

ADDING SOME BABY TEETH TO U.S. PARTICIPATION IN THE INTER- AMERICAN HUMAN RIGHTS SYSTEM: A 8 6 & 2 5 2 // \$ 5 < 7 2 + (5 1 È 1 * 8 // & 2 ¶ 6 OBSERVATIONS

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description of Argentine debates over how decisions by the American human rights system should be treated by Argentine courts, after KHDULQJ WKH GHEDWH RYHU \$UJH-QWRU ¶ V UHODWLRQV Court of Human Rights (Inter-American Court) and the Inter-American

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Hernán Gullco, The Clash of Constitutional and International Law in Argentinean Case Law, 27 Sw. J. INT ¶ L. 315 (2021).

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decisions by State judges, instead applying a restrictive understanding of when courts should treat treaties as self-executing,⁵ and blocking the self-executing applies with particular strength to the American system.⁷

Second, U.S. scholars will be struck by the fascinating indispensable party problem that Professor Gullco sets out. 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 benefited 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 awarded custody to the father because of his exclusion of the mother. As Professor Gullco points out, both in the case 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

Id. at 497-99.

See id. at 505-10 (see also e.g., John O. McGinnis, *Medellin and the Future of International Delegation* 118 YALE L.J. 1712, 1736-31 (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 15, 318-19 (2021) (discussing *Bulacio v. Argentina, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 10 (Sep 8, 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 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 39-40 (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. 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. ¶ 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.

fundamental law can be improved through engagement with transnational norms.¹⁵

* X O O F R ¶ V I R F X V R Q \$ U J I n t e r - A m e r i c a n S y s t e m H o w S h o u l d I F W I R U W K H
 out a personal experience for me that illustrates what at the very least is a
 F R W W I S I Q L W W G S U H V Z K I H O M F R X L D W V R Q W I Z U D W K H
 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
 W R R Q W K H H F X W I R U H D M J Q E R O F W G R P H F R X L D W G
 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 whom tmions woact R

Commi V V L R Q ¶ V 6 W D W X W H R Q O \ S U R Y L G H V⁵⁵ W K D W L W F D Q L
hardly language that grants authority to issue binding rulings. Limiting the
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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 Assem⁵⁶by.

While the U.S. Supreme Court has never considered whether the
& R P P L V V L R Q constitute binding law, the consistent lower court
case law, as well as the Supreme & X U W ¶ V R Z O E L I N I X T O D O L Q
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 & R P P L V V L R Q ¶ V M E D E L L I N . 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
X Q G H U W K H 8 1 & K D U W H U W R J L ⁵⁹ Y H H I I H F W W R W K H , & - ¶ V

Some portions of the U.S. government and U.S. civil society treat the
Inter-American Commission as a body with the same force as 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 208217-PCT-DGC, 2020 WL 4940909, at *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), 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 in the need for the treaty).

57. *Medellín*, 552 U.S. at 491, 506-04.

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/bcweb/schools/law/academics/faculty/experientialearning/clinics.html> (last visited Dec. 18, 2021); Human Rights and Atrocity Prevention Clinic, CARDOZO SCH. LAW, <https://cardozo.yu.edu/humanrights-and-atrocity-preventionclinic> (last visited Dec. 18, 2021); Human Rights and Gender Justice Clinic, CUNY SCH. LAW, <https://www.law.cuny.edu/academics/clinics/hrj/> (last visited Dec. 18, 2021); Human Rights Clinic, COLUM. L. SCH., <https://www.law.columbia.edu/academics/experiential/clinics/human>

the InterAmerican 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 nonexistent. The lack of judicial engagement does not go unnoticed, and, at least in the Argentine context, the enormous gap between the way both the judiciary and the media respect the InterAmerican system and the complete lack of U.S. 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, J. PA. L. SCH., <https://www.law.upenn.edu/clinic/transnational/> (last visited Dec. 18, 2021); Frank C. Newman International Human Rights Law Clinic, 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, S. CAL. GOULD SCH. L., <https://gould.usc.edu/academics/experiential/clinics/ihrcl/> (last visited Dec. 18, 2021); Human Rights Clinic, U. TEX. AUSTIN SCH. LAW, <https://law.utexas.edu/clinics/humanrights/> (last visited Dec. 18, 2021); Human Rights Program, U. VA. SCH. LAW, <https://www.law.virginia.edu/academics/program/humanrights-program?section=clinic> (last visited Dec. 18, 2021); International Human Rights Clinic, WYO. COLL. LAW, <http://www.uwyo.edu/law/experiential/clinics/intl-law-clinic.html> (last visited Dec. 18, 2021); International Human Rights Clinic, N. 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 American system: International Human Rights Practicum, U. C. L. SCH., International Human Rights Clinic, HARV. L. SCH., International Human Rights Center, U. OF CALIF. 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, J. PA. L. SCH., Frank C. International Human Rights Clinic, U.S.F. SCH. LAW, International Human Rights Clinic, 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).

W K D W \$ U J H Q W L Q D G L G Q R W D F W Z L W K V X I I L F L H Q W I R U F
 behalf⁸⁷ But Guerrero found success in a case on behalf of Saldaño against
 the United States⁸⁸, 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 without the response of the
 Argentine media to the case, regardless of political inclination.

6 D O G D x R ¶ V F D V H K D G O R Q J U H F H L Y H G U H J X O D U D W V
 S U H V V Z K L F K L V Q R W V X U S U e n t u r y C o u d e a t h i n Q 6 D O G D x R ¶ V T X
 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 and the Pope met
 with Lidia Guerrero twice to express his concerns and offer support.⁹⁰ But
 the focus of coverage on the role of the Commission has been equally
 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)⁹¹ to
 describe a key domestic judicial proceeding, but to refer to a hearing before

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.

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.

2 E Y L R X V O \ 6 D O G D s o r l f e d n a h y r e p u t a t i o n p a l d o k
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 6 W D W H V ¶ M X G L F L D O S U D F W L F H U H J D U G L Q J & R P P L V V L R Q 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 ¶ STUD. Q. 259 (2012) (offering a useful overview of the role of reputation on alliances); George W. Downs & Michael A. J. Reppel, *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* 59 INT ¶ 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.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/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 IHGHUDO JRYHUQPHQW ¶ V SURSHUW\ RU FRQWUDFWXDO L 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 QHHG IRVUS ¶ FDLM HF GHIHUHQFH WR WKH SROLWLFDO EUDQF of Interest is filed in an action with foreign affairs implications, and noted WKDW ³>L@Q VXFK FDVHV WKHUH LV D VWURQJ DUJXPH JLYH VHULRXV ZHLJKW WR WKH ([HFXWLYH %UDQFK ¶ V YL IRUHLJQ¹¹⁰ Dozens of lower court decisions have quoted the Supreme & RXUW ¶ V OD Gspc ¶ Jde fere ¶ Q ¶ fd ¶ A ¶ Statement of Interest.

There is certainly no legal impediment to the State Department filing a Statement of Interest through the Department of Justice when it would appropriate to comply with a Commission decision.¹¹² Q 6 DOGD x R ¶ V FDVH WKH 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 SURJUHV VLYH LQWHUQDWLRQDOLVP RI +DUROG +RQJMX . Legal Adviser at the time, and a former dean of Yale Law School is also D OHDGHU RI ZKDW LV FDOOHG Bernatkin L ¶ HZ +DYHQ 6FKRR 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

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, regarding the *Walden* habeas corpus petition.¹⁴ 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

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 principles presently allow treatment of Commission decisions as domestic legal obligations. But that