Neither Hypocrisy nor Submission: Democratic Politics and International Human Rights Law

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Introduction

Some months before the British people voted to leave the European Union, then Home Secretary Theresa May declared that, “regardless of the EU referendum”, the European Convention of Human Rights (ECHR) “binds the hands of Parliament” and therefore the United Kingdom should denounce it.¹ This was not the first time the

government had made this suggestion\(^2\) and, reportedly, Ms. May had planned to run her 2020 campaign on this platform.\(^3\)

The progressive paper *The Guardian* immediately produced a satiric sketch in response to Ms. May’s statement. In it, an angry Prime Minister, played by Patrick Stewart, furiously asks his cabinet after a nationalistic harangue: "What has the ECHR ever done for us?!". Responses do not take long to arrive: “the right to a fair trial”, “right to privacy”, “protection for victims of domestic violence”... After grudgingly conceding the first few suggestions, an increasingly irritated Stewart is bombarded with each time stronger responses. Cornered and frustrated, Stewart insults everyone and leaves the room.\(^4\)

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\(^2\) Secretary May had suggested the possibility of quitting the ECHR in 2013, after a controversial decision regarding the extradition of presumed terrorist Abu Qatada to Jordan, where—according to the European Court of Human Rights—he could be indicted inhumane and degrading treatment in violation of Article 6. See Alan Travis, *Theresa May criticizes human rights convention after Abu Qatada affair*, *The Guardian* (July 8, 2013), https://www.theguardian.com/world/2013/jul/08/theresa-may-human-rights-abu-qatada. Prime Minister David Cameron himself advanced the position in 2015, threatening to withdraw from the ECHR if the UK was not given a veto power over the Court’s decisions. See Nicholas Watt, *David Cameron prepared to break with Europe on human rights*, *The Guardian* (June 2, 2015), https://www.theguardian.com/politics/2015/jun/02/david-cameron-prepared-to-break-with-europe-on-human-rights.

\(^3\) See Will Worley, *Theresa May ‘will campaign to leave the European Convention on Human Rights in 2020 election’*, *The Independent* (December 29, 2016), http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html. Later, Ms. May called for anticipated elections, which were held on June 8\(^{th}\), 2017. While her platform finally included that the UK remained signatory to the ECHR “for the next parliament”, it did include the revision of the Human Rights Act and, after Brexit concluded, the “human rights framework” would be reconsidered. See the Conservative Party electoral platform (FORWARD TOGETHER. OUR PLAN FOR A STRONGER BRITAIN AND A PROSPEROUS FUTURE, https://www.conservatives.com/manifesto). One of the last Ms. May’s campaign statements was that if “our human rights laws stop up from [tackling, convicting and deporting terrorism suspects] we will change the laws so we can do it”, see Christopher Hope and Gordon Rayner, *Theresa May: I’ll tear up human rights laws so we can deport terrorists*, *The Telegraph* (June 6, 2017), http://www.telegraph.co.uk/news/2017/06/06/theresa-may-will-not-let-human-rights-act-stop-bringing-new/

\(^4\) The video — which can be seen in the following link https://www.theguardian.com/culture/video/2016/apr/25/patrick-stewart-sketch-what-has-the-echr-ever-done-for-us-video — is an explicit homage to the movie *Life of Brian* (1979), in which the leader of a Judean liberation organization asks his comrades what had the Romans ever done for the Jews only to learn that, apparently, they had done a lot.
The United Kingdom is not the only country in which prominent political actors have recently accused international human rights bodies of being external and illegitimate restrictions on democracy, and even threatened to withdraw from them. As a former judge of the European Court of Human Rights (ECtHR) noted, “every now and then, the first reaction to a new judgement by national politicians has ever been to announce that they would have a look to see if it would still be worthwhile to remain a Party to the Convention”.\(^5\) Recently, political or judicial challenges to the legitimacy of human rights institutions were displayed in countries as different as

Argentina, Brazil, Dominican Republic, France, Venezuela and Zimbabwe, just to name a few.

6 In February 2017, the Argentine Supreme Court issued a decision refusing to nullify a previous judgment, as ordered by the Inter-American Court of Human Rights (IACHR) in a case against the country. In doing so, the Court overturned a previous doctrine holding that IACHR’s decisions were mandatory to every state institution in the country (for a brief reference, see Jorge Contesse, *Inter-American Constitutionalism and Judicial Backlash*, https://law.yale.edu/system/files/area/center/kamel/sela17_contesse_cv_eng.pdf).

7 In April 2011, the Inter-American Commission on Human Rights issued a precautionary measure ordering Brazil to halt construction on a $1.7 billion hydroelectric dam to protect indigenous communities. Brazil denounced the measure as “unjustifiable,” withdrew its Ambassador to the Organization of American States, and withheld its assessed contribution to the organization. See Manuela Picq, *Is the Inter-American Commission of Human Rights too progressive?*, Al Jazeera, June 9, 2012, http://www.aljazeera.com/indepth/opinion/2012/06/2012658344220937.html.

8 In 2014, following a decision of the IACHR concerning the treatment of Dominicans of Haitian descent, the Dominican Constitutional Court withdrew the country from the jurisdiction of the IACHR, arguing that the ratification of the agreement that accepted it was in violation of the country’s separation of powers. See Silvia Ayuso, *La República Dominicana se desliga de la Corte Interamericana de DD HH [Dominican Republic Detaches Itself from IACHR]*, El País (November 5, 2014), http://internacional.elpais.com/internacional/2014/11/06/actualidad/1415230815_658290.html. See also Dominican Republic Constitutional Court, Sentence TC/0256/14 (November 4, 2014).

9 While campaigning for the 2016 French presidential primaries, the three candidates of the center-right party Républicains (including former President Nicolas Sarkozy) accused the European Court of Human Rights (ECHR) of illegitimately interfering with domestic politics and promised either to leave or to reform the ECHR. See Jean-Baptiste de Montvalon, *La Cour européenne des droits de l’homme, cible des candidats à la primaire de la droite [European Court of Human Rights, Target of Candidates at the Right Wing Primary]*, Le Monde (November 14, 2016), http://www.lemonde.fr/politique/article/2016/11/14/la-cedh-en-ligne-de-mire_5030666_823448.html.

Shortly before, a number of high public officials had published an op-ed in one of French largest newspapers elaborating on how the ECHR meant that a progressive bureaucracy had more influence in France than a good number of Members of Parliament (Cour européenne des droits de l’homme: pourquoi en sortir est un impérative démocratique [European Court of Human Rights: Why Leaving Is a Democratic Imperative], Le Figaro (June 21, 2016), http://www.lefigaro.fr/vox/Politique/2016/06/21/31001-20160621ARTFIG00149-cour-europeenne-des-droits-de-l-homme-pourquoi-en-sortir-est-une-imperatif-democratique.php. In the right-wing edge of the political spectrum, National Front’s leader Marine Le Pen had already proposed “cutting the umbilical cord” with the ECHR (see Guillaume Gendron, *Peut-on quitter la Cour européenne des droits de l’homme? [Can We Quit the European Court on Human Rights?]*, Libération (May 6, 2015), http://www.libération.fr/societe/2015/06/05/peut-on-quitter-la-cour-europeenne-des-droits-de-l-homme_1323692.

10 In 2008, Venezuelan Supreme Court refused to comply with the IACHR’s ruling in Apitz Barbera case. See the Supervision of Compliance Sentence issued by the IACHR itself on November 12, 2012, available at http://corteidh.or.cr/docs/supervisiones/apitz_23_11_12.pdf.


Each of these cases is complex enough to deserve more detailed treatment than could possibly be given here. However, a common theme warrants closer attention. Let us turn again to the British case, where Secretary May complained about the ECHR binding the hands of Parliament. The ECHR would be, under this vision, a tie that constrains democracy, an external restriction upon the self-governance of the British people. Interestingly, The Guardian's response also operates within this framework. The Prime Minister in the sketch asks what has the ECHR done for Great Britain, and he receives back an enumeration of the rights the Convention establishes. The Convention is, according to one of the fictional ministers, an instrument to “protect people from abuses of state power”. Theresa May argues that the United Kingdom should quit the ECHR because it ties the hands of Parliament. Progressives answer back that they should remain in it precisely because it ties the hand of government. For May, the ECHR is an external imposition that unduly restricts democracy. For The Guardian, it is a blessing that it does so.

However axiomatic it may appear, the idea of the ECHR doing something for (or, for that matter, against) the people in the United Kingdom should strike one as surprising. To paraphrase what Josef Stalin asked about the Pope: how many divisions does the ECHR have? That is to say, anything the ECHR may have done to the United Kingdom, it had to do it through the work of British institutions. The Human Rights Act of 1998, that implemented Convention rights at a domestic statutory level, was not thrown upon the United Kingdom by the Court itself or the Council of Europe. Quite on the contrary, it was in many respects the product of

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13 Louis Henkin, talking precisely about the enforcement of international law, said that the answer to that question is that the Pope had a lot of divisions, Stalin just did not know how to recognize them. See ANTONIO CASSESE, FIVE MASTERS OF INTERNATIONAL LAW, 192 (2011).
intense political negotiation that presaged the Good Friday Agreement and the cessation of paramilitary violence in Northern Ireland.\textsuperscript{14}

The implicit agreement between Ms. May and \textit{The Guardian} reflects, however, an ordinary understanding on how human right bodies work. A prominent human rights scholar and advocate noted approvingly in 1999 that “[t]he international human rights movement... has represented a significant erosion of state sovereignty”.\textsuperscript{15} The debate between Theresa May and \textit{The Guardian} does not gravitate around the descriptive accuracy of this assertion, but over its normative evaluation.

Wider forms of this conflict are familiar to international and constitutional lawyers alike. While international tribunals routinely assert the uncontestable supremacy of international law over any form of domestic law,\textsuperscript{16} and national courts usually take a symmetrically opposed stand,\textsuperscript{17} academic commentators have been eager to find more nuanced ways of dealing with this issue.

Some look for general rules, which would tell us, for example, to hold a rebuttable presumption for the authority of international law.\textsuperscript{18} Others, more open to

\begin{footnotesize}
\textsuperscript{14} See Rights, Safeguards and Equality of Opportunity, chapter in The Agreement Reached in the Multi-party Negotiations (informally known as “Good Friday Agreement”, or “Belfast Agreement”), April 10, 1998 (assuring that “[t]he British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights”).

\textsuperscript{15} Louis Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 FORDHAM L REV 1, 4 (1999). See also Patrick Macklem, The Sovereignty of Human Rights, 33 (2015) (“It is not particularly controversial to defend the view that international human rights operate to check the exercise of internal sovereign power”).

\textsuperscript{16} See Eyal Benvenisti and Alon Harel, Embracing the tension between national and international human rights law: The case for discordant parity, 15 INT. J. CON. L. 36, 54 (2017) (observing that “[i]t is hardly surprising that international tribunals reject the primacy of state courts and believe in the primacy of international norms” and providing examples thereof).

\textsuperscript{17} See Benvenisti and Harel, n. 16 at 52 (“the unanimous conclusion of [European] state courts is that in cases of direct conflict between international and state norms, the state norms prevail”). This is also true, of course, for the Supreme Court of the United States. See Medellin v. Texas, 552 U.S. 491 (2008).

uncertainty, recommend us to “accommodat[e]”\(^{19}\) features of one of the two systems into the other. Some even “celebrate” the “dissonance” between these as a “positive” feature of the legal world.\(^{20}\)

This is by no means an exhaustive survey of the debate. These positions are, however, illustrative: despite recognizable differences, the three of them share a vision of international and domestic law as two formally distinct, neatly divided systems. The conflict between them is a conflict over the source of the legitimacy\(^{21}\) of fundamental rights, or even over who is their “author”\(^{22}\). For international lawyers, domestic law is just a fact. For constitutional scholars, international law is an “irritation, perhaps alarming but probably best ignored”.\(^{23}\) In such a scenario, any method for coping with the conflict that is not crude supremacy of one system upon the other must be a game of mutual concessions, almost a negotiation, which leaves intact the radical hiatus between them.

In this article, I suggest that we need a deeper approach to understand the domestic implementation of international norms and rulings. Within a national polity, legal decisions are taken against the background of a political organization and in virtue of a political authorization of some kind. To look at the international/national law

\(^{19}\) Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 58 STAN. L. REV. 1863, 1882 (2003) (stating that international and constitutional law are two distinct systems, each of which claims “ultimate authority to evaluate [state compliance with] fundamental rights”, but which have some similarities that allow for “accommodation”).

\(^{20}\) See Benvenisti and Harel, n. 16, at 39 (“friction [between international and constitutional norms] is a positive, indeed, a necessary element for ensuring individual liberty”). However, they also note that “interpreters . . . must consult the parallel sources with the view to accommodate them unless serious considerations suggest otherwise” (id. at 57).

\(^{21}\) Neuman, n. 20, at 1876 (“the international treaty regimes and national constitutional orders rest on distinct and incommensurable sources of consensual legitimacy and authority, which can cause interpretations of fundamental rights to diverge or to come into direct conflict”).

\(^{22}\) Benvenisti and Harel, n. 16, at 58.

divide without paying attention to the relationship between law and politics is incomplete. In this light, international rulings may not necessarily impair sovereignty, but only affect its mode of exercise.\textsuperscript{24}

To engage in this inquiry, I examine the case \textit{Gelman v. Uruguay}\textsuperscript{25}, of the Inter-American Court of Human Rights (IACtHR). In \textit{Gelman} (2011), the IACtHR declared that the amnesty law Uruguay had enacted after the military dictatorship (1973-1985) was contrary to the American Convention on Human Rights (ACHR) and therefore should not be an impediment for the prosecution of the crimes against humanity. Even though the amnesty law had been passed by a democratic Congress (1986) and ratified by the people in a referendum (1989) and a plebiscite (2009)\textsuperscript{26}, Congress promptly nullified the law, justifying its action on the basis that it was only obeying the country’s international obligations. \textit{Gelman} could at first sight be an example of resounding success of an international human rights body; a stoic demonstration of the respect for individual rights against majoritarian unreflective decisions. I will argue, however, that such an account would be an illusion posed by law’s internal point of view, and that the \textit{Gelman} success (to the extent it was a success)\textsuperscript{27} relied heavily on the political dynamics of the Uruguayan polity.

\textsuperscript{24} This type of understanding has been explored in political science. Famously, Beth Simmons has argued that compliance with human rights treaties can be explained “because they have predictable and important effects on domestic politics”, empowering internal actors with “human rights preferences” and influencing the domestic political agenda: “The real politics of change is going to occur at the domestic level”. \textit{See BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS. INTERNATIONAL LAW IN DOMESTIC POLITICS}, 126-127 (2009). \textit{See also DEREK JINKS and RYAN GOODMAN, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW} (2013) (providing a theory of compliance to human rights treaties through internal processes such as “persuasion and acculturation”, apart from the more traditional “material inducement”).

\textsuperscript{25} IACtHR, \textit{Gelman vs. Uruguay. Merits and Reparations. Judgment of February 24\textsuperscript{th}, 2011, Series C. No. 221}, available at \url{http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf} (hereinafter, “\textit{Gelman}”).

\textsuperscript{26} Under Uruguayan constitutional law, a “referendum” is a popular voting to repeal a recently enacted piece of legislation, while a “plebiscite” is a popular voting for reforming the Constitution (Uruguayan constitution, articles 79 and 331). In this essay, unless specified, I will be using both terms interchangeably.

\textsuperscript{27} \textit{See infra, Epilogue}. 
Gelman is not the denial, but an instance, of politics. It penetrated Uruguayan political life as a phenomenal perturbation, which the polity struggled over until a new equilibrium was reached. Presenting itself as the ultimate legal norm, the innocent product of legal syllogism and dispassionate professionalized legal analysis, Gelman was politicized into law. Its implementation was its profanation. The way it happened, I argue, is an exemplar of a realistic way in which cosmopolitan norms can be turned into enforceable law. The price for this realism is, of course, uncertainty.

In Part I, I sketch a theoretical framework for understanding the internalization of universal norms through what Seyla Benhabib calls “democratic iterations”. In Part II, I narrate the facts that led to the Gelman case and those that followed. In short: Uruguayan Congress passed an amnesty law forgiving the crimes committed by the military during the last dictatorship, which was ratified by two popular referenda, in 1989 and in 2009. Nonetheless, the IACtHR deemed the amnesty laws invalid in Gelman, holding that the amnesty’s popular support did not affect its substantive invalidity. Afterwards, Congress declared the amnesties void, claiming to be complying with the IACtHR’s decision, and trials continued. In Part III, I give an account on the transformation of the public debate around the amnesty law, which went from being framed in almost purely political terms to almost purely legal ones. More specifically, I reconstruct the position of the IACtHR as a vision that considers (international) law as completely distinct from, and superior to, (national) politics (III.a). I also survey the position of the internal political actors in Uruguay who supported (III.b) and opposed (III.c) the nullification of the Expiry Law. In Part IV, I reflect on the interaction between law and politics in the context of this political debate and argue that this case shows an instance of a “democratic iteration”, whose
paradoxical nature—attempting to be universalistic while remaining deeply political—underlies the whole process. In the Epilogue, I make some concluding remarks.

I. Thick, Democratic Iterations

In an oft-quoted passage, Oliver Wendell Holmes posited that “the life of law has not been logic, it has been experience” 28. This seems to be the challenge of the enforcement of international norms in domestic contexts: to transform logic into experience.

Different accounts of norm creation have paid attention to this problem, both in the development of morality and in the creation of law. Richard Rorty has noted that “as groups get larger, law has to replace custom and abstract principles have to replace *phronesis*”. 29 Michael Walzer has made a similar description, identifying the “thin” and the “thick” as types of moral argument: a way of talking about morality that tackles the “thickness of our own history and culture (including our democratic political culture)”, and “a way to talking to people abroad, across different countries, about the thinner life we have in common”. 30

The relation between international human rights treaties and their domestic application can be read as being traversed by similar dynamics. An international treaty cannot possibly account for the different particular instances in which abstract values such as “equality” or the “reasonableness” of restrictions to

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28 OLIVER WENDELL HOLMES, THE COMMON LAW, 1 (1883).
29 Richard Rorty, *Justice as a Larger Loyalty*, 4(2) ETHICAL PERSPECTIVES 139, 141 (1997) (framing conflicts between justice and loyalty as conflicts between loyalty to two different groups to which one feels more or less identified).
fundamental rights can be operationalized in a particular community. However, the more one commits to a true value in international norms, the more deviations from that ideal become a violation of those norms rather than their situated embodiment. In this vein, for example, the margin of appreciation doctrine has been criticized for enacting “moral relativism” and being “at odds with the concept of the universality of human rights”.31

However, if it is true that our deep conflicts over legal issues reflect disagreement over morality32, their instantiation in domestic politics cannot be but a result of moral discussion, in all its “thickness”. Each time a community enacts into law a particular understanding of a universal moral value, it is less useful to understand it as a “deviation” from the universal standard than to see it as an ever-new creation of it. Perhaps Seyla Benhabib has best captured this dynamics with her concept of democratic iterations: “a complex process of public argument, deliberation, and exchange—through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned—throughout legal and political institutions as well as in the associations of civil society”33. Since a “democratic iteration is never merely an act of repetition”34 but of resignification and transformation, democratic iterations allow a democratic community to be also the author, and not only the subject, of international law.

31 Eyal Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, 31 INT. L. & POLITICS 843, 844 (1999). See also ECtHR, Z. v. Finland, February 25, 1997, Application No. 22009/93, Judge De Meyer’s dissenting opinion (“I believe it is high time for the Court to banish [the concept of margin of appreciation] from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and the relativism it implies”).
32 See Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1380-1386 (2005) (observing that judicial decisions usually deal with issues that are controversial in society deliberations about rights, and that the type of reasons that courts are allowed to give push the “real issues at stake in good faith disagreements about rights . . . to the margins”, id. at 1383).
34 Id.
Unlike iterations in language, these democratic iterations refer to “an antecedent which is taken to be authoritative”\textsuperscript{35}. The existence of an organ such as an international tribunal, which claims for itself the ascertainment of the “true” meaning of international norms, invites obvious conflict. In what way, if any, can these two processes—the official, professional determination of the meaning of a legal rule, and the “thick” meaning of “democratic iterations”—coexist, if and when they contradict each other? Can they coexist if disagreement is deep and persistent?

In the context of US American constitutional law, Robert Post and Reva Siegel offer an account of the relation between the meaning the people give to their constitutional commitments and the meaning that courts, as the organs officially charged with that task, give them. “If courts interpret the constitution in terms that diverge from the deeply held convictions of the American people”, they tell us, “Americans will find ways to communicate their objections and resist judicial judgments”.\textsuperscript{36} Democratic legitimacy of constitutional law depends at a large extent upon the “ongoing possibility of shaping constitutional meaning”.\textsuperscript{37} This legitimacy, however, comes at the price of eroding the distinction between law and politics, which “from the internal perspective of the law . . . is constitutive of legality”.\textsuperscript{38}

The key to the democratic legitimacy of constitutional law, therefore, is some degree of responsiveness to popular understandings of the meaning of the shared commitments the Constitution embodies from the organs charged with uttering the “official” meaning of the law. Courts therefore should “[perceive] social pressures as

\textsuperscript{35} SEYLA BENHABIB, ANOTHER COSMOPOLITANISM, 48 (2006). Benhabib differentiates this from language, in which “[i]t is obvious . . . that an act of original meaning-giving makes no sense”, id.

\textsuperscript{36} Robert Post and Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. CIV. RIGHTS L. REV. 373, 374 (2008).

\textsuperscript{37} Id. at 383.

\textsuperscript{38} Id. at 384.
sources of knowledge and opportunities for self-correction" instead of fearing them as threats to formal legality. Democratic iterations can be said to be to international norms what this responsiveness is to constitutional law. Some of the mechanisms through which responsiveness to popular pronouncements can be transmitted are formal (such as judicial appointments) while others are looser in their form (such as strategic litigation or public norm contestation). All of them, however, depend at some extent on judges being a part to the community they exert power over, and on the likelihood of obtaining support from the political branches.

It has been argued that international courts behave strategically in order to enhance their legitimacy when issuing each judgment, taking into account the political agenda of the countries involved and interacting with domestic actors such as constitutional courts. The doctrine of the “margin of appreciation” also has been characterized as a tool through which international tribunals can enhance the legitimacy of their rulings. Again, all these mechanisms are highly sensitive to the particularities of the community the decision is to be applied to. A strong commitment to a plain universality of the norms from which judgments emerge could be the international equivalent to a strong commitment to formal legality.

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40 Post and Siegel, n. 36, at 375 (“[imagining] resistance to courts as a threat to the Constitution itself... is a mistake”).
41 Id. at 381
42 See Alexander Bickel, The Supreme Court and the Idea of Progress, 91-92 (1970) (stating that “[v]irtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives” and adding that “[t]he effectiveness of the judgment universalized depends on consent and administration”).
43 See generally Shai Dothan, How International Courts Enhance Their Legitimacy, 14 Theoretical Inquiries in Law 455 (2013).
Both are necessary to maintain the legitimacy of the law from an internal point of view, but, taken to an extreme, both could threaten perceptions of its democratic legitimacy.

The judge of the ECtHR cited above criticized the reaction of “shame” and “indignation” that local politicians sometimes show towards international human rights rulings: “[H]ow dare this international Court”, the critic would say, “criticize something which has been approved by national parliamentarians, or has been looked at by national judges”. However, he admonishes us not to worry: “The answer to such a reaction is quite simple. . . The Court . . . can be compared with an external auditor. The Court does not look at the case with the eyes of a national judge who is a product of national traditions but with the eye of an international judge”.

To the extent this can be a solution, this could also be the problem.

**II. The Torture Chamber**

Maintaining one of the few long-lasting democracies in the region, while surrounded by its giant neighbors’ chaotic political violence, became part of Uruguayan national pride. By then, a relatively progressive welfare state implemented in the early 20th century, a radical separation between the Catholic church and the State, an egalitarian ethos, and a peaceful political life, had made Uruguay stand out within the region. In the early 2010s, Uruguay became the first Latin American country to legalize marijuana and the second to legalize abortion and same-sex marriage. Some

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45 Myjer, n. 5, at 270.
of these features, along with now-abrogated strict bank secrecy regulations, earned Uruguay the nickname “the Switzerland of South America”\textsuperscript{46}.

The prestige of Uruguayan democracy was not sufficient, however, to prevent it from following the region’s path in the second half of the 20\textsuperscript{th} century. The pattern of the story is a sadly well-known one. In the 1960s and 1970s, most South American countries went through fierce right-wing military dictatorships, which exerted uncontrolled repression over their populations while claiming to be combatting the left-leaning guerillas that gained momentum after the Cuban revolution.

In Uruguay, the \textit{Movimiento de Liberación Nacional – Tupamaros}\textsuperscript{47} had made its first public violent intervention in 1968.\textsuperscript{48} Since then, as they increased their presence, the government jailed an increasing number of political prisoners.\textsuperscript{49} In 1973, democratically elected president Juan María Bordaberry dissolved Congress and suspended the constitution. Later, as he postponed elections indefinitely, he lost the support of the military, which in 1976 deposed him and installed successive \textit{de facto} presidents Alberto Demicheli (1976), Aparicio Méndez (1976-1981) and Gregorio Álvarez (1981-1985).

Human rights violations during the twelve years of dictatorship were widespread. In a country that was home to less than three million inhabitants at the time,


\textsuperscript{47} The name “Tupamaros” derives from Tupac Amaru II, indigenous leader of fiercely repressed anti-colonialist revolts in the Viceroyalty of Peru.

\textsuperscript{48} Until 1968, Tupamaros were involved in episodes of “courteous violence”. After a failed attempt to take over the city of Pando in 1969, Tupamaros started to directly confront the state. See Markarian, n. 46, at 43.

\textsuperscript{49} In fact, according to a project for victim reparations issued in 2009 by the presidency, state terrorism started in 1968.
between 300,000 and 500,000 fled the country. 60,000—that is, one in fifty Uruguayans—were detained at some point of the decade, out of which between 5,000 and 6,000 were permanently held as political prisoners. According to the last report, 123 people were assassinated because of political reasons, while other 192 were forcefully disappeared.\textsuperscript{50} During the 1970s, Uruguay was reported to keep the largest number of political detainees per capita in the world.\textsuperscript{51} The country once praised as the Switzerland of Latin America was now referred to as its “Torture Chamber”.\textsuperscript{52}

As many dictatorships in the region, what started as a project to “annihilate subversion” soon tried to institutionalize its own perpetuation. In 1980, the military called for a plebiscite to approve a new constitution whose text was not fully disclosed. If enacted, the new constitution would have conferred large amounts of power to the armed forces. The election was generally interpreted as a plebiscite for the military government itself. Most of the political parties and leaders campaigned for “no”, which ultimately won the 55.9% of the popular vote—against a 41.9% that voted “yes”.

The results of the plebiscite forced a transition to democracy, which was negotiated between the government and the main political forces. In 1984, representatives of three of the four main political parties secretly gathered with the main military commanders in Montevideo’s “Naval Club”. There, they agreed to call elections later

\textsuperscript{50} Many of the disappearances occurred in Argentina, presumably because of the coordination between military governments in the region under Operation Condor. For these figures, I am relying on Francesca Lessa and Elin Skaar, \textit{Uruguay. Halfway towards accountability}, in Elin Skaar, Jemima Garcia-Godos and Cath Collins (eds.), \textit{TransitionaL justice in Latin America. The uneven road from impunity towards accountability}, 77-102, 78 (2016).

\textsuperscript{51} Id.

\textsuperscript{52} Id.
that year. Commentators\(^5^3\) and political actors\(^5^4\) have repeatedly suggested that impunity for state crimes was demanded and conceded, although this has been unanimously denied by the participants of the pact.\(^5^5\)

The candidate of the centrist Colorado Party, Julio María Sanguinetti, won the elections later that year and took office in 1985. In his inaugural speech before Congress, he announced that he would submit a bill which would simultaneously ratify the ACHR and introduce an amnesty whose scope had to be discussed by Congress but which was necessary for national pacification.\(^5^6\) A first amnesty, forgiving crimes committed by civilians, was passed only one week later.\(^5^7\)

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\(^{54}\) This has been the position of the National Party, only major party that did not participate to the Naval Club Pact. In 2005, over a debate on an interpretive law to the Expiry Law, party leader Jorge Larrañaga declared in a press conference that "in the National Party’s mind, impunity derives from the Naval Club Pact, which, as we all know, counted with the participation of the Colorado Party, the Broad Front and the Armed Forces…", see National Party Opposes Interpretive Bill on Expiry Law [El Partido Nacional se opone al proyecto interpretativo sobre la Ley de Caducidad], La Red 21 (November 22, 2005), http://www.lr21.com.uy/politica/195417-el-partido-nacional-se-opone-al-proyecto-interpretativo-sobre-la-ley-de-caducidad. This position was maintained by the National Party during further deliberations on the nullification (see Uruguayan Senate. Legislative report from 9th Ordinary Session of the XLVII Legislature, April 12, 2011, Senator Larrañaga at 713)

\(^{55}\) Julio María Sanguinetti, participant to the Naval Club Pact and elected president later that year, assured that the topic was not even put on the table because it would have jeopardized the whole transition. Also, he assures, the military knew that no political representative was at the time capable of guaranteeing what not-yet-elected parliamentarians would vote. See JULIO MARÍA SANGUINETTI, *LA RECONQUISTA. PROCESO DE LA RESTAURACIÓN DEMOCRÁTICA EN URUGUAY (1980-1990)* [THE RECONQUERING. THE PROCESS OF DEMOCRATIC RESTORATION IN URUGUAY (1980-1990)], 210-211 (2012).

\(^{56}\) Julio María Sanguinetti, Inaugural Address to Congress, March 1, 1985 ("I will immediately submit to this Congress a bill we have named ‘National Pacification’, in which we include the ratification of the American Convention of Human Rights, in which we acknowledge the internationality of human rights and international jurisdiction at their regard, in which we propose an amnesty that—we deem—has to be as generous as it is necessary for the country… We may have differences in the nuances, but this is no moment to discuss them. I simply say this is an honest expression of our will of pacification and of our conviction that our country needs an amnesty. Its scope will be, after all, the one we decide it has to be, but it must be quick and opportune so it can fulfill its pacifying effect and, fundamentally, as it is an ethical issue for this society, it must not be the object of anyone’s political speculation…"), full text in Spanish available at https://parlamento.gub.uy/documentosleyes/discursos/presidentes-rou/3839

\(^{57}\) Act No. 15,737, passed by Congress March 7th, 1985.
Soon after, some judges started to indict some members of the military, who publicly announced that they would not submit to civil justice. In 1986, partially because of military pressure, a new amnesty law was discussed in Congress, this time regarding the crimes committed by the military and the police. After some initial resistance, the “Ley de caducidad de la pretensión punitiva del Estado” (Law on the Expiration of the Punitive Claims of the State, or simply Expiry Law) was signed into law by President Sanguinetti on December 22. One day later, the first military officers were due to appear before the courts: if, as many had claimed, they failed to meet that duty, political tension in the country would have dramatically increased.

The Expiry Law was a curious creature. Its first article declared that “as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces signed in August 1984, and in order to complete the transition to full constitutional order, the State relinquishes the exercise of penal actions with respect to crimes committed until March 1, 1985, by military and police officials whether for political reasons or in fulfilment of their functions and in obeying orders from superiors during the de facto period” .\(^{58}\) This curious phrasing was arguably conceived to avoid the need for qualified majorities that amnesty laws require under the Uruguayan constitution.\(^{59}\) The rest of the law was also unusual. Article 3 ordered judges to report new cases to the Executive, which would decide on a case by case basis whether the law applied to them. Article

\(^{58}\) Act No. 15,848, passed by Congress on December 22, 1986.

\(^{59}\) Article 85.14 of the Uruguayan constitution. The lack of a qualified majority became one of the main arguments for the Supreme Court to declare the Expiry Law unconstitutional in 2009, see Suprema Corte de Justicia, October 19, 2009, Sabalsagaray Curutchet, Blanca Stela. Complaint: Unconstitutionality Objections for Articles 1, 3, and 4 of Law No. 15.848, Ficha 97-397/2004. Also, an amnesty had been rejected by Congress earlier the same year, and Uruguayan constitution also forbids discussing a bill that was already rejected during the same year (see article 142, Uruguayan constitution). Despite this, for clarity I will keep using the word “amnesty” to refer to the Expiry Law.
also allowed the Executive Branch to conduct investigations on disappearances and kidnapped children.

Victims’ family members and human rights organizations immediately started a campaign to repeal the law, creating a National Pro-Referendum Committee. Under the Uruguayan constitution, it was permissible to submit any law passed by Congress to popular referendum, upon the collection of the signatures of 25% of the electoral roll—more than 600,000 signatures. The two main political parties (the incumbent Partido Colorado, and Partido Nacional) actively advocated for keeping the law alive. The center-left coalition (Frente Amplio, or Broad Front) joined the Pro-Referendum Committee. By the end of 1988, the Committee handed in to the electoral authority 634,702 signatures that had been collected door to door. The referendum was scheduled for April, 1989.

Ultimately, the option of keeping the Expiry Law intact won the vote by a 56.7-43.3% margin. The representatives of the Committee acknowledged the legitimacy of the result that very evening: “according to the results of the plebiscite, the Expiry Law has been confirmed. Without a doubt, the pronouncement of the electoral body must be followed ... But the country and all its institutions cannot be insensitive to the fact

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60 Article 79, Uruguayan constitution.
61 President Sanguinetti, for example, stated in a speech that “this signature [for the referendum] is for rancor and revenge. We send out a warning, to all those who in good faith may feel tempted to do so, that what they will be doing is simply taking the country back to a period it has already overcome” (cited in Elin Skaar, Judicial Independence and Human Rights in Latin America: Violations, Politics, and Prosecution, 146 [2011]). This is one of the few statements of President Sanguinetti on the matter, since the president is constitutionally prevented from participating in electoral campaigning (Uruguayan constitution, article 77.5).
62 Some days before the referendum, General Medina (one of the strong men of the dictatorship) was asked how the military would react to a positive vote of the people. He answered that “time will tell... [it is] difficult to know” because such a vote would “provoke very bitter and unfortunate moments” and a “strong confrontation”. One of the arguments of the Expiry Law’s opponents has been that people approved the law out of fear of a new military coup, which has been denied by Colorado and National Party. Elin Skaar comments on this that “since no systematic academic work has been done on the political, cultural or psychological motivations driving the outcome of the referendum, nothing conclusive can be said about why the people approved the law” (Skaar, n. 61, at 146-147).
that about half of the population disagreed radically with the solution of the Expiry Law. Although its content must be complied with, it must also be accepted as a commitment of a national scope: never, under no circumstances, will these violations of human rights be repeated...”

Human rights organizations stayed relatively inactive on the matter for some years. Some began to seek answers in international human rights organisms. The Inter-American Commission of Human Rights (IACHR) issued Report No. 29/92 on October 2nd, 1992, deeming the Expiry Law contrary to the ACHR and recommending Uruguay to adopt measures to clarify human rights violations and identify those responsible for them. The Human Rights Committee did a similar thing in 1993. None received significant attention from the public, although they might have aroused enthusiasm in human rights movements in Uruguay.

In 1995, Argentinean Navy Officer Adolfo Scilingo’s confessions about the infamous “death flights”—in which political prisoners were drugged and thrown alive to the River Plate, shared by Argentina and Uruguay—caused revolt in human rights movements. Finally, a public mobilization was convoked for May 20th, 1996—the twentieth anniversary of the assassination of two Uruguayan congressmen in Buenos Aires—under the motto “Truth, Memory and Never Again”. In that first “March of Silence”, which gathered around 50,000 people, the demand for justice

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63 Matilde Rodríguez Larreta, spokeswoman of the Committee, cited in ALDO MARCHESI et al., LEY DE CADUCIDAD: UN TEMA INCONCLUSO. MOMENTOS, ACTORES Y ARGUMENTOS [EXPIRY LAW: AN UNCONCLUDED ISSUE. MOMENTS, ACTORS AND ARGUMENTS], 112 (2012). In a very similar vein, Carlos Nino, commenting on the Uruguayan referendum, said that even if its results were “disappointing”, nonetheless it allowed for an intense public debate and reflection on the topic that was beneficial for dealing with the past, see CARLOS SANCTO NINO, RADICAL EVIL ON TRIAL, 36 (1996).


66 Marchesi et al., n. 63, at 112.
was consciously left aside: “it was a very tough decision... but we had taken the compromise of abiding by the referendum, we couldn’t just go outside and demand justice... It was terrible, very hard to maintain. I was embarrassed”.67 The “March of Silence” was held every May 20th since then, stimulating an increasing public debate over the fate of the disappeared.

In March 2000, Colorado President Jorge Batlle took office. Coming from a different faction of the party than his predecessor Sanguinetti, and more sensitive to the increasing pressure of human rights movements, Batlle took a different approach to the question of the past. Within fifteen days of his government, he announced the finding of Macarena Gelman, a young woman kidnapped as a baby during the Argentinean dictatorship and whose identity had been recovered in Uruguay in 2000.68 Some weeks later, he became the first president to receive victims’ family members in his office and he ordered the creation of the Commission for Peace. The Commission was tasked with the investigation of crimes—as allowed by Article 4 of the Expiry Law—although no prosecution was permitted.69 In April 10th, 2003, the Commission published the final results of said investigation.70 They were able to establish 26 cases of forced disappearances, of which they found one body. Although the Commission’s investigation was criticized for falling short of the actual

67 Óscar Urtasun, one of the organizers of the march, in a 2012 interview cited in Marchesi et al., n. 6., at 113.
69 According to Resolution 858/2000, the Commission’s task was to “receive, analyze, classify and accumulate information concerning forced disappearances during the de facto regime”. The Preamble to the Resolution states that the Commission is created with the goal of “consolidating national pacification and seal forever the peace between the Uruguayans”.
dimensions of the crimes committed during the dictatorship\textsuperscript{71}, their activity aroused public attention and legitimized the claims of human rights organizations. In the following year’s ”March of Silence”, for the first time, the demand for justice was incorporated in the march’s motto. At that time, many envisioned the triumph of the progressive Broad Front in the presidential elections.

Indeed, in 2005, Tabaré Vázquez, the first center-left candidate to win the presidency in Uruguay and a former member of the Pro-Referendum Committee, took office. In his inaugural speech, he stated that it was necessary to shed light on the “dark zones of the past”, albeit within the current legal framework.\textsuperscript{72} However, the party assembly that drafted his electoral platform had rejected including the abrogation of the Expiry Law, precisely out of respect to the referendum. However, lawmakers of the Broad Front introduced an “interpretive bill” of the Expiry Law, which would in practice deprive it from most of its effects. Because of pressures both to the right and to the left, the project was soon abandoned.\textsuperscript{73}

However, unlike his predecessors, Vázquez put to use the controverted Article 3 of the Expiry Law, declaring that some cases and crimes were not encompassed by it. Among others, former \emph{de facto} presidents Bordaberry and Álvarez were tried and

\textsuperscript{71} See Errandonea, n. 53, at 9. The lack of budget and subpoena power was indicated as a factor for the Commission’s shortcoming. Also, the impossibility of acting abroad was a determinative factor, since many of the dictatorship crimes were committed in Argentina. The Commission itself acknowledges the difficulties it faced in its final report, where they conclude that “it was, in sum, not about achieving ‘one truth’ or ‘the most convenient truth’, but only ‘the possible truth’”. See \textit{Informe final de la comisión para la paz}, n. 70, paragraph 38.

\textsuperscript{72} See Tabaré Vázquez, \textit{INAUGURAL ADDRESS TO CONGRESS}, March 1, 2005, https://parlamento.gub.uy/documentosyledes/discursos/presidentes-rou/3714 (“Let us acknowledge that, after twenty years of the recovery of the democratic institutionality, dark zones in human rights issues subsist. Let us acknowledge as well that it is in everybody’s interest to clarify those within the framework of existing legislation, so peace can find its place definitely in Uruguayans’ hearts and so collective memory can incorporate yesterday’s drama, with its stories of sacrifice, altruism and tragedy, as an undeletable learning for tomorrow”).

\textsuperscript{73} Errandonea, n. 53, at 25-26 (noting that the bill never got wholehearted support from human rights NGOs, since it seemed to legitimize the Expiry Law by not absolutely repudiating it).
convicted following the exception.\textsuperscript{74} Also, in a judicial proceeding in which Expiry Law had been invoked, the Executive Branch accepted its unconstitutionality as the prosecutor in charge petitioned.\textsuperscript{75}

During Vázquez’ presidency, human rights organizations gained new hopes. In 2006, a new campaign for a popular consultation is formed. In 2007, the Broad Front party assembly revised its position and supported the campaign.\textsuperscript{76} This time, the signatures of 10% of the electoral roll were needed in order to call for a “plebiscite” to introduce a constitutional amendment that would declare the Expiry Law unconstitutional.\textsuperscript{77} In April, 2009, they had comfortably surpassed the 254,000 signatures they needed. The plebiscite was scheduled for October 25\textsuperscript{th}, 2009, the same day as the presidential elections.

Six days before the plebiscite, the Supreme Court ruled that the Expiry Law was unconstitutional in the case of left-wing activist Nibia Sabalsagaray, murdered by the military in 1974.\textsuperscript{78} The decision was celebrated by the campaign\textsuperscript{79} and arguably increased support for the nullification\textsuperscript{80}, but it was not enough. The “pink ballot” for

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\textsuperscript{74} Bordaberry was sentenced to 30 years’ imprisonment for orchestrating two political murders and nine disappearances, while Alvarez was convicted to 25 years for 37 aggravated murders, see Lessa and Skaar, n. 50, at 84.


\textsuperscript{76} See Marchesi et al., n. 63, at 128.

\textsuperscript{77} According to Article 331.A of the Uruguayan constitution, constitutional amendments need to be passed by a plebiscite with the affirmative vote of half of the voters (including blank votes in the total).

\textsuperscript{78} Sabalsagaray Curutchet, Blanca Stela. Complaint. Unconstitutionality Objections for Articles 1, 3, and 4 of Law No. 15.848, Ficha 97-397/2004.

\textsuperscript{79} In one of the last campaign spots, an elderly member of human rights group “Madres y Familiares de Uruguayos Detenidos Desaparecidos” appears on camera stating: “we have been saying this law was unconstitutional for the last twenty years. Last Tuesday, the Supreme Court just proved us right” (the spot can be watched at https://www.youtube.com/watch?v=xNzwIeJdpQs).

\textsuperscript{80} The last polls—conducted before the Supreme Court’s decision—had predicted only a 42% of support for the nullification. See Constanza Moreira, \textit{El impulso y su freno: itinerarios de la lucha contra la impunidad [The impulse and its arrestment: itineraries of the fight against impunity]} in Gabriela Fried and Francesca Lessa (eds.) \textit{LUCHAS CONTRA LA IMPUNIDAD. URUGUAY (1985-2011) \[FIGHTS AGAINST IMPUNITY. URUGUAY 1985-2011]}(14 (2011).
the nullification of the law obtained only a 47% of the popular vote in the elections. As electoral law demands half of the votes for passing a constitutional amendment in plebiscite, there was no ballot for keeping the law alive, so it would be inaccurate to say that 53% of voters rejected the amendment. However, the election was widely interpreted as a second defeat for the abrogation campaign.

This time, the reaction of the organizers of the plebiscite was not a call to respect the result. Immediately after the results were known, the spokesman of the campaign for the plebiscite expressed his disappointment but nonetheless stated that "the fight for truth and justice is neither finished nor impaired". More dramatically, plebiscite activist Victoria Moyano—who had been kidnapped by the military in Argentina, where her Uruguayan parents were exiled—stated in an interview two days after the plebiscite that "one thing that is clear now is that the nullification of the [Expiry] Law is going to be reached by the way of popular mobilization, and not by the institutional way".

In fact, the incumbent Broad Front introduced a bill in 2010, declaring the Expiry Law void. President José Mujica—former Tupamaro leader, who had been elected the same day of the 2009 plebiscite and who only reluctantly had joined the campaign—opposed the initiative. While campaigning for the second presidential round (two weeks after the plebiscite) he had stated: "I have no choice but to respect the popular will, whether I like it or not. And the less I like it, the more I have to..."

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81 Uruguayan House of Representatives, Legislative report from 46th Session, October 20th, 2010, at 8.
respect it”. As late as May 2011 he ratified that position. The bill was passed by a bare majority of the Lower House, although it was not discussed in the Senate: The Broad Front, not being able to discipline its slight senatorial majority, preferred not to run the risk of a frontal rejection of the bill.

This was the situation when, in February 2011, the IACtHR decided the case brought by Macarena Gelman. In Gelman, the Court ordered Uruguay to “guarantee that the Expiry Law, for lacking effects due to its incompatibility with the American Convention and the Inter-American Convention on the Forced Disappearance of Persons, as far as it can hinder the investigation and possible sanction of those responsible for serious human right violations, will never again be an impediment to the investigation of the facts and for the identification, and were applicable, punishment of those responsible...” The Court briefly dismissed the relevance of the fact that the Expiry Law had been enacted by a democratic Congress and ratified twice in popular plebiscites.

After the IACtHR’s decision, Congress grappled again with the 2010 bill. In the Senate, it passed by one vote. Senator and former Tupamaro leader Eleuterio Fernández Huidobro announced that he considered a grave mistake to enact a law against the popular vote. He voted for the nullification out of party discipline, but

84 Television interview available at https://www.youtube.com/watch?v=z3WWIXPEWhQ
85 “I don’t like [the proposal of nullification] for two reasons. First, two plebiscites are being overlooked, which violates our principles, respecting the will of the people. Second, there is a minuscule parliamentarian majority that is at use here, one obtained with less than 1% of the vote, for such an important issue...”. Interview available at https://www.youtube.com/watch?v=Yd9VjBlBfi4 See also Para Mujica, anular la ley de caducidad "es un camino equivocado" [Mujica Says Nullifying Expiry Law is “taking the wrong path”], PÁGINA 12 (May 5, 2011), https://www.pagina12.com.ar/diario/ultimas/20-167616-2011-05-05.html
87 Gelman, n. 25, Par. 11 of the resolution.
88 See infra, Part III.a.
presented his resignation in protest immediately after the vote. However, since the Senate modified the bill, it came back to the Lower House, where the Broad Front failed to break a 49-49 tie.

Only in October 2011, the Broad Front’s slight parliamentary majority, now with President Mujica’s support, was able to pass a new version of the nullification act law in both Houses of Congress. Its first article simply declared that the “exercise of the punitive claims of the state is reestablished” for the crimes encompassed by the Expiry Law. Its second article stated that the crimes committed by government officials during the dictatorship were not subject to the regular statute of limitations: otherwise, these crimes would have expired some days later, on November 1st.

III.- The Debate on the Expiry Law Goes Meta
When the Expiry Law was first discussed—both in Congress in 1986 and before the 1989 referendum—it was in terms no different from other amnesty laws throughout the world. On one side, those seeking truth and justice; on the other, those advocating for stability and reconciliation. The last time it was discussed—before its nullification in 2011—the discussion was somehow unrecognizable: truth and justice had been replaced by compliance with international law; the urge to look to “turn the page” to look at the future was replaced by the exasperated claim that Congress ought to abide by the popular will—expressed, necessarily, in the past.

89 Uruguayan Senate. Legislative report from 9th Ordinary Session of the XLVII Legislature, April 12, 2011, Senator Fernández Huidobro at 731-733.
90 See Act No. 18,831, passed by Congress October 27, 2011. Unlike previous versions, this text does not explicitly talk about the “nullification” of the Expiry Law. Since the distinction is not relevant for the purposes of the article, I will globally refer to all these attempts as “nullification”.
International law arguments were largely absent in the first instances of debate about the Expiry Law, both in legal and political arenas. In 1988, for example, when the Supreme Court deemed the Expiry law constitutional, neither any of the Justices or the attorneys even mentioned the issue of compatibility of Expiry Law with international law. While members of the left had started to explore the international law implications, the legal arguments at the time were concentrated in separation of powers concerns.

International arguments were no more present in the political debate. As late as 1997, President Sanguinetti responded a victims’ petition to open investigations in purely political terms. He stated that reopening investigations “would be a serious setback for Uruguayan society’s efforts to overcome past conflicts, to create the conditions for a genuine pacification of the country and achieve a reunion among all sectors... The country now lives in democracy, with the full respect of all individual rights and the clear and unequivocal subordination of police and military command to civilian authority. That is the country that the Expiry Law helped to recompose and that is the country that the Executive Power is committed to preserve and not put at risk”.

92 Errandonea, n. 53, at 24.

93 Constitutional law scholar Oscar López Goldacerena, who would later become a senator and advocate for the 2009 plebiscite, had published an article in 1986, before the enactment of the Expiry Law, arguing that an amnesty for human rights violators would be contrary to international law. See Oscar López Goldacerena, Derecho internacional y crímenes contra la humanidad [International Law and Crimes Against Humanity] (1986).

In fact, some documents issued by “Madres y Familiares de Uruguayos Detenidos Desaparecidos” and the Pro-Referendum Committee sometimes mention international obligations in a few lines, although the core of argumentation is always “to reaffirm inalienable values: truth, equality before the law, trial to those guilty of State terrorism, identity restitution to disappeared children”, see Madres y Familiares de Uruguayos Detenidos Desaparecidos, Después del referéndum [After the referendum] (1989) (report analyzing the results of the 1989 referendum, available at http://www.trilce.com.uy/pdf/anexos/07-familiares-doc.pdf)

94 See President Julio María Sanguinetti, Respuesta a la petición presentada por Madres y Familiares de Uruguayos Detenidos-Desaparecidos [Response to Petition Presented by Mothers and Family Members of
Only tangentially he referred both to the 1989 referendum and to international law concerns. On the former, he only mentioned it to comment on the legitimacy of the Expiry Law. He briefly dismissed the latter saying: “Even the American Convention on Human Rights... acknowledges that each person's rights are limited by the just demands of general welfare in a democratic society. In Uruguay, the democratic society, through its legitimate means, defined the ‘just demands of general welfare’ establishing by statute pardon laws...”

The campaigns preceding both plebiscites were explicitly framed in terms of truth and justice. Whereas the 1989 campaign had filmed a TV spot of a mother separated from her child —which was not aired, reportedly because of governmental pressure on TV stations—the 2009 campaign issued a series of spots of now grown-up children whose parents had been killed or disappeared. In the closing rally before the 2009 referendum, famous writer Eduardo Galeano gave a speech focusing on the question of the difficulty of building peaceful coexistence upon the grounds of impunity. In the same occasion, Oscar López Goldacerena—senator and constitutional law scholar—also stressed the values of truth and justice, instead of focusing in the arguments of international law that he himself had been advancing since 1986.

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95 Id. Petitioners had invoked obligations under the ACHR, last among other arguments (see petition to the Executive Power at http://www.trilce.com.uy/pdf/anexos/09-familiares-doc.pdf).
96 The spot can be watched in DIANA DI CANDIA and DENISSE LEGRAND, NOS SOBRA UNA LEY [A LAW WE DO NOT NEED], minute 3:13, https://www.youtube.com/watch?v=kAr361Evhj8&t=1219s. It consists on Sara Méndez—left-wing activist—looking at the camera saying: “When my son Simón was only 20 days old, he was torn away from my arms. I have never seen him again. The Expiry Law would not allow me to look for him. My heart tells me he is alive. Next Sunday, will you, with your vote, help me find my son?”.
97 Aldo Marchesi et al., n. 63, at 116.
Only after the 2009 referendum did international law based arguments became prominent. In a debate in 2010, Broad Front Senator Felipe Michelini—one of the main anti-Expiry Law activists, himself a son of a Congressman assassinated by the dictatorship—expressed that the issue was raised again because of the imminent decision of the IACtHR. The first paragraph of the motivation of the bill introduced in 2010, indeed, explained that the bill was a “direct, necessary and automatic” consequence of the “recognition of the primacy of international law”.98

During debates in Congress, hardly any congressman who advocated for the nullification of the Expiry Law forgot to mention international law obligations or, in 2011, the Gelman decision. Many of them, indeed, said in one way or another that fundamental human rights questions could not be left to the majority to decide.99

Symmetrically, all the opponents of the nullification mentioned the two referendums100 and claimed an absolute duty to abide by their results. Most of them, also, rooted the respect to the popular will in the Uruguayan constitutional text and history. Articles 4 and 82 of the Uruguayan Constitution are understood to place sovereignty directly in the people.101 This was emphasized by many of the Congressmen, many of whom also cited a famous dictum made by Uruguayan founding father José Gervasio de Artigas, which is sculpted in the Congress’

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99 See infra, Parts III.b and III.c, for a more detailed discussion on the parliamentary debate.
100 Many of the opponents to the nullification also made a strong argument against the alleged unconstitutionality of a retroactive abrogation of an amnesty, based on constitutional law scholars who were invited to dissertate before the Congressional committees.
101 “Article 4: Sovereignty to its full extent resides fundamentally in the nation, which has the exclusive authority to enact its laws in the manner which will be hereinafter set forth.”
“Article 82: The nation adopts the democratic republican form of government. Its sovereignty shall be exercised directly by the voters [“electoral body”] through election, initiative, and referendum, and indirectly by the representative powers which this Constitution establishes; all in conformity with the rules herein set forth.”
“My authority emanates from you [Uruguayan citizens], and it ceases before your sovereign presence”.

A debate which once was about truth and reconciliation was now about sovereignty and international law. Indeed, the debate was at a large extent irreducible. Both sides were invoking in their favor two different and independent normative systems, each of which had expressed itself by their supreme authorities: the IACtHR and the people themselves. The lack of an explicit provision in the Uruguayan constitution on how to treat conflicts between internal and international norms\(^\text{102}\) collaborated in this conundrum.

For most people involved in this issue, however, this was not an unsolvable problem at all. Far from that, most participants in the discussion stated their position with striking certainty. For the IACtHR, for example, the question was easy enough to summarize it in one paragraph: the plebiscites were, to international law, acts attributable to the state, no less than an executive order or a legislative act\(^\text{103}\). It could be said that it is the grammar of law imposing such an assertive tone: if a court bases its authority in a univocal meaning of sacred legal texts, there can be no room for hesitation in its decisions\(^\text{104}\).

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102 Traditionally, international treaties were treated in Uruguayan law as regular statutes. However, in the Sabalsagaray decision in 2009—declaring the unconstitutionality of the Expiry Law—the Supreme Court embraced the superiority of international human rights law over regular statutes. However, Uruguayan lacks a strong *stare decisis* doctrine and Supreme Court rulings are also valid for the case decided. See Gianella Bardazano, *Uruguay*, in Roberto Gargarella and Conrado Hubner Mendes, *Handbook of Latin American Constitutional Law* [2017, forthcoming].

103 Gelman, n. 25, par. 228-229.

104 See Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harv. L. Rev. 1, 59-66 (2011) (noting that “Judicial opinions are notoriously—even comically—unequivocal. It is rare for opinions to acknowledge that an issue is difficult, much less that there are strong arguments on both sides” and arguing for the explicit recognition of the complexity of legal problems in complex decisions).
More strikingly, as I will show in the following subsections, most legislators replicated this way of arguing. None of the members of Congress who supported the nullification of the Expiry Law expresses perplexity or despair in voting against what the people decided. Unsurprisingly, the opposite position is no more nuanced. Once and again, the opposition legislators expressed how obvious it was that the popular will, supreme sovereign of the nation, had to be abided by.

In the following subsections I will survey the Gelman decision and the political debates that followed, trying to show that these symmetrical certainties find their root in symmetrical disagreement on the understandings of the relationship between politics and (international) law in Uruguay. If politics and law are isolated vessels, the conflict between them has no way to be resolved but by the primacy of one upon the other. Without a bridge that can claim to unite both provinces, participants in the discussion are doomed to talk in circles.

III.a.- The Inter-American Court of Human Rights and Autonomous Law

Perhaps the best place to start this inquiry is the Gelman decision itself. For the Court, the conflict between the expression of the popular will and the Court’s interpretation of what human rights protection entails seems to have an obvious solution. In the short passage the IACtHR devotes to the problem of the democratic legitimacy of the Expiry Law, it simply asserts that the referenda are acts imputable to the Uruguayan state—as much as a presidential decree or a police battery would be. Consequently, the “fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions . . .
does not automatically or by itself grant legitimacy under International Law.”

According to the Court, the incompatibility of amnesty laws with the American Convention “does not derive from formal considerations, such as their origin” but rather from their “ratio legis [which is] leaving unpunished serious violations of international law”.

As Roberto Gargarella notes, for the IACtHR “both the expression of a sovereign Congress and the organization by the citizenry of, first, a referendum and, secondly, a plebiscite, represent [for the Court] merely formal matters that have little to do with the substantive validity of a law.” It is interesting here that the Court does not contest the two referenda on their merits, but it quickly dismisses the validity of any possible referendum on human right issues. A quantitative exercise, even if admittedly simplistic, shows the leitmotif of the decision: the words referendum or plebiscite appear in the text of the decision 24 times, only three of which are in the paragraph that promptly dismisses them. Other eight times they are mentioned as a part of the narration of the facts of the case and the remaining thirteen are scattered in footnotes as parts to cites to supreme courts throughout the world ruling in unrelated cases that human rights are a limitation on what referenda can be called for.

This approach shows a conception of human rights as something neatly distinct from an outcome of democratic process, a conception present in the IACtHR’s jurisprudence since its beginning. The IACtHR started its task when many countries in the region were either authoritarian regimes or nascent and unstable.

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105 Gelman, n. 25, par. 238.
106 Gelman, n. 25, par. 229.
democracies. According to many authors, that predisposed the Court to disregard domestic decisions to a larger extent than the ECtHR, which operated in a more democratized context. Jorge Contesse, for example, calls this trend the “Velasquez” ethos, after the first decision of the IACtHR\(^\text{108}\): a way of standing as a “moral superior with the power to prescribe the actions of [nondemocratic] state parties”.\(^\text{109}\)

Many track to these different historical backgrounds the explanation for one of the main differences between the jurisprudence of the ECtHR and the IACtHR: the “margin of appreciation” doctrine. In its 1975 case *Handyside v. United Kingdom*, the ECtHR considered that “by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position to give an opinion of the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them”.\(^\text{110}\) Since then, the doctrine of margin of appreciation has been used to give the states some leeway in the way the interpret their obligations under the ECHR.

Nothing similar can be found in the IACtHR caselaw. Even if some commentators read some elements of deference to national authorities in some of its decisions, this deference is obliquus and undertheorized, at best.\(^\text{111}\)

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\(^{110}\) ECtHR, *Handyside v. UK* No. 5493/72, December 7, 1976, §47.

\(^{111}\) The first two books providing a comprehensive account of the margin of appreciation doctrine in the IACtHR appeared as late as 2012. In one of them, published in Spanish and focusing on the Inter-American System of Human Rights, the doctrine is described as “incipient” and is constructed departing from “indicia”, see Paola Acosta Alvarado and Miguel Núñez Poblete, *El margen de apreciación en el sistema interamericano de derechos humanos: proyecciones nacionales y regionales* [Margin of Appreciation in the Inter-American Human Rights System: National and Regional Projections], 7 (2012). In the other one, comparing the European, Inter-American and Universal Human Rights Systems, Andrew Legg also notes the minor role the doctrine has played in the IACtHR, although he attributes it to the kind of cases that reach the Court (mainly involving factual determinations, as opposed to interpretive judgments). See
which a national policy was subject to democratic deliberation and control was never a source of concern to the IACtHR when evaluating the adequacy to the ACHR.\textsuperscript{112}

If it can be said that the IACtHR has developed some sort of deference to national bodies, it did so despite itself. The former president of the IACtHR Antônio Cançado Trindade, for example, praises the Court for not having developed such a doctrine: “Fortunately, such doctrine has not been developed within the inter-American human rights system... How could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries’ judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? \textit{How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity?... We have no alternative but to strengthen the international mechanisms for protection...}.”\textsuperscript{113}

Apparently, in Cançado Trindade’s view, the fight against impunity is not a contingent product of democracy, but a precondition thereof. If a community decides to amnesty those crimes, maybe it was not that much of a democracy after all; no \textit{true} democracy would do such thing. Taken to the extreme, this position falls into definitional circularity: the only society that could be allowed to amnesty these

\begin{footnotesize}
\textsuperscript{112} Andrew Legg notes that “there are no obvious cases of a margin of appreciation to democratic bodies” in the IACtHR caselaw. See Legg, cit. at 79.

\textsuperscript{113} \textsc{Antônio Cançado Trindade}, \textit{El derecho internacional de los derechos humanos en el siglo XXI [International Human Rights Law in the 21st Century]}, 389–90 (2008), cited by Contesse, n. 109, at 134. My italics.
\end{footnotesize}
crimes is a society that would not do it anyways. But where did this understanding of democracy come from?

This pervasive synonymy between protection of human rights and punishment of those responsible of their violation is strikingly new. Kathryn Sikkink notes that shortly before the trials to the Argentinean *juntas* in 1985, no one in Argentina or Uruguay even conceived the possibility of holding dictators criminally accountable for their actions.\(^1\)\(^{14}\) As late as 1991, Argentinean jurist Carlos Nino—one of the architects of the trials to the *juntas*—noted that “it may be idealistic” to hope that the international community could force countries to punish human rights violations.\(^1\)\(^{15}\) In 1993, the South African Constitutional Court ruled that an amnesty such as the one enacted in that country was part of “part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses” and “quite different from acts of a state covering up its own crimes by granting itself immunity”.\(^1\)\(^{16}\)

The evolution of the idea of human rights as anti-impunity has been rapid since. Indeed, as Karen Engle notes, “[s]ince the beginning of the twenty-first century . . . to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It also means to be against amnesty laws that might preclude such accountability”\(^1\)\(^{17}\).

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Notably, the IACHR and the IACtHR had an inaugural role in fueling this understanding since the early 1990s\textsuperscript{118} and have influenced both international and national jurisdictions in the same direction.\textsuperscript{119} This is interesting because the ACHR has no self-evident textual support for mandating the investigation or the punishment of human rights violators.\textsuperscript{120} The IACtHR has found that the obligation to “respect” human rights, as enacted in Article 1(1) of the ACHR, implies that “the States must prevent, investigate and punish any violation of the rights recognized by the Convention”.\textsuperscript{121} The IACtHR has since been expansive in its interpretation of this duty.\textsuperscript{122} In further cases, it has held that the state may not excuse itself from the obligation to investigate and punish because of considerations such as amnesties, presidential pardons or statutes of limitations—\textsuperscript{123}even in cases in which these violations are not deemed crimes against humanity.\textsuperscript{124}

By 2011, therefore, the Gelman Court had a lot of cases available to cite to support its conclusion that amnesties for human right violations are impermissible under international law. Most of the cases cited belonged, of course, to the IACHR or the

\textsuperscript{118} Engle, n. 117, at 1091-1103 (providing a chronology of IACHR and IACtHR cases, containing each time stronger obligations of anti-impunity).

\textsuperscript{119} Engle, n. 117, at 1103 (noting that the IACtHR “has clearly taken the lead on jurisprudence on amnesties” and that other international human rights bodies and domestic courts have “often” cited it to find amnesties invalid).

\textsuperscript{120} Gargarella, n. 107, at 118-119 “(In sum, one of the principle reasons advanced by the IACtHR for condemning Uruguay for its failure to respect international human rights law is based on an Article of the Convention that nowhere makes explicit reference to obligations to ‘prevent,’ ‘investigate,’ ‘punish,’ and ‘repair the damage caused by the violation of human rights’).”

\textsuperscript{121} Velásquez-Rodríguez, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 164 (my italics).

\textsuperscript{122} For a short history, see Engle, n. 117, at 1091-1103.

\textsuperscript{123} See IACtHR, Case of Barrios Altos v. Peru. Judgment of March 14, 2001 (Merits), 641 (considering that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible”).

\textsuperscript{124} In Bulacio, a police battery case (in which the victim, a seventeen-years-old, ultimately died out of the battery) the IACtHR ruled that “it is necessary for the [Argentinean] State to continue and conclude the investigation of the facts and to punish those responsible for them”. At no point does the Court imply that the acts attributed to Argentina were crimes against humanity. See IACtHR, Case of Bulacio v. Argentina. Judgment of September 18, 2003 (Merits, Reparations and Costs), §121.
IACtHR itself. Others were issued by international tribunals or domestic courts, most of which were at their time influenced by prior cases of the IACtHR. Notably, the Court cites no case of a democratic body repealing previous amnesties, nor any transition process in which no amnesties had been put into place from the beginning.

The Court’s cite to the Argentinean case is particularly telling. The history of punishment of human rights violations in Argentina has been oscillating. After the trials to the juntas in 1985, amnesties were passed in 1987—although not covering the high rank officials that had already been sentenced, who were however pardoned in 1990. In 2003, the amnesty laws were “nullified” by Congress and in 2005 the Supreme Court issued the Simón decision, declaring the amnesty laws invalid because they were contrary to the ACHR as interpreted by the IACtHR.

This is an interesting case, because both Congress and the Supreme Court declared the amnesties invalid. However, instead of taking the Argentine Congress’ decision to support the invalidity of amnesties, the IACtHR does exactly the opposite: it mentions the nullification law, only to cite the part of the decision that declares it irrelevant, for it did not deprive the judiciary from giving the last word on the matter.

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125 Gelman, n. 25, at §196-197, citing three IACtHR decisions and six IACHR reports declaring the “non-compatibility of amnesties with the American Convention in cases of serious human rights violations”.
126 See Engle, n.117, at 103-106 (arguing that the IACtHR “has clearly taken the lead on jurisprudence on amnesties” and that its caselaw has “often been cited in other regional human rights courts and commissions as well as in domestic jurisdictions outside of the Americas”).
127 Engle notes that “notwithstanding increased condemnation of amnesties... both formal and informal amnesties continue to be granted in much of the world”, see Engle, n. 117, at 1106.
130 CSJN, 14/06/2005, “Simón, Julio Héctor y otros s/privación ilegítima de la libertad”, 328 FALLOS 2056.
131 Gelman, n. 25, footnote 264 (citing par. 34 of Justice Petracchi’s opinion in Simón, who said that the nullification law “could, from a formalistic perspective, be deemed unconstitutional” although in this case declaring such unconstitutionality would be a “hollow formalism” since it would not change the solution.
The IACtHR talks law to law. In the hundred and eight pages of the *Gelman* decision, there is no attempt to ground any finding of law in a democratic origin, and even those which are available—as the Argentine case, which would show spontaneous internalization of the anti-impunity norm—are explicitly disregarded. The democratic arguments for the validity of the Expiry Law are not contested, but treated as irrelevant. Instead, previous and foreign judicial decisions are profusely cited, precisely to sustain the point that majoritarian decisions are irrelevant when human rights are at issue. In this context, Cançado Trindade’s words are intelligible: the democratic decision of the Uruguayan people to grant amnesties is not only irrelevant, but it also demonstrates why people should not have spoken in the first place.

For the IACtHR, the language of human rights is the language of pure law. Democracy has little to say when rights are invoked. It was the director of Human Rights Watch for the Americas who perhaps most bluntly expressed this ethos after the plebiscite: “accountability [for human rights violations] is not subject to a popularity contest”.

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132 The IACtHR does cite domestic constitutional and supreme courts and, to the extent that these could be described as responsive to democratic politics, the IACtHR could be said to show some democratic responsiveness of second degree. This connection, however, seems weak. On one hand, democratic responsiveness is only one input of domestic constitutional courts, while professional reason and, circularly, decisions of the IACtHR play an arguably more significant role. On the other hand, the IACtHR can easily cherry-pick what courts to cite. In *Gelman*, for example, they cited *Gomes Lund v Brazil* (a case in which the IACtHR declared amnesty law in Brazil to be contrary to the ACHR) but avoided mentioning the decision in which the Supreme Federal Tribunal of Brazil rejected the claims of unconstitutionality of the same amnesty (see Walter Claudius Rothenburg, *Constitucionalidade e convencionalidade da Lei de Anistia brasileira*, Revista de Direito Getulio Vargas Vol. 9 No. 2, available at [http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322013000200013&lng=pt&nrm=iso&tlng=en]).

133 José Miguel Vivanco stated that “[t]he results of the plebiscite are disappointing, but let us not forget that accountability is not subject to a popularity contest that depends on the decision of a majority.”
**III.b.- The Supporters of the Nullification: Apologetic Politics**

Surprisingly, it is not only the Court who uses the language of pure law. Even before the *Gelman* decision, the mere perspective of an adverse ruling by the IACtHR was used as the predominant argument by the domestic proponents of the nullification of the Expiry Law. The bill introduced in Congress in 2010—one year before *Gelman*—established the “constitutional hierarchy” of human rights treaties and, only as an “obvious, direct and automatic consequence” of that, the “inapplicability” of the Expiry Law.\(^1\)

When the Minister of Foreign Affairs, Luis Almagro, introduced the bill in Congress, he said that Uruguay “must adapt its legislation to international law . . . if we don’t, we are going to be sentenced”.\(^2\)

After the *Gelman* decision was issued, the law-abiding language became even more explicit. The Congressman who defended the position of the Broad Front in the House of Representatives explicitly presented the bill as inevitable: “This bill is born as a need to give a response to an international ruling imposed on the Uruguayan state by the Inter-American Court of Human Rights”\(^3\). If the law mandates the nullification of the Expiry Law, there was nothing else to be said. As the Court itself, Uruguayan Congress spoke as a jurist, as a “passive [dispenser] of a received,

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\(^1\) Uruguayan House of Representatives. Legislative report from 46\(^{th}\) Session, October 20\(^{th}\), 2010, at 9.


\(^3\) Congressman Nicolás Núñez (Broad Front), Uruguayan House of Representatives. 54\(^{th}\) Session of 2011. October 26, 2011, at 42.
impersonal justice”, whose claim of authority comes from “[obeying] an external will and not their own”.137

When law is considered autonomous, it “is elevated above politics”, since it is regarded as embodying standards that “public consent . . . has removed from political controversy”.138 In abiding by the IACtHR ruling, Congress does not necessarily agree on the substance of the Gelman decision, but it does agree on the acknowledgment of the limitation of politics: “There is no majority that can go against a person’s rights. No plebiscite can do against the Gelman case”.139 Once again, the Gelman decision appears to be the only way of ascertaining what a person’s rights are. Majorities can take decisions in the interstices of the law, in the free spaces between one judicial decision and the other.

The aim of the law is not to convince the citizens of its own correctness, but only to be complied with, bureaucratically. One of the Broad Front Congressmen explained: “Naturally, each citizen of the Republic, or all the citizens of the Republic, have the right to disagree with the [Gelman] decision. . . Of course they can. But this decision has a feature: it is final”.140 People can disagree, but their disagreement will not be heard. Not even unanimous condemnation of the decision would change the normative reality to which Uruguayans were subject. This is only possible if people’s opinions and the IACtHR are issued, indeed, in different languages. People’s opinions

137 Nonet and Selznick, n. 39, at 57 (describing the divide of law and politics within the conception of law they call “autonomous”).  
138 Id.  
140 Congressman Orrico, Uruguayan House of Representatives. 54th Session of 2011. October 26, 2011, at 18 (who added that the decision was not issued by some “mafia guy giving orders around” but by “a tribunal to which Uruguay, democratically and constitutionally, submitted”).
speak the language of politics; but *Gelman* is the word of the law. And when the law speaks, politics stay silent.

**III.c.- The Opposition: Hypocrisy and Submission**

Many of the Congressmen in the opposition had a less flattering view on the role of the Broad Front. For them, the left-wing wanted to abrogate the Expiry Law, and tried to do so with all the means they had. When the resort to popular will failed, they recurred to courts and to a congressional majority; had they failed as well, they would have come up with something else.

Take for example the words of Congressman Jorge Gandini during one of the debates in Congress: “Bottom-line: in 2009, twenty years after the people were consulted to repeal the Expiry Law, the people pronounced itself again and foreclosed the path that some sectors thought, again, that should be followed. And, since the people said ‘no’, the Broad Front, because of commitments they took, brought again to this Congress an already settled issue, disguised in one way or another... We are not discussing about human rights... that’s another thing. What we are debating is whether we abide by what the people said or not”. 141

Or take the more acidic words of Congressman Juan Ángel Vázquez during the same debate: “the Uruguayan left used to say human rights were empty formal freedoms, typical of a bourgeois democracy. Today, they have changed their minds, and they defend human rights...”142 Finally, Congressman Ricagni was perhaps the crudest: “The argument which is being used today is the sentence of an international organism, the Inter-American Court of Human Rights. But that is not the argument,

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141 Congressman Gandini (National Party), *id.* at 114.
142 Congressman Vázquez (Colorado Party), *id.* at 124.
that is the excuse. The discussion has always been the same, today that is the excuse, but the spirit it quite another one”.  

Some of the opposition members, we see, thought that the advocates of the Expiry Law did not mean what they were saying. Others, on the contrary, were afraid they meant it too much. To Congressman Gustavo Borsari, for example, this was precisely the problem: “Mr. Speaker: we have to lower this to what Doña María and Don José think, and not fly over international treaties that are poorly understood. Doña María and Don José were asked what to do with this law; they were asked in 1989 and in 2009.” Yet another National Party Congressman openly framed the question in terms of imperialism: “These international organisms tend to be very brave with the small countries, and very submissive to the big ones, before whom they kneel. . . this same Court that, inflating its breast, asks Uruguay what it does not have the courage to ask powerful countries. So, we are not talking either human rights or international courts, because you cannot defend human rights violating the Constitution of the Republic”.

It was yet another member of Congress, who remarked that he had campaigned for the referendum in 1989, the one that put it in the most dramatic terms: “nobody has

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143 Congressman Ricagni (National Party), id. at 96.
144 Congressman Borsari Brenna (National Party), id. at 14.
145 Congressman Javier García (National Party), id. at 68. Also Senator Fernández Huidobro, who voted for the nullification out of party discipline, said that he “personally [did] not accept intromission of extraterritorial tribunal in [Uruguayan] territory” nor he “[shared] the human rights policy invented by the United States government and financed by the Ford Foundation, that would only judge on deeds and not on contexts. . . We want to have a debate inside the Uruguayan left against that danger that we can see in the horizon. We can talk Kosovo, Panama, Iraq, Afghanistan, and today, Libya, and it is always about human rights; we are in an era of benevolent and humanitarian imperialism”, see Uruguayan Senate. Legislative report from 9th Ordinary Session of the XLVII Legislature, April 12, 2011, Senator Fernández Huidobro at 733.
the right to prevent us [Uruguayans] from forgiving; not even the Inter-American Court of Human Rights".\textsuperscript{146}

It was obvious for the opposition that the 1989 and 2009 referenda had to be abided by, and that Congress had no business replacing the decision taken by the sovereign people. Whoever contested this obvious truth in the name of some international commitment was being either hypocritical or servile.

\textbf{IV.- Ceci n’est pas une pipe. On the Paradoxical Nature of Democratic Iterations}

What sense can be made out of this deep political division? The words of one of the Congressmen who opposed the nullification of the Expiry Law may shed some light of the general lines along which the controversy could be explained from their point of view: “this has to be solved by the judiciary. Even though international norms can guide judges to rule about certain crimes that may be thought not to be subject to the statute of limitations, naturally it is not this Parliament who must tell judges how to act. If we follow that path, we will be putting politics in the way of the rule of law, and we don’t want to do that”.\textsuperscript{147}

This quote suggests a sharp contrast between law and politics: the former being the reign of judges (international and domestic); the latter, the exclusive domain of politicians and, ultimately, of the people. As a corollary, there is no contradiction in saying: “this may be very well unconstitutional, but we should not care”. It is not that legislators refrain from nullifying the law because they do not agree or doubt the arguments about its unconstitutionality; it is simply that constitutionality is only an

\textsuperscript{146} Congressman Amarilla (National Party), \textit{id.} at 38
\textsuperscript{147} Iturralde Viñas, \textit{id.} at. 17. My italics, only to highlight the ambivalence between the sense of duty and will in this statement.
argument that has nothing to do with what Congress produces. What Congress should tell to the IACtHR is, precisely: “see you in court”.

The Expiry Law, even if juridical in its form, had an elevated political pedigree. It had been passed by a Congressional majority and ratified twice in popular consultation. The Gelman decision’s links to Uruguayan politics were remote. Even though some Congressmen explicitly tracked its legitimacy to Congress’ previous decision of accepting the IACtHR’s jurisdiction, it was facially the decision of seven foreign judges sitting in a tribunal thousands of miles away. The Expiry Law, recently tested in the ballot boxes, was pure politics. Gelman was pure, chemically isolated law.

If the law can be valid but at the same time not a reason for action in the forum of politics, it is because politics is understood as the realm of mere aggregation of bare preferences; the scenario of nude, concupiscent political will\(^\text{148}\). The product of politics is, in this vision, ultimately disinterested in the fate of individual rights. The majorities act, unleashed; control upon their actions can come only later, and from the outside.

If politics is the mere aggregation of bare preferences, plebiscites stand unrivalled as the reflection of popular will. The theoretical complications of treating the result of an election as the expression of an underlying “general will” are extensively known\(^\text{149}\), but nonetheless majority voting remains to be the most intuitively


appealing method to legitimately solving persisting disagreement within a polity giving everyone's opinions equal respect.\footnote{See Jeremy Waldron, THE DIGNITY OF LEGISLATION, 125-126 (1999) (citing Hannah Arend’s On Revolution when she states that “the principle of majority is inherent in the very process of decision-making” and problematizing this statement).}

In such an understanding of politics, the \textit{Gelman} decision could only be politically relevant insofar as there is any reason to believe it could have provided any motive for people to shift preexisting preferences. But \textit{Gelman}’s firepower in respect of changing incentives is weak, to say the least: an $800,000 sentence for a country with a 47 billion dollars GDP does not appear to be a particularly good reason to discard a 25-years-old central policy ratified by two popular referenda. After all, countries sometimes disobey the Inter-American organs with no immediate consequences\footnote{See supra, Introduction. See also Eric A. Posner and John C. Yoo, Judicial Independence in International Tribunals, 93 CAL. L. REV. 1, 43 (2005) (reporting a 5% rate of compliance with the IACtHR rulings, taking into account the Court’s own reports).}.

Merely majoritarian politics is “will against will, as in war. . . . The member of an outvoted party accepts the majority decision, not because he has ceased to believe in his own case, but simply because he admits defeat”.\footnote{Elias Canetti, CROWDS AND POWER (1960), cited by Chantal Mouffe, ON THE POLITICAL, 23 (2005).} If this is so, for the people’s representatives to disregard the expression of their constituencies’ in the absence of severe sanctions for noncompliance is an unapologetic retreat from a peace treaty. It is betrayal.

However, the nature of this “acceptance” of the majority decision may be more ambiguous than Canetti’s quote would suggest. It is certainly true that an outvoted party does not necessarily switch its views. But it is also true that in politics people
try to convince each other—and not merely to impose themselves. Sometimes, they even succeed. Not only in law, but also in politics, people give reasons for their actions. And the reasons they give constitute to some extent the political action they undertake: to say one is engaging in some sort of interpretive practice is, to some extent, doing so. Even hypocrisy, as Jon Elster has famously put it, has a "civilizing force". Saying without believing forces one to act as if one believed—it can lead, even, to belief. Indeed, even conceding to the opposition that the Broad Front referred to Gelman only as an excuse, why did they think it would work—even as an excuse?

It is because, regardless of how they present their point, the opposition members also recognize that political conflict can be addressed by the recourse to reason, rather than mere head-counting. It is significant that many of the opponents to the nullification reclaimed having supported the 1989 referendum for nullification then, but having no option but voting against it now. Many indeed cited the case of Matilde Rodríguez Larreta, spokeswoman of the 1989 referendum, who was reported to have refused endorsing the nullification of the Expiry Law in 2011 saying: “In 1989

153 See Post, n. 148, at 1336 (“Politics is not populated merely by reasonable persons. But . . . neither . . . merely by preference maximizers”).
154 See Waldron, n. 32, at 1382 (observing that “[l]egislators give reasons for their votes just as judges do”).
155 See, for example, Jon Elster, Deliberation and Constitution making, in Jon Elster (ed.), Deliberative Democracy, 97-122, 104 (1998) (“public speaking is subject to a consistency constraint. Once a speaker has adopted an impartial argument because it corresponds to his interest or prejudice, he will be seen as opportunistic if he deviates from it when it ceases to serve his needs”). For a discussion of this concept in the context of human rights law compliance, see Goodman and Jinks, n. 24, at 150-154 (“Various constituencies provide incentives for public actors to live up to their ‘hypocritical’ endorsement of a norm. The publicity of their acts creates expectations among those constituents, and these expectations generate political and social costs when officials contravene or deviate from the norm”).
156 For a discussion of the “Pascal’s wager” (“Kneel and you will believe”), see generally Jon Elster, Sour Grapes, Part II (1983). Other authors have noted that there may be actual psychological effects in political actors’ “hypocritical” appeal to norms. See Goodman and Jinks, n. 24, at 151. See also James D. Fearon Deliberation as Discussion, in Elster (ed.), cit., at 54 (“There is also the possibility that arguing publicly for a position would, by various psychological mechanisms, reshape one’s private desires”).
I collected signatures under the motto ‘So the People Can Decide’, as everybody else”.157

It is very likely that Ms. Rodríguez Larreta did not change her views about the deep immorality of the Expiry Law, but she accepted defeat nonetheless, as Canetti suggests. However, that acceptance reflects also a change of preferences, or maybe the elicitation of a preference of a second order.158 She may very well have wanted to nullify the Expiry Law, but she wanted more to abide by the mechanisms Uruguayans gave themselves to solve their disputes. She wanted justice, but not at the price of ceasing to be a Uruguayan.

When Congressmen praise Ms. Rodríguez Larreta for her willingness to give up on her immediate preference in order to serve the higher end of keeping social cohesion, they are also making a statement on what mechanism they think Uruguayans have agreed upon in order to settle intractable conflict. Referenda will do the trick, will be the “rule of recognition”, that should force all Uruguayans to act as if they had all agreed on the matter. The name such a mechanism receives is, unsurprisingly, no other than law: law allows to presume agreement in the face of disagreement.159

For the supporters of nullification, Uruguayans agreed on the respect of human rights as they are understood by the international community. The existence of the Gelman decision is, in this register, all the proof that is needed to erase any previous

157 For example, Congressman Gandini, Uruguayan House of Representatives. 54th Session of 2011. October 26, 2011, at 40.
159 See Post, n. 148, at 1340 (“we invoke law when we believe we have reached agreement—or when we wish to act as if we have reached agreement”, italics on the original).
decision of the Uruguayan people, because everyone would be supposed to recognize this superior commitment.

However, an additional layer of tension to the usual dynamics of law and politics arises when the presumed agreement is a decision taken by an institution residing outside the community, and which, unlike national judges, does not even claim to exercise their powers in the name of the sovereign people. An “agreement” is essentially contingent, and human rights are rarely thought of to be contingent in that way. As the text of the Gelman decision shows, and unlike other forms of law, international human rights “derive their authority from sources outside of or prior to national democratic processes”.160

By contrast, the idea of law as a presumed agreement comes from a democratic understanding of constitutionalism, in which the “the authority of the constitution depends on its democratic legitimacy”.161 To be sure, the conceptions of democratic constitutionalism were born in the context of US American constitutional law.162 However, the Uruguayan Constitution was enacted representing the “peoples situated at the East of the River Uruguay”163, echoing the American “We the People”. Moreover, the “[Republic of Uruguay] is and will always be independent of all sorts of foreign powers”164 and “full sovereignty resides radically in the Nation, which

161 Post and Siegel, n. 36, at 374. A similar definition is given by Rubenfeld (“Democratic constitutionalism regards constitutional law as embodying a particular nation’s fundamental, democratically selfgiven legal and political commitments.”, Rubenfeld, n. 160, at 1999).
162 Rubenfeld explicitly contrasts “democratic constitutionalism” as an American model of constitutionalism against other models of a European heritage, based in abstract norms. Rubenfeld, n. 160., at 1971.
163 Preamble to the 1830 Uruguayan Constitution available at www.uruguyeduca.edu.uy/Userfiles/P0001/File/Texto%20de%20la%20Constitución%20de%201830.pdf
164 Article 2 to the Uruguayan Constitution.
holds the exclusive right to enact its laws”\textsuperscript{165}. This is not a doctrinal game: the constant insistence of the opposition members to the results of the referenda suggests that the resort to direct democracy is deeply embedded in Uruguayan political culture.\textsuperscript{166}

As I have already noted, a dispute that was originally about a concrete policy—the Expiry Law—went meta. In the very process of deciding on it, even as a byproduct, Uruguayans also decided on something, perhaps, more fundamental: how would they presume agreement when they fundamentally disagree. They were arguing, in other words, about how Uruguayan fundamental law was going to be defined.

The struggle around the nullification of the Expiry Law can be read as a dispute on how to account for that fundamental commitment that holds the Uruguayan people together. This is possible because the border between the political and the legal is itself subject to a definition. Law and politics dispute not only the content of their respective domains, but also the boundary between them. In the very process of deciding a particular issue, the normative commitments to which Uruguayans owe allegiance moved.

The \textit{Gelman} decision—the law by itself—was impotent to make that happen without the support of politics. Its success depended overwhelmingly of a previous history of decades of mobilization by large portions of the population, and its elevation to the status of law was possible only when a majority of parliamentarians—the ultimate political mechanism—endorsed it as \textit{being already} a part of fundamental law. It was maybe a Congresswoman who voted for the nullification of the Expiry

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\textsuperscript{165} Article 4 to the Uruguayan Constitution.
\textsuperscript{166} See also David Altman, \textit{Collegiate Executives and Direct Democracy in Switzerland and Uruguay: Similar Institutions, Opposite Political Goals, Distinct Results} 14(3) SWISS POL. SCI. REV. 482 (2008)
\end{flushleft}
Law who best captured this feature, when she confessed not “believe[ing] in the merely rationalistic explanations for our votes: each of us has a history, from which we judge the present and take a stand on it”. As she suggests, nobody acts out of abstract concepts of right and wrong, but out of thick, rooted, shared commitments to a common morality. If the latter are going to coincide with the former, it is through a “democratic iteration”, doomed to exist in the perpetual limbus between its universalistic aspirations and its contingent realization. While forced to claim the universality of their claims, participants in democratic iterations of universal norms are playing the old game of domestic politics, with its usual doses of reason and will. *Ceci n’est pas une pipe.*

**Epilogue: On the Intractability of Conflict**

Future cases will show how much this story fundamentally changed commitments held by the Uruguayan. If it is true that even hypocritical endorsement to norms generate long-term commitments, the adoption of the *Gelman* decision, in all its contingency, may have changed the way Uruguayans solve their conflicts.

Intractable conflict, however, does not disappear with a “methodological trick”, be it a plebiscite or be it an international ruling. After the nullification of the Expiry Law, conflict over the trials of military figures continued. In February 2013 the same Supreme Court that in 2009 had declared that the Expiry Law was unconstitutional decided that the law that nullified it also violated constitutional rights—in this case, because of the retroactive modification of the statute of limitations. By the same

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168 Post and Siegel, n. 36, at 385.
time, the Supreme Court also displaced Judge Mariana Mota, who was in charge of trying many of these crimes, because of alleged violations to judicial impartiality. The social movements that had successfully challenged the Expiry Law two years before mobilized intensely. Many inferior judges refused to follow the lead of the Supreme Court and continued the trials. Commentators, however, note that there was a drop in accountability for human rights violations and the perception thereof. Political conflict over the meaning of impunity continued. Neither the Gelman decision nor its acceptance by Congress, no matter how solemn in their proclamation of the law, arrested politics, but only opened a new stage for it.

Now it is time for a confession. I purposely misrepresented Patrick Stewart’s sketch in the Introduction. Recall he was asking his cabinet what had the ECHR ever done for the United Kingdom, and he received a list of the rights the Convention would protect for the British. However, this alone did not convince Stewart, and he sarcastically proposed drafting a bill of rights and “stick it on the Europeans’ faces, what would they say then, huh?” A minister had then the embarrassing task of reminding his boss that the ECHR had, indeed, been drafted by British legal experts. Only after realizing the United Kingdom was the author of, and not merely a subject to, the ECHR, Stewart is forced to drop his secessionist ambitions.

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170 La jueza Mariana Mota pide anular el traslado [Judge Mariana Mota Asks to Nullify Displacement], El País (September 4 2013), http://www.elpais.com.uy/informacion/mariana-mota-enfrenta-corte-anulacion-traslado.html

171 See Lessa and Skaar, n. 50, at 95-98.

172 Unlike other forms of deep disagreement, this conflict is closely tied to the people that were alive and active during a particular time in history. As history marches, and the protagonists of the dictatorship and its victims die, it is likely that the conflict also reconfigures itself into a battle over the meaning of history rather than the fate of certain individuals.
I hope to have showed through the Uruguayan case that countries can be the authors of international human rights law in less literal, although more meaningful, senses than having penned some few hundred words.