutes, Complements, and Irritants*, 87 U. CHI. L. REV. 2357, 2365-73 (2020) (developing the concept of “engagement” in the context of a U.S. case examining a decision of the Inter-American Commission).

17. JACKSON, *supra* note 13, at 123.

18. *Id.* at 124.

19. *Id.* at 118.

20. *Id.* at 123.

21. *Id.* at 129.

22. See e.g., *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519 (2005) (Justices Scalia and Breyer set out some of the basic issues of the debate); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006); Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335 (2007); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82 (2004); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007). Interestingly, this literature, which is prescriptive and U.S.-focused, has almost no overlap with the literature on constitutional transplants, which is largely descriptive. For an overview of that literature, see Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, in OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW (M. Rosenfeld & A. Sajo, eds., Oxford University Press, 2012). The debate about use of foreign and international law by U.S. courts in constitutional interpretation essentially asks prescriptively whether it is

Gulco's focus on Argentina's respect for the Inter-American system brought out a personal experience for me that illustrates what at the very least is a cost to the United States' prestige when its courts fail to interact with the Inter-American system. In a death penalty case that I have worked on for many years on behalf of an Argentine citizen on death row in Texas, the perception conveyed by much of the Argentine press is that the failure of the United States to immediately remove our client from death row openly violates its obligations to the Inter-American Commission, and that international law binds the United States to comply.²³ It is a position that stands far away from U.S. case law; yet perhaps there are steps that the U.S. government can engage in to start to bridge the gap.

On occasion, the U.S. State Department has used a Statement of Interest to convey the Executive's foreign affairs concerns to domestic courts, and this approach might also sometimes be used for conveying recommendations of the Inter-American Commission. If done at least occasionally when the Commission has either developed a clear line of decisions in an area that can cause the United States international embarrassment, or in cases that are not *res judicata* where the Commission has issued recommendations, then the State Department can attenuate some of the international cost to the United States. While at present, U.S. judicial decisions largely ignore the Commission, in spite of the efforts of litigants, the U.S. State Department has an interest in promoting greater engagement by U.S. courts with the Inter-American system, and a Statement of Interest is a brief that judges typically respond to in their opinions, even if they decide differently. A more proactive approach toward filing Statements of Interest is needed because existing approaches leave the United States far more disengaged from the Inter-American human rights system than other countries in the Americas, the disengagement carries at least some costs, and engagement through a Statement of Interest should lead to increased dialogue between U.S. courts and the Inter-American system and would not represent a significant departure from existing State Department practice.

This essay will progress in three stages. First, after briefly explaining the Inter-American Commission's functions, it will show how the United States presently fails to give even minimal domestic respect to the Commission's decisions even though U.S. State Department lawyers regularly appear before the Commission to defend U.S. conduct. Second, it will use an ongoing death penalty case to show the enormous gap between

appropriate for the United States to engage in the ongoing international process of constitutional transplants, borrowing and migration that the legal transplants literature describes.

23. *See infra* pp. 354-60.

Argentine and U.S. perceptions of the Commission's role, and the cost of lack of engagement for the United States. Third, it will describe how increased use of Statements of Interest may serve to increase the dialogue between U.S. courts and the Commission, an attempt that Harold Koh began while Legal Advisor at the U.S. Department of State, and why Koh's precedent needs expansion.

II. THE UNITED STATES FAILS TO ENGAGE DOMESTICALLY WITH THE INTER-AMERICAN HUMAN RIGHTS SYSTEM EVEN THOUGH IT TRIES TO ENGAGE INTERNATIONALLY

International human rights advocates use a variety of tools at international institutions to challenge U.S. practices. They may offer comments on periodic reports that the U.S. government offers to various treaty organs, such as the United Nations (UN) Human Rights Committee or the Committee Against Torture,²⁴ they may try to influence advisory opinions by the International Court of Justice²⁵ or the Inter-American Court of Human Rights,²⁶ they may often seek to influence multilateral treaty negotiations,²⁷ or they may provide information to rapporteurs of many types, named either by the UN Secretary General, the UN Human Rights Council, different treaty mechanisms, or the Inter-American Commission on Human Rights.²⁸

24. See e.g., THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013); AMNESTY INT'L, *USA Should Use UN Hearing to Address 'Shocking Accountability Gap' on Torture*, (Nov. 12, 2014, 12:00 AM), <https://www.amnesty.org/en/latest/news/2014/11/usa-should-use-un-hearing-address-shocking-accountability-gap-torture/> (highlighting recent violations perpetrated by the United States, published in the week when the United States was scheduled to appear before the UN Convention Against Torture).

25. Statute of the International Court of Justice arts. 65-68, June 26, 1945, 59 Stat. 1055, 3 Bevens 1179 (providing the process by which the "Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request").

26. Organization of American States, American Convention on Human Rights art. 64, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (allowing a member State to request opinions from the Court "regarding the compatibility of any of its domestic laws" with the rules of the Organization's instruments); Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Court of Human Rights arts. 70-75 (2013), <http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf> [hereinafter IACHR Rules of Procedure] (providing guidelines for the types of advisory opinions produced by the Court as well as procedural rules for request and delivery of opinions).

27. Katharina Rietig, *The Power of Strategy: Environmental NGO Influence in International Climate Negotiations*, 22 GLOBAL GOVERNANCE 269 (2016) (analyzing the effectiveness of NGO demonstrations, media coverage, and lobbying efforts)

28. Surya P. Subedi, *Protection of Human Rights Through the Mechanism of UN Special Rapporteurs*, 33 HUM. RTS. Q. 201 (2011) (describing the role of UN Special Rapporteurs as "one

Helpful reports receive media attention, are used in lobbying efforts, and sometimes get invoked in amicus briefs. But the Inter-American human rights system offers U.S. litigants something more: a right of individual petition and a process that can conclude with a merits decision, in which the Commission, with a detailed analysis of the case, offers findings on whether human rights have been violated and, where necessary, offers recommendations to the U.S. government to cure the violation. Yet, while the process has significant procedural sophistication, while the U.S. State Department will usually brief significant cases and appear at a hearing before the Commission,²⁹ and while the Commission will often hand down very detailed decisions, the domestic impact of Commission decisions in the United States is much more limited than one would expect from the efforts of the parties and the Commission. Even progressive U.S. judges not only consistently treat the Commission's decisions as lacking any domestic legal effect but fail to treat Commission decisions as something with persuasive authority or as offering ideas they should engage with. This is an anomaly that the U.S. State Department can change through judicious use of a Statement of Interest in the same fashion that it brings U.S. foreign policy interests to the attention of courts when foreign governments are involved.

The United States has consciously avoided participation in any individual petition process when it has ratified international human rights treaties, as well as specifically provided that the treaties shall be treated domestically as non-self-executing. For example, in the case of both the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the U.S. has accepted the need to present periodic reports to the UN Human Rights Committee and the Committee against Torture respectively,³⁰ but has not accepted the competence of the Committees to

of the main mechanisms employed by the United Nations to protect and promote human rights worldwide”).

29. For examples of fairly typical U.S. responses to the Commission, see Case No. 10.573 (Salas), 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 283; Petition No. P-1010-15: José Trinidad Loza Ventura, 2019 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(3), at 253. For fairly typical prepared remarks by the United States at appearances before the Commission, see TPS & DACA Hearing, U.S. Presentation, 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 301-05; Guns Hearing, U.S. Presentation, 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 297-301; Puerto Rico Hearing, U.S. Presentation, 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 305-09.

30. See, e.g., Comm. Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Third to Fifth Periodic Reports of States Parties Due in 2011, United States of America, CAT/C/USA/3-5 (Aug. 12, 2013); Hum. Rts. Comm., Consideration of Reports Submitted by States Parties under Article

hear complaints brought by individuals.³¹ Furthermore, the Senate ratification resolutions in both cases specifically provide that the treaties shall be deemed non-self-executing.³² The litigants in a domestic court in the United States can only cite implementing legislation as a legal obligation—not the treaty itself. However, in some ways, the U.S. participation in the Inter-American human rights system is more robust than with other human rights mechanisms.

The Inter-American human rights system consists of two bodies, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, with the Commission predating the Court. The Inter-American Commission is a product of the Charter of the Organization of American States (OAS).³³ Article 53 of the Charter lists the Commission as a subsidiary organ of the Organization,³⁴ and Article 106 first notes the creation of the Commission, then establishes that its “principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters,”³⁵ and then states that “[a]n Inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.”³⁶ The United States is a party to the OAS Charter, but, unlike almost all of the countries of Latin America, the United States only signed, but never ratified, the American Convention on Human Rights, the human rights convention that Article 106 anticipates.³⁷

40 of the Covenant, Fourth Periodic Report, United States of America, CCPR/C/USA/4 (Dec. 30, 2011).

31. S. Res. 136, 101st Cong., 136 CONG. REC. 36193 § III(2) (1990) (enacted) (provides that the United States only “recognizes the competence of the Committee against Torture to receive and consider communications” between State Parties); S. Res. 138, 102d Cong., 138 CONG. REC. 8071 § III(3) (1992) (enacted) (provides that the United States “accepts the competence of the Human Rights Committee to receive and consider communications” between State Parties).

32. S. Res. 136, 101st Cong., 136 CONG. REC. 36193 § III(1) (1990) (enacted) (“the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing”); S. Res. 138, 102d Cong., 138 CONG. REC. 8071 § III(1) (1992) (enacted) (“the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing”).

33. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324 [hereinafter OAS Charter].

34. *Id.* art. 53.

35. *Id.* art. 106.

36. *Id.*

37. See *Signatories and Ratifications, American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32)*, ORG. OF AM. STATES, [http://www.oas.org/dil/treaties_B-](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)

32_American_Convention_on_Human_Rights_sign.htm (last visited Aug. 7, 2021) for the OAS table listing the member states that have ratified the Convention.

The failure of the United States, Canada, and a small group of English-speaking Caribbean countries to ratify the Convention means that there are two different tracks used for the protection of human rights in the Americas. In the countries that have ratified the Convention, which creates the Inter-American Court of Human Rights, the parties are bound to protect the many individual rights established in the Convention, and individual petitioners who have exhausted their domestic remedies may bring their cases to the Commission, which issues findings and may refer cases to the Inter-American Court.³⁸ (The Defending States upset with Commission findings may also appeal their cases to the Court,³⁹ but this rarely happens.) The Court then has the authority after hearing the case to issue a judgment that the state parties obligate themselves to comply with.⁴⁰ In the case of the countries like the United States, that have not ratified the Convention, only the Statute of the Inter-American Commission on Human Rights comes into play. The Statute, approved as a resolution of the OAS General Assembly in 1979, with later 1990 amendments, states that in the countries that have not ratified the Convention, the human rights protected by the Commission should be understood as those of the American Declaration of the Rights and Duties of Man⁴¹ (a human rights declaration adopted at the same meeting that adopted the Charter of the OAS, which includes a variety of fundamental rights plus a selection of social and economic rights—as well as listing of a variety of obligations that individuals owe to the state and the community⁴²). The seven-member Commission is charged with examining petitions from parties

38. American Convention on Human Rights, *supra* note 26, arts. 44-51 (Article 44 provides that “[a]ny person... may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party;” Article 46 sets out the requirement that the petitioner must have first “pursued and exhausted” any “remedies under domestic law;” and Articles 48-51 outline the procedures by which the Commission issues its findings).

39. *Id.* arts. 51, 61.

40. *Id.* arts. 62-67 (Article 62(3) provides that “[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement,” while Article 67 continues that “[t]he judgment of the Court shall be final and not subject to appeal”).

41. Org. of Am. States [OAS], G.A. Res. 447 (IX-0/79), Statute of the Inter-American Commission on Human Rights art. 1(2), Oct. 31, 1979 [hereinafter IACHR Statute], <http://www.oas.org/en/iachr/mandate/basics/statuteiachr.asp> (“[f]or the purposes of the present Statute, human rights are understood to be: (a) [t]he rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; (b) [t]he rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states”).

42. Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man*, OAS (May 2, 1948), <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp> (chapter 1 provides a list of fundamental rights, followed by a list of state duties in chapter 2).

that have exhausted domestic legal procedures, asking the relevant government for information, and “to make recommendations to it, when it finds this appropriate, in order to bring about the more effective observance of fundamental human rights.”⁴³ The Commission has developed extensive rules of proceedings for hearing individual petitions, which include the possibility of precautionary measures, submission of evidence by the parties, on-site investigations and hearings before the issuance of a report.⁴⁴ While the Commission formally only issues “recommendations” to states that have not ratified the American Convention on Human Rights, the Commission will sometimes flatly describe the failure of a state to comply with its recommendations as a violation of international law.⁴⁵ Regardless of whether or not the United States as a matter of its own constitutional law considers that Commission decisions must receive domestic effect, the fact is that the United States is today part of a regional human rights system that hears individual cases brought by private petitioners.

However, while the Commission has issued recommendations in final merits decisions against the United States in over forty cases since 1987, it is extremely likely that no Commission decision has ever influenced the result of a U.S. judicial proceeding. Certainly, activists and scholars have made the most out of Commission decisions as moral or international legal support for their causes.⁴⁶ Broadly, throughout the Americas, some of the most important impacts of the Inter-American human rights system have been political rather than legal.⁴⁷ But the fact remains that the domestic judicial impact in the United States has been nil. Tom Ginsburg recently described a decision by

43. IACHR Statute, *supra* note 41, art. 20.

44. IACHR Rules of Procedure, *supra* note 26, arts. 23-57.

45. *See* *Mortlock v. United States*, Case No. 12.534, Inter-Am. Comm’n. H.R., Report No. 63/08, ¶ 50 (2008) (noting that the alleged victim was “a person whose rights are protected under the American Declaration, the provisions of which the State is *bound to respect* in conformity with the OAS Charter, Article 20 of the Commission’s Statute and Article 49 of the Commission’s Rules of Procedure” (emphasis added)). The Commission’s position in *Mortlock*, implying a binding nature to its decisions, is cited and rejected in *Flores-Nova v. Att’y Gen. of U.S.*, 652 F.3d 488, 493 (3d Cir. 2011).

46. For example, the Commission’s decision in *Dann v. United States*, Case 11.140, Inter-Am. Comm’n. H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2003), involving the usurpation by the U.S. government of Native American lands, became the subject of multiple articles by scholars and activists seeking to politically advance the rights of Native Americans. *See, e.g.*, S. James Anaya, *Keynote Address: Indigenous Peoples and Their Mark on the International Legal System*, 31 AM. INDIAN L. REV. 257, 264-65 (2006); Brian D. Tittmore, *The Dann Litigation and International Human Rights Law: The Proceedings and Decision of the Inter-American Commission on Human Rights*, 31 AM. INDIAN L. REV. 593 (2006); Francisco Rivera, *Inter-American Justice: Now Available in a U.S. Federal Court Near You*, 45 SANTA CLARA L. REV. 889 (2005).

47. *See* Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court’s Varied Authority*, 79 L. & CONTEMP. PROBS. 179, 180-81 (2016).

Judge Diane Wood, a progressive appellate judge,⁴⁸ as showing “engagement” with international law in a decision that held that the Commission’s decisions do not create a binding legal obligation for the United States, since she at least fully considered the issue,⁴⁹—and to date, that is as internationalist as the U.S. courts have gotten.

Approximately a dozen U.S. court decisions have rejected attempts by litigants to invoke rulings of the Inter-American Commission.⁵⁰ A progressive Ninth Circuit panel, in *Mitchell v. United States*,⁵¹ recently summed up three reasons for these rejections. First, the OAS Charter is a non-self-executing treaty, at least with respect to any obligation to respect decisions of the Commission, so that even if the creation of the Commission as an organ of the OAS created an obligation of the United States internationally to respect its decisions, without implementing legislation from Congress, its decisions lack domestic legal force.⁵² Second, the human rights obligations that the Commission’s statute creates for countries that have not ratified the American Convention on Human Rights are those of the American Declaration on the Rights and Duties of Man,⁵³ which is not a treaty, but a resolution of the General Assembly of the OAS, and, therefore, creates no binding treaty obligations for the Commission to interpret.⁵⁴ And finally, in the case of the countries that have not ratified the Convention, the

48. See Neil A. Lewis, *Potential Justice Offers Counterpoint in Chicago*, N.Y. TIMES (Mar. 11, 2009), <https://www.nytimes.com/2009/05/12/us/politics/12wood.html>.

49. Ginsburg, *supra* note 16, at 2365-73 (2020), uses the term “engagement” from the framework proposed by VICKI JACKSON, *supra* note 13, to describe Judge Wood’s opinion in *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001).

50. The first rejection by the United States of a Commission request for domestic enforcement appears in the context of the very first case that the Commission decided against the United States, *Roach & Pinkerton v. United States*, Case No. 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/ser.L/V/II.71, doc. 9 rev. 1, ¶¶ 46-49 (1987). The Fourth Circuit was unwilling to stay the execution during the Commission’s consideration of the case. *Roach v. Aiken*, 781 F.2d 379, 380-81 (4th Cir. 1986). For other rejections of the Commission’s authority, see *Garza v. Lappin*, 253 F.3d 918, 924-26 (7th Cir. Ind. 2001) (offering the first thorough analysis of the rejection of the Commission’s authority); *Flores-Nova v. Att’y Gen. of U.S.*, 652 F.3d 488, 493-95 (3rd Cir. 2011); *Mitchell v. United States*, 971 F.3d 1081, 1084 (9th Cir. 2020). See also, e.g., *Tamayo v. Stephens*, 740 F.3d 991, 997 (5th Cir. 2014); *Ex parte Medellín*, 280 S.W.3d 854, 857-58 (Tex. Crim. App. 2008); *Reno v. Davis*, No. CV 96-2768 CBM, 2017 WL 486307, at *56 (C.D. Cal. Aug. 15, 2017).

51. 971 F.3d 1081 (9th Cir. 2020). The Ninth Circuit panel was a progressive one, including two Obama Administration appointees, Morgan B. Christen and Andrew D. Hurwitz.

52. *Id.* at 1084 (citing to the District Court decision, *Mitchell v. United States*, No. CV 20-8217-PCT-DGC, 2020 WL 4940909, at *5 (D. Ariz. Aug. 22, 2020), which offers a full analysis).

53. IACHR Statute, *supra* note 41, art. 20.

54. For a fuller decision of the lower court, see 971 F.3d at 1084.

Commission's Statute only provides that it can issue "recommendations,"⁵⁵ hardly language that grants authority to issue binding rulings. Limiting the Commission to "recommendations" would seem to be required by the limited powers of the General Assembly, since resolutions of the General Assembly of the OAS do not generally create binding legal obligations in themselves, and the Statute is merely a resolution of the General Assembly.⁵⁶

While the U.S. Supreme Court has never considered whether the Commission's decisions constitute binding law, the consistent lower court case law, as well as the Supreme Court's own refusal in *Medellín v. Texas* to treat a decision of the International Court of Justice (ICJ) as judicially enforceable,⁵⁷ leave little doubt that the Court would take a similar approach in the case of the Commission's decisions. In *Medellín*, the Supreme Court indicated that all ICJ decisions are non-self-executing and therefore lacking in obligation for U.S. courts.⁵⁸ Moreover, in the *Medellín* decision, unlike in the Inter-American context, there was a specific treaty conferring jurisdiction on the International Court of Justice to hear the case, and a clear obligation under the UN Charter to give effect to the ICJ's decisions.⁵⁹

Some portions of the U.S. government and U.S. civil society treat the Inter-American Commission as a body with relevance, just not the courts. As noted, the U.S. State Department invests significant effort in representing the United States before the Inter-American Commission. Further, there are at least forty U.S. law school clinics that, to some extent, focus on international human rights,⁶⁰ nineteen of which expressly note that they bring cases before

55. *Id.* (citing to the District Court decision, *Mitchell v. United States*, No. CV 20-8217-PCT-DGC, 2020 WL 4940909, at *5-6 (D. Ariz. Aug. 22, 2020), which references the IACHR Statute, *supra* note 41, arts. 18, 20).

56. *See* OAS Charter, *supra* note 33, art. 54 (on the powers of the General Assembly); *id.* art. 106 (providing that a future treaty would establish the "structure, competence and procedure" of the Commission—which implies a limited role for the General Assembly given the need for the treaty).

57. *Medellín*, 552 U.S. at 491, 506-14.

58. *See id.* at 508-09.

59. *Compare Medellín*, 552 U.S. 491 with IACHR Statute, *supra* note 41, (authorizing the Commission to issue "recommendations," not being a treaty itself).

60. This list of law school clinics with an international human rights focus is based on a review of their websites and is likely incomplete, but the following forty clinics appeared in the search: International Human Rights Law Clinic, AM. U. WASH. COLL. LAW, <https://www.wcl.american.edu/academics/experientialedu/clinical/theclinics/ihrcl/> (last visited Dec. 18, 2021); International Human Rights Practicum, B.C. L. SCH., <https://www.bc.edu/bc-web/schools/law/academics-faculty/experiential-learning/clinics.html> (last visited Dec. 18, 2021); Human Rights and Atrocity Prevention Clinic, CARDOZO SCH. LAW, <https://cardozo.yu.edu/human-rights-and-atrocity-prevention-clinic> (last visited Dec. 18, 2021); Human Rights and Gender Justice Clinic, CUNY SCH. LAW, <https://www.law.cuny.edu/academics/clinics/hrgj/> (last visited Dec. 18, 2021); Human Rights Clinic, COLUM. L. SCH., <https://www.law.columbia.edu/academics/experiential/clinics/human->

rights-clinic (last visited Oct. 15, 2021); International Human Rights Policy Advocacy Clinic, CORNELL L. SCH., <https://kalantry.lawschool.cornell.edu/international-human-rights-policy-advocacy-clinic/> (last visited Dec. 18, 2021); International Human Rights Clinic, DUKE U. SCH. LAW, <https://law.duke.edu/humanrightsclinic/> (last visited Dec. 18, 2021); Human Rights Institute, GEO. SCH. L., <https://www.law.georgetown.edu/human-rights-institute/> (last visited Dec. 18, 2021); International Women's Human Rights Clinic, GEO. SCH. LAW, <https://www.law.georgetown.edu/experiential-learning/clinics/international-womens-human-rights-clinic/> (last visited Oct. 23, 2021); International Human Rights Clinic, HARV. L. SCH., <https://hls.harvard.edu/dept/clinical/clinics/international-human-rights-clinic/> (last visited Dec. 18, 2021); International Human Rights Center, LOY. L. SCH., <https://www.lls.edu/academics/centers/internationalhumanrightscenter/> (last visited Dec. 18, 2021); Center for Human Rights and Global Justice, N.Y.U., <https://www.law.nyu.edu/centers/chrhj-center-for-human-rights-global-justice> (last visited Dec. 18, 2021); Human Rights (area of study and specialized clinics), NEW ENG. L. BOS., <https://www.nesl.edu/academics-faculty/concentrations/international-law> (last visited Dec. 18, 2021); International Human Rights Advocacy, NW. PRITZKER SCH. LAW, <https://www.law.northwestern.edu/academics/curricular-offerings/coursecatalog/details.cfm?CourseID=627> (last visited Dec. 18, 2021); Bluhm Legal Clinic of International Human Rights, NW. PRITZKER SCH. LAW, <https://www.law.northwestern.edu/legalclinic/humanrights/index.html> (last visited Dec. 18, 2021); Human Rights at Home Litigation Clinic, ST. LOUIS U. SCH. LAW, <https://www.slu.edu/law/experiential-learning/legal-clinics/human-rights.php> (last visited Dec. 18, 2021); Immigration and Human Rights Clinic, ST. MARY'S U. SCH. LAW, <https://law.stmarytx.edu/academics/special-programs/clinics/> (last visited Dec. 18, 2021); International Human Rights Clinic, SANTA CLARA U. SCH. LAW, <https://law.scu.edu/ihr/> (last visited Dec. 18, 2021); International Human Rights Clinic, SEATTLE U. SCH. LAW, <https://law.seattleu.edu/academics/curriculum/courses-library/course-offerings-i#INTL402> (last visited Dec. 18, 2021); Immigrant's Rights/International Human Rights Clinic, SETON HALL U. SCH. LAW, <https://law.shu.edu/clinics/immigrants-rights-international-human-rights.cfm> (last visited Dec. 18, 2021); International Human Rights Clinic, STAN. L. SCH., <https://law.stanford.edu/international-human-rights-and-conflict-resolution-clinic/> (last visited Dec. 18, 2021); Human Rights and Indigenous Peoples Clinic, SUFFOLK U. L. SCH., <https://www.suffolk.edu/law/academics-clinics/clinics-experiential-opportunities/clinics/human-rights-and-indigenous-peoples> (last visited Dec. 18, 2021); International Human Rights Clinic, U.C. BERKELEY SCH. LAW, <https://www.law.berkeley.edu/experiential/clinics/international-human-rights-law-clinic/> (last visited Dec. 18, 2021); Refugee and Human Rights Clinic, U.C. HASTINGS L. SCH., <https://www.uchastings.edu/academics/experiential-learning-opportunities/clinical-programs/refugee-human-rights-clinic/> (last visited Dec. 18, 2021); International Human Rights Clinic, U.C. IRVINE SCH. LAW, <https://www.law.uci.edu/academics/real-life-learning/clinics/ihr.html> (last visited Dec. 18, 2021); International Human Rights Clinic, UCLA SCH. LAW, <https://law.ucla.edu/academics/clinical-education/clinics/international-human-rights-clinic> (last visited Dec. 18, 2021); Global Human Rights Clinic, U. CHI. L. SCH., <https://chicagounbound.uchicago.edu/ihr/> (last visited Dec. 18, 2021); Asylum and Human Rights Clinic, U. CONN. SCH. LAW, <https://www.law.uconn.edu/academics/clinics-experiential-learning/asylum-human-rights-clinic> (last visited Dec. 18, 2021); International Human Rights Clinic, U. ILL. CHI. L., <https://law.uic.edu/experiential-education/clinics/international-human-rights/> (last visited Dec. 18, 2021); Human Rights Clinic, U. MIAMI SCH. LAW, <https://www.law.miami.edu/academics/clinics/human-rights-clinic> (last visited Dec. 18, 2021); Immigration and Human Rights Clinic, U. MINN. L. SCH., <https://www.law.umn.edu/course/7842/immigration-and-human-rights-clinic> (last visited Dec. 18,

the Inter-American Commission.⁶¹ Vibrant, U.S.-headquartered non-governmental organizations (NGOs), like the Center for Justice and International Law (CEJIL), focus on advocacy and litigation in the Inter-American system.⁶² However, U.S. judicial engagement is non-existent. The lack of judicial engagement does not go unnoticed abroad and, at least in the Argentine context, the enormous gap between the way both the judiciary and the media respect the Inter-American system and the complete lack of U.S. judicial regard for the Commission's decisions leaves the United States looking like a scofflaw, regardless of the clarity of U.S. case law.

III. THE UNITED STATES AS A SCOFFLAW BEFORE THE ARGENTINE PUBLIC

Perhaps unsurprisingly, a counterpart to Argentine respect for the Inter-American system is to regard as a scofflaw any country that fails to respect it. My personal experiences with Argentine media offer a corollary to the Argentine legal debates that Professor Gullco analyzes. Since the late 1990s,

2021); Transnational Legal Clinic, U. PA. L. SCH., <https://www.law.upenn.edu/clinic/transnational/> (last visited Dec. 18, 2021); Frank C. Newman International Human Rights Law Clinic, U.S.F. SCH. LAW, <https://www.usfca.edu/law/professional-skills/law-clinics/international-human-rights> (last visited Dec. 18, 2021); International Human Rights Clinic, U.S. CAL. GOULD SCH. L., <https://gould.usc.edu/academics/experiential/clinics/ihr/> (last visited Dec. 18, 2021); Human Rights Clinic, U. TEX. AUSTIN SCH. LAW, <https://law.utexas.edu/clinics/human-rights/> (last visited Dec. 18, 2021); Human Rights Program, U. VA. SCH. LAW, <https://www.law.virginia.edu/academics/program/human-rights-program?section=clinic> (last visited Dec. 18, 2021); International Human Rights Clinic, U. WYO. COLL. LAW, <http://www.uwyo.edu/law/experiential/clinics/intl-law-clinic.html> (last visited Dec. 18, 2021); International Human Rights Clinic, W. NEW ENG. U. SCH. LAW, <https://www1.wne.edu/law/experiential/clinics.cfm> (last visited Dec. 18, 2021); Lowenstein International Human Rights Clinic, YALE L. SCH., <https://law.yale.edu/schell/lowenstein-international-human-rights-clinic> (last visited Dec. 18, 2021).

61. The following law school clinics describe themselves as working in the Inter-American system: International Human Rights Practicum, B.C. L. SCH., International Human Rights Clinic, HARV. L. SCH., International Human Rights Center, LOY. L. SCH., Human Rights at Home Litigation Clinic, ST. LOUIS U. SCH. LAW, International Human Rights Clinic, SANTA CLARA U. SCH. LAW, Immigrants' Rights/International Human Rights Clinic, SETON HALL L. SCH., International Human Rights Clinic, STAN. L. SCH., Human Rights and Indigenous Peoples Clinic, SUFFOLK U. L. SCH., International Human Rights Law Clinic, U.C. BERKELEY L. SCH., International Human Rights Clinic, U.C. IRVINE L. SCH., International Human Rights Clinic, UCLA L. SCH., International Human Rights Clinic, U. ILL. CHI. L., Human Rights Clinic, U. MIAMI L. SCH., Transnational Legal Clinic, U. PA. L. SCH., Frank C. International Human Rights Clinic, U.S.F. SCH. LAW, International Human Rights Clinic, U. S. CAL. GOULD SCH. LAW, Human Rights Clinic, U. TEX. AUSTIN SCH. LAW, Human Rights Program and Clinic, U. VA. SCH. LAW, Lowenstein International Human Rights Clinic, YALE L. SCH., sources cited *supra* note 60.

62. See CTR. FOR JUST. & INT'L L., <https://cejil.org/en/> (last visited Dec. 18, 2021).

I have represented, in various capacities, Víctor Saldaño, an Argentine citizen on death row in Texas. I have often found myself struck by the sharp difference between Argentine and U.S. views of the Commission's role and of each country's view of obligations owed to the Commission. In the *Saldaño* case, some of the difference in perceptions originated from Juan Carlos Vega, the media-savvy attorney of Víctor Saldaño's mother, Lidia Guerrero, who emphasized the United States' misconduct and failure to adhere to international norms.⁶³ However, that is to be expected in many contentious cases. What is remarkable is the Argentine media's acceptance of Vega's narrative when compared with U.S. judicial attitudes. As a result, the United States is branded as a scofflaw.

Victor Saldaño's case is unquestionably an embarrassing one for the United States. During the penalty phase of a capital case, which follows the initial finding of guilt for murder, Texas law requires a unanimous jury finding on the special issue of future dangerousness, that is, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."⁶⁴ To prove future dangerousness at Saldaño's 1996 trial, the prosecution presented the testimony of Dr. Walter Quijano, a former chief psychologist and director of psychiatric services of the Texas prison system,⁶⁵ who stated he had testified in approximately seventy death penalty cases.⁶⁶ Quijano testified that Saldaño's Hispanic ethnicity was a factor indicating future dangerousness, because Hispanics were over-represented in the Texas prison system.⁶⁷ Defense counsel did not object. Instead, he asked on cross-examination whether, given that the bulk of the U.S. Hispanic population was of Mexican and Puerto Rican origin, it was correct to classify Saldaño as Hispanic for the purpose of the future dangerousness correlation, as he was an Argentine, so

63. Paula Lugones, *Tratan en Washington el caso del argentino condenado a muerte en EE.UU.*, CLARÍN (Oct. 10, 2015), https://www.clarin.com/mundo/tratan-washington-argentino-condenado-eeuu_0_S1xBlzYv7l.html, (describing a press conference of Juan Carlos Vega, attorney for Lidia Guerrero, after his meeting with the Commission and asking that the United States be held to have violated its international obligation).

64. TEX. CODE CRIM. PROC. ANN. art. 37.071 (West, Westlaw through 2021 Regular and Second Called Sessions of the 87th Legislature).

65. Transcript of Record at 61, *Texas v. Saldaño*, No. 199-80049-96 (199th Dist. Ct., Collin County, Tex. July 12, 1996).

66. Transcript of Record, *supra* note 65, at 68.

67. *Id.* at 75-76; *see also* *Saldaño v. Cockrell*, 267 F. Supp. 2d 635, 638 (E.D. Tex. 2003).

his “blood lines” were different.⁶⁸ Not surprisingly, the witness answered that Spanish-speaking South Americans are Hispanics.⁶⁹

After the Texas Court of Criminal Appeals found no reversible error,⁷⁰ the Texas Attorney General, John Cornyn, admitted error before the U.S. Supreme Court, recognizing that “the prosecution’s introduction of race during the penalty phase, as a factor for determining ‘future dangerousness,’ constituted a violation of Saldaño’s rights to equal protection and due process.”⁷¹ The U.S. Supreme Court accordingly returned the case to Texas in light of the confession of error.⁷² However, on remand, the Texas Court of Criminal Appeals insisted that the Texas Attorney General’s admission of error was improper given defense counsel’s failure to object at trial,⁷³ and that counsel insisting that Saldaño’s “blood lines” did not make him Hispanic was a trial tactic and hence did not constitute ineffective assistance of counsel.⁷⁴

Ultimately, Saldaño was awarded a new trial due to a new confession of error by the Texas Attorney General during the federal habeas corpus proceeding.⁷⁵ Nevertheless, thanks to the Texas Court of Criminal Appeals’ decisions and an attempted intervention by local prosecutors during federal habeas corpus,⁷⁶ eight years passed from the time of Saldaño’s first trial to when he finally received a new capital trial in 2004.⁷⁷ After eight years on death row, strong evidence indicates that he had suffered a severe psychiatric decline.⁷⁸ Saldaño’s second trial, held exclusively to consider the application of the death penalty, was focused on “future dangerousness” and evidence relevant to mitigation of punishment. Saldaño presented a bizarre figure, very

68. The term “blood lines” is used by the defense counsel. *See* Transcript of Record, *supra* note 65, at 127, 129, 131-32; *see also* Saldaño v. Cockrell, 267 F. Supp. 2d at 638.

69. Transcript of Record, *supra* note 65, at 127, 129, 131-32.

70. Saldaño v. State, No. 72, 566, 1999 Tex. Crim. App. Unpub. LEXIS 2 (Tex. Crim. App. Sep. 15, 1999).

71. Response to Pet. for Writ of Cert. at 1, Saldaño v. Texas, 530 U.S. 512 (2000) (No. 99-8119).

72. Saldaño v. Texas, 530 U.S. 1212 (2000).

73. Saldaño v. State, 70 S.W.3d 873, 889-91 (Tex. Crim. App. 2002).

74. *Id.* at 885-86.

75. Saldaño v. Cockrell, 267 F. Supp. 2d 635, 640 (E.D. Tex. 2003).

76. *See* Saldano v. Roach, 363 F.3d 545 (5th Cir. 2004) (dismissing the District Attorney’s appeal on denial of his right to intervene).

77. Jury selection for the second trial began on October 4, 2004. Individual Questioning of Prospective Jurors, Texas v. Saldaño, No. 199-80049-96. Saldaño’s first trial concluded with a death sentence on July 15, 1996. Transcript of Record, *supra* note 65, at 309.

78. An excellent summary appears in an affidavit by Valeria M. Gonzalez Posse, Deputy Consul General of the Consulate of Argentina in Houston, which appears in Petitioner Victor Hugo Saldaño’s Petition for Writ of Habeas Corpus, Exhibit K. Petitioner Victor Hugo Saldaño’s Petition for Writ of Habeas Corpus, Saldaño v. Thaler, No. 4:08cv193 at 342-62.

different from the way he appeared during the first trial, where the record shows no abnormal conduct. At the second trial, he insisted on wearing prison clothing, rocked in his chair, laughed inappropriately, read magazines, yawned, masturbated on four occasions, and after being trussed in restraints, suddenly stood up so that the jury saw his shackles.⁷⁹ Moreover, most of the State's evidence on future dangerousness consisted of similar bizarre behaviors by Saldaño, for example his tendency to throw urine and feces while in severe isolation,⁸⁰ an environment that Texas established for all death row inmates starting in early 2000.⁸¹

Yet, the Fifth Circuit Court of Appeals held that the trial judge could rely on defense counsel's assertions that Saldaño had been examined by experts who had found him competent for trial,⁸² even though no details regarding the examinations were in the record other than defense counsel's assertion that they had occurred.⁸³ Reviewing courts had no issue with the prison guards' future dangerousness testimony about Saldaño's misconduct while he was suffering from the effects of severe isolation in a ten-foot by six-foot cell.⁸⁴ Given the conditions of death row in Texas and Saldaño's long history of psychiatric hospitalizations,⁸⁵ his conduct in isolation and at trial would all point to severe mental deterioration. However, the Fifth Circuit insisted that his decline did not provide a constitutional claim that would prevent the second penalty trial.⁸⁶ There is little doubt that Saldaño's case, with its combination of racist testimony at the first trial and severe mental decline during eight years on death row, had exceptional potential to discomfit the United States internationally.

Starting in 1998, Lidia Guerrero turned to the Commission on behalf of her son, first with an unsuccessful case against Argentina where she argued

79. *Saldaño v. Davis*, No. 16-70025, 701 F. App'x 302, 312-13 (5th Cir. 2017).

80. Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus, *Saldaño v. Thaler*, No. 4:08cv193 at 157-59.

81. See HUM. RTS. CLINIC, UNIV. TEXAS SCH. LAW, DESIGNED TO BREAK YOU 5 (2017), <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf>.

82. *Saldaño v. Davis*, 759 F. App'x 276 (5th Cir. 2019).

83. *Saldaño v. Davis*, No. 16-70025, 701 F. App'x at 315.

84. The Court of Appeals rejected arguments that mental deterioration short of incompetency could justify blocking a second death sentencing proceeding or the future dangerousness testimony based on death row misconduct. *Id.* at 310-11. The cell is described in Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus. Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus, *Saldaño v. Thaler*, No. 4:08cv193 at 168.

85. See Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus, *Saldaño v. Thaler*, No. 4:08cv193 at 344, 355 (emphasizing Exhibit K, Declaration of Valeria M. González Posse, Deputy Consul General of the Consulate of Argentina in Houston).

86. See *Saldaño v. Davis*, 759 F. App'x 276 (5th Cir. 2019).

that Argentina did not act with sufficient force internationally on Saldaño's behalf.⁸⁷ But Guerrero found success in a case on behalf of Saldaño against the United States,⁸⁸ which I assisted with during its early stages. What is truly remarkable, however, is not the Commission decision—the Commission could hardly have ruled for the United States—but the response of the Argentine media to the case, regardless of political inclination.

Saldaño's case had long received regular attention in the Argentine press, which is not surprising given Saldaño's quarter-century on death row and his status as the only Argentine citizen on death row during this entire time.⁸⁹ There is even a film documentary about the case,⁹⁰ and the Pope met with Lidia Guerrero twice to express his concerns and offer support.⁹¹ But the focus of coverage on the role of the Commission has been especially striking. Some articles used the headline *Horas decisivas para Saldaño, el Argentino condenado a muerte en Estados Unidos* (Decisive hours for Saldaño, the Argentine condemned to death in the United States),⁹² not to describe a key domestic judicial proceeding, but to refer to a hearing before the Commission for consideration of his petition. The implicit assumption was that the Commission could make an important difference in Saldaño's fate.

Just as interesting as the Commission's report in Saldaño's case, is its coverage in Argentina. In an extensive report, the Commission issued recommendations that concluded that the United States had violated Saldaño's right to life, right to equal treatment, right to a fair trial, right to

87. Saldaño v. Argentina, Petition, Inter-Am. Comm'n H.R., Report No. 38/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 12 (1999).

88. Saldaño v. United States, Case 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L./V/161, doc. 31 (2017).

89. See Jordan S. Rubin, *Argentina Backs Texas Death Row Prisoner at U.S. Supreme Court*, BLOOMBERG L. (OCT. 23, 2019, 1:50 AM), <https://news.bloomberglaw.com/us-law-week/argentina-backs-texas-death-row-prisoner-at-u-s-supreme-court>.

90. SALDAÑO, EL SUEÑO DORADO (El Desencanto Films SRL 2014); *Llega a los cines la historia de Víctor Hugo Saldaño, el argentino condenado a muerte en Texas* [The Story of Víctor Hugo Saldaño, the Argentine Condemned to Death in Texas, Arrives in Theaters], TELAM DIGITAL (Apr. 28, 2015, 11:17 AM), <https://www.telam.com.ar/notas/201504/103149-la-historia-de-saldano-el-argentino-condenado-a-muerte-en-texas-llega-a-los-cines.html>.

91. Marisa Iatí, *Why Pope Francis and the Texas Bishops are Trying to Save a Man on Death Row*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/religion/2019/09/05/why-pope-francis-texas-bishops-are-trying-to-save-man-death-row/>.

92. *Horas decisivas para Saldaño, el argentino condenado a muerte en Estados Unidos*, EL PATAGÓNICO (Oct. 6, 2015), <https://www.elpatagonico.com/horas-decisivas-saldano-el-argentino-condenado-muerte-estados-unidos-n1295521>; *Horas decisivas para el argentino condenado a muerte en Estados Unidos*, EL ANCASTI (Oct. 7, 2015), <https://www.elancasti.com.ar/nacionales/2015/10/7/horas-decisivas-para-argentino-condenado-muerte-estados-unidos-275421.html>; see also Lugones, *supra* note 63.

protection from arbitrary arrest, and right to due process—given the racism of the first death penalty trial, the mental decline that he exhibited during the second death penalty trial, the harsh conditions of his confinement, and the extraordinarily long time on death row and its impact on his mental health.⁹³ It is hardly surprising that the Commission called for a halt to any threat of execution, a commutation of his sentence to life imprisonment, Saldaño's removal from death row to more humane conditions of confinement, and for adequate mental health treatment.⁹⁴ The decisions of the Commission in the case naturally received extensive Argentine coverage,⁹⁵ but much more striking is that the leftist newspaper, *Página 12*, the centrist *Voz del Interior* (the principal newspaper of Córdoba, Argentina, Saldaño's birthplace), *Télam* (Argentina's government-owned news agency), and the business journal *BAE Negocios*, all refer to the Commission as the "única posibilidad" (only possibility) for saving Saldaño's life, when discussing appeals to the U.S. Supreme Court.⁹⁶ The Argentine media see a decision by the Commission as the key to ending Saldaño's torture on death row.⁹⁷

Certainly part of the focus on the Commission was initiated by Juan Carlos Vega, the lawyer representing Saldaño before the Commission. Vega

93. *Saldaño v. United States*, Case 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶ 268 (2017).

94. *Id.* ¶ 269.

95. See e.g., Gabriela Origlia, *Caso Saldaño: la CIDH intima a Pompeo para sacarlo del corredor de la muerte*, LA NACION (Jan. 18, 2019, 12:52 AM), <https://www.lanacion.com.ar/sociedad/caso-saldano-cidh-intima-pompeo-sacar-del-nid2211907/>; *Piden a EE.UU. bajar la pena de Víctor Saldaño, el argentino condenado a muerte*, LA NACION (Jan. 20, 2017, 10:52 AM), <https://www.lanacion.com.ar/sociedad/piden-a-eeuu-que-baje-la-pena-de-victor-saldano-el-argentino-condenado-a-muerte-nid1977524/>; *Piden a EE.UU. que conmute la pena de Saldaño*, LA VOZ (Jan. 20, 2017, 12:51 AM), <https://www.lavoz.com.ar/ciudadanos/piden-eeuu-que-conmute-la-pena-de-saldano/>.

96. *Víctor Saldaño: Argentina presentó un recurso en la Corte Suprema de EE.UU.*, PÁGINA 12 (Aug. 16, 2019, 7:40 PM), <https://www.pagina12.com.ar/212561-victor-saldano-argentina-presento-un-recurso-en-la-corte-sup>; *Caso Saldaño: en noviembre ejecutarían al cordobés que está condenado a pena de muerte hace 24 años en EE.UU.*, LA VOZ (Apr. 19, 2019, 12:31 AM), <https://www.lavoz.com.ar/ciudadanos/caso-saldano-en-noviembre-ejecutarian-al-cordobes-que-esta-condenado-pena-de-muerte-hace-/>; *La Argentina presentó un "Amicus Curiae" a la Corte Suprema de EE.UU.*, TELAM (Aug. 15, 2019, 5:45 PM), <https://www.telam.com.ar/notas/201908/384846-argentina-presento-un-amicus-curiae-a-la-corte-suprema-de-eeuu-por-el-caso-saldano.html>; *El Gobierno reclama la suspensión de la pena de muerte a un argentino en EE.UU.*, BAE NEGOCIOS (Aug. 15, 2019, 5:05 PM), <https://www.baenegocios.com/sociedad/Argentina-reclama-la-suspension-de-la-pena-de-muerte-a-un-argentino-en-EE.UU.-20190815-0022.html>.

97. See Sol Amaya, *Caso Víctor Saldaño: audiencia clave ante la Comisión Interamericana por el cordobés sentenciado a muerte en los EE.UU.*, LA NACION (Oct. 7, 2015, 4:15 PM), <https://www.lanacion.com.ar/el-mundo/caso-victor-saldano-audiencia-clave-ante-la-comision-interamericana-por-el-cordobes-sentenciado-a-muerte-en-los-eeuu-nid1834510/>.

publicly questioned the value of seeking judicial remedies in the United States that did more than refer to the Commission's decision once it had spoken.⁹⁸ But the mainstream press took seriously not only Vega's demands that the United States comply with the Commission's recommendations,⁹⁹ but also his demands that the Commission now order the United States to pay \$10 million in compensation.¹⁰⁰ Given that the courts in the United States have consistently treated Commission recommendations as lacking domestic legal authority, the gap between what the Argentine press focused on and the realities within the United States borders is tragicomic in the death penalty context.¹⁰¹

IV. THE STATEMENT OF INTEREST AS AN OPPORTUNITY FOR ENGAGEMENT

The United States has a foreign policy interest in maintaining a high reputation on international human rights issues. Scholars have written a great deal about the importance of reputation in international relations, including

98. See Gabriela Origlia, *La defensa de Víctor Saldaño juega su última carta en los Estados Unidos para evitar la ejecución*, LA NACION (July 17, 2019, 11:40 AM), <https://www.lanacion.com.ar/seguridad/la-defensa-victor-saldano-juega-ultima-carta-nid2268503/>.

99. E.g., "EEUU no quiere cumplir con la CIDH," dijo el abogado de Saldaño tras decisión de la Corte Suprema, TELAM (Nov. 19, 2019, 1:32 PM), <https://www.telam.com.ar/notas/201911/409869-saldano-estados-unidos-pena-de-muerte-cidh-corte-suprema.html>; Paula Lugones, *Piden sacar a Víctor Saldaño del corredor de la muerte y enviarlo a un psiquiátrico*, CLARÍN (Mar. 18, 2017, 6:35 PM), https://www.clarin.com/policiales/piden-sacar-victor-saldano-corredor-muerte-enviarlo-psiquiatri-co_0_rJdtBpqig.html; see also Juan Carlos Vega, *Las lecciones del caso Saldaño*, LA NACION (Jan. 30, 2019), <https://www.lanacion.com.ar/opinion/las-lecciones-del-caso-saldano-nid2215511/> (an op ed emphasizing the Commission addressing itself to U.S. Secretary of State Michael Pompeo to require the United States to comply with the Commission's recommendations).

100. *El abogado de Víctor Saldaño pidió que EE.UU. lo indemnice con 10 millones de dólares*, CLARÍN (June 18, 2021, 12:37 PM), https://www.clarin.com/sociedad/abogado-victor-saldano-pidio-ee-uu-indemnice-10-millones-dolares_0_6iiv9t47B.html; see, e.g., Gabriela Orgilia, *Piden indemnizar a Víctor Saldaño con US\$10 millones por sus 24 años en el "corredor de la muerte" en Texas*, LA NACION (June 18, 2021, 12:01 AM), <https://www.lanacion.com.ar/seguridad/piden-indemnizar-a-victor-saldano-con-us10-millones-por-sus-24-anos-en-el-corredor-de-la-muerte-en-nid18062021/>; *El cordobés Saldaño pidió que EE.UU. lo indemnice con US\$ 10 millones por tenerlo en el "corredor de la muerte"*, LA VOZ (June 17, 2021, 5:28 PM), <https://www.lavoz.com.ar/ciudadanos/corredor-de-la-muerte-el-cordobes-victor-saldano-pidio-que-eeuu-lo-indemnice-con-us-10-millones/>.

101. In practice, the only body for whom a decision of the Commission might have even theoretical relevance in Saldaño's case is the Texas Board of Pardons and Parole, which has the power, by majority vote, to recommend commutation of a death sentence, which then the Governor can approve. TEX. CODE CRIM. PROC. ANN. art. 48.01 (West, Westlaw through 2021 Regular and Second Called Sessions of the 87th Legislature).

reputation in the human rights field.¹⁰² It would seem intuitive that countries will prefer to ally with states that share and effectuate their most important values, since values-based frictions will diminish, and states can count on more easily sharing responses to common challenges. International public opinion polls show that the reputation of the United States has slumped on the question of whether the United States respects the personal freedoms of its people. In 2018, less than half of the populations of France, Germany, Spain, and the United Kingdom indicated favorable perceptions of the United States in respecting personal freedoms compared to strong majorities showing favorable perceptions five years earlier.¹⁰³ While the image of the United States has recently improved under President Biden, many foreigners continue to have doubts about the United States as a successful democracy.¹⁰⁴

Obviously, Saldaño's case is a minuscule piece of any reputational drop for the United States. Yet, the huge difference between the judicial realities in the United States and the assumptions of Argentine media about how the United States should treat Commission decisions forms part of the problem. Further, the contradictions are all the sharper given the activism of the U.S. law school clinics and NGOs before the Commission. While the United States' judicial practice regarding Commission decisions is limited by the present state of the case law, it behooves the U.S. State Department to consider ways to limit perceptions of the United States as a human rights scofflaw with respect to the Inter-American system. One small step could be for the State Department to use Statements of Interest to support Commission decisions.

102. Reputation has many facets, from reputation for resolve and consistency, to reputation as a good ally and reputation for upholding shared values. Discussion on the role of reputation is central to international relations literature. See generally Mark J.C. Crescenzi et al., *Reliability, Reputation, and Alliance Formation*, 56 INT'L STUD. Q. 259 (2012) (offering a useful overview of the role of reputation on alliances); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002) (arguing that reputation consequences are area specific); Alex Weisiger & Keren Yarhi-Milo, *Revisiting Reputation: How Past Actions Matter in International Politics*, 69 INT'L ORG., 473 (2015) (offering an overview of debates about the importance of resolve and consistency). In the human rights area, arguments for compliance tend to focus on reputational benefits from shared values that strengthen alliances with like-minded countries. See Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L.J. 635, 650 (2007).

103. Richard Wike et al., *U.S. Image Plummets Internationally as Most Say Country Has Handled Coronavirus Badly*, PEW RES. CTR. (Sept. 15, 2020), <https://www.pewresearch.org/global/2020/09/15/us-image-plummets-internationally-as-most-say-country-has-handled-coronavirus-badly/>.

104. Richard Wike et al., *America's Image Abroad Rebounds with Transition from Trump to Biden*, PEW RES. CTR. (June 10, 2021), <https://www.pewresearch.org/global/2021/06/10/americas-image-abroad-rebounds-with-transition-from-trump-to-biden/>.

Statements of Interest are statutorily authorized¹⁰⁵ and used in a variety of contexts. Sometimes the Department of Justice files them to defend the federal government's property or contractual interests without intervening as a party to a lawsuit.¹⁰⁶ More recently, the government has used these statements as a strategic tool, rather like an amicus brief in a civil rights context, to express its preferred legal position.¹⁰⁷ But they are probably best known for their use in foreign affairs cases. A recent student note found approximately 156 filings dealing with foreign affairs from 1925 through 2016.¹⁰⁸ In dicta in *Sosa v. Alvarez-Machain*,¹⁰⁹ the Supreme Court noted the need for "case-specific deference to the political branches" when a Statement of Interest is filed in an action with foreign affairs implications, and noted that "[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."¹¹⁰ Dozens of lower court decisions have quoted the Supreme Court's language on case-specific deference to a Statement of Interest.¹¹¹

There is certainly no legal impediment to the State Department filing a Statement of Interest through the Department of Justice when it would be appropriate to comply with a Commission decision.¹¹² In Saldaño's case, the State Department under the Obama administration did something similar, if not quite as definitive, which serves at least as a partial precedent should the Biden administration or any future administration wish to show a deeper engagement with the Commission. What was done likely owed much to the progressive internationalism of Harold Hongju Koh, the State Department's Legal Adviser at the time, and a former dean of Yale Law School. He is also a leader of what is called the "New Haven School of International Law," which focuses on international law as the internalization of the norms of a broad range of international actors and not merely the product of power politics.¹¹³ The approach naturally lends itself to broad international

105. 28 U.S.C. § 517.

106. Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 HARV. C.R.-C.L. L. REV. 227, 232 (2017).

107. *Id.* at 233-43.

108. *Id.* at 233.

109. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

110. *Id.* at 733 n. 21.

111. *See, e.g., Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.C. Cir. 2007); *Sarei v. Rio Tinto, PLC.*, 456 F.3d 1069, 1081 (9th Cir. 2006); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1177 (C.D. Cal. 2005).

112. The Supreme Court emphasized the centrality of the U.S. State Department's role in indicating the official immunity of foreign government officials. *See Samantar v. Yousuf*, 560 U.S. 305, 323-24 (2010).

113. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 310-11 (2007).

engagement, since actors gain advantages in the development of a particular legal culture that they cannot simply impose or even necessarily develop through negotiations.

Koh wrote a letter addressed to Thomas E. Perez, then the Assistant Attorney General leading the Civil Rights Division of the U.S. Department of Justice, for filing with the U.S. District Court hearing Saldaño's habeas corpus petition.¹¹⁴ The letter did not make a request of the District Court or take an explicit legal position, but instead merely explains the international importance of the case to the Court and notes the U.S. government's representations to the Commission that there would be a thorough habeas corpus review of Saldaño's case.¹¹⁵ The letter referenced a hearing before the Commission on November 3, 2009, at which the United States stressed that the federal habeas corpus proceedings would provide a venue to address Saldaño's allegations that his death sentence violated his human rights.¹¹⁶ The letter noted that the Commission had requested that the U.S. government file an amicus brief on Saldaño's behalf, and stressed that "[t]he United States 'would like to respond to the Commission as favorably as possible' and 'recognizes the Commission as an important mechanism for the promotion and protection of human rights in the Americas, in other states as well as our own.'¹¹⁷ Without specifically asking for anything, the letter further noted that the case would also become a focus of United Nations human rights bodies,¹¹⁸ and explains that:

The unusual facts of this case—that Petitioner is a foreign national whose original death sentence was vacated as tainted by admitted unconstitutional racial bias during his initial penalty hearing and who now alleged that he has suffered severe mental deterioration during his lengthy confinement on death row—set against the international community's broader concerns regarding discriminatory application of the death penalty in the United States, provides a strong additional basis for the Department of State to demonstrate to those UN bodies that the United States has taken every available step to address Petitioner's claims of violations of his constitutional (and human) rights.¹¹⁹

114. Letter from Harold Hongju Koh, Legal Adviser, U.S. Dept. of State, to Thomas E. Perez, Assistant Att'y Gen., Civ. Rts. Div., U.S. Dept. of Just. (May 10, 2010), <https://2009-2017.state.gov/documents/organization/179245.pdf>.

115. *Id.*

116. *See id.*

117. *Id.*

118. *Id.*

119. *Id.*

The letter expresses strong sentiments of wishing to engage with the Commission and more broadly with UN human rights bodies—but at the same time, does not ask the Court to do or hold anything, as an amicus brief or a Statement of Interest typically would. The letter did not offer a position to respond to. In fact, the U.S. Attorney who filed the letter described it as “redundant of what the Court would be reviewing in the habeas petition,” and stated that the Department of Justice “takes no position” on whether Saldaño should receive an evidentiary hearing on his habeas petition, though “the State Department would be very glad if the Court did convene such a hearing.”¹²⁰ At least implicitly, the U.S. Attorney appeared perplexed by the lack of a formal request for any action from the Court, which made it a very atypical filing. In the end, the District Court made no reference to the filed letter in its ruling against Saldaño’s habeas petition.¹²¹

The Saldaño case offers a guide for the future, however. A future State Department Legal Adviser could certainly pick up where Koh left off and ask a court to take specific steps in response to a recommendation from the Commission. Not all cases that the Commission resolves have equal international importance, and because the Commission’s Statute requires exhaustion of domestic judicial remedies before petitioners may file a case,¹²² many petitioners in exhausting their domestic remedies will also face the limitation that their cases are *res judicata*. Domestic rules of *res judicata* mean that sometimes the executive and legislative branches are the only possible interlocutors for the Commission. But at least in some cases, engagement between U.S. courts and the Commission should be possible, whether because later litigations can invoke an earlier Commission decision, or because the Commission, as in *Saldaño*, was willing to hear a death penalty case before the federal habeas corpus proceeding had concluded.¹²³ In today’s rarified political climate, it is conceivable that some state court judges might take offense at a progressive administration calling for respect for a recommendation by the Commission. Nevertheless, when an opportunity presents itself before the right U.S. court, and when the intervention could be productive, a progressive administration has no excuse not to take U.S. international engagement a small step further, by going beyond what Koh did in Saldaño’s case and actively supporting a position taken by the Commission. A Statement of Interest should lead judges to

120. Letter from John M. Bales, U.S. Att’y, E. Dist. of Tex., to Richard Schell, U.S. Dist. J., E. Dist. of Tex. (June 2, 2010).

121. *Saldaño v. Director*, No. 4:08-cv-193, 2016 WL 3883443, *1 (E.D. Tex. July 18, 2016).

122. IACHR Statute, *supra* note 41, art. 20.

123. *See Saldaño v. United States*, Case 12.254, Inter-Am. Comm’n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶¶ 80-83 (2017).

respond to the U.S. government and thereby toward a process of engagement with the Commission.

V. CONCLUSION

Right now, the United States pays a price for its lack of engagement with the Inter-American Commission. It might not be a high price, but as the Saldaño case shows, it is part of broader conceptions that the United States is a scofflaw. Our constitutional system, unlike Argentina's, does not presently allow treatment of Commission decisions as domestic legal obligations. But that does not rule out greater engagement of the U.S. courts with the Commission, and if a progressive administration wishes to encourage that engagement, the U.S. government's participation in key cases through a Statement of Interest or an amicus brief offers a natural path.

COMBATTING BASE EROSION AND PROFIT SHIFTING: IS A DIGITAL SERVICE TAX ON REVENUE THE RIGHT PATH TOWARD EQUITABLE INTERNATIONAL TAXATION?

*Brendan Nafarrate**

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* J.D. Candidate, Southwestern Law School, 2021; B.A. History, California Polytechnic University, Pomona, 2017. Thank you to my wife and family for their constant support. Also, I would like to thank Professor Jonathan Miller, Professor Warren Grimes, Professor Kathryn Campbell, and the Southwestern community for their guidance and support throughout the writing process and beyond.

I. INTRODUCTION

Social media and digital platforms have increased the interconnectedness of the world by allowing for a level of communication unseen before, but it has exacerbated a variety of societal problems. Everything from unfair taxation practices and promotion of gambling in children¹ to creation of black markets for stolen relics has been increased by digital platforms.² This note seeks to first shed light on the issues surrounding base erosion and profit shifting and subsequently advocate for the recognition of “user created value” to combat it. Base erosion and profit shifting allow large tech companies to pay little to nothing in taxes in countries where they conduct business.

Base erosion and profit shifting are tax planning strategies that exploit gaps in tax rules.³ These strategies allow businesses that operate in multiple countries the ability to shift their profits from high-tax jurisdictions to low-tax jurisdictions.⁴ Essentially, a company like Facebook will keep their labor in a high tax jurisdiction like the United States but move all of their profitable intellectual property to a low tax country like Ireland. Effectively, the higher U.S. payroll tax is countered by the lower tax rate of the profits from the intellectual property and allows Facebook to pay virtually nothing in either jurisdiction. This is a simplified version of the problem, but it highlights the main issues.

Every year, base erosion and profit shifting costs countries between \$100 to \$240 billion in lost revenue.⁵ Multinational Companies (MNCs) like Google, Amazon, Facebook, and Apple, disguise their income through profit shifting schemes that reduce the effective tax rate imposed on their cross-border income. Tech MNCs do this easily because their income derived from intangible assets like patents, algorithms, and trademarks are registered in

1. *See generally*, Ara Aghakhanian, Video Game Microtransactions Featuring Loot Boxes: Not Gambling, but Similar Enough to Warrant Regulation (February 2020) (unpublished note, Southwestern Law School) (on file with the Southwestern Law School Library).

2. *See generally*, Alexandra Figueroa, Applying Transnational Anti-Trafficking Legal Regimes to Digital Platforms in Order to Preserve Global Cultural Heritage (Dec. 19, 2019) (unpublished note, Southwestern Law School) (on file with the Southwestern Law School Library).

3. *What is BEPS?*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], <https://www.oecd.org/tax/beps/about/> (last visited Dec. 14, 2021).

4. DANIEL BUNN, SUMMARY AND ANALYSIS OF THE OECD’S WORK PROGRAM FOR BEPS 2.0, TAX FOUND. 3 (2019), <https://files.taxfoundation.org/20190617125254/Summary-and-Analysis-of-the-OECDs-Work-Program-for-BEPS-2.0-FF-660.pdf>.

5. OECD, *supra* note 3.

shell corporations in low tax countries. In 2017, for example, Amazon paid one tenth of one percent in taxes on its \$2.2 billion revenue in the United Kingdom by disguising its profits using a holding company in Luxembourg.⁶

Many European Union (EU) countries agree that base erosion and profit shifting are a problem, but they cannot agree on a uniform solution. The European Commission released its digital service tax proposal in March 2018.⁷ This tax would apply to companies with total annual worldwide revenues of \$868 million and total EU revenues of \$58 million.⁸ This proposal could only be passed with unanimous support of all EU members. As a result, it has not been implemented.⁹ Ireland, Luxembourg, Malta and the Netherlands are skeptical of a digital service tax, fearing it will make them less competitive as low-tax havens for tech MNCs.¹⁰

Refusing to wait for EU cooperation, France enacted a three percent digital service tax on tech MNCs' revenues in July 2019.¹¹ The United States immediately launched investigations as it found the tax discriminatory against U.S. companies.¹² By August 2019, both countries reached an agreement hinging on the Organization for Economic Cooperation and Development's (OECD) tax guidelines set to be released by the end of 2020.¹³ However, other EU countries are considering passing digital service taxes on MNCs' revenue.¹⁴ Canada has also declared that it will enact a three percent tax on targeted advertising services.¹⁵

6. *France Tech Tax: What's Being Done to Make Internet Giants Pay More?*, BBC NEWS (July 11, 2019), <https://www.bbc.com/news/business-48928782>.

7. DANIEL BUNN, A SUMMARY OF CRITICISMS OF THE EU DIGITAL TAX, TAX FOUND. 2 (2018), <https://files.taxfoundation.org/20181022090015/Tax-Foundation-FF618.pdf>.

8. *Id.* at 3.

9. *Id.*

10. Andrew Thompson & Louis D.C. Grandjouan, *Digital Economy Taxation: The OECD's Report and European Commission's Draft Directives*, 35 J. TAX'N INVESTMENT 23 (2018), LEXIS.

11. *France Passes Tax on Tech Giants Despite US Threats*, BBC News (July 11, 2019), <https://www.bbc.com/news/world-europe-48947922>.

12. Lilian V. Faulhaber, *Beware. Other Nations Will Follow France with Their Own Digital Tax*, N.Y. TIMES (July 15, 2019), <https://www.nytimes.com/2019/07/15/opinion/france-internet-tax.html>.

13. Jim Tankersley & Alan Rappeport, *As Nations Look to Tax Tech Firms, U.S. Scrambles to Broker a Deal*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/business/economy/tech-company-taxes.html>.

14. Elke Asen, *Announced, Proposed, and Implemented Digital Services Taxes in Europe*, TAX FOUND. (Oct. 25, 2019), <https://taxfoundation.org/digital-taxes-europe-2019/>.

15. Alexander Panetta *POLITICO Pro Canada: Liberal Platform Vows French-style Digital Tax*, POLITICO (Sept. 30, 2019, 10:01 AM), <https://www.politico.com/news/2019/09/30/politico-pro-canada-liberal-platform-vows-french-style-digital-tax-011564>.

In December 2019, the investigation's findings were announced. The U.S. Trade Representative determined that the French digital services tax unfairly discriminates against U.S. companies, conflicts with international tax principles, and intends to penalize Google, Apple, Facebook, and Amazon.¹⁶ France's digital service tax will affect only a small number of large companies. The tax will apply to companies with worldwide revenues of at least \$868 million and at least \$28 million of French "qualifying" revenues.¹⁷ A few Chinese, British, and Indian companies, and one French firm fit into this revenue category; the rest of the companies affected are U.S. based.¹⁸ Although the tax is not directly aimed at the United States, all the leading tech MNCs are American.

France's decision to tax only the highest earning tech MNCs shows its desire not to impede competition in the tech sector, but rather ensures MNCs are contributing their fair share. Further, France's negotiations with the United States show it is willing to end the tax once a solution is created. The tax is discriminatory, but only because the United States has the highest-earning companies in the tech sector. France's willingness to cooperate once a worldwide tax solution is achieved shows a diplomatic restraint the country should be commended for. It also creates an adaptable framework, which other countries seeking to tax tech MNCs can use. This law and its flexibility will push the OECD to make changes sooner.

Traditionally, taxing a corporation requires a fixed, "physical presence" within the country.¹⁹ The French law creates an "economic presence" criteria by establishing the above income thresholds for companies profiting from the French people and the data they provide to the companies.²⁰ Critics argue this is unfair because users do not create value through using a free service.²¹ Furthermore, a social networking company may have no employees, servers,

16. Douglas J. Heffner & Richard P. Ferrin, *U.S. Trade Representative Announces Results of Section 301 Investigation of French Digital Services Tax*, NAT'L L. REV. (Dec. 4, 2019), <https://www.natlawreview.com/article/us-trade-representative-announces-results-section-301-investigation-french-digital>.

17. Jessie Gaston, *Tax Alert: French Digital Services Tax ("DST")*, DENTONS (July 15, 2019), <https://www.jdsupra.com/legalnews/tax-alert-french-digital-services-tax-24392/>; *see generally*, Loi 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés [Law 2019-759 of July 25, 2019 on the creation of a tax on digital services and modification of the downward trajectory of corporate tax], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 25, 2019, https://www.legifrance.gouv.fr/download/pdf?id=vQhycwR0pIwjxQK8QpQMgIstvrVw7vibSIX3L_C8eE=.

18. BBC NEWS, *supra* note 6.

19. SEAN LOWRY, CONG. RSCH. SERV., R45532, DIGITAL SERVICE TAXES (DSTs): POLICY AND ECONOMIC ANALYSIS 2 (2019).

20. *Id.* at 4; Law 2019-759 of July 25, 2019 (Fr.).

21. BUNN, *supra* note 4 at 5-6.

or even sales agents in France and still be taxed.²² In reality, user-created data is highly valuable because advertisers pay for users' personalized attention which is only possible through collecting and analyzing personal data.²³ These steps serve to check the power of tech MNCs and increase competition in the digital sector. As more and more countries begin implementing their own digital service taxes, tech MNCs will be forced to change their practices.

This note aims to further Professor Wei Cui's assertion that users do in fact create value simply by using a social media platform.²⁴ Using the French law's "economic presence" theory, it can be shown that tech MNCs are profiting from their applications' mere usage in a foreign jurisdiction. However, this note counters other scholars' assertion that users of social media platforms should be compensated for their labor. Data is highly valuable, but tech MNCs still provide a costly service by allowing access to their applications for free or little cost. With the advances in data mining in the coming years, it may be possible that users will start selling their data to tech companies, but that subject goes beyond the scope of this note.

Digital Service Taxes (DST) are the next step in creating equitable taxation worldwide. As the economy becomes digitized, more income can be generated without a company's physical presence within a country. Tech MNCs have taken advantage of this through base erosion and profit shifting. Section II addresses the French tax and explains how it set this movement in motion. Section III discusses how the tax should be implemented by recognizing that users create value for tech companies and seeking a global shift toward recognizing economic presence criteria. Finally, Section IV will respond to critics of the tax demonstrating the strategic value of implementing a DST.

II. THE CIRCUMSTANCES LEADING TO THE CREATION OF FRENCH LAW No. 2019-759

Following the EU's failure to make a decision on how to tax tech MNCs, France enacted its digital services tax law on July 25, 2019.²⁵ Recognizing the need to combat base erosion and profiting, the OECD adopted a plan to

22. *Id.*

23. Le Monde avec AFP, *Le Parlement adopte définitivement la « taxe GAFA », contestée par les Etats-Unis* [Parliament Finally Adopts "GAFA Tax", Challenged by the United States], LE MONDE (July 12, 2019, 6:25 AM), https://www.lemonde.fr/economie/article/2019/07/11/le-parlement-francais-adopte-definitivement-la-taxe-gafa-contestee-par-les-etats-unis_5488135_3234.html.

24. Wei Cui, *The Digital Services Tax: A Conceptual Defense*, 73 TAX L. REV. 69, 84 (2019).

25. Law 2019-759 of July 25, 2019 (Fr.).

address these issues in September 2013.²⁶ With over 120 member countries involved, progress is slow, but the OECD has promised to publish a plan by the end of 2020.²⁷

Many countries are concerned that tech MNCs are failing to pay their “fair share” in taxes. Unafraid of the repercussions, frustrated with the slow progress, and supported by President Emmanuel Macron, the French parliament passed France’s DST primarily to “break any impasse at the OECD level and push countries to reach an international solution.”²⁸ The legislation taxes revenue, generated by (i) selling personalized digital advertising, (ii) providing intermediation services, and (iii) online market places, at a flat rate of three percent.²⁹ This is generally the same as the European Commission’s digital services tax proposal.³⁰ However, it differs greatly from traditional tax bases that only tax profits.³¹

The biggest differences are in the thresholds of who is taxed. As stated previously, France will impose the same threshold for a yearly total revenue of \$868 million but will drop the in-country revenue from the European Commission’s \$58 million to \$28 million.³² U.S. companies fit squarely in these thresholds, yet the French will tax those with lower revenues in country.³³ This means the French version of the tax actually encompasses more non-U.S. companies than the European Commission’s proposal. Following France’s lead many others have begun moving toward a digital services tax. Since October of 2019, Austria approved a DST; the Czech

26. OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, at 3 (2019), <https://www.oecd.org/tax/beps/harmful-tax-practices-2018-progress-report-on-preferential-regimes-9789264311480-en.htm>.

27. James Ross, *INSIGHT: U.K.’s Digital Service Tax—Where Are We?*, BLOOMBERG TAX (Oct. 21, 2019, 12:01 AM), <https://news.bloombergtax.com/daily-tax-report-international/insight-u-k-s-digital-services-tax-where-are-we>.

28. Lilian Faulhaber, *France’s Digital Services Tax a Sign of Things to Come*, LAW 360 (Aug. 30, 2019, 12:07 PM), <https://www.law360.com/articles/1194303/france-s-digital-services-tax-a-sign-of-things-to-come>.

29. Julien Pellefigue, *The French Digital Service Tax: An Economic Impact Assessment*, DELOITTE TAJ (Mar. 22, 2019), <https://taj-strategie.fr/content/uploads/2020/03/dst-impact-assessment-march-2019.pdf>.

30. European Commission, Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services, COM (2018) 148 final (Mar. 21, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:148:FIN> [hereinafter EC DST].

31. Faulhaber, *supra* note 28.

32. See EC DST, *supra* note 30; Law 2019-759 of July 25, 2019 (Fr.).

33. See Faulhaber, *supra* note 28.

Republic published a revised draft of their DST; and Italy, Uganda, and Turkey plan to implement a DST.³⁴

A. *Base Erosion, Profit Shifting and the OECD*

Since 2012, the OECD's Base Erosion and Profit Shifting project has been working to create a solution to inequitable global tax in conjunction with G20 countries.³⁵ The G20 is an international forum for global economic cooperation made up of a variety of countries with robust economies.³⁶ It includes the EU, the United Kingdom, the United States, Mexico, Canada, and Argentina to name a few.³⁷ By the end of 2015, the OECD began to implement their new changes to combat base erosion and profit shifting.³⁸ The OECD's goal is to prevent the incentive of shifting intellectual property profits to low-tax jurisdictions while keeping labor and costly expenses in high tax jurisdictions. It has been fairly successful in doing so, touting that practically every jurisdiction involved in negotiations has begun to implement their directives to create more transparency.³⁹ Nonetheless, it points out that tax changes worldwide continue to make their work difficult, especially the United States' recent "Tax Cuts and Jobs Act."⁴⁰

The slow progress of the OECD has pushed countries to implement their own DSTs. Due to base erosion, the EU only receives nine percent of taxes owed by tech MNCs, while traditional businesses pay twenty four percent.⁴¹ All EU members are affected, but France was the first to act. Corporate tax rates worldwide have also dropped seven percentage points since 2000, and the United States cut rates in 2018 to the worldwide average of twenty-one percent.⁴² This is another factor that likely increases the amount of money tech MNCs hide because it suggests a worldwide tendency of lax taxation for large corporations.

34. Asen, *supra* note 14.

35. See e.g., *The Latest on BEPS-2019 Midyear Review*, ERNST & YOUNG (July 30, 2019), <https://globaltaxnews.ey.com/news/2019-5951-the-latest-on-beps-2019-mid-year-review?uAlertID=fzxxkRx9St40PMYLOPBYQA%3d%3d>.

36. *The G20*, AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://dfat.gov.au/trade/organisations/g20/Pages/g20.aspx>.

37. *Id.*

38. ERNST & YOUNG, *supra* note 35.

39. *Id.*

40. *Id.*

41. Eléa Pommiers, *Taxation des Gafa : la France peut-elle faire cavalier seul ? [Taxation of Gafa, Can France Go It Alone?]*, L'EXPRESS (Apr. 1, 2019, 18:46), https://expansion.lexpress.fr/actualite-economique/taxation-des-gafa-la-france-peut-elle-faire-cavalier-seul_2055669.amp.html.

42. See Tankersely & Rappeport, *supra* note 13.

Perhaps due to these tax cuts or their strong control of markets, tech MNCs revenues have surged worldwide.⁴³ With the increased revenues of tech MNCs, France realized the OECD was not working fast enough. Although the United States has responded negatively to the tax, France's DST may push countries to move more quickly in reaching a multilateral solution.

At the moment, it seems that more unilateral moves are being made as more countries implement their forms of the DST. One can speculate that these pushes may be to force the United States to do something about the U.S. companies that are primarily causing the great inequities in foreign tax. The United States would benefit from a treaty pushing legislators to research these taxation issues and to reach an agreement between the countries that have implemented DSTs.

B. Impact in the United States

Much criticism is targeted at France, although many countries, including the United States, have been seeking to collect taxes from large tech MNCs. The U.S. Supreme Court has overruled prior decisions allowing only domestic businesses with physical presence in a state to be taxed.⁴⁴ Now, a company dealing in "e-commerce" may be taxed in any state where it substantially engages in business, thus no longer requiring an actual storefront, office, or employees in state.⁴⁵ The current international tax system was established at a time when international trade involved tangible assets and physical locations for companies to sell goods or services.⁴⁶ Thus, changes must be made to keep up with evolving technology in order to maintain competitive and equitable markets.

Understandably, the United States does not want its companies discriminated against by international taxation. However, profit shifting and base erosion have allowed many companies, including Netflix and Amazon, to pay no taxes in the United States in 2018.⁴⁷ Furthermore, Congress is launching a bipartisan investigation into the tech industry regarding the "anti-competitive conduct" of tech MNCs like Facebook, Google, and Amazon in

43. *Id.*

44. *See* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2085 (2018).

45. *Id.* at 2099.

46. *See* Faulhaber, *supra* note 28.

47. *60 Fortune 500 Companies Avoided All Federal Income Tax in 2018 Under New Tax Law*, INST. ON TAX'N & ECON. POL'Y (Apr. 11, 2019), <https://itep.org/60-fortune-500-companies-avoided-all-federal-income-tax-in-2018-under-new-tax-law/>.

the United States.⁴⁸ This note does not examine the possible monopolies existing in big tech, but this is a serious concern within the realm of taxation and tech MNCs.

U.S. scholars, tax experts, and attorneys continue to criticize the implementation of digital services taxes, but more countries continue to implement them. In particular, critics allege that France's DST's tax burden will be borne by customers and lead to high administrative costs in determining who owes what.⁴⁹ This perceived burden to be carried by consumers is addressed later in this note.

It is important to note that the United States is not content with the passing of DSTs. In 2019, U.S. President Trump threatened to impose tariffs upon French wine and luxury goods in response to this "discriminatory" tax;⁵⁰ however, both countries quickly reached a compromise. France agreed to tax tech MNCs for differences in the digital tax and whatever changes arise from the OECD's upcoming global mechanism for taxation.⁵¹ French President Macron believes that an international solution is necessary⁵² and the United States has agreed, in principle, to implement a tax change sanctioned by the OECD.⁵³ Many are unhappy with the slow rate of progress the OECD is making. Even if a plan is created in 2020, it will take years to implement.⁵⁴ Thus, France's stance, although opposed by the United States, is a push in the right direction. More countries are deciding to not standby idly as tech MNCs fail to pay their fair share. Hopefully, this will push the OECD to make changes sooner or lead to a U.S. sponsored treaty.

It seems the OECD is struggling because of the three classes of countries that are at odds. The United States is one type of class where the tech MNCs are headquartered and founded. France, a majority of the EU, Canada and most countries that acknowledged tech MNCs are not paying enough are

48. Vivian Ho, *Tech Monopoly? Facebook, Google and Amazon Face Increased Scrutiny*, GUARDIAN (June 3, 2019), <https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon>; see Press Release, Off. Of Pub. Affs., Dep't of Just., Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms> [<https://perma.cc/3J6A-9CZ3>].

49. Pellefigue, *supra* note 29.

50. Hadas Gold, *US and France Reach Compromise on Digital Tax*, CNN (Aug. 26, 2019, 1:59 PM), <https://www.cnn.com/2019/08/26/business/digital-tax-france-us/index.html>.

51. *Id.*

52. *Id.*

53. Sean J. Brennan, *The Digital Service Tax: A Big Gun in International Tech Company Tax Wars*, PA. INST. OF CERTIFIED PUB. ACCTS. (Aug. 21, 2019), <https://www.picpa.org/articles/cpa-now-blog/cpa-now/2019/08/21/digital-service-tax-big-gun-in-international-tech-company-tax-wars>.

54. See Gold, *supra* note 50.

another class. Finally, the third class includes countries like Ireland and Luxembourg that benefit from attracting tech MNCs to set up shop in their countries due to low-tax rates.

Rather than be at odds with each other, the first- and second-class countries should bind together and propose a treaty. The United States feels its companies are being discriminated against, yet the United States is also losing out on valuable tax revenue just like France and the others. These conflicts likely prevent the OECD from making quicker decisions in the international taxation realm. A treaty or executive agreement between the United States and similarly positioned countries may be a solid step forward. Until then, U.S. companies may incur more and more DSTs.

III. ACKNOWLEDGING THAT MNCs DO NOT NEED A PHYSICAL PRESENCE AND VALUE IS CREATED BY DIGITAL TECHNOLOGY USERS

The French DST recognizes the need to adapt the current tax laws for the changing landscape of tech businesses. As imposed, the DST recognizes two important factors: some companies without a physical presence should be taxed and users on tech platforms create value.⁵⁵ Both of these factors go hand-in-hand because substantial profits are earned in countries where companies have no physical presence. Tech MNCs mine tons of data from their users in particular countries, and subsequently sell that data to advertisers or use that data themselves to develop how to target users. Thus, the users of the social media or online marketplace essentially become the product that the MNCs sell.

A. *The Problem with a “Physical Presence” Framework*

The recognition that users create value, although using a free service, is a critically important component of the DST. As legislators accept this reality the fair taxation of tech MNCs will become increasingly possible. The problem stems again from the idea that a company should only be taxed if it has physical presence described in a country. The Supreme Court has recognized this problem domestically;⁵⁶ now it is time the rest of the world realizes that it can work to tax those companies who take from their countries without giving back. The OECD has recognized that tech MNCs can create

55. Law 2019-759 of July 25, 2019 (Fr.).

56. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

great value for themselves but are immune to taxes under the current international tax laws.⁵⁷

A simple example of the untaxed value stemming from a company with no physical presence in a jurisdiction occurs when an advertiser exists in one country, the tech MNC in another, and the users in multiple countries. Based on traditional taxation laws, only the country where the advertiser and MNC are located would be allowed to tax any profit the two made advertising to others. Under a DST, the country where the user interacted with the ad would also levy a tax because a user's online behavior generates the data and metadata needed to enable and personalize online advertising.⁵⁸ Without this data, advertisers and tech MNCs alike can neither predict what products will sell and what features are performing well nor can data collectors continue to be profitable, because they will have no data to sell advertisers.

As it stands, domestic tax laws and international agreements provide the first right to tax where a company owns an asset.⁵⁹ The location of the corporation's customers does not matter.⁶⁰ Thus, there needs to be a shift where the nexus is tied to the customers or users of the platform. This concept was a significant portion of the European Commission's proposal in March 2018.⁶¹ The Commission's stance has changed drastically since 2014, when an initial group of experts explicitly stated that they did not believe the collection of data via electronic means in a country should in itself create a taxable presence in that country.⁶²

The latest proposal shows a support for taxing tech MNCs for the revenue they take in from use of their platforms. One proposal the European Commission agreed with was expanding the permanent establishment or the physical presence definition.⁶³ This would allow a company with a significant economic activity through its "digital presence" to be taxed by either: (i) exceeding a threshold of seven million euros in annual revenue in

57. *Addressing the Tax Challenges of the Digitalisation of the Economy*, OECD (Mar. 6, 2019), <https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf>.

58. CHRISTIAN FUCHS, *THE ONLINE ADVERTISING TAX AS THE FOUNDATION OF A PUBLIC SERVICE INTERNET* 60 (2018).

59. LOWRY, *supra* note 19, at 8.

60. *Id.*

61. See Press Release, European Commission, Digital Taxation: Commission Proposes New Measures to Ensure That All Companies Pay Fair Tax in the EU, IP/18/2041 (Mar. 21, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2041.

62. *Report of the Commission Expert Group on Taxation of the Digital Economy*, at 7 (May 28, 2014), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/digital/report_digital_economy.pdf.

63. Press Release, *supra* note 61.

a EU member state, (ii) having over 100,000 users in a taxable year, or (iii) having over 3,000 business contracts for digital services business users in a taxable year.⁶⁴

The other proposal, after which the French modeled their DST, involves a three percent interim tax on digital activities.⁶⁵ These activities include selling online advertising, online market-place generated data, and data generated from user-provided information.⁶⁶ The EU as a whole has realized it is time to take charge of its taxing rights as individual sovereign nations. Although not every country is on board, France has led the push.

B. *The Case for “User Created Value”*

The main critique of “user created value” is that innovations and assets of the tech MNCs create the value, not their users.⁶⁷ This criticism is misguided because tech MNCs are multisided businesses, meaning one side of users cares about the other side of users, most importantly obtaining a large number of them.⁶⁸ Essentially, a tech MNC’s application is nothing without a wide user base and the interactions created by users drive the demand for new users to use the application. Advertisers are “one side of users” and recreational users of Instagram or Facebook are “the other side.” Advertisers are only willing to pay Facebook for ad space if it generates many users. Most users will only create a profile if it is free to do so. Thus, Facebook cannot profit unless it attracts many users, and those users create a community, which in turn puts more eyes on the ads Facebook sells.⁶⁹ Although an MNC’s intellectual property is what drove people to use or ignore a website, it is the number of people on the site that attracted the advertisers. This is critical and shows that value is created by users, an important concept the French recognized and implemented in support of their law.

Data is collected in three ways and used to sell ad space. A platform’s users are the product that is sold.⁷⁰ Volunteered data is the information users provide freely such as their names, addresses, birthdays, and activities or businesses they “like.”⁷¹ Observed data is the information gathered by GPS tracking, monitoring flash-cookies, and by digging through the history of

64. *Id.*

65. *Id.*

66. *Id.*

67. LOWRY, *supra* note 19, at 13.

68. Cui, *supra* note 24.

69. *Id.* at 85.

70. Adam B. Thimmesch, *Transacting in Data: Tax, Privacy, and the New Economy*, 94 DENV. L. REV. 145, 151 (2016).

71. *Id.* at 152.

pages browsed.⁷² Inferred data is the information gathered from searches and purchases to determine information, such as, a user who may be pregnant or an avid soccer fan.⁷³ All this data combined allows companies a thorough look into a user's habits, lifestyle, and career. In turn, such data can be used to market specific products to a person and influence their political beliefs or purchasing habits. Thus, the "free" access the digital platforms provide is not truly "free" of cost.

Conversely, the user receives access to a highly valued product through exchanging data for services. The use of digital platforms is arguably necessary to be a fully engaged member of society.⁷⁴ However, at some point, a line must be drawn because consumers are handing over a lot of personalized data in exchange for information and entertainment.⁷⁵ Consumers are not completely giving away free labor, but there is a disconnect in the privacy they are losing and the services they are receiving. In addition, companies that mine the data are making large profits from privacy breaches.

Some scholars have argued that consumers should own their data and have the choice to decide whether to sell it or not. For example, U.S. presidential candidate, Andrew Yang, has proposed treating data as a property right.⁷⁶ This is important as he brought user-created value into the U.S. zeitgeist. In the United States, data gathering and marketing is a \$198 billion industry, and Yang believes Americans have not received enough in return for their data and loss of privacy.⁷⁷ Others have suggested viewing data creation as labor because so many jobs will soon be lost to automation in the coming decades.⁷⁸ Furthermore, artificial intelligence needs the constant input of others in order to become better.⁷⁹ It is of note that the users who input the data needed for better digital platforms create the value. Viewing data as property that can be sold is a radical approach that may one day be applicable. For now, governments must realize that users create value for tech MNCs, and this value must be taxed.

72. *Id.*

73. *Id.*

74. *Id.* at 155.

75. *Id.* at 160.

76. Tyler Sonnemaker, *Andrew Yang Wants You to Make Money on Your Data by Making It Your Personal Property*, MKTS. INSIDER (Nov. 14, 2019, 4:19 PM), <https://markets.businessinsider.com/news/stocks/andrew-yang-data-ownership-property-right-policy-2019-11-1028691103>.

77. *Id.*

78. Imanol Arrieta Ibarra et al., *Should We Treat Data as Labor? Moving Beyond "Free,"* 108 AM. ECON. ASS'N PAPERS & PROC. 38, 42 (2018).

79. *Id.* at 40.

The first step in pushing tech companies to be equitably taxed requires the understanding that users are creating value. Many recognize this and France is making the salient moves needed to center these values. Considering data input as labor may reach too far, but recognizing value is created by data mined from users is not. This value can be determined through annual reports by the tech MNCs that take into account the ad revenue generated in various parts of the world. Finally, if the users create value that means profits are being made simply from interactions with the social media platform inside the country. This would allow the tech MNCs to be taxed because they are actually profiting a tangible amount of money from that particular country.

C. Understanding the Value of Data and the Tech Marketplace

The market inhabited by tech MNCs is much different than the previous international businesses. Professor Wei Cui explains how Facebook in France offers free social media services to users all over the world as well as advertising services to advertisers for untaxed profit.⁸⁰ U.S. companies then purchase advertisements targeting French consumers, and Facebook profits from the American company, receiving payment in the United States.⁸¹ If Facebook had a permanent establishment (PE) in France, there would be no reason to attribute the profits it earns from American advertisers to the French PE.⁸² However, Facebook's profit from the ads targeted at the French is based on value created in France. American companies pay Facebook only because they expect the ads will boost sales in France, and sales do not increase unless French consumers use the social media platform. Although Facebook creates the technology outside France's jurisdiction, the users create the value because without them, advertisers would not pay for ad space on the platform that is unique to France.⁸³ Therefore, Facebook's profits from ads targeted at the French is earned from users in France.⁸⁴

This differs from yesteryear's business model. Previously, through television or radio, consumers received free programming in exchange for listening to or viewing ads.⁸⁵ Before, someone may see a good commercial and tell a friend about a particular blender. The friend could then go to the store and buy the blender based on word of mouth but tracking the

80. Wei Cui, *The Superiority of The Digital Services Tax Over Significant Digital Presence Proposals*, 72 NAT'L TAX J. 839, 848-49 (2019).

81. *Id.* at 848.

82. *Id.*

83. *Id.*

84. *Id.*

85. LOWRY, *supra* note 19, at 13.

commercial that caused the friend to buy would be difficult. Now, every click made on a website shows the consumer trends of a country.

Consumers today are not stagnant. Consumers create content which drives demand for others to join the social media platform. These people are “prosumers,” meaning they are producing consumers.⁸⁶ These prosumers are the ones that drive people to sites like Instagram to keep up with the constant photos the prosumer shares. France estimates 150 million posts are uploaded daily in the EU and that value, which is user created, goes into the pockets of tech MNCs.⁸⁷ Tech MNCs depend on a developing, active, and engaged user base. The larger the base, the more market power an MNC can wield.⁸⁸

Tech MNCs are aware that users create value. The volume and quality of the content created by users is key in a tech MNC’s ability to generate revenue from other users or paid-for advertising targeted at those users.⁸⁹ Many users realize this and become influencers, users who create value through advertising products, and yet Instagram is beginning to slow the progress these influencers have made. Under the guise of mental health, Instagram allowed users to remove “likes,” a numerical indicator that shows how much attention a post is getting, but in reality they want to turn around and sell the analytics of “likes” to users.⁹⁰ Millions of dollars pass from brands to influencers weekly, while Facebook (Instagram’s parent company) does not get a share.⁹¹ To combat this, Instagram is removing analytics, such as “likes,” and then turning around to sell a service to brands which shows the traffic a post gets.⁹²

This may be a bad move as social media business models are based on encouraging users to proactively contribute content and spend time on the platform. Instagram may now find itself losing users, which in turn would mean losing profits as users switch to a platform that allows them to capitalize from their contributions.

Netflix is also aware that its users create value through the data gathered from them. At its core, Netflix is a data driven company focused on collecting

86. FUCHS, *supra* note 58, at 62.

87. *Projet de loi relatif à la taxation des grandes entreprises du numérique*, MINISTÈRE DE L’ÉCONOMIE ET DES FINANCES 4 (Mar. 6, 2019), <https://www.economie.gouv.fr/files/files/2019/dp-tax-gafa-v11.pdf>.

88. OECD, *supra* note 57, at 9.

89. *Id.*

90. Olivia Ovenden, *Why Is Instagram Removing Likes? It’s Probably Not to Help Your Mental Health*, ESQUIRE (Nov. 12, 2019), <https://www.esquire.com/uk/design/a29768558/instagram-removing-likes-facebook/>.

91. *Id.*

92. *Id.*

information from its large user base.⁹³ It uses the data to analyze what shows to commit to. For example, without even seeing a pilot, Netflix invested \$100 million into two seasons of “House of Cards.”⁹⁴ Unlike other platforms, Netflix is ad-free and, although it charges a monthly subscription, it has had a negative cash flow throughout the majority of its existence—\$3 billion in 2018 alone.⁹⁵ Many speculate that this is because of their extreme data collection and that soon they will profit by selling off all of this data.⁹⁶ This data would be worth a fortune to marketers, political campaigns, and advertisers.⁹⁷

User data is worth a lot to tech MNCs, some even operate at a loss to continue to mine user data. The previous view that users of internet platforms do not create value is wrong. Existing international taxation is too focused on the physical activities of tech MNCs to determine where they can be taxed.⁹⁸ France is taking sound steps by realizing remote participation in a domestic economy without a taxable physical presence must be addressed.⁹⁹

D. DST Costs Will Be Passed Onto Consumers

Users create value when using the search engines and social media platforms of tech MNCs. The passing of a new tax, especially on businesses conducting business on an international scale, will be hard to trace. Some costs will rise in the implementation of the new tax, but ultimately the costs will balance out as France begins to collect the revenue from the tax. There is also the chance that the frustration caused by the tax and the concurrently implemented DSTs by other nations will push the OECD to move quickly in creating an international solution to base erosion and profit shifting.

A conundrum exists with increasing the taxes tech MNCs pay because it allegedly will increase costs on consumers. However, that again shows a misunderstanding of the tech business model. If all costs are passed onto individual users, it may drive down usage, which would drive down

93. Harsha Hedge, *Netflix and Its Revolutionary Use of Big Data*, DATAECONOMY (Sept. 22, 2014), <https://dataconomy.com/2014/09/netflix-and-its-revolutionary-use-of-big-data/>.

94. *Id.*

95. Jason Mittell, *Gold Mine: Will Netflix Eventually Monetise Its User Data?*, THE WIRE (Apr. 24, 2019), <https://thewire.in/the-arts/netflix-user-data-finances>.

96. *Id.*

97. *Id.*

98. OECD, *supra* note 57, at 10.

99. *Projet de loi relatif à la taxation des grandes entreprises du numérique*, *supra* note 87, at 3.

advertisers' desire to pay for ad space and diminish a platform's market power.¹⁰⁰

Costs will rise, but that cost may not be transferred onto the consumer in certain areas. For example, due to increased taxation, a newspaper may lower, rather than raise, the price of a subscription in order to increase circulation and attract more advertisers.¹⁰¹ The advertising profits go up and compensate readers for the increase in advertisement with a lower subscription price.¹⁰² Now, in applying this to Facebook or Google, it would be best for these firms to absorb the costs or risk losing advertisers.¹⁰³ The more advertisers either of these sites lose, the less profitable it becomes to maintain the platform, unless the firm operates on the rare "Netflix" model of running at a deficit without ads.

The shifting of costs onto consumers may be different for sites that sell products, rather than social media providers. In response to the DST, Amazon has passed the cost onto vendors.¹⁰⁴ Legally, Amazon is the one who pays the tax, but this does not stop them from passing that tax along as the economic incidence of the DST.¹⁰⁵ As of October 1, 2019, Amazon has increased the commission rate it takes from businesses selling in the French marketplace by three percent.¹⁰⁶ The vendors will likely pass this on to the consumers by raising the prices of the goods sold.¹⁰⁷ In fact, the Tax Foundation argues that the DST will pass fifty five percent of the burden onto consumers, forty percent onto online vendors and only five percent onto the targeted digital companies.¹⁰⁸ In this case, the French may have overstepped by applying the tax to interfaces on which the sales of goods and services take place. However, if prices continue to rise, it can spur the creation of a French marketplace, or influence vendors to sell using different platforms. Amazon should tread lightly in how much it intends to raise costs as many customers may leave.

100. Cui, *supra* note 24, at 106.

101. *Id.*

102. *Id.* at 28.

103. *Id.* at 27-28.

104. Elke Asen & Daniel Bunn, *Amazon Passes France's Digital Services Tax on to Vendors*, TAX FOUND. (Aug. 6, 2019), <https://taxfoundation.org/amazon-france-digital-tax/>.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

IV. THE POLITICAL UNDERPINNINGS OF THE DIGITAL SERVICES TAX

As global barriers are lessened through the advancement of technology, many disparities become more apparent. Social media, through all of its collection of data, has provided a window into the affairs of other countries. It has even allowed for meddling in the political affairs of other countries. DSTs may serve to get tech MNCs to pay their share, but also to increase responsibility for the actions they take. As the OECD makes clear, base erosion and profiting have become a huge global problem.¹⁰⁹ They have allowed tech MNCs to take control of sovereign nations through the manipulation of government elections and failure to pay taxes.

France's decision to implement the DST was due in part to social unrest throughout the country.¹¹⁰ The country erupted in protests after President Macron implemented anti-labor policy such as cutting taxes for the wealthy and large corporations.¹¹¹ Seeing the deteriorating conditions of his approval, Macron made concessions, including increasing the minimum wage, allowing for tax exemptions on overtime pay, and raising retiree social security.¹¹² These concessions are set to cost the French government approximately \$11.3 billion, which the DST will help to finance.¹¹³ The government aims to collect \$5.5 million annually from the proposed DST.¹¹⁴ Although the DST alone will not solve France's budget issues, it will address the issue of tech MNCs not paying taxes and show the public that Macron is ready to tackle larger issues.

Critics see this desire to equitably tax firms as "populist responses to demonize tech."¹¹⁵ This may be true considering the United Kingdom will

109. *What is BEPS?*, *supra* note 3.

110. Liz Alderman, *France Moves to Tax Tech Giants, Stoking Fight with White House*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/business/france-digital-tax-tech-giants.html>.

111. Alissa J. Rubin, *France's Yellow Vests Confront Macron with a New Reality*, N.Y. TIMES (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/world/europe/macron-yellow-vests-france.html?module=inline>.

112. Alissa J. Rubin, *Macron's Proposal to Mollify Yellow Vest Protesters Fails to Impress*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/world/europe/yellow-vests-france-macron.html?module=inline>.

113. *Id.*; see also Liz Alderman, *France, Not Waiting for European Union, to Tax U.S. Tech Firms as '19 Starts*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/technology/france-tax-tech-companies.html>.

114. LOWRY, *supra* note 19, at 7-8.

115. Gillian Tans, *Why Global Taxation Is Needed for the Success of the Digital Age*, WORLD ECON. F. (Jan. 21, 2019), <https://www.weforum.org/agenda/2019/01/why-global-taxation-is-needed-for-the-success-of-the-digital-age>.

begin a two percent DST as of April 2020,¹¹⁶ and seeing that France agreed to end the tax as soon as the OECD reaches a resolution.¹¹⁷ However, the whole world, including the United States, seems to have had it with tech MNCs and their failure to pay their fair share of taxes.

An internationally coordinated approach through the OECD is likely the best option to address this issue. Continuous unilateral decisions make it difficult to assure there is no double taxation or burdensome administrative costs in determining where taxes are owed. All countries are affected by the harms of base erosion and profit shifting. As the leader in tech, the United States should push for a treaty to make arrangements to receive taxes until the OECD can reach an agreement.

V. CONCLUSION

In 2019, Google's ex-CEO, Eric Schmidt, stated that he was comfortable with Google's tax avoidance practices. He emphasized that everything they did was ethical, and that if countries desperately wanted more money, they should change their tax laws.¹¹⁸ The French DST is the first set of tax laws to push Google and others to pay its share of tax around the world. In a short time, Schmidt may regret his statement as more than ten countries plan to implement DSTs in one form or another.

The French DST will serve to increase competition and push corporations to pay their fair share in taxes. The actual revenue collected by each tax may be low, but the frustrations it will cause tech MNCs will help sovereign states and people take back their power. Recognizing that users create value will serve to show tech MNCs that they truly need individual input for continued success. Furthermore, states need taxes to operate effectively and tech MNCs should not be allowed to flourish without giving back. If the taxes do become too burdensome and force vendors and advertisers to leave the site, then it will increase competition and innovation.

The French Digital Services Tax is a solid start in combatting base erosion and profit shifting to make corporations more responsible. Through acknowledging that users create value, the tax effectively captures profits earned by tech MNCs. Furthermore, France's widening of the scope of MNCs that are subject to the tax, by setting the in country threshold at \$28

116. Chris Jewers, *UK Presses Ahead with Digital Services Tax*, ACCT. AGE (July 12, 2019), <https://www.accountancyage.com/2019/07/12/uk-presses-ahead-with-digital-services-tax/>.

117. Faulhaber, *supra* note 28.

118. Paul Hill, *Eric Schmidt Is 'Comfortable' with Google's Tax Avoidance Practices*, NEOWIN (May 14, 2019, 1:08 PM), <https://www.neowin.net/news/eric-schmidt-is-comfortable-with-googles-tax-avoidance-practices/>.

million, shows a desire to tax more than just American tech MNCs.¹¹⁹ In truly combatting base erosion and profit shifting, the DST is not the best, but serves as a testing ground for eventually finding a way to stop all industries from artificially moving and keeping money tax free.¹²⁰

Many other countries have followed France's bold move, although U.S. scholars and companies continue to argue that the DST is disastrous. It may be disastrous to large MNCs, but perhaps it will create more competition and in turn, more innovation in the tech industry. Rather than fall behind, the United States must get ahead of this growing problem and agree on a treaty to deal with these taxation issues.

The main takeaway is recognizing that users of social media platforms create value. U.S. legislators must understand this and begin to move forward in creative ways to adhere to that principle. This is the first wave in the regulation of the complex digital economy that has been created by social media. It is best that larger countries with more resources lay the foundation for new tax schemes or be forced to adhere to small, complex taxes throughout the world. Tech MNCs have made it known that they have no problem with gaming the loopholes in the current taxation system. Thus, a justly taxed world will not come about unless countries are willing to push back.

119. Alderman, *supra* note 110.

120. See generally Christine Kim, *Weekly SSRN Tax Article Review and Roundup: Kim Reviews Cui's The Digital Services Tax: A Conceptual Defense*, TAXPROF BLOG (May 17, 2019), https://taxprof.typepad.com/taxprof_blog/2019/05/weekly-ssrn-tax-article-review-and-roundup-kim-reviews-cuis-the-digital-services-tax-a-conceptual-de.html.

“SONS OF THE SOIL”—MALAYSIA’S PREFERENCE LAWS FOR MALAYS AS A VIOLATION OF EQUAL PROTECTION

*Jasmine Penny**

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* J.D. Candidate, Southwestern Law School (2021); M.B.A., Finance, Pepperdine University (2009); B.S., Business Law & Business Management, California State University, Northridge, (2006). I would like to thank my husband, Dr. Brian Penny, and family for being my pillar of strength throughout my academic endeavors. Thank you also Professor Jonathan Miller, Professor Warren Grimes, and the Southwestern community for the tremendous support.

I. INTRODUCTION

A. *Issue Addressed and Thesis Statement*

Although Article 8 of Malaysia's Federal Constitution provides for the equality of all persons and, to a limited extent, a prohibition on discrimination, Article 153 of the Federal Constitution creates an exception to safeguard the "special position" of the Malays and the natives of the states of Sabah and Sarawak (collectively known as "Bumiputeras" or "sons of the soil").¹ Article 153's "special position" for the Malays resulted from marked economic difficulties endured by the majority ethnic group, comprising largely of Malays, at the time period before Malaysia's independence.²

Malaysia's economic climate has drastically changed since 1957. Today, the preferential treatment of Malays violates fundamental human rights. Malaysia must adopt a solution for its problem of poor Bumiputeras that will eradicate poverty and restructure society, to remove the identification of race or ethnicity with economic status without solidifying the power positions of the Malay elite.

While Malaysia has not ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which establishes that affirmative action programs must have an end date, there is little doubt that progressive international practice requires that it start to dismantle its affirmative action programs.³ International law requires equal protection, subject only to measures in the period immediately after previous discrimination, during which remedial measures are permitted. The ICERD, European practice, and United States practice recognize the need to treat affirmative action programs as exceptional measures because they perpetuate stereotypes and race-based politics. Moreover, countries like India, which have used programs like Malaysia's, have had similar problems of corruption and misdirected resources, with South Africa, and its redress-focused approach offering a better model. The terms under which Malaysia's program originally set an end-date have been met—redress has been achieved, as shown by the significant wealth acquired by the native Malay population. Now that basic redress has been achieved, measures focused on income, wealth, family education levels and place of residence will produce greater equity over time than race-based solutions—something that the

1. MALAY. CONSTITUTION Aug. 27, 1957, arts. 8, 153, https://www.constituteproject.org/constitution/Malaysia_2007.pdf?lang=en.

2. *Id.*

3. International Convention on the Elimination of All Forms of Racial Discrimination art. 1, adopted Dec. 21, 1965, T.I.A.S. 94-1120, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

United States has increasingly emphasized. Malaysia's present problem simply lacks continuing justification.

In Part II (A), this note demonstrates that international law requires equal protection, subject only to measures in the period immediately after previous discrimination, during which remedial measures are permitted. Part II (B) illustrates that, after nearly fifty years, Malaysia can no longer justify preferential measures and the criticality of a stipulated end date. Finally, Part II (C) of this note discusses how measures focused on wealth, place of residence, and other, less problematic, distinguishing features, can accomplish many of the same goals as racial preferences.

B. *Colonialization, Communism, and Independence*

On December 7, 1941, the Japanese invaded from the north and attacked Malaya.⁴ This attack on Malayan shores occurred about an hour before the Japanese surprise aerial attack on Pearl Harbor, a United States naval base in Hawaii.⁵ This marked the start of the Pacific War during World War II.⁶

In 1948, upon the conclusion of the Japanese occupation of Malaya, the Federation of Malaya was created under British protection.⁷ British involvement in Malaya dates back to 1786, when the British East India Company acquired the island of Penang; subsequently, in the early 1800s, Sir Stamford Raffles founded British settlements in Singapore and Penang and the sultans of small Malay states began to accept British "advisers" who, essentially, became the true rulers of the land.⁸ To effectuate colonialization efforts, the British encouraged heavy immigration from India and China to supply labor to British tin mines and rubber plantations.⁹ The British reigned supreme until the 1941 Japanese invasion of Malaya. Japanese troops moved rapidly down the Malay Peninsula resulting in the United Kingdom's surrender of Singapore, where it had established a significant naval base in

4. Rouwen Lin, *Invasion of Malaya: First Shot in the Pacific War*, THE STAR (Dec. 8, 2016 6:45AM), <https://www.thestar.com.my/lifestyle/people/2016/12/08/invasion-of-malaya-the-japanese-arrive>.

5. *Id.*

6. *Id.*

7. See Richard Cavendish, *Malayan Independence*, HISTORY TODAY, Aug. 2007, <https://www.historytoday.com/archive/malayan-independence>.

8. *Id.*

9. *Id.*

1923.¹⁰ The fall of Singapore was touted as Britain's greatest military defeat since the Battle of Yorktown in 1781.¹¹

In 1948, the "Malayan Emergency," a national state of emergency, began when the Communist Party of Malaya, a predominantly Chinese organization, began a guerilla insurgency.¹² British troops fought to quash the Communist insurrection, which lasted until the early 1950s.¹³ Malayan independence was the pivotal solution to the Communists' claim that they were freeing the Malayan people from British rule. In 1957, the Federation of Malaya gained its independence from the British and joined the Commonwealth of Nations as an independent sovereign state.¹⁴ The federation, which included Singapore, was renamed Malaysia in 1963.¹⁵ In 1965, Singapore parted ways to become its own island-nation.¹⁶

C. Riots of 1969

The Malayan Emergency led to Malay unrest, and there was an urgent need to do something about it. Of Malaysia's population of thirty-two million people, ethnic Malay Muslims make up about 60%, while ethnic Chinese and Indians comprise about 30%.¹⁷ Malaysia's history of racial tension dates back to the influx of Chinese workers in the 19th century and was heightened in 1957 after Malaysia gained independence from the United Kingdom.¹⁸ The Japanese occupation and the British rule increased communal distrust. Facing a communist insurgency, Malaysia was a young nation wrought with fragile race relations. During the Malaysian national elections of 1969, the United Malays National Organization (UMNO), the party that has dominated the government since independence, won less than half the popular vote.¹⁹ UMNO's parliamentary seats were significantly reduced after it won less

10. Kelly McLaughlin, *The Surrender of Singapore: Pictures Show The Moment Britain Surrendered Island Territory to Japan in 1942, Leading to Three Years of Hell for 80,000 Prisoners of War*, DAILY MAIL (Feb. 20, 2017, 6:58 AM), <https://www.dailymail.co.uk/news/article-4241644/The-moment-Britain-surrendered-Singapore-Japan-1942.html>.

11. *Id.*

12. *Malayan Emergency*, ENCYC. BRITANNICA (Sept. 27, 2017), <https://www.britannica.com/event/Malayan-Emergency#ref775636>.

13. Cavendish, *supra* note 7.

14. See Commonwealth Secretariat, *Member Countries*, THE COMMONWEALTH, <https://thecommonwealth.org/member-countries> (last visited Dec. 29, 2021).

15. Cavendish, *supra* note 7.

16. *Id.*

17. *Malaysia's New King Calls for Racial Unity at Coronation*, ASSOCIATED PRESS, (July 29, 2019), <https://news.yahoo.com/malaysias-king-calls-racial-unity-050147114.html>.

18. *A Black Day in May for Malaysia*, ASS'N FOR DIPLOMATIC STUD. & TRAINING (Mar. 3, 2016), <https://adst.org/2016/03/a-black-day-for-malaysia/>.

19. *Id.*

than half the popular vote, and while it still held a majority in Parliament, the Chinese-based Opposition Party claimed “victory.”²⁰ As a result, deadly riots ensued.²¹ Malays and Chinese ran amok and wreaked havoc throughout the kampongs, or residential areas.²² The riots, a result of the brewing tensions between the native Malays and the more economically powerful Chinese,²³ continued for weeks and led to a state of national emergency along with the suspension of Parliament until 1971.²⁴

D. 1971 Race-Based Affirmative Action

In 1970, after the 1969 riots, Malaysia adopted a race-based affirmative action program under the New Economic Policy (NEP), known as the pro-Bumiputera policies.²⁵ The NEP sought to eliminate poverty and to reduce wealth and income inequalities between different ethnic groups in Malaysia.²⁶ In Colonial Malaya, “ethnic cartels” prevented the indigenous Malays from venturing into profitable industries. Moreover, the Malays held employment mostly in agriculture and other less-skilled occupations, while the Chinese and Indians were employed in higher skilled and higher-income occupations.²⁷ In 1970, the Malays held just 2.4% of the total share capital of companies in Malaysia while the Chinese and Indians jointly held almost one third, with the remaining 63% owned by foreign interests.²⁸

The NEP sought to rectify these wealth and income disparities between the Malays and non-Malays by restructuring company ownership, control, and employment, by implementing quotas and price discrimination in the commercial and industrial sectors, and by adapting explicit enrollment quotas at institutes of tertiary education.²⁹

For instance, companies today have to allocate 30% of their share capital to Bumiputeras as part of any expansion effort and all construction projects

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Hazlin Hassan, *What Happens If an Emergency Is Declared in Malaysia?*, STRAITS TIMES (Oct. 24, 2020), <https://www.straitstimes.com/asia/se-asia/what-happens-if-an-emergency-is-declared-in-malaysia>.

25. See Zainal Aznam Yusof, Inter-Reg'l Ineq. Facility, Overseas Dev. Inst., *Policy Brief 13*, (Feb. 2006), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4078.pdf>.

26. *Id.*

27. *Id.*

28. *Id.*

29. See *id.*

are required to have 30% Bumiputera participation.³⁰ This has led to the notoriety of “Ali Baba” ventures in Malaysia: joint ventures between a less qualified Bumiputera and a financially well-endowed non-Bumiputera, whereby the unqualified Bumiputera “rents” his ethnic status in exchange for lucrative sums of money.³¹ This rampant practice of selling-off one’s entitlements disguises the actual beneficiaries of these pro-Bumiputera policies. Bumiputera businessmen are also generally granted a 10% discount when bidding for construction projects, and state-sponsored institutions subsidize these individuals’ finance and management training programs.³² There are also race-based quotas for enrollment to assist Malays in gaining admission into coveted Malaysian universities. Race discrimination furthermore persists in the context of hiring and property rentals. Race-based discrimination persists in every aspect of life in Malaysia, and impacts the social, economic, financial, academic, and political climate of the nation.

Malaysia’s affirmative action program favoring the Bumiputera majority was justifiable during the immediate post-colonial period with a market-dominant ethnic minority, but, with no cut-off date or pre-specified intended outcome, the pro-Bumiputera policies have morphed from a necessity to reduce racial economic inequalities to a hallmark of Malay supremacy.

E. “Ban-ICERD” Protests Today

The pro-Bumiputera policies are a heated issue in Malaysia today and it was the cause of recent, major protests in Malaysia. In late 2018, massive protests broke out³³ as a result of a pledge by Malaysia to ratify the ICERD.³⁴ Malay groups feared that Malaysia’s ratification of ICERD would invariably dilute the race-based privileges for the Malay majority as the pro-Bumiputera policies are in direct violation of ICERD. Malaysia would have been compelled to establish an end date to its pro-Bumiputera policies had it followed through with its pledge of ICERD ratification as the ICERD requires a stipulated end date for any special measures taken by its Member States that engage in special measures for the advancement of certain racial

30. *Id.*

31. *Id.*

32. *Id.*

33. See Reuters, *Why Malaysia Backpedalled on ICERD Ratification*, NEW STRAITS TIMES (Nov. 24, 2018), <https://www.nst.com.my/news/nation/2018/11/434078/why-malaysia-backpedalled-icerd-ratification>.

34. *Id.*

groups.³⁵ The protestors at the all-Malay rally were adamant that Malay privileges and Islamic superiority prevail in Malaysia.

The protests, coupled with fear of the loss of the Malay majority vote and the lack of buy-in from its own members, caused the Malaysian government to backpedal on its pledge to ratify the ICERD.³⁶ The office of Prime Minister Mahathir Mohamad issued a statement stating that the Malaysian government would not ratify the ICERD without providing any reason for its decision.³⁷ Clearly, the protests had a significant political impact and caused a drastic shift in the position of the Malaysian government.

II. SUPPORT FOR THE ELIMINATION OF RACE-BASED AFFIRMATIVE ACTION PROGRAMS

A. *International Human Rights Law*

International law requires equal protection, subject only to measures in the period immediately after previous discrimination, during which remedial measures are permitted. As a matter of customary international law, a post-colonial setting requires limits to be imposed on affirmative action programs to avoid it from becoming abusive. This section explains how there is practice and *opinio juris* under customary international law that supports the elimination of race-based affirmative action programs.

1. UN Human Rights

The Office of the High Commissioner for Human Rights (UN Human Rights) is the principal United Nations office that is mandated to protect and promote human rights worldwide.³⁸ The United Nations was established in 1945 and promotes “respect for human rights for all without distinction as to race, sex, language, or religion.”³⁹ The High Commissioner works in close collaboration with governments worldwide to set human rights standards and to subsequently implement and monitor these standards on the ground.⁴⁰ To lessen the burden of governments when transitioning to the implementation of international human rights standards, the High Commissioner “provides

35. ICERD, *supra* note 3, art. 1.

36. *See* Reuters, *supra* note 33.

37. *Id.*

38. *What We Do: An Overview*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx> (last visited Dec. 14, 2021) [hereinafter High Commissioner].

39. *Id.*

40. *Id.*

assistance to Governments, such as expertise and technical trainings in the areas of administration of justice, legislative reform, and electoral process, to help implement international human rights standards on the ground.⁴¹

The High Commissioner subscribes ICERD's provisions allowing for, but limiting special measures taken for the sole purpose of advancing certain racial groups as stipulated in Article 1:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . shall not be continued after the objectives for which they were taken have been achieved.⁴²

ICERD clearly stipulates that a defined end date be effectuated in the event a State Party undertakes special measures for the advancement of certain racial groups requiring such protection. Such special measures advancing certain ethnic groups must be discontinued once the objectives for which those measures created have been achieved. Moreover, ICERD unmistakably condemns all forms of racial discrimination and governmental policies that create or perpetuate racial discrimination. State Parties cannot sponsor, defend, or support racial discrimination.⁴³ More proactively, State Parties have the responsibility to review legislative policies to amend, rescind or nullify these policies that perpetuate racial discrimination.⁴⁴ State Parties are responsible for ending any pre-existing racially discriminatory practices.⁴⁵ ICERD's Article 2 states:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

41. *Id.*

42. ICERD, *supra* note 3, art. 1, ¶ 4 (emphasis added).

43. *Id.* art. 2, ¶ 1(b).

44. *Id.* ¶ 1(c).

45. *See id.* ¶ 1(d).

*Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.*⁴⁶

The language in ICERD's Article 2, prohibiting State Parties from enacting regulations that create or perpetuate racial discrimination, is particularly at conflict with Malaysia's pro-Bumiputera policies. The pro-Bumiputera policy essentially promotes racial discrimination in a multi-racial society. The 2018 protests led to the Malaysian government retracting its pledge to ratify the ICERD. The retraction occurred due to the fact that Malaysia would have had to rescind or nullify its pro-Bumiputera policies had it become a State Party to the ICERD. Equality is a highly esteemed virtue for a developing nation. Malaysia's ratification of the ICERD would support the furtherance of Malaysia's economic and social growth on an international level because developed nations typically do not engage in race-based affirmative action programs. Ratification of the ICERD would also bolster Malaysia's standing regionally among the Association of Southeast Asian Nations (ASEAN) because other, more progressive ASEAN nations do not subscribe to race-based affirmative action programs.

Therefore, the pro-Bumiputera policies are in direct conflict with the ICERD. Equal protection calls for governmental policies undertaken by the Malaysian government to nullify the existing pro-Bumiputera policy and to end any direct or indirect forms of racial discrimination within the young nation.

Malaysia, however, must balance any plans of conforming to the UN Human Rights laws and ratifying the ICERD with the violent protests that recently ensued. The violent protests could ensue again upon any plans to ratify ICERD in the near future. The Malaysian government could seek the help of the High Commissioner to lessen its burden when transitioning to the implementation of international human rights standards. The High Commissioner would be able to provide assistance to the Malaysian government, providing its expertise in dealing with the socialization of such changes within the society at large. For instance, the High Commissioner could provide the Malaysian government with technical trainings in the areas of administration of justice, legislative reform, and electoral process. The successful implementation of international human rights standards on the ground is based largely on the successful socialization and adoption of these standards by the people of a nation. Seeking the High Commissioner's assistance to obtain the buy-in of the people is critical. Any rash

46. *Id.* ¶ 1(a)-(d) (emphasis added).

implementation without proper socialization is surely to backfire and likely to result in rampant riots and protests that would jeopardize the safety of the people.

2. European Convention on Human Rights

The European Convention on Human Rights (ECHR) is a convention based in Strasbourg, France that protects the human rights of people in countries that belong to the Council of Europe.⁴⁷ The Council of Europe is an intergovernmental organization created after World War II.⁴⁸ The Council of Europe has forty-seven Member States and is focused on the human rights and social development of its Member States.⁴⁹ The ECHR came into force in 1953 and was adopted by the forty-seven Member States of the Council of Europe, including the United Kingdom.⁵⁰ The ECHR established the European Court of Human Rights, which is an international court that hears cases concerning alleged breaches of human rights provisions.⁵¹ The ECHR focuses on cases related to human rights matters, principally civil rights and political rights.⁵² Section I, Article 14 of the ECHR prohibits both direct and indirect forms of discrimination and states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured *without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*⁵³

The ECHR is a reputable body of human rights law within Europe. Below is an explanation of how the United Kingdom incorporates the rights set out in the ECHR into domestic British law by way of the Human Rights

47. See European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

48. Eur. Union Agency for Fundamental Rts. & Council of Eur., *Handbook on European Non-Discrimination Law*, at 18 (2018), https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf.

49. *Id.*

50. *Id.*; Eur. Ct. of Hum. Rts., *The European Convention on Human Rights a Living Instrument*, at 5, 17, 23 (2020), https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf.

51. Eur. Ct. of Hum. Rts., *Questions & Answers*, at 3-4, https://echr.coe.int/Documents/Questions_Answers_ENG.pdf.

52. ECHR, *supra* note 47.

53. *Id.* art. 14 (emphasis added).

Act that came into force in 1998⁵⁴ and the Equality Act that came into force in 2010.⁵⁵

On the one hand, the United Kingdom's Human Rights Act of 1998 enables cases involving breaches of human rights to be heard domestically in courts within the United Kingdom.⁵⁶ This eliminates the hassle of British citizens seeking justice at the ECHR in Strasbourg, France.⁵⁷ The Human Rights Act also posits that all public bodies within the United Kingdom must respect and protect human rights.⁵⁸ Additionally, the Human Rights Act stipulates that all new laws passed by the British Parliament must comply with the rights set out in the ECHR.⁵⁹

On the other hand, the Equality Act of 2010 brings together 116 pieces of legislation into one single Act.⁶⁰ The Equality Act provides Britain with anti-discrimination laws that serve to further the rights of the ECHR by promoting a more fair and just society and by protecting individuals from unfair treatment.⁶¹ Ironically, the United Kingdom breached the ECHR's Article 14's prohibition against discrimination more than any other country in the European Council.⁶²

The ECHR states that being treated differently due to race may be lawful only in select instances.⁶³ For instance, race discrimination is lawful when an organization is taking positive action to encourage or develop people in a racial group that is under-represented or disadvantaged in a role or activity.⁶⁴

54. Human Rights Act 1998, (UK), <https://www.legislation.gov.uk/ukpga/1998/42/contents>; see also, *The Human Rights Act*, EQUALITY & HUM. RTS. COMM'N (Nov. 15, 2018), <https://www.equalityhumanrights.com/en/human-rights/human-rights-act>.

55. Equality Act 2010, (UK), <https://www.legislation.gov.uk/ukpga/2010/15/contents>; see also, *What is the Equality Act?*, EQUALITY & HUM. RTS. COMM'N (June 19, 2019), <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>.

56. *The Humans Rights Act*, *supra* note 54.

57. *Id.*

58. *Id.*

59. *Id.*

60. *What is the Equality Act?*, *supra* note 55.

61. *Id.*

62. *Article 14: Prohibition of Discrimination*, EACH OTHER, <https://eachother.org.uk/article-14-prohibition-of-discrimination/> (last visited Dec. 15, 2021).

63. See generally Eur. Ct. of Hum. Rts., *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, at 13 (2020), https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf (describing situations where positive action discrimination is permitted); see also Eur. Comm'n, *Beyond Formal Equality: Positive Action Under Directives 2000/43/EC and 2000/78/ED*, at 50 (2007), <https://op.europa.eu/s/vfTB>.

64. *Handbook on European Non-Discrimination Law*, *supra* note 48, at 69-80; see also *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, *supra* note 63, ¶¶ 40-43.

In line with international law, Malaysia should impose limits on its affirmative action programs to avoid abuse. Malaysia has already undertaken post-colonialization affirmative action programs by way of the pro-Bumiputera policy to develop the Bumiputera population due to that majority population being disadvantaged during the colonial period in Malaysia. Therefore, Malaysia ought to re-evaluate the under-representation and disadvantages its Bumiputera population faces in light of modern-day circumstances, to ascertain whether that population is currently disadvantaged. There have been substantial changes over the past fifty years, and so today Malaysia is not what it was in colonial times. Mirroring what is prescribed in Article 14 of the ECHR, Malaysia culminated the pro-Bumiputera policy to assist the then-disadvantaged Bumiputera ethnic group, who was disadvantaged by ethnic cartels during the colonial era.

However, the economic sphere of modern-day Malaysia has changed, and the Malays are no longer confined to menial industries. Unlike the colonial British times, the “lucrative” industries in Malaysia are no longer controlled by the Chinese. Although the ECHR allows for such race-based positive action to correct past wrongs to certain racial groups, there is no verbiage within the ECHR to suggest that these positive actions persist indefinitely once the injustice to the disadvantaged group has been rectified.⁶⁵

B. Unduly Lengthy Time Period for Preferential Measures

After nearly fifty years, Malaysia can no longer justify preferential measures. Malaysia should identify an end date for its pro-Bumiputera policy. Preferential measures are a means to an end and, once that pre-determined end goal has been accomplished, the preferential measures should be terminated. An unduly lengthy time period for preferential measures blurs the line between affirmative action and discriminatory practice. While affirmative action may be viewed as partaking in compensatory justice, it nonetheless has negative consequences, since it perpetuates racial division. Compensatory justice seeks to correct past wrongs, but once those wrongs are corrected, furtherance of affirmative action programs subvert those corrective outcomes into the realm of racial supremacy.

This section distinguishes the affirmative action schemes in South Africa and in India with that of Malaysia. Internationally, a plethora of countries deploy affirmative action schemes: neighborhood-based

65. *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, *supra* note 63, ¶ 41; *see also Handbook on European Non-Discrimination Law*, *supra* note 48, at 71.

affirmative action (France), gender-based affirmative action (Germany and China), race/ethnic-based affirmative action (Brazil and Slovakia), and linguistic-based quotas (Finland).⁶⁶ The scope of this section shall be limited to the race-based affirmative action approach employed in South Africa and the social class-based approach implemented in India.

The affirmative action programs in South Africa and in India were set in motion to rectify past disadvantages to select groups of the respective societies. Similar to Malaysia, the affirmative action programs in South Africa and in India are still in force today. However, the dynamics and circumstances surrounding those programs differ significantly from that of Malaysia so while those programs continue due to differing circumstances, the pro-Bumiputera policy enforced in Malaysia should not continue.

1. Affirmative Action in South Africa

While affirmative action programs can be justified in South Africa, where huge racial gaps persist, they can no longer be justified in Malaysia. Similar to Malaysia, South Africa has a racial majority that benefits from affirmative action as a result of disadvantages encountered by the black majority group during the apartheid. Apartheid was a social and political system during an era of white minority rule in South Africa during the period between 1948 and the 1990s.⁶⁷ Established in 1948 by the racist National Party, apartheid means “separateness” in the Afrikaans language.⁶⁸ During the apartheid period, South Africans were divided by race and forced to live separately.⁶⁹ Apartheid meant inferior public services and separate building entrances for non-whites, and it also stripped black South Africans of their citizenship.⁷⁰ Apartheid was abolished in 1994 at which time Nelson Mandela, a key anti-apartheid activist and Nobel Peace Prize recipient, was elected to the Presidency of South Africa.⁷¹

The South African Constitution contains an equality provision that serves a two-fold purpose: first, it is used to redress past disadvantages and past imbalances after the apartheid regime that sought to benefit white South Africans while disadvantaging black South Africans; and, second, it is used

66. Erin L. Nel, *The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique* (2011) (Ph.D. dissertation, Stellenbosch University) (on file with SUNScholar Research Repository, Stellenbosch University).

67. Mark Byrnes, *Life in Apartheid-Era South Africa*, BLOOMBERG (Dec. 10, 2013, 11:52 AM), <https://www.bloomberg.com/news/articles/2013-12-10/life-in-apartheid-era-south-africa>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

to build the vision of an egalitarian society.⁷² “Redress is a backward-looking justification while the creation of an egalitarian society is a forward-looking justification.”⁷³ On the one hand, redress seeks to tip the moral scales so as to position those previously disadvantaged individuals or groups in a position that they would have been in had the injustices not occurred.⁷⁴ On the other hand, building an egalitarian society takes a forward-looking approach focusing on South Africa’s present day dilemmas: poverty and homelessness along with insufficient healthcare and unemployment.⁷⁵

Equality comes in many shapes and forms. While substantive equality recognizes differences, and focuses on *creating* an equal society, “restitutionary” equality recognizes harms done in the past and focuses on *making up* for past injustices.⁷⁶ The main legislative agent for achieving equality in South Africa is the “equality provision” in Section 9 within the Bill of Rights in the South African Constitution that states in part:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.⁷⁷

The Bill of Rights is the cornerstone of democracy in South Africa and prohibits *unfair* discrimination; yet it is not violated in the event remedial action is taken to rectify past disadvantages to designated categories of persons.⁷⁸ The two most prominent examples of affirmative action legislation that gives effect to equality pursuant to Section 9(2) of South Africa’s Constitution are the Employment Equity Act and the Labor Relations Act.⁷⁹ Per Section 2(b), the Employment Equity Act seeks to achieve equity in the workplace by “implementing affirmative action measures to redress the disadvantages in employment experienced by *designated groups*, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”⁸⁰

72. Nel, *supra* note 66, at 3.

73. *Id.*

74. *Id.*

75. *Id.* at 4.

76. *Id.* at 11.

77. S. AFR. CONST., 1996, ch. 2, § 9(1)-(2).

78. *Id.*

79. See Employment Equity Act of 1998 (S. Afr.), https://www.gov.za/sites/default/files/gcis_document/201409/a55-980.pdf; see also Labor Relations Act of 1995, at 66 (S. Afr.), <http://www.ilo.org/legacy/english/inwork/cb-policy-guide/newsouthafricallra1996.pdf>.

80. Employment Equity Act of 1998, ch. 1, §2(b) (emphasis added).

Designated groups within the meaning of the Employment Equity Act means “black people, women and people with disabilities.”⁸¹ Therefore, perceived discriminatory employment practices in furtherance of the goal of redressing the disadvantages encountered by the majority black people during the apartheid era of white minority rule is permitted. This form of “reverse discrimination” is permitted as it is deemed “positive action.”⁸²

Nonetheless, one can distinguish reverse discrimination practices in South Africa from the Bumiputera policy in Malaysia. While the identified social ills, like poverty, unemployment, and homelessness, are still highly prevalent in South Africa, these have been significantly reduced in Malaysia. Poverty is on the rise in South Africa, and more than half of South Africans were affected by poverty in 2015.⁸³ However, economic statistics show the incidence of income disparities between Bumiputera and non-Bumiputera have narrowed in Malaysia over the past fifty years.⁸⁴ Moreover, “[t]he incidence of absolute poverty in Malaysia fell from about half (49%) of total households in 1970, to 37% per cent in 1980, 17% per cent in 1990 and 5% per cent by 2002.”⁸⁵ Therefore, the rampancy of the social ills still prevalent in modern day South Africa is not encountered in present-day Malaysia. This key distinguishing factor demonstrates why the continuation of Malaysia’s preference laws is not justified although the preference laws of South Africa may still be justifiable.

2. Affirmative Action in India

Affirmative action programs seem to encourage political manipulation to game the system, and benefit individuals who do not deserve it. Malaysia’s experience with affirmative action programs has been similar to India’s where the beneficiaries of these programs are not the truly deserving recipients as explained by the “Ali Baba” schemes above.⁸⁶

Reservation systems in India seek to create social caste-based, affirmative action programs for minorities, namely Scheduled Castes (SCs) and the Scheduled Tribes (STs).⁸⁷ The Hindu caste hierarchy deemed the SCs and STs as “untouchables” and these groups of people have been historically

81. *Id.* ch. 1, §1.

82. Nel, *supra* note 66, at 20.

83. *Poverty on the Rise in South Africa*, STAT. S. AFR. (Aug. 22, 2017), <http://www.statssa.gov.za/?p=10334>.

84. *Policy Brief 13*, *supra* note 25, at 3.

85. *Id.*

86. *See supra* p. 393.

87. *See* Sukhadeo Thorat, Inter-Reg’l Ineq. Facility, Overseas Dev. Inst., *Policy Brief 14*, at 2 (Feb. 2006), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4080.pdf>.

ostracized from society for being “unclean.”⁸⁸ India’s reservation policy is built into the country’s sixty-nine-year-old Constitution. It seeks to improve the lives of these minority castes via three primary methods: appointment and promotion in government services, admissions to public educational institutions, and seats in central, state, and local legislatures.⁸⁹

Initially aimed at promoting social justice and equal rights, India’s affirmative action program has been subject to abuse and its efficacy questioned. While reservations in political representation originally had a ten-year time limit with subsequent extensions every ten years, the reservations in government services and education had no explicit time limit. They were left to the discretion of the government. Without judicial oversight, India’s affirmative action program perpetuates inequality versus redressing it.⁹⁰

The circumstances surrounding today’s socio-economic climate in India are starkly different from 1500 years ago when the caste system was enacted. Then, India’s caste system was created as a way of organizing occupations in a feudal agricultural society.⁹¹ The Brahmins were at the top of the “food chain” and were assigned highly reputable occupations, while the untouchables were at the very bottom and were confined to menial jobs.⁹² Today, however, the exodus of India’s population from villages to sprawling cities negates caste as an economic restriction.⁹³ Population migration and urbanization have led to increased income mobility within India’s castes and the erosion of historical, educational boundaries.⁹⁴

The caste-based quotas have led to inequality and abuse. For instance, children from India’s mega-rich families have secured highly coveted seats reserved for the traditionally “untouchable” castes at India’s top universities simply because they satisfy the requirements of being classified within that historically “untouchable” caste.⁹⁵ These wealthy beneficiaries capitalize upon the universities’ caste-based quotas through fraud and corruption and deny highly intelligent children from poor families the right to secure admission which they would have earned on their own merits in the absence

88. *Id.*

89. *Id.*

90. Gardiner Harris, *With Affirmative Action, India’s Rich Gain School Slots Meant for Poor*, N.Y. TIMES (Oct. 7, 2012), <https://www.nytimes.com/2012/10/08/world/asia/indias-rich-benefit-from-schools-affirmative-action.html>.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

of these mandated quotas.⁹⁶ Additionally, according to a recent BBC News report, India's affirmative action program has become a political gimmick.⁹⁷ Politicians use affirmative action quotas as a tool to win quick votes among their constituents by promoting added caste-based quotas as part of their political campaigns.⁹⁸ These examples show that the true goals of the affirmative action program are not being met. In many instances, the true beneficiaries of these affirmative action programs are not the actual ones benefiting from the fruits of these programs and affirmative action programs and quotas have been rampantly misused by rogue politicians seeking to win quick votes.

Comparing India's affirmative action program with that of Malaysia's, it is clear that the grave consequences of inequality and abuse resulting from India's program ought to be taken into consideration as a reason to halt the unduly lengthy period for preferential measures in Malaysia. An undefined end date not only reduces the efficacy of the pro-Bumiputera program but also undermines the results of the corrective measures undertaken. Moreover, analogizing to the abuse of caste-based quotas in India's higher education system, abusive "Ali Baba" ventures have gained notoriety in Malaysia.⁹⁹ These joint ventures lead to inequality as they involve an unqualified Bumiputera "renting" his ethnic status to a financially well-endowed non-Bumiputera for that non-Bumiputera to engage in that business venture. Although the non-Bumiputera is well-equipped with the assets and the capital to start a business venture in a given industry on his own, he is unable to do so without a Bumiputera business partner. This is pursuant to the pro-Bumiputera policy's designated quotas and total share capital allocations for Bumiputeras. Ali Baba ventures are abusive and unequal because the Bumiputera partner sits back and collects lucrative sums of money simply in exchange for "renting" his ethnic status to the non-Bumiputera business partner who invests his hard work, time, and savings into the business venture. Therefore, similar to India, Malaysia, too, encounters inequality as part of having an undefined end date for its preference laws.

3. Stipulated End Date

The NEP's goals have already been achieved. Therefore, Malaysia needs to define an end date to its preference system. The end date should be based on the achievement of the pro-Bumiputera policy's pre-defined goals, as

96. *Id.*

97. Soutik Biswas, *Is Affirmative Action In India Becoming A Gimmick?*, BBC NEWS (Jan. 10, 2019), <https://www.bbc.com/news/world-asia-india-46806089>.

98. *Id.*

99. *Policy Brief 13*, *supra* note 25, at 4.

stated in the NEP in 1971.¹⁰⁰ In addition to eradicating poverty, the NEP stipulated a 30% Bumiputera ownership of total share capital in Malaysia.¹⁰¹ Today, the 30% Bumiputera equity target has been achieved using the market value calculation. However, this Bumiputera equity target is unlikely to ever be achieved using the flawed par value calculation. Per the NEP, the 30% total share capital is calculated using a stock's par value.¹⁰² Additionally, the valuation of share capital excludes shares held by the federal and state governments.¹⁰³

Par value is a stock's face value.¹⁰⁴ Most stocks are issued a par value at the time of issuance.¹⁰⁵ Usually, corporations issues stocks with a nominal assignment for par value, such as a penny.¹⁰⁶ The par value is a very minimal amount a corporation assigns its shares to prevent legal liability in the event the price of its stock falls below the assigned par value.¹⁰⁷ For stocks, it is the market value that really matters.¹⁰⁸ Market value is a stock's actual value at any given time of trade on the stock market.¹⁰⁹ Market value fluctuates based on market conditions and is a better representation of the company's health along with the micro- and macro-economic conditions.

For illustrative purposes, Apple Inc.'s stock (NASDAQ ticker symbol "AAPL") as of the end of 2018 demonstrates the significantly enormous difference between par value and market value.¹¹⁰ As of the end of 2018, Apple Inc.'s assets totaled \$365.73 billion and its liabilities totaled \$258.58 billion.¹¹¹ While Apple's resulting total stockholders' equity was \$107.15 billion, its par value was just \$40.2 billion.¹¹²

Par value as a basis of valuation of share capital is egregious. As the Malaysia Press has noted, the government's methodology is incomplete because of the use of par value, instead of market price, along with its

100. See Eileen Ng, *New Book on 1969 Race Riots in Malaysia May Be Banned*, *Officials Warn*, TAIWAN NEWS (May 16, 2007, 18:12), <https://www.taiwannews.com.tw/en/news/451017>.

101. *Has 30pct Bumi Equity Target Been Achieved?*, MALAYSIAKINI (Dec. 4, 2014, 4:23 PM), <https://www.malaysiakini.com/news/282322>.

102. *Id.*

103. *Id.*

104. Carol Kopp, *Par Value vs. Market Value: What's the Difference?*, INVESTOPEDIA (June 1, 2021), <https://www.investopedia.com/ask/answers/051115/what-difference-between-par-value-and-market-value.asp>.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

exclusion of government shareholding from the computation of equity ownership.¹¹³ An end date based on the achievement of the Bumiputera equity target ought to be implemented with a revised, more rational, calculation of total share capital. Total share capital should be calculated using a stock's market value instead of its par value.

As the example of Apple's stock demonstrates, the par value is an unrealistic basis for the formulation of the true value of a company's total shareholder equity. If Malaysia were to amend its calculation of total share capital to use par value instead of market value, the 30% Bumiputera quota for total share capital holdings would have been long met, thereby negating the continuation of the pro-Bumiputera policy. Not only are adequate goals and targets important in devising preference measures but also the standards and bases of calculations by which one measures how those pre-defined goals are met. Equality and fairness call for fair goals, fair standards, and fair practices in every aspect of society.

C. *Non-Race Based Affirmative Action Programs*

As in the United States, measures not focused on race, but on wealth, place of residence, and other less problematic distinguishing features can accomplish many of the same goals as racial preferences. While race-based affirmative action programs are subject to strict scrutiny in the United States, affirmative action programs focusing on income, family education and wealth are subject to a lower standard of review, namely the rational basis standard of review. This section explains the two standards of review along with alternative non-race-based affirmative action programs that Malaysia could adopt in place of its pro-Bumiputera policies so as to effectively target the categories of people who are expected to benefit from the program.

1. The Use of Strict Scrutiny

The United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,¹¹⁴ posits that strict scrutiny should be used regardless of the level of government whenever any race-based affirmative action is analyzed.¹¹⁵ The burden of proof is on the government to show that the narrowly tailored, race-based affirmative action program serves a compelling government interest. The government would have to show the discrimination is pervasive and would have to consider race-neutral ways to achieve the same goal and find that they are insufficient in order for the government to

113. MALAYSIAKINI, *supra* note 103.

114. 515 U.S. 200 (1995).

115. *Id.* at 201.

remedy it. Malaysia's program certainly fails this part of strict scrutiny. Nevertheless, a strict scrutiny approach is called for given the unique societal tensions and stigmas racial distinctions produce and the possibility of affirmative approaches to produce greater equity.

In *Parents Involved in Community Schools v. Seattle School District*,¹¹⁶ a case involving race discrimination without an invidious purpose, strict scrutiny was applied.¹¹⁷ The United States Supreme Court held that remedying past discrimination could not be used as a compelling interest to justify the Seattle School District's ongoing plans because the School District had remedied the past discrimination.¹¹⁸ This rule is correct because remedied past discrimination cannot be used for the continuation of race-based affirmative action programs. It does not make sense to base an actively ongoing affirmative action program on a past course of discrimination that has been remedied. The Court reasoned that the essence of an affirmative action program is to correct an existing inequality. Similarly, in Malaysia, past discrimination that has been remedied cannot serve as the basis for ongoing race-based preference measures. As explained above, Malaysia has reached 30% using the market value versus the par value of a given stock and past racial inequalities has been rectified with the Malays accumulating a significant amount of wealth. Instead, non-race based affirmative action programs can be adopted as further discussed below.

2. The Use of Rational Basis Review

If Malaysia instead focused on income, place of residence, family education, or wealth, it would be focusing on characteristics more relevant to the sources of inequality. This would make such non-race-based affirmative action programs less questionable because it would be dealing with categories of people the state would be expected to wish to assist because of social and economic disadvantage.

Healthcare, food, shelter, and education are not deemed fundamental rights under the Constitution of the United States.¹¹⁹ Under rational basis review, the burden of proof is on the challenger to show that the government's action is rationally related to a legitimate government purpose. Unlike strict scrutiny where the burden of proof is on the government, rational basis review affords the government more leeway and flexibility. The fit between the law in question and the government's purpose is allowed

116. 551 U.S. 701 (2007).

117. *Id.* at 758.

118. *Id.* at 702-03.

119. *See generally*, U.S. CONST.

to be poor under rational basis review such that any conceivable legitimate purpose suffices, regardless of whether it is the government's actual purpose.

Under rational basis review, it is acceptable to deny one group rights but approve another group those same rights because the relationship only has to be rationally related; thus, over-inclusivity and under-inclusivity of laws are permitted. Laws reviewed using a rational basis standard are allowed to be under-inclusive because the legislature is allowed to take incremental steps, one step at a time. Additionally, cost savings and administrative inconvenience to the legislature are valid excuses in favor of the government under rational basis review.

Therefore, instead of race-based pro-Bumiputera policies, Malaysia could opt to enact affirmative action programs based on income, place of residence, family education, and wealth that are rationally related to any conceivable legitimate government purpose. These laws are allowed to be over-inclusive or under-inclusive allowing for the government to take incremental steps of corrective action. The Malaysian government's policies would then only be subject to a rational basis standard of review, and the legislature would be allowed to account for cost savings and administrative burdens in deciding the acceptability to deny one group rights while approving another group those same rights.

Nonetheless, fear or bare dislike of a group is never sufficient as a legitimate purpose. The only explanation for the Malaysian approach today is a desire of a majority group to dominate minorities for its own benefit. Under rational basis review, any conceivable purpose would work but not where the actual purpose is known and where the challenger has proved actual animus behind the law. In such cases, rational basis review is applied more strictly—with “teeth.” In *United States Department of Agriculture v. Moreno*,¹²⁰ rational basis review with “teeth” was applied to a law that prevented people from obtaining food stamps when they lived with someone in the same house unrelated to them who already claimed food stamps.¹²¹ The law in this case was struck down because the animus against hippies was the actual purpose of the law. While individual citizens may hold their own biases and prejudices based on the circumstances of their upbringing, for instance, the government is not allowed to hold such biases and prejudices toward any specific group of the society. It does not matter if the government is merely mirroring the feelings of the general population. The government is, under no circumstances, allowed to legitimize fear, hate, animus or bare

120. 413 U.S. 528 (1973).

121. *Id.* at 535-36.

dislike toward any selected group of people regardless of whether it is based on the group's mutable (e.g., wealth) or immutable (e.g., race) traits.

III. CONCLUSION

Given the analysis between strict scrutiny and rational basis review, Malaysia should use a rational basis review approach and implement affirmative action measures focused on income, family education, or wealth. For instance, affirmative action programs could target those with a combined household income below a certain designated threshold; this would assist and better the lives of citizens of limited means regardless of race. The prevalence of misuse via "Ali Baba" antics would be reduced via wealth-based affirmative action measures. Moreover, wealth-based affirmative action programs would still further of the objective of eradicating poverty, which was the original goal of the pro-Bumiputera policy.

To combat the extreme human rights violations of non-Malays in Malaysia, Malaysia should engage in non-race-based affirmative action programs and stipulate an immediate end date of pro-Bumiputera policies given that the Bumiputera total share capital in Malaysia has reached 30% under a market value calculation.

INTERNATIONAL TRASH PICK-UP: THE NEED FOR A NEUTRAL ORBITAL DEBRIS REMOVAL ORGANIZATION

*Astina T. Shakilyan**

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I. BACKGROUND

The launch of Sputnik in 1957 transformed the human exploration of space forever. Today, the United States and other space-faring nations depend heavily on space to carry out daily activities such as the use of GPS,

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internet, and weather monitoring.¹ Moreover, the several technological advancements of humankind allow us to continually explore space and expand the knowledge of our galaxy. However, since the launch of Sputnik, space-faring nations continue to congest space with satellites and spaceships as they push the boundaries of space exploration. Just as humans have wreaked havoc on the environment down on earth, they are currently wreaking havoc on the environment in space.

Orbital debris is any man-made object that is no longer functional, traveling in the Earth's orbit.² More than 500,000 trackable pieces of debris currently orbit the Earth, posing a serious threat to both astronauts and operational satellites.³ Pieces of old satellites, nails, screws, and paint chips currently travel at speeds up to 17,500 mph in low earth orbit.⁴

Orbital debris continues to threaten human exploration of space just as it has in the past few decades. In 2009, the inactive Russian satellite Kosmos 2251 and the active U.S. communication satellite Iridium 33 collided, resulting in about 2,000 of pieces of orbital debris.⁵ In 2015, three astronauts living at the International Space Station (ISS) hurriedly attempted to reach safety as orbital debris from another inactive Russian satellite made a "close pass" to the station.⁶ In 2018, controllers at the European Space Agency had to quickly boost the \$162 million CryoSat-2 spacecraft into higher orbit to avoid a collision with another piece of orbital debris.⁷ Maneuvers like this are more frequent each year as the number of trackable pieces of space debris increases.⁸

Despite the recent coverage of orbital debris by the media, the issue of orbital debris and collisions first came to NASA's attention in 1970.⁹ That year, derelict Delta rockets that were left in earth's orbit exploded, creating

1. *See generally* FRANCIS LYALL & PAUL B. LARSEN, *SPACE LAW: A TREATISE*, 1 (2d ed. 2018).

2. Mark Garcia, *Space Debris and Human Spacecraft*, NASA (Sept. 26, 2013), https://www.nasa.gov/mission_pages/station/news/orbital_debris.html.

3. Maya Wei-Hass, *Space Junk Is a Huge Problem-and It's Only Getting Bigger*, NAT'L GEOGRAPHIC (Apr. 25, 2019), <https://www.nationalgeographic.com/science/space/reference/space-junk/>.

4. *Id.*

5. *Id.*

6. *ISS Astronauts Dodge Flying Russian Space Debris*, PHYS ORG (July 16, 2015), <https://phys.org/news/2015-07-iss-astronauts-dodge-russian-space.html>.

7. Alexandra Witze, *The Quest to Conquer Earth's Space Junk Problem*, NATURE (Sept. 5, 2018), <https://www.nature.com/articles/d41586-018-06170-1>.

8. *Id.*

9. Judy Corbett, *Micrometeoroids and Orbital Debris (MMOD)*, NASA (June 14, 2016), https://www.nasa.gov/centers/wstf/site_tour/remote_hypervelocity_test_laboratory/micrometeoroid_and_orbital_debris.html.

a cloud of shrapnel in Earth's orbit.¹⁰ However, it was almost a decade later that the orbital debris issue attracted the attention of scholars. In 1978, Donald J. Kessler and Burton G. Cour-Palais published a paper entitled "Collision Frequency of Artificial Satellites: The Creation of a Debris Belt."¹¹ Their work brought attention to the dangers of orbital debris and made the space community aware of an array of issues that may arise as a result of the increasing amount of orbital debris. Kessler and Cour-Palais explained that as humans continue to send satellites up into space, it increases the probability of collisions between active satellites and debris, which will in turn create more debris and more collisions.¹² In sum, they coined the term "Kessler Syndrome," which refers to the phenomenon that a chain reaction of collisions will make operating space technology extremely costly and dangerous because of this cascade effect.¹³

The increasing awareness and understanding of the harmful effects of orbital debris has led some space-faring nations to propose interesting solutions, including the use of lasers and harpoons to remove orbital debris, which broaches the issue of national security and dual-use weapons in space.¹⁴ For example, China and Russia proposed using a space-based laser or a harpoon to clean up debris.¹⁵ This raises the concern of countries covertly weaponizing space while holding themselves out as addressing the orbital debris crisis. The concern is that the harpoon or space-based laser can serve as a dual-use weapon, or an object that can be used both to remove orbital debris and damage another country's working satellite. Although the weaponization of space is prohibited by current space law,¹⁶ the orbital debris issue allows willing countries to place dual-use weapons in space. This conflict could lead to heightened tensions internationally.

The threat that orbital debris poses to human life and functional satellites is serious and increasing. The more space-faring nations explore space, the more contaminated it becomes with defunct satellites and other useless space objects. This note will argue that, to prevent countries from covertly

10. *Id.*

11. James Alver et al., *An Analysis of the Potential Misuse of Active Debris Removal, On-Orbit Servicing, and Rendezvous & Proximity Operations Technologies* (May 6, 2018) (unpublished M.A. capstone, George Washington University) (on file with author).

12. *Id.*

13. *Id.*

14. Saadia Pekkanen, *Why Space Debris Cleanup Might be a National Security Threat*, PHYS ORG (Nov. 13, 2018), <https://phys.org/news/2018-11-space-debris-cleanup-national-threat.html>.

15. Avery Thompson, *China Wants to Use a Space Laser to Clean Up Space Junk*, POPULAR MECHS. (Jan. 16, 2018), <https://www.popularmechanics.com/space/satellites/a15173781/china-wants-to-use-a-laser-to-clean-up-space-junk/>.

16. *International Legal Agreements Relevant to Space Weapons*, UNION OF CONCERNED SCIENTISTS (Feb. 11, 2004), <https://www.ucusa.org/resources/legal-agreements-space-weapons>.

weaponizing space with dual-use technology under the guise of addressing the orbital debris issue, space-faring nations must join forces to create and fund a neutral inter-governmental organization tasked with actively removing orbital debris, using the legal framework of the ISS as a model for the new organization. The construction and maintenance of the ISS has been largely successful, proving that international cooperation and funding for various space activities is possible, albeit difficult. A neutral inter-governmental organization would serve to address the environmental crisis occurring in Earth's orbit and to eliminate the need for individual countries to address the issue, which may potentially carry out ulterior motives.

II. INTRODUCTION—DEFINITIONS AND CURRENT SPACE LAW

The term “space law” refers to the body of international law that governs activities in outer space, which is the zone that extends one hundred kilometers above Earth. The main treaties in space law are the Outer Space Treaty (the Treaty), formally known as the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, the Convention on International Liability for Damage Caused by Space Objects (the Liability Convention), the Convention on the Registration of Objects Launched into Outer Space (the Registration Convention), and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement).¹⁷ Many space law scholars have written about the Treaty, its ambiguity, and its failure to guide space-faring nations on the issue of orbital debris.

Moreover, although orbital debris is littered throughout outer space, the orbital debris issue exists mainly in low earth orbit (LEO), which mimics the orbit of the earth and has an altitude of up to 2,000 miles.¹⁸ The term “in orbit” describes an object in motion around the center of the earth.¹⁹ LEO has become a popular destination for satellites because of its low latency.²⁰ In simple terms, latency refers to the time it takes for data to be transmitted to earth from a satellite.²¹ LEO's low latency makes it a hot spot for both military and commercial satellites.²²

17. *Space Law Treaties and Principles*, U.N. OFF. FOR OUTER SPACE AFFS., <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html> (last visited Dec. 15, 2021).

18. Greg Ritchie & Thomas Seal, *Why Low-Earth Orbit Satellites Are the New Space Race*, WASH. POST (July 10, 2020), https://www.washingtonpost.com/business/why-low-earth-orbit-satellites-are-the-new-space-race/2020/07/10/51ef1ff8-c2bb-11ea-8908-68a2b9eae9e0_story.html.

19. LYALL & LARSEN, *supra* note 1, at 153.

20. *Id.* at 153-54.

21. *Id.*

22. *Id.*

It is important to distinguish between the militarization and the weaponization of space. Although most people use the terms militarization and weaponization interchangeably, these words do not have the same meaning and pose very different implications. The militarization of space entails the use of space by military spacecraft, whereas the weaponization of space entails placing a device in the terrestrial environment, created to attack a man-made device.²³ This distinction is integral to understanding the national security issues that the space community is currently discussing. Weaponization may entail militarization, but militarization does not necessarily entail weaponization.²⁴ Further, several countries have militarized space with satellites which are used for reconnaissance and other military activities.²⁵

Additionally, the growing concern of orbital debris gave rise to the issue of its removal, which turned into a national security threat. China and Russia, striving to solve this issue, proposed using a space-based laser or a harpoon to clean up debris.²⁶ This inevitably broached the subject of national security and dual-use technology in space.²⁷ The concern is that the same harpoon or laser that cleans up space debris can also shoot down or capture an adversary's functioning satellite.²⁸ In other words, the orbital debris crisis offers countries a chance to weaponize space under the guise of addressing the orbital debris problem, which is not something that the drafters of the Treaty could have foreseen.²⁹ To prevent countries from covertly weaponizing space, a neutral syndicate must be created to clean up orbital debris.

23. Sa'id Mosteshar, *Space Law and Weapons in Space*, OXFORD RES. ENCYC. OF PLANETARY SCI. (May 23, 2019), <https://oxfordre.com/planetaryscience/view/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-74>.

24. *Id.*

25. Meghan Bartels, *Space Has Always Been Militarized, Just Not Weaponized – Not Yet, Anyway*, SPACE.COM (Nov. 1, 2018), <https://www.space.com/42298-space-weaponized-already-military-history.html>.

26. Thompson, *supra* note 15.

27. Pekkanen, *supra* note 14.

28. *See id.*

29. Saadia Pekkanen, *The Hidden Danger of Cleaning Up Our Space Junk*, DAILY BEAST (Nov. 30, 2018, 9:50 PM), <https://www.thedailybeast.com/the-hidden-danger-of-cleaning-up-our-space-junk>.

A. *Current Space Law—The Outer Space Treaty and More*

The launch of the Soviet Union's artificial satellite, Sputnik, in 1957 arguably started the great space race.³⁰ Sputnik's launch was a breakthrough in the human exploration of outer space. The launch offered hope for the limitless possibilities of space exploration, but it also instilled feelings of inferiority and insecurity in Americans.³¹ Just a decade after the Cold War, Russia showcased its superiority in space.³² The concern was that space, a neutral commons, would become another battle field for humanity.³³ This fear led to the creation of the UN ad hoc committee, the Committee on The Peaceful Uses of Outer Space in 1958.³⁴ Shortly after, the International Co-operation in the Peaceful Uses of Outer Space (Resolution 1472 XIV) was created.³⁵ Part XIV of the resolution emphasizes that the exploration of outer space should only be for peaceful purposes and for the betterment of mankind.³⁶ This emphasis echoed the fear of the militarization of outer space.³⁷ Moreover, Russia and the United States, the main space-faring nations, went further to prevent space from becoming a battlefield and created the Treaty in the early 1960s.³⁸ The Treaty would go on to serve as the primary legal framework of international space law.

The Treaty, formally known as the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, has become the primary source of space law. It was opened for signature in January 1967 and entered into force later that year.³⁹ Currently, 109 countries have ratified the Treaty, including the leading space-faring nations of the United States, China, and Russia.⁴⁰

On its face, the Treaty appears to address many unanswered questions about the obligations and goals of space-faring nations, but a closer read

30. *Sputnik and The Dawn of the Space Age*, NASA, <https://history.nasa.gov/sputnik/> (last visited Dec. 15, 2021).

31. Eleanor Imster & Deborah Byrd, *Today in Science: Launch of Sputnik*, EARTHSKY (Oct. 4, 2019), <https://earthsky.org/space/this-date-in-science-launch-of-sputnik-october-4-1957>.

32. *See id.*

33. *COPUOS History*, U.N. OFF. FOR OUTER SPACE AFFS., <https://www.unoosa.org/oosa/en/ourwork/copuos/history.html> (last visited Dec. 15, 2021).

34. *Id.*

35. *Id.*

36. G.A. Res. 1472 (XIV) A, International Co-operation in the Peaceful Uses of Outer Space, at 5 (Dec. 12, 1959).

37. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter OST].

38. *Id.*

39. *Id.*

40. LYALL & LARSEN, *supra* note 1, at 49.

reveals that the Treaty is quite ambiguous and incomplete. The preamble to the treaty reaffirms the importance of the peaceful exploration of outer space and international cooperation, similar to the International Co-operation in the Peaceful Uses of Outer Space resolution.⁴¹ It is important to note that the treaty emphasizes, at least seven times, that the exploration of outer space shall be peaceful.⁴² However, despite the Treaty's deceptively apparent promise to preserve space as a peaceful environment, it fails to deal with the growing concern of space weaponization.

In particular, Article 4 of the Treaty has been widely criticized as ambiguous and inadequate to address the growing concerns of the weaponization of outer space. Article 4 explicitly prohibits placing in Earth's orbit nuclear weapons or other weapons of mass destruction.⁴³ It also prohibits establishing military bases, fortifications, and testing weapons on any celestial body.⁴⁴ Furthermore, although the Treaty prohibits placing nuclear weapons and weapons of mass destruction in Earth's orbit, the ambiguous language of the treaty fails to encompass lasers, anti-satellite weapons, and land-based weapons that can cause irreparable damage in outer space. The Treaty also prohibits military fortifications and bases on celestial bodies but makes no mention of military fortifications and LEO bases.⁴⁵

The Treaty also fails to explicitly discuss orbital debris and how to deal with it. In 2010, the UN Committee on the Peaceful Uses of Outer Space (COPUOS) recognized that orbital debris poses a threat to both spacecrafts and human life.⁴⁶ Consequently, it created guidelines for Member States to follow in order to mitigate the threat of orbital debris.⁴⁷ These guidelines include, inter alia, limiting debris during normal operations, minimizing the potential for break-ups during operational phases, and limiting the probability of accidental orbital collision.⁴⁸ However, the guidelines state that "[m]ember States and international organizations should voluntarily take [these] measures."⁴⁹ The guidelines go on to state that they "are applicable to mission planning and the operation of newly designed spacecraft and orbital stages and, if possible, to existing ones. They are not legally binding under

41. OST, *supra* note 37.

42. *Id.*

43. *Id.* art. 4.

44. *Id.*

45. *Id.*

46. Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on Its Fifteenth Session, U.N. Doc. A/AC.105/C.1/L.260 (2010).

47. *Id.* at 1-2.

48. *Id.*

49. *Id.*

international law.”⁵⁰ Therefore, launching states may ignore the guidelines and potentially create orbital debris without consequence.

Similarly, the Inter-Agency Space Debris Coordination Committee created the IADC Space Debris Mitigation Guidelines in 2007.⁵¹ These guidelines, compared to the COPUOS guidelines, lay out different measures that space-faring nations should take to reduce the amount of orbital debris in space. However, similar to the COPUOS mitigation guidelines, the IADC guidelines are not binding and merely encourage the participating nations to “apply [the] guidelines to the greatest extent possible.”⁵² Moreover, both the IADC and COPUOS guidelines focus on debris prevention, not removal.⁵³ Given that there are currently millions of pieces of debris orbiting the earth, it is apparent that mitigation is not enough to address the threat posed by the debris. Space-faring nations must begin to engage in active debris removal (ADR) instead of merely mitigating the harm. However, the current orbital debris crisis coupled with the Treaty’s ambiguity leaves open the possibility that space-faring nations may weaponize space covertly, despite their previous attempts to prevent it.

B. Past International Efforts to Prevent Weaponization

Over the past few decades, space-faring nations have made efforts to prevent the weaponization of space. In the early to mid-1980s the UN called on the Conference on Disarmament to create the resolution of the Prevention of an Arms Race in Outer Space (PAROS).⁵⁴ However, the United States refused to sign the treaty, claiming there was no need for it because, at the time, there were no weapons in space.⁵⁵ Shortly after, the committee on PAROS was dissolved.

Similarly, in 2008, Russia and China combined forces to propose a drafted treaty: The Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (PPWOS).⁵⁶ The Minister of the Foreign Affairs of the Russian Federation at the time, Sergey

50. *Id.*

51. Inter-Agency Space Debris Coordination Comm. [IADC], *IADC Space Debris Mitigation Guidelines* (2007), https://www.unoosa.org/documents/pdf/spacelaw/sd/IADC-2002-01-IADC-Space_Debris-Guidelines-Revision1.pdf.

52. *Id.* at 5.

53. *Id.*

54. G.A. Res. 62/20, *Prevention of an Arms Race in Outer Space*, at 2 (Dec. 5, 2007).

55. *Id.*

56. Joshua Pantesco, *Russia, China Propose Draft Treaty on Use of Weapons in Space*, JURIST (Feb. 12, 2008, 9:41 AM), <https://www.jurist.org/news/2008/02/russia-china-propose-draft-treaty-on/>.

Lavrov, expressed concern about the state of international space law because it "did not prohibit deployment in space of weapons other than weapons of mass destruction."⁵⁷

The PPWOS treaty was extensive and laid out clear-cut definitions for critical terms. For example, the treaty defined a weapon in outer space as "any device placed in outer space, based on any physical principle, which has been specially produced or converted to destroy, damage or disrupt the normal functioning of objects in outer space, on the Earth or in the Earth's atmosphere, or to eliminate a population or components of the biosphere which are important to human existence or inflict damage on them."⁵⁸ By offering concrete definitions, the draft treaty aimed to correct much of the Treaty's ambiguity, but unfortunately, negotiations were stalled after the United States refused to sign the PPWOS treaty.⁵⁹

However, even if the United States had signed the PPWOS treaty and the countries agreed to limit themselves, the treaty's definition of a weapon in space fails to encompass ground-based anti-satellite weapons (ASATs). ASAT's are a type of directed-energy weapon that destroys or interferes with working satellites and consequently prevents the country in ownership of the satellite from using it properly.⁶⁰ Considering the importance of satellites in military intelligence, the amount of harm an ASAT weapon can do to a working satellite is alarming. Moreover, the space-based laser that China proposed to clean up space debris is an ASAT weapon capable of destroying working U.S. and Russian satellites.⁶¹

When the Soviet Union first launched Sputnik I, there was no existing legal framework to govern outer space activities.⁶² Before creating COPUOS, the countries assumed that the law that governed airspace would also govern outer space.⁶³ Currently, no body of law addresses the weaponization concerns of LEO. It is also important to note that the Treaty was written when

57. *Id.*

58. Letter dated 19 August 2008 from the Permanent Representative of the United States of America addressed to the Secretary-General of the Conference transmitting comments on the draft "Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT)" as contained in document CD/1839 of 29 February, U.N. Doc. CD/1847, at 4 n.3 (Aug. 26, 2008), <https://undocs.org/CD/1847>.

59. *See id.*

60. Carin Zissis, *China's Anti-Satellite Test*, COUNCIL ON FOREIGN RELS. (Feb. 22, 2007, 10:37 AM), <https://www.cfr.org/backgroundunder/chinas-anti-satellite-test>.

61. *See* Matt Williams, *China Has a Plan to Clean up Space Junk with Lasers*, PHYS ORG (Jan. 17, 2018), <https://phys.org/news/2018-01-china-space-junk-lasers.html>.

62. MATTHEW J. KLEIMAN, *THE LITTLE BOOK OF SPACE LAW* (2013).

63. *Id.*

the main concern was nuclear weapons.⁶⁴ However, since 1967, space technology has advanced rapidly. The Treaty is arguably outdated due to its failure to prohibit the many types of firearms that countries may place in LEO today.

The unique issue of orbital debris, its removal efforts, and the shortcomings of current space law aligned to create the perfect storm. Today, any space-faring nation would be able to place a dual-use weapon in space under the guise of minimizing the threat of orbital debris.⁶⁵ Just last year, Chinese engineers at China's Air Force Engineering University published a paper detailing the feasibility of a space-based laser that can be used to address the issue of orbital debris.⁶⁶ They believe that the laser can blast large pieces of space debris into smaller pieces, making the pieces less harmful to humans and spacecraft in orbit.⁶⁷ Moreover, China plans to accomplish this by equipping a satellite with the laser.⁶⁸ This would effectively make the satellite a dual-use weapon. Although China was the first country to propose placing a laser in space to clean up debris, theoretically any country would be able to do so without violating the Treaty.⁶⁹ This would give adversarial countries an advantage in space by allowing them to damage working satellites belonging to another country, potentially leading to a war in space.

Additionally, China's proposal to use a laser to blast orbital debris into smaller pieces puts the fear of the weaponization of space into the spotlight. Because orbital debris is a pressing issue for all space-faring nations, it gives every nation, not just China, a chance to hold itself out as attempting to solve the issue while simultaneously weaponizing space with dual-use technology.⁷⁰ Similarly, under current international space law, any country would be able to place an ASAT dual-use weapon in space without violating the Treaty or other international agreements.⁷¹ The growing threat of orbital debris, the potential weaponization of space, and ambiguous language of the Treaty raise several concerns for the future of the final frontier, and existing space law does little to address those concerns.

64. Daryl Kimball, *The Outer Space Treaty at a Glance*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheets/outerspace> (last visited Dec. 23, 2021).

65. NAT'L AIR & SPACE INTEL. CTR., *COMPETING IN SPACE*, (Dec. 2018), <https://media.defense.gov/2019/Jan/16/2002080386/-1/-1/1/190115-F-NV711-0002.PDF>.

66. Joe Pappalardo, *Could a Chinese Space Junk Laser Double as a Weapon?*, POPULAR MECHS. (Jan. 17, 2018), <https://www.popularmechanics.com/military/weapons/a15338238/china-space-junk-laser-weapon-potential/>.

67. *Id.*

68. *Id.*

69. NAT'L AIR & SPACE INTEL. CTR., *supra* note 65.

70. Pappalardo, *supra* note 66.

71. Zissis, *supra* note 60.

III. THE NEED FOR A NEUTRAL INTERGOVERNMENTAL ORGANIZATION

Right now, it is critical for space-faring nations to come together to create and fund a neutral intergovernmental organization (IGO) to safely remove orbital debris. There are several reasons why this is the best solution for the current orbital debris crisis. First and foremost, the IGO will directly address the orbital debris issue by actively removing orbital debris. Second, because the IGO will be created and funded by several nations it will eliminate the need for a single country to address the orbital debris issue on its own. For example, because the IGO will be an international effort to remove orbital debris, China, for instance, will have less of a reason to send a dual-use laser to space in order to blast large pieces of debris into smaller pieces. Because several space-faring nations in the past have indicated an interest to preserve space as a peaceful environment, dual-use weapons in space would likely raise tensions between countries and potentially lead to strained diplomatic relations. Third, the creation of the IGO will strengthen the diplomatic relations of the space-faring nations. Space has always been recognized as a neutral commons, owned by no one and open for exploration by anyone, like the sea. It is appropriate for the space-faring nations to unite and address the crisis in space together.

Some scholars argue against an intergovernmental organization, describing it as unnecessary and futile. Jie Long argues there is no need to create a costly intergovernmental organization that actively removes orbital debris, and that the solutions to our orbital debris problems are in the Treaty itself.⁷² In particular, Long points to Article 9 of the Treaty which states:

In the exploration and use of outer space... State Parties to the treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the treaty.⁷³

Long argues that countries must do their due diligence and remove the orbital debris which results from their own activities so as to comply with the Treaty.⁷⁴ However, Long's argument fails due to the Treaty's ambiguity.

Long's argument could be successful if the Treaty contained clear and unambiguous guidelines for space-faring nations to follow. However, the language of the Treaty is far too ambiguous to encourage due diligence in removal of orbital debris. The language of the Treaty, not just in Article 9,

72. Jie Long, *Ideas for Development of Long-Term Sustainability of Outer Space Activities: Active Space Debris Removal*, 48 H.K. L.J. 623, 635 (2018).

73. *Space Law Treaties and Principles*, *supra* note 17.

74. Long, *supra* note 72.

but all throughout, is ambiguous enough to allow countries to interpret it in their favor. Interpreting “with due regard to the corresponding interests of all other State Parties” as creating an obligation for countries to actively remove orbital debris is a forced reading of the Treaty.⁷⁵ Furthermore, the ambiguity and broad language of the Treaty does not give countries enough incentive to deorbit their satellites or to fund an active debris removal project.

Long’s argument could succeed if countries that have ratified the Treaty held each other accountable for violating it. Although the language of the treaty is ambiguous, pressure from other countries to respect the shared environment of space may encourage the main space-faring nations to practice more awareness in regard to the orbital debris they leave behind, because otherwise, they would risk disrupting their foreign relations with powerful countries. However, given that the orbital debris crisis is gradually worsening, it is crucial that countries take a more active approach and create the IGO.

In addition to the new IGO’s ability to actively remove orbital debris, it would also reduce the risk of the covert weaponization of space. For example, if each country funded the IGO through a tax, knowing that they are contributing to the removal of debris, the attempt of other countries to go around the IGO and use a space-based harpoon to clean up debris would raise concerns. In other words, the creation and operation of the IGO will make it unnecessary and less likely that countries will weaponize space with dual use weapons to clean up orbital debris, because there will be an entire international organization to take care of the clean-up. The IGO will make it more apparent if a country is trying to use the orbital debris crisis as an opportunity to weaponize space.

IV. THE LEGAL FRAMEWORK OF THE INTERNATIONAL SPACE STATION

The ISS is celebrated as the apogee of international partnership.⁷⁶ The United States, Russia, China, Canada, and Europe (the Partners) are all part of the successful partnership.⁷⁷ Part of the success of the ISS is attributed to the Intergovernmental Agreement of 1998 (the 1998 Agreement). The 1998 Agreement offers a sophisticated and detailed legal framework of, inter alia,

75. *Space Law Treaties and Principles*, *supra* note 17.

76. Eric Mack, *At 20, the International Space Station Remains a Stellar Success Story*, CNET (Nov. 19, 2018, 11:32 AM), <https://www.cnet.com/news/at-20-the-international-space-station-remains-a-stellar-success-story/>.

77. *International Space Station Basics*, NASA (2007), https://www.nasa.gov/pdf/179225main_ISS_Poster_Back.pdf.

the management, operation, ownership, and funding of the ISS.⁷⁸ The law governing the creation, operation, and utilization of the Station can be divided into three categories: the 1998 agreement, the Memoranda of Understanding (MOU), and implementing agreements between the Partners.

The first and arguably most important category is comprised of the 1998 Agreement, which superseded the earlier 1988 agreement.⁷⁹ Article 1 of the 1998 Agreement emphasizes that the object of the Agreement “is to establish a long-term international cooperative framework among the Partners, on the basis of genuine partnership, for the detailed design, development, operation, and utilization of a permanently inhabited civil international Space Station for peaceful purposes, in accordance with international law.”⁸⁰

Moreover, the ISS is operated in accordance with all of the major space treaties, including the Outer Space Treaty.⁸¹ The 1998 Agreement created a genuine partnership between the Partners and has proven to be successful in governing the activities of the ISS. Article 7 states that the Partners, acting through managing bodies, shall “plan and coordinate activities affecting the design and development of the Space State and its safe, efficient, and effective operating and utilization.”⁸² The Agreement also provides that each member state is responsible for managing its own programs.⁸³ The 1998 Agreement emphasizes that each Partner shall play a vital role in the operation and success of the ISS.

The second category of the law governing the ISS consists of the MOU. Although the 1998 Agreement lays out the basic legal framework of the Station, the MOUs are integral to the operation and utilization of the ISS. A MOU is less than a formal contract, but more than a simple agreement.⁸⁴ It is generally understood that MOUs are a type of soft law.⁸⁵ They “provide a

78. Rochus Moenter, *The International Space Stations: Legal Framework and Current Status*, 64 J. AIR L. & COM. 1033, 1048 (1999).

79. A. Farand, *The Space Station Cooperation Framework*, Legal Affairs, ESA (1998), <http://www.esa.int/esapub/bulletin/bullet94/FARAND.pdf>.

80. Agreement among the government of Canada, governments of Member States of the European Space Agency, the government of Japan, the government of the Russian Federation, and the government of the United States of America concerning Cooperation on the Civil International Space Station, Jan. 29, 1998, T.I.A.S No. 12, 927 at 3 [hereinafter 1998 ISS Agreement].

81. *See id.* at 2.

82. *Id.* art. 7.

83. *See id.*

84. *See* LYALL & LARSEN, *supra* note 1, at 33-34.

85. *See id.* at 50-52 (discussing how soft law cannot be enforced like formal hard law but provides a framework for countries to engage in space activities and exploration).

framework for cooperation and coordination” and “set forth broad guidelines describing the roles and responsibilities” of the parties to the MOU.⁸⁶

MOUs have become increasingly popular over the past few decades and are extensively used by the Partners to the ISS, because they allow for cross-agency partnerships.⁸⁷ For example, after the Partners signed the 1998 Agreement, NASA entered into several MOUs with other major space agencies, including the European Space Agency (ESA) and the Russian Space Agency (RSA). Also, NASA and ESA entered into a MOU establishing that NASA will “assist in the on-orbit activation and performance verification of the flight elements provided by the Partners in accordance with agreed assembly, activation and verification plans” and “participate with ESA and the other partners in Space Station management mechanisms as provided in Articles 7 and 8, including the development of the Operations Management Plan and the Utilization Management Plan.”⁸⁸

In sum, a MOU can be an effective way for international agencies to reach agreements with each other and to establish each agency’s rights and responsibilities to one another. The MOUs that the Partners of the ISS created have proven to be successful and no conflicts have arisen thus far.

The final category of the law governing the ISS consists of implementing agreements between the Partners. Article 4 of the 1998 Agreement states that the cooperating agencies shall enter into “implementing arrangements” with one another to carry out their obligations under the 1998 Agreement and MOU’s.⁸⁹ It is understood that these arrangements between agencies are necessary to further cooperation on the Station, and the 1998 Agreement itself hints at this.⁹⁰ The 1998 Agreement, MOUs and agreements between partners, in addition to the success of the ISS demonstrate that space-faring nations are able to work together to use space peacefully. This in turn offers hope that the IGO will succeed after its inception because, similarly to the ISS, space-faring nations will be coming together to work towards the common goal of active debris removal.

86. *Memoranda of Understanding*, NASA SPACE SCI. DATA COORDINATED ARCHIVE (Oct. 5, 2016), <https://nssdc.gsfc.nasa.gov/archive/mou/>.

87. See LYALL & LARSEN, *supra* note 1, at 37; *ESA and NASA Sign Memorandum of Understanding Cooperation in Space Transportation*, EUR. SPACE AGENCY (Sept. 14, 2009), http://www.esa.int/Enabling_Support/Space_Transportation/ESA_and_NASA_sign_Memorandum_of_Understanding_on_cooperation_in_space_transportation.

88. Memorandum of Understanding between NASA of the U.S. and the European Space Agency Concerning Cooperation on the Civil International Space Station art. 6, NASA-ESA, Jan. 29, 1998, T.I.A.S No. 12844.

89. 1998 ISS Agreement, *supra* note 80, art. 4.

90. See Farand, *supra* note 79, at 1.

V. USING THE INTERGOVERNMENTAL AGREEMENT OF 1998 AS A MODEL FOR THE NEW INTERGOVERNMENTAL ORGANIZATION

Like the legal framework of the ISS, the creators of the new IGO should model the main agreement after the 1998 Agreement and use MOUs and implementing agreements as an operational template. The principal space-faring nations have already proven that they are willing to cooperate on a multinational level for the sake of science and exploration, which offers hope for the creation of the new IGO. Using the legal framework of the ISS to create the IGO will be crucial to its success given that the legal framework of the ISS is sophisticated and clear.

For instance, Article 16 of the 1998 Agreement creates a cross-waiver of liability.⁹¹ The Partners agree to a cross-waiver of liability for damage arising out of “protected space operations,” including the research, development, and operation of the ISS.⁹² Further, the Partners effectively waive liability that may arise out of damage to the ISS, excluding willful misconduct.⁹³ Likewise, it would be essential to the operation of the IGO to include a cross-waiver of liability similar to the one in the 1998 Agreement to ensure that it can effectively remove orbital debris without the looming fear of liability. For example, if a defunct intact satellite were to be damaged during removal, the IGO would not be liable for it and would be immune from suits by the launching nation. Additionally, this waiver should operate under the assumption that nonoperational satellites in LEO are not of use to the launching nation.

Although the new IGO can look to the 1998 Agreement when modeling its cross-waiver of liability, it must take a more original approach when it comes to funding the organization. While the 1998 Agreement offers a detailed system of funding, the unique nature of orbital debris requires the IGO to take a different approach. Currently, the governments of the Partners fund the Station collectively.⁹⁴ Article 15 of the IGA reads “each Partner shall bear the costs of fulfilling its respective responsibilities under this Agreement, including sharing on an equitable basis the agreed common system operations costs or activities attributed to the operation of the Space Station as a whole, as provided in the MOUs and implementing arrangements.”⁹⁵ The Station is unique in that each Partner nation owns a different part of the Station, and is therefore responsible for its funding.

91. 1998 ISS Agreement, *supra* note 80, art. 16.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* art. 15.

However, to fund the IGO for orbital debris removal, a tax should be levied on each launch to space, including both governmental and non-governmental launches. Each nation that launches any kind of space object into orbit should pay an additional tax to fund the IGO. As a result, the nations that have the greatest presence in space will be the primary funders of the IGO. The funds would be used to jumpstart the new organization, to allow for the costly endeavor of debris removal, and also to allow for continued research of new technologies that could make debris removal more efficient. Furthermore, the tax would serve as a reminder to launching entities that earth's orbit is a valuable resource, and that the orbital debris crisis is alarming and worsening.

Some may argue that countries will not have enough incentive to create and enter the IGO to remove orbital debris. However, there are several benefits that will come from the inception of the IGO. First, the increased visibility of the threat of orbital debris should incentivize the main space-faring nations to engage in active debris removal. The current amount of debris is so great that it may very well damage their expensive satellites and harm their astronauts.⁹⁶ Second, creating a neutral syndicate to remove orbital debris can help calm the tensions between nations in light of the fear of the weaponization of space.⁹⁷ Third, the countries that would create and fund the new IGO could be rewarded with increased tracking abilities, allowing them to track both orbital debris and the space objects of other countries. The countries would have a greater presence in space while contributing to the solution for orbital debris. It would particularly work well for countries like India that do not have as great of a presence in space as Russia, China, or the United States.

VI. OWNERSHIP OF DEBRIS

Arguably, the biggest legal challenge the IGO would face is the ownership of debris in space. Active debris removal may lead to conflict between countries under the Treaty and Registration Convention. The issue of ownership over orbital debris is complex, so this note will only discuss it to the extent necessary to analyze the problems that ownership can pose for the IGO.

96. See Long, *supra* note 72, at 627.

97. See generally, *China's Space Debris Cleanup May Be Cover Story for Arms Against U.S. Satellites, Pentagon Says*, JAPAN TIMES (Feb. 12, 2019), <https://www.japantimes.co.jp/news/2019/02/12/asia-pacific/chinas-space-debris-cleanup-may-cover-story-arms-u-s-satellites-pentagon/>.

Under Article 8 of the Treaty, when a State Party registers and launches an object into outer space, the State Party retains jurisdiction and control over the object “while in outer space or on a celestial body.”⁹⁸ The launched object is entered into a registry so that countries can keep track of its ownership. The treaty does not specify when the ownership and jurisdiction over a launched object ceases. Therefore, the launching countries still own the defunct and nonoperational satellites currently orbiting the earth which disincentives other countries to actively remove their satellites from orbit.⁹⁹ As Melissa Kemper Force explains, “it is the eternal fidelity to the superiority to ownership rights that prevents threatened users from using ADR to ameliorate the danger posed by hazardous space objects.”¹⁰⁰ Neither does the 1998 Agreement address the cessation of ownership. Since it expressly states that the Station will be run in accordance with the Treaty, it is clear that the IGA does not offer any solution for determining when the ownership over defunct satellites ceases.

A plausible argument is that the law of abandonment should be applied to orbital debris.¹⁰¹ Given the severity of the contamination of LEO and the increasing risk of Kessler Syndrome, the IGO will have to adopt strict abandonment laws for scrap pieces of former space objects and for objects that cannot be identified under the registry. Moreover, the IGO should utilize MOUs to address the ownership issue of objects and satellites that have more value. More specifically, the members of the IGO should enter into a MOU that when an intact non-operational satellite is removed from earth’s orbit by the IGO, it will identify the satellite through the registry and return it to the custody of the country that launched it.

Although all space objects are costly, which makes ADR more difficult, satellites in particular will be an issue for the IGO. Satellites are generally used for GPS tracking and telecommunications, but they are also used for reconnaissance.¹⁰² Satellites store the information they collect in chips that

98. OST, *supra* note 37.

99. See Michael Listner, *Legal Issues Surrounding Space Debris Remediation*, SPACE REV. (Aug. 6, 2012), <https://www.thespacereview.com/article/2130/1>.

100. Melissa Kemper Force, *Active Space Debris Removal: When Consent Is Not an Option*, 29 AIR & SPACE LAWYER 13, 14 (2016) (discussing the problem with nonconsensual use of active debris removal).

101. Emily M. Nevala, *Waste in Space: Remediating Space Debris through the Doctrine of Abandonment and the Law of Capture*, 66 AM. UNI. L. REV. 1495, 1516 (2017) (noting that for a property to be abandoned, the owner must (1) perform a manifest act that (2) shows his or her intent to forsake the property and (3) the action and the intent must occur concurrently).

102. Satellite Reconnaissance: Secret Eyes in Space, SPACE RACE, <https://airandspace.si.edu/exhibitions/space-race/online/sec400/sec400.htm> (last visited Dec. 23, 2021).

are installed within them.¹⁰³ Therefore, some defunct satellites in space may contain sensitive information and it is likely that the launching nation does not want another nation to get a hold of the information on the satellite for a plethora of reasons.

This creates a hurdle for the IGO in its course of ADR. The sensitive information contained within the satellites would force the IGO to carefully go about removing and handling the satellites to avoid potential conflicts. Additionally, materials used to create satellites and other space objects are highly expensive and can most likely be recycled and repurposed.¹⁰⁴ Therefore, the IGO should give the launching state a chance to reclaim its property by attempting to locate the launching state and returning it to that state to the best of its abilities. The pressing issue of orbital debris and continued contamination of space gives rise to the need of skillful balancing removing orbital junk and respecting the property of the launching countries.

However, because it is important to reduce the burden on the newly created IGO, the MOU's that countries would enter into with one another should only apply to certain satellites. The countries that create the IGO should consult with one another and set a deadline for when the IGO shall be obligated to locate the owner of intact satellites and when a satellite becomes derelict and fit for automatic disposal. Some defunct satellites may orbit the earth for decades. Just recently, the \$2.9 billion European satellite Envisat went silent and stopped responding.¹⁰⁵ Shortly after, the ESA announced that it will not recover the satellite, which is the size of a school bus, and instead leave it in earth's orbit.¹⁰⁶ It may very well remain there for 150 years as the ESA has expressed its intent to allow the satellite to spiral into the atmosphere and burn up on its own.¹⁰⁷ This is clearly not a viable option since it greatly contributes to the orbital debris issue. A satellite of such massive size may likely collide with other pieces of orbital debris and continue to create more pieces of debris. This situation will undoubtedly pose a threat to the lives of astronauts.

However, requiring the IGO to identify and return every satellite it collects would be a costly burden and it would slow down the ADR process. Due to the severity of the threat posed by orbital debris, countries should

103. Satellites: A Global View of Earth, NASA (Aug. 1996), <https://www.nasa.gov/centers/langley/news/factsheets/Satellites.html>.

104. See Jez Turner, *Space Junk: A Recycling Station Could be Cleaning Up in Earth Orbit by 2050*, THE CONVERSATION (July 26, 2019, 7:03 AM), <https://theconversation.com/space-junk-a-recycling-station-could-be-cleaning-up-in-earth-orbit-by-2050-119787>.

105. Mike Wall, *Huge Dead Satellite May Be Junk for 150 Years*, SPACE.COM (May 11, 2012), <https://www.space.com/15640-envisat-satellite-space-junk-150years.html>.

106. *Id.*

107. *Id.*

agree to remove and dispose of satellites without attempting to locate the owner if the satellite has been nonoperational and orbiting the earth as debris for more than a decade but less than fifteen years. It should be presumed that such satellites are derelict, so the IGO does not have to go through the process of locating and returning the satellite to the launching country forever, which drives up costs and inefficiency. This MOU will allow the IGO to actively remove orbital debris while still being respectful of the property of other Partners to the organization.

Aside from the liability concerns that may arise in removing space objects that belong to other countries, the IGO must also consider the problem of unidentifiable pieces of orbital debris. Unidentifiable pieces of orbital debris, whether they are pieces of defunct satellites or intact defunct satellites, should be disposed of and should not become a burden on the IGO. The unidentifiable pieces of debris should either be disposed of or recycled by the IGO, and the cost should be factored into the funding of the IGO. Whether the unidentifiable pieces are disposed of or recycled, the debris will be out of earth's orbit and will no longer pose a threat to humans and working satellites in space.

VII. PRIVATE ACTORS IN SPACE

The growing American private space industry raises several legal questions about the liability of private actors and the role they play in the orbital debris removal. The private space industry revolutionized satellite usage and non-governmental exploration, making it cost-effective while still promising reliability.¹⁰⁸ Private space companies, also known as non-governmental space entities, are also gaining visibility because NASA recently entered into partnerships with companies like SpaceX and Boeing to fly astronauts to space.¹⁰⁹ It is generally understood that non-governmental entities in the United States must also conduct space activities in accordance with the Treaty.¹¹⁰ However, the U.S. Congress recently passed the American Commerce Free Enterprise Act (the Act) which streamlines regulations for the licensing of space objects launched by private companies.¹¹¹

108. Michaels Sheetz, *How NASA Is Evolving Through Partnerships with Private Space Companies*, CNBC EVOLVE (Nov. 30, 2019, 9:59 AM), <https://www.cnbc.com/2019/11/30/how-nasa-is-evolving-through-partnerships-with-private-space-companies.html>.

109. *Id.*

110. FED. COMM. COMM'N, MITIGATION OF ORBITAL DEBRIS IN THE NEW SPACE AGE, FCC-CIRC1811-02, at 36 (Oct. 25, 2018), <https://docs.fcc.gov/public/attachments/DOC-354773A1.pdf>.

111. Jeff Faust, *House Passes Commercial Space Regulatory Bill*, SPACE NEWS (Apr. 25, 2018), <https://spacenews.com/house-passes-commercial-space-regulatory-bill/>; H.R. Res. 2809, 115th Cong. § 80102(a) (2018) (enacted).

The Act makes licensing and regulation for private entities simple and fast, with all licensing and approval granted by the Secretary of Commerce of the Office of Space Commerce.¹¹² The language of the Act raises concerns about the United States' willingness to prioritize commercial needs since it severely limits regulation of private entities. For example, the Act emphasizes that "United States citizens and entities are free to explore and use space, including the utilization of outer space and resources contained therein, without conditions or limitations."¹¹³ The firm language of the Act reflects the United States' intention to hold commercialization and capitalism in superior regard over regulation and safeguards. Although the Act later explains that all activities shall be conducted in compliance with the Treaty, some are concerned about impact the Act may have on international space activities.

Mike Listner, the founder of Space Law and Policy Solutions, a private space consulting firm, believes that the Act could "create some unfavorable interpretation of international law—and set a bad example for other nations who are enacting private space activities."¹¹⁴ Listner's concern likely stems from § 80103(2)(C) of the Act, which states that "the Federal Government shall not presume all obligations of the United States under the Treaty are obligations to be imputed upon U.S. non-governmental entities."¹¹⁵ This provision shows the United States' intent to separate its own obligations under the Treaty from the obligations of private entities, implying that private companies may fail to conduct their space activities in compliance with the Treaty. However, Article 6 of the Treaty explicitly states:

States Parties to the Treaty shall bear international responsibility for national activities in outer space . . . whether such activities are carried on by governmental agencies or non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty.¹¹⁶

The Treaty also emphasizes that the activities of non-governmental entities in outer space must be supervised and regulated by the appropriate State Party to the treaty. Therefore, the Act creates some friction with the Treaty because the United States is trying to relieve as many burdens as possible on private companies to make space more accessible. However, by

112. H.R. Res. 2809, 115th Cong. § 80102(a) (2018).

113. *Id.* § 2(b)(1).

114. Caroline Haskins, *Private Space Companies No Longer Have to Follow the Law*, OUTLINE (May 8, 2018), <https://theoutline.com/post/4469/outer-space-treaty-commerce-free-enterprise-bill-spacex-blue-origin-boeing-lockheed-martin?zd=1&zi=tgzeqltd>.

115. H.R. Res. 2809, § 80103(2)(C).

116. OST, *supra* note 37.

doing so, the U.S. is not only holding itself out to the international community as relieving itself of responsibilities, but it is also risking violating the Treaty. If a private space company conducts space activities that are not in compliance with the Treaty, the United States will be responsible for violating the Treaty.

Because the Act relieves much of the regulatory burdens and allows private entities to complete their registrations through the Office of Space Commerce, there will likely be an influx of satellites and space objects launched into space by private companies. Elon Musk, the billionaire behind the private space company SpaceX, recently launched sixty satellites into space.¹¹⁷ This inevitably broaches a discussion about orbital debris. The fear is that the growing commercialization of earth's orbit by private companies will make Kessler Syndrome a reality sooner than anticipated.¹¹⁸ Although, some may argue that the Act requires companies to submit a debris mitigation plan for space objects that they launch, it merely requires that the plan take into account best practices. It does little to combat the dangers of orbital debris, similarly to the voluntary mitigation guidelines laid out by the COPUOS.¹¹⁹

More importantly, the Act opens the door for private companies to weaponize space. According to section 80103(b)(3), if the Secretary of Commerce fails to approve or deny an application for licensing within 90 days, the application shall be automatically approved.¹²⁰ Considering that the Office of Space Commerce has only twelve staff members, it is inevitable that some space objects launched by non-governmental entities will be automatically approved without meeting the regulations and requirements set out by the Act.¹²¹ Therefore, it is possible that a private company could launch a dual-use weapon to clean up orbital debris while covertly weaponizing space, with the help of the United States. In addition to the possibility of weaponization, private companies are taking up the precious resources of orbital space and increasing the threat of space collisions and the amount of orbital debris.

117. Shannon Hall, *As SpaceX Launches 60 Starlink Satellites, Scientists See Threat to "Astronomy Itself,"* N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/science/spacex-starlink-satellites.html>.

118. Tom Hoggins, *Fears Over Space Junk After Elon Musk Launches 60 Starlink Internet Satellites,* TELEGRAPH, (Nov. 12, 2019, 5:13 PM), <https://www.telegraph.co.uk/technology/2019/11/12/fears-space-junk-elon-musk-launches-60-starlink-internet-satellites/>.

119. H.R. Res. 2809, §80104(a)(1).

120. *Id.* §80103(b)(3).

121. *Staff & Contact Information,* OFF. OF SPACE COM., <https://www.space.commerce.gov/about/staff-contact/> (last visited Dec. 18, 2021).

The commercialization of space by non-governmental entities adds another complex layer to the orbital debris issue. Private companies in the United States, backed by billionaires seeking to exploit the neutral commons of space, are now actively contributing to the contamination of earth's orbit. Other space-faring nations should not allow the United States to shirk its responsibilities under the Treaty by delegating commercialization and exploration tasks to private companies by relieving the regulatory burdens. Any space-faring entity, whether governmental or private, should contribute to ADR and should not be allowed to exploit the resources of space without paying a tax.

The IGO could reduce this tension between the Treaty and the Act by requiring that private space companies contribute to its funding. They would have to pay a tax for every launch that would fund the IGO directly. This would ensure that private actors do not get away with launching several satellites into space, using the valuable resources of earth's orbit, without contributing to its clean up. Therefore, the agreement that will govern the new IGO must incorporate obligations of non-governmental actors to ensure that they contribute to funding of orbital debris removal.

VIII. CONCLUSION

Orbital debris poses a dire threat to working satellites and human beings in space. Several nations, and especially the United States, are heavily dependent on space for military reconnaissance and commercial activities, and that dependence shows no sign of fading in the near future. Each year more and more satellites and other space objects are launched into LEO, and most are not properly programmed to deorbit into the atmosphere and burn up. Therefore, space-faring nations must turn their efforts to active debris removal since mitigation efforts are doing little to reduce the hazards of orbital debris.

The best way to tackle this is to create a neutral international organization tasked with carrying out the operations of orbital debris removal. This circumvents the potential risk of one country weaponizing space under the guise of addressing the orbital debris issue. It also addresses the environmental crisis head on. The organization can use the legal framework of the ISS to create its own agreements.

Moreover, because non-governmental entities increase their presence in space each year, they should help fund the IGO so that they are not free to exploit outer space without contributing to its clean-up. If more countries follow in the U.S.'s footsteps and relieve non-governmental entities of administrative and regulatory burdens, the space race and the increase of orbital debris will progress rapidly.

The time has come to take an active approach to debris removal. Mitigation efforts have fallen short of decreasing the amount of debris in orbit, and if space-faring nations do not act now, they may no longer be able to use space for daily activities and military reconnaissance in the future. However, to preserve space as a neutral environment, no single country should be able to take debris removal upon itself. Orbital debris is an issue that affects all space-faring nations, so all space-faring nations should enter into a partnership, akin to the IGA, to establish the guidelines and processes for safe debris removal.

Lastly, the IGO need not operate forever since it is a remedial measure. It may operate for as long as it is necessary to rid LEO of enough space debris to make it a safer and less costly place to operate. The amount of funds spent on the IGO now will be far less than what nations will have to spend in the future, if and when Kessler Syndrome becomes a reality.