The Impact of International Law on Domestic Judgments: The Influence of the Inter-American Court Of Human Rights in the Rulings of the Argentinean Supreme Court Regarding Crimes Against Humanity

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Good afternoon. I would like to thank the International Association of Law Libraries, the organizing committee and especially Gloria Orrego Hoyos for the invitation. It is a real pleasure and honor for me to be here.

Today I will talk about the influence of the Inter-American Court of Human Rights in the rulings of Argentina's Supreme Court. I will focus particularly on the importance that the Argentinian Supreme Court gave to the Inter-American Court in the most significant decisions during the process of re-opening cases of crimes against humanity.

There are some empirical studies,[1] which show the low rates of local compliance regarding the rulings of the Inter-American Court. There are also many academic works that demonstrate how the invocation of the Argentinian Supreme Court of Inter-America Court's decisions have not been neither systematic nor uniform.

For instance, in the case *Ekmekdjian (1992)*, the Supreme Court says that the interpretation of the American Convention should be guided by the jurisprudence of the Inter-American Court. In a similar sense, in the ruling *Giroldi (1995)* our Supreme Court considered that "the Inter-American Court should be considered as an interpretative guide". But then, in other cases, the Argentine Supreme Court disowned the recommendations of the Inter-American Commission.[2] Even in cases of transitional justice in the 1990s, the Argentine

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[1] Among them, the work of *Basch, et al.*

[2] See, e.g., *Acosta, 1998*; *Boico, 2000;* and *Felicetti 2000.*

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Supreme Court did not accept some standards recognized by the Inter American Commission and Court.

However, I will describe in this presentation how, on the most important cases related to crimes against humanity (crimes linked with the last dictatorship in this country), the reference to the Inter-American Court has been considered by our own Court as "essential". Before that, it would be useful to explain briefly to you the path that resulted in the re-opening of the cases related to crimes against humanity. I know that tomorrow you will have a deeper presentation on the subject about the struggle for Human Rights in Argentina with Professor Abramovich, but I would like to mention some important dates:

1976-1983: Dictatorship (just before leaving power, the military pronounced an Amnesty Act on September 22nd, 1983).

The elections took place on **October 30th 1983** and President Alfonsín took power on **December 10th, 1983**. He based part of his campaign on the idea of reconstructing democracy, and one of the ways of doing this was by judging the members of the military junta. As a matter of fact, when he assumed office, he appointed two very important Law professors and philosophers as advisers, Carlos Nino and Jaime Malamud Goti (who he called 'the philosophers') and who envisioned and designed the legal and moral justifications to judge the military Junta.

1984: Creation of the CONADEP (National Commission on the Disappearance of Persons).

1985: Trial of the military junta.

1986/1987: Congress passed the "Obediencia debida"[3] and "Punto Final"[4] Acts. The first stated that the soldiers with a lower rank than Colonel could not be responsible for crimes against humanity. The second established the expiration (a "deadline") of the criminal investigation and prosecution in these cases.

1987: The Supreme Court ruled the case *Camps* (where it declared that the "Due Obedience" and "Full Stop" Acts were constitutional).

1989: President Carlos Menem used his Presidential Powers to pardon and commute the sentences of the members of the military junta and other members of the army.

1990: The Supreme Court ruled the case *Riveros* (the victim's relatives questioned the constitutionality of President Menem's Executive pardons. The Court rejected the appellation and the pardons became *res judicata*).

1994: Constitutional reform: the International Treaties of Human Rights were given Constitutional Hierarchy.

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[3] Literally, it means "Due Obedience."

[4] Meaning "Full Stop."

2001: The Inter-American Court ruled in the case *Barrios Altos*. Some lower courts in Argentina began to declare the unconstitutionality of the Due Obedience and Full Stop Acts.

2003: Congress passed the Act n° 25.779 which declared the Acts "insanablemente nulas" (nulls and voids).

2003-2005: President Néstor Kirchner appointed new judges for the Supreme Court (after several judges appointed by Carlos Menem resigned due to impeachment processes opened against them).

2004: The Supreme Court ruled in *Arancibia Clavel*.[5]

2005: The Supreme Court ruled *Simón*.[6]

2006: The Inter-American Court ruled in *Almonacid.*

2007: The Supreme Court ruled in *Mazzeo*.[7]

Let's see first, what the Inter-American Court stated in the case *Barrios Altos*. In this case, the Inter-American Court had to decide about the liability of the Peruvian State, regarding the massacre of Barrios Altos. I am going to quote the exact language since it became paramount in future judicial decisions regarding crimes against humanity all over the region:

> "This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law".[8]

In the case *Arancibia Clavel*, the Supreme Court of Argentina declared the applicability of crimes against humanity.

Let's focus now on the two other most important Argentinian cases in this topic: *Simón* and *Mazzeo*.

In the first case, *Simón* was imputed for kidnapping three people. The three of them were allegedly taken to a clandestine center of detention, where one of them was allegedly tortured and is still disappeared. The Court declared the validity of the **Act n° 25.779** which declare the Due Obedience and Full Stop Acts null and void. It also completely nullified the Acts. Let's remember that the Court, the same institutional actor, had ruled about this issue **in 1987**, and had

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[5] This case declared the applicability of crimes against humanity.

[6] It declared the unconstitutionality of the Acts.

[7] It reopened the case Riveros and declared the unconstitutionality of Menem's Executive pardons.

[8] Paragraph 41.

ruled the exact opposite. That is to say, the Court had to deploy its major rhetorical abilities and engage in a big argumentative effort in order to justify the change in its decision. In this sense, in the construction of the judicial opinion, it gave a primordial role to the Inter-American system and the Inter American Court in particular. It quoted again paragraph 41; and emphasized: "The doubts regarding the concrete scope of the Argentinean State duty of the 'Full stop' and 'Due Obedience' Acts, had been clarified in the decision of the Inter-American Court in the case 'Barrios Altos'"[9] And then, again, the court emphasized: "the subjection of the Argentinean State to the Inter-American jurisprudence".[10]

In *Mazzeo*, the Court had to decide on the constitutionality of the Executive Order through which President Menem had pardoned, among others, Santiago Riveros. Note that the Court had decided this case previously, in 1990. So in *Mazzeo*, the Court reopened a case which had the authority of *res judicata*. In this case, the Supreme Court not only relied on *Barrios Altos*, but also on *Almonacid*, which reinforces the idea of the invalidity of the amnesties and that cases could be re-opened although they have the authority of *res judicata*. The Supreme Court quoted *Almonacid* case, when it says:

> 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.[11]

What I wanted to show was the role and importance that our Supreme Court has given to the Inter-American Court rulings regarding crimes against humanity. As I mentioned in the beginning, the Inter-American Human Rights system has not been systematically or uniformly introduced in domestic judgments, but has been rather erratic and, some might say, arbitrary in the sense of its unpredictability and lack of clear standards or rules.

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[9] Point 23.
[10] Point 31.
[11] Paragraph 124.

But in the particular case of crimes against humanity, our own Court has given the rulings of the Inter-American Court a central role as a guiding interpreter in the construction of its judicial opinions. This may very well be the need for a domestic institutional actor to require argumentative, legitimate and authoritative assistance from an international, perhaps more objective, actor. Let's remember that the same institutional domestic actor (Supreme Court) which declared the constitutionality of the mentioned Acts and Executive pardons, declared the exact opposite approximately two decades later, reopening the cases that itself gave the authority of *res judicata*.

This may illustrate that in at least in this subject matter, the Inter-American Court served as an argumentative, legitimate and authoritative tool for a domestic institutional actor (Supreme Court).

We should not forget, however, the quantitative and qualitative studies that have shown that, in general, Inter-American rulings do not have clear rules of how or if they are compulsory in our legal system, and that the levels of compliance of these rulings by the American States are significantly low. But maybe there is a symbolic efficacy in these rulings, at least in cases where the Supreme Court needs a different source of legitimacy.

In this sense, it may very well be that the Inter-American rulings in other cases, such as structural inequality or structural human rights abuses by the State, can develop this same role and come to the aid of the domestic Courts.