

# An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights

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## INTRODUCTION

Charles Evans Hughes said more than a hundred years ago that “[w]e are under a Constitution, but the Constitution is what the judges say it is.”<sup>1</sup> Today, nevertheless, in Latin America, it would be more appropriate to say that we are under the American Convention on Human Rights, but the Convention is what the judges of the Inter-American Court of Human Rights say it is. This change in the paradigm comes thanks to the conventionality control theory developed by the Inter-American Court of Human Rights (“Court” or “Inter-American Court”) in the last several years.<sup>2</sup> In brief, this conventionality control (or control of conventionality) demands that inter-American and domestic judges examine the compatibility of national rules and practice with the American Convention on Human Rights (“Convention” or “American Convention”)<sup>3</sup> as interpreted by the Inter-American Court.<sup>4</sup> For domestic judges, this duty comes in addition to traditional constitutionality control or judicial review within their respective States.

Since the Court started to use the concept of conventionality control, a plethora of articles have explained its origins, legal foundations, development, characteristics,

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1. Charles Evans Hughes, Governor of New York, Speech before the Elmira Chamber of Commerce (May 3, 1907), in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906–1908, at 133, 139 (1908).

2. See generally DANIEL TODA CASTAN, THE TRANSFORMATION OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: THE STRUCTURAL IMPACT OF THE INTER-AMERICAN COURT’S CASE LAW ON AMNESTIES 34–39 (2013).

3. Cf. American Convention on Human Rights art. 64, Nov. 22, 1969, 1144 U.N.T.S. 144, available at <http://www.oas.org/en/iachr/mandate/Basics/convention.asp> [hereinafter American Convention] (noting that it is a duty of court members to provide judgment on the compatibility of national and Convention rules).

4. See *infra* Part I.

consequences, and limits.<sup>5</sup> In this Article I will not repeat these explorations. On the contrary, I will take a different path, presenting the conventionality control as part of a bigger project pursued by the Court (and its supporters) in conceiving itself as an Inter-American constitutional court. My analysis of the conventionality control is also part of a bigger personal project in which I analyze and offer constructive criticism of the structure and functioning of the inter-American system and propose ways to improve it.<sup>6</sup>

First this Article will discuss how the theory of conventionality control partly modifies the theoretical paradigm on which the inter-American system of human rights rests.<sup>7</sup> Traditionally, the inter-American human rights system was conceived of as being subsidiary and complementary to the national legal order. The conventionality control, however, does not act in a complementary or subsidiary manner, but places the American Convention and its inter-American judicial interpreter, the Court, at the top of the legal order. The Convention is no longer a subsidiary treaty but an integral, fundamental, and hierarchically superior norm of the national domestic legal system. In this way, the Court is developing a new principle, which I will refer to as the integration principle. This principle comes to complement, not to replace the traditional principle of subsidiarity. This

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5. For a more detailed analysis of the conventionality control concept itself, see Karlos Castilla, *El control de convencionalidad: un nuevo debate en México a partir de la sentencia del caso Radilla Pacheco*, XI ANUARIO MEXICANO DE DERECHO INTERNACIONAL 593 (2011); Eduardo Ferrer Mac-Gregor, *Reflexiones sobre el control difuso de convencionalidad. A la luz del caso Cabrera García y Montiel Flores vs. México*, XLIV BMDC 917 (2011) [hereinafter Ferrer Mac-Gregor, *Reflexiones*]; Sergio García Ramírez, *El control judicial interno de convencionalidad*, V REVISTA IUS, julio-diciembre 2011, at 1; Rolando E. Gialdino, *Control de constitucionalidad y de convencionalidad de oficio. Aportes del Derecho Internacional de los derechos humanos*, LA LEY 1295 (2008); Juan Carlos Hitters, *Control de constitucionalidad y control de convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos)*, 7 ESTUDIOS CONSTITUCIONALES, no. 2, 2009, at 109; Adelina Loianno, *El marco conceptual del control de convencionalidad en algunos fallos de la Corte Suprema argentina "Arancibia Clave", "Simón", "Mazzeo"*, in EL CONTROL DE CONVENCIONALIDAD 113 (Susana Albanese ed., 2008); Ernesto Rey Cantor, *Controles de convencionalidad de las leyes*, in 8 LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL: ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTAS AÑOS COMO INVESTIGADOR DEL DERECHO 225 (Eduardo Ferrer Mac-Gregor & Arturo Zaldívar Lelo de Larrea eds., 2008); Oswaldo Ruiz-Chiriboga, *The Conventionality Control: Examples of (Un)Successful Experiences in Latin America*, 3 INTER-AM. & EUR. HUM. RTS. J. 200 (2010); Néstor P. Sagüés, *El "control de convencionalidad", en particular sobre las constituciones nacionales*, LXXIII LA LEY 1, 1-3 (2009), available at [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) [hereinafter Sagüés, *El "control de convencionalidad"*].

6. See generally Ariel Dulitzky, *50 años del Sistema Interamericano de Derechos Humanos: Una propuesta de reflexión sobre cambios estratégicos necesarios*, in 60 AÑOS DESPUÉS: ENSEÑANZAS PASADAS Y DESAFÍOS FUTUROS 491 (Gonzalo Aguilar Cavallo ed., 2008); Ariel Dulitzky, *The Inter-American Human Rights System Fifty Years Later: Time for Changes*, 2011 QUEBEC J. INT'L L. (SPECIAL EDITION) 127 [hereinafter Dulitzky, *Time for Changes*]; Ariel E. Dulitzky, *La OEA y los derechos humanos: nuevos perfiles para el Sistema Interamericano*, 25 DIÁLOGO POLÍTICO no. 4, 2008, at 69; Ariel Dulitzky, *Las Peticiones Individuales ante la Comisión Interamericana de Derechos Humanos o el Amparo Interamericano en Contexto*, in TRATADO DE DERECHO PROCESAL CONSTITUCIONAL: ARGENTINO, COMPARADO Y TRANSNACIONAL 667 (Pablo Luis Manili ed., 2010); Ariel Dulitzky, *Reflexiones sobre la judicialización interamericana y propuesta de nuevos perfiles para el amparo interamericano*, in LA REFORMA DEL PROCESO DE AMPARO: LA EXPERIENCIA COMPARADA 327 (Samuel B. Abad Yupanqui & Pablo Pérez Tremps eds., 2009) [hereinafter Dulitzky, *Reflexiones*].

7. See *infra* Part II.

transformation occurred, this Article argues, despite the lack of clear textual support in the Convention.

Then, this Article delves into some of the consequences of this new approach. It explains that the conventionality control, by demanding that national judges apply the American Convention over domestic legislation as interpreted by the Court, positions the Inter-American Court as a kind of inter-American constitutional court.<sup>8</sup> The conventionality control also changes the role of domestic judges by requiring them to be the guardians of the supremacy of the Convention as interpreted by the Court. Additionally, the Court may be requiring Latin American tribunals to exercise a judicial review that they are prevented from doing under their own Constitutions. Rather than having a single Inter-American Court as the treaty's interpreter, this Article speculates about the consequences of having thousands of Latin American courts and tribunals,<sup>9</sup> as required by the conventionality control, each interpreting the American Convention. This Article then presents some questions on the proper balance between national and inter-American judges. In sum, I argue that the conventionality control is one of the tools the Court uses to define its own identity and role in the hemisphere and to continue the move to a more *judicialized* approach to human rights protection. Nevertheless, this Article argues that the Court's approach to conventionality control is unidirectional as it does not properly embrace domestic judges in this enterprise.

In order to overcome the limits of the Court's approach, this Article develops an alternative justification and framework for the integration principle.<sup>10</sup> It recognizes that social change will come from within the countries. Thus, making the Convention an integral part of the domestic system could facilitate and promote social change based on human rights standards. The proposal also conceives the relationship between the Court and Latin American judges as a political one where each of them responds to different constituencies and demands at the same time. The integration model, I argue, facilitates the socialization process by which international human rights norms are implemented at the local level. Recognizing the importance of Latin American judges, the proposed integrated model advocates for a more balanced relationship and for a cautious loyalty with the Court and a willingness to question or challenge the Court, rather than a mechanical embracement of its case law.

This Article concludes with a proposal that takes seriously both the conventionality control and the integration principle.<sup>11</sup> This Article proposes amendments to the Convention, as well as procedural and jurisprudential changes to

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8. See *infra* Part III.

9. I use the term "Latin American judges" instead of a more comprehensive and appropriate term like American judges (as judges from the Americas and not the parochial equation of the United States and America as synonymous). By doing so, I am aware that I am leaving aside and making invisible the judges from the English-speaking countries that have ratified the Convention. This is a traditional and well-deserved critique and problem of the inter-American system in general. See generally Auro Fraser, *From Forgotten through Friction to the Future: The Evolving Relationship of the Anglophone Caribbean and the Inter-American System of Human Rights*, 43 REVISTA IIDH, Enero-Junio 2006 at 207 (criticizing the absence of Anglophone Caribbean nations in discussions regarding the inter-American system of human rights). I do so only because the focus of my study is the relationship between the inter-American human rights system and Latin American countries.

10. See *infra* Part IV.

11. See *infra* Part V.

strengthen and deepen the principle of integration to complement that of subsidiarity. My proposal attempts to overcome some of the critiques to the conventionality control.

## I. The Conventionality Control in Brief

The American Convention is a treaty that has been ratified and is currently in effect in 23 Member States of the Organization of American States (OAS).<sup>12</sup> The Convention creates two organs as “means of protection” and with “competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to th[e] Convention”:<sup>13</sup> the Court and the Inter-American Commission on Human Rights (the Commission).<sup>14</sup> For the Court to intervene in individual cases, States need to ratify the Convention and to make an additional declaration accepting the contentious jurisdiction of the Court.<sup>15</sup> According to its statute, the Court “is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention.”<sup>16</sup> The Convention indicates that the “judgment[s] of the Court [are] final and not subject to appeal.”<sup>17</sup> States “undertake to comply with the judgment of the Court in any case to which they are parties.”<sup>18</sup>

In the context of deciding individual cases, traditionally the main task of the Court was to determine whether a state action or omission constituted a violation of the Convention and whether there was international state responsibility.<sup>19</sup> Nevertheless, in the last two decades, the Court greatly expanded its reach. Of particular importance in this evolution are the expansive and detailed remedies ordered by the Court.<sup>20</sup> Another crucial and recent tool used in this enterprise is the use of the conventionality control theory.<sup>21</sup> This theory was first explicitly used by the Inter-American Court in 2006 in *Almonacid-Arellano v. Chile*:

12. *American Convention on Human Rights “Pact of San Jose, Costa Rica”* B-32, ORG. OF AM. STATES, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Oct. 30, 2014) (detailing both the current Member States of the Organization of American States who have ratified the Convention, as well as Venezuela’s denunciation, which took effect September 2013).

13. American Convention, *supra* note 3, art. 33.

14. *Id.*

15. See *id.* art. 62 (declaring that Member States who have ratified the Convention have the additional power to give the Court jurisdiction over any and all cases relating to the “interpretation or application” of the Convention).

16. Org. of Am. States, Statute of the Inter-American Court of Human Rights, G.A. Res. 448, art. 1 (Oct. 1979), available at <http://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp> [hereinafter Statute of the Inter-American Court].

17. American Convention, *supra* note 3, art. 67.

18. *Id.* art. 68.

19. See, e.g., *Castillo Petruzzi v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, para. 90 (May 30, 1999) (stating that although “[t]he Court does have authority to rule that States that violate human rights bear international responsibility,” it does not have the authority to investigate or punish beyond this).

20. See, e.g., Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 368, 371 (2008) (discussing the Court’s recent increased propensity to grant equitable relief).

21. Sometimes the Court uses the expression “control of the conformity” between domestic law and the human rights treaties to which the State is a party. E.g., *Mendoza v. Argentina*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, para. 221 (May 14,

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.* (emphasis added).<sup>22</sup>

While the need for the compatibility of domestic legislation with the Convention is nothing new in the Court's jurisprudence,<sup>23</sup> *Almonacid*, for the first time, introduced the requirement that national judges exercise this compatibility control between the domestic norms and the Convention.<sup>24</sup> In *Dismissed*

2013).

22. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006). *Almonacid* involved the lack of judicial investigation and punishment in the extrajudicial execution of a political dissident by Chilean security forces. *Id.* para. 3. Previously there were references to "control of conventionality" or similar language in some concurring opinions by Judge Sergio García Ramírez. *E.g.*, *Vargas-Areco v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, paras. 6, 12 (Sept. 26, 2006) (García-Ramírez, J., concurring) (addressing the Court's duty to "control[] compliance" with the convention); *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, para. 3 (Sept. 7, 2004) (García-Ramírez, J., concurring) (comparing the Court's duty to determine the "conventionality" of State action to a domestic judiciary's duty to "control[] constitutionality"); *Myrna Mack Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, para. 27 (Nov. 25, 2003) (García-Ramírez, J., concurring) (discussing the court's "treaty control" obligation).

23. *E.g.*, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, para. 58 (Dec. 9, 1994) [hereinafter International Responsibility] ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty. Furthermore, if such violation affects the protected rights and freedoms of specific individuals, it gives rise to international responsibility for the state in question. [In addition,] the enforcement by agents or officials of a state of a law that manifestly violates the Convention gives rise to international responsibility for the state in question. If the enforcement of the law as such constitutes an international crime, it will also subject the agents or officials who execute that law to international responsibility."); *cf.* Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Inter-Am. Ct. H.R. (ser. A) No. 13, para. 57 (July 16, 1993) ("Within the terms of the attributes granted it by Articles 41 and 42 of the Convention, the Commission is competent to find any norm of the internal law of a State Party to be in violation of the obligations the latter has assumed upon ratifying or adhering to it, but it is not competent to decide whether the norm contradicts the internal juridical order of that State.").

24. In fact, some have argued that the requirement that judges verify the compatibility of domestic legislation with the Convention existed prior to *Almonacid*; the only innovation of *Almonacid* was to name this obligation "conventionality control." See Humberto Nogueira Alcalá, *Los desafíos del control de convencionalidad del corpus iuris Interamericano para las jurisdicciones nacionales*, XLV BMDC 1167, 1175 (2012) [hereinafter Nogueira Alcalá, *Los desafíos*] (noting that the *Almonacid* case formalized the requirement for conventionality control).

*Congressional Employees v. Peru*, the Court specified that the conventionality control (no longer referring to it as “a sort of”) must be exercised ex officio or sua sponte by all judicial authorities.<sup>25</sup> Additionally, the Court clarified that judges must exercise the control within “the context of their respective spheres of competence and the corresponding procedural regulations.”<sup>26</sup> It added that “[t]his function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action.”<sup>27</sup>

In *Cabrera García v. Mexico*, the Court extended the obligation to exercise conventionality control from the judiciary to all “domestic legal provisions,” “at all levels.”<sup>28</sup> A further step in this evolution came in *Atala Riffo v. Chile*, in which the Court included the conventionality control in the section on reparations, demanding that judges exercise this control of conventionality as a form of reparation for human rights abuses.<sup>29</sup> Finally in *Gelman v. Uruguay*, the tribunal continued to expand and explain the scope of the control by requiring that the control be exercised by all state authorities, not only judges.<sup>30</sup> It added that all States Parties to the Convention and all their organs were legally required to exercise the conventionality control using the Court’s interpretation of the treaty even if their State was not part of the specific case.<sup>31</sup>

Since *Almonacid*, the Court has consistently used this control of conventionality in a multitude of cases. The cases where the Court applied this theory differed in their factual situations, the legal issues discussed, the States involved, or the domestic judge’s use of the American Convention.<sup>32</sup> In other words, the Court has used the theory across the board regardless of the particularities of the case.

25. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128 (Nov. 24, 2006). The case dealt with the lack of effective remedies for congressional staffers illegally removed from their positions. *Id.* paras. 102–32.

26. *Id.* para. 128.

27. *Id.*

28. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, para. 225 (Nov. 26, 2010). The claim concerned two Mexican peasants and environmentalists who were illegally detained and tortured by the Mexican Army. *Id.* paras. 2, 53.

29. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, paras. 281–84 (Feb. 24, 2012). In *Atala*, the Court dealt with the illegal use of the sexual orientation of a mother to determine the custody of her daughters after her divorce. *Id.* para. 59.

30. Monitoring Compliance with Judgment, Order of the Court, “Considering,” para. 66 (Inter-Am. Ct. H.R. Mar. 20, 2013), available at [www.corteidh.or.cr/docs/supervisiones/gelman\\_20\\_03\\_13\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13_ing.pdf). *Gelman* relates to a case of enforced disappearance and the subsequent application of an amnesty law in the judicial investigation of the case. *Id.* para. 1.

31. *Id.* paras. 66–69.

32. *E.g.*, *García Cruz v. Mexico*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 273, paras. 59–61 & nn.76, 82 (Nov. 26, 2013) (concerning detention and due process); *Mendoza v. Argentina*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, para. 221 (May 14, 2013) (concerning juvenile life imprisonment without parole); *Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 259, paras. 142–44 (Nov. 30, 2012) (concerning a civilian massacre); *Apitz Barbera v. Venezuela*, Monitoring Compliance with Judgment, Order of the Court, “Considering,” paras. 26–37 (Inter-Am. Ct. H.R. Nov. 23, 2012), available at [http://www.corteidh.or.cr/docs/supervisiones/apitz\\_23\\_11\\_12\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/apitz_23_11_12_ing.pdf) (concerning dismissal of judges); *Furlan v. Argentina*, Preliminary Objections, Merits,

In sum, the conventionality control requires that all State authorities, but particularly judges, apply the Convention as interpreted by the Court in all their interventions. While there are a variety of ways that the conventionality control can be interpreted in good faith, there is, however, a danger that it can be interpreted in an absolutist way that causes strong doubts about its prospects and potential unintended consequences. In this absolutist interpretation, the Convention becomes an integral component of the domestic legal system and is transformed from a complementary or subsidiary international treaty creating international obligations to a domestic norm hierarchically superior to the domestic legal system including national constitutions.<sup>33</sup> And in this transformation the Court is placed as the final and sole proper interpreter of the Convention. The lack of analysis provided by the Court and the expansive language in its latest decisions suggest that this absolutist way is the Court's view of the conventionality control. Hence in this Article I will focus on that absolutist interpretation for purposes of my argument to show the potential problems and how to overcome them.

## II. FROM SUBSIDIARITY TO INTEGRATION AND BACK

### A. *The Traditional Understanding of the Principle of Subsidiarity*

The traditional principle of subsidiarity is foundational to both the protective function of international human rights law and the institutional functions and identity of human rights supervisory bodies.<sup>34</sup> The inter-American system was conceived as complementary or auxiliary to the national/domestic rights protection system. This subsidiarity principle is expressed in the Preamble of the American Convention, which conceives of the treaty as "reinforcing or complementing the protection provided by the domestic law of the American States."<sup>35</sup> Procedurally, the main manifestation of the principle of subsidiarity is the requirement that a petitioner exhaust all domestic remedies prior to accessing the inter-American bodies.<sup>36</sup> The State must have the possibility to resolve matters at the domestic level before being sued internationally.<sup>37</sup> The subsidiarity principle stems from the idea that States have the primary responsibility to protect the rights of individuals through their domestic

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Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, paras. 302–05 (Aug. 31, 2012) (concerning lack of due process due to delay); *Gomes Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, paras. 176–77 (Nov. 24, 2010) (concerning extrajudicial execution, enforced disappearances, and amnesty laws); *Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, paras. 14–15 (May 26, 2010) (concerning extrajudicial execution of a politician).

33. I thank Tara J. Melish for this pertinent observation.

34. Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L., 389, 438 (2009). See generally Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).

35. American Convention, *supra* note 3, pmbl.

36. *E.g.*, *id.* art. 46.

37. *E.g.*, *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 61 (July 29, 1988) ("The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction . . .").



legal systems and practices, and in case they fail to do so, the American Convention and the organs that it creates (the Court and the Inter-American Commission) act as a complement to domestic laws and practices in redressing victims.<sup>38</sup> Importantly, subsidiarity is also premised on the understanding that local actors, including legislators and judges, are in the best position to appreciate the complexity of circumstances on the ground. Those local actors are better suited to understand what measures may be most effective for internalizing human rights norms in distinct social, economic, cultural, historical, and political contexts.<sup>39</sup>

The subsidiarity principle recognizes that the domestic legal order has primary responsibility to respect and guarantee the rights recognized in the Convention through Article 1.1.<sup>40</sup> Article 2 refers to the “exercise of any of the rights or freedoms . . . not already ensured by legislative or other provisions” and to the States’ commitment to adopt, “in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”<sup>41</sup> The Convention adds in Article 43 that “[t]he States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.”<sup>42</sup> The Convention is not required to be part of the domestic legal system and does not replace those domestic legal orders. Importantly, States are only required to effectively guarantee the conventional rights.<sup>43</sup> The Convention only functions as a subsidiary normative framework constituting the minimum level of protection of rights that must be recognized and guaranteed by the States and also requiring local judges to justify their decisions taking into account the Convention.<sup>44</sup>

From the text of the Convention nothing can be derived about how the Convention should be domestically incorporated nor if it should rank at any particular level in the domestic system. It is for each State to decide what place to assign the Convention in its domestic legal system.<sup>45</sup> It could be that, for

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38. See, e.g., *Acevedo-Jaramillo v. Peru*, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 157, para. 66 (Nov. 24, 2006) (“[T]he State is the principal guarantor of the human rights and that, as a consequence, if a violation of said rights occurs, the State must resolve the issue in the domestic system and redress the victim before resorting to international forums such as the Inter-American System for the Protection of Human Rights . . .”).

39. Melish, *supra* note 34, at 443.

40. American Convention, *supra* note 3, art. 1(1) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . .”).

41. *Id.* art. 2.

42. *Id.* art. 43.

43. See *id.* art. 2 (providing that when States have not adopted rights or freedoms protected by the Convention they should “undertake to adopt, in accordance with their constitutional processes,” measures to guarantee Conventional rights).

44. See *id.* art. 29(b) (“No provision of this Convention shall be interpreted as: restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party . . .”).

45. See, e.g., *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, para. 33 (Aug. 29, 1986) (addressing how States can come into conformity with their obligations under the

convenience, some States choose to grant a hierarchical status to facilitate compliance with the Convention,<sup>46</sup> but there is no international obligation to do so.<sup>47</sup> As a policy matter, I agree that it makes sense to have the Convention as a domestic norm at the highest possible level and to require judges to apply it. Because of this position I would make the conventionality control requirement explicit, as I will explain later.<sup>48</sup>

### B. *The Integration Principle*

In its more radical version that appears to flow from the decision of the Court, the conventionality control changes this traditional and well-accepted principle by demanding that the Convention operate not only complementarily but rather in a concurrent manner at the highest level of the national legal system.<sup>49</sup> By requiring domestic judges in each of their cases to examine the compatibility of state actions or omissions and the compatibility of the national legal framework with the Convention, the Inter-American instrument becomes an integral part of domestic legal systems at the highest possible level. This is what I call the integration principle.

The integration principle seeks to embed the American Convention in national legal systems in order to provide solutions where justifications for subsidiarity fail.<sup>50</sup> Subsidiarity generally works when there is a functioning democratic system and, particularly, an independent and effective judiciary.<sup>51</sup> The Court never had this privilege, as most of the cases that it dealt with (and in part still deals with) involve issues where grave and massive human rights violations have taken place<sup>52</sup> and the national courts are unable, incapable, powerless, or unwilling to intervene.<sup>53</sup> In other cases decided by the Court the main problems originated in failures by those same national courts to secure due process guarantees<sup>54</sup> or to provide effective remedies

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Convention).

46. As most Latin American constitutions do. See *infra* note 64 and accompanying text.

47. See *infra* notes 65–66 and accompanying text.

48. See *infra* Part V.B.1.

49. See TODA CASTAN, *supra* note 2, at 34–35 (describing conventionality control as consisting of two types of control: “that exercised by the Court itself, and that exercised by national authority”).

50. See, e.g., Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 136–37 (2008) (explaining the integration principle in the context of the European Convention on Human Rights (European Convention)).

51. See, e.g., *id.* at 128 (explaining that subsidiarity “finds its animating spirit” in the availability domestically of effective remedies, among other things).

52. See, e.g., David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1, 2 (David J. Harris & Stephen Livingstone eds., 1998) (“[Cases in the Inter-American system] have been much more to do with the forced disappearance, killing, torture and arbitrary detention of political opponents and terrorists than with particular issues concerning, for example, the right to a fair trial or freedom of expression that are the stock in trade of the European Commission and Court.”)

53. Cf. Nuno Garoupa & Maria A. Maldonado, *The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America*, 19 CARDOZO J. INT’L & COMP. L. 593, 616 (2011) (discussing how Latin American judiciaries are “perceived as incompetent, ineffective, politically, and financially corrupt” and that they “tend to be weak in terms of their credibility and legitimacy” despite efforts to reform them).

54. See, e.g., Richard J. Wilson, *Supporting or Thwarting the Revolution? The Inter-American Human Rights System and Criminal Procedure Reform in Latin America*, 14 SW. J.L. & TRADE AMERICAS 287,

for human rights abuses.<sup>55</sup> Some but not all of those problems could be attributed to the lack of use of the American Convention by domestic courts.<sup>56</sup>

So, it is not surprising that the Court sought to develop new tools and new theories to deal with these structural issues and problems.<sup>57</sup> Some examples of the Court's innovative approaches to overcome domestic deficiencies are the expansive approach to reparations,<sup>58</sup> the detailed factual determinations that go into the minutia (as any other international tribunal does),<sup>59</sup> the Court's refusal to apply the European standard of a margin of appreciation,<sup>60</sup> and the flexible approach to exemptions to the requirement to exhaust domestic remedies.<sup>61</sup> The integration principle via the conventionality control is another attempt to respond to the limitations of the subsidiarity principle given the context in the Americas by pushing national institutions to "appropriate the Convention and make it their own."<sup>62</sup> From this perspective, the Court's approach departs from the subsidiarity principle. Rather than giving leeway to domestic courts to decide how to implement the Convention it imposes a particular one: direct applicability of the Convention.

Traditionally, it was argued that one of the main differences between the European and the inter-American system was the existence of a democratic State and independent judiciary in Europe, which was lacking in Latin America.<sup>63</sup> The emergence of the conventionality control doctrine and the integration principle show that currently, after almost thirty years of a sustained move to more stable democratic governance in Latin America, the Court may have more confidence in the judiciary of the region. Rather than giving leeway to Latin American States on

295–98 (2007) (addressing the Court's jurisprudence where State tribunals suspend due process protections).

55. See, e.g., *id.* at 312 (discussing a case where the Court found that the availability of only limited appeals was an inadequate remedy under the Convention).

56. See, e.g., Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q., 856, 884 (2009) (stating that States Parties routinely fail to make "Convention based rights operative under domestic law" or judges may apply "norms of domestic law in contravention of their state's engagements under the American Convention"); see also Claudio Nash Rojas, *Control de convencionalidad. Precisiones conceptuales y desafíos a la luz de la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, 489, 491 (Christian Steiner ed., 2013) (explaining that domestic judges do not consistently apply the Convention).

57. E.g., Harris, *supra* note 52, at 10–11 (discussing the Court's interpretation innovations).

58. E.g., Antkowiak, *supra* note 20, at 371–86.

59. See, e.g., Álvaro Paúl, *In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights*, 55 REVISTA IIDH 57, January-June 2012, at 80 (referring to the "tribunal's attempt to settle as many facts as possible — probably for giving a more colorful account of the facts").

60. See, e.g., Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 NW. J. INT'L HUM. RTS. 28, 61–63 (2012) (discussing the Court's hostility to the margin of appreciation standard).

61. E.g., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11, para. 42 (Aug. 10, 1990).

62. See Carozza, *supra* note 34, at 75 (addressing how the European Court of Human Rights (ECHR) has allowed European States to interpret the Convention to make it a part of domestic law).

63. E.g., Henry Steiner & Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 869 (2d ed. 2000) (describing the hostile, authoritarian environment within which the Inter-American system developed, as compared to the experience of its European counterpart).

how to incorporate and use the Convention, the Court prefers to take a stronger position, requiring that the Convention be fully integrated into the domestic legal system.

In fact, the Court follows a trend initiated by Latin American constitutions more than twenty or thirty years ago. The constitutional reform process that took place in the region in the last three decades gave international human rights treaties a special status within the constitutional framework.<sup>64</sup> But this Latin American process was done as a political choice by the reformers and not as a legal obligation coming from the Inter-American Court.<sup>65</sup> In these countries where the Convention has a constitutional status, the conventionality control becomes part of the judicial review or constitutionality control because of the decision of the constitutional framers and not of the Court.<sup>66</sup> In these countries the Convention becomes part of what is known as the “constitutional bloc” composed by the Constitution and those treaties with constitutional status. Judicial review checks the compatibility of any state action or omission with the “constitutional bloc”.<sup>67</sup> Finally, it is important to note that not all the constitutions of the States Party to the Convention grant a special status to the Convention or to human rights treaties in general.<sup>68</sup>

The integration principle, by requiring a constant use of the American Convention and Inter-American precedents by domestic courts, expands and complements the subsidiary principle. The integration principle shares the same foundational idea of subsidiarity: Interpretation and implementation of human rights law should “occur[] at the domestic level, as close as possible to the affected individual,” and the “struggle over the meaning of rights and their application to concrete . . . situations [should] take place within domestic control mechanisms.”<sup>69</sup>

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64. See generally Ariel E. Dulitzky, *La aplicación de los tratados sobre derechos humanos por los tribunales locales: un estudio comparado*, in LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES 33 (Martín Abregú & Christian Courtis eds., 2004) [hereinafter Dulitzky, *La aplicación*] (quoting the Constitutions of Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Venezuela). In the last ten years, the Constitutions of Bolivia (2009), CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [C.P.] art. 13; Brazil (2004), CONSTITUIÇÃO FEDERAL art. 109 (Braz.); Dominican Republic (2010), CONSTITUCION DE LA REPUBLICA DOMINICANA art. 74; Ecuador (2008), CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR art. 84 (2008); and Mexico (2011), Constitución Política de los Estados Unidos Mexicanos, *as amended*, art. 10, Diario Oficial de la Federación [DO], 10 de junio de 2011, all gave a new or revised constitutional status to international human rights treaties.

65. Cf. Dulitzky, *La aplicación*, *supra* note 64, at 43–44 (describing the political choice some Latin American constitutional framers made to require special procedures to protect human rights and human rights treaties).

66. E.g., Valério de Oliveira Mazzuoli, *O controle jurisdicional da convencionalidade das leis no Brasil*, in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, *supra* note 56, at 417, 419 (discussing how Brazilian constitutional framers implemented conventionality control independent of the court).

67. See, e.g., Rodrigo Uprimny, EL BLOQUE DE CONSTITUCIONALIDAD EN COLOMBIA: UN ANÁLISIS JURISPRUDENCIAL Y UN ENSAYO DE SISTEMATIZACIÓN DOCTRINAL 10 (2005), available at [http://redescuelascsa.com/sitio/repo/DJS-Bloque\\_Constitucionalidad%28Uprimny%29.pdf](http://redescuelascsa.com/sitio/repo/DJS-Bloque_Constitucionalidad%28Uprimny%29.pdf) (discussing how Columbia's judicial system interprets and uses “bloque de constitucionalidad”).

68. For example, various constitutions fail to mention the Convention or provide a particular status to human rights treaties. E.g., CONST. OF BARBADOS (1966); GRONDWET VAN DE REPUBLIEK SURINAME [CONSTITUTION] 1987; CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL (Uru.).

69. Melish, *supra* note 34, at 452.

The Court has explained the connection between the principle of subsidiarity and the conventionality control. According to the Tribunal there is “a dynamic and complementary control . . . between the domestic authorities (who have the primary obligation) and the international instance (complementarily), so that their decision criteria can be established and harmonized.”<sup>70</sup> “[I]t is only if a case has not been settled at the domestic level, as corresponds in the first place to any State . . . in effective exercise of control of conformity with the Convention [conventionality control], that the case can be lodged before the [Inter-American] system . . .”<sup>71</sup> Conceived in this way, the integration principle could be understood in fact as an aspect of the subsidiarity principle.

But there is another aspect of the conventionality control that informs the integration principle that appears to be a limitation and restriction to the subsidiarity principle. Subsidiarity presupposes that, under international law, States are required to comply with the treaty, and under both international and domestic law, States are free to choose how and at what level to incorporate the Convention into their domestic legal systems.<sup>72</sup> The conventionality control, as it appears to be understood by the Court, not only requires, as a matter of an international obligation, that the Convention be incorporated as domestic law but also that it have a higher status than any other domestic norm, including the Constitution or any other lower legislative act.<sup>73</sup> If domestic judges must check the compatibility of all state action, whether constitutional or legislative, with the American Convention as a matter of international and domestic law, this means that the Convention must be of a higher legal rank. If it were at the same hierarchical level as the rest of the normative order, judges would simply apply the principle *lex posterior derogat priori*, or that the act later in time should prevail over the earlier one, or the principle *lex specialis derogat generali*, which claims that the special or specific law overrules the general law.<sup>74</sup>

Treaties, including the American Convention, do not specify how domestic law incorporates those international norms.<sup>75</sup> The relationship between international treaties and domestic law is subject to the national constitutional and legislative framework.<sup>76</sup> States have traditionally been given wide latitude in this matter.<sup>77</sup> Subsidiarity, Carozza explains,

70. Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, para. 143 (Nov. 30, 2012).

71. *Id.* para. 144.

72. Carozza, *supra* note 34, at 62–63 (“[T]he institutional supervision and enforcement of international human rights law is notable mostly for the extent that it still relies so heavily on states’ discretion regarding the degree and manner of implementation of human rights domestically.”).

73. See, e.g., Sagiés, *El “control de convencionalidad”*, *supra* note 5, at 2 (“En Estados donde la doctrina jurisprudencial establecida por la Corte Suprema o el Tribunal Constitucional es obligatoria para los tribunales inferiores, ella también reviste materialmente condición de norma, y por ende, está captada por dicho control. Incluso, la constitución nacional, no exceptuada en los veredictos aludidos . . . . El pacto assume así condición de supraconstitucionalidad.” [In states where the jurisprudence established by the Supreme Court or Constitutional Court is obligatory for lower courts, this also takes on the characteristics of a legal norm, and consequently, is understood to have as much control . . . . In this way the Pact takes on the conditions of supraconstitutionality.]).

74. E.g., Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT’L L. 670, 680 (2011).

75. Carozza, *supra* note 34, at 62–63.

76. *Id.* at 63.

open[s] up a wide range of possibilities for the precise role of international norms; the treaties themselves do not specify that domestic law must follow any particular pattern of incorporation. Rather, the relationship of international treaties to domestic law will be subject to the requirements and possibilities of domestic constitutional and statutory law. While some states will allow for the direct applicability of human rights treaties, others will internalize the international norms through legislation, and still others may maintain an entirely dualist approach that gives international law no domestic effect at all. . . . [T]he mechanisms of implementation and enforcement accord very wide latitude to states.<sup>78</sup>

In the past, the Court consistently insisted that domestic norms, including a State's constitution, need to conform to the Convention.<sup>79</sup> But up to *Almonacid*, it never required judges to directly apply the Convention. It always left it to the judicial authorities' discretion how to secure such compatibility.<sup>80</sup> Of course, the wide latitude simultaneously requires full compliance with the treaty.<sup>81</sup>

In contrast, the conventionality control as understood by the Court makes it mandatory that the Convention function as a domestic and legally binding standard with a higher rank than any other legislation, including the Constitution. Thus, the conventionality control theory breaks the traditional scheme for the incorporation of international law into domestic law. The integration principle makes the Inter-

77. *Id.*; see also U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paras. 13, 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (stating that the International Covenant on Civil and Political Rights, a treaty similar to the American Convention, "allows a State Party to pursue [the Covenant's substantive guarantees] in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law," and observing that "the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law"); *Indep. News & Media PLC v. Ireland*, App. No. 55120/00, 2005-V Eur. Ct. H.R. 33, 61 ("A State remains free to choose the measures which it considers best adapted to address domestically the Convention matter in issue . . ."). Even in Europe, where most national constitutional courts and other high courts of appeal have decided that there is a constitutional obligation to enforce the European Convention and to faithfully apply the European Court's jurisprudence, those same constitutional courts have stressed that the European Convention does not have formal constitutional rank. See, e.g., Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court*, BEPRESS (Oct. 2009) 13, [http://works.bepress.com/alec\\_stone\\_sweet/33/](http://works.bepress.com/alec_stone_sweet/33/) ("[M]ost constitutional courts have stressed that the Convention does not have formal constitutional rank . . ."). The European constitutional courts have asserted that "it is the national Constitution that ultimately regulates the relationship between the domestic legal order and the Convention system," not the European Court or the European Convention itself. *Id.*

78. Carozza, *supra* note 34, at 63–64.

79. See, e.g., International Responsibility, *supra* note 23, para. 58 ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.").

80. Nogueira Alcalá, *Los desafíos*, *supra* note 24, at 1175.

81. The *Medellín v. Texas* case decided by the U.S. Supreme Court exemplifies the negative effects of the wide latitude given to States regarding how to incorporate international treaties and execute international judgments. 552 US 491, 509–11 (2008) (discussing the enforceability of International Court of Justice decisions in the United States and that the U.S. government is not obliged to follow such decisions).

American Court, rather than the State, the final interpreter on how international human rights commitments deriving from the American Convention are translated into domestic law.<sup>82</sup> As such, the Court is taking an absolutist construction of the conventional duties, accepting only one method to give effect to the treaty.<sup>83</sup> The integration principle also challenges the traditional concept that a State may commit itself to protect human rights on an international plane by ratifying a human rights treaty, but those rights may not be self-executing on the domestic plane.<sup>84</sup> By instructing domestic courts not to enforce national laws that violate the Convention, the treaty becomes self-executing regardless of what the domestic legal system establishes.<sup>85</sup>

The integration principle as developed by the Inter-American Court, via the conventionality control, resembles more the European Union (EU) model than the European human rights system model. In effect, the legal system of the EU is based on the assumption of the primacy of community law over domestic law.<sup>86</sup> The Court of Justice of the European Union (CJEU) has consistently insisted that European law prevails over national legislation.<sup>87</sup> The principle of supremacy of European law was introduced by the CJEU in the *Costa v. ENEL* case in 1964, where the CJEU understood that the European Community created its own legal system, which “became an integral part of the legal systems of the Member States and which their courts are bound to apply.”<sup>88</sup> Moreover, it ruled that European law “could not, because of its special and original nature, be overridden by domestic legal provisions,

82 See, e.g., *Cabrera García v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, para. 225 (Nov. 26, 2010) (“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 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.”).

83 Cf. Melish, *supra* note 34, at 445 (addressing the United States’s jurisdictional aggressiveness in rejecting absolutist construction of human rights law that denies to the United States the right to decide how to incorporate international human rights law domestically).

84 See, e.g., 138 CONG. REC. 8071 (1992) (“[T]he United States declares that the provisions of Articles 1 through 27 of the [International Covenant on Civil and Political Rights] are not self-executing.”).

85 See, e.g., JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 217 (2d ed. 2012) (“The Inter-American Court has taken the unprecedented step of declaring that State laws in violation of the American Convention lack legal effect domestically. In essence, the Inter-American Court is instructing domestic courts not to enforce those national laws that violate the American Convention.” (citation omitted)).

86 E.g., Consolidated Version of the Treaty on the Functioning of the European Union declaration 17, Mar. 30, 2010, 2010 O.J. (C 83) 1, 343 [hereinafter TFEU] (“[I]n accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States . . .”).

87 E.g., Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1126, 1146.

88 Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 587, 593.

however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”<sup>89</sup> This is exactly the same rationale that the Inter-American Court takes with regard to the American Convention. This position has never been taken by the European Court of Human Rights (European Court).<sup>90</sup> And it is important to insist, the American Convention is a human rights treaty that does not create nor intends to create an inter-American legal system.

### C. *The Conventionality Control and the Legal Constraints of Domestic Judges*

In this metamorphosis of the Convention from an international treaty to a hierarchically superior domestic norm, the Court is asking local tribunals to exercise both judicial review and conventionality control even if those tribunals are not constitutionally authorized to perform them. The Court appears to be ignoring that Article 2 of the Convention, which requires that the rights be guaranteed in accordance with “constitutional processes.”<sup>91</sup> In particular, the Court is asking domestic courts not to apply rules contrary to the Convention even if the Convention has a rank similar to or lower than the law (or Constitution) in question, or even if the judge does not have the authority to override legal norms.<sup>92</sup>

The Court has tried to overcome this problem by simplistically stating that judges should exercise conventionality control within their powers.<sup>93</sup> But this does not solve the problem when judges, as they do in most countries, lack such powers to avoid the application of the Constitution or other laws. Nor does it explain how judges can exercise this control in a country where judicial review of constitutionality

89. *Id.* at 594.

90. In Europe, constitutional courts have stressed that the European Convention does not have a formal constitutional rank and it is the Constitution, not the European Convention or the European Court that regulates the relationship between the domestic legal order and the European treaty. Stone Sweet, *supra* note 77, at 13.

91. American Convention, *supra* note 3, art. 2(1).

92. The European Court, to the contrary, has been more aware of those constraints, stating that it “cannot be oblivious of the substantive or procedural features of [Member States’] respective domestic laws.” *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 31 (1979). The most extreme example of the Inter-American Court’s position is *Boyce v. Barbados* regarding the death penalty in that Caribbean country. Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169 (Nov. 20, 2007). In this case, the Court required the conventionality control to be performed even in countries where the judges themselves cannot exercise judicial review or, for that matter, conventionality control. *Id.* paras. 60, 78–80. Article 26 of the Constitution of Barbados prevents courts from declaring the unconstitutionality of laws that have been enacted before the entry into force of the Constitution, that is, before November 30, 1966. CONST. OF BARBADOS § 26. Such is the case of the law providing for the mandatory imposition of the death penalty for murder cases. *Boyce*, Inter-Am. Ct. H.R. (ser. C) No. 169, para. 75. So the courts of Barbados in the case which was under consideration by the Court were legally prevented from exercising judicial review. The Court, however, criticized the Judicial Committee of the Privy Council of the United Kingdom of Great Britain (which at that time acted as the court of appeals of Barbados) for making “purely constitutional analysis that did not take into account the State’s obligations under the American Convention as interpreted by this Court’s jurisprudence.” *Id.* para 77. It added that the analysis of the Judicial Committee of the Privy Council should not have been limited “to the issue of whether the [law] was unconstitutional. Rather, the question should have also been whether it was ‘conventional.’” *Id.* para. 78.

93. *E.g.*, *Dismissed Congressional Employees v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128 (Nov. 24, 2006).



is concentrated in a constitutional or Supreme Court.<sup>94</sup> Several Latin American constitutions explicitly require the compatibility of international treaties with the Constitution and allow constitutional courts to declare the unconstitutionality of treaties, even in countries where human rights treaties are granted a special status.<sup>95</sup> Moreover, the Court has required that judges perform this conventionality control *ex officio* or *sua sponte*,<sup>96</sup> when in many countries judges are forbidden to resolve more than what was requested and argued by the parties.<sup>97</sup> Judges may even be officially barred from exercising *ex officio* judicial review.<sup>98</sup>

The Court's position is even more extreme than the requirements and practices of a fully developed integration system such as the EU. In the EU context, "national courts have come to accept the twin doctrines of supremacy and direct effect" elaborated by the CJEU and thus "now routinely set aside national legislation when it conflicts with EU directives, regulations, and Treaty provisions."<sup>99</sup> Yet the domestic courts have not fully accepted the idea that European law prevails over domestic constitutions<sup>100</sup> or embraced the idea of being "subservient lower courts of a new judicial hierarchy in which the [CJEU] act[s] as supreme federal tribunal."<sup>101</sup> Many European tribunals "have attached reservations to their acceptance of supremacy and direct effect" of European law.<sup>102</sup> Those domestic European courts

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94. For example, Colombia, Peru, Costa Rica, and Guatemala, to name a few. *E.g.*, Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189, 205–09 & 203 tbl.4 (2005); see also Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203, 1216–17 (2011) (addressing the problem of requiring judges without authority to exercise judicial review to do so).

95. *E.g.*, C.P. art. 202.9 (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 82; CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 241.10; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 272.e.

96. *Dismissed Congressional Employees*, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128.

97. Cf. Keith S. Rosenn, *Judicial Review in Brazil: Developments under the 1988 Constitution*, 7 SW. J. L. & TRADE AM. 291, 294 n.16 (2000) (mentioning that the Supreme Federal Tribunal of Brazil cannot address issues *sua sponte* when its jurisdiction is arises from an extraordinary appeal).

98. For the evolution of the situation in Argentina, see Agustín Gordillo, *La progresiva expansión del control de constitucionalidad de oficio*, 2004-E LA LEY 2004-E 1231, 1231-33 (2004), available at <http://gordillo.com/articulos/art11.pdf>.

99. Arthur Dyeve, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?*, 9 EUR. CONST. L. REV. 139, 140 (2013).

100. This is particularly the case of the German Federal Constitutional Court. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 12, 2012, 132 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 287 (290–91), 2012 (requiring treaties to be compatible with the German constitution); BVerfG Sept. 7, 2011, 129 BVERFGE 124 (149–50), 2011 (considering the constitutionality of the Maastricht Treaty); BVerfG June 30, 2009, 123 BVERFGE 267 (330), 2009 (considering the constitutionality of the Lisbon Treaty); BVerfG June 7, 2000, 102 BVERFGE 147 (161–64), 2000 (stating that the court would not exercise its jurisdiction to review the compatibility of European law with German constitutional law); BVerfG Oct. 12, 1993, 89 BVERFGE 155 (181), 1993 (determining that Germany could constitutionally ratify the Maastricht Treaty); BVerfG Oct. 22, 1986, 73 BVERFGE 339 (387), 1986 (reviewing the procedures of the European Court of Justice to determine whether they provide adequate protection under the German Constitution); BVerfG May 29, 1974, 37 BVERFGE 271 (278), 1974 (stating that the European Court of Justice is without authority to determine the compatibility of European law with local law). See generally Erich Vranes, *German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis*, 14 GERMAN L.J. 75 (2013) (discussing the limits of EU law influence on the German constitution).

101. Dyeve, *supra* note 99, at 140.

102. *Id.*

have tried to accommodate and reconcile two conflicting goals: (1) the imperative to ensure the application and supremacy of European law over national legislation, and (2) the desire to keep integration under control by preserving an at least hypothetical last word for the States.<sup>103</sup> The European national courts conceive themselves primarily, and quite naturally, as organs of their State, and have tried to fit the 'European mandate' formulated by the CJEU within the framework of the powers attributed to them by their national constitutional system.<sup>104</sup>

To the contrary of these European courts, by placing the Convention above national legal orders, including national Constitutions, it appears that the Court is not merely going further than the European judicial system. It resembles more a conception of the Convention as a federal Constitution and setting the Court as a supreme court in a federal State. For instance, the Supremacy Clause of the U.S. Constitution not only stipulates that the Constitution, the laws of the United States, and the international treaties "shall be the supreme Law of the Land" but also commands local and state judges to disregard any other conflicting rule in the laws or constitution of their State.<sup>105</sup> And by virtue of this supremacy, the Supreme Court can exercise judicial review over state courts and override their decisions.<sup>106</sup> This is exactly what the Court requires from Latin American States: Make the Convention the "supreme Law of the Land." But, again, the Convention is not a federal constitution; the OAS has not created a federal State or a federal supreme court in the form of an Inter-American Court.

#### *D. The Weak Legal Justification of the Conventionality Control or the Integration Principle*

Given the explicit silence of the Convention on the conventionality control or integration principle, some authors have tried to find a justification as an implicit principle of the Convention or a principle that can be derived from other norms of the Convention or from general principles of international law.<sup>107</sup> These authors argue that Article 25 of the Convention—by requiring the existence of a simple, prompt, and effective remedy for the protection of the rights recognized in the Convention—requires the exercise of control of conventionality over judges dealing with those remedies.<sup>108</sup> Nevertheless, while there must be a judicial remedy that allows the protection of the rights recognized conventionally, it does not follow that the Convention must be directly incorporated or given a higher ranking. Article 25

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103. *Id.* at 141–42.

104. *Id.* at 153.

105. U.S. CONST. art. VI, cl. 2. Similar provisions are found in article 33 of the Argentine Constitution and article 133 of the Mexican Constitution. Art. 33, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.); Constitución Política de los Estados Unidos Mexicanos, *as amended*, art. 133, DO, 10 de junio de 2011 (Mex.).

106. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 314–15 (1816).

107. *E.g.*, Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, 9 ESTUDIOS CONSTITUCIONALES 531, 589–90 (2011) [hereinafter Ferrer Mac-Gregor, *Interpretación conforme*], available at [http://www.scielo.cl/scielo.php?script=sci\\_arttext&pid=S0718-52002011000200014&lng=es&nrm=iso](http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-52002011000200014&lng=es&nrm=iso).

108. *See, e.g.*, Ruiz-Chiriboga, *supra* note 5, at 214 (discussing how state courts can use and have used Article 25 of the Convention in their own jurisprudence).

only requires the existence of a simple, prompt, and effective remedy.<sup>109</sup> This recourse should be used to ensure the effectiveness of the treaty rights, either directly if the Convention has been incorporated into domestic law, or indirectly if the Convention has been incorporated by national legislation. The critical point is the right to be protected, regardless of which norm recognizes that right. Additionally, Article 25 does not establish that the Convention should prevail over domestic legislation. Article 25 only refers to the “fundamental rights recognized by the constitution or laws of the State concerned or by this Convention,” without hierarchical distinctions.<sup>110</sup> In fact, the Convention itself allows domestic law to prevail over the Convention if the national norm provides broader protection.<sup>111</sup>

Other authors have tried to justify the special domestic status of the Convention as required by the Inter-American Court by resorting to general principles of international law.<sup>112</sup> Those principles are reflected in Article 27 of the Vienna Convention on the Law of Treaties, which provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,”<sup>113</sup> and Article 32 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides that “[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.”<sup>114</sup> According to these authors, these rules mean that the Convention (after *Almonacid*) not only should operate above domestic law, but also that it has always done so, regardless of the recent case law of the Court.<sup>115</sup> In other words, the supremacy of the Convention comes from the mere fact that it is an international treaty, not because of the Court’s doctrine of conventionality control. I disagree. The Vienna Convention and the Articles of Responsibility refer to the international responsibility of the State, not to the manner of incorporation of treaties or their hierarchical position in domestic law. These standards prevent a State from justifying the violation of any treaty, including the Convention, by arguing that an internal norm or provision requires it. But it does not follow that the Convention should have direct applicability and precedence over domestic law or the Constitution.<sup>116</sup>

109. See American Convention, *supra* note 3, art. 25 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights . . .”).

110. *Id.*

111. See *id.* art. 29.b (“No provision of this Convention shall be interpreted as [r]estricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party . . .”); cf. Mónica Pinto, *El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos*, in LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES, *supra* note 64, at 163 (explaining the concept of *pro homine*, which suggests an expansive interpretation of human rights).

112. See generally Ferrer Mac-Gregor, *Interpretación conforme*, *supra* note 107.

113. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

114. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex art. 32, U.N. Doc. A/res/56/83 (Jan. 28, 2002).

115. See, e.g., Ferrer Mac-Gregor, *Interpretación conforme*, *supra* note 107, at 572–76 (providing examples through language from Latin American courts that suggest that the Convention has been held superior to domestic law both prior to and after *Almonacid*).

116. Cf. Ximena Fuentes Torrijo, *International and Domestic Law: Definitely an Odd Couple*, 77 REV. JUR. U.P.R. 483, 488–89 (2008) (“It is an unprecedented reading of Article 27 of the Vienna Convention

Of course it could be argued that the European Convention is not explicitly required to be domestic law, yet it is routinely used by domestic judges, and the precedents of the European Court are systematically followed in practice by national courts.<sup>117</sup> The same can be said of the United States, where judicial review, or the power to invalidate laws as unconstitutional, is not expressly stated in the Constitution.

### III. FROM THE INTER-AMERICAN COURT TO AN INTER-AMERICAN CONSTITUTIONAL COURT

The theory of conventionality control emphasizes the Court's self-identification as an Inter-American Constitutional Court. It also attempts to position the Convention as an inter-American constitution.

#### A. *The Conventionality Control and the Judicialization of the Inter-American System*

With the theory of conventionality control and the integration principle, the Court places judges in a central role as responsible for ensuring the effectiveness of conventional standards.<sup>118</sup> In this way, the integration principle serves a second goal in addition to transforming the Convention into an integral part of the domestic legal system. By virtue of the control of conventionality requirement, Latin American judges become integrated into an inter-American judicial system, guarantor of the Convention. This inter-American judicial system includes the Court and all national judges or state authorities exercising judicial functions. In the Court's view, the judicial enforcement of the Convention, whether national or Inter-American, becomes central to the promotion and protection of human rights.<sup>119</sup> Judges, rather than legislators or executive or administrative authorities, are at the core of Convention enforcement and guarantee.<sup>120</sup> In part, this belief was reflected by former Judge and President of the Court, Antonio Cançado Trindade, when he argued that the courts are "the most developed form of protection of the rights of the human person."<sup>121</sup>

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on the Law of Treaties to claim that it establishes an obligation . . . to place treaties above the ordinary laws of each country's legal system.").

117. See, e.g., Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 23 EUR. J. INT'L L. 401, 422–23 (2012) ("[T]he Italian case is symptomatic, in which ordinary judges autonomously treat the Convention as if it is EU law.").

118. See *supra* Part II.B–C.

119. E.g., *Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, paras. 142–43 (Nov. 30, 2012).

120. See, e.g., *Dismissed Congressional Employees v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128 (Nov. 24, 2006) (describing the role of domestic judges in upholding the guarantees of the American Convention).

121. President of the Inter-American Court of Human Rights, *Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen Its Protection Mechanism*, para. 84, OEA/Ser.G Doc. CP/CAJP-1781/01 (Apr. 5, 2001) [hereinafter *Basis for a Draft Protocol*].

As such, the conventionality control could be seen as a tool used by the Inter-American Court to advance its effort to “judicialize”<sup>122</sup> the inter-American system. In the last two decades much emphasis has been placed on the process of *judicialization* of the system, or in other words, on the centralization of the individual complaint mechanism, particularly the one that ends with a judgment of the Court, as the instrument par excellence for the protection and promotion of human rights in the region.<sup>123</sup> In fact, this is a trend that could be observed worldwide, reflected in the creation and use of international courts and tribunals and a judicially-focused development of certain areas of international law.<sup>124</sup> The clearest example of this approach in the human rights area is the transformation of the European human rights system into one with a single judicial and permanent body.<sup>125</sup>

### B. The Conventionality Control as Constitutional Control or Judicial Review

The conventionality control doctrine as developed by the Court could be seen as an attempt to place the Convention as an inter-American constitution and the Court as an inter-American constitutional court. The discourse used by the Court when referring to the conventionality control clearly resembles the constitutional language of judicial review. Or, as one author explained, the conventionality control brings constitutional law doctrines into international human rights law.<sup>126</sup>

Former Judge and President of the Court, Sergio García Ramírez, who is credited with the creation of the theory of conventionality control,<sup>127</sup> highlighted the similarity between conventionality and constitutionality control.<sup>128</sup>

122. See, e.g., Dulitzky, *Reflexiones*, *supra* note 6, at 342 (defining “judicialization” in the context of the inter-American system).

123. Dulitzky, *Time for Changes*, *supra* note 6, at 142–43.

124. See, e.g., Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order* 2–6 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-05, 2011), available at <http://ssrn.com/abstract=1753015> (discussing the development of international tribunals in various different areas of law).

125. E.g., Rudolf Bernhardt, *Current Developments, Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT’L L. 145, 145 (1995); Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11 Entry into Force and First Year of Application*, 79/80 BOLETIM DE DOCUMENTAÇÃO DE DIREITO COMPARADO 221, 223 (1999).

126. Ferrer Mac-Gregor, one of the judges of the Court, explained that in the conventionality control “[e]xiste . . . una asimilación de conceptos del derecho constitucional [there exists . . . an assimilation of concepts of constitutional law].” Ferrer Mac-Gregor, *Reflexiones*, *supra* note 5, at 928 (translation by author). It clearly shows an internationalization of constitutional law, particularly in bringing the constitutional guarantees as procedural instruments for the protection of fundamental rights and as safeguards of constitutional supremacy to the conventional guarantee of courts and quasi-judicial mechanisms for the protection of human rights under international covenants when these have not been enough, also setting a conventional supremacy. *Id.* at 928–29 (translation by author).

127. *Id.* at 942; Víctor Bazán, *La Corte Interamericana de Derechos Humanos y las cortes nacionales: acerca del control de convencionalidad y la necesidad de un diálogo interjurisdiccional sustentable* 6 (6–10 diciembre 2010) (unpublished manuscript), <http://www.juridicas.unam.mx/wcc/ponencias/13/215.pdf>.

128. *Dismissed Congressional Employees v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, paras. 4–5 (Nov. 24, 2006) (García Ramírez, J., concurring) (highlighting the similarities between the control of constitutionality and the conventionality control deposited in international court).

Judge García Ramírez—and the Court, which followed him in this aspect—not only assimilated the conventionality control to judicial review or control of constitutionality, he also highlighted the similarity of the Inter-American Court to a constitutional court.<sup>129</sup> García Ramírez argued that the Inter-American Court should not become a jurisdiction of last resort for those who cannot find justice in their own country.<sup>130</sup> On the contrary, the Mexican judge understood that only a few cases per year should be resolved by the Inter-American Court,<sup>131</sup> or else otherwise it would be “impracticable and disturbing.”<sup>132</sup> The Court should deal only with “big issues”<sup>133</sup> and develop case law and standards in some paradigmatic cases rather than being a human rights court to provide remedies for individual victims in as many cases as necessary.<sup>134</sup> It should be more like an inter-American constitutional court than a court of last resort for victims of human rights abuses.

This position reflects the debates in Europe that had focused on whether the European Court of Human Rights should provide “individual” or “constitutional” justice.<sup>135</sup> Proponents of the first view argue that “the right of individual petition is the centrepiece of the [European system]” that requires the European Court know each case and provide a remedy for any person whose rights have been violated.<sup>136</sup> Meanwhile, proponents of the constitutional justice position understand that the European Court should focus on providing fully reasoned decisions in cases that raise important or novel and complex issues of law that are of particular importance to the State concerned or that involve allegations of serious human rights violations.<sup>137</sup> Something similar has been proposed in relation to the U.N. Human Rights Committee to focus on encouraging, clarifying, interpreting, and explaining the International Covenant on Civil and Political Rights rather than attempting to solve all the individual cases that may arise.<sup>138</sup>

Certainly the clearest expression of the vision of the conventionality control as a constitutionality control and the Court as an inter-American constitutional court is when the Inter-American Court not only asserts the incompatibility of a domestic norm with the Convention but also assumes the power to invalidate those domestic norms. In the famous *Barrios Altos v. Peru* case the Court did not limit itself to deciding that Peru’s amnesty law was incompatible with the American Convention,

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129. *Id.* para. 4 (“I have compared the function of international human rights tribunals to the mission of national constitutional courts.”).

130. *See id.* para. 11 (stating that the international sphere is “not a substitute” because “the vital battle for human rights will be won in the domestic sphere”).

131. García Ramírez, *supra* note 5, at 131.

132. *Id.* (translation by author).

133. *Id.* (translation by author).

134. *Id.*

135. *See, e.g.,* Steven Greer & Andrew Williams, *Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?*, 15 EUR. L.J. 462, 466 (2009) (arguing that despite the reluctance of “the Council of Europe as a whole,” the ECHR should abandon the “discredited” individual justice motif for a constitutional justice jurisprudence).

136. Helfer, *supra* note 50, at 127.

137. *Id.*

138. *See* Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 15, 17–18 (Philip Alston & James Crawford eds., 2000) (arguing that the Human Rights Committee can best impact human rights by “exploring and explaining” its governing covenant rather than “summarily” applying it in each case).

but rather ruled that “consequently, [the law] lack[s] legal effect,”<sup>139</sup> adding that the lack of legal effect “has generic effects” beyond the *Barrios Altos* case itself.<sup>140</sup> The invalidation of national norms with general effects is a typical power of a constitutional court exercising judicial review, not of an international tribunal determining international responsibility of a State.<sup>141</sup> As such, *Barrios Altos* could be seen as the genesis of this constitutional court approach and the conventionality control. In another manifestation of its constitutional court approach, the Court has also ordered the transfer of cases from the military to the civil jurisdiction, even though the domestic legislation does not grant jurisdiction over military personnel to regular courts.<sup>142</sup>

In the past, the Court did not arrogate the power to invalidate domestic legislation. Prior to *Barrios Altos*, the Court had stated,

[T]he promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.<sup>143</sup>

The tribunal also stated that “[i]f the Court were to find the existence of such a violation, it would have to hold that the injured party be guaranteed the enjoyment of the rights or freedoms that have been violated and, if appropriate, that the consequences of such violation be redressed and compensation be paid.”<sup>144</sup> By seizing the power to “quash national court rulings [and] order national governments to amend legislation or revise administrative practices,” the Inter-American Court, through the conventionality control and other tools, has assumed the role of what Professor Laurence R. Helfer calls “‘direct’ embeddedness.”<sup>145</sup> This approach is typical of a deep-integration regime such as the EU,<sup>146</sup> or of a constitutional court, but not of an international human rights system.

In Europe, where there is a strong ongoing debate on whether the European Court should become a constitutional court,<sup>147</sup> the defenders of the constitutional

139. Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, para. 51 (Mar. 14, 2001); see also *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 171 (Sept. 26, 2006) (“[The law] has no legal effects.”).

140. *Barrios Altos v. Peru*, Interpretation of the Judgment of the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, Sec. VII, para. 2 (Sept. 3, 2001).

141. Cf. *Binder*, *supra* note 94, at 1215–17 (discussing the similarities between constitutional review and the Court’s insistence of conventionality control by domestic courts).

142. *Cabrera García v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, paras. 233–35 (Nov. 26, 2010).

143. See, e.g., International Responsibility, *supra* note 23, para. 58 (“[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.”).

144. *Id.* para. 48.

145. See Helfer *supra* note 50, at 135 (addressing how by not having the power to “quash national court rulings [and] order national governments to amend legislation or revise administrative practices,” the ECHR does not have “an integrated judicial hierarchy,” or “‘direct’ embeddedness”).

146. *Id.*

147. E.g., Steven Greer & Luzius Wildhaber, *Revisiting the Debate about ‘constitutionalising’ the*

vision do not advocate for granting the power to the European tribunal to quash domestic legislation. Those who advocate for seeing the European Convention as a Constitution and the European Court as a constitutional court argue that the European system has many constitutional characteristics.<sup>148</sup> First, as the European Court has stated, the European Convention is “a constitutional instrument of European public order.”<sup>149</sup> In its American counterpart, several authors have argued that the conventionality control contributes to the construction, consolidation and harmonization of an inter-regional legal order, or the formation of an *ius commune*.<sup>150</sup> Second, “human rights litigation in national legal systems is, almost by definition, ‘constitutional’ because it raises fundamental questions about the distribution of benefits and burdens and about the structure of social and institutional relationships, because it tests the limits of the exercise of public power by reference to specified interests framed as rights, and because it impacts significantly only on the docket of the highest courts, particularly at the supreme or constitutional court level.”<sup>151</sup> For these proponents, it would be “difficult to understand, therefore, how human rights litigation with such a clear constitutional complexion at the national level could lose this characteristic when it is taken” to the European Court.<sup>152</sup> Third, the European Convention is “increasingly acquiring ‘constitutional status’ in member States.”<sup>153</sup> Something similar is happening in Latin America, as I already explained.<sup>154</sup> If domestically the Convention has constitutional status, these advocates ask how this constitutional sense could be lost at the transnational level.<sup>155</sup> Fourth, “to a large extent, the [European Court] decides broadly the same kind of issues as a domestic supreme or constitutional court, and also in largely similar ways.”<sup>156</sup> But even with all those similarities to a constitutional court, no one in Europe advocates for granting the European Court the power to nullify domestic legislation, as the Inter-American Court does.

*Barrios Altos* and *Almonacid*, read together, show that the judicialization and constitutionalization process is a project that the Court initiated a decade-and-a-half ago. It is an ambitious one that surprisingly did not generate the strong debate that is taking place in Europe.

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*European Court of Human Rights*, 12 HUM. RTS. L. REV. 655, 667 (2012) (arguing to turn the ECHR into a constitutional court).

148. *E.g., id.*

149. *Loizidou v. Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) at 22 (1995) (Preliminary Objections).

150. *E.g.,* García Ramírez, *supra* note 5, at 127. Similarly, Ferrer Mac-Gregor mentions that the conventionality control of the Court “is gradually creating an *ius commune constitutionale* on human rights for the Americas or, at least, for Latin America.” Ferrer Mac-Gregor, *Reflexiones*, *supra* note 5, at 967 (translation by author). Sagüés also argues that control of compliance “is presented as one of the most immediate and practical tools to develop an *ius commune* in the region, particularly as a homogeneous view on fundamental human rights.” Nestor Pedro Sagüés, *Obligaciones Internacionales y Control de Convencionalidad*, 8 ESTUDIOS CONSTITUCIONALES 117, 119 (2010) (translated by author).

151. Greer & Wildhaber, *supra* note 147, at 667.

152. *Id.* at 667–68.

153. *Id.* at 668.

154. See *supra* Part III.A.

155. See, e.g., Greer & Wildhaber, *supra* note 147, at 668 (“[H]ow could [the ECHR] gain [constitutional] status at the national level without having it at the transnational level in some sense already?”).

156. *Id.*



### C. *The Court as the Final Interpreter of the Convention*

The conventionality control theory is also used by the Court to impose its authority as final interpreter of the Convention. The Court argues that the parameter of conventionality control is not only the Convention itself, but also its own case law.<sup>157</sup> Domestic judges should follow the Convention as interpreted by the Court. According to the Court, because it is empowered to enforce and interpret the Convention,<sup>158</sup> its interpretations acquire the same effectiveness as the Convention's text.<sup>159</sup> For instance, in *Gomes Lund v. Brazil*, a case challenging the validity of the Brazilian amnesty law,<sup>160</sup> the Brazilian Supreme Court did consider the arguments brought against the amnesty law, including those arguing its incompatibility with international law and Inter-American case law. The Brazilian court decided that the Inter-American precedents were not applicable, as it understood that the Brazilian amnesty law was different from the other cases decided by the Court.<sup>161</sup> Nevertheless, the Inter-American Court stated that the Brazilian Supreme Court did not exercise control of conventionality.<sup>162</sup> It appears that, for the Court, the only valid conventionality control is the one that coincides with its own decisions. In other words, a domestic judicial interpretation of the Convention differing from the Court's previous decisions is not an acceptable conventionality control.

There is some logic to the proposition that domestic tribunals should follow Inter-American precedents. Obviously, the opinions of the Court have highly persuasive force, as they come from the judicial body created to interpret the Convention.<sup>163</sup> Consistency and procedural-economy reasons also call for States to follow those precedents. In fact, many national judges in many countries follow the Court's jurisprudence.<sup>164</sup> If States do not follow the Court's interpretation it is possible that the case could be referred to the Inter-American system and eventually the Court may rule on it according to its own precedent. There is even some normative support for this idea. Article 69 of the Convention, by requiring that all States Party to the Convention be notified of the judgments of the Court,<sup>165</sup> seems to suggest an intention to promote the use of the Court's reasoning.<sup>166</sup>

157. See, e.g., *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006) ("To perform this task [of conventionality control], the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court . . .").

158. American Convention, *supra* note 3, art. 63.

159. Ferrer Mac-Gregor, *supra* note 5, at 63.

160. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010).

161. S.T.F., 2008/148623, Relator: Min. Eros Grau, 29.04.2010, 180, DIÁRIO O DO JUDICIÁRIO [D.J.e.], 19.09.2011, para. 42, available at <http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/adpf153.pdf>.

162. *Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, para. 177.

163. See, e.g., Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835, 1839–40 (2011) (explaining the impact of the Court's declarations on the jurisprudence of the Inter-American Court and its influence in the interplay between national and international law).

164. See, e.g., *id.* at 1844–47 (providing examples of the region's courts that have followed the Inter-American Court's interpretation).

165. American Convention, *supra* note 3, art. 69.

166. See, e.g., Nogueira Alcalá, *Los desafíos*, *supra* note 24, at 1179–80 (discussing Article 69 of the

Although policy and judicial economy reasons justify adhering to decisions rendered by the Court, such reasons do not create the legal obligation that the Court seeks to impose. Nowhere in the text of the treaty is it established that the Court's decisions are binding on States Parties to the Convention but not parties to the case, or that national courts must respect the Court's jurisprudence. Article 68.1 clearly states that "States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties,"<sup>167</sup> but it is silent with respect to cases to which they are not party.

The Convention does not create a system in which national courts must, in all cases, follow the decisions of the Court as if they were hierarchically inferior courts. Through conventionality control theory, the Court transforms international law into a system of precedent, similar to common law. The Court is also betting that Latin American tribunals, based on civil law traditions, with a lesser emphasis on case law and precedents,<sup>168</sup> will follow the Court's jurisprudence. At the same time, the Court may be contributing to a process, already in progress, of the transformation of the Latin American legal systems with more emphasis on interpretation of legal texts and reliance on precedents.<sup>169</sup>

#### IV. THE RELATIONSHIP BETWEEN LATIN AMERICAN AND INTER-AMERICAN JUDGES

Judges from countries that ratified the Convention are required by the Court to exercise conventionality control.<sup>170</sup> That means that there could be thousands of judges interpreting the content and scope of the American Convention. Domestic judges become inter-American judges at the national level.<sup>171</sup> In other words, the location of the interpretation of the Convention is not only in Costa Rica at the headquarters of the Inter-American Court.<sup>172</sup> On the contrary, there are multiple geographical points of conventional interpretation. While the Court asserted, as previously explained, its role as final interpreter of the Convention,<sup>173</sup> so far it has failed to develop a proper theory on the value of those Latin American precedents in developing the content of the Convention.

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Convention and its objective to make sure States Parties have a thorough knowledge of what the Convention requires).

167. American Convention, *supra* note 3, art. 68(1).

168. Cf. Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOBAL LEGAL STUD. 173, 182 (2009) ("Civil law systems look askance upon precedent because the code, and not its judicial incrustations, is the law."); *see generally* MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW* (3d ed. 2007).

169. *See generally* Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 AM. U. INT'L L. REV. 1031 (2011) (discussing modern developments in Latin American jurisprudence).

170. *See supra* Part I.

171. Noguiera Alcalá, *Los desafíos*, *supra* note 24, at 1170.

172. *Basis for a Draft Protocol*, *supra* note 121, para. 2.

173. *See supra* Part III.C.

### A. *Multiple Inter-American Interpreters of the American Convention*

A very positive consequence of the conventionality control is that now there will be multiple inter-American interpreters of the Convention, something that both the subsidiarity and integration principles seek to achieve. If each Latin American judge, in each case he or she decides, applies the Convention as the Court requires, there will be thousands of national precedents on the scope of the treaty. In fact, in most situations, the only precedents on rights protected by the Convention will come from national judges. With only a dozen or so cases a year decided by the Court, there are many areas where the national judges will be acting with no specific interpretive guidance from the Tribunal.<sup>174</sup> This decentralized system of conventionality control is already creating a strong Latin American jurisprudence on the Convention.<sup>175</sup> The interpretation of the Convention by Latin American judges in fact could be: “(a) an expansive or broad interpretation, (b) an innovative interpretation, (c) a corrective interpretation, (d) a receptive interpretation, (e) a neutralizing interpretation and (f) a conflicting interpretation.”<sup>176</sup> In the first possibility, a national judge interprets the Convention or national legislation in a more protective or expansive way than the Court does.<sup>177</sup> In the innovative interpretation, the national judge is called to interpret the Convention in areas where there is no case law from the Inter-American Court.<sup>178</sup> In the corrective interpretation, the national court changes its previous case law based on a decision from the Inter-American Court requesting it to do so.<sup>179</sup> In the receptive interpretation, national judges use the decisions of the Court handed down in cases involving third countries.<sup>180</sup> In the neutralizing interpretation, the national judge formally applies the Convention but avoids following the case law of the Court, for instance by arguing that the case at hand is different from the one decided by the Court.<sup>181</sup> Finally, in the conflicting interpretation, the national court rules against the

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174. For instance, there are no cases on the non-imposition of the death penalty on pregnant women, American Convention, *supra* note 3, art. 4.5; the right to compensation, *id.* art. 10; the right to reply, *id.* art. 14; the right to assembly, *id.* art. 15; or most aspects of freedom of religion, *id.* art. 12. *See generally* NICOLÁS ESPEJO YAKSIC & CARLA LEIVA GARCÍA, DIGESTO DE JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS (ENERO DE 1984–FEBRERO DE 2012) (2012) (discussing each case that has come before the court over a twenty-eight-year period and arranging them by article of the Convention).

175. For instance, a search of the case law of the Peruvian Constitutional Court referring to the American Convention recovers over 250 decisions (<http://tinyurl.com/oksmx2q>); and over 400 decisions for the Mexican Supreme Court (<http://tinyurl.com/mcd4u9x>) and 495 for only 2013 by the Costa Rican Constitutional Chamber ([http://jurisprudencia.poder-judicial.go.cr/SCIJ\\_PJ/busqueda/jurisprudencia/jur\\_libre.aspx?strErr=](http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_libre.aspx?strErr=)).

176. Humberto Nogueira Alcalá, *Diálogo interjurisdiccional y control de convencionalidad entre los tribunales nacionales y la Corte Interamericana de Derechos Humanos en Chile*, in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, *supra* note 56, at 511, 531 [hereinafter Nogueira Alcalá, *Diálogo*] (translation by author).

177. *Id.* at 531–32.

178. *Id.* at 532–33.

179. *Id.* at 533–34.

180. *Id.* at 534–35.

181. *Id.* at 540.

mandates of the Court in a particular case or the Inter-American case law in general.<sup>182</sup>

So, the Latin American interpretation of the Convention could be consistent with, partially consistent with, or contradictory to current or future Inter-American case law or among other domestic Latin American decisions. These consistencies or contradictions could be found at a horizontal level among courts of the same country and of the same level. In those circumstances a higher court could unify the interpretation of the American Convention at the national level. But those consistencies or contradictions can also occur transnationally when courts in different countries decide on the same conventional issue without a superior tribunal to unify or reconcile the interpretations. There may also be consistencies or contradictions between the Court and national courts. And finally, consistencies or contradictions may exist between the Commission and the Court<sup>183</sup> and between the Commission and national tribunals. The potential for intra-judicial conflict is omnipresent in a pluralistic system where multiple high courts and judges assert jurisdiction over the Convention.<sup>184</sup>

The emergence of multiple inter-American judges could generate, for some, concerns about the risks caused by the fragmentation of inter-American human rights (or international) law that could endanger its stability, consistency, “credibility, reliability and, consequently, authority.”<sup>185</sup> As I will develop later, I do not share those concerns about potential tensions among different inter-American

182. Nogueira Alcalá, *Diálogo*, *supra* note 176, at 542.

183. For example, for several years the Commission considered in cases of enforced disappearances whether there is a violation of Article 3 of the Convention, while the Court rejected that proposition. Compare *Lorenzo Manrique v. Peru*, Case 10.824, Inter-Am. Comm’n H.R., Report No. 56/99, OEA/Ser.L.V/II.102, doc. 6 rev. para. 110 (1999) (finding an enforced disappearance to be a violation of Article 3 of the convention), *Núñez Santana v. Peru*, Case 10.815, Inter-Am. Comm’n H.R., Report No. 55/99, OEA/Ser.L.V/II.102, doc. 6 rev. para. 111 (1999) (same), *Cruz Gómez v. Guatemala*, Case 10.606, Inter-Am. Comm’n H.R., Report No. 11/98, OEA/Ser.L.V/II.98, doc. 6 rev. para. 57 (1998) (same), *Medina Charry v. Colombia*, Case 11.221, Inter-Am. Comm’n H.R., Report No. 3/98, OEA/Ser.L.V/II.98 doc. 7 rev. para. 64 (1998) (same), *Lemus Garcia v. Guatemala*, Case 8076, Inter-Am. Comm’n H.R., Report No. 55/96, OEA/Ser.L.V/II.95 doc. 7 rev. para. 24 (1996) (same), and *Juventino Cruz Soza v. Guatemala*, Case 10.897, Inter-Am. Comm’n H.R., Report No. 30/96, OEA/Ser.L.V/II.95 doc. 7 rev. para. 43 (1996) (same), with *Ticona Estrada v. Bolivia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 191, paras. 68–71 (Nov. 27, 2008) (finding an enforced disappearance not to be a violation of Article 3 of the Convention), *La Cantuta v. Perú*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, paras. 117–21 (Nov. 29, 2006) (rejecting that an enforced disappearance violated Article 3 despite the State’s concession), and *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, paras. 176–81 (Nov. 25, 2000) (establishing that an enforced disappearance was not a violation of Article 3 of the Convention despite the State Party not presenting any argument on the issue). Finally, the Court changed its jurisprudence in *Anzualdo Castro v. Peru*. Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, para. 90 (Sept. 22, 2009) ([T]he Tribunal reconsiders its previous position and deems it is possible that . . . the forced disappearance may entail a specific violation of [Article 3] . . .”).

184. Cf. Stone Sweet, *supra* note 77, at 12–13 (discussing the problems of constitutional pluralism in Europe).

185. See Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, [2000] 2 part 2 Y.B. Int’l L. Comm’n 143, 147–49 U.N. A/CW.4/SER.A/2000/Add.1(Part2)/ Rev. 1, U.N. Sales No. E.03 V.7 (Part 2) (2006) (expressing concern about the risks to the authority and credibility of international law posed by the fragmentation of international law).

interpreters.<sup>186</sup> To the contrary I accept such possibilities as a matter of fact given the multiplicity of actors with different roles, loyalties, and constituencies.

The conventionality control exercised by the Court and its insistence on making its precedents binding could be seen as contributing to the unity or defragmentation of international or inter-American law.<sup>187</sup> Nevertheless, in the inter-American context there is no court that has the final word unifying the interpretation of the Convention. The Court is not a supreme inter-American court with powers to unify jurisprudence. As stated, the judgments of the Court are binding only for that specific case and for the parties in the case.<sup>188</sup> Even if it were possible for the Court to settle a question in a case, this does not mean that all national courts must retroactively overturn their decisions that are contradictory to the Court's decision. So it is possible that thousands of national cases that were decided in ways that are contradictory to subsequent case law of the Inter-American Court remain untouched. Given the requirements that petitions be submitted to the Commission within six months of the final decision of a case<sup>189</sup> and the length of Inter-American procedures,<sup>190</sup> most of these cases with national jurisprudence that contradicts that of the Court cannot be litigated at the Inter-American level. So this contradictory national jurisprudence will remain in force.

I embrace the emergence of multiple inter-American judges at the local level. As I explained, the subsidiarity principle reflects the idea that social change will come from local actors closer to local realities.<sup>191</sup> The contradictions and inconsistencies—rather than expressing pathologies, mistakes, or unfortunate side-effects of the proliferation of inter-American interpreters—reflect the different political contexts in which the Inter-American Court and national judges operate, the different institutional interests that they pursue, or the different goals that they intend to advance.<sup>192</sup> Latin American courts should be seen as political actors using inter-American law and not as mechanical followers of the Court.<sup>193</sup>

186. See *infra* Part V.A.

187. See, e.g., Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 586 (2010) (proposing that expansionism of the Inter-American Court contributes to unity of international law).

188. The Convention states that States Parties to the Convention undertake to comply with the judgment of the Court in any case to which that state is a party. American Convention, *supra* note 3, art. 68. However, I have argued that the Convention is silent with regards to whether a decision of the Court is binding upon states who are not parties to that particular case. See *supra* paragraph accompanying note 167.

189. American Convention, *supra* note 3, art. 46(1)(b).

190. See, e.g., Ariel Dulitzky, *Too Little, Too Late: The Pace of Adjudication of the Inter-American Commission on Human Rights*, 35 LOY. L.A. INT'L & COMP. L. REV. 131, 150 (2013) (finding the wait time for cases before the Inter-American Commission on Human Rights to be approximately six-and-a-half years, with the wait time becoming "even longer" when the petition is referred to the Inter-American Court).

191. See *supra* paragraph accompanying notes 38–39.

192. Cf. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 561–62 (2002) (noting that bodies interpreting international law "are engaged in a hegemonic struggle in which each hopes to have its special interests identified with the general interest" (emphasis omitted)).

193. Cf. Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 518 (2011) (arguing in favor of an approach whereby the Court "forge[s] closer ties to the state institutions that matter to implementation")

### B. *The Court and Latin American Precedents*

Beyond these real or possible contradictions, the fact is that Latin American judges are (or have the potential to be) active interpreters of the Convention. In fact, in most areas these national judges will intervene before the Court has the chance to do so.<sup>194</sup> Latin American judges had been using the American Convention for decades prior to *Almonacid*,<sup>195</sup> when the Court first introduced the concept of conventionality control, and in the past, the Court used precedents from Latin American courts on different occasions.<sup>196</sup> Nevertheless there is an urgent need to advance a theory on Latin American precedents informing the Court's interpretation of the Convention. The Court cannot in good faith demand that tribunals apply the Convention by exercising conventionality control and then ignore how those courts interpret the treaty and the resulting Latin American case law that emerges. As I said, there is a strong Latin American case law on the Convention.<sup>197</sup> Additionally, the Court already uses comparative Latin American law as an interpretative tool of the Convention.<sup>198</sup> If the Court quotes more domestic cases it needs to do so in a more principled manner.

Nevertheless the Court lacks proper principles to use when interpreting the Convention on issues which are new for the Court but that have been decided already by national courts or when domestic case law evolved from an original Inter-American precedent. Some of the basic questions that remain unanswered are: How should the Inter-American Court value such national interpretations? Is there some degree of deference that the Court should grant to these interpretations? Should the Inter-American Court wait for several Latin American courts in different countries to rule on the same matter before it moves forward in these areas? What is the interpretative value of Latin American precedents compared to other sources of interpretation that the Inter-American Court uses, primarily the jurisprudence of the European Court? Which should prevail, Latin American jurisprudence or European Court jurisprudence? What criteria should be used to decide these priorities? What is the value of the jurisprudence from the State that is being examined as opposed to decisions from other Latin American tribunals? How should potential conflicts among different national courts' decisions be treated? Should the Court distinguish different national judicial approaches to the same issue, and if so, how? Should the

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of the Court's orders).

194. *Cf. id.* at 514–15 (discussing how the Court has enabled Latin American judiciaries to gain power and legitimacy through applying the Convention and the Court's holdings).

195. *E.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/12/1989, "Microómnibus Barrancas de Belgrano S. A., impugnación," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1989-312-2490) (Arg.).

196. *E.g.*, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, para. 41 (Jan. 30, 1987) (quoting a decision of the Cámara Federal de Apelaciones en lo Criminal y Correccional of Buenos Aires, Argentina).

197. For example, see the cases cited discussing enforced disappearances *supra* note 183.

198. For instance, in *Osorio Rivera v. Peru*, the Court quotes cases from the Supreme Courts of Venezuela, Mexico, and Chile; from the Constitutional Courts of Peru and Bolivia; and from a Court of Appeal of Argentina. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 274, para. 113 n.213 (Nov. 26, 2013).

Court analyze Latin American jurisprudence that is inconsistent with its own reasoning or with the prevalent trends in the region?<sup>199</sup>

The Court lacks an appropriate response to these and many more questions on the value of the Latin American judicial interpretations of the Convention or of similar constitutional rights. As I mentioned, lately the Court has assumed the practice of citing domestic decisions consistent with its own interpretation of the Convention.<sup>200</sup> But the Court cites domestic cases that recognize the particular right in different manners and degrees.<sup>201</sup> The Court sometimes mentions decisions from countries that have ratified the Convention along with countries that have not ratified it and even countries outside the Americas.<sup>202</sup> However, the Court includes all those references as if they regulated the pertinent right in the same way, as if they were consistent with the doctrine held by the Court, and as if all jurisdictions had adopted their position because of the influence of the Convention or in order to comply with it. The Court does not conduct a serious analysis of Latin American case law to determine the existence of a regional consensus around a particular right or even to define the scope of such right.<sup>203</sup> Nor does it seem that the Inter-American Court is interested in analyzing the jurisprudence from various countries contrary to the position that the Court adopts.<sup>204</sup>

199. For instance, in *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court omitted quoting a decision from Honduras that contradicted its own assertions. *Compare* Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 164 (June 27, 2012) (citing cases and statutes from numerous jurisdiction, but not Honduras, that have complied with the Court's precedence requiring prior consultation with indigenous groups "regarding any administrative or legislative measure that directly affects them"), with *La Corte Ley de Propiedad*, Feb. 8, 2011, SENTENCIA DE LA CORTE SUPREMA EN RELACIÓN A RECURSOS INCONSTITUCIONALIDAD SOBRE LA LEY DE PROPIEDAD (Hond.) (on file with author).

200. For example, in *Sarayaku*, the Court cites national legislation and case law relating to prior, free, and informed consent by indigenous peoples from countries that had ratified the Convention (Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay, Peru, and Venezuela), countries that had not ratified the Convention (Belize, Canada, and the United States), and even countries outside the region (New Zealand). *Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 164.

201. See, e.g., *id.* (discussing the varying degrees to which nations have incorporated the rights of tribal persons as provided by the Convention).

202. E.g., *id.*

203. I doubt that it is advisable for the regional consensus to be a determining factor in the interpretation of the Convention. In a region where there are so many structural human rights problems, giving deference to the regional consensus would lower many standards of protection. It would also mean a somewhat conservative vision for the role of the Convention and of the Court, which would limit them to protecting at the regional level the rights already guaranteed domestically. I believe that the Convention and the Court play a much bigger role in the Americas. A regional consensus can be an element but should be neither the floor nor the ceiling guideline. The Court must be aware of what it is that states are doing and how tribunals are ruling in each area over which it must intervene. This will necessarily facilitate the acceptance of its jurisprudence and the understanding of the context in which such jurisprudence will operate. *But cf.* Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 123 (2008) (arguing that inattention to regional consent is problematic because it "presents a problem that may impede efforts to strengthen the system").

204. For example, in *Sarayaku*, the Court cites a lower court in Brazil that recognizes the right to consultation but omits any reference to the Brazilian Supreme Court decision that established many stringent conditions for, and strong limitations on, the scope of when prior consultation with indigenous peoples is required. *Compare Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 164 (citing a Brazilian lower court that had required prior consultation with indigenous peoples), with S.T.F., No. 3.388-4,

This Article will not attempt to develop the principles of the proper relationship between Latin American and Inter-American precedents. For now, it is sufficient to say that I disagree with former Judge García-Ramírez, who held that when a national court carries out a conventionality control without Inter-American precedents its decisions have only provisional value and are conditional up to the emergence of an inter-American standard developed by the Court.<sup>205</sup> These national decisions are not provisional. Many, if not all of them, will stand in the specific cases in which they were rendered and will never be revised by the Court.

While the Court should not feel bound by national decisions, it should grant them particular authoritative interpretative value. In the new integration model, national judges are proper interpreters, guardians, and enforcers of the Convention, just as the Court is. Thus, the Court should, at least, mention this groundbreaking national jurisprudence. In that way, the Court will show that tribunals in the region have already dealt with similar matters. The Court should also be more serious about the often-mentioned jurisprudential dialogue,<sup>206</sup> meaning the reciprocal influence between national courts and the Inter-American Court in the development of its jurisprudence. Currently it seems to be more of a one-way monologue or a “unidirectional pattern.”<sup>207</sup> A truly judicial dialogue would require the Court to read and discuss national courts’ jurisprudence, in open-minded-yet-critical fashion.<sup>208</sup> Judicial dialogue implies “reciprocal intellectual give and take,”<sup>209</sup> and not a recitation of national precedents without any real analysis or influence in the process of forming the Court’s opinion. In so doing, the Court would have a true ongoing

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Relator: Min. Carlos Britto, 19.03.2009, 181, D.J.e., 25.09.2009, 71, 77–78 (Braz.) (addressing the rights of consultation of native peoples).

205. *E.g.*, García Ramírez, *supra* note 5, at 128–29.

206. *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 194 (2003) (arguing that international dialogue amongst courts will lead to greater judicial comity based on “respect owed judges by judges,” not a comparison of “general national interest as balanced against the foreign nation’s interest”); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1108 (2000) (arguing that conflict between the European Court of Justice (ECJ) on the one hand and national courts from Germany, Italy, and Belgium on the other is part of a “tug of war” where each is a check on the power of the other “through dialogue of incremental decisions”); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 100, (1994) (discussing the “judicial dialogue” between the ECJ and national courts whereby national courts “refer cases raising European law issues to the ECJ and then use its analysis of these issues to guide their disposition of the case”).

207. Víctor Bazán, *Control de convencionalidad, aperturas dialógicas e influencias jurisdiccionales recíprocas*, 18 REVISTA EUROPEA DE DERECHOS FUNDAMENTALES 63, 94 (2011); *see also* Nogueira Alcalá, *Los desafíos*, *supra* note 24, at 1180–81 (noting that domestic courts have received little input from the Inter-American Court). For example, the Court’s President has said, “The highest courts of Latin America have been nourishing themselves from the Court’s case law in a process that can be referred to as the ‘nationalization’ of international human rights law.” *Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, para. 33 (May 26, 2010) (García-Sayán, J., concurring). The President added, for this important process of interaction between national and international courts in the region to happen, in which the former are called to implement international human rights law and observe the provisions of the jurisprudence of the Court, it is necessary to continue encouraging the substantive dialogue which makes it possible. *Id.* In other words, Latin American courts should receive and apply inter-American precedents. But the Court’s President does not mention in any way the need for the Inter-American Court to nourish, inform, and enrich itself by using and taking Latin American jurisprudence seriously.

208. *Cf.* ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 66, 70 (2004) (discussing how some Justices on the United States Supreme Court have begun to cite and discuss international precedents in their opinions).

209. VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 71 (2010).



conversation on matters of substance with national tribunals. This would also encourage domestic courts to use the Convention more and would provide legitimacy to those domestic courts that consistently apply the Convention and whose decisions the Court will follow. If the Court agrees with national decisions, it should recognize this agreement explicitly and explain specifically why it follows such case law. If, to the contrary, the Court departs from national jurisprudence, it should explain the reasons. This approach strengthens the position of national courts as interpreters of the Convention; it encourages national tribunals to use the Convention more and makes national tribunals substantive interlocutors of the Inter-American Court.

### C. *National Courts and Inter-American Precedents*

On the other side of the coin, conventionality control requires national courts to apply the Convention as interpreted by the Court. Thus, it is possible to argue that, in cases where jurisprudence from the Inter-American Court exists, the degree of freedom for national courts is limited. The reason would be that national courts must implement the decisions of the Court without departing from it.<sup>210</sup> And, as the body was created to provide judicial interpretations of the Convention, the Court's decisions have a strong authoritative value. Nevertheless, from a purely textual point of view, there is no legal conventional obligation to follow Court decisions beyond the specific case and only for the specific country. As I mentioned, there are policy reasons to do so, but no legal obligation.<sup>211</sup>

In fact, from a human rights perspective, there are several reasons that could justify national courts departing from the Inter-American precedents on certain occasions. A blind application of the decisions of the Court undermines the dynamic and evolving nature of the American Convention. As the Court has stated correctly, "[H]uman rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."<sup>212</sup> The conditions may have evolved since the Court's decision and may require a new inter-American interpretation that could be started by a national judge. Moreover, the Court is not infallible. It may have erred in its decision on a specific case. Why should a national judge follow a Court's decision that may be wrong or less protective than that State's constitution?<sup>213</sup>

210. *E.g.*, Ruiz-Chiriboga, *supra* note 5, at 204–10; Sagüés, *El "control de convencionalidad"*, *supra* note 5, at 3.

211. *See supra* paragraph accompanying notes 112–16.

212. Sánchez v. Honduras, Interpretation of Judgment of Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 102, para. 56 (Nov. 26, 2003) (quoting 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, para. 114 (Oct. 1, 1999)).

213. *See*, for instance, the Supreme Court of Argentina in *Esposito*, CSJN, 23/12/2004, "Espósito, Miguel Ángel / incidente de prescripción de la acción penal," La Ley [L.L.] (2004-E-224), paras. 14, 16, in comparison to the Inter-American Court in *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, para. 162 (Sept. 18, 2003). In *Bulacio*, the Court established on a dubious conventional and jurisprudential basis the inapplicability of the statute of limitation in an isolated case of extrajudicial killing and determined that the criminal investigation should continue to punish those found guilty of the crime. Inter-Am. Ct. H.R. (ser. C) No. 100, para. 162. The Supreme Court of Argentina was then faced with the need to decide whether to annul, in clear prejudice to the accused, the decision given in the internal process, or whether to keep the domestic decision in

A mechanical application of the case law would affect the very judicial independence of Latin American judges.<sup>214</sup> The situation is similar to the one explained by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Čelebići* case when it was requested to follow a precedent set by the International Court of Justice (ICJ).<sup>215</sup> In rejecting the argument, the Appeals Chamber stated,

[T]his Tribunal is an autonomous . . . judicial body, and although the ICJ is the 'principal judicial organ' within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of . . . courts, it may, after careful consideration, come to a different conclusion.<sup>216</sup>

The same could be said about the Inter-American Court. Although the tribunal is "an autonomous judicial institution whose purpose is the application and interpretation of the American Convention,"<sup>217</sup> it is not a hierarchical authority above domestic judges.<sup>218</sup> The European Court has explained that there is a difference between its role and purpose and that of the ICJ that provides a "compelling basis for distinguishing Convention practice from that of the International Court."<sup>219</sup> The same compelling reasons given the different roles of national courts and the Inter-American Court could justify departing from the Inter-American case law in a concrete case.

The jurisprudence of the Court has to have an authoritative value as an interpretive guide that domestic courts should follow as much as possible, even if they are mandatory only for the specific case. Because the Court and the Commission were created by the Convention to apply and interpret the Convention, the jurisprudence of the Court and the views of the Commission should be the starting point for Latin American judges when they apply the Convention and should be given particular deference. Following the jurisprudence of the Court and the

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defiance of the ruling of the Inter-American Court. *Espósito*, L.L. (2004-E-224), para. 14. The Supreme Court opted for the first choice, even if it "made clear that this Court does not agree with limiting the right to defense which follows from the decision of the said international court." *Id.* para. 12 (translation by author). The Argentine Court added that it was its duty "as part of the Argentine State, to comply with the Inter-American Court decision." *Id.* para. 16 (translation by author).

214. As the Inter-American Court itself said, independence of judges means that "they should not feel compelled to avoid dissenting with the reviewing body which, basically, only plays a distinct judicial role that is limited to dealing with the issues raised on appeal by a party who is dissatisfied with the original decision." *Apitz Barbera v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, para. 84 (Aug. 5, 2008).

215. *Prosecutor v. Delalić (Čelebići Case)*, Case No. IT-96-21-A, Judgment, paras. 21-24 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

216. See, e.g., *International Responsibility*, *supra* note 23, para. 58 ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.").

217. Statute of the Inter-American Court, *supra* note 16, art. 1.

218. See *American Convention*, *supra* note 3, art. 68 (requiring States that are party to the case undertake to comply with the judgment of the Inter-American Court).

219. *Loizidou v. Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) at 24 (1995) (Preliminary Objections).

views of the Commission consolidates predictability and consistency in the legal developments of the Convention, increases confidence in judicial decisions, and contributes to the real and perceived integrity of the judicial process.

Clear guidelines should be developed to allow the possibility of rejecting a jurisprudence of the Court or the Commission when compelling reasons so require and justify such departure. A national court could depart from the Court's precedents after serious consideration of the implications of that departure. Some of the weighty reasons for such a position could be that the Inter-American decision turns out to be outdated given the evolution of international human rights law and comparative law, that the departure is warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions, highly persuasive reasons demonstrating the erroneous nature of the Court's decision, or the proper appreciation of the lessons learned from experience.<sup>220</sup> Of course, domestic courts are bound by the Court's decisions in specific cases against their own States.

## V. IMPROVING THE INTEGRATED INTER-AMERICAN MODEL

### A. *A Justification for the Integration Model*

As already explained, the control of conventionality and the integration principle lack a strong legal foundation. And so far, there is little effort to develop a theoretical framework to support this principle. In this Part I attempt to provide

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220. International and national tribunals have reconsidered earlier decisions and changed their positions. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (“When this Court reexamines a prior holding [to determine whether to depart from a prior decision], its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of [departing from the Court’s precedent.]. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” (citations omitted)); CSJN, 21/3/2006, “Barreto, Alberto Damián c. Provincia de Buenos Aires / daños y perjuicios,” Fallos (2006-329-759) (Arg.) (justifying changes in its case law based on “reasons of justice, recognition of the erroneous nature of the decision, the proper appreciation of lessons learned through experience, or if changing historical circumstances have demonstrated the advantage of abandoning the established criterion” (translation by author)); *Cossey v. United Kingdom*, App. No. 10843/84, 184 Eur. Ct. H.R. (ser. A) para. 35 (1990) (“[Legal certainty] would not prevent the [ECHR] from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.” (citation omitted)); *Anzualdo Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, para. 90 (Sept. 22, 2009) (explaining the decision to “reconsider[] its previous position” taking into account the adoption of new international instruments, the practice of U.N. treaty bodies and special procedures, the consistent position of the Commission, and the legislation and case law of some countries).

some justification for a more robust integration model. My framework departs from the hierarchical, unidirectional stance that the Court takes.

The Inter-American Court does not operate in isolation. There is already a network of judicial authorities that provides a fertile ground to cement the conventionality control doctrine and the integration principle. Several Latin American courts exercised conventionality control or applied the Convention as interpreted by the Court years before the explicit requirement established in *Almonacid*.<sup>221</sup> After the *Almonacid* case, several Latin American tribunals embraced the conventionality control doctrine.<sup>222</sup> At the same time, some other high courts in Latin America have squarely rejected the decisions of the Inter-American Court either in concrete cases involving their own countries or by refusing to apply Inter-American precedents.<sup>223</sup> This suggests that when the Court made the conventionality

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221. See, e.g., CSJN, 7/7/1992, "Ekmekdjian, Miguel Angel c. Sofovich, Gerardo / recurso extraordinario," Fallos (1992-315-1492) (Arg.) (stating that the interpretation of the Convention should be guided by the case law of the Inter-American Court); Corte Constitucional [C.C.] [Constitutional Court], febrero 23, 2000, M.P: Alejandro Martinez Caballero, Sentencia C-010/00 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2000/c-010-00.htm> (affirming that the Court's interpretation is a relevant hermeneutical criterion for the interpretation of the Colombian Constitution, as the American Convention has a special status in the Colombian legal order); Sentencia [S.] No. 2313, de las 4:18 p.m., 9 May 1995, SISTEMA COSTARRICENSE DE INFORMACIÓN JURÍDICA [Constitutional Court], Expediente 90-000421-0007-CO sección VII (Costa Rica) (establishing that the Inter-American Court's interpretation of the Convention has the same legal value as the Convention).

222. E.g., CSJN, 31/8/2010, "Videla, Jorge Rafael y Massera, Emilio Eduardo s/recurso de casación," Fallos (2010-333-1657) (Arg.), <http://www.dipublico.org/7314/videla-jorge-rafael-y-massera-emiliueduardo/>; CSJN, 13/7/2007, "Mazzeo, Julio Lilo s/ recurso de casación e inconstitucionalidad," Fallos (2007-330-3248) (Arg.), <http://www.dipublico.org/juris/mazzeo.pdf>; Tribunal Constitucional Plurinacional de Bolivia [Plurinational Constitutional Tribunal of Bolivia], noviembre 7, 2011, Sentencia Constitucional 1888/2011-R, available at <http://www.tcpbolivia.bo/tcp/sites/all/modulostcp/gaceta/resolucion24029.html>; C.C., agosto 23, 2012, M.P: Jorge Iván Palacio, Sentencia T-653/12 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2012/t-653-12.htm>; Corte de Constitucionalidad [Constitutional Court], febrero 14, 2012, Expediente 3334-2011 (Guat.), available at <http://old.congreso.gob.gt/archivos/acuerdos/2012/CCXCIII1000900293334201101032012.pdf>; Resolución dictada por el Tribunal Pleno en el expediente varios 912/2010 y Votos Particulares formulados por los Ministros Margarita Beatriz Luna Ramos, Sergio Salvador Aguirre Anguiano y Luis María Aguilar Morales; así como Votos Particulares y Concurrentes de los Ministros Arturo Zaldívar Lelo de Larrea y Jorge Mario Pardo Rebolledo, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court] (Mex.), available at [http://dof.gob.mx/nota\\_detalle.php?codigo=5212527&fecha=04/10/2011](http://dof.gob.mx/nota_detalle.php?codigo=5212527&fecha=04/10/2011); Tribunal Constitucional de Peru [Constitutional Court of Peru], agosto 8, 2012, M.P: César Humberto Tineo Cabrera, Expediente 00156-2012-PHC/TC, available at <http://www.tc.gob.pe/jurisprudencia/2012/00156-2012-HC.html>.

223. This is particularly the case in Venezuela. See Tribunal Supremo de Justicia [T.S.J.] [Supreme Tribunal of Justice], Sala Constitucional diciembre 18, 2008, M.P: Arcadio Delgado Rosales, Expediente No. 08-1572 (rejecting several decisions of the Inter-American Court); see also CARLOS AYALA CORAO, DEL DIÁLOGO JURISPRUDENCIAL AL CONTROL DE CONVENCIONALIDAD 192-93 (2012) (discussing the T.S.J.'s rejection of the Inter-American Court's conventionality control). Two recent, highly publicized cases are the decision of the Supreme Court of Uruguay, rejecting the *Gelman* decision, and the Dominican Constitutional Court decision rejecting the *Yean and Bosico* judgment. Suprema Corte de Justicia [Supreme Court], "M. L., J. F. F. O. - Denuncia - Excepción de inconstitucionalidad arts. 1, 2 y 3 de la Ley no. 18.831," 22 febrero 2013, M.R.: Jorge O. Chediak González, IUE 2-109971/2011, Sentencia No. 20 (Uru.), available at [http://www.stf.jus.br/repositorio/cms/portalStfInternacional/newsletterPortalInternacionalJurisprudencia/anexo/19\\_Suprema\\_Corte\\_de\\_Justica.pdf](http://www.stf.jus.br/repositorio/cms/portalStfInternacional/newsletterPortalInternacionalJurisprudencia/anexo/19_Suprema_Corte_de_Justica.pdf); Tribunal Constitucional [Constitutional Court], 23 septiembre 2013, Expediente TC-05-2012-0077, Sentencia TC/0168/13 (Dom. Rep.), available at <http://tribunalconstitucional.gob.do/sites/default/files/documentos/Sentencia%20TC%200168-13%20-%20C.pdf>. The Brazilian Supreme Court decision on amnesty law that took a very restrictive interpretation of the Inter-American precedents can also be added. S.T.F., 2008/148623,

control explicit, the tribunal was building upon existing, although inconsistent, Latin American practices. It could also mean that the conventionality control is not a radical departure from accepted Latin American precedents. But it also calls for the Court to recognize that Latin American tribunals had shown creativity in applying the Convention before the explicit requirement made by the Court. So the starting point should be a model that understands that the relationship of the Court with States goes beyond the executive, particularly the Ministries of Foreign Affairs. In particular, the model should reinterpret the relationship between the Court and local tribunals in order to conceive it as a strategic partnership. This partnership can help to “heighten [domestic courts’] sense of accountability, and to demonstrate the benefits of partaking in transnational judicial dialogue by deferring to, citing to, and otherwise promoting national jurisprudence that embeds the Court and its rulings in national settings.”<sup>224</sup> Particularly, this trend should encourage a bottom up process led by domestic judges rather than a top-down approach imposed by the Court.<sup>225</sup>

By grounding the conventionality control in a partnership between the Court and local tribunals, the integration principle embraces the foundations of the subsidiarity principle. The subsidiarity principle stems from the idea that States have the primary responsibility to protect the rights of individuals through their domestic legal systems and practices, and in case they fail to do so, the American Convention and the organs that it creates (the Court and the Inter-American Commission) act as a complement to domestic laws and practices in redressing victims.<sup>226</sup> Subsidiarity is also premised on the understanding that local actors, including legislators and judges, “are in the best position to appreciate the complexity of circumstances on the ground.”<sup>227</sup> In this alternative understanding, the integration principle embraces the idea that those local actors including domestic judges are better suited to understand what measures may be most effective for internalizing human rights norms in distinct social, economic, cultural, historical, and political contexts.<sup>228</sup> Nevertheless my argument does not seek to place judges as the main actors to bring social change.<sup>229</sup>

From this perspective, there is consensus that improvement in national Convention compliance lies more in the effective use of the Convention by judges rather than in its formal incorporation. Several studies on the effectiveness of international adjudication have demonstrated the importance of local actors, particularly judges, in the implementation of international human rights law standards.<sup>230</sup> Others have also highlighted that social change consistent with human

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Relator: Min. Eros Grau, 29.04.2010, 180, D.J.e., 19.09.2011, para. 42, available at <http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/adpf153.pdf>.

224. Huneus, *supra* note 193, at 496–97.

225. I thank Lucas Lixinski for this idea.

226. *E.g.*, Acevedo-Jaramillo v. Peru, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 157, para. 66 (Nov. 24, 2006).

227. Melish, *supra* note 34, at 443.

228. *Id.*

229. For Europe, see Lucas Lixinski, *Taming the Fragmentation Monster through Human Rights? International Constitutionalism, ‘Pluralism Lite’ and the Common Territory of the Two European Legal Orders*, in *THE EU ACCESSION TO THE ECHR* 219–33 (Vasiliki Kosta et al. eds., 2014).

230. *E.g.*, Huneus, *supra* note 193, at 531; *cf.* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 306–07 (1998) (arguing that although studies have had mixed results, supranational tribunals generate better results when state judiciaries are

rights standards comes, not from international courts, but from local actors and how they appropriate international human rights law.<sup>231</sup> So the integration model proposed embraces the emergence of multiple inter-American judges at the local level. Jointly with the subsidiarity principle it reflects the idea that social change will come from local actors closer to local realities.<sup>232</sup>

Others have also demonstrated that national actors obey international law in part as a result of “repeated *interaction* with other actors in the transnational legal process.”<sup>233</sup> Thus, “a first step is to empower more actors to participate” in those processes.<sup>234</sup> Transnational legal processes, including the relationship between the Inter-American Court and domestic tribunals do, could, and should trigger those interactions.<sup>235</sup> Similarly, some have explained that international human rights law is implemented by a process of socialization.<sup>236</sup> In other words, the way the Court can exert influence over the behavior of national decision-makers, particularly domestic courts, does not rest on its coercive power, but rather in the “the skillful use of persuasion to realign the interests and incentives of decision-makers in favour of compliance” with the Court’s decisions and case law.<sup>237</sup>

From this perspective, the conventionality control and the integration principle facilitate and promote these socialization and transnational processes and recognize the role that domestic courts play in promoting (or hampering) social change. Domestic courts operating within this newly expanded, integrated inter-American system, and having to justify or criticize the State’s official policies in terms of the inter-American human rights discourse, become essential actors in this socialization process.<sup>238</sup> Thus, domestic courts are influenced and strengthened by using the inter-American discourse. At the same time, they become a source of legitimacy and authority for the decisions and the jurisprudence of the Court. If national courts use the Inter-American precedents, they provide the Court with social legitimacy. Interpreted in this manner, the integration principle requires the Court to be aware that its authority and legitimacy depend, in large part, on the existence of a community of Latin American judges engaged with the Court who use the tribunal’s precedents, interact with it, but also monitor and disseminate the Court’s decisions

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willing to implement their precedents).

231. See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 775 (2008) (“[R]ather than viewing local actors as forces to be deployed to increase the power of a tribunal, human rights tribunals should understand that international rights courts are more effective when their work contributes to efforts deployed by domestic activists as part of their broader human rights campaigns.”).

232. See *supra* Part II.A.

233. Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656 (1997).

234. *Id.*

235. Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT’L L. 337, 339 (2004).

236. E.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 635–38 (2004).

237. Helfer, *supra* note 50, at 135.

238. See, e.g., Par Engstrom & Andrew Hurrell, *Why the Human Rights Regime in the Americas Matters*, in HUMAN RIGHTS REGIMES IN THE AMERICAS 29, 39 (Mónica Serrano & Vesselin Popovski eds., 2010) (arguing that domestic judiciaries, if they harness the resources available to them, are essential political actors for the domestic protection of human rights).

and standards by applying (or sometimes rejecting) them. If national judges take into account the Court's jurisprudence in their decisions, the effectiveness of the Convention is increased as the Court's interpretation transcends the individual case.<sup>239</sup> Conceived in this way, the integration principle calls for a strategic partnership between the Court and Latin American judges and places both sides on equal footings, not in a hierarchical order.

Paradoxically, as the Inter-American Court pushes to expand its power and legitimacy by requiring domestic courts to apply its case law, national judges may find an incentive to protect their own spaces by using the American Convention in a more consistent way. Rather than submit to the Court's overarching presence, national judges may preclude the Inter-American Court's intervention by consistently using a pro-human rights perspective to interpret the American Convention and other international treaties. In such a way, domestic rulings, rather than the Court's, would be the final word in a specific case. By protecting human rights, national courts may be protecting their own inter-American jurisdiction. From this perspective, "assertive national courts invoking international law can effectively limit the autonomy of the international tribunals . . ."<sup>240</sup>

By conceiving of Latin American judges as active participants in the creation of inter-American human rights law, my integrated model challenges the approach developed by the Court. By its vision, the Court reduces national courts "to a simple compliance mechanism for international law; in effect, not judges, but police"<sup>241</sup> by requiring strict adherence to its case law and by not paying enough serious and due attention to Latin American precedents. The Court's model insists on "the existence of vertical connections that require the courts of a State to enforce that State's international legal obligations"<sup>242</sup> in a very mechanical way. "Associated with this on/off view of the application of international law," including inter-American law, "is the assumption that international law" and inter-American law "will look much the same everywhere."<sup>243</sup> It is in this perspective that the Court insists that its decisions be applied in all situations and in all countries regardless of the case in which it was handed down and the particular context. Additionally, in this understanding, most of the judgments of the Court are textual repetition of previous cases without due respect to the different contexts involved. The Inter-American Court's aspiration of a strong and unified international law is misguided in its focus on notionally uniform enforcement. Such a goal ignores the complications, contradictions, complementarities, and nuances in the meaning of the American Convention that come from rulings by domestic courts that my integrated model promotes.<sup>244</sup>

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239. See generally Stone Sweet, *supra* note 77.

240. Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 68 (2009).

241. See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 502-03 (2000) (arguing that when international tribunals (and scholars) view domestic courts merely as enforcement mechanisms, it diminishes those domestic tribunals' abilities to be strategic choices in litigation).

242. *Id.* at 515.

243. *Id.* at 503.

244. See *id.* at 516-17 (discussing the intricacies of implementing international law).

Because domestic judges, in contrast to the Inter-American Court, have to apply both domestic law and international human rights law, they speak to two different communities: the national and the Inter-American. My integration model understands that “domestic judges applying international law may be more conscious both of the need to translate norms from one community to another and of the relationship between that translation and the persuasiveness of their judgment to both communities.”<sup>245</sup> Contrary to the Court’s insistence on the mechanical application of its case law, an alternative interpretation of the integration principle sees that “domestic interpretation of international law is not merely the transmittal of the international, but a process of translation from international to national.”<sup>246</sup> This understanding of the integration principle “recognize[s] the creativity, and therefore the uncertainty, involved in domestic interpretation” and use of the American Convention.<sup>247</sup> As such, this new vision of the integration model gives more power to domestic judges in embedding the American Convention in time and place and as part of a broader inter-American community. In other words, the integration principle as a translation process requires local judges to be both faithful to the other language (the Convention and the case law of the Court) as well as to assert their own language (the national legal system and context). In this perspective, the integration principle does not require substituting the local judgment with the Inter-American one but to promote engagement with diverse internal and Inter-American perspectives on the problem at hand.<sup>248</sup> The contradictions and inconsistencies between Inter-American and Latin American precedents, rather than expressing pathologies, mistakes, or unfortunate side-effects of the proliferation of inter-American interpreters, instead reflect the different political contexts in which the Inter-American Court and national judges pursue their different institutional interests or goals.<sup>249</sup>

In this conception, Latin American courts are seen as political actors using inter-American law rather than mechanical followers of the Court. If we conceive the Inter-American Court and national courts as political actors pursuing their own institutional goals and responding to different, although sometimes overlapping, audiences, the well-reasoned decisions of the Court will be necessary but not enough to ensure that domestic courts follow them. In other words, we need to understand that in this “dialogue,” or “translation,” there is no “impartial third party.”<sup>250</sup> The Inter-American Court and the States (including their courts) “each have stakes to defend and it is their negotiating skills that determine where solutions will be found and whether they will stick in the long run.”<sup>251</sup>

The proposed integrated model takes a pluralistic vision of inter-American interpreters using the American Convention. The model embraces the “jurisdictional tensions [that] express deviating preferences held by influential

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245. *Id.* at 504.

246. *Id.* at 506.

247. Knop, *supra* note 241, at 506.

248. *See id.* at 535 (discussing the need for a more integrated form of international law so that “the authority of international law is persuasive not binding”).

249. *See, e.g.,* Koskeniemi & Leino, *supra* note 192, at 561–63 (discussing that differences in interpretation among tribunals “arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic”).

250. *Id.* at 578.

251. *Id.*



players in the international [and domestic] arena. Each institution (the Court and national judges) speaks its own professional language and seeks to translate that into a global Esperanto, to have its special interests appear as the natural interests of everybody.”<sup>252</sup> The integration principle accepts that the ways of advancing human rights “should be a matter of debate and evidence, and not of abstract ‘consistency,’ as to which institution should be preferred in a particular situation.”<sup>253</sup> In other words, the integration principle accepts the idea of human rights as a space for political disputes where a plurality of interested actors has many elements at stake and in which the Court and the domestic tribunals negotiate their relationships. While some domestic courts use the Inter-American Court to fortify their own independence and authority with respect to other branches of government,<sup>254</sup> other domestic tribunals unite with executives and legislators of their nation in a position of confrontation against the Court.<sup>255</sup>

The integration principle rejects the idea of an integrated whole, neatly organized according to rules of hierarchy and a clear distribution of tasks.<sup>256</sup> Instead, it accepts that there is a pluralistic human rights legal order where several fundamental norms (particularly the Convention and domestic constitutions) compete for authority.<sup>257</sup> The relationships between the constituent parts of this pluralistic system “are governed in the final analysis, not by legal rules, but by politics, including the politics of the various judiciaries involved. This results in a horizontal-heterarchical, rather than vertical-hierarchical structure . . . .”<sup>258</sup> In Europe it is argued that this system is “remarkably stable, mutually-respectful, and ultimately non-conflictual . . . . [T]he principal dynamic stems mainly from the status of the ECHR in national legal systems, and the role ascribed to it and to Convention jurisprudence by national courts.”<sup>259</sup> In this vision domestic courts are at least as relevant as the Inter-American one.

My alternative integration model also acknowledges that, “[w]ithin the domestic legal order, the Convention is only one element in the mosaic of different constitutional provisions and its interpretation in that context may differ considerably from an interpretation based on the Convention alone,” as the Court does.<sup>260</sup> Additionally, national judges should have flexibility to decide cases, taking

252. *Id.*

253. *Id.*

254. See C.C., febrero 26, 2010, Sentencia C-141/10 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm> (barring the possibility of a third presidential mandate citing Article 23 of the Convention).

255. See, e.g., T.S.J., Sala Constitucional, diciembre 18, 2008, M.P: Arcadio Delgado Rosales, Expediente No. 08-1572 (Venez.) (rejecting the enforceability of a Court’s decision and asking the Government of Venezuela to withdraw from the Convention).

256. See *supra* Part II.B.

257. See Greer & Wildhaber, *supra* note 147, at 681 (discussing the pluralistic conceptual framework in the context of the ECHR).

258. *Id.*

259. *Id.*

260. See Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT’L L.J. 359, 376 (2005) (discussing integration in the context of Europe). A concrete example is Colombia’s Constitutional Court, which has expressly departed from the jurisprudence of the Inter-American Court, holding that “although it is a significant precedent . . . this decision cannot be automatically transplanted to the Colombian case in exercise of conventionality control

into consideration not only the case law of the Court but also their evolving socio-political, economic, cultural, and geographic context. For these reasons, national courts should have at least a “modicum of independent interpretative authority.”<sup>261</sup> The integration principle recognizes that first and foremost States (including their courts) must implement the American Convention in their domestic legal orders and follow the Court’s case law; but domestic courts must also do more than that. Given the different legal, social, political, economic and cultural context in which they operate, domestic courts may and must, depending on exceptional and very weighty circumstances, deviate from the Court’s case law, independently strike a fair balance between opposing forces, and provide their own answers to pertinent human rights issues. Domestic courts will need to provide, in those exceptional circumstances, substantial reasons that have higher legitimacy than those given by the Court. In those circumstances, it appears the domestic court will need to make a principled case why a “primacy of national law anchored less in general theory than in empirical reality” is required.<sup>262</sup> The integration principle promotes a “critical loyalty” to the Court’s jurisprudence.<sup>263</sup>

The proposed integration model rests on the relationship that the Court needs to develop with domestic courts. This relationship may take years to fully flourish. As the historical experience in the United States and how its Supreme Court succeeded in exercising judicial review over state courts demonstrates, the Inter-American Court may need years in order to succeed in its enterprise of obtaining full acceptance from domestic courts. As Professor Mark L. Movsesian has suggested,

[A] number of factors favored the success of Supreme Court review. The Court asserted jurisdiction over states in conformity with an express statutory grant. It asserted jurisdiction under a Constitution that established it as part of a new national government, one with significant regulatory authority. The Court asserted jurisdiction over states, finally, in the context of a relatively homogeneous society. While there were regional differences, Americans in the early nineteenth century shared much in the way of a common political and legal culture.

Notwithstanding all these factors, the Court found it impossible, over a period spanning more than forty years, to establish its authority over recalcitrant States. While States accepted the Court’s judgments most of the time, they did not hesitate to defy it where they believed that vital interests were at stake.<sup>264</sup>

That situation is quite similar to the one in Europe as I explained.<sup>265</sup> Additionally, in the case of the American Convention, no provision requires third

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which does not take into account the particularities of the internal legal system, especially the constitutional jurisprudence and that of the Supreme Court . . . .” C.C., mayo 25, 2011, Sentencia C-442/11, available at <http://www.corteconstitucional.gov.co/relatoria/2011/c-442-11.htm> (translation by author).

261. Helfer, *supra* note 50, at 137.

262. Greer & Wildhaber, *supra* note 147, at 682.

263. *Id.* at 683.

264. See, e.g., International Responsibility, *supra* note 23, para. 58 (“[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.”).

265. See *supra* paragraph accompanying notes 99–106.

States to follow the Court's precedents or make the Convention directly enforceable domestically.<sup>266</sup> Unlike the U.S. Supreme Court and the European Court of Justice, the Inter-American Court does not act as part of a new government or as part of a regional organization with ample regulatory powers. Crucially, the Convention is not a constitution, but a treaty with a specific provision for withdrawal.<sup>267</sup> Although OAS Members, and particularly those parties to the Convention that accepted the jurisdiction of the Court, share a somewhat common culture and history, they differ in many social, economic, political and ethnic aspects. From this perspective, the more the Court engages in a strategic partnership with local judges and recognizes their full and central role in developing the inter-American system, the more it has possibilities of being successful.

### B. A New Conventional Model

For several years I have pushed for reform of the Convention mainly to change the role or profile of the Inter-American Commission.<sup>268</sup> In this Article I suggest amendments to the Convention<sup>269</sup> to enhance or deepen the integration model. I accept that this is not a good time to discuss an amendment to the Convention due to the strong mobilization of a group of States attempting to weaken the inter-American human rights system.<sup>270</sup> But the question of timing should not prevent a discussion of an alternative model that could better reflect the way in which the Convention is part of the integrated inter-American system.

#### 1. Facilitating and Promoting the Interaction between the Court and National Judges

I propose to amend the Convention to facilitate a more fluid interaction between Latin American judges and the Court. There should be a mechanism to allow domestic judges to consult the Court on cases pending before them. The proposed model would follow the model of preliminary rulings of the EU in which any judicial body of a Member State may apply to the CJEU to ask about the validity or proper interpretation of a decision adopted by the EU.<sup>271</sup> The national judge who raises this issue in the context of a process under consideration must stay the proceedings until the Court of Justice rules on it.<sup>272</sup> In Latin America there are

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266. See *supra* paragraph accompanying note 167.

267. See American Convention, *supra* note 3, art. 78 (discussing terms for denunciation of the Convention).

268. See sources cited *supra* note 6.

269. Cf. American Convention, *supra* note 3, art. 76 ("1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.").

270. See generally Victoria Amato, *Una mirada al proceso de reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos*, APORTES DPLF, marzo de 2012, at 4.

271. TFEU, *supra* note 86, art. 19 § 3.

272. Court of Justice of the European Union, *Recommendations to National Courts and Tribunals in*

already models of pre-judicial referral. In effect, both Articles 32 to 36 of the Treaty Creating the Judicial Tribunal of the Andean Community<sup>273</sup> and Article 22.k of the Statute of the Central American Court of Justice<sup>274</sup> both allow a pre-judicial referral.

In the inter-American context, a similar mechanism would allow judges who have doubts about the applicability or scope of the Convention to refer the case to the Court, which would then give its opinion on the matter, and that opinion would be binding. This mechanism would serve multiple purposes. First, it would preemptively avoid judges resolving cases in ways which are contrary to the Convention as interpreted by the Court.<sup>275</sup> Second, it would greatly facilitate the interaction between local courts and the Inter-American Court.<sup>276</sup> Third, it would increase the number and types of issues that the Court resolves.<sup>277</sup> Fourth, it could strengthen national judges, as their decisions could find a source of legitimacy in the Inter-American Court.<sup>278</sup>

It is possible that this proposal, rather than strengthening a horizontal dialogue between the Inter-American Court and the domestic tribunals, might reinforce a hierarchical and hegemonic vision of the Inter-American Court as the final interpreter of the Convention. However, as long as consultation is voluntary and not mandatory for the national judge, the potential for a hierarchical vision would be diminished. This would be particularly true if the Court also adopts the other proposals expressed in this article regarding a higher respect for national precedents and rulings. Particularly, the voluntary nature of preliminary referral will allow domestic judges to strategically use the Inter-American Court.<sup>279</sup> National judges will

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*Relation to the Initiation of Preliminary Ruling Proceedings*, para. 29, 2012 O.J. (C 338) 1, 4. A similar proposal was made in the European system by the Brighton Declaration, which invites the Committee of Ministers to adopt an optional protocol providing a 'preliminary reference procedure' (similar to that available in the EU context) that would enable national courts to seek, in ongoing litigation, a non-binding advisory opinion from the ECHR. High Level Conference on the Future of the European Court of Human Rights, para. 12(d), Apr. 19–20, 2012, Brighton Declaration (April 20), available at [http://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf).

273. Tratado de Creación del Tribunal de Justicia de la Comunidad Andina [Treaty Creating the Judicial Tribunal of the Andean Community] arts. 32–36, Mar. 10, 1996, available at <http://www10.iadb.org/int/intradebid/DocsPdf/Acuerdos/CANDINA%20-%20472.pdf>; accord Jânia Maria Lopes Saldanha & Lucas Pacheco Vieira, *Controle jurisdicional de convencionalidade e reenvio prejudicial interamericano: Um diálogo de ferramentas processuais em favor da efetivação do direito internacional dos direitos humanos*, in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, *supra* note 56, at 435, 449.

274. Convention on the Statute of the Central American Court of Justice art. 22(k), Dec. 10, 1992, 1821 U.N.T.S. 279; accord Lopes Saldanha & Pacheco Vieira, *supra* note 273, at 452. [Editor's note: The spelling errors by which the letter "u" is twice turned upside down into an "n" are part of the official English-language title of the treaty in the U.N. Treaty Series].

275. For a discussion of the various ways domestic judges interpret and can interpret the Convention, see *supra* Part IV.A.

276. For a discussion about the need for a greater dialogue between domestic courts and the Inter-American Court, see *supra* paragraph accompanying notes 206–209.

277. For a discussion about gaps in the Court's jurisprudence interpreting the Convention, see *supra* paragraph accompanying note 174.

278. For a discussion of the powers of domestic judges within their states and their legitimacy, see *supra* paragraph accompanying notes 238–240.

279. In Europe, constitutional or supreme courts have a mixed use of the preliminary referral. Currently, it appears that there is a move from a situation characterized by the reluctance by European Constitutional Courts to raise preliminary references to the CJEU to a context where Constitutional Courts accept the mechanism, mentioning the cases of the constitutional courts of Austria, Belgium,

have the discretion to decide when and what type of consultation they will refer to the Inter-American Court. As I promote a deliberate partnership between the Court and domestic judges, the amendment will allow for a very strategic use of the Court's jurisdiction by national judges.

## 2. Expanding the Standing to Request Advisory Opinions

Another proposed amendment to the Convention expands the number of institutions and organs with standing to seek advisory opinions from the Court. Supreme or constitutional courts should be authorized to request advisory opinions from the Inter-American Court, particularly invoking the second paragraph of Article 64 concerning the compatibility of any of the internal laws of the State with international human rights instruments.<sup>280</sup> And those same justices from the highest national tribunals should be invited to submit briefs in Advisory Opinion proceedings. This would bring to the system more interaction with key state actors dealing with human rights issues. It is clear that multiple state officials beyond the bureaucracy of foreign relations or justice ministries design, implement, supervise, promote, and evaluate public policies regarding human rights issues.<sup>281</sup> As such, those officials, and particularly justices from the highest domestic tribunals, need to have the opportunity to approach the Court even against the will of the executive. Allowing justices to access the Court could also help unlock domestic political processes in which a state entity promotes the adoption of policies compatible with human rights while other sectors or officials within the government or the State oppose or resist such policies. Particularly, it will enhance the conventionality control as the Court will have more opportunities to analyze the compatibility of domestic laws with the Convention. Again, the idea is to strengthen the partnership between the Court and domestic judges in a very strategic way. It does not pretend to reinforce the idea of the Court as the single authoritative interpreter of the Convention.

I am not proposing the use of advisory opinions as a way to address concerns about the fragmentation of international law or to challenge the welcome emergence of multiple inter-American judicial interpretations.<sup>282</sup> Nor do I propose the request of advisory opinions as a way to consolidate the status of the Court as a final

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Lithuania, and, lastly, Italy. Giuseppe Martinico, *Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?* 3 (Tilburg Inst. of Comp. & Transnat'l L., Working Paper No. 2009/10, 2009), available at <http://ssrn.com/abstract=1483664>. Other courts, such as the German and Spanish Constitutional Courts, so far have refused to do so. *Id.* at 4.

280. Cf. American Convention, *supra* note 3, art. 64(2) ("The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.").

281. See, e.g., Helfer & Slaughter, *supra* note 230, at 288–89 (addressing the multitude of players domestically that impact human rights within states).

282. As did the former President of the International Court of Justice, Judge Stephen Schwebel. See Press Release, Int'l Court of Justice, Failure by Member States of the United Nations to Pay Their Dues Transgresses Principles of International Law, President Schwebel Tells United Nations General Assembly (Oct. 26, 1999), <http://www.icj-cij.org/presscom/index.php?pr=133&pt=&p1=6&p2=1> ("In order to minimize . . . significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the [ICJ] on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law . . . ." (omission in original)).

arbitrator of inter-American law. My proposal pursues to expand the activities and interactions between relevant domestic state actors and the Court. The more political actors there are that can address the Court, the more possibilities there will be for the Court to intervene in current situations and the more possibilities there will be for enhancing the status of domestic actors, especially courts, pushing for a human rights agenda.

### C. *A New Procedural Model*

The Court, for its part, should review its procedures to encourage participation and recognize the central role that domestic judges play in this integrated model as required by the conventionality control doctrine. To this end, I propose that the Court establish formal channels of interaction with national courts of all States and not just those of the State in a particular case. Upon receiving a new case, the Court should immediately notify all the high courts or constitutional courts of the States Party to the Convention and invite them to intervene in the case. This intervention could take different forms. For instance, the Court could request information from each high court and constitutional court on its jurisprudence on the subject matter discussed in the case.

### D. *Improving the Quality of the Court's Legal Reasoning*

If the conventionality control is going to be successful it will require that domestic judges be very familiar with the Inter-American case law and that those judges can easily access and understand the rulings of the Court. For this to happen, the reading of the decisions of the Court must be facilitated as much as possible. Rulings longer than one hundred pages<sup>283</sup> are not easy to read, and courts find them difficult to use.

More importantly than reducing the length of its decisions, the Court needs to be much more explicit, precise, rigorous, and serious in the reasoning used to decide each case. Many times, it is extremely difficult to determine the holding of a case or the main reasoning the tribunal used to decide whether there was a violation of the Convention.<sup>284</sup> Sometimes the Court's decisions make it impossible to understand what the applicable principles are and how any local court should apply them.

Several authors have noted that the successful control of conventionality depends on whether the Court's judgments are well reasoned and based on firmly established legal ground.<sup>285</sup> Similar claims were argued in relation to the effectiveness of transnational adjudication in general.<sup>286</sup> The interpretation offered should be clear and practical, coherent, and context-sensitive.<sup>287</sup> As John Tobin notes,

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283. For example, 133 pages in *Artavia Murillo v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012), and 108 pages in *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

284. See Sagüés, *El "control de convencionalidad"*, *supra* note 5, at 2 (noting that the criteria the Court applies is not always uniform or linear).

285. E.g., Binder, *supra* note 94, at 1228; Sagüés, *El "control de convencionalidad"*, *supra* note 5, at 2.

286. E.g., Helfer & Slaughter, *supra* note 230, at 318–23.

287. See John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty*

“The requirement of coherence in reasoning demands that the views of those with relevant expertise must be considered and assessed in order to develop a common understanding as to the meaning of a human right. The requirement of system coherence recognizes that there is a broader system of law within which the understanding of a specific human right must be located.”<sup>288</sup>

The Court needs to pay closer attention so that domestically, the Convention operates with other norms, including constitutions. “[F]inally, the requirement for a context-sensitive interpretation accepts the reality that the successful implementation of a human right must occur within both a local and global socio-political context in which the power of States and their legitimate interests cannot be dismissed.”<sup>289</sup> The Court must be very careful to distinguish one case from another and should pay particular attention to the specifics of each case and the context in which it developed.<sup>290</sup>

The integration principle creates an interpretative community<sup>291</sup> of inter-American judges. Thus, the Court should revalue the role of Latin American judges in developing conventional standards. The Court must take Latin American jurisprudence more seriously and explain its value in its interpretation of the Convention. It must analyze in detail the national cases it cites and explain why it cites them, how they are selected, and why any contradictory jurisprudence is incorrect according to the Convention and Inter-American case law. Recognizing that Latin American judges are part of the inter-American interpretative community should move the Court to “identify, engage with, and consider” their decisions when offering a meaning for a particular provision of the Convention.<sup>292</sup> This does not mean that the Court must always accommodate or reconcile those local precedents with its own decisions. However, a careful consideration of local views, to the extent that they can be identified, contributes to a deeper and more rigorous analysis. This demands that the Court engage in robust dialogue throughout the interpretative process. By substantially engaging and not purely reciting Latin American decisions, the Court contributes to an interpretation of the Convention grounded in local realities.

## CONCLUSION

Despite the shortcomings of the Inter-American Court’s analysis and use of the conventionality control, I firmly believe in the need for an integrated inter-American model that merges Latin American constitutional law and Inter-American law. I

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*Interpretation*, 23 HARV. HUM. RTS. J. 1, 15 (2010) (addressing what a supranational body should consider while interpreting a text).

288. *Id.* at 50.

289. *Id.*

290. See generally Cavallaro & Brewer, *supra* note 231.

291. For the concept and idea of interpretative community, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETATIVE COMMUNITIES 14 (1980). For a more recent discussion, see William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 641–59 (2001).

292. Tobin, *supra* note 287, at 10–11.

argue that the Court should develop this integrated model in a serious, consistent, coherent, and systematic way.<sup>293</sup> My basic proposition is that the Court must assume that Latin American judges are essential and central actors in this new framework. National judges are not merely robotic users of the Convention as interpreted by the Court.<sup>294</sup> To the contrary, domestic judges are at the forefront of developing the scope and content of the American Convention.<sup>295</sup> In most areas and in most situations, national judges will be the first to interpret the Convention.<sup>296</sup> In many instances, in fact, there will be strong and firmly developed case law prior to the Court's intervention.

In order to succeed in the Convention's domestication process, the Court must recognize the important political role that judges play. As the judges are the ones deciding the content of constitutional and conventional rights, the prospect of success for the Court relies heavily on how those judicial authorities follow its determination. As such, the Court needs to become an ally of judicial authorities at the national level and also transform them into its own allies.<sup>297</sup> The first step in this direction will be to take seriously what judges are saying and deciding in similar situations. It requires the Court to engage in a substantive bidirectional dialogue with national judges and to involve them as much as possible in the procedure of the tribunal.

In fact, the control of conventionality shows that at present the inter-American system is not autonomous and self-sufficient (if it ever were), operating by itself in its own sphere of action.<sup>298</sup> When talking about the inter-American human rights system we must think more broadly than just in the Commission and the Court.<sup>299</sup> Particularly, States should be a primary focus of understanding the inter-American system. But it must be recognized that States are multifaceted rather than monolithic; they have multiple actors who have different agendas, responsibilities, and visions ranging from the ministries of foreign affairs to the legislative branch, the ombudspersons, prosecutors, and public defenders, through multiple authorities at national, provincial, and municipal levels, all of which, within their respective areas, have responsibilities for human rights.

From this perspective, the conventionality control shows that judges are inter-American actors of central importance. It shows in particular that the State can no longer be considered a unitary fiction and should be analyzed in its components to understand the particular role that judges are called upon to perform in the use and interpretation of the Convention.

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293. For proposals in Europe on how to further integrate the European Convention and the European Court of States Parties, see Helfer, *supra* note 50, at 149–58.

294. See, e.g., Nogueira Alcalá, *Diálogo*, *supra* note 176, at 531 (arguing that domestic judges may interpret the Convention in different ways than the Court, including in a more extensive and protective manner).

295. See *supra* Part IV.A.

296. See *supra* paragraph accompanying note 174 and accompanying text.

297. See, e.g., Huneeus, *supra* note 193, at 496–97 (arguing that the Court should “establish[] a link between the Court and particular state actors” so as to better “embed[] the Court and its rulings in national settings”).

298. For a similar argument about the European system, see Stone Sweet, *supra* note 77, at 8.

299. See, e.g., Dulitzky, *Time for Changes*, *supra* note 6, at 162–63 (arguing for more participation by the most relevant institutions and ministries for coordinating and implementing the decisions of the Inter-American system).



Conventionality control shows that neither the Court nor the States, represented by their foreign ministries, own or exclusively control the inter-American system. In fact, the conventionality control, by strengthening the judiciary vis-à-vis other branches, produces two effects: local courts become more relevant inter-American players, and the other branches lose part of the control in the relations between the country and the American Convention and Inter-American Court.

