

IS THE *PRO HOMINE* PRINCIPLE STILL  
RELEVANT UNDER THE AMERICAN  
CONVENTION ON HUMAN RIGHTS?  
APPLYING THE MOST FAVORABLE  
INTERPRETATION FOR MAN IN  
DOMESTIC COURTS

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INTRODUCTION

In recent decades, Latin America has witnessed a tendency to constitutionalize the *pro homine* principle. In states where the principle has not been explicitly recognized, it has been implicitly associated with human dignity defense, thus gaining momentum. Moreover, the principle has been linked to domestic provisions relating to international human rights law (hereinafter IHRL) reception, and to international norms, such as article 29<sup>1</sup> of the American Convention of Human Rights (hereinafter ACHR), that, once incorporated to domestic law are binding within the state. In this context, the application of the *pro homine* principle is commonly accepted by the judiciary and international courts namely the Inter-American Court (hereinafter IACtHR). It should not be overlooked that this principle is a key feature of the compulsory nature of IACtHR judgments upon domestic law. A complex problem thus arises when domestic courts argue more favorable domestic provisions that are

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<sup>1</sup> Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, EUR. J. INT'L. L. 585, 587 (2010). This article contains the specific rules on interpretation of the American Convention. As Lucas Lixinski explains, it precludes interpretations that would allow for the restriction of rights protected in the Convention (except within the limits set by the Convention) or rights 'inherent in the human personality'. In addition, it precludes interpretations that generally restrict the enjoyment of rights recognized in domestic law or other international treaties.

opposed to inter American judgments. In this context, it is necessary to emphasize the *pro homine* principle's substantive content to define a "broader interpretation" and whether that interpretation upholds the dignity of the human person.

To comprehend such a person-centric perspective of the *pro homine* principle, this study has conducted a comparative analysis of the Peruvian and the Chilean reception of IHRL regarding the *pro homine* principle. Section 1 points out differences in the application of the *pro homine* principle in both states as well as the respective Constitutional Courts' implementation of the conventionality control doctrine (*control de convencionalidad*). The second section analyzes the defining parameters of the *pro homine principle's* broader interpretation of human rights' substantive content. The third section explores an alternative perspective of this principle anchored in the complimentary nature of human rights. Finally, the last section considers the *pro homine* principle's role in causing possible conflict between courts, and its contributions to the permanent dialogue between domestic tribunals and the IACtHR, under a proper application of conventionality control.

## I. RECEPTION OF IHRL IN PERUVIAN AND CHILEAN LEGAL SYSTEMS

Peruvian and Chilean legal systems present similarities between both legal systems and each State's position on conventionality control and the application of the *pro homine* principle. According to this, sometimes the approach of those domestic judges has been similar, but there are also many different and interesting criteria in other cases. These similarities and variations therefore are useful to re-evaluate the *pro homine* principle from a broader perspective, which is appropriate as the prevailing context of those States reveals new issues related to basic human rights, especially the trend to invoke IACtHR doctrine<sup>2</sup> to

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<sup>2</sup> Tribunal Constitucional [T.C] [Constitutional Court], 28 de septiembre 2017, Requerimiento de inconstitucionalidad de las normas que indican del proyecto de ley que "Regula la despenalización de la interrupción voluntaria del embarazo en tres causales", Rol de la causa: 3729-17, <http://www.tribunalconstitucional.cl/ver.php?id=3515> (Chile).

navigate away from the traditional interpretation of the *pro homine* principle.<sup>3</sup>

Before 2005, there were doubts about the way in which the international treaties were validated in the Chilean legal system, as stated in the doctrine. Article 50 (1) of the 1980 Constitution indicated that the international treaties had to be subjected to the formalities of a rule, but failed to specify how to make it operative. With the approval of international treaties during the constitutional reform of 2005, Article 54 was incorporated—regulating several matters: such as the drafting of reservations or interpretative declarations, the practice of denouncing treaties or withdrawing from them, approval quorums, modification or suspension, and so forth.<sup>4</sup>

Despite the process by which international treaties acquire internal legal validity and the existing effects on the state's legal system, the hierarchy that such treaties hold inside the legal system has generated endless academic and jurisprudential debates, especially human rights treaties.

Article 5, Subsection 1 of the 1980 Chilean Political Constitution, states that "the exercise of sovereignty recognizes as a limitation the respect for the essential rights which emanate from human nature."<sup>5</sup> In this context, the addition of a second subsection<sup>6</sup> marked a definitive milestone in the IHRL incorporation process. This important constitutional reform, as was pointed out, does not explicitly recognize the constitutional rank of human rights treaties. Thus, a significant

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<sup>3</sup> Artavia Murillo et al. ("In Vitro Fertilization") v Costa Rica, Preliminary objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (Ser. C) No. 257 (Nov. 28, 2012).

<sup>4</sup> Constanza Núñez Donald, *Control de Convencionalidad: Teoría y aplicación en Chile* [The Conventionality Control: Theory and application in Chile], 60 CUADERNOS DEL TRIBUNAL CONSTITUCIONAL, 1, 77 (2015); Ana María García Barzelatto, Control constitucional de los tratados internacionales con especial referencia al control represivo [Control of constitutionality of international treaties with special reference to repressive control], Vol. 69, DERECHO PÚBLICO, 502, 503-10 (2007).

<sup>5</sup> Constitute Project, *Chile's Constitution of 1980 with Amendments through 2015* (2018), [https://www.constituteproject.org/constitution/Chile\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Chile_2015.pdf?lang=en).

<sup>6</sup> Highlighting the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.

section of the doctrine considers that reform in and of itself implicitly grants a normative rank.<sup>7</sup>

Nevertheless, the discussion defines two positions: first, the notion that human rights treaties have a supranational rank. Meaning that even though these treaties are subordinate to the Constitution, they are above domestic laws and norms.<sup>8</sup> Chilean Constitutional Tribunal (hereinafter CCT) jurisprudence adopted the notion:<sup>9</sup> that "the reformed constitutional norm does not imply that essential rights in international treaties have a similar or higher hierarchy than fundamental law."<sup>10</sup>

The basis for the Court's reasoning was the need for constitutionality of treaties. Consequently, the CCT questions the application of these controls if human rights treaties were to be given the same authority and rank as the Constitution.<sup>11</sup> In addition, the CCT has pointed out that if human rights treaties were to hold a constitutional rank, it would imply a less complex procedure for Constitutional reform than the one established for constitutional amendments.<sup>12</sup>

While the opposition argues that the reform seeks to raise the rank of human rights recognized in international treaties<sup>13</sup> to the level of the

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<sup>7</sup> Marisol Peña Torres, *La aplicación del Derecho Internacional de los Derechos Humanos por el Tribunal Constitucional Chileno*, [The implementation of the International Law of Human Rights by the Chilean Constitutional Court], 6 ESTUDIOS CONSTITUCIONALES, 2008, at 205, 207; Edmundo Vargas Carreño, *Derecho Internacional público, de acuerdo a las normas y prácticas que rigen en el siglo XXI* [Public International Law According to The Rules and Practices In The 21st Century], EDITORIAL JURÍDICA DE CHILE, 2007, at 219, 219-20.

<sup>8</sup>This thesis has been defended in the academia by: Alejandro Silva Bascuñán, *Tratado de derecho Constitucional* [Treaty of Constitutional Law], EDITORIAL JURÍDICA DE CHILE, Tomo VI, 1997, at 124; Raúl Bertelsen Reppeto, *Rango Jurídico de los Tratados Internacionales en el Derecho Chileno* [Legal rank of treaties in Chilean Law], Vol. 23(2-3), REVISTA CHILENA DE DERECHO, 221-22 (1996).

<sup>9</sup> Tribunal Constitucional [T.C.][Constitutional Court], 8 abril 2002, "Requerimiento de inconstitucionalidad presentado por treinta y cinco señores Diputados respecto del Estatuto de Roma de la Corte Penal Internacional," Rol de la causa: 346-2002, <http://www.tribunalconstitucional.cl> (Chile); Tribunal Constitucional [T.C.][Constitutional Court], 25 agosto 2009, "Control de constitucionalidad del proyecto de ley, aprobado por el Congreso Nacional, que modifica la Ley N° 17.997," Rol de la causa: 1288-2009, <http://www.tribunalconstitucional.cl> (Chile).

<sup>10</sup> TC, 8/4/2002, 62, Rol: 346-2002 (Chile).

<sup>11</sup> *Id.*

<sup>12</sup> TC, 23/1/2013, 11, Rol: 2387/2388-2012. (Chile).

<sup>13</sup> Humberto Nogueira Alcalá, *La Constitución reformada de 2005* (Ed. Librotecna Santiago 2005), 6 ESTUDIOS CONSTITUCIONALES, 2008, 325, 325-370.

Constitution, the Chilean Supreme Court and Chilean Appellate courts have adopted a different position.<sup>14</sup> According to Andrade, if legal norms upholding respect for human rights existed prior to the reform, then that reform would have no other objective than to strengthen its protection.<sup>15</sup> Hence, if the international treaties had a supralegal rank prior to the reform, then the reform's objective would be to improve that rank.

In addition, the end of the Chilean dictatorship led to the support of the constitutional rank of human rights treaties. In this sense, the political sectors were especially concerned with incorporating a clause that strengthened protection of human rights and imposed limitations on State action.<sup>16</sup> This integration introduced a distinction between the treaty and the embodied essential rights, substantial to any constitution.<sup>17</sup>

As examined above, the year 1989 marked the beginning of debate and discussion surrounding the hierarchy of human rights treaties that intensified after the reform of 2005.<sup>18</sup>

However, Chile was not the only state engaging in this debate. Article 205 of the Peruvian Constitution holds that, "Once all legal recourse to national legislation has been sought and denied, the constitutional right of the injured party is to appeal to international courts or bodies established by treaties or agreements binding on Peru."<sup>19</sup> Because injured parties are subjects of international law, parties can

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<sup>14</sup> Corte Suprema de Justicia [C.S.J.][Supreme Court], 13 diciembre 2006, Rol de la causa: 559-2004, <http://corte-suprema-justicia.vlex.cl/vid/paulino-flores-rivas-30909868>, No. 20 (Chile); Corte Suprema de Justicia [C.S.J.][Supreme Court], 10 mayo 2007, Rol de la causa: 3452-2006, <http://corte-suprema-justicia.vlex.cl/vid/-332842894>, No. 66 (Chile); Corte Suprema de Justicia [C.S.J.][Supreme Court], 13 marzo 2007, Rol de la causa: 3125-2004, No. 39 (Chile). *See also* Miriam Lorena Henríquez Viñas, *Jerarquía de los tratados de derechos humanos: análisis jurisprudencial desde el método de casos* [Ranking Human Rights Treaties: A Jurisprudential Analysis of Case Law], 6(2) ESTUDIOS CONSTITUCIONALES, 2008 at 73, 73-119.

<sup>15</sup> Carlos Andrade Geywitz, *Reforma de la Constitución política de la Republica de Chile de 1980* [Reform of the Political Constitution of 1980], EDITORIAL JURÍDICA DE CHILE, 1991, at 276, 276-290.

<sup>16</sup> Constanza Núñez Donald, *supra* note 4, at 84.

<sup>17</sup> Liliana Galdámez Zelada, *El valor asignado por la jurisprudencia del Tribunal Constitucional a la jurisprudencia de la corte Inter-Americana de Derechos Humanos* [The Value Assigned by the Jurisprudence of the Constitutional Tribunal to the Jurisprudence of the Inter-American Court of Human Rights], 12(1) ESTUDIOS CONSTITUCIONALES, 2014, at 329, 33.

<sup>18</sup> Constanza Núñez Donald, *supra* note 4, at 85. (Consequently, for some, the existence of a hesitant jurisprudence has hindered the beginning of a debate about the conventionality control in Chile).

<sup>19</sup> Political Constitution of Peru, Dec. 29, 1993, art. 55.

submit their claims directly to the Inter-American Court of Human Rights, a subsidiary jurisdiction.<sup>20</sup>

Accordingly, article 55 of the Peruvian Constitution holds: that “Treaties formalized by the State and in force are part of national law.”<sup>21</sup> Therefore human rights treaties have the legal force of domestic law and are immediately applicable in the State.<sup>22</sup> The hermeneutical application of an international treaty is facilitated through the clauses requiring consistency and conformity in interpretation (CCI hereinafter). Typical examples are the fourth of the final and transitory provisions of the Peruvian Constitution<sup>23</sup> and article V of the Preliminary Title of the Constitutional Procedural Code<sup>24</sup>, which were incorporated in the Peruvian legal system at different times.<sup>25</sup>

Once the ACHR was incorporated into the domestic legal order, both internal and international normative sources are coordinated in a dynamic way.<sup>26</sup> In Negishi’s own words, “the incorporated international

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<sup>20</sup> It means that it is only operative when the national instances are over, being this last one a previous requirement subject to procedure to start the international process.

<sup>21</sup> *Id.*

<sup>22</sup> Tribunal Constitucional [Constitutional Court], Nov. 8, 2005, Exp. N° 5854-2005-AA/TC, 22, <http://www.tc.gob.pe/jurisprudencia/2007/04853-2004-AA.pdf> (Peru).

<sup>23</sup> Political Constitution of Peru, Dec. 29, 1993, Final and Transitory Provisions IV. (Rules concerning the rights and freedoms recognized by this Constitution are construed in accordance with the Universal Declaration of Human Rights and the international treaties and agreements regarding those rights that have been ratified by Peru).

<sup>24</sup> Political Constitution of Peru, Dec. 29, 1993, Preliminary Title of the Constitutional Procedural Code, art. V. (The content and reach of the constitutional rights protected by the processes that are regulated in the present Code must be interpreted in conformity with the Universal Declaration of Human Rights, the treaties on human rights, as well as the decisions adopted by the international courts on human rights that were constituted according to treaties that Peru is part of).

<sup>25</sup> Cf. Domingo García Belaúnde, *El nuevo Código Procesal Constitucional del Perú* [The new constitutional procedural code in Peru], Provincia Número Especial 401, 408 (2005) (The Peruvian Constitution of 1979 had no similar disposition. It only established a systematic catalog of rights and granted constitutional rank to the treaties on human rights. The clause was incorporated in the Constitution of 1993. As referred by Professor García Belaúnde, this clause «had and almost surreptitious and unnoticed inclusion» in the constitutional text).

<sup>26</sup> Edgar Carpio Marcos, *La Interpretación De Los Derechos Fundamentales* [The interpretation of Fundamental Rights], PALESTRA, 1, at 130 (2004).

standards function as the parameter or block for the constitutional review of national acts."<sup>27</sup>

In light of article 3 of the Peruvian Constitution, which establishes a *numerus apertus* list of other rights –not explicitly recognized– but of constitutional rank, it is inferred that international treaties defending human rights, similar to the Constitution,<sup>28</sup> also have constitutional force<sup>29</sup>. In reality, this position is assumed not only by the Peruvian system –including the Peruvian Constitutional Tribunal (PCT hereinafter)<sup>30</sup>– but also by other Latin American courts.

The discussion surrounding the hierarchy of human rights treaties in the Peruvian and Chilean Constitutions has taken different forms throughout the years. For instance, before the promulgation of the Peruvian CCI (found in the fourth final provision), the PCT established a standard where the interpretation of treaty rights adhered to the international courts' decisions, and specifically to IACtHR judgments.<sup>31</sup> Chile has continued this exact discussion that has faced harsh criticism over the years.

Nonetheless, the current minister of the CCT—Marisol Peña—pointed out that nowadays it is generally agreed that the breadth of fundamental rights is not restricted in Chile. That is, it is not only composed by the rights explicitly recognized in article 19 of the Constitution, but it is also complemented by all essential rights that, emanating from human nature, are recognized in international treaties ratified by Chile and entered into force.<sup>32</sup>

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<sup>27</sup> Yota Negishi, *The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control*, 28(2) EUR. J. INT'L. L. 457, 462 (2017).

<sup>28</sup> César Landa Arroyo, *Constitución Y Fuentes Del Derecho* [Constitution and Legal Foundations], Palestra, 1, at 120 (2006).

<sup>29</sup> Tribunal Constitucional [Constitutional Court], Apr. 25, 2006, Exp. N° 00025-2005-PI/TC and N. ° 00026-2005-PI/TC, ¶ 29-30 (Peru).

<sup>30</sup> Tribunal Constitucional [Constitutional Court], Apr. 24, 2006, Exp. N° 00025-2005-PI/TC, ¶ 26, 33 (Peru); Tribunal Constitucional [Constitutional Court], Apr. 24, 2006, Exp. N° 00047-2004-AI/TC, 61(Peru).

<sup>31</sup> Tribunal Constitucional [Constitutional Court], Apr. 17, 2002, Exp. N° 0217-2002-HC/TC, ¶ 2 (Peru); Tribunal Constitucional [Constitutional Court], June 6, 2002, Exp. N° 218-2002-HC/TC, 2 (Peru).

<sup>32</sup> Marisol Peña Torres, *supra* note 7, at 207.

In conclusion, in Chile and Peru, once international human rights treaties are ratified, they are enforceable in the national legal system. The States therefore are committed to respect and guarantee those rights, and in conformity with the *pacta sunt servanda* principle, states must be willing to comply with its *bona fide* international obligations.

## II. THE CLAUSES OF CONFORMITY INTERPRETATION (CCI) AND THE BINDING EFFECTS OF IACTHR RULINGS

The CCI are hermeneutical techniques that facilitate the incorporation of an international treaty's content into domestic law. These techniques bridge both national and international sources of protection thereby reinforcing primary jurisdiction<sup>33</sup> of domestic protection.

In this context, human rights treaties place limitations on the sovereignty of the States, but are not as influential or authoritative as IACTHR rulings. CCI techniques have given cause for discussion, especially within the Peruvian legal system where the second CCI considers IACTHR case law as a parameter of conformity. Thus, IACTHR decisions are controversial and have not led to any real consensus.<sup>34</sup>

Professor Montoya Zamora implies that enforcing ACHR and IACTHR decisions, is not a sharp imposition of conventional order over the national legal system, instead it provides for better domestic protection.<sup>35</sup> The conformity prescribed is not a dissent<sup>36</sup> from internal

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<sup>33</sup> Corte Constitucional (C.C.) [Constitutional Court] diciembre 7, 2001, Sentencia T-1319/01, Expediente T-357702 <http://www.corteconstitucional.gov.co/relatoria/2001/t-1319-01.htm>. (Colom.) Tribunal Consitucional [Constitutional Court], 7 noviembre 2011, Sentencia 1907/2011-R, [https://buscador.tcpbolivia.bo/\(S\(2farwxnsz10tyv105s5lv4z3\)\)/WfrJurisprudencia.aspx](https://buscador.tcpbolivia.bo/(S(2farwxnsz10tyv105s5lv4z3))/WfrJurisprudencia.aspx) (Bolivia) (A typical example is Article 93 of the 1991 Constitution of Colombia, which provides the Colombian Constitutional Court with the legal foundation for dynamically including the ACHR standards within the constitutionality block. Likewise, Article 256(2) of the 2009 Constitution of Bolivia becomes the legal basis for the Bolivian Constitutional Court to confirm both conventionality control and constitutionality control).

<sup>34</sup> Liliana Galdámez Zelada, *supra* note 17, at 331.

<sup>35</sup> Raúl Montoya Zamora, *Las Nuevas Pautas Interpretativas en Materia de Derechos Humanos [The New Interpretative Keys in Human Rights]*, 17 (6) QUID IURIS, 135, 142 (2012).

<sup>36</sup> Eduardo Ferrer Mac Gregor, José Luis Caballero Ochoa, & Christian Steiner (Coords.), *Derechos humanos en la Constitución: comentarios de jurisprudencia constitucional e interamericana [Human Rights in the Constitution, Comments on Constitutional and Inter American Jurisprudence]*, Instituto de



legal protection but instead an extension of it. Although IACtHR rulings promote the idea of a “living development”<sup>37</sup> of human rights, states are still subjected to such criterion.

Moreover, the term “in conformity with” may be better understood in a material or substantive sense that calls for rights to be regulated by the concomitance or compatibility between the national legal system, the conventional order, and jurisprudence.<sup>38</sup>

In Chile, those who refuse to accept IACtHR jurisprudence are backed by the Constitution that remains silent on the authority of international jurisdictional bodies and the CCT has said nothing about the value of IACtHR decisions. On the contrary, those who defend IACtHR jurisprudence, invoke articles 1, 2 and 62 N° 3 of the ACHR and Decree N° 873 (January 5, 1981), that approve the Convention.<sup>39</sup>

### III. APPLICATION OF THE IHRL AND IACtHR CRITERIA IN THE JURISPRUDENCE OF THE CHILEAN AND PERUVIAN CONSTITUTIONAL TRIBUNAL

There is scarce reference to the IACtHR doctrine in CCT<sup>40</sup> decisions, which shows that the inter-American rulings are not more

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Investigaciones Jurídicas: Konrad Adenauer Stiftung, Programa Estado de Derecho para Latinoamérica (2013).

<sup>37</sup> José Luis Caballero Ochoa, *La cláusula de interpretación conforme y el principio Pro Persona* (Artículo 1º, segundo párrafo, de la constitución), INSTITUTO DE INVESTIGACIONES JURÍDICAS DE LA UNAM 103, 127 (2013).

<sup>38</sup> Cf. Alejandro Saiz Arnaiz, *La interpretación de conformidad: significado y dimensión práctica (un análisis desde la constitución española)* [The interpretation of conformity: meaning and practical dimension (an analysis from Spanish Constitution)], *Protección Multinivel de Derechos Humanos: Manual, Red de Derechos Humanos y Educación Superior 2013*, at 47; Mariela Morales Antoniazzi, *El nuevo paradigma de la apertura de los ordenes constitucionales: una perspectiva sudamericana*, [The new paradigm of the opening of constitutional orders: a South American perspective], *Soberanía y Estado abierto en América Latina y Europa*, ESTUDIOS JURÍDICOS, México, 2014, at 250; Mauricio Del Toro Huerta, *La apertura constitucional al derecho internacional de los derechos humanos en la era de la mundialización y sus consecuencias en la práctica judicial* [The constitutional opening to the international law of human rights in the era of Globalization and its consequences in judicial practice], 112 *BOLETÍN MEXICANO DE DERECHO COMPARADO*, 325, at 331–343 (2005).

<sup>39</sup> This norm states that the government of Chile recognizes as binding the IACtHR’s interpretation and application of the ACHR in conformity with article 62.

<sup>40</sup> Galdamez questioned if the CCT used the IHRL including its jurisprudence, and in case it does, if with that it could broaden or not the parameter of control of constitutionality and the system of

important than foreign laws or even the European Court of Human Rights rulings.<sup>41</sup> Professor Galdamez questions if the Chilean Tribunal could dispense the IACtHR's definition of conventional rights or if the CCT could uphold a more restrictive interpretation. For Galdamez, the lack of consensus on the IHRL's authority is what weakens the binding strength of the IACtHR doctrine.<sup>42</sup> However, the solution goes beyond a consensus on the IHRL clause. While states are called to observe IACtHR judgments, national courts do not have to enforce the convention in every single case. In fact, this would go beyond the purpose of conventional rights and the domestic courts' faculties within every legal system.

The enforceability of IACtHR decisions depends on whether it provides a greater or broader protection that is more favorable than existing domestic law. However, when defining what "most favorable" means, such criterion is determined by the decisions of the IACtHR resulting in a circular argument. Because, for some, referring to favorable protection as the 'broadest' protection, leads to the idea that the IACtHR will always provide a much wider or extensive protection than what the States can or are willing to provide.

Here, IACtHR decisions point to two highly significant but unresolved matters. First, though the *pro homine* principle would bridge the binding effects of IACtHR judgments, it is necessary to understand what 'a concrete favorable tutelage' means. Otherwise, this principle does not resolve the problem and judges are tempted to mindlessly accept the IACtHR arguments first.

Second, if the *pro homine* principle is viewed as only granting wider protection, this could lead to the conclusion that there is no limit to favorable protection. This is not a problem if we consider that the purpose of the Inter-American human rights system and the States is to offer a more favorable protection for subjects. However, when 'wider'

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sources of the Chilean constitutional law. In this context, she determined that between 2006 and 2011 the jurisprudence of the IACtHR was cited in six cases.

<sup>41</sup> Liliana Galdámez Zelada, *supra* note 17, at 332 (For instance, between 2006 and 2010 foreign jurisprudence and law were cited in 35 cases, while between 2006 and 2011 the doctrine of the IACtHR was cited in six cases).

<sup>42</sup> *Id.* at 333.

protection is interpreted as dissonance with the nature of human rights, we relativize its content and reach a kind of arbitrary classification of rights, in which “favorable” is ultimately defined by the subjective criterion of its interpreters.

In other words, the solution lies in how we understand “wider protection” in relation to “basic” human rights, so that what is “favorable” emerges from that reality.

If unaddressed, the domestic courts may not actively begin an inter-judicial dialogue, therefore continuing to criticize the IACtHR criteria as slaves subject to the “favorability” accorded to individuals and state international responsibility. It follows, that domestic courts would progressively lose their role as the first line of defense and interpretation of human rights.

For example, the PCT has sometimes assumed a passive and receptive role, when in reality, it (in relationship with the IHRL) should assume a critical and sensible approach rather than an immediate adherence.<sup>43</sup> Thus, internal judges should find for just and reasonable criteria beyond the minimal warranty offered by the IACtHR.<sup>44</sup> This does not call for a parallel and contradictory development of rights,<sup>45</sup> but rather an appreciation that human rights at a minimum are reinforced by IHRL and at a maximum should derive from domestic law, so that the human rights protection system is conceived from various sources.<sup>46</sup>

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<sup>43</sup> Although the Peruvian State fully assumed the IACtHR criteria in some occasions, it should be considered the political context, such as cases of self-amnesty. (Cf. Natalia Torres Zúñiga, Control de convencionalidad y protección multinivel de los derechos humanos en el Sistema Interamericano de Derechos Humanos [Review for legal compliance and multi-level protection of human rights in the Inter-American System], 70, REVISTA DE DERECHO PUCP, 347, 364 (2013).

<sup>44</sup> *Id.* at 365.

<sup>45</sup> Manuel Góngora Mera, *Diálogos jurisprudenciales entre la Corte Interamericana de Derechos Humanos y la Corte Constitucional de Colombia: Una visión coevolutiva de la convergencia de estándares sobre derechos de las víctimas* [Jurisprudential Dialogues Between the Inter-American Court of Human Rights and the Constitutional Court of Colombia: A Coevolutive Vision of the Convergence of Standards On the Rights of Victims], 2 LA JUSTICIA CONSTITUCIONAL Y SU INTERNACIONALIZACIÓN: ¿HACIA UN IUS CONSTITUTIONALE COMMUNE EN AMÉRICA LATINA?, 403, 403-430 (2010).

<sup>46</sup> German Bidart Campos, *Jerarquía y Prelación de Normas en un Sistema Internacional de Derechos Humanos* [Hierarchy and priority of norms in an International Human Rights System], LIBER AMICORUM HECTOR FIX- ZAMUDIO, 465 (1998).

Although the CCT at times rejects IACtHR rulings, there are cases in which IHRL principles and criteria interpret the constitutionality of fundamental rights. Chilean Tribunal judgment N° 634,<sup>47</sup> argued for the constitutional right to access public information. The Court held that the right to access public information is a form of freedom of expression and partially relied on the Declaration of Principles of the Inter-American Commission on Human Rights (October 2000).<sup>48</sup>

Despite citing two IACtHR judgments, the Chilean Tribunal relied on the verdicts of the ECtHR and the Spanish Constitutional Court to decide judgment N°567.<sup>49</sup> This illustrates that the IACtHR rulings were necessary to strengthen the constitutional court criteria but did not influence<sup>50</sup> the outcome of the decision.

Similarly, in Judgment N°1723,<sup>51</sup> the IACtHR jurisprudence was merely a source used to reinforce the domestic decision. Here, the IACtHR condemned the Chilean State but was not given any special authority over the decision in this judgment.<sup>52</sup>

However, in Judgment 739-2007, the CCT should have determined if article 1 subparagraph 2<sup>53</sup> of the Penal Code opposed articles 19 N°3 inc.5 and 5 inc.2 of the Constitution. To determine the compatibility of these articles with the innocence principle, the Chilean Tribunal (noting

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<sup>47</sup> Sentence relapsed on the deducted requirement by the Court of Appeals of Valparaíso to declare the inapplicability of article 13 of Law N°18.575, Constitutional Organic of General Bases of Administration of the State.

<sup>48</sup> Organization of American States, Background and Interpretation of the Declaration of Principles, ¶ 19 (2000) ( Without the information that every person is entitled to, it is clearly impossible to exercise freedom of expression as an effective vehicle for civic participation or democratic oversight of government management).  
<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&IID=1>.

<sup>49</sup> Tribunal Constitucional [T.C][Constitutional Court], 2 junio 2010, “Requerimiento de parlamentarios y otros para que se declare la inconstitucionalidad del Movimiento Patria Nueva Sociedad,” Rol de la causa: 567-06, <http://www.tribunalconstitucional.cl> (Chile).

<sup>50</sup> Liliana Galdámez Zelada, *supra* note 17, at 348.

<sup>51</sup> Tribunal Constitucional [T.C][Constitutional Court], 24 mayo 2011, “Proceso de inconstitucionalidad iniciado de oficio por el Tribunal Constitucional en relación al artículo 2331 del Código Civil,” Rol de la causa: 1723-10/1800-10 INA, <http://www.tribunalconstitucional.cl> (Chile).

<sup>52</sup> Cf. Liliana Galdámez Zelada, *supra* note 17, at 349.

<sup>53</sup> “Las acciones u omisiones penadas por la ley se reputan siempre voluntarias, a no ser que conste lo contrario” [The actions or omissions punished by the law are always voluntary unless it explicitly states otherwise] Código Penal (Cód. Pen.) [Penal Code] art. 1.2 (Chile).

that this principle is not explicitly in the Constitution) interpreted the domestic norm in light of international treaties that have recognized that principle.<sup>54</sup>

The following case concerns the right to identity and the constitutionality of the Chilean Civil Code article 206,<sup>55</sup> which limits the possibilities to exercise posthumous paternity actions. In Judgment 1340-2009, the CCT held that even though the Chilean Constitution does not recognize the right to an identity, it still deserves protection. Furthermore, the Court pointed out this right is protected specifically in diverse international treaties ratified by Chile.<sup>56</sup>

Here, the CCT incorporated internationally recognized rights into the parameters of national constitutionality. The Court referred to the “constitutional block,” that allows bringing in rights that were not formally recognized by the Constitution. The Tribunal amplified the normative structure and allowed for the right to identity form part of the parameter of constitutional regularity.<sup>57</sup>

In Judgment 2273-2013 the CCT considered the constitutionality of a legislative decree on immigration. The tribunal indicated that even though the internal law of each state has the authority to receive immigrants according to its own laws, arbitrary discretion is disallowed.<sup>58</sup> The Tribunal decided that if the Ministry of Interior’s discretion to reject visas was not limited then the right to equality and the right to travel freely would be violated.<sup>59</sup>

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<sup>54</sup> Tribunal Constitucional [T.C][Constitutional Court], 21 agosto 2007, “Requerimiento de inaplicabilidad por inconstitucionalidad presentado por Hartmut Wilhelm Hopp Miottel, respecto del inciso segundo del artículo 1º, y artículo 292 del Código Penal,” Rol de la causa: 739-07, <http://www.tribunalconstitucional.cl> (Chile).

<sup>55</sup> Código Civil (Cód. Civ.) [Civil Code] art. 206.

<sup>56</sup> Tribunal Constitucional [T.C][Constitutional Court], 29 septiembre 2009, “Requerimiento de inaplicabilidad por inconstitucionalidad del Juez Presidente del Juzgado de Familia de Padahuel, señor Carlo Marcelo Casaula Mezzano respecto del artículo 206 del Código Civil,” Rol de la causa: 1340-09, <http://www.tribunalconstitucional.cl> (Chile).

<sup>57</sup> Cf. Constanza Núñez Donald, *supra* note 4, at 107.

<sup>58</sup> Tribunal Constitucional [T.C][Constitutional Court], 4 julio 2013, “Requerimiento de inaplicabilidad por inconstitucionalidad respecto de los artículos 13, 64 N° 2 y 67 del Decreto Ley N° 1.094, de 1975, que establece normas sobre extranjeros en Chile,” Rol de la causa: 2273-2013, pg. 13, <http://www.tribunalconstitucional.cl> (Chile).

<sup>59</sup> *Id.* at 43, 50, and 51.

Finally, in Judgment 2493-2013, the Chilean Tribunal held that civilians are not subject to the military's jurisdiction rendering these types of cases inapplicable and unconstitutional. The CCT pointed to the incorporation of human rights affirmed in international commitments, as founding norms of the "constitutionality block", to be used in direct application, or as a reference or interpretative criteria.<sup>60</sup> The Tribunal also recognized the IACtHR decisions concerning military jurisdiction and its intervention only when military juridical goods are affected.<sup>61</sup> The Court recalled that the Chilean State should comply with the IACtHR order of military justice.<sup>62</sup>

The Court in judgment N<sup>o</sup>740<sup>63</sup> questioned the effects of the "morning-after pill" after considering technical and scientific reports casting doubt on the concrete effects of emergency contraception on the life of an unborn child. Considering the *pro homine principle*, the Court concluded that it is more favorable to opt for a prohibition on the "morning-after pill."<sup>64</sup> The CCT opted for preventive protection of the right to life.<sup>65</sup>

For some the application of *pro homine* (a principle many attribute to the IACtHR) indicates that domestic courts are subject to whatever the IACtHR dictates. From this author's point of view, it is essential not to consider the *pro homine* as a criterion that is external to the domestic legal order and thus imposed by the IHRL. In other words, even if the IACtHR might suggest the application of this principle it does not mean that this principle should be applied or that it has binding force.

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<sup>60</sup> Tribunal Constitucional [T.C.][Constitutional Court], 6 mayo 2014, "Requerimiento de inaplicabilidad por inconstitucionalidad respecto del artículo 5<sup>o</sup>, numerales 1<sup>o</sup>, inciso primero, y 3<sup>o</sup> del Código de Justicia Militar," Rol de la causa: 2493-2013, pg. 9-10, <http://www.tribunalconstitucional.cl> (Chile).

<sup>61</sup> *Id.* at 10.

<sup>62</sup> *Id.* at 10-11.

<sup>63</sup> Tribunal Constitucional [T.C.][Constitutional Court], 18 abril 2007, "Requerimiento de inconstitucionalidad deducido en contra de algunas disposiciones de las 'Normas Nacionales sobre Regulación de la Fertilidad'," Rol de la causa: 740-2007, <http://www.tribunalconstitucional.cl> (Chile) (The controversy concerns a group of members of the parliament that requested the declaration of the unconstitutionality on behalf of the norms of D.S. N<sup>o</sup> 48 that regulated the free distribution of the morning after pill in public doctors' establishments.).

<sup>64</sup> *Id.* at 140-143.

<sup>65</sup> Liliana Galdámez Zelada, *supra* note 18, at 349-50.

Even though the Peruvian Court has applied the *pro homine* principle<sup>66</sup> in various decisions, *the following case will be examined.*

The *amparo* proceedings against the Ministry of Health in 2004, challenged the free distribution of emergency contraceptive pills (a similar policy also challenged in Chile). Here, the Peruvian Court acknowledged that the *pro homine* principle guides human rights law, both at the national and conventional level. The Court additionally recognized the capacity of this principle to order, in a plurality of applicable norms, its application to guarantee fundamental rights in the most effective way.<sup>67</sup>

This court held that *pro homine* should be applied even in cases where doubt exists over fundamental rights issues and the other rights are at stake.<sup>68</sup> This Peruvian Tribunal's assessment is highly relevant in showing how the principle is a hermeneutical key that delineates the path to follow by the highest interpreter to solve human rights controversies.

#### IV. STRUGGLING FOR THE CONVENTIONALITY CONTROL

The conventionality control is a doctrine created by the IACtHR in *Almonacid Arellano v. Chile*.<sup>69</sup> According to the doctrine, the IACtHR requires states to implement and comply with ACHR provisions at the domestic level.

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<sup>66</sup> Tribunal Constitucional [Constitutional Court], Aug. 29, 2006, Exp. N° 5033-2006-AA/TC, 37, (Peru); Tribunal Constitucional [Constitutional Court], Oct. 7, 2009, Exp. N° 00252-2009-AA/TC, 14, (Peru); Tribunal Constitucional [Constitutional Court], July 13, 2011, Exp. N° 01499-2010-AA/TC, 9, (Peru); Tribunal Constitucional [Constitutional Court], Jan. 30, 2004, Exp. N° 1049-2003-AA/TC, 4, <http://www.tc.gob.pe/tc/public/resolucion/pubwebmes/ultimo> (Peru).

<sup>67</sup> Tribunal Constitucional [Constitutional Court], Oct. 16, 2009, Exp. N° 02005-2009-AA/TC, 33, (Peru).

<sup>68</sup> *Id.*

<sup>69</sup> See Nestor Pedro Sagüés, *Obligaciones internacionales y control de convencionalidad*, [International obligations and conventionality control], 8 (1) ESTUDIOS CONSTITUCIONALES, 2010, at 117, 113; Eduardo Ferrer Mac Gregor, *Interpretacion Conforme y Control Difuso de Convencionalidad. El Nuevo Paradigma para el juez Mexicano*. [Conformity Interpretation and diffuse conventionality control. The new paradigm to the Mexican judge], 9(2) ESTUDIOS CONSTITUCIONALES, 2011, at 531, 582.

Articles 1 and 2 of the ACHR<sup>70</sup> regulate the implementation of the “conventionality control” doctrine in domestic courts. The IACtHR calls for the application of the treaty through its jurisprudence is the unique path to comply with those conventional provisions. On this basis, only the norms and jurisprudence that conform with the San Jose treaty and particularly to the IACtHR doctrine will pass muster and be considered valid law.

With limits imposed on domestic protection resources, the IACtHR seeks to go beyond the scope of a given individual case to compel most states to apply IACtHR decisions even if they are not internationally responsible. Under this doctrine, the IACtHR is given priority and specific domestic authority although it is only able to offer minimal and subsidiary protection.<sup>71</sup>

Following the new jurisprudential formula, judgments of the Chilean and Peruvian Constitutional Tribunals referring directly or indirectly to conventionality control, will be briefly examined.

An explicit reference to such conventionality control is found in the concurrent vote of the Chilean Minister Viera-Gallo in the Judgment 2265-2013.<sup>72</sup> He reasoned that if a norm infringes on article 5°, if

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<sup>70</sup> As we know, articles 1 and 2 of the ACHR contain obligations of result that means states can choose the means to do so. Nonetheless, the IACtHR has ordered in their judgments the obligations of means. States have received concrete instructions about the way to proceed. To the Mexican judge Fernando Silva Garcia, the court does not only say the “what” (result), it also incorporates many responsibilities related with the “how” (though the actions) states should compensate the conventional violations. (Fernando Silva García, *Aportaciones del Sistema de reparaciones de la Corte Interamericana al Derecho Internacional de los Derechos Humanos* [Contributions of the reparations system of the Inter-American Court to the international law of human rights], *Protección Multinivel de Derechos Humanos: Manual, Red de Derechos Humanos y Educación Superior 2013*, at 245.).

<sup>71</sup> Corte Costituzionale (Corte Cost.) Constitutional Court, 18 Dicembre 1973, G.U. 1974, no. 183 (It.). Deutsche Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) 2 BvL 52/71, May 29, 1974; BVerfG, 2 BvR 197/83, October 22, 1986 (Ger.).

Nollkaemper, *Rethinking the Supremacy of International Law*, 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 65, at 67–71 (2010) (Nollkaemper affirms that sovereign states have resolutely reserved the ultimate power to limit the performance of international obligations conflicting with national fundamental principles and values).

<sup>72</sup> Tribunal Constitucional [T.C][Constitutional Court], 21 noviembre 2013, “Requerimiento de inaplicabilidad por inconstitucionalidad presentado por Francesco Carretta Muñoz, Juez de Familia de Valparaíso, respecto del artículo 14 de la Ley N° 14.908,” Rol de la causa: 2265-2013, pg. 10, <http://www.tribunalconstitucional.cl> (Chile).



applicable, the Constitutional Tribunal would hold the norm unconstitutional.

Professor Nuñez Donald affirms that there are Chilean norms that enable and force judges to carry out conventionality control. According to the author, the Chilean state is not concerned with the scenarios that Ferrer MacGregor frames as contrary to the application of such doctrine such as the impossibility of challenging the norms before other instances<sup>73</sup> - such as circumstances where judges are unable to verify the control of constitutionality (and thus the conventionality control), or cases where there is no procedural path to refer to whom is able to exercise those controls<sup>74</sup>. In the case of unsatisfactory interpretation, the Chilean Courts can<sup>75</sup> defer to the Constitutional Tribunal.<sup>76</sup>

On the other hand, the Peruvian Constitutional Tribunal compared "*Panamericana Television S. A.*" to *Ivcher Brostein v. Peru* (which was resolved by the IACtHR) and applied the same criteria. The Peruvian Court stated that is possible to distinguish a vertical conventionality control born from a supranational order, jurisdiction and interpretation. It is a concentrated control applied by the IACtHR whose judgments produces *erga omnes* effects. All domestic courts of the region are linked to those decisions where they are given a 'national margin of appreciation' that allows them to apply such conventional case law where they deem appropriate.

There is also a horizontal conventionality control, exercised by domestic courts of each country (diffuse control), whose effects are only for the country in which its judges have exercised international conventions (such as treaties, *ius cogens* or jurisprudence) instead of its domestic provisions.<sup>77</sup>

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<sup>73</sup> Eduardo Ferrer Mac-Gregor, *Reflections on the diffuse control of conventionality in light of Cabrera García Montiel Flores v. Mexico case*, Vol. XLIV(131) BOLETÍN MEXICANO DE DERECHO COMPARADO, 917.

<sup>74</sup> Nestor Pedro Sagüés, *supra* note 69, at 122.

<sup>75</sup> Constanza Núñez Donald, *supra* note 4, at 90-91 (The author alludes to the conservative functions of domestic judges to support the application of conventionality control).

<sup>76</sup> *Id.* at 89 (This argument is based on an interpretation the judges' power to apply articles 5 and 6 of the Constitution, 1.1 and 2 of the ACHR and 27 of the ICCPR).

<sup>77</sup> Tribunal Constitucional [Constitutional Court], Mar. 12, 2014, Exp. N° 04617-2012-PA/TC, 14 (Peru).

As noted above, according to the PCT, IACtHR jurisprudence is binding on all domestic courts. The Peruvian Tribunal however recognizes that judges have a margin of discretion to evaluate the application of conventional case law in each particular case.<sup>78</sup>

In the anonymous case of P.E.M.M., who requested a sex change (from male to female) on his ID and birth certificate,<sup>79</sup> the Court refers to and considers the binding authority of IACtHR decisions but does not actually apply them. Judges Eto Cruz and Mesía Ramírez believed that the decision, that declares the claim unfounded, is ‘unconventional’. These judges considered that such a ruling contradicts IACtHR decisions concerning ‘gender identity’, concluding that such a right can only accept the biological sex as a configurative element of the person's sexual identity.<sup>80</sup>

The previous opinion is remarkable because, although it does not reflect the position of the Constitutional Tribunal as a whole, it somewhat delineates the judicial perception of conventionality control as an idea that is still at a general stage.<sup>81</sup> For some, a strict application of the IACtHR decisions is a proper execution of the control. And for others, namely the PCT, that execution also implies a ‘distancing effect’ from that jurisprudence when required. While the discussion is open, it is

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<sup>78</sup> Corte Costituzionale (Corte Cost.) Constitutional Court, 1 maggio 2015, no. 49, ¶ 7 (It.); Конституционный Суд РФ провозгласил Постановление по делу о применимости решений ЕСПЧ на территории РФ [Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions], Rossiiskaia Gazeta [Ros. Gaz.], 2015 (Russ.); Corte costituzionale, (Corte Cost.) Constitutional Court, 22 Ottobre 2014, no. 238, ¶ 3.2 (It.); BVerfG, 2 BvL 1/12, December 15, 2015, ¶ 53–54, 67 (Ger.).

<sup>79</sup> Tribunal Constitucional [Constitutional Court], Mar. 18, 2014, Exp. N° 139-2013-PA/TC, (Peru).

<sup>80</sup> Such a jurisprudence nevertheless was revoked by the ruling N° 06040-2015-PA/CT, which established that the legal claims pursuing the change of sex and name in the ID can be processed in summary trials before civil courts as it is indicated in article 546.6 of Civil Procedure Code. Additionally, the PCT established that judges have a margin of decision to interpret the right to identity and they do not should be obligated to assume that this kind of claims will contradict the legal certainty.

<sup>81</sup>Raymundo Gil Rendón, *El control difuso de la convencionalidad* [The Conventionality Control], VOL. 5 REVISTA DE DERECHOS HUMANOS. UNIVERSIDAD DE PIURA, 175 (2014).

necessary<sup>82</sup> for a prudent judicial dialogue to piece together an adequate and productive conventionality control.

Looking at the way conventionality control should be applied within Latin American states, it would be essential to define its nature. Thus, if this control is part of the IHRL and this is, at its core, subsidiary, then the control should be subsidiary as well. Domestic courts therefore would have the power to carry out the control only when the fundamental rights are not protected within the State or their protection is insufficient.<sup>83</sup> That is, only when constitutional control fails, should internal courts resort to conventionality control. This approach nonetheless seems inadequate because it undermines the subsidiarity of the IHRL.

First, the ACHR remains subsidiary in its character (and therefore not subordinate to the Constitutions) as long as it complements rather than substitutes for domestic law, but is directly enforceable within the domestic legal system. Second, the jurisdiction of the IACtHR is subsidiary, meaning that the protection of rights is first reserved to the states. Then, it follows that, the definition of conventionality control would be defined and specified for either case.

As the ACHR is immediately applicable and complementary to constitutional provisions, it cannot be concluded that it will be used only to fill the gaps. So, in what terms does the treaty-based convention test apply? If by conventionality control, it is meant that the application of the ACHR remains subsidiary, then such a control would not be subsidiary but necessary and mandatory.

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<sup>82</sup> In this regard, a judge of the province of San Martin decided to turn away from the doctrine established in the P.E.M.M. ruling and to declare founded the appellant's request, based on the IACtHR's criteria. That judge argued that P.E.M.M. judgment contravenes the interpretations of the IACtHR to which the Peruvian State is bound. (Corte Superior de Justicia de San Martin [Civil Court of the province of San Martin], Aug. 12, 2014, Exp. No. 03-2012-O-2208-JR-CI-0, Sentencia No. 150-2014, 2.2 (Peru); Tribunal Constitucional [Constitutional Court], Oct. 21, 2016, Exp. N° 06040-2015-PA/TC, <http://laley.pe/not/4742/juez-civil-de-arequipa-ordena-registro-de-cambio-de-sexo-de-mujer-a-varon/> (Peru)).

<sup>83</sup> Jaime Uriel Torres Hernández, *El control difuso de convencionalidad y su naturaleza subsidiaria o complementaria para optimizar el sistema jurídico mexicano* [Conventionality Control and Its Subsidiary Nature to Improve the Mexican Legal System], 5 YEARS OF ACADEMIC DAYS IN MICHOACÁN. A CURRENT LEGAL VIEW, 2013, at 1, 135-51.

Conversely, if control of conventionality is understood as the applying of IACtHR jurisprudence, this control is subsidiary and complementary. This is because the jurisdiction and nature of this court is subsidiary and states or persons do not necessarily have to come before such a court in all cases, nor is its doctrine imperative. That is not to say that on some occasions the Peruvian State, although outside the proceeding, can or should turn to the Court's interpretation, which in any case would be subject to the most favorable interpretation of a specific right.

As indicated below, the assumption that conventionality control by the IACtHR is subsidiary, its control by internal judges is paramount and necessary insofar as the treaty is applied *ipso facto*, accompanied by a complementary interpretation of the IACtHR. Nevertheless, would this truly operate as a conventionality control?

It has been said that the obligation of domestic courts to ensure a full protection of conventional rights essentially comes from the rights themselves and from the fact that the ACHR is part of the 'constitutionality block'. It is also an obligation assumed by both Latin American states, emphasizing that its ratification is prior to the creation of the so-called conventionality control.<sup>84</sup>

To apply the ACHR as part of the control of constitutionality and to separate such application from other constitutional provisions on fundamental rights, and to propitiate a parallel control called 'conventionality assessment', promotes isolated and even contradictory interpretations that cause domestic provisions to be unnecessarily subjected to double control. This provokes a conflict between the two sources of human rights protection and goes so far as to impose the superiority of one over the other.

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<sup>84</sup> Nestor Pedro Sagüés, *supra* note 69, at 131-32 (If what is intended with the control of conventionality is to reinforce the application of the ACHR, the intrinsic content of IACtHR rulings is an important element, as Professor Sagüés states. Therefore, if the interpretations that the IACtHR makes are correct and have a convincing dose of legitimacy, the axiological weight of such exegesis will provoke acceptance and consensus. Conversely, if such interpretations give rise to disagreement and questioning, either because of their legal defects, or because of a possible ideological manipulation of human rights law or because they ignore the reality's possibilities and limits, such parameters will weak the conventionality control that the Court by itself foments).

Furthermore, the term ‘conventionality control’ is grammatically similar to the term control of constitutionality, which may produce confusion, making the understanding of its characteristics more difficult. As is known, the control of constitutionality refers to a formal criterion of hierarchy that is constitutionally material or substantial with respect to other provisions. Unfortunately, it is not possible to attribute such a position regarding legal systems to the ACHR, because it does not have a formal nor material overlap that makes it a criterion of validity for domestic provisions.

In that regard, it is necessary to consider the risks involved in imposing application of the ACHR and IACtHR decisions on national judges to exert a ‘super constitutional control’ of sorts. For this reason, although the role of this treaty and the resulting jurisprudence is valuable, it is even more useful if the conventionality control is not removed from the constitutional context that should protect it and correspond to its implementation. Otherwise, examining it objectively may render its application more questionable and unsuccessful.

Consequently, it seems necessary, from the IHRL perspective, to redefine the conventionality control by specifying its limits and effects based on the Convention. It is also essential that domestic judges contextualize the application of this control<sup>85</sup> and adequately define its scope when courts appeal to any ACHR and IACtHR judgments.

To accomplish this, it is critically important for states and the Inter American Human Rights System to recognize that IACtHR jurisprudence

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<sup>85</sup> Burgorgue-Larsen indicates that the keys to understanding the jurisprudential policy of the Court are in the eradication of impunity. The Court constructs, in relation to serious violations of human rights, institutional patterns of behavior. These patterns refer both to the circumstances surrounding their commission and to the impunity accompanying such crimes. This context encourages the Court to include in its judgments reflections on such patterns and the most effective formulas for curbing obstacles to the investigation and punishment of crimes. It is then in impunity issues where conventionality control have spread more forcefully and effectively in the region. The question is whether such control can be extended to other human rights contained in the Convention. Cf. Laurence Burgorgue-Larsen, *The context, techniques and consequences of the American Convention of Human Rights’ interpretation*, 12 (1) ESTUDIOS CONSTITUCIONALES, 2014, at 105; Laurence Burgorgue-Larsen, *The eradication of impunity: Keys to decipher the jurisprudential policy of the Inter-American Court of Human Rights*, 9 INSTITUTO DE DERECHO EUROPEO E INTEGRACIÓN REGIONAL (IDEIR) Universidad Complutense, Madrid, 2011, at 1, at <https://www.ucm.es/data/cont/docs/595-2013-11-07-la%20erradicaci%C3%B3n%20de%20la%20impunidad.pdf>.

is not 'the parameter'. The parameter is the normative and interpretative option that favors the human person. On this basis, provisions and interpretations will be determined by what is materially adjusted or corresponds to the spirit of the Convention. This approach will be meaningless unless the meaning and scope of the *pro homine* principle is intended<sup>86</sup> and understood as analyzed in the following section.

#### V. A CLOSE-UP, ALTERNATIVE LOOK AT THE *PRO HOMINE* PRINCIPLE

The *pro homine* principle is a fundamental criterion [that] upholds the nature of human rights in a way that extensively interprets the rules that consecrate or expand them and restricts the ones limit or restrict human rights. In this way, the principle *pro person* concludes that the immediate and unconditional enforceability of human rights is the rule and conditioning the exception.<sup>87</sup>

Among a wide range of definitions on the *pro homine* principle,<sup>88</sup> the most frequently used is that formulated by Professor Monica Pinto, for whom this principle is a hermeneutical criterion that informs all human rights law. According to this principle, one must resort to the broader norm or to the more extensive interpretation when it comes to recognizing protected rights and, conversely, one must resort to more

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<sup>86</sup> As criticized by Alejandro Rodiles, the *pro homine* principle would be labelled as intuitive and tautological because 'it is the object and purpose of every human rights treaty to grant the broadest possible protection to each of the rights it contains, and that everything else would run counter to their very normative function'. The expert contests that '[t]he limits of this principle become apparent when human rights of different individuals have to be balanced'. Aust, Rodiles and Staubach, *Unity or Uniformity? Domestic Courts and Treaty Interpretation*, 27 (1) LEIDEN J. INT'L LAW, 75, 97 (2014).

<sup>87</sup> Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/85, Inter-Am. Ct. H.R. (ser. A), No. 7, ¶ 36 (Aug. 29, 1986) (Isolated opinion from Judge Rodolfo E. Piza Escalante, in Inter American Court on Human Rights).

<sup>88</sup> Cf. Zlata Drnas de Clément, *La complejidad del principio pro homine* [The complexity of the pro homine principle], 2015-I, fascículo n. 12 JA, Buenos Aires 98, 101-102 (2015) (Drnas de Clément has made a synthesis of the different denominations attributed to this principle. It is known as: underlying norm, norm "not stated", rule of preference-predominance, a vector that gives meaning and hierarchy to the normative system, a crystallizing pole of public order in the field of human rights, a rule of objective justice, a point of support for the formation of a transnational ius commune, an amalgamating rule of domestic and international law rights, the basis of a new ius gentium).

restricted norms or interpretations when establishing permanent restrictions on the exercise of rights or their extraordinary suspension.

Therefore, this principle is consistent with the fundamental objective of human rights law, i.e., to always favor man.<sup>89</sup> That definition gives us key elements to define substantial content.

It must be clarified that one must avoid falling into the trap of interpreting a norm as broadly as possible, which results in the conception of rights as unlimited freedoms in permanent expansion. This, in many cases, has been the IACtHR *pro homines* assessment. To understand the protection "as broad as possible" as one with the least limitations, would implicitly accept the conflicting rights thesis<sup>90</sup> which results in a tangible application of *pro homine*. That is, if rights were unlimited freedoms, it would lead to conflicting interests and incompatibility of rights. Consequently, Courts would protect some and arbitrarily sacrifice or limit others (because rights would inherently have no limitations).<sup>91</sup> In that context, acting in favor of the person would be acting in favor of only certain rights and certain persons.<sup>92</sup>

On the other hand, another way to define and apply this principle is to choose a more restricted interpretation when restrictions to human rights are established.

In that context, if rights were indeterminate freedoms, the application of *pro homine* would affect human rights minimally, and the judge, who could arbitrarily decide what is favorable, would always impose those restrictions. There would be no objectively restrictive

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<sup>89</sup> Mónica Pinto, *El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos* [The pro homine principle. Criteria of hermeneutics and guidelines for the regulation of human rights] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, 1997, at 163, 163.

<sup>90</sup> Pedro Serna & Fernando Toller, *La interpretación constitucional de los derechos fundamentales: una alternativa a los conflictos de derechos* [The constitutional interpretation of fundamental rights: An alternative to conflicts of rights], 20 (2000).

<sup>91</sup> Cf. Fernando M. Toller, *Metodologías para tomar decisiones en litigios y procesos legislativos sobre derechos fundamentales* [Methodology to make decisions in litigation and legislative processes on fundamental rights, I Treaty of Constitutional Rights, 108, 115 (2014) (called 'Legal Darwinism of Rights').

<sup>92</sup> Cf. Zlata Drnas de Clément, *supra* note 88 at 105 (As Drnas De Clément points out, this principle is enforceable and unconditional. The system itself requires a permanent disposition to the perception of the whole system in favor of the person, without admitting exceptions. It acts as a starting point in legal reasoning and as a final assessment in legislative, administrative and judicial pronouncements).

delimitations or interpretations because those rights would not have any limits. Again, if this were the ultimate interpretation of *pro homine*, it would favor the “collective” rights, which is the same as acting in favor of none. On the contrary, this principle –also called ‘pro persona’–refers to individuals.

As a result, to apply this principle and to opt for the broadest interpretation means not only to avoid restricting or harming the very content of the right, but also not to tighten the parameters of those rights that are already legally protected<sup>93</sup>. In other words, *pro homine* is not a principle of unlimited maximization, but actually, the hermeneutic criterion of maximum enjoyment of a right according to its inherent protection.<sup>94</sup>

However, if we resort to the *pro homine* principle to interpret and determine the right content in a specific case, how can we verify that this principle will not go beyond the scope of that content? Alternatively, if this principle seeks not to restrict, harm or limit a particular right, how can we explain that this principle does not trample the judicially protected ‘limits’ of that right?

This principle acts in favor of those who hold a particular right in specific circumstances. This does not mean to favor one right in detriment of another, but to acknowledge that there may be only one existing right in a case while there is no case for the other. Another option is the presence of elements of various rights, which is different from arguing that the alleged rights are present, but due to a wider protection the content of some of them will be indefinitely extended and the rest will be sacrificed.

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<sup>93</sup> Tomás De Domingo & Antonio-Luis Martínez-Pujalte, *La interpretación de la garantía del contenido esencial y la estructura de los derechos fundamentales* [The Interpretation of the Guarantee of the Essential Content and Structure of Fundamental Rights] *LOS DERECHOS FUNDAMENTALES EN EL SISTEMA CONSTITUCIONAL: TEORÍA GENERAL E IMPLICACIONES PRÁCTICAS*, 78 (2010).

<sup>94</sup> Yota Negishi, *The Pro Homine Principle’s Role in Regulating the Relationship between Conventionality Control and Constitutionality Control*, 28 *EUR. J. INT’L LAW* 457, 473 (2017) (Negishi argues that the *pro homine* principle has a double function to offensively pierce or defensively safeguard the boundary between international and domestic legal orders. In other words, the *pro homine* principle may have two aspects: the offensive function as a sword to penetrate the border between international and national legal orders and the defensive function as a shield to preserve constitutional principles and values).



As noted above, our proposal aims to question what has been commonly understood and applied as *pro homine*, especially by the IACtHR. In this sense, a wider and less restrictive protection does not always guarantee a more effective, favorable and concrete protection. A common mistake is that through such extension, any variety of pretensions –without an intrinsic connection regarding the good that should be protected– are recognized as part of a right. Consequently, an authentic representation of the respective right is restricted or limited.<sup>95</sup>

In addition, if the broader interpretation avoids the restriction or limitation of rights, it must be clarified that it is only possible to restrict that which is part of the right's usual scope. Nothing outside of that space is a right that can be restricted or sanctioned. For fear of resulting in an abuse for being outside its regular or harmonic display with other rights, and with the rest of people who are holders of other rights.<sup>96</sup>

Then, the application of *pro homine* applied broadly cannot protect what is impossible to restrict because it is not an authentic right. In fact, the right would be blurred with an excessively 'broad' content but its concrete manifestation would give it a harmful meaning to the juridical good which it aims to protect.

In short, it is seriously questionable to identify the *pro homine* principle as a principle under which content of rights are allowed to endlessly expand. Judges would be constantly asking what the limit of a

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<sup>95</sup> Cf. Zlata Drnas de Clément, *supra* note 90 at 109; Cf. Alma Bahena Villalobos, *El Principio pro persona en el estado constitucional y democrático de derecho* [Pro homine principle in a constitutional and democratic state of law], 4(7) CIENCIA JURIDICA 7, 16 (2015); *Id.* at 109 (In this sense, "To favor the human person" cannot be understood in a simplistic manner such as "protecting the victim", ignoring the positive law and without considering that protection also has to be pondered in the organized social group that is founded in and oriented towards the common good. That is, the man as an individual and in his or her social group, establishing a concordance between the human rights of one person with the rights of every human being). Cf. Alma Bahena Villalobos, at 16 (In some verdicts and in part of the doctrine it has been mentioned that best protection of the human person is referred as the "victim individual"). Cf. Zrnas Drnas de Clément, *supra* note at 109 (Such perception however is not coherent with the object and the purpose of the protection of human rights. The beneficiary of the application of the principle is the "human being").

<sup>96</sup> Interview by Tania Elías with Fernando M. Toller, Professor of Law, Austral University Law School in Buenos Aires, Arg. (July 12, 2016), <http://udep.edu.pe/hoy/2016/cuando-la-libertadde-expresion-es-utilizada-para-calumniar-no-es-propriadamente-un-derecho/>).

broad interpretation or the limit of the favorable would be or how it would be identified or who would determine it.<sup>97</sup>

As shown above, the difficulty of maximizing the content of a right without invading the scope of another right<sup>98</sup> may lead to the conclusion there is no broad interpretation that can be objectively unlimited and at the same time favorable to the human person. On the contrary, the *pro homine* interpreted broadly, demands respect for the inherent parameters of those rights. *In other words, applying the principle from the essential content of the rights, from which it is possible to concretely favor, in sense of justice, the holder in a particular case.*

Now, what does “essential content” entail? Let us analyze the meaning of ‘in favor of the person’ from the inherent nature of those rights.

First, it is necessary to define the term ‘man’ and how it is beneficial to him. While it is true that purpose implies a Ius Philosophical clarification of the reality of the human person,<sup>99</sup> it is necessary to clarify that this outlook is not an exhaustive anthropological-philosophical reflection. Nonetheless, it is indispensable that we turn back to human reality, the matrix of this principle, in which the centrality of the dignity of the human being is condensed and reaffirmed. Accordingly, the teleological content of those rights qualified as ‘human’ is rooted in human dignity.

The first step is an overview of anthropological elements of dignity flowing from the human being, in which an incommensurable

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<sup>97</sup> Zrnas Drnas de Clément, *The Complexity of the Pro Homine Principle*, cit., 109 (As pointed out by Zrnas, the evolution, progressivity, and the impossibility to regress infinitely the *pro homine* in a lineal manner is logically unsustainable, since it would imply the derogation of all the rights and it would turn into an only norm with no structural context. All teleological interpretation of the particular rights must take into account the optimization of the social and juridical harmony of the area in which it is applied).

<sup>98</sup> This is appreciated, for example, at the moment of expanding the borders of the actions that are included in the material content of the freedom of speech, in which there is an area to pronounce oneself regarding what we do not agree and even to accuse. However, when we start to use expressions that might turn out to be injurious or harming, this would be a threat to the formal content of the right to honor.

<sup>99</sup> Luis Castillo Córdova, *Los Derechos Constitucionales. Elementos para teoría general* [The Constitutional Rights. Elements for a general theory] 51 (Palestra, 3rd ed., 2007).

dignity consubstantial to the very human nature, that is, an ontological dignity is revealed. From a teleological and deontological standpoint, humankind is called to utilize certain goods responsibly by virtue of a duty to obtain such goods and to respect those of others.<sup>100</sup>

In this sense, if dignity is part of the identity of a person and the *pro homine* disposes to act in favor of it, this principle implies a reversion to that identity.<sup>101</sup> The *pro homine* principle is necessarily linked to such a reality, where the *pro homine's* application will also be related to those goods. That means that acting in favor of the person is to proceed in favor of the full realization of all and every one of those goods rooted in dignity are the ones that promote their complete development.

Additionally, because those goods are complimentary, acting in favor of them implies the preservation of that harmony in every moment. This is the highest objective of the *pro homine* principle, which requires the acknowledgment of a unitary and harmonic reality shaped by basic human goods, and the action in favor of that reality chooses the interpretation that does not harm those goods so that they are concretely protected.<sup>102</sup>

#### VI. CRITERIA TO CONSIDER IN A PROPOSAL FOR A PROPER APPLICATION OF THE *PRO HOMINE*

First, the *pro homine* principle offers a new perspective on the exercise of conventionality control. When this principle is applied from the complementarity of rights, the rights in dispute are neither confused with the provisions that regulate them nor with the norms that derive from them. So, when such dispositions and norms are or seem conflicting

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<sup>100</sup> Cf. José Chávez-Fernández Postigo, *La dignidad como fundamento de los derechos humanos en las sentencias del Tribunal Constitucional peruano: la tensión entre la mera autonomía y la libertad ontológica* [Dignity as a human rights foundation in Peruvian Constitutional Tribunal judgments. The tension between mere autonomy and ontological liberty] 102 (Palestra, 2012).

<sup>101</sup> ARISTOTLE, *NICOMACHEAN ETHICS*, I, 1094a-1103a.

<sup>102</sup> Ana Martha González, *Moral, Razon, y Naturaleza: una investigación sobre Tomás de Aquino* [Moral, Reason and Nature: A research on Thomas Aquinas] 151-52 (Eunsa, 2nd ed., 1998), cited in Juan Cianciardo, *El Ejercicio Regular de Los Derechos: Análisis y Crítica Del Conflictivismo* [The regular exercise of rights: Analysis and criticism of conflictivism] 129 (Editorial Ad Hoc, 2007).

and its effective use gets complicated, it cannot be concluded that the rights are also contradictory.

This means judges should not try to solve the conflict of norms as a conflict of rights, postponing either.

As Professor Castillo indicates, such confrontation can be avoided by verifying whether conventional or constitutional provisions are possible to formulate more than one norm, with at least one norm compatible with, at least, one other norm formulated from another conflicting constitutional or conventional provision in the beginning.<sup>103</sup>

If the provisions and its norms –constitutional or conventional– diametrically oppose each other, then a different situation arises. Where the two conflicting norms refer to the essential content of the same human right, or to the essential content of different human rights, only one norm fits the essential content of the human right(s) in question. In other words, only one of the two norms will favor a greater and fuller realization of the person.

Strictly speaking, because they are opposites, one will favor the full realization of the person and the other will actually foster the opposite. In consequence, only one of the two norms will be judicially valid.<sup>104</sup> The same is applicable when an irreconcilable contradiction arises between the dissimilar interpretations done by domestic and Inter-American judges. This means that at least one of the interpretations does not fit with the substratum of the protected right and would not be materially constitutional or conventional.

In addition, the rights' content is ultimately defined only in a particular case, and it is only in this context that an effective and specifically favorable protection can be provided. The binding authority of IACtHR case law cannot establish the existence of 'standard criteria' that states must mandatorily comply to.<sup>105</sup> Instead, the states are first to

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<sup>103</sup> Cf. Luis Castillo Córdova, *La relación entre los ámbitos normativos internacional y nacional sobre Derechos Humanos*. [The relation between national and international normative spheres of human rights], 10(2) ESTUDIOS CONSTITUCIONALES 231, 259 (2012).

<sup>104</sup> Cf. Luis Castillo Córdova, *supra* note 99 at 271.

<sup>105</sup> Robert Spano, *Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487, 493 (2014); Federico Fabbrini, *Fundamental Rights in Europe: Challenges*

determine the most favorable protection of rights. This suits the subsidiarity principle and the Inter American System's role, especially if we take into account each State where rights are held, exerted, made accessible and concretely enjoyed.<sup>106</sup> The protection that the IHRL grants to fundamental rights is for their enjoyment inside and not outside of the State.<sup>107</sup>

Consequently, the provision contained in article 29 of the ACHR is first addressed to the states, because they are the first ones who are compelled to constantly interpret the Convention regarding those points that have not been addressed by the IACtHR. This court only interprets it according to its judicial competence, in the cases that are brought before it.<sup>108</sup>

Nevertheless, the primary interpretation that corresponds to States according to the substantive content of ACHR should not be confused with the supervisory power that corresponds to international human rights bodies. In reference to international obligations, noncompliance and state's subsequent international responsibility to repair, states cannot assume the function to observe and verify the noncompliance, replacing international jurisdiction.<sup>109</sup>

Besides, the new *pro homine* approach agrees to some extent with the methodology of harmonizing interpretation of rights<sup>110</sup>, but as a meta

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and Transformations in Comparative Perspective, OXFORD STUDIES IN EUROPEAN LAW 35-44 (Oxford University Press, 2014).

<sup>106</sup> Cf. German Bidart Campos, *Teoría general de los derechos humanos* [General theory of human rights], 118 (Astrea, 1991).

<sup>107</sup> Cf. *Id.* at 119.

<sup>108</sup> André Nollkaemper, *The Duality of Direct Effect of International Law*, 25 EUR. J. INT'L. L. 105, 115-117 (2014).

<sup>109</sup> Cf. Calogero Pizzolo, *La relación entre la Corte Suprema de Justicia y la Corte Interamericana de Derechos Humanos a la luz del Bloque de Constitucionalidad Federal* [The relationship between Supreme Court of Justice and the Inter American Court of Human Rights in the light of federal constitutional block], Susana Albanese, *El Control de Convencionalidad* [The Conventionality Control Doctrine], 197 (Ediar, 2008).

<sup>110</sup> Cf. Fernando M. Toller, *La resolución de los conflictos entre derechos fundamentales. Una metodología de interpretación constitucional alternativa a la jerarquización y el balancing test* [An Alternative Methodology for Constitutional Interpretation and Decision Making and Balancing Test], in Eduardo Ferrer MacGregor, *Constitutional Interpretation*, 1281 (Porrúa, tome II, 2005); See Fernando M. Toller, *supra* note 91 at 179.

criterion,<sup>111</sup> goes further and applies, for example, not only in relation to the substantive rules concerning protected rights, but also in relation to the adjective rules that affect them. In addition, it is a principle recognized nationally and internationally.<sup>112</sup>

It can be assumed that this principle creates a methodological path that derives from the value of human dignity and an understanding of rights as fundamental attributes of the human person, becoming itself an implicit constitutional postulate.<sup>113</sup>

Finally, it is important to consider the core of this principle to not denaturalize it and indirectly transform it into an *ad hominem* argument (against man). Both domestic and international courts at the time of its application should prudently reflect on the social and legal consequences of its decisions. That is, they should serve not only the claimant but also the whole of humanity involved in the case.<sup>114</sup> Otherwise, all efforts to standardize jurisprudence might convert the long awaited "*ius commune*" into an *erga omnes* or systematic violation of various rights.

## CONCLUSION

It can be said that the *pro homine* principle is an appropriate and effective hermeneutical key that facilitates protection nationally and internationally. According to this principle, one must always act in favor of the person, either by applying the norm that does not undermine the contours of the formal content of each right or by choosing the least restrictive interpretation, according to the particular circumstances of each case.

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<sup>111</sup> Zrnas Drnas de Clément, *supra* note 90 at 104.

<sup>112</sup> Valerio De Oliveira Mazzuoli & Dilton Ribeiro, *The Pro Homine Principle as an Enshrined Feature of International Human Rights Law*, 3 *INDON. J. INT'L & COMP. L.* 77, 78 (2016) (It is enshrined as "the backbone of the post-Second World War international law of human rights")

<sup>113</sup> Cf. Gonzalo Aguilar Cavallo & Humberto Nogueira Alcalá, *El principio favor persona en el derecho internacional y en el derecho interno como regla de interpretación y de preferencia normativa* [The Pro Persona Principle in International Law and Domestic Law as an Interpretative and Normative Rule], 84(1) *REVISTA DE DERECHO PÚBLICO* 11, 23 (2016).

<sup>114</sup> Cf. Zrnas Drnas de Clément, *supra* note 90 at 111.

Although *pro homine* has been identified as a broader protection, it is necessary to consider that acting in favor of the person essentially means to address the nature of his or her rights. Thus, attending such reality is the surest route, to act in favor of each person. At the same time, the determination and application of the most favorable interpretation is first in the hands of the states, which does not mean that a proper interpretation cannot be found in the conventional sphere; nor does it obstruct the participation of the IACtHR, as long as it acts within the limits of its intervention.

Finally, IHRL has been incorporated differently into the Peruvian and Chilean legal system and repercussions that each of these processes have had in later situations, namely the reception of conventionality control have been illustrated. While in the Peruvian case, the ICC has been key for the integration of conventional law, the lack of a similar provision in the Chilean case caused long-winded discussions over the hierarchy of IACtHR jurisprudence. In both states, the *pro homine* principle has been key. Nevertheless, if there is a rejection of the reality in which that principle is anchored, little progress may be predicted in providing materially favorable protection to human rights.