

THE INTER-AMERICAN COURT OF  
HUMAN RIGHTS, THE CONTROL OF  
CONVENTIONALITY DOCTRINE AND THE  
NATIONAL JUDICIAL SYSTEMS OF LATIN  
AMERICA

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INTRODUCTION

The Inter-American Court of Human Rights, based in Costa Rica, was created by the American Convention of Human Rights (known also as the Pact of San José of Costa Rica) in 1969, which the United States has signed but not ratified. Its main mission is to judge states in the event that they violate the human rights of their citizens. However, those affected should first use the domestic courts of their own countries. In consequence, the idea is that the Court has a subsidiary role. The Court steps in if national authorities do not exist, err, or even if they rule correctly, but the parties concerned are not satisfied.<sup>1</sup>

After exhausting domestic remedies, concerned parties may appeal to the Inter-American Commission of Human Rights, based in Washington D.C. This Commission investigates the facts, and if it considers that the applicants are right, tries to reach an agreement with

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<sup>1</sup> Sergio García Ramírez, *Admisión de la competencia contenciosa de la Corte Interamericana de Derechos Humanos*, in RECEPCIÓN NACIONAL DEL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS Y ADMISIÓN DE LA COMPETENCIA DE LA CORTE INTERAMERICANA, at 27-30 (Sergio García Ramírez & Mireya Castañeda Hernández, Universidad Nacional Autónoma de México, 2008). See also Manuel Núñez Poblete, *Sobre la doctrina del margen de apreciación nacional. La experiencia latinoamericana confrontada y el thelos constitucional de una técnica de adjudicación del DIDH*, in EL MARGEN DE APRECIACIÓN EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: PROYECCIONES REGIONALES Y NACIONALES, at 43-44 (Acosta Alvarado et al., Universidad Nacional Autónoma de México, 2012); Alfonso Santiago, *El Derecho Internacional de los Derechos Humanos: posibilidades, problemas y riesgos de un nuevo paradigma jurídico*, in 60 PERSONA Y DERECHO 91, 118-119.

the transgressor state in order to repair the damage and compensate the victims. If this is not possible, it sues that country before the Court, because the victims cannot do so themselves.<sup>2</sup>

In its almost thirty years of existence, the Court has issued rulings in just over 200 cases,<sup>3</sup> and through its jurisprudence has been developing the content of the rights established in the American Convention and other treaties of the Inter-American System. However, it is very important to note that this labor has been done by an “evolutionary,”<sup>4</sup> “dynamic,”<sup>5</sup> “progressive,”<sup>6</sup> “finalist,”<sup>7</sup> and “systematic”<sup>8</sup> interpretation of these

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<sup>2</sup> Felipe González Morales, *La Comisión Interamericana de Derechos Humanos: antecedentes, funciones y otros aspectos*, in 5 ANUARIO DE DERECHOS HUMANOS, at 35-57 (2009).

<sup>3</sup> *Decisions and Judgments*, INTER-AM. CT. H.R.,

[http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda\\_casos\\_contenciosos.cfm?lang=en](http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en) (last visited Feb. 22, 2017).

<sup>4</sup> Liliana Galdámez Zelada, *Protección de la víctima, cuatro criterios de la Corte Interamericana de Derechos Humanos: interpretación evolutiva, ampliación del concepto de víctima, daño al proyecto de vida y reparaciones*, REVISTA CHILENA DE DERECHO, vol. 34, no. 3, at 442-54 (2007); Antonio Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el siglo XXI*, JURIDICA DE CHILE, at 27, 40 & 168-169 (2006).

<sup>5</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 115 (Oct. 1, 1999). See Ariel Dulitzky, *El impacto del control de convencionalidad. ¿Un cambio de paradigma en el sistema interamericano de derechos humanos?*, in TRATADO DE LOS DERECHOS CONSTITUCIONALES, at 553-54 (José Sebastián Elías et al., 1<sup>st</sup> ed., 2014); Humberto Nogueira Alcalá, *El uso del derecho y jurisprudencia constitucional extranjera de tribunales internacionales no vinculantes por el Tribunal Constitucional chileno en el período 2006-2011*, ESTUDIOS CONSTITUCIONALES, vol. 11, no. 1, at 264 (2013); Humberto Nogueira Alcalá, *Diálogo interjurisdiccional y control de convencionalidad entre los tribunales nacionales y la Corte Interamericana de Derechos Humanos en Chile*, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO, vol. 19, at 521 (2013).

<sup>6</sup> Poblete, *supra* note 1, at 29; see also Humberto N. Alcalá, *Diálogo Interjurisdiccional, Control de Convencionalidad y Jurisprudencia del Tribunal Constitucional en el Período 2006-2011*, ESTUDIOS CONSTITUCIONALES, vol. 10 no. 2, at 69, 82 (2015); José Orozco, *Los Derechos Humanos Y El Nuevo Artículo 1º Constitucional*, IUS: REVISTA DEL INSTITUTO DE CIENCIAS JURÍDICAS DE PUEBLA, n. 28, 93-94 (2011).

<sup>7</sup> Alcalá, *supra* note 6, at 82; Manuel N. Poblete, *Principios Metodológicos para la Evaluación de Los Acuerdos Aprobatorios de Los Tratados Internacionales de Derechos Humanos y de las Leyes de Ejecución de Obligaciones Internacionales en la Misma Materia*, HEMICILO: REVISTA DE ESTUDIOS PARLAMENTARIOS, vol. 2 no. 4, at 54 (2011); Trindade, *supra* note 4.

<sup>8</sup> Luis D. Vásquez & Sandra Serrano, *Los Principios de Universalidad, Interdependencia, Indivisibilidad y Progresividad. Apuntes Para su Aplicación Práctica*, in LA REFORMA CONSTITUCIONAL EN DERECHOS HUMANOS: UN NUEVO PARADIGMA, at 151-155 (Carbonell & Salazar, ed. III, Universidad Nacional Autónoma de México, 2011); Karlos C. Juárez, *Un Nuevo Panorama Constitucional para el Derecho*

treaties. The Court has also applied the “*pro homine*” or “*pro persona*”<sup>9</sup> principle. This principle allows the Court to use the most favorable regulations for the victims. That’s the reason why it has based its decisions on agreements foreign to the Inter-American system. These other provisions have been taken from universal human rights treaties, judgments of the European Court of Human Rights, judgments and laws of other countries, and even international *soft law* (declarations, principles, recommendations, directives, reports, etc.).<sup>10</sup> Consequently, in many cases, a country can be condemned by rules or provisions that it has not accepted as binding upon it.

What all this has done is that over the years the Court has been modifying the treaties as originally signed by States, either by extending the interpretation of the rights enshrined in them, or by establishing “implicit”<sup>11</sup> rights; even going against their wording.<sup>12</sup> Consequently, the

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*Internacional de los Derechos Humanos en México*, ESTUDIOS CONSTITUCIONALES, vol. 9 no. 2, at 154-157 (2011).

<sup>9</sup> Álvaro F. Villarreal, *El Principio Pro Homine: Interpretación Extensiva Vs El Consentimiento Del Estado*, INTERNATIONAL LAW: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL, no. 5, at 337-380 (2005); Eduardo F. Mac-Gregor, *Interpretación Conforme y Control Difuso de Convencionalidad, el Nuevo Paradigma para el Juez Mexicano*, in DERECHOS HUMANOS: UN NUEVO MODELO CONSTITUCIONAL, at 340-358, 361-366 & 387-390 (Carbonell & Salazar, Universidad Nacional Autónoma de México, 2011); José L. Ochoa, *La cláusula de interpretación conforme y el principio pro persona (art. 1º segundo párrafo de la Constitución)*, in LA REFORMA CONSTITUCIONAL DE DERECHOS HUMANOS: UN NUEVO PARADIGMA, at 132-133 (Carbonell & Salazar, Universidad Nacional Autónoma de México, 2011).

<sup>10</sup> “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct H.R. (ser. A) No. 1, ¶ 42 (Sept. 24, 1982); *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct H.R. (ser. A) No. 16, ¶ 115 (Oct. 1, 1999); see also Dulitzky, *supra* note 5, at 550; Mac-Gregor, *supra* note 9, at 340, 365, 391-392, 394; Sergio G. Ramírez, *El control judicial interno de convencionalidad*, IUS: REVISTA DEL INSTITUTO DE CIENCIAS JURÍDICAS DE PUEBLA, no. 28, at 134-135, 137-138 (2011); Juan C. Hitters, *¿Son Vinculantes los Pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos? (Control de Constitucionalidad y Convencionalidad)*, in REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL, no.10, at 137-141, 148-150 (Mac-Gregor, 2008); Néstor P. Sagüés, *Obligaciones Internacionales y Control de Convencionalidad*, ESTUDIOS CONSTITUCIONALES, vol. 8 no. 1, at 125-126 (2010).

<sup>11</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 89-93 & 161-78 (Feb. 24, 2012).

<sup>12</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, ¶ 179-83, 186-89 & 264 (Nov. 28, 2012).

treaties of the Inter-American System do not compel what they establish, but what the Court interprets.<sup>13</sup>

It is worth noting that almost every country that has granted powers to the Inter-American Court belongs to the legal tradition of the “continental system” – different from the common law, and influenced especially by French law. According to *modus operandi*, it is considered that the statutes passed by the legislature, the Constitution, and international treaties prevail over judge-made law. For this reason, the judge must submit to these authorities, being a simple enforcer, in order not to contradict the democratic will that gave rise to the Court. Even though exaggerated and unreal, this judicial role was summed up by Montesquieu, noting that the judge was “the mouth that pronounces the words of the law.”<sup>14</sup> Because the judge should not create law, a judicial interpretation that departs from the verdict of the law is often seen with suspicion in continental law. In the case of the Inter-American Court, this is even worse due to its aforementioned interpretation of human rights treaties as evolutionary, dynamic, progressive, finalist, and systematic.

On the other hand, in common law countries that are also part of the Inter-American system, it is understood that international rules of treaty interpretation prohibit *ultra vires* interpretations, that is, those that exceed the interpretative powers granted to an international tribunal by the treaty that regulates it. Thus, by creating new rights not originally contemplated in the treaty by means of an interpretation, which in practice amends it, the Inter-American Court could fall into judicial activism, also called “judicial legislation,” even though the power to legislate belongs only to the legislature according to the basic principle of separation of powers of democratic government.

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<sup>13</sup> Juan Carlos Hitters, *Un avance en el control de convencionalidad. (El efecto ‘erga omnes’ de las sentencias de la Corte Interamericana)*, ESTUDIOS CONSTITUCIONALES, vol.11, no. 2, at 709 (2013); see also Alcalá, *supra* note 6, at 70-72; Néstor Pedro Sagüés, *El ‘control de convencionalidad’ en el sistema interamericano y sus anticipos en el ámbito de los derechos económico-sociales. Concordancias y diferencias con el sistema europeo*, UNAM, <https://archivos.juridicas.unam.mx/www/bjv/libros/7/3063/16.pdf> (last visited Mar. 27, 2014).

<sup>14</sup> CHARLES DE MONTESQUIEU, MONTESQUIEU: THE SPIRIT OF THE LAWS 163 (Anne M. Cohler et al. eds., 1989).

Despite its good intentions, in my opinion, this constitutes a change in the game rules to which States committed originally, exceeding the competencies of this international tribunal. Moreover, this broad freedom to interpret treaties has caused the Court to change its own competencies. This means that it has attributed to itself a set of powers that States have not given it, exacerbating the above problem. One of the issues generating most discussion today is the so-called “control of conventionality” doctrine.<sup>15</sup>

#### I. THE CONTROL OF CONVENTIONALITY DOCTRINE

The control of conventionality is the comparison that the Court applies itself<sup>16</sup> and also orders national judges to do,<sup>17</sup> between the American Convention of Human Rights as interpreted by it, and the internal laws of each country, in order to prioritize international

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<sup>15</sup> Miguel Carbonell, *Introducción general al control de convencionalidad*, UNAM, <https://archivos.juridicas.unam.mx/www/bjv/libros/7/3271/11.pdf> (last visited May 14, 2014); *see also*, Ramírez, *supra* note 10, at 123-59; Juan Carlos Hitters, *Control de constitucionalidad y control de convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos)*, ESTUDIOS CONSTITUCIONALES, vol.7, no. 2, at 109-28 (2009); Juan Carlos Hitters, *Control de convencionalidad (adelantos y retrocesos)*, ESTUDIOS CONSTITUCIONALES, vol.13, no. 1, at 125-62 (2015); Humberto Nogueira Alcalá, *El control de convencionalidad por los Estados parte de la Convención Americana sobre Derechos Humanos y tribunales chilenos*, BOLETÍN MEXICANO DE DERECHO COMPARADO [BMDC], vol. 45, no. 135, at 1167-1220 (Sept. 26, 2011); Sagüés, *supra* note 10, at 117-36.

<sup>16</sup> Christina Binder, *¿Hacia una Corte Constitucional de América Latina? La jurisprudencia de la Corte Interamericana de Derechos Humanos con un enfoque especial sobre las amnistías*, UNAM, <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2895/8.pdf> (2010); *La justicia constitucional y su internacionalización. ¿Hacia un ius constitutuonale commune en América Latina?*, UNAM, vol. 2 (Armin von Bogdandy et al. eds., 2010); MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, <http://www.mpil.de/de/pub/aktuelles.cfm>; INSTITUTO IBEROAMERICANO DE DERECHO CONSTITUCIONAL, <http://historico.juridicas.unam.mx/iidc/>; Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad...*, *supra* note 9, at 368-70; Hitters, *supra* note 14, at 110-12 & 118-19.

<sup>17</sup> Ramírez, *supra* note 10, at 124-131; Eduardo F. Mac-Gregor, *Control de Convencionalidad (Sede Interna)*, in *DICCIONARIO DE DERECHO PROCESAL CONSTITUCIONAL Y CONVENCIONAL: INSTITUTO DE INVESTIGACIONES JURÍDICAS*, at 236-40 (Mac-Gregor et al., 2d ed., Universidad Nacional Autónoma de México, 2014); Hitters, *supra* note 14, at 110-19.

provisions over national laws, unless the latter grant better protection than international provisions, by virtue of the *pro homine* principle.<sup>18</sup>

Accordingly, the Court is not content with just making this comparison itself, but it also purports to give direct orders to national judges to do the same, almost as if they were state representatives.<sup>19</sup> The great question on this issue is whether an international court may grant powers directly to domestic judges. That's why its creator, Judge Garcia Ramirez, has compared the control of conventionality with constitutional control. As he notes in this regard:

*"It has been said that the mission of the international tribunal as a 'controlling subject' is similar, in certain essential respects, to that of a national constitutional tribunal, called upon to pass on the 'constitutional quality' of the act of a domestic authority, taking as a point of reference the text of the supreme internal norm and its interpretation by the constitutional organ."*<sup>20</sup>

It is necessary to insist that control of conventionality is not established in the American Convention, but has emerged thanks to the jurisprudence of the Court.<sup>21</sup> Its remote origin lies in several minority

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<sup>18</sup> Hitters, *supra* note 13, at 708-09; Eduardo F. Mac-Gregor, *Eficacia de la Sentencia Interamericana y la Cosa Juzgada Internacional: Vinculación Directa Hacia Las Partes (Res Judicata) E Indirecta Hacia los Estados Parte de la Convención Americana (Res Interpretata) (Sobre El Cumplimiento del Caso Gelman Vs. Uruguay)*, ESTUDIOS CONSTITUCIONALES, vol. 11 no. 2, at 676 (2013); Ramírez, *supra* note 10, at 133-39.

<sup>19</sup> Néstor P. Sagüés, *El 'Control De Convencionalidad', en Particular Sobre las Constituciones Nacionales*, LA LEY (2009), at 2, [http://www.joseperezcorti.com.ar/Archivos/DC/Articulos/Sagues\\_Control\\_de\\_Convencionalidad\\_LL\\_2009.pdf](http://www.joseperezcorti.com.ar/Archivos/DC/Articulos/Sagues_Control_de_Convencionalidad_LL_2009.pdf); Mora Méndez & Jorge Andrés, *El Control de Convencionalidad: Un Replanteamiento de Principios y Fuentes del Derecho*, REVISTA REPUBLICANA, no. 12, at 228-229 (2012); Alcalá, *supra* note 6, at 64, 127.

<sup>20</sup> Sergio G. Ramírez, *The Relationship Between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*, 5 NOTRE DAME J. INT'L & COMP. L. 116, 139 (2015).

<sup>21</sup> Diego Mejía-Lemos, *On The 'Control De Convencionalidad' Doctrine: A Critical Appraisal of the Inter-American Court of Human Rights' Relevant Case Law*, ANUARIO MEXICANO DE DERECHO INTERNACIONAL, vol. 14, at 136-37 (2014); Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L. J. 46, at 50-52, 54-55 (2015); Ramírez, *supra* note 10, at 144-45; Gonzalo A. Cavallo, *El Control de Convencionalidad de los Derechos. Comentario a la Sentencia Dela Corte Suprema de Chile en el Caso*

opinions of Judge García Ramírez.<sup>22</sup> Nevertheless, the paradigmatic judgment in this regard was *Almonacid Arellano et. al v. Chile*, 2006, which established:

*“124. The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”<sup>23</sup>*

Due its jurisprudential origin, over time the Court has broadened the scope of the control of conventionality in other judgments.<sup>24</sup> Thus, in

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*Denominado Episodio Rudy Cárcamo Ruiz de 24.5.12*, ESTUDIOS CONSTITUCIONALES, vol. 10 no. 2, at 725-27 (2012); Binder, *supra* note 15, at 169, 173.

<sup>22</sup> See Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.101, ¶ 27 (Nov. 25, 2003) (Ramírez, J., concurring); See also Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 3 (Sept. 7, 2004) (Ramírez, J., concurring); López Álvarez v. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 30 (February 1, 2006) (Ramírez, J., concurring); Vargas-Areco v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 6, 7, 12 (Sept. 26, 2006) (Ramírez, J., concurring).

<sup>23</sup> *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006).

<sup>24</sup> Hitters, *supra* note 14, at 125-162; Víctor Bazán, *El Control de Convencionalidad: Incógnitas, Desafíos y Perspectivas*, in JUSTICIA CONSTITUCIONAL Y DERECHOS FUNDAMENTALES. EL CONTROL DE CONVENCIONALIDAD 2011, at 30-31 (Víctor Bazán & Claudio Nash, Universidad de Chile, 2012);

*The Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*, 2006, the Court added:

*“128. When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the effect of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of ‘conventionality’ ex officio between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations.”<sup>25</sup>*

Later, the Court considered that this control of conventionality must also be exercised by other state authorities, including the Executive and the Legislative. As the Court noted in *Cabrera García and Montiel-Flores v. Mexico*, 2010:

*“225 In its case law, this Court has acknowledged that domestic authorities are bound to respect the rule of law, and therefore, they are required to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, all its institutions, including its judges, are also bound by such agreements, which requires them to ensure that all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end. The Judiciary, at all levels, must exercise ex officio a form of ‘conventionality control’ between domestic legal provisions and the American Convention, obviously within the framework of their respective competences*

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Miriam Henríquez Viñas, *La Polisemia del Control de Convencionalidad Interno*, 24 Int'l L: Rev. Colomb. Derecho Int. Bogotá (Colombia) 113, at 123, 131 (2014).

<sup>25</sup> *Aguado - Alfaro et al. v. Peru*, Preliminary Objections, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 128 (Nov. 24, 2006).

*and the corresponding procedural regulations. In this task, the Judiciary must take into account not only the treaty itself, but also the interpretation thereof by the Inter-American Court, which is the ultimate interpreter of the American Convention.”<sup>26</sup>*

Finally, just to mention the principal judgments that have dealt with this matter, the Court considered that conventionality control must also be respected by democratic decisions. As it noted at length in *Gelman v. Uruguay*, 2011:

*“238. 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, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, using methods of direct exercise of democracy, (...) should be considered, as an act attributable to the State that give rise to its international responsibility.*

*239. The bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter. The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the*

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<sup>26</sup> *Cabrera García and Montiel-Flores v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 225 (Nov. 26, 2010).

*majority, that is, to the forum of the 'possible to be decided' by the majorities in the democratic instance, those who should also prioritize 'control of conformity with the Convention' (...), which is a function and task of any public authority and not only the Judicial Branch."*<sup>27</sup>

So far, the kind of conventionality control that has had more influence on the countries of the American subcontinent, and which has been more discussed, is the control that the court orders national judges to apply. Furthermore, it should be able to be exercised by all judges in a country (called *diffuse* control of conventionality<sup>28</sup>), judges authorized for control of constitutionality.<sup>29</sup> In addition, there would be an obligation to exercise it *ex officio*, that is, even if the parties do not request its application.<sup>30</sup>

## II. THE POSSIBLE EFFECTS OF THE CONTROL OF CONVENTIONALITY

In theory, the use of this control of conventionality would have two effects. The first possibility is that domestic norms, including national constitutions, could be "reinterpreted" to coincide with the Court's criteria, with which it could significantly alter their genuine sense.<sup>31</sup> The

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<sup>27</sup> Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am Ct. H.R. (ser. C) No. 221, ¶ 238, 239 (Feb. 24, 2011).

<sup>28</sup> García Ramírez, *supra* note 10, at 150-154; Hitters, *supra* note 14, at 123-125; Nogueira Alcalá, *supra* note 13, at 84-87.

<sup>29</sup> Viñas, *supra* note 23, at 124; *see also* Alcalá, *supra* note 6, at 102; Sagüés, *supra* note 18, at 2.

<sup>30</sup> Carbonell, *supra* note 14, at 71-74. *See also* Eduardo Ferrer Mac-Gregor & Carlos Pelayo Möller, *La obligación de 'respetar' y 'garantizar' los derechos humanos a la luz de la jurisprudencia de la Corte Interamericana*, ESTUDIOS CONSTITUCIONALES, vol. 10, no. 2, at 181-82 (2012); Juana Ibáñez Rivas, *Control de convencionalidad: precisiones para su aplicación desde la jurisprudencia de la Corte Interamericana de Derechos Humanos*, ANUARIO DE DERECHOS HUMANOS, vol. 8, at 105-106 (2012); Juan Carlos Hitters, *El control de convencionalidad y el cumplimiento de las sentencias de la Corte Interamericana*, ESTUDIOS CONSTITUCIONALES, vol. 10, no. 2, at 121-25 (2012).

<sup>31</sup> José Caballero Ochoa, *La cláusula de interpretación conforme y el principio pro persona (art. 1º segundo párrafo de la Constitución)*, in LA REFORMA CONSTITUCIONAL DE DERECHOS HUMANOS: UN NUEVO PARADIGMA, *supra* note 9, at 109-12 & 120-22 (Carbonell Sánchez & Salazar Ugarte eds., 2011). *See also* Pablo Contreras, *Control de convencionalidad, deferencia internacional y discreción nacional en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, IUS ET PRAXIS, vol. 20, no. 2, at 237-38, 254, 261 & 263 (2014); Néstor Sagüés, *Las relaciones entre los tribunales internacionales y los tribunales*

second possibility is that, if the national standard is incompatible with these criteria, the national norm becomes “inapplicable,”<sup>32</sup> although the Court has not been clear whether inapplicability means to stop using the internal law or to actually repeal it.

It is necessary to note again that the national norm would not really be contrasted with the American Convention, but with the way that the Court understands it. Thus, the original meaning of this treaty has changed greatly over time, due to the interpretive rules of International Law of Human Rights. Also, the Court claims that national judges should apply conventionality control not only if they belong to a country that has been convicted by a judgment of the Court, but in all States that have signed the American Convention.<sup>33</sup> Indeed, as this court established in monitoring compliance of *Gelman v. Uruguay*, 2013:

*“67. Accordingly, it is possible to identify two distinct manifestations of the State’s obligation to exercise control of conventionality, depending on whether the judgment has been delivered in a case in which the State was a party. This is because the binding effect of the provision of the Convention that is interpreted and applied differs depending on whether or not the State was a material party to the international proceedings.*

*68. With regard to the first manifestation, when an international res judicata judgment exists regarding a State which has been a party in a case submitted to the jurisdiction of the Inter-American*

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*nacionales en materia de derechos humanos. Experiencias en Latinoamérica*, IUS ET PRAXIS, vol. 9, no. 1, at 215-16 (2003).

<sup>32</sup> Gonzalo García Pino, *Preguntas esenciales sobre el control de convencionalidad difuso aplicables a Chile*, in LA PROTECCIÓN DE LOS DERECHOS HUMANOS Y FUNDAMENTALES DE ACUERDO A LA CONSTITUCIÓN Y EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS, at 356 & 359-60 (Humberto Nogueira Alcalá ed., 2014). See also Humberto Nogueira Alcalá, *Diálogo interjurisdiccional y control de convencionalidad entre los tribunales nacionales y la Corte Interamericana de Derechos Humanos en Chile*, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO, *supra* note 5, at 546-47; Dulitzky, *supra* note 20, at 60. See *Gelman v. Uruguay*, Monitoring Compliance with Judgment, Order of the Court, 2013 Rep. Inter-Am. Ct. H.R., “Resolves,” ¶ 12, 84 & 85 (Mar. 20, 2013).

<sup>33</sup> Hitters, *supra* note 13, at 695-710. See also Alcalá, *supra* note 6, at 65 & 83-84; Ramírez, *supra* note 10, at 128-29.

*Court, all its authorities, including judges and the organs responsible for the administration of justice, are also bound by the treaty and the judgments of this Court. This requires them to ensure that the effects of the provisions of the Convention, and therefore the decisions of the Inter-American Court, are not impaired by the application of standards contrary to their object and purpose or by judicial or administrative decisions that make full or partial compliance with the judgment illusory.*

69. *As to the second expression of the exercise of control of conformity with the Convention, in situations and cases in which the State concerned has not been a party to the international proceedings in which certain case law was established, the mere fact of being a Party to the American Convention means that all public authorities and all the organs of State, including the democratic bodies, judges and other organs involved in the administration of justice at all levels, are bound by the treaty. This obliges them to exercise control of conformity with the Convention ex officio, taking into account the treaty itself and its interpretation by the Inter-American Court, within the framework of their respective spheres of competence and of the corresponding procedural rules, either by the enactment and enforcement of laws, as regards their validity and compatibility with the Convention, or through the identification, prosecution and deciding of particular situations and specific cases, bearing in mind the treaty and, as appropriate, the jurisprudential precedents and guidelines of the Inter-American Court.”<sup>34</sup>*

The Court has also indicated in its 2014 advisory opinion “Rights and guarantees of children in the context of migration and/or in need of international protection”:

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<sup>34</sup> Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Court, 2013 Rep. Inter-Am. Ct. H.R., “Resolves,” ¶ 67-69 (Mar. 20, 2013).

*“31. Similarly, the Court finds it necessary to recall that, pursuant to international law, when a State is a party to an international treaty, such as the American Convention on Human Rights, such treaty is binding for all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention, based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is ‘the protection of the fundamental rights of the human being’. Furthermore, the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the Member States of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(l)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9), with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, it can provide guidance when deciding matters relating to children in the context of migration and to avoid possible human rights violations.”<sup>35</sup>*

In other words, because the Court is the official interpreter of the Convention, and this treaty only “speaks” through it, this tribunal considers that any interpretation of the same is amended, and automatically incorporated to the treaty originally signed by the countries. Therefore, the reasoning developed by the Court in a given judgment (the so-called *res interpretata*) will be mandatory for all countries, thereby having an *erga omnes* effect. In consequence, national

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<sup>35</sup> Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No.21, ¶ 31 (Aug. 19, 2014).

judges should apply the control of conventionality inspired by any judgment or advisory opinion issued by the Court. On this basis, Judge García Ramírez pointed out:

*“Because the Court has been conferred the power to interpret the Convention, which is a positive legal order for all state parties to it, the Court possesses the capacity to define the meaning and scope of the corresponding norms. This is true not only for purposes of a concrete case, but also for all hypotheses arising from the case.*

*The evident result is that a resolution of the tribunal has a double role: inter partes, with respect to the facts and their immediate and direct consequences; and erga omnes, with respect to the conventional norms and their interpretation in all cases. This binding character of the jurisprudence of the Court applies both to advisory opinions, which entail the interpretation of a precept by the official interpreter of the norms, and to the judgments, which implicate the same function on the part of this organ.”<sup>36</sup>*

Thus, the idea is for the Court to convert itself into a cassation court to establish precedents that should be replicated across the whole continent,<sup>37</sup> which in theory would mean it would only deal with paradigmatic cases.<sup>38</sup> This would mean that the Constitution of each country would not be its highest standard and, theoretically, any national

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<sup>36</sup> Ramírez, *supra* note 19, at 136.

<sup>37</sup> Ariel Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, *supra* note 20, at 64-68; Christina Binder, *¿Hacia una Corte Constitucional de América Latina? La jurisprudencia de la Corte Interamericana de Derechos Humanos con un enfoque especial sobre las amnistías*, *supra* note 15, at 25; Néstor Sagüés, *Derecho internacional y derecho constitucional. Dificultades operativas del control de convencionalidad en el sistema interamericano*, in *EL ESTADO DE DERECHO EN AMÉRICA LATINA*, at 21 (Helen Ahrens ed., 2012).

<sup>38</sup> Néstor Sagüés, *Derechos constitucionales y derechos humanos. De la Constitución Nacional a la Constitución convencionalizada*, in *LA PROTECCIÓN DE LOS DERECHOS HUMANOS Y FUNDAMENTALES DE ACUERDO A LA CONSTITUCIÓN Y EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS*, at 18 (Humberto Nogueira Alcalá ed., 2014); Alcalá, *supra* note 14, at 1195-96; Hitters, *supra* note 13, at 705, 707.

judge could ignore it and apply instead the American Convention of Human Rights and other treaties of the Inter-American System as they are understood by the Court in any of its sentences and advisory opinions. Otherwise, if national judges prefer to apply their domestic norm rather than the international, then, according to the Court, the State could be internationally responsible because of a failure to comply with its international obligations.<sup>39</sup>

### CONCLUSION

The aforementioned concerns would entail a radical change for national legal systems, because they are transforming the American Convention and the jurisprudence of the Court, that modifies it by its interpretation, into a kind of “Continental Superconstitution.”<sup>40</sup> Thus, all national legal systems should work according to the criteria of the Court.<sup>41</sup> Furthermore, the Executive and Legislative branches of respective states would have the alleged obligation to dictate their rules according to the Court’s interpretation, thereby losing their autonomy,<sup>42</sup> and the limitations required for the democratic decisions of their citizens.<sup>43</sup> These problems are not analyzed here.

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<sup>39</sup> VÍCTOR BAZÁN, *En torno al control de las inconstitucionalidades e inconvenionalidades omisivas*, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO, vol. 14, at 170-73 (2010); TRINDADE, *supra* note 4, at 416-417; JORGE TAPIA VALDÉS, *Poder constituyente irregular: los límites metajurídicos del poder constituyente originario*, ESTUDIOS CONSTITUCIONALES, vol. 6, no. 2, at 133-34 (2008).

<sup>40</sup> Dulitzky, *supra* note 20, at 64; *see also* Gomes Lund et al. (“Guerrilha Do Araguaia”) v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 5 (Nov. 24, 2010)(Caldas, R., concurring)(“For all States of the American Continent, which have willingly adopted it, the Convention is the equivalent to a supranational Constitution pertaining to Human Rights. All public powers and national spheres, as well as the respective Federal, state and municipal legislatures of all adherent States are under obligation to respect it and conform it.”).

<sup>41</sup> Sagüés, *supra* note 37, at 17.

<sup>42</sup> Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, *supra* note 9, at 363-98; *see also*, Alcalá, *supra* note 6, at 85-128; Contreras, *supra* note 30, at 255-57.

<sup>43</sup> Gelman, *supra* note 26, at ¶ 238-39. *See also* Gelman, *supra* note 33, at ¶ 69. *See* Gelman, *supra* note 31, at ¶ 51-56, 93, 97; Claudio Nash Rojas, *Control de convencionalidad. Precisiones conceptuales u desafíos a la luz de la jurisprudencia de la Corte Interamericana de Derechos Humanos*, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO, vol. 19, at 498-99 (2013); Lemos, *supra* note 20, at 134-35.

However, an aspect lightly discussed so far is to what extent can States be deemed to be really disobeying the American Convention of Human Rights. This is because, as has been said, thanks to the interpretive rules applied by the Court (evolutionary, dynamic, progressive, finalist, and systematic), we are now virtually dealing with *another* treaty, not that originally ratified by the states. This is because the *pacta sunt servanda* (“the agreement binds”), considered the fundamental principle of international law, has been violated not by the States, but by the Court itself.

Indeed, the mission of the Inter-American Court was to protect the rights established in the American Convention, not to modify them according to its criteria. And it is that to which States are bound, that is, to protect the rights really enshrined in the Convention. In other words, it seems unlikely that States have committed themselves to blindly follow the provisions established by the Court in all its judgments and advisory opinions, giving it complete freedom to interpret the treaty as it deems appropriate. This is not only because the work of national judges would be deeply altered, but also because it would be the end of each nation’s own freedom to establish its laws and even democratic decisions. Furthermore, one should ask if the authorities of a country have the power to renounce their national autonomy and transfer it to an international organization.

On the other hand, the doctrine that defends the control of conventionality argues that, in its application, the Court has the last word as the official interpreter of the Convention.<sup>44</sup> This means that if local authorities do not apply conventionality control, or do so defectively, it could result in international responsibility for the State and it could be sued before the Court<sup>45</sup>.

Nonetheless, as has been rightly observed, it is absolutely impossible that this international tribunal has the capacity to monitor the judgments of an entire continent. Indeed, it only issues about twenty to

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<sup>44</sup> Alcalá, *supra* note 6, at 58-59, 62-63 & 90-98; Mac-Gregor, *supra* note 9, at 424 & 427; Cavallo, *supra* note 20, at 727-28 & 740-42; Hitters, *supra* note 14, at 115, 118 & 122.

<sup>45</sup> Bazán *supra* note 38, at 170-73.

twenty-five final judgments every year. Therefore, pretending that this tribunal always has the last word is utopian.<sup>46</sup>

In fact, if conventionality control was applied as the Court pretends, this could produce authentic chaos in states parties to the inter-American system, because thanks to the application of this control, domestic judges could “disapply” or “reinterpret” the national standards, including their own Constitution. However, this could give rise to many opposite interpretations, either among judges from different countries or even the same country.<sup>47</sup> Therefore, since the Inter-American Court is unable to monitor all of them, rather than having a harmonious interpretation and application of human rights arise in the region (what has been called an Inter-American *ius commune*<sup>48</sup>), the opposite may occur: an absolute dispersion of criteria.<sup>49</sup>

In conclusion, regardless of whether the Court has the legitimacy to demand that national authorities execute control of conventionality (which is more than unlikely), and although its final intention has been to arrive at a common approach on human rights in the continent, in practice, it could produce exactly the opposite, and generate an authentic collapse of national legal systems.

Finally, it is necessary to insist that human rights are exceedingly important, and must be respected by the State. Moreover, as we are in an increasingly globalized world, the existence of international bodies to protect them is necessary. But this analysis requires clear rules in that regard - above all, in respect to this content and the competencies of these bodies. Otherwise, the very abuses that it tries to avoid may occur all over again.

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<sup>46</sup> Dulitzky, *supra* note 5, at 553, 557.

<sup>47</sup> *Id.*, at 552-53. See also, Dulitzky, *supra* note 20, at 48.

<sup>48</sup> Hitters, *supra* note 10, at 153; see also, Alcalá, *supra* note 14, at 1218; Néstor Sagüés, *El ‘Control de convencionalidad’ como instrumento para la elaboración de un ius commune interamericano*, UNAM, at 449-51, 467.

<sup>49</sup> Max Silva Abbott, *Control de convencionalidad interno y jueces locales: un planteamiento defectuoso*, ESTUDIOS CONSTITUCIONALES, vol. 14, no. 2, at 127-28 (2016).