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The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions

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ARTICLE

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Abstract

In this Article, Judge Sergio García Ramírez of the Inter-American Court of Human Rights explores the complex and often vexing relationship between the Inter-American Human Rights system and the domestic human rights protections within the system's member states. García Ramírez identifies a number of challenges to implementing human rights protections in Latin America, many of which are rooted in a history of authoritarianism in the twentieth century and the nascent nature of the region's democratic institutions. Yet he sees solutions in the role of the Inter-American Court in

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the region. García Ramírez highlights the Court's role in interpreting international human rights laws for the region and the increasing role of national judges in integrating these rights into national systems. Thus, with this body of law as a baseline, he believes that through careful legal and political dialogue and a greater exercise of conventionality control, among other steps, the domestic and international human rights regimes in the region can work together to ensure greater respect for and protections of individual persons.

I INTRODUCTION

This work seeks to present a brief overview of the relationship between states—and, more broadly, national systems of protection of human rights—and the Inter-American Court of Human Rights (the Court). This implies examining the work of an international or supranational jurisdiction which has been called upon to render justiciable "decisions and transformations" of great importance,[1] that have opened the way forward, overcoming innumerable obstacles during recent decades.[2]

What is involved is a relatively recent experience, and of course a tentative one. It remains far—but ever less so, viewed historically—from firmly taking root and yielding the results proponents hoped for when the system was founded,[3] with the adoption of the Pact of San José in the Conference of 1969,[4] and the installation of the Court.[5]

This topic, which today stimulates expectations and actions among the states of the Latin American subcontinent (participants in a sort of "judicial space" defined in 1999[6] and reduced in 2013[7]) is of course closely related to the conditions of the subcontinent—country by country, and collectively—and with the

[1] I refer to the name of a recent work in which I have examined this issue, in respect to my country. *See* SERGIO GARCÍA RAMÍREZ & MARICIO DEL TORO HUERTA, MÉXICO ANTE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS [MEXICO BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS] (2011).

[2] "During its first 30 years of operation in a particularly unsuitable context . . . the Inter-American Human Rights System, even with all the limitations [it faced] reached a level of development that few could have anticipated." FELIPE GONZÁLEZ MORALES, SISTEMA INTERAMERICANO DE DERECHOS HUMANOS [THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS] 58, 290–91, 457 (2013).

[3] *See* CARLOS GARCÍA BAUER, LOS DERECHOS HUMANOS: PREOCUPACIÓN UNIVERSAL [HUMAN RIGHTS: UNIVERSAL CONCERNS] 113 (1960).

[4] *See* Inter-American Specialized Conference on Human Rights, *Actas y documentos* [*Records and Documents*], 349–51, O.A.S. Doc. OEA/Ser.K./XVI/1.2 (1969), http://www.oas.org/es/cidh/docs/enlaces/Conferencia%20Interamericana.pdf.

[5] *See* INTER-AMERICAN COURT OF HUMAN RIGHTS, CORTE INTERAMERICANA DE DERECHOS HUMANOS. MEMORIA DE INSTALACIÓN [INTER-AMERICAN COURT OF HUMAN RIGHTS: PROCEEDINGS OF INSTALLATION] (2d ed. 1999), http://biblio.juridicas.unam.mx/libros/libro.htm?l=2185.

[6] Barbados was the last state that accepted the contentious jurisdiction of the Court, on June 4, 2000. On the other hand, Dominica was the last state that ratified the American Convention on Human Rights on June 11, 1993. *See* Signatories and Ratifications of the American Convention on Human Rights, DEP'T OF INT'L L., http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited June 25, 2015).

[7] Venezuela deposited its complaint against the ACHR on September 10, 2012 before the Secretary General of the Organization of American States; the denunciation took effect the following year. Actually, twenty states recognized the contentious jurisdiction of the Court. *See id.*

panorama of such conditions at the time of the formal establishment of the Inter-American system of protection of human rights as well as in our own time. It is worth observing, of course, in order to apply the observation to the topics addressed in this Article—and with special emphasis on the understanding of what I shall call below the "American voyage"—that this region has a great deal of heterogeneity, reflected in the expression "the Americas," which suggests a different reality than that found in the concept of "America." The totality of states and peoples of the American continent and nearby islands consists of profoundly different sub-regions, each of which presents its own profile with respect to regulation and protection of human rights. It is necessary, then, to revert to the existence of "borders" within "the Americas," which define separate and diverse historical, demographic, and cultural conditions, as well as political, economic and social characteristics, which lead to variations among the national systems of human rights protection and their relations with the Inter-American system.[8]

II The Course of Democracy

The development of the relations between the Inter-American tribunal—and even more the system[9]—and the states of the Americas has run through a hazardous, gradually widening course: the course of democracy, a right of the American peoples, implicit or explicit in their national constitutions, and only recently recognized in a regional instrument,[10] that would have seemed impractical only a few years ago and pursuant to which it is now possible to consider collective

[8] There are significant differences, even in the midst of the "same America." Such is the case in the Caribbean, which coincides geographically (though not completely; take into account the case of Suriname, a continental country). States possess diverse national ascendancy and distinct juridical traditions: English, French, Spanish, and Dutch, in addition to the African component of the population of several republics of the Caribbean. In respect to the northern states, the possibility that the United States would join the group of states party to the ACHR seems very remote (although it would be very convenient) (there have been suggested midrange alternatives, such as having the country provide advisory opinions. *See* Mark Kirk, *Should the United States Ratify the American Convention on Human Rights?*, Rev. IIDH, July–Dec. 1991, at 65, 86–89. A less distant option could be the approach of Canada. *See* Staff of Standing S. Comm. on Hum. Rts., Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights 58 (Comm. Print 2003), `http://www.parl.gc.ca/Content/SEN/Committee/372/huma/rep/rep04may03-e.pdf`.

[9] It is necessary to fully understand the system, which encompasses much more than the international monitoring bodies, and understand, in a real sense, the states, OAS, civil society (and its institutions), and emerging actors (journalists, various professions, academia, Ombudsman, public defenders). *See* Sergio García Ramírez, La Corte Interamericana de Derecho Humanos [The Inter-American Court of Human Rights] 38–42 (2007). Within this framework, the political mission of the OAS is essential and unfolds in various acts. It has failed to recognize the Inter-American Court as an organ of the OAS. On this subject, *see* Thomas Buergenthal, *The Inter-American Court, and the OAS*, 7 Hum. Rts. L.J. 157, 162–64 (1986).

[10] *See* O.A.S. G.A. Res. 1 (XXVIII), Inter-American Democratic Charter (Sept. 11, 2001). Adopted by the General Assembly of the Organization of American States on September 11, 2001 (the same date as the tragic terrorist attacks in Washington and New York), its preamble reaffirms "the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society," and reiterates that "democracy is indispensable for the stability, peace, and development of the region." *Id.* pmbl.

actions in defense of democracy,[11] a controversial topic. These relations now advance, stand still, or retreat in accordance with actions taken by democratic nations.[12]

In general, the American constitutions embody the ideals of democracy and fundamental rights.[13] These are central facts of their purpose, their history, and their discourse, but not necessarily of their experience. Some time ago, an illustrious Italian jurist, in my country for a course on procedure and democracy, referred to this distance—which seemed irreducible—between the reality and the constitutional ideal: What is important is not so much the solemn letter of the fundamental law, but the democratic customs that serve as its cement and guarantee.[14]

The gap between the democratic proclamations of our fundamental laws and the chronic practice of the exercise of power is not, to be sure, the only serious obstacle to the effective enjoyment of human rights. To this gap, it is necessary to add another, no less profound and deep-rooted: that imposed by poverty—and its consequences and scarcities—on an enormous number of people in Latin America. The real enjoyment of human rights—not only economic, social, and cultural, but also, of course, civil and political—is unthinkable where the supposed bearers of these rights lack the conditions of life that permit, not to say favor, the true realization of their rights and liberties.[15]

Latin American constitutions fall within the category that is called "nominal"

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[11] Relating to this question, see Pedro Nikken, *Análisis de las definiciones conceptuales básicas para la aplicación de los mecanismos de defensa colectiva de la democracia previstos en la Carta Democrática Interamericana* [*Analysis of Basic Conceptual Definitions for the Application of Collective Defense Mechanisms of Democracy Under the Inter-American Democratic Charter*], REV. IIDH, Jan.–June 2006, at 13.

[12] *See* Antônio Augusto Cançado Trindade, *Democracia y derechos humanos: el régimen emergente en la promoción internacional de la democracia y del Estado de Derecho* [*Democracy and Human Rights: The Emerging Regime in the International Promotion of Democracy and the Rule of Law*], *in* LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS [THE COURT AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM] 515 (Rafael Nieto Navía ed., 1994); *see also* GONZÁLEZ MORALES, *supra* note 2, at 457; MANUEL BECERRA RAMÍREZ, EL CONTROL DE LA APLICACIÓN DEL DERECHO INTERNACIONAL [CONTROL OF THE OPERATION OF INTERNATIONAL LAW] 122 (Instituto de Investigaciones Jurídicas, Estudios Jurídicos Ser. No. 234, 2013).

[13] In this sense our constitutions respond to what has been called the "constitutional State with a common European and Atlantic mark." PETER HÄBERLE, EL ESTADO CONSTITUCIONAL [THE CONSTITUTIONAL STATE] 3 (2001). *See also* ANTONIO COLOMER VIADEL, INTRODUCCIÓN AL CONSTITUCIONALISMO IBEROAMERICANO [INTRODUCTION TO SPANISH-AMERICAN CONSTITUTIONALISM] 102–03 (1990).

[14] *See* PIERO CALAMANDREI, PROCESO Y DEMOCRACIA [PROCEDURE AND DEMOCRACY] 56 (Héctor Fix-Zamudio trans., Jurídicas Europa-América 1960) (1954).

[15] The relationship between poverty and human rights provides unique characteristics to the countries of our America and promotes reflections oriented through an effective assessment of state human rights protection in the region, beyond statements about substantive democracy and social justice. *See* Pedro Nikken, *La pobreza en la perspectiva de los derechos humanos y la democracia* [*Poverty in Terms of Human Rights and Democracy*], *in* ¿QUIÉN RESPONDE POR LOS DERECHOS HUMANOS DE LAS POBLACIONES MAS POBRES EN AMÉRICA LATINA Y EL CARIBE? [WHO IS RESPONSIBLE FOR THE HUMAN RIGHTS OF THE POOREST POPULATIONS IN LATIN AMERICA AND THE CARRIBBEAN?] 204–07 (Gerardo Caetano & Roberto Cuéllar Martínez eds., 2012), http://iidh-webserver.iidh.ed.cr/multic/UserFiles/Biblioteca/IIDH/12_2012/5d289ec3-6c92-4f47-b5c2-fa036d212549.pdf.

or "semantic,"[16] more discursive than normative. This reality reflects an old colonial saying, common to the nations of "our America" of José Martí:[17] The orders of the Crown are respected, but not carried out.[18] Thus was incubated a dual reality—and a dual legitimacy and legality—from which we have yet to liberate ourselves.

III The "American Voyage"

In writing on this and related topics, I have used a nautical image that strikes me as useful to describe the process of human rights and its instruments of protection in this region. In my view, the nations of the Americas—and I focus, of course, on those of Latin, Ibero, or Hispanic America—have made and are making their own voyage into the wind,[19] from a certain point of departure,[20] toward the common destiny sought by humanity: the arrival port that implies the definitive reign—not merely discursive, but in practice—of human rights.

This voyage is not identical to the one undertaken by humanity as a whole (although the American voyage develops in that context and travels in the same direction), nor is it the same as that taken by Europe in the Convention of 1950 in response to the experiences of the Second World War;[21] nor is it identical—

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[16] *See* Karl Loewenstein, Teoría de la Constitución [Theory of the Constitution] 218 (Alfredo Gallego Anabitarte & Ariel Barcelona trans., Ariel 1976) (1959). About this characteristic of Latin American constitutions, *see* Humberto Quiroga Lavié, Derecho constitucional latinoamericano [Latin American Constitutional Law] 17–19 (1991).

[17] *See* José Martí, *La Conferencia Monetaria de las Republicas de America*, La Rev. Ilustrada, Jan. 10, 1891, *reprinted in* José Martí, 6 Obras Completas [Complete Works] 157 (2d ed. 1992); José Martí, *Nuestra América*, El Partido Liberal, Jan. 30, 1891, *reprinted in* José Martí, Obras Completas, *supra*, at 15.

[18] *See* José María Ots y Capdequí, Historia del derecho español en América y del derecho indiano [The History of Spanish Law in America and Indian Law] 89 (1969).

[19] *See* Sergio García Ramírez, *La Corte Interamericana de Derechos Humanos ante la pena de muerte* [*The Inter-American Court of Human Rights before the Death Penalty*], *in* Por la Abolición Universal de la Pena de Muerte [For the Universal Abolition of the Death Penalty] 215, 229 (Antonio Muñoz Aunión et al. eds., 2010) [hereinafter García Ramírez, *La Corte Interamericana*]; Sergio García Ramírez, Control judicial de convencionalidad I [Judicial Control of Conventionality I] (Poder Judicial del Estado de Aguascalientes, Monografías Ser. No. 50, 2012); Sergio García Ramírez, *El control judicial interno de convencionalidad* [*The Conventional Internal Control Court*], 5 Rev. IUS 123 (2011); Sergio García Ramírez, *La 'Navegación Americana' de los derechos humanos: hacia un ius commune* [*The "American Navigation" of Human Rights: Towards an* Ius Commune], *in Ius constitutionale commune* en América Latina [*Ius Constitutionale Commune* in Latin America] 459 (Armin von Bogdandy et al. eds., 2014) [hereinafter García Ramírez, *La Navegación Americana*].

[20] Of course, I do not refer to the "long march" of the Americas in the struggle between authoritarianism that has prevailed since ancient times—it is a constant of American life—and the current rising of human rights. I have alluded to this in Sergio García Ramírez, Los derechos humanos y la jurisdicción interamericana [Human Rights and the Inter-American Jurisdiction] 5 (2002). Relating to this material is an illustrative reflection in Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 Hum. Rts. Q. 281 (2003).

[21] There has been a frequent comparison between the European and American experiences. *See* Héctor Fix-Zamudio, *Reflexiones sobre la Corte Europea e interamericana de Derechos Humanos* [*Reflections on the European and Inter-American Courts of Human Rights*], *in* Similitudes

although there are points of similarity—to that which has been carried out with enormous effort in Africa.[22] Each voyage reflects particularities that identify it and mark its rhythm. Each has its own chronology and movements, characteristic "style," and must overcome its own particular obstacles.[23] Each adjusts, then, to the conditions of the region in which it navigates. It is linked to its circumstances in "Ortega-like" fashion.[24]

It is essential to understand—not to praise or denigrate—this specificity in assessing the American voyage, to understand its course and to advance it effectively, just as it is essential to understand—even though at times we may be disconcerted—certain characteristic facts of other voyages, quite important for them but still distant for us, or even—from our own perspective—very disquieting and risky, such as the margin of appreciation in the European system.[25]

Y DIVERGENCIAS ENTRE LOS SISTEMAS DE PROTECCIÓN REGIONAL DE LOS DERECHOS HUMANOS [SIMILARITIES AND DIFFERENCES BETWEEN REGIONAL SYSTEMS OF HUMAN RIGHTS PROTECTION] 99, 99–131; EL DIÁLOGO ENTRE LOS SISTEMAS EUROPEO Y AMERICANO DE DERECHOS HUMANOS (Javier García Roca et al. eds., 2012); *see also* INTERNATIONAL PROTECTION OF HUMAN RIGHTS (Louis B. Sohn & Thomas Buergenthal eds., 1973).

[22] The African system is based on the African Charter on Human Rights and Peoples' Rights, adopted by fifty-three states in 1981. In addition to the African Commission on Human Rights, there exists a Court established by protocol in 1998, entered into force in 2004; the tribunal has been operational since 2006. Today, the two jurisdictions have joined together in a single body: the African Court of Justice and Human Rights. *See* Yuria Saavedra Álvarez, *El sistema africano de derechos humanos y de los pueblos. Prolegómenos* [*The African System of Human and Peoples' Rights: Prologue*], 8 ANUARIO MEXICANO DE DER. INTERNACIONAL [MEXICAN Y.B. INT'L L.] (Instituto de Investigaciones Jurídicas) 671 (2008); José H. Fischel de Andrade, *El sistema africano de protección de los derechos humanos y de los pueblos: Primera parte* [*The African System of Protection of Human and Peoples' Rights: Part I*], *in* 6 ESTUDIOS BÁSICOS DE DERECHOS HUMANOS [BASIC STUDIES IN HUMAN RIGHTS] 447 (1999).

[23] The answer as to the overall success of the Court in the performance of its duties "depends on the political climate of the Americas and the attitude of the American governments towards human rights in general." THOMAS BUERGENTHAL, ROBERT E. NORRIS & DINAH SHELTON, LA PROTECCIÓN DE LOS DERECHOS HUMANOS EN LAS AMÉRICAS [THE PROTECTION OF HUMAN RIGHTS IN THE AMERICAS] 55 (1990).

[24] Regarding the influence, ideas and democratic expressions, with different manifestations, in the European and American systems, see AMAYA ÚBEDA DE TORRES, DEMOCRACIA Y DERECHOS HUMANOS EN EUROPA Y EN AMÉRICA [DEMOCRACY AND HUMAN RIGHTS IN EUROPE AND AMERICA] (2006).

[25] *See* JAVIER GARCÍA ROCA, EL MARGEN DE APRECIACIÓN NACIONAL EN LA INTERPRETACIÓN DEL CONVENIO EUROPEO DE DERECHOS HUMANOS [THE NATIONAL MARGIN OF APPRECIATION IN THE INTERPRETATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS] (2010); GIUSEPPE DE VERGOTTINI, MÁS ALLÁ DEL DIÁLOGO ENTRE TRIBUNALES [BEYOND DIALOGUE BETWEEN TRIBUNALS] 110–11 (Pedro J. Tenorio Sánchez trans., Civitas 2011) (2010); *see also* MIERIELLE DELMAS-MARTY, LE PLURALISME ORDONNÉ [THE ORDERLY PLURALISM] 75 (2006) (arguing that this national margin is the "master key" of "orderly pluralism"); Robert Blackburn, *The Institutions and Processes of the Convention*, *in* FUNDAMENTAL RIGHTS IN EUROPE 3, 24 (Robert Blackburn & Jörg Polakiewicz eds., 2001); HÉCTOR FAÚNDEZ LEDESMA, EL SISTEMA INTERAMERICANO DE PROTECIÓN DE LOS DERECHOS HUMANOS [THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS] 62 (3d ed. 2004). It has been said that the unrestricted application of this figure "could cause the same human right to not have the same depth or reach in all places, but different forms and intensities, a circumstance that would affect the universality of the law and authorize its unequal interpretation." NÉSTOR SAGÜÉS, LA INTERPRETACIÓN JUDICIAL DE LA CONSTITUCIÓN: DE LA CONSTITUCIÓN NACIONAL A LA CONSTITUCIÓN CONVENCIONALIZADA [JUDICIAL INTERPRETATION OF THE CONSTITUTION: FROM THE NATIONAL CONSTITUTION TO THE CONVENTIONALIZED CONSTITUTION]

It is evident that the American context has shaped the structures and offices of the Inter-American Commission and Court. Its influence is found in the origin of their limitations and their possibilities; in the "reasons" or lack thereof for their membership (which has often been questioned, although there do not seem to be "antiseptic" solutions, and which today, in addition, suffers from an absence of women judges, despite the fact that recently there were three women judges on the Court, including the President);[26] in the scarcity of their material resources,[27] which it has been necessary to complement—from a surprising "source of provisioning"—with resources from other nations, distant (in more than one sense) from the American nations;[28] in debates over the force of the resolutions emitted by the international organs of the system;[29] in the novel nature of the reparation measures decreed by the Commission and the Court, which are rooted in the "social" ideas of the foundational instruments;[30] in the "institutional role" of the Inter-American Court, to which I will refer again below, and in the "itinerant" effort the Court has undertaken in order to "nationalize itself" in each of the countries over which it exercises contentious jurisdiction.[31]

338 (2013).

[26] In this area, there was a long-time issue of judges and of national judges who appeared in contentious proceedings. On this subject, see the criticism Faundez formulated about the figure of ad-hoc judges within the jurisdiction of human rights. Héctor Faúndez Ledesma, *La Composición de la Corte Interamericana de los Derechos Humanos* [*The Composition of the Inter-American Court of Human Rights*], Rev. de Der. Público [Rev. Pub. L.], Jan.–June 1994, at 25, 29 (Venez.). The Inter-American Court modified its traditional interpretation of Article 55 of the ACHR, under the terms of *Advisory Opinion OC-20/09*. Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (ser. A) no. 20 (Sept. 29, 2009). Under this opinion, the figure of the *ad hoc* judge remained excluded.

[27] The actual position of the Inter-American Court on budget matters contrasts starkly with the numerous official recommendations on improving the resources of the Tribunal, taking into account that "the promotion and protection of human rights constitutes a fundamental priority for the Organization [of American States]." O.A.S. G.A. Res. 1827 (XXXI), ¶ 6 (June 5, 2001).

[28] This is the case of contributions from the Ministry of Foreign Affairs of Norway, the Spanish Agency for International Cooperation, and the Government of the Kingdom of Denmark. In fact, the first effective contributions to finance the Inter-American public defense came from the Norwegian government. *See Aportes y donaciones* [*Contributions and Donations*], Inter-Am. Ct. Hum. Rts., `http://www.corteidh.or.cr/index.php/es/al-dia/aportes-donaciones` (last visited Feb. 15, 2015).

[29] García Ramírez, *La Navegación Americana*, *supra* note 19, at 489.

[30] The preamble to the ACHR includes the reaffirmation of American states to "consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and *social justice* based on respect for the fundamental rights of man." American Convention on Human Rights, pmbl., Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978) (emphasis added). Asdrúbal Aguiar refers to the ideal of social democracy pursued by the Inter-American system, and adds: "Join the 631 teachings of the Inter-American Court of Human Rights, taken from the most relevant advisory opinions and contentious judgments, that show democracy in its strength, and how it is not only a political regimen but, above all, a form of social life and an individual state of mind." Asdrúbal Aguiar, La democracia en la jurisprudencia de la Corte Interamericana de Derechos Humanos 1987–2012 [Democracy in the Jurisprudence of the Inter-American Court of Human Rights 1987–2012], at 11 (2012), `http://www.infojus.gob.ar/descarga-archivo?guid=/lmnoprst-uvwd-octr-inac-f130344f1pdf&name=CF130344F1.PDF`.

[31] *See* Pablo Saavedra Alessandri & Gabriela Pacheco Arias, *Las sesiones "itinerantes" de la Corte Interamericana de Derechos Humanos: Un largo y fecundo caminar por América* [*The "Itinerant" Sessions of the Inter-American Court of Human Rights: A Long and Fruitful Walk for America*],

All this enters into the sum of the ups and downs, vicissitudes, advances, and setbacks of the American voyage, as well as into the complex relations between the international organs (especially the Court) and the national systems.[32]

At the outset, the creation and functioning of the Inter-American Court of Human Rights encountered severe obstacles in many countries of the region with respect to the effective enjoyment of human rights,[33] given the dominant ideas about sovereignty and domestic jurisdiction.[34] This problem, present on the international scene, was especially serious in the context of Latin American nations, where it was necessary to wage and to win—to a growing but not absolute degree—the battle for universal respect of human rights and their effective guarantees. In the relationship between the Court and the states, telltale markers of the old debate are often seen.[35] Such markers are also seen in the variety of positions taken in the capitals of states, none of which are monolithic.[36] The diversity of forces contending inside each state has made possible the progress of democracy and human rights and continues to favor their advance in the face of opposing currents, which often "hold the steering wheel" of government. Finally, an extremely important development has been strengthened and consolidated in the Inter-American system, namely the conviction that the subject of human rights belongs properly to the international sphere and is not reserved to domestic jurisdiction.[37]

The story of the vicissitudes of the Inter-American jurisdiction cannot properly be told without mentioning the moments of "crisis," more or less intense, which the Court has had to confront and which have generated obstacles of considerable importance. Among them are the chronic insufficiency of resources from their natural source (the OAS), the conflicts with states culminating in their

in RECEPCIÓN NACIONAL DEL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS Y ADMISIÓN DE LA COMPETENCIA CONTENCIOSA DE LA CORTE INTERAMERICANA [NATIONAL RECEPTION OF THE INTERNATIONAL HUMAN RIGHTS LAW AND ADMISSION OF THE CONTENTIOUS JURISDICTION OF THE INTER-AMERICAN COURT] 37 (Sergio García Ramírez & Mireya Castañeda Hernández eds., 2009).

[32] Faúndez Ledesma describes the problems and limitations of the system and refers to the obstacles that foster an insufficient will on behalf of the states as to an effective respect for human rights. However, he also concludes that the system offers an "encouraging balance." *See* FAÚNDEZ LEDESMA, *supra* note 25, at 1007.

[33] *See* Thomas Buergenthal, *Recordando los inicios de la Corte Interamericana de Derechos Humanos* [*Recalling the Beginnings of the Inter-American Court of Human Rights*], REV. IIDH, Jan.–June 2004, at 11; *see also* GONZÁLEZ MORALES, *supra* note 2, at 43–44.

[34] *See* GARCÍA BAUER, *supra* note 3, at 297. Today, the issue of human rights is part of the catalog of the "globalized areas" in which appear "shared sovereignties." *See also* Manuel Becerra Ramírez et al., *La soberanía en la era de la globalización* [*Sovereignty in the Era of Globalization*], *in* SOBERANÍA Y JURIDIFICATIÓN DE LAS RELACIONES INTERNACIONALES [SOVEREIGNTY AND THE JURIDIFICATION OF INTERNATIONAL RELATIONS] 66 (Manuel Becerra Ramírez & Klaus Theodor Müeller Uhlenbrock eds., 2010).

[35] *See* Díaz Peña v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 244, ¶ 7 (June 26, 2012).

[36] *See* SERGIO GARCÍA RAMÍREZ & MARCELA BENAVIDES HERNÁNDEZ, REPARACIONES POR VIOLACIÓN DE DERECHOS HUMANOS (2014).

[37] *See* Claudio Grossman, *Reflexiones sobre el sistema interamericano de protección y promoción de los derechos humanos* [*Reflections on the Inter-American System for the Protection and Promotion of Human Rights*], *in* LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS, *supra* note 12, at 245, 254–55.

unilateral withdrawal from the jurisdiction of the Court, after which the Court fortunately and energetically rejected this approach and found a reasonable solution[38]—the denunciation of the American Convention on Human Rights by certain states, to which I will refer below; and the recent tensions in the seat of the Inter-American system during a process of review.[39] The Court itself has suggested and undertaken processes of review, such as that which culminated in its current regulation.[40] In academic doctrine, there are arguments that it "is timely and useful to pause in the road and substantially review the Court."[41]

IV Some Actors in the System: Civil Society and Emerging Actors

In bringing and examining contentious cases before the Inter-American Court, and also in promoting and analyzing advisory opinions, civil society has played a role of prime importance. Without the presence of organizations of this "third sector," the Inter-American system would not have achieved the degree of de-

[38] Among the "crises" of the system, which impacted or still impact the work of the Commission and the Court, was the appearance that Peru would purportedly withdraw from the jurisdiction of the Inter-American Court without denouncing the Convention. On the removal and return of Peru to the jurisidiction of the Court, see César Landa Arroyo, Tribunal Constitucional y Estada Democrático [The Constitutional Tribunal and the Democratic State] 867 (3d ed., 2007); Sergio García Ramírez, *Una controversia sobre la competencia de la Corte Interamericana de Derechos Humanos* [*A Controversy on the Competence of the Inter-American Court of Human Rights*], *in* Estudios jurídicos [Legal Studies] 389 (2000); Sergio García Ramírez, La jurisdicción internacional: Derechos humanos y justicia penal [International Jurisdiction: Human Rights and Criminal Justice] 389 (2003); Carmela Ossa Henao, *La OEA y el pretendido 'retiro' de la aceptación de la jurisdicción obligatoria de la Corte Interamericana de Derechos Humanos por el gobierno peruano (1999–2000)* [*The OAS and the Purported "Withdrawal" of Acceptance of the Compulsory Jurisdiction of the Inter-American Court of Human Rights by the Peruvian Government (1999–2000)*], *in* 2 Os rumos do Direito Internacional dos Direitos Humanos [Trends in the International Law of Human Rights Law] 323, 323–92 (Renato Zerbini Ribeiro Leão ed., 2005); Douglass Cassel, *El Perú se retira del Corte: ¿Afrontará el reto el Sistema Americano de Derechos Humanos?*, Rev. IIDH, Jan.–June 1999, at 69; Christina Cerna, *Questions on International Law raised by Peru's "withdrawal" from the Inter-American Court of Human Rights*, *in* 2 Os rumos do Direito Internacional dos Direitos Humanos, *supra*, at 353, 353–92; *see also* Ivcher-Bronstein v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, ¶¶ 36, 46, 49, 50, 53 (Sept. 24, 1999); Constitutional Court v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55, ¶¶ 35, 45, 48, 49, 52 (Sept. 24, 1999).

[39] Take into account the "reflection" of 2012 to 2013, which led to an Extraordinary General Assembly of the OAS (April 2013), in which it was decided to keep open critical reflection on the Inter-American system for the protection of human rights. *See* Inter-Am. Comm'n H.R. Res. 1/2013 (Mar. 18, 2013), `http://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf` (incorporating various changes in the functioning of this body of the OAS).

[40] In other stages, the Court proposed, "to initiate an expanded process of a shared review and examination . . . [which] could lead to useful suggestions on ways to correct, reform, advance, and consolidate." Sergio García Ramírez (Vice-President of the Inter-Am. Ct. of Hum. Rts.), *Reflections on the Inter-American Court of Human Rights, Based on the Report of its Work Presented to the Committee on Juridical and Political Affairs*, ¶ 10, O.A.S. Doc. OEA/Ser.G/CP/CAJP-2131/04 add. 1 (Mar. 11, 2004); *see also* O.A.S. G.A. Res. 2043 (XXXIV), Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights (June 8, 2004).

[41] This is the opinion of Manuel Becerra Ramírez, who provided a list of changes that, in his opinion, require the jurisdiction of the Inter-American Court. Becerra Ramírez, *supra* note 12, 158–59.

velopment it has now attained, and national systems would lack a particularly rigorous and effective mechanism for asserting rights and liberties. The indispensable participation of the private sector—which must be favored—is also demonstrated by the positive accompaniment of victims by non-governmental organizations,[42] as well as in the extensive presentation of amicus curiae briefs before the Inter-American jurisdiction,[43] as permitted by the regulation of the Inter-American Court.[44]

It is also necessary to highlight the presence of what I have called "emerging actors," among them the Ombudsmen and national public defenders, whose participation raised some objections because they were state organs appearing in international litigation on the side of the victims.[45] The actions of the public defenders helped establish the "Inter-American defender."[46]

V ROLE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Unlike other international tribunals and supervisory mechanisms, the Inter-American Court has known how to assume—with realism and efficacy—that which I understand is its institutional role as a human rights tribunal in the region where it operates: An agency for generating renewed Inter-American human rights law, that establishes, by means of addressing large themes in especially transcendent cases, the criteria that will guide the national courts in a broad process of their reception of Inter-American Law. In thirty years of work,[47] the Inter-American Court has gradually reinforced this institutional role, which may be expected to achieve its best results to the extent that the impact of the Inter-American jurisdiction penetrates national orders and practices.

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[42] *See* Viviana Krsticevic, *El papel de las ONG en el sistema interamericano de protección de los derechos humanos: Trámite de los casos ante la Corte Interamericana de Derechos Humanos* [*The Role of NGOs in the Inter-American System of Human Rights Protection: Case Procedure before the Inter-American Court of Human Rights*], *in* 1 EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI [THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION AT THE THRESHOLD OF THE TWENTY-FIRST CENTURY] 407, 409 (2d ed. 2003); GONZÁLEZ MORALES, *La participación de la sociedad civil en el sistema interamericano de derechos humanos* [*The Participation of Civil Society in the Inter-American System of Human Rights*], *in* SISTEMA INTERAMERICANO DE DERECHOS HUMANOS, *supra* note 2, at 213; García Ramírez, *La Corte Interamericana*, *supra* note 19, at 39.

[43] *See* Dinah Shelton, *The Participation of Nongovermental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 638 (1994). The Ombudsman of Central America acted as amicus curiae for the purposes of *OC-18/03*, September 17, 2003, through their technical secretariat, which then fell to the Inter-American Institute of Human Rights.

[44] *See Rules of Procedure of the Inter-American Court of Human Rights*, INTER-AM. CT. OF HUM. RTS. arts. 2(3), 44 (Nov. 2009) [hereinafter *Rules of Procedure*], `http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf`.

[45] *See* García Ramírez, *La Corte Interamericana*, *supra* note 19, at 41–42.

[46] *See* Rules of Procedure, *supra* note 44, arts. 2(11), 37.

[47] In the first stage of "unique" features, it did not receive contentious cases from the either the Commission (until now the only supplier) or the states. It first gave attention to providing advisory opinions and then only in a few contentious cases. *See* Buergenthal, *supra* note 33, at 20; GONZÁLEZ MORALES, *supra* note 2, at 46–47. About the initial problems that generated the coexistence of the Commission and the Court, see Symposium, *Regional Approaches to Human Rights: The Inter-American Experience*, PROC. 72D ANN. MEETING AM. SOC'Y INT'L L. 197 (1978).

Nowadays, the Inter-American Court is an organ that emits general—but mandatory—guidelines for the formation of an American *ius commune* in its subject matter. In contrast, it is not—and never was—a jurisdictional organ of third or fourth instance,[48] nor is it a tribunal designed to intervene repeatedly in innumerable cases of the same nature in order to affirm, through hundreds or thousands of resolutions, a consistent thesis. If it attempted that, it would drown.

Fortunately, the Inter-American Commission, the states subject to the Court's jurisdiction, and even the victims—and of course the Court itself—have understood this institutional role, in which the Court carries out its judicial mission of hierarchical supremacy and international application. They have adhered to this role, which defines the Court's task and permits its progress without seriously misplaced efforts. The Commission has regulated its referrals of cases to the Court.[49] After thirty years, the number of complaints and judgments is not very high.[50]

VI National Reception of International Human Rights Law

The relation between states or national systems, and international or supranational jurisdiction, entails a debate between the rule of the national legal order and the domain of the international legal order.[51] Here arises a larger point, which, if carefully taken into account, may lead to plausible solutions in the journey in defense of human rights. It will not be easy in this discussion to find a conceptual solution unanimously accepted, perhaps neither is it absolutely necessary to achieve unanimity by overriding contrary ideas and wills. There are factors that mitigate the conflict, such as the growing recognition of the special

[48] This statement, highlighted various times by the system's organizational bodies, was reiterated by the author of this Article in his speech as President of the Inter-American Court at the beginning of the session held in Brasilia on May 28, 2006. *See* García Ramírez, *La Corte Interamericana*, *supra* note 19, at 205.

[49] The Rules of the Commission set out the elements for the latter to consider to support the submission of cases to the Court; among them: the need to develop or clarify the jurisprudence of the system and the possible effect of the decision on the laws by the member states. Inter-Am. Comm'n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art. 45(2)(c)–(d) (Mar. 18, 2013), *reprinted in* Inter-Am. Commission on Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, `http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf` (last visited June 25, 2015).

[50] Note that the number of cases subject to this Court's jurisdiction is reduced—and continues to remain so; I have said that this would be a condition of success for the continental protection of human rights, per the Inter-American Court. In the course of its history (until February 24, 2014) the Court has issued 275 judgments on 174 cases resolved in this venue. Annual judgments, whose numbers are proportionate to corresponding demands (or submissions of cases) have helped to avoid a backlog of cases: eighteen in 2008, nineteen in 2009, nine in 2010, eighteen in 2011, twenty-one in 2012, and sixteen in 2013. *See Archive Decisions*, Inter-Am. Ct. Hum. Rts., `http://www.oas.org/en/iachr/decisions/archive.asp` (last visited Feb. 15, 2015).

[51] Regarding the normative range of international treaties on human rights, see Carlos M. Ayala Corao, *La jerarquía de los tratados de derechos humanos* [*The Heirarchy of Human Rights Treaties*], *in* El Futuro del Sistema Interamericano de Protección de los Derechos Humanos [The Future of the Inter-American System of Human Rights Protection] 141 (Juan E. Méndez & Francisco Cox eds., 1998).

nature of human rights treaties;[52] and there exist, above all, paths of understanding that constitute true "bridges" between the international and national legal orders, sowing harmony where there was division and confrontation.[53]

These paths or bridges imply national decisions of the highest importance and open the door to attaining the most effective protection of human rights through norms emanating from both international and national sources of law. This has opened a way for the drafting and consolidation of a Latin American *ius commune* on human rights, and a means and method for a reasonable and acceptable accommodation of international law and national law. This will also evidently require creative decisions and transformations within each state.

This is the field of operation of one of the most important current developments: the national reception of the international order.[54] It occurs in the most diverse fields, but the one that concerns me here is international human rights law (IHRL), the characteristics of which differ from those of other fields of the international legal order. So when I refer below to the topic of national reception, it should be understood that I am referring only to the international human rights system. To pretend that the patterns of reception of IHRL apply also in those other fields, serves only to introduce complications and resistance, and to foment "mix-ups" between the state and the universal and regional systems. I am, of course, aware that this introduces particularities with regard to the reception of IHRL and leaves aside, or implies differing modalities, at least to some degree, for the entry of other international norms into national legal orders.

The bridges or paths of linkage between the realms of national and international norms have a distinctive nature and operate in various fields: political, normative, and practical. For this to occur, and for the crossing of the bridges to perform the function we attribute to it, it is necessary to establish, as I will attempt to do below, the force of the international norms *vis-à-vis* the national

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[52] The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) no. 2, ¶ 29 (Sept. 24, 1982). The Inter-American Court cites the European judgments in the cases *Ireland v. United Kingdom* and *Soering v. United Kingdom*, in the resolution of the *Ivcher-Bronstein* case. Ivcher-Bronstein v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 54, ¶ 45 (Sept. 24, 1999) (citing Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 239 (1978); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) ¶ 87 (1989)). In regards to this issue and the interpretation of treaties on human rights, see SAGÜÉS, *supra* note 25, at 331; JOSÉ LUIS CABALLERO OCHOA, LA INCORPORACIÓN DE LOS TRATADOS INTERNACIONALES SOBRE DERECHOS HUMANOS EN ESPAÑA Y MÉXICO [THE INCORPORATION OF HUMAN RIGHTS TREATIES IN SPAIN AND MEXICO] 13 (2009).

[53] *See* García Ramírez, *La Navegación Americana*, *supra* note 19; *see also* Sergio García Ramírez, *Recepción de la jurisprudencia interamericana sobre derechos humanos en el derecho interno* [*Reception of the Inter-American Jurisprudence on Human Rights in Domestic Law*], 2008 ANUARIO DE DER. CONSTITUCIONAL LATINOAMERICANO [LATIN-AM. Y.B. CONST. L.] (Instituto de Investigaciones Jurídicas) 353; GARCÍA RAMÍREZ, CONTROL JUDICIAL DE CONVENCIONALIDAD I, *supra* note 19, at 17–18.

[54] On the domestic reception of international law, its pathways, characteristics, and implications, see Dinah Shelton, *Introduction* to INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS 1 (Dinah Shelton ed., 2011); *see also* Sergio García Ramírez, *Admisión de la competencia contenciosa de la Corte Interamericana de Derechos Humanos*, *in* RECEPCIÓN NACIONAL DEL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS Y ADMISIÓN DE LA COMPETENCIA CONTENCIOSA DE LA CORTE INTERAMERICANA, *supra* note 31, at 17.

norms and the nature—binding or merely orientational—of the decisions made by the international organs with regard to these norms. This equally demands finding the border between "hard" international law, the effectiveness of which is recognized by many national constitutions, as we will see below, and international "soft law,"[55] which strengthens through the formation of ever more general and influential standards.

Highly important, in this same context, for the formation and consolidation of international jurisprudence, with its projections in the establishment of a gradual and true *ius commune*, is jurisprudential dialogue (strictly speaking, jurisdictional dialogue) between different kinds of courts with distinct jurisdictional competencies. This implies a *transjudicial communication* which would characterize the relations between diverse tribunals: horizontal and vertical. The first refers to the relations between various national tribunals and between various supranational tribunals; the second to the relations between supranational tribunals and national tribunals.[56] This recognizes what has been called a universal, multi-directional dialogue, built on common universal values.[57]

The Inter-American Court has promoted this dialogue, both in relation to other international tribunals and to non-jurisdictional organs—such as human rights treaty committees—and in relation to domestic tribunals. This last is increasingly frequent and constructive.[58]

Of course, the dialogue to which I refer is not limited to frequent communications between jurisdictional organs. It should penetrate more deeply, through reciprocal contributions that enrich (cross fertilize) the reasoning and decisions of the tribunals in dialogue.[59]

VII The Constitutional Bridge

In considering what I have called "bridges" or "paths," it is worth considering first and foremost the constitutional bridge.[60] If the basic objection to the entry of international law is state sovereignty, and this has its supreme expression in

[55] *See* Huerta del Toro & Iván Mauricio, *El Fenómeno del* soft law *y las nueva perspectivas del Derecho Internacional* [*The Phenomenon of* Soft Law *and New Perspectives on International Law*], 6 Anuario Mexicano de Der. Internacional [Mexican Y.B. Int'l L.] (Instituto de Investigaciones Jurídicas) 513, 513–49 (2006); Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int'l & Comp. L.Q. 850 (1989); Tadensz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 McGill L.J. 37 (1984).

[56] De Vergottini, *supra* note 25, at 39.

[57] Carlos Ayala Corao, Del diálogo jurisprudencial al control de convencionalidad [Jurisprudential Dialogue on the Control of Conventionality] 199 (2012).

[58] On the dialgoue between international and national tribunals, see *id.* at 55.

[59] Ayala Corao stated that the reception of jurisprudence, like the effect of dialogue between courts, "must have a useful effect, that is, be relevant and appropriate, in order to maintain consistency with the argument of the judgment"; "it must reasonably lead to the reciprocal ratification of both constitutional and international jurisprudence, to achieve more reasoned and reasonable solutions." *See id.* at 22–23.

[60] *See* Germán J. Bidart Campos, *La interpretación de los derechos humanos en la jurisdicción internacional y en la jurisdicción interna* [*The Interpretation of Human Rights in International Jurisdiction and under Domestic Law*, *in* La Corte y el Sistema Interamericanos de Derechos Humanos, *supra* note 12, at 39, 51 ("The internal reception of international law on human rights

the constitution of a republic, then naturally the first path of linkage is found within the rubric of the fundamental law.[61] From there, the consequences will spread throughout the whole normative framework, as they properly should in a constitutional state. The constitution is the supreme law, to which all secondary norms must conform. Therefore, from a practical point of view, it is fitting that the relations between the international system and the national system "are regulated by constitutional provisions of a general and unilateral character, which affirm the level of recognition of international conventional law or of particular provisions of international treaties."[62]

United States constitutional law influenced Latin American normative frameworks in the nineteenth century.[63] Recent decades have seen important constitutional reforms in various American nations, with different formulations but a single goal—the primacy of human rights[64]—and an alliance, for this purpose, between international treaties and domestic norms. The jurisprudence of the Inter-American Court plays a role in the current constitutionalism in the region.[65]

Latin American constitutional reform has a democratic stamp; it is concerned with the protection of human rights, which it expands; the adoption of the beneficial innovation of the "constitutional block" enriched by these rights;[66] extending jurisdictional guarantees; and diminishing and rationalizing the conditions

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does not engender conflicts between international law and democratic constitutions, there is a common denominator that reconciles the two together.").

[61] From this context emerges the case of the "internationalization of universal human rights" within the "universal community of constitutional states." HÄBERLE, *supra* note 13, at 75; *see also*, CABALLERO OCHOA, *supra* note 52, at 39; HÉCTOR FIX-ZAMUDIO, JUSTICIA CONSTITUCIONAL, *ombudsman* Y DERECHOS HUMANOS [CONSTITUTIONAL JUSTICE, *Ombudsman*, AND HUMAN RIGHTS] 44 (2d ed. 2001) ("El Derecho internacional de los derechos humanos en las constituciones latinoamericanas y la Corte Interamericana de Derechos Humanos.").

[62] DE VERGOTTINI, *supra* note 25, at 88.

[63] *See* Patricia Galeana, *Historia comparada de los procesos independentistas de las Américas* [*Comparative History of the Indpendence Processes of the Americas*], *in* HISTORIA COMPARADA DE LAS AMÉRICAS. SUS PROCESOS INDEPENDENTISTAS [COMPARATIVE HISTORY OF THE AMERICAS: THEIR INDPENDENCE PROCESSES] 19 (Patricia Galeana ed., 2010).

[64] *See* CABALLERO OCHOA, *supra* note 52, at 45 (explaining the actual prescience human rights have in constitutional dynamics and relationships between the state and society).

[65] *See* MANUEL EDUARDO GÓNGORA MERA, INTER-AMERICAN JUDICIAL CONSTITUTIONALISM 243 (2011); AYALA CORAO, *supra* note 57, at 90.

[66] *See* GÓNGORA MERA, *supra* note 65, at 161; *see also* Calogero Pizzolo, *La relación entre la Corte Suprema y la Corte Interamericana de Derechos Humanos a la luz del bloque de constitucionalidad federal* [*The Relationship between the Supreme Court and the Inter-American Court of Human Rights in Light of the Federal Constituionality Block*], *in* EL CONTROL DE CONVENCIONALIDAD [THE CONTROL OF CONVENTIONALITY] 189, 193 (Susana Albanese ed., 2008) (explaining the reception of this concept from the IHRL in Argentina). In Mexico, the conclusions reached by the Supreme Court of Justice to discuss the *contradicción de tesis* 293/2011, August 26 to September 3, 2013, which can be seen in the minutes from public meeting no. 88 on September 2, 2013. *See Session Publica Núm. 88* [*Public Session No. 88*], SUPREME CORTE JUDICIAL DE LA NATION [SUPREME COURT OF JUSTICE] (Sept. 2, 2013) (Mex.), `http://www.scjn.gob.mx/PLENO/Lista_Actas_de_las_Sesiones_Publicas/88%20-%202%20de%20septiembre%20de%202013%20(2).pdf` (last visited Feb. 15, 2015). For an analysis of this question, see SERGIO GARCÍA RAMÍREZ & JULIETA MORALES SÁNCHEZ, LA REFORMA CONSTITUCIONAL SOBRE DERECHOS HUMANOS (2009–2011) [CONSTITUTIONAL REFORM FOR HUMAN RIGHTS (2009–2011)] at 334 (3d ed. 2013).

for suspensions and restrictions of rights, which on occasion amounted to nothing less than a "constitutional dictatorship."[67] To be sure, the Inter-American Court has been outspoken in constraining suspensions of the exercise of rights, which should serve to preserve the state and to protect democracy,[68] not to suppress them.

Important expressions of this reform movement can be found in the constitutions of Peru (of 1979[69]) and of Argentina, but especially the latter.[70] In a significant text, Argentina explicitly "constitutionalized," through the insertion in the catalogue of the constitutional text, the most important international human rights instruments—including the Universal and American Declarations—and opened the way for the inclusion of others, an advance realized shortly afterward.[71]

I find interesting, and instructive, the conclusions that academic doctrine draws from the Argentine constitutional reform of 1994. It is said that the reform:

> incorporated new rights and guarantees into the constitutional system; it contributed to inserting the country fully into an international system of justice for human rights; it stimulated changes in the administration of justice; it required a rethinking of the federal organization; it favored the creation of new public institutions tasked to design and implement specific government policies on human rights;

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[67] Diego Valadés, La dictadura constitucional en América Latina [The Constitutional Dictatorship in Latin America] 47 (1974); *see also* Cecilia Medina Quiroga, La Convención Americana [The American Convention] 45 (2003) (explaining the suspension of the exercise of rights and freedoms in conformity with the ACHR).

[68] *See generally* Florentín Meléndez Padilla, La suspensión de los derechos fundamentales en los estados de excepción según el derecho internacional de los derechos humanos [The Suspension of Fundamental Rights in States of Emergency under International Human Rights Law] 109 (1999); Valadés, *supra* note 67, at 47.

[69] "In the case of conflict with the treaty (international as signed by Peru) the former prevails." Constitución Política del Perú [C.P.] of 1979, art. 101 (Peru). "The provisions contained in human rights treaties have constitutional hierarchy. They cannot be modified except by the procedure governing the reform of the Constitution." *Id.* art. 105. "Exhausted domestic remedies, for anyone who considers the rights recognized by the Constitution, the courts may resort to international organizations established under treaties to which Peru is a party." *Id.*, art. 305 (under the Title "Constitutional Guarantees," on the purpose of the Warranty Court). *See generally* Constitución Nacional [Const. Nac.] (Arg.); Constitución Política de la República de Guatemala [C.P.], art. 46. *But see* Constitución Política del Perú [C.P.] of 1979, art. 105 (recognizing with "more strength" the primacy of international law in human rights); *see also* Héctor Fix-Zamudio, *supra* note 61, at 452.

[70] *See* Gozaíni, *supra* note 70, at 81, 98 (explaining that, before the constitutional reform of 1994, Argentina recognized obligatory decisions adopted through transnational justice).

[71] The second paragraph of Article 75 establishes the relationship between declarations and treaties that possess constitutional standing. Art. 75, Constitución Nacional [Const. Nac.] (Arg.). The third paragraph of the same Article fixes the procedure (by vote of a qualified majority of the members of each house of Congress) for other treaties and conventions on human rights to acquire the same hierarchy. *Id.*; *see* Jorge R. Vanossi, *Los tratados internacionales ante la reforma de 1994* [*International Treaties Before the 1994 Reform*], *in* La aplicación de los tratados sobre derechos humanos por los tribunales locales [The Application of Human Rights Treaties in Local Courts] 105 (Martín Abregú & Christian Courtis eds., 1997).

> and it contributed to the consolidation of an academic discipline that debated and supported the application of these standards and principles in different fields of public and private law.[72]

Other countries have brought different formulas to the same goal of constitutional protection of persons. They commonly provide that international human rights norms that proscribe restrictions of rights, or which recognize more or better protection of persons, prevail in the internal legal order.[73]

Such provisions embody the principle *pro homine* or *pro persona*[74]—adopted by the Inter-American Court, among other bodies—which resolves, in terms favorable to the human being, the tension between the internal and international legal orders. Even so, the emphasis on *pro homine* does not necessarily avoid occasional recurrences to the primacy of constitutional law that restricts internationally-recognized rights.[75] Attention should be paid to this phenomenon, which is inconsistent with the general obligations of a state party to the American Convention.[76]

VIII OTHER BRIDGES

In additional to constitutionalization, there is the path of ordinary legislation, through provisions that receive, internalize, or implement norms of more general application. While the constitutional reception of international human rights norms has flourished, there is an appreciable deficit in the legislative reception of those norms and of the decisions of international organs of protection. In

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[72] Víctor Abramovich, *Prólogo* [*Introduction*] to LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS EN EL ÁMBITO LOCAL. LA EXPERENCIA DE UNA DÉCADA [THE APPLICATION OF HUMAN RIGHTS TREATIES IN LOCAL AREAS: THE EXPERIENCE OF ONE DECADE] 1 (Víctor Abramovich et al. eds., 2007); *see also* Pizzolo, *supra* note 66, at 189.

[73] *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 93, 94; CONSTITUCIÓN POLÍTICA DEL ESTADO [C.P.] art. 13, pts. II, IV (Bol.); *Id.* art. 256; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(77)(2) (Braz.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] arts. 417, 424; CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE GUATEMALA [C.P.] art. 46; CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI art. 19; CONSTITUTCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.] art. 1, Diario Oficial de la Federación [DOF], 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ [C.P.] [CONSTITUTION] art. 17 (Pan.); CONSTITUCIÓN POLÍTICA DEL PERÚ [C.P.] of 1979, tit. VIII (Peru); *Id.* art. 2; CONSTITUCIÓN DE LA REPÚBLICA DOMINICA [CONSTITUTION] art. 74(1), (3), (4) (Dom. Rep.); CONSTITUCIÓN DE LA REPÚBLICA [CONSTITUTION] art. 72 (Uru.); CONSTITUCIÓN DE LA REPÚBLICA BOLIVIRIANA DE VENEZUELA [CONSTITUTION] art. 23 (amended 2009) (Venez.).

[74] Regarding this principle, its reach and limitations, see SAGÜÉS, *supra* note 25, at 325–26.

[75] *See* GARCÍA RAMÍREZ & MORALES SÁNCHEZ, *supra* note 66, at 338. Currently, highly relevant sources estimate that a constitution prevails when it stipulates limitations or restrictions on internationally recognized rights. *See also* Margarita Beatriz Luna Ramos, *Supremacía Constitucional y Control de Convencionalidad* [*Constitutional Supremacy and Control of Conventionality*], *in* EL CONTROL DE CONVENCIONALIDAD Y LAS CORTES NACIONALES: LA PERSPECTIVA DE LOS JUECES MEXICANOS [THE CONTROL OF CONVENTIONALITY AND NATIONAL COURT: THE PERSPECTIVE OF MEXICAN JUDGES] 30–39 (Paula M. García Villegas Sánchez Cordero ed., 2013).

[76] It is inconsistent to the extent that it violates a general obligation of the state to respect and guarantee the rights and freedoms enshrined in Articles 1 and 2 of the American Convention. *See* MEDINA QUIROGA, *supra* note 67, at 21 (regarding the obligation to take action).

this regard, there have been only a few laws of implementation.[77] The deficit is revealed as more serious when national laws do not require compliance with international decisions declaring violations and requiring payment of money damages. The innovative and expansive character of Inter-American rules on the legal consequences of international wrongs requires a much wider and more complex normative response, which national states have not adopted, and on which the efficacy of Inter-American jurisprudence depends in appreciable measure.[78]

Another form of internalization is constituted by public policies incorporating human rights and their various implications in all fields of political, economic, social, and cultural life. It is clear that the state and society do not carry out their mission in reality only by adopting constitutional, legislative, and regulatory norms; they do so, above all, through the carrying out of public policies with a human rights meaning or perspective. Some states have broad human rights policies (with "transversal" effect, as it is said), which constitute good instruments for receiving rights and giving them concrete practical application.[79]

On the same horizon of reception are the formation and consolidation of a culture of human rights.[80] I already mentioned, citing an Italian professor, the role of democratic customs in the observance of democratic constitutions. It is not easy to give root to this culture in countries that historically have suffered authoritarian or dictatorial—even totalitarian—experiences. Granted, these experiences are not that distant, to be sure, from the "subcultures" of other continents, which are customarily deemed—with short memories—to enjoy better traditions. But be that as it may, one must acknowledge that the countries of our America are far from having a true culture, respected and cultivated,[81] of human rights.

Here I cannot avoid mentioning the role played by adverse conditions in the field of public security. This situation, which overwhelms some countries of Latin America (or perhaps all), engenders a siege against human rights, which are blamed for the prevailing insecurity. It brings not only the undesirable expan-

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[77] For example, in Mexico: Ley Federal de Responsabilidad Patrimonial del Estado [LFRPE] [The Federal Law on State Responsibility], Diario Oficial de la Federación [DOF] 31-12-2004, últimas reformas DOF 12-06-2009; *Ley General de Víctimas* [LGV] [*General Law of Victims*], Diario Oficial de la Federación [DOF] 09-01-2013, últimas reformas DOF 03-05-2013. In Peru: Código Procesal Constitucional [Cód. Proc. Const.] [Constitutional Procedural Code], art. 115.

[78] This end is served, in Mexico, by the General Law of Victims published (after some legislative vicissitudes) on January 9, 2013, which seeks a "comprehensive redress," on a broad spectrum (Article 1), and that has as its subjects the victims of crimes and human rights violations (Article 2), and that is interpreted in conjunction with the Constitution and human rights treaties "favoring at all times the most ample protection of the rights of persons" (Article 3). *See* LGV, arts. 1–3 (Mex.).

[79] Here, for example, Mexico has embarked on the development of a so-called National Human Rights Program. *See Programa Nacional de Derechos Humano* [*National Human Rights Program*], Secretaría de Gobernación (Aug. 5, 2005), `http://www.ordenjuridico.gob.mx/Federal/PE/APF/APC/SEGOB/Programas/05082005(1).pdf`; *see also* García Ramírez & Morales Sánchez, *supra* note 66, at 45.

[80] *See* Alfred Fernandez & Geoffrey Gowland, Towards a Culture of Human Rights (2006).

[81] *See* Sergio García Ramírez, Los derechos humanos y el derecho penal [Human Rights and Criminal Law] 175–76 (2d ed. 1988).

sion of the punitive apparatus,[82] but also the excesses—which a certain sector of society views with complacency—of indiscriminate and prohibited methods of investigation, prosecution, and enforcement. A contradiction is proposed between *due process* (with its importance for human rights) and crime control.[83] These false dilemmas weaken the culture of human rights, which is viewed with distrust by partisans of the "hard hand."

The Inter-American Court, given its own function of protecting rights, has demanded of national systems at least two actions to halt the culture of violations and encourage the culture of rights. On one hand, timely compliance with their general duty of guarantees, suppressing obstacles to bringing violators to justice,[84] a topic associated with an unwavering rejection of impunity, which the Court has highlighted in its jurisprudence and which remains as one of the "weak flanks" of the system;[85] on the other hand, the training of justice officials

[82] *See* Luigi Ferrajoli, *Criminalidad y globalización* [*Criminality and Globalization*], ITER CRIMINIS: REV. DE CIENCIAS PENALES [ITER CRIMINIS: J. CRIM. SCI.], Aug.–Sept. 2005, at 71, 78; Joachim Vogel, *Derecho penal y globalización* [*Criminal Law and Globalization*], 9 ANUARIO DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE MADRID [Y.B. FAC. L. AUTONOMOUS U. MADRID] 113, 117 (2005); Daniel Erbetta, *Postmodernidad y globalización: ¿hacia dónde va el Derecho penal?* [*Post-Modernity and Globalization: Where Does the Criminal Law Go?*], *in* EL DERECHO PRIVADO ANTE LA INTERNACIONALIDAD, LA INTEGRACIÓN Y LA GLOBALIZACIÓN [PRIVATE LAW BEFORE INTERNATIONALIZATION, INTEGRATION, AND GLOBALIZATION] 75, 79, 83 (Carlos A. Hernández ed., 2005).

[83] The debate on the options has been initially discussed in the United States as a trade-off between crime control and due process. "On one side, the effectiveness of the criminal justice system, conceived as a system of crime control . . . . On the other, procedural guarantees (*due process*) transforms the penal system into an obstacle course." The "question of process options in Europe is reflected in the opposition between efficiency in the investigation of offenses and their perpetrators, and the respect for the fundamental human rights of the person," although it has also been pointed out that both sides can be reconciled in a "bipolarity of the criminal process." PROCESOS PENALES DE EUROPA [CRIMINAL PROCEDURE IN EUROPE] 40–41 (Mireille Delmas-Marty ed., Pablo Morenilla Allard, trans., Edijus 2000) (1995); *see also* Sergio García Ramírez, *Reflexiones sobre democracia y justicia penal* [*Reflections on Democracy and Crimial Justice*], *in* 1 HOMENAJE AL DR. MARINO BARBERO SANTOS [TRIBUNES TO DR. MARINO BARBERO SANTOS] (Luis A. Arroyo Zapatero & Ignacio Berdugo Gómez de la Torre eds., 2001).

[84] This is a topic that calls for careful examination in light of the principles that govern a state's obligation of justice and those of reality that impose conditions and restrictions. *See, e.g.*, José Zalaquett, *Derechos humanos y limitaciones políticas en las transiciones democráticas del Cono Sur* [*Human Rights and Political Constraints on Democratic Transitions in the Southern Sphere*], REV. IIDH, July–Dec. 1991, at 91. This article analyzes (in a time before definitions were adopted by the Inter-American Court and some states) the "ethical, legal and practical complexities" which accompany situations of "political transition." *Id.* at 131; *see also* Laurence Burgorgue-Larsen, *La lutte contre l'impunité dans le système interaméricain des Droits de l'homme* [*The Fight Against Impunity in the Inter-American System of Human Rights*], *in* LOS DERECHOS HUMANOS FRENTE A LA IMPUNIDAD [HUMAN RIGHTS AGAINST IMPUNITY] 89 (J. Soroeta ed., Cursos de Derechos Humanos de Donostia-San Sebastián Ser. No. 10, 2009). The responses of the Inter-American Court against attempts to circumvent the pursuit of these facts have been "intransigent." *Id.* at 90.

[85] *See* Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001); Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 147 (Nov. 24, 2010); Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 232 (Feb. 24, 2011); Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 283 (Oct. 25, 2012). On the invalidity of criminal and procedural concepts that block the investigation and prosecution of serious crimes, see Douglass Cassel, *Lecciones de las*

in matters of human rights,[86] and including, more ambitiously, the intervention of the state—an intervention of undeniable cultural significance—in order to remove deep-rooted patterns and factors militating against human rights.[87] The Court has likewise rejected settlements between victims and perpetrators that are inconsistent with public order in criminal matters and with human rights.[88]

IX The Jurisdictional Bridge

We now come to another bridge between the international and national orders: the jurisdictional path.[89] This implies the reception of IHRL norms and the pronouncements of the Inter-American Court by national tribunals, which traditionally (and surely still, to a high degree) are reluctant or resistant to the winds of the international system. Not infrequently in hearings before the Inter-American Court, state representatives base their positions, subject to final dispositions by national courts, on grounds of "division of powers" and the "independence of the judiciary," which the Inter-American Court has defended vigorously.[90] They go so far as to argue that the international judgment obligates some powers, or one sector of the state, while others remain immune from this interference.[91]

The jurisdictional reception, the route for the realization of control of conventionality (a topic I will address at the end of this article), departs from a

Américas: Lineamientos para una respuesta internacional ante la amnistía de atrocidades [*Lessons From the Americas: Guidelines for an International Response to Amnesty for Atrocities*], Rev. IIDH, July–Dec. 1996, at 277; González Morales, *supra* note 2, at 268; Burgorgue-Larsen, *supra* note 84.

[86] *See, e.g.*, González ("Cotton Field") v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 541–42 (Nov. 16, 2009).

[87] *Id.* ¶¶ 531–43.

[88] In relation to the duty of justice that concerns the Inter-American Court, the Court has rejected the compositional agreements between victim and victimizer for acts constituting a criminal offense, which are then not subject to the filing of a complaint by the victim. Garrido v. Argentina, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 26, ¶¶ 72–73 (Aug. 27, 1998).

[89] In Europe, the impact of international human rights law is relevant—through the 1950 Convention—for the jurisprudence of the constitutional tribunals. There is talk of a "conventional nationalization" in this area. Laurence Burgorgue-Larsen, *L'influence de la Convention européenne sur le fonctionnement des Cours Constitutionnelles* [*The Influence of the European Convention on the Operaton of Constitutional Courts*], 60 Revue internationale de droit comparé [Int'l Rev. Comp. L.] 247, 265 (2008).

[90] The attack on the proper integration of the courts affects democratic judicial review, that is, the "review of the adequacy of the State's conduct per the Constitution." Constitutional Court v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 112 (Jan. 31, 2001); *see also* Sergio García Ramírez, El debido proceso en la jurisprudencia. De la corte interamericana [Due Process in Case Law: The Inter-American Court of the Human Rights] 25 (2012), `http://www.ijf.cjf.gob.mx/cursosesp/2012/jornadasitinerantes/procesoSGR.pdf`.

[91] Invariably, the Inter-American Court is not a criminal court; therefore, it does not designate responsibilities of this type. In this regard, the Court noted that it "is not compatible with the Convention to agree that specific individuals are or are not guilty and must or must not be prosecuted." Huilca-Tecse v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶¶ 105–06 (Mar. 3, 2005). Decisions on these matters fall to domestic criminal jurisdictions.

double premise: Judges are the primordial guarantors of human rights,[92] and states are fully committed to observing human rights and to complying with the obligations resulting from their neglect or violation.

On the international plane, the state appears and is obligated as "a whole";[93] as a consequence, it is responsible for illicit behaviors by any of its agents or officials, and even, in certain circumstances, for transgressions committed by non-state actors.[94] This broad scope of attribution of state responsibility constitutes one of the strongest elements of the Inter-American Court's jurisprudence, notably important for the relation between the Court and the states, especially when states take advantage of persons or groups formally unconnected to the state structure (but in reality linked to it) to carry out activities related to public safety or national security.[95]

X FORCE OF INTERNATIONAL HUMAN RIGHTS LAW PROVISIONS

The Inter-American Court has addressed the content and force of the provisions of IHRL, a topic that can lead to points of debate, resistance, or disagreement with the states. Let us acknowledge, in the first place, that the imperatives of Inter-American human rights law have a complex content, which must be addressed in this same dimension. That content includes both the conventional precept—accepted by the state by its act of ratification or adhesion—and the interpretation of that precept—equally accepted by the state when it recognized the role of the tribunal as interpreter and applier of the conventional norm.[96]

Doubt has frequently been expressed as to the binding or merely orientational—the equivalent of "suggestive"—character of decisions of the Inter-American Court.[97] A distinction is proposed that "calibrates" the reach of these deci-

[92] *See* GARCÍA RAMÍREZ, *supra* note 90, at 35; LA JUSTICIA COMO GARANTE DE LOS DERECHOS HUMANOS: LA INDEPENDENCIA DEL JUEZ [JUSTICE AS GUARANTOR OF HUMAN RIGHTS: THE INDEPENDENCE OF THE JUDGE] (Eugenio Raúl Zaffaroni & Kurt Madlener eds., 1996).

[93] Mack Chang v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 27–31 (Nov. 25, 2003) (García Ramírez, J., concurring).

[94] *See* Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 125(1), (25), 133 (July 1, 2006); Mapiripán Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 121–23 (Sept. 15, 2005); *see also* MEDINA QUIROGA, *supra* note 67, at 28.

[95] *See Ituango Massacres v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 148; *Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134; Blake v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 75 (Jan. 24, 1998).

[96] Article 62(3) of the American Convention states: "[T]he Court has the jurisdiction over all cases concerning the interpretation and application of the provisions of this Convention that are submitted, provided that the States party to the case recognize or have recognized such jurisdiction, whether by special declaration, as indicated in the preceding paragraphs, or by special agreement." American Convention of Human Rights, art. 62(3), *supra* note 30. Regarding the general binding effect of judgments of the Court, see Becerra Ramírez's point of view, based on the position of those within the system of the sources of international law. BECERRA RAMÍREZ, *supra* note 12 at 47–49, 128.

[97] The issue of being binding in nature has arisen in connection with the Court, and in relation to the IACHR, in that it does not produce judgments but recommendations. In this respect, the positions of the states are diverse. For example, Argentina has recognized the obligatory force

sions and therefore conditions or dilutes their effectiveness. This position, often maintained, has to do both with the nature of determinations by the Court, which in no event, of course, lose their jurisdictional character, and with the extent of their impact on the state parties as a whole.

The first position mentioned argues for a distinction between the "decision" of the Court in contentious cases, rendered in the form of a judgment, and the "appreciation" of the Court in advisory proceedings, expressed in the form of an opinion. In the first situation, the decision is binding for the state, that is a party in the case.[98] In the second situation, the Court's opinion does not bind anyone, although it could be "significant" for all. The Court itself has accepted this distinction,[99] which is challenged by academic doctrine[100] and nuanced in the position of a state that recognizes the normative efficacy of a decision that it solicited by requesting an advisory opinion.[101]

The second point to consider on this subject, with obvious repercussions for the functioning of the Inter-American jurisdiction and its relation with the states, distinguishes, on the one hand, between the state that is party to the litigation, and on the other hand, the effects of the decision with respect to states not parties to the case in which the decision is made.[102]

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of the Commission's decisions that interpret conventional norms, but it has also stated that those are "moral, and expressed by taking all the necessary efforts to ensure compliance." *See* Gozaíni, *supra* note 68, at 109–11. The Inter-American Court has addressed this issue through its relevant judgments. Caballero-Delgado v. Colombia, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 66 (Dec. 8, 1995); Loayza-Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶¶ 80–81 (Sept. 17, 1997).

[98] *See* Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Court, "Control of Conventionality," ¶¶ 87–88 (Inter-Am. Ct. H.R. Mar. 20, 2013), http://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13_ing.pdf. The judgments of the Inter-American Court have the effect of res judicata and are binding, which derives from the ratification of the Convention and the recognition of the jurisdiction of the Court, and sovereign acts made by the party states. Furthermore, once a state has ratified an international treaty and recognized the jurisdiction of its monitoring bodies, it is precisely through its constitutional mechanisms that the treaty comes to be part of its domestic legal system.

[99] *See* "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 51 (Sept. 24, 1982). The Court has stated that the advisory opinions of the Court, like those of other international tribunals, by their very nature, do not have the same binding effect that is recognized for its judgments under Article 68 of the Convention.

[100] *See* Alonso Gómez-Robeldo Verduzco, Derechos Humanos en el Sistema Interamericano [Human Rights in the Inter-American System] 46 (2000); *see also* Faúndez Ledesma, *supra* note 25, at 989.

[101] So acted Costa Rica. *See* Corte Suprema de Justica de Costa Rica [Supreme Court], Sala Constitucional [Constitutional Chamber], 9 mayo 1995, acción de inconstitucionalidad No. 421-S-80 (Costa Rica) (citing Compulsory Membership in an Assoc. Prescribed by Law for the Practice of Journalism (Arts. 13 & 29 Am. Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5 (Nov. 13, 1985)) http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_ficha_sentencia.aspx?nValor2=81561.

[102] *See* Juan Carlos Hitters, *¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos?* [*Are Pronouncements of the Inter-American Court of Human Rights and the Inter-American Commission Binding?*], *in* El Control Difuso de Convencionalidad [The Diffuse Control of Conventionality] 245, 255 (Eduardo Ferrer Mac-Gregor ed., 2012). As to the force of decisions of the Inter-American Court with respect to states that were party to the dispute, Juan Carlos Hitters affirms the effectiveness of those under the concept of the "ripple

Obviously, the Court's findings of fact in the litigation and their consequences, whether the state is liable or not, operate only *inter partes*. The question does not end there, but rather inquires as to the efficacy of the Court's pronouncement with respect to the interpretation of the norms applied in the case sub judice, which could also be applicable, by their reasoning, to a large number of disputes.

For good reasons, and with growing force, the answer has emerged that best fits the design of IHRL and lends greatest efficacy to the jurisdiction established to guarantee these rights. The Court rules on the facts before it, as between the parties to the case, but, on occasion, also rules on the meaning and scope of the rights and liberties consecrated in the applicable instrument as among all those subject to the observance of the norms that consecrate such rights and liberties.[103]

Because the Court has been conferred the power to interpret the Convention, which is a positive legal order for all state parties to it, the Court possesses the capacity to define the meaning and scope of the corresponding norms. This is true not only for purposes of a concrete case, but also for all hypotheses arising from the case. The evident result is that a resolution of the tribunal has a double role: *inter partes*, with respect to the facts and their immediate and direct consequences; and *erga omnes*, with respect to the conventional norms and their interpretation in all cases.[104] This binding character of the jurisprudence[105] of the Court applies both to advisory opinions,[106] which entail the interpretation of a precept by the official interpreter of the norms, and to the judgments, which implicate the same function on the part of this organ.

The Inter-American Court has emphasized the recognition by high national courts of the binding effect of its judgments.[107] This does not mean that the ob-

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effect." He is less emphatic regarding his position on advisory opinions.

[103] García Ramírez, *La Navegación Americana*, *supra* note 19, at 467–68.

[104] *See* "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 69.

> In situations where the State concerned has not been party to the international process in which the jurisprudence was established, by the mere fact of being party to the American Convention, all of its public authorities and bodies, including democratic bodies, judges and other bodies involved in the administration of justice on all levels, are obligated by the treaty.

Id.

[105] I use this term in its broadest understanding, that encompasses the fruit of the jurisdiction: the law. Included, therefore, is the criteria formally established by the Court to expand its jurisdiction when any of the following actions are manifest: opinion, judgment, intermediate or interlocutory judgment, action, decision on compliance. Determinations whose content is purely administrative remain outside the Court's jurisdiction.

[106] *See* FAÚNDEZ LEDESMA, *supra* note 25, at 989. This point of view, which seems correct to me, has been strongly supported by Faúndez Ledesma who criticized the expression "advisory opinion" and who noted that in such circumstances the Inter-American Court operates as "Constitutional Court" whose interpretive statement of standards has binding effect.

[107] It has done this since the judgment in *Cabrera García v. Mexico* under the heading "Adaptating domestic law to international standards of justice," where it alludes to the recognized judgments of the Inter-American Courts by the High Courts of Costa Rica, Bolivia, the Dominican Republic, Peru, Argentina, and Colombia. Cabrera García v. Mexico, Preliminary Objection, Merits, Repara-

stacles that on occasion generate resistance in the internal judicial order have disappeared.[108] All in all, it may be affirmed that on the basis of that binding effect the orientation receptor of Inter-American jurisprudence has reached domestic tribunals of diverse rank and has spread among the totality of the member states of the system. The states are bound by the norms of the international instruments to which they are parties, and subject to the official interpretation of them, without prejudice, of course, to other dispositions that may improve on the interpretation of the American Convention under the rule of the principle *pro persona*.[109]

XI Control of Conventionality

The previous discussion is closely related—by imposing conditions—with a derivative concept that is gaining importance in various countries of the region, with differing emphasis: the control of conventionality.[110] This constitutes "a

tions, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶¶ 226–32 (Nov. 26, 2010). The resolution on monitoring compliance in *Gelman v. Uruguay* will be incorporated with the decisions of other countries: Guatemala, Mexico and Panama. Sagüés indicates that the admission of the Inter-American Court's criteria by the highest national courts presents the following panorama: express acceptance, qualified tacit acceptance (rises to a higher court), partial tacit acceptance (the Constitution is not subject to control), silence or tacit denial. Néstor P. Sagüés, *El control de convencionalidad en el Sistema Interamericano y sus anticipos en el ámbito de los derechos ecoómico-sociales. Concordancias y diferencias con el Sistema Europeo* [*The Control of Conventionality in the Inter-American System and its Advances in the Field of Economic and Social Rights: Similarities and Differences with the European System*], *in* El Control Difuso de Convencionalidad, *supra* note 102, at 421, 431.

[108] *See* Osvaldo Alfredo Gozaíni, *El impacto de la jurisprudencia del sistema interamericano en el derecho interno* [*The Impact of the Jurisprudence of the Inter-American System on Domestic Law*], *in* El control de convencionalidad, *supra* note 66, at 81, 83–84, 91–92 (with respect to the possible conflict between constitutional courts and ordinary courts, "[I]t has little relevance when it comes to resolving human rights, because for them the only law to be applied is that which comes from the jurisdiction of the State itself recognized at the time of joining the system.").

[109] American Convention on Human Rights, *supra* note 30, art. 29.

> Nothing in this Convention shall be interpreted as:
>
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
>
> b. 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;
>
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
>
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Id.

[110] On the origin of the doctrine of control of conventionality, see De Vergottini, *supra* note 25, at 112; Ernesto Rey Cantor, Control de Convencionalidad de las Leyes y Derechos Humanos [Control of Conventionality of Laws and Human Rights] 46, 167–71 (2008); Juan Carlos Hitters, *Control de constitucionalidad y control de convencionalidad. Comparación* [*Constitutional Control and Conventional Control: Comparison*], 7 Estudios Constitucionales [Const.

guarantee designed to obtain the harmonious application of applicable law,"[111] a concept which, to this end, touches on norms from both relevant sources: international and national, under the "guide" of the former. It seems obvious that the Inter-American Court, which hears cases involving national acts allegedly in violation of international norms, should exercise a control over whether those acts are consistent with the requirements of the Convention.[112] This entails a matching, a confrontation, and a comparison between the national acts and the conventional norms—stressing the preeminence of the conventional norms—which are the subject matter of the Court's analysis and the reason for its determinations.[113]

It should be mentioned at this point that the control of conventionality (a duty imposed on a universe of obligated persons to which I will allude below, and which, in addition, is not yet completely defined) should not be confused with the general obligation of observance and subordination to the dispositions of IHRL (a duty imposed on all public authorities, as indicated, for example, by Article 1 of the Mexican Constitution, and even on private parties). This observance or subordination reflects the duty that each person has with respect to his own conduct, personally, in the terms required by legal provisions. In contrast, the obligation of control is exercised with respect to a third party, the "controlled subject," whose acts are examined by the "controlling subject" to verify their conformity with the requirements of IHRL (or with national human rights laws) and to apply, for that purpose, particular measures with certain

STUD.], no. 1, 2009, at 109, 109–14; SAGÜÉS, *supra* note 25, at 449; Sagüés, *supra* note 107, at 442; SAGÜÉS, *supra* note 25, at 344–46; Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano* [*Interpretation-Based Diffuse Control of Conventionalty: A Paradigm for the Mexican Judge*], *in* EL CONTROL DIFUSO DE CONVENCIONALIDAD, *supra* note 102, at 107, 132–33; Victor Bazán, *Estimulando sinergias: de diálogos jurisprudenciales y control de convencionalidad* [*Stimulating Synergies: Jurisprudential Dialogue and Control of Conventionality*], *in* EL CONTROL DIFUSO DE CONVENCIONALIDAD, *supra* note 102, at 11; AYALA CORAO, *supra* note 57, at 133, 142 n.502, 147 n.509; JOSÉ LUIS CABALLERO OCHOA, LA INTERPRETACIÓN CONFORME: EL MODELO CONSTITUCIONAL ANTE LOS TRATADOS INTERNACIONALES SOBRE DERECHOS HUMANOS Y EL CONTROL DE CONVENCIONALIDAD [CONSISTENT INTERPRETATION: THE CONSTITUTIONAL MODEL TO INTERNATIONAL TREATIES ON HUMAN RIGHTS AND THE CONTROL OF CONVENTIONALITY] 75–76 (2013); Emmanuel Rosales, *En busca del acorde perdido o la necesidad de un lenguaje común para el análisis sistemático de la aplicación del derecho internacional de derechos humanos por cortes nacionales* [*In Search of the Lost Chord or the Need for a Common Language for the Systematic Analysis of the Application of International Human Rights Law by National Courts*], *in* EL CONTROL DE CONVENCIONALIDAD Y LAS CORTES NACIONALES: LA PERSPECTIVA DE LOS JUECES MEXICANOS, *supra* note 75, at 180.

111 Susan Albanese, *La internacionalización del derecho constitucional y constitucionalización del derecho internacional* [*The Internationalization of Constitutional Law and Constitutionalization of International Law*], *in* EL CONTROL DE CONVENCIONALIDAD, *supra* note 66, at 1, 15.

112 *See* Ernesto Rey Cantor, *Controles de convencionalidad de las leyes* [*Control of Conventionality of the Law*], *in* EL CONTROL DIFUSO DE CONVENCIONALIDAD, *supra* note 102, at 391, 393. Rey Cantor broadly refers to the development of the jurisprudence of the Inter-American Court, in various stages, on the power of confrontation between national provisions and international standards, depending on which implicates the implied doctrine of control of conventionality.

113 *See* Karlos A. Castilla Juárez, *El control de convencionalidad. Un nuevo debate en México a partir del Caso Radilla Pacheco* [*The Control of Conventionality: A New Debate in Mexico From the Case of* Radilla Pancheco], *in* EL CONTROL DIFUSO DE CONVENCIONALIDAD, *supra* note 102, at 81, 91. Only the Inter-American Court—not national judges—can exercise control of conventionality.

consequences, to which I will refer below.

It has been said that the mission of the international tribunal as a "controlling subject" is similar, in certain essential respects, to that of a national constitutional tribunal, called upon to pass on the "constitutional quality" of the act of a domestic authority, taking as a point of reference the text of the supreme internal norm and its interpretation by the constitutional organ.[114]

Ever since the first espousal of control of conventionality, initially in separate opinions and shortly thereafter, in an evolutionary manner, in the jurisprudence of the full Court, the concept has gained in prestige and further development.[115] The Inter-American Court has formulated definitions and specificities concerning the control of conventionality, which have brought about an important evolution in this regard.[116] Nonetheless, there still does not exist among the countries of our region a universally accepted conception of control of conventionality; of the procedure or method for exercising it, its consequences, or subjects empowered to apply it;[117] or of the situations to which it should be applied.[118] Accordingly, what I say in this section should be taken with caution, bearing in mind the particularities of each national regime and even of each analyst or person applying this new control. The very fact that there is a great variety of solutions and opinions makes obvious the need to carry out an orderly reex-

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[114] Tibi v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 3 (Sept. 7, 2004) (García Ramírez, J., concurring).

> In a certain sense, the work of the Court is similar to that undertaken by the constitutional courts. Those examine contested acts—general provisions—in light of the rules, principles and values of fundamental laws. The Inter-American Court, for its part, analyzes the acts within their jurisdiction in relation to the norms, principles, and values of the treaties that form the basis of its jurisdiction. Said in another way, if the constitutional courts control "constitutionality," the international court of human rights decides on the "conventionality" of such acts. Through the control of constitutionality, internal bodies shape the activity of public power—and eventually of other social agents—with the legal order that forms the core of a democratic society. The Inter-American Court, meanwhile, aims to conform to its activities to the international order bestowed during the founding convention for the Court's jurisdiction and accepted by the Party States through the exercising of their sovereignty.

Id.; *see also* Dismissed Congressional Employees (Aguado-Alfaro) v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 4 (Nov. 24, 2006) (García Ramírez, J., concurring).

[115] *See* Mack Chang v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 27 (Nov. 25, 2003) (García Ramírez, J., concurring).

[116] On this matter, see Becerra Ramírez's comment and review of the evolution of control of compliance. Becerra Ramírez, *supra* note 12, at 123 ("The concept of control of compliance . . . that the doctrine has developed in recent years has several inaccuracies.") (footnote omitted).

[117] *See* Ayala Corao, *supra* note 57, at 162–64. In his examination of compliance control, Ayala Corao accurately notes the content of the control: It encompasses all the acts and conduct of the state, it is exercised by the organs of the state, judges have a special obligation towards this respect, the parameter is the ACHR, it should be performed by state bodies within their jurisdiction and relevant procedural regulations, the result must be effective, and the lack of control gives rise to the international responsibility of the state.

[118] "Compliance control has a complementary nature and therefore is an exceptional mechanism that is not exercisable in all cases." Sergio Flores Navarro & Victorino Rojas Rivera, Control de Convencionalidad [Control of Conventionality] 27 (2013).

amination of this protective guarantee, which is informed by winds of diverse natures and with different and uncertain end results.

It is desirable to arrive soon at basic agreement in regard to questions concerning the control of conventionality, which are often fomented by "enthusiasm" and rising expectations. Basic agreements will enable control of conventionality to achieve the best possible application, to bring about reasonable uniformity in our region, and to contribute to the formation of the *ius commune*, to harmonization and consistency, to the plausible and admissible definition of the legal order and its guarantees.[119] If this does not happen, the risk is that divergences will increase, and contradictions will arise within countries—not only between countries—and the hemispheric protection of human rights will suffer.[120]

Of course, the Inter-American Court is the body authorized to resolve, definitively, whether control of conventionality has been exercised correctly with regard to the Inter-American system, for so long as there does not exist a superior organ competent to review the decisions of that tribunal.[121] There are stages or "seasons" in the Inter-American jurisprudential development in regard to control.[122] In the following paragraphs I will refer to the novel characteristics of each stage, indicating also the case in which they arose, in the knowledge that the new terms established in each case were reiterated in the subsequent jurisprudence, except in regard to the *Gelman Case*, which I will analyze separately.

Supported by the idea that the protective function of the state—and the state's consequent responsibility—applies to all its organs, it was understood that domestic adjudicators are obligated to respect and to guarantee the observance of IHRL, and that in this sense their natural jurisdictional function should serve those ends and should not be limited to adjudicating violations of internal legal norms. For that purpose, they should exercise a kind of control of conventionality.[123]

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[119] "Compliance control in terms of human rights assumes a cornerstone character for the development of a common law or customary law in Latin America." Luna Escudero & Víctor Octavio, *La nueva cultura jurídica en México: El juez nacional y los retos del control de convencionalidad* [*The New Legal Culture in Mexico: The National Court and the Challenges of the Control of Conventionality*], *in* EL CONTROL DE CONVENCIONALIDAD Y LAS CORTES NACIONALES: LA PERSPECTIVA DE LOS JUECES MEXICANOS, *supra* note 75, at 87.

[120] On the neccesity of organizing compliance control in a form that harmonizes law and the construction of an ius commune, avoiding the "derailment" of this concept, see Sergio García Ramírez, *Prólogo* [*Foreword*] to FLORES NAVARRO & ROJAS RIVERA, *supra* note 118, at xx–xxi; *see also* GARCÍA RAMÍREZ, CONTROL JUDICIAL DE CONVENCIONALIDAD I, *supra* note 19, at 9.

[121] This has raised questions. *See* BECERRA RAMÍREZ, *supra* note 12, at 156–57.

[122] Burgorgue-Larsen indicates that this concept has developed in three stages: The emergence of the duty to control in *Almonacid*, the establishment of of the contours of the obligation in *Dismissed Congressional Employees*, and the "theorizing" of control in *Cabrera García v. Mexico*. Laurence Burgorgue-Larsen, *La Erradicación de la Impunidad: Claves para Descifrar la Política Jurisprudencial de la Corte Interamericana de Derechos Humanos* [*The Eradication of Impunity: Keys for Deciphering the Jurisprudential Policy of the Inter-American Court of Human Rights*], *in* EL CONTROL DIFUSO DE CONVENCIONALIDAD, *supra* note 102, at 33, 38.

[123] *See* Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

> The Court is aware that domestic judges and courts are bound to respect the rule of

This judicial mission as guarantor of human rights—based on their national Constitutions and on IHRL—is valuable not only to repress violations, but also to prevent them, by "purging" state actions and thereby limiting the involvement of the international tribunal, which would become involved less frequently, by virtue of its being limited by the principle of subsidiarity.[124] In contrast, all acts not effectively controlled by the national judges—or by other competent internal bodies—can be the subject of cases brought before and examined by the international tribunal.[125]

Accordingly, then, the Inter-American Court understood that the emerging doctrine of control of conventionality would be exercised by national adjudicators,[126] in the manner in which the Inter-American Court, by its very nature the controller of conventionality, exercised this function in the international sphere.[127] The domestic control rested in the hands, then, of the jurisdictional organs, established for internal protection of rights, which for that purpose would pay heed to international law. That seemed reasonable.

Later it was added that the national tribunals should exercise control within their own fields of competence and in accordance with their own established procedures[128] (a reasonable addition in practical terms and unassailable in le-

> 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.

Id. ¶ 124.

[124] *See* Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int'l L. 38 (2003) The presence of the subsidiarity principle, well established, favored the application of the ACHR. Of course, its effective operation involves a determination of compliance by states, associated with the ability to ensure respect and guarantees.

[125] *See* García Ramírez, Control judicial de convencionalidad I, *supra* note 19, at 46–47.

[126] As in the aforementioned judgment in *Almonacid-Arellano v. Chile*, "Judicial compliance control represents an analysis of the confrontation between internal norms and acts in regards to the Conventional Law on Human Rights, judicially determined by competent judges, for the restoration of the full exercise of undermined freedoms." Gumesindo García Morelos, *El control judicial difuso de convencionalidad de los derechos humanos por los tribunales ordinarios en México* [*Diffuse Judicial Control of Conventionality of Human Rights for the Ordinary Courts in Mexico*], *in* El Control Difuso de Convencionalidad, *supra* note 102, at 207; *see also* Castilla Juárez, *supra* note 113.

[127] *See* García Ramírez, Control judicial de convencionalidad I, *supra* note 19, at 42.

[128] *Id.* It has been written that this remark about the powers and procedural regulations must be interpreted as a way to "adjust" control. *See* Ferrer Mac-Gregor, *supra* note 110, at 147. On this subject and, in general, on compliance control, see the reasonsed opinion of Ferrer Mac-Gregor as judge on the Inter-American Court in the case of Cabrera García v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 220 (Nov. 26, 2010) (Ferrer Mac-Gregor Poisot, J. ad hoc, concurring).

gal terms, since it is respectful of the rule of law[129]), governing the activities of the courts and, in general, of all authorities. This mission would be exercised by the adjudicator *motu proprio*, in the same way that the principle *iura novit curia* governs the general functioning of the Court, and should not depend on the initiative of the parties. The control 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."[130]

It bears mentioning that the scope of this last statement was not clarified by the jurisprudence of the Court. Academic doctrine has called attention to this statement, which recognizes the importance of satisfying certain material and formal conditions for applying, where those conditions obtain, international and national controls.[131]

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[129] *See* GARCÍA RAMÍREZ, CONTROL JUDICIAL DE CONVENCIONALIDAD I, *supra* note 19, at x–xi, 54, 65.

[130] Dismissed Congressional Employees (Aguado-Alfaro) v. Peru, Prelminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 128 (Nov. 24, 2006).

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

Id. (third and fourth emphases added) (footnote omitted). In regards to the *jura novit curia* principle, which supports the implementation of relevant legal provisions, whether or not raised by the parties, the Court's position has been consistent since *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R (ser. C) No. 4, ¶ 163 (July 29, 1988).

[131] This refers to the existence of possible procedural and substantive materials of admissible origin.

> We know . . . that international law provides some estimations for the initiation and development of paths for the international protection of human rights: material and formal conditions (related to the nature of the issue, the timing of the presentation of the case, the jurisdiction of the court, for example), before the Commission and the Court . . . . The requirement that these assumptions be satisfied does not imply, in a concrete case in which they are proposed, appreciation of the existence of the alleged violations or responsibility of one must confront them or the relevant reparation. It only signifies—though this is not without importance and value on a case-by-case basis, as is evident—the unfolding of the international path, through its own norms and under the internal control of conventionality, in itself. These are associated with observances of such provisions. After all, internal regulations can be—and should be—flattering to the protection of fundamental rights, and therefore can and should minimize the evaluations above, in order to avoid raising unnecessary barriers to the protection of the individual. Under the same logic these estimations apply to the international sphere.

GARCÍA RAMÍREZ, CONTROL JUDICIAL DE CONVENCIONALIDAD I, *supra* note 19, at 54–56.

Shortly after these foundational judgments, it was deemed convenient to extend the exercise of control to other authorities, organs linked to the administration of justice at all levels.[132] But it is necessary to take into account that such organs linked to the administration of justice at all levels constitute a very broad universe of public officials with diverse primary attributes and professional training,[133] not only judicial secretaries, among whose functions is that of substitution for judges (that is, the exercise of jurisdiction), but also persons with other natural missions.

A further step was taken in the assignment of control to all public servants.[134]

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[132] Cabrera García v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 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.

Id. (first emphasis added) (footnote omitted).

[133] I follow the distinction between auxiliary procedural functions (including the Clerk who can act as a judge) and auxiliaries of the judicial system, that develop administrative or bureaucratic characteristics. *See* Niceto Alcalá-Zamora y Castro, Panorama del derecho Mexicano: Síntesis del Derecho Procesal [Panorama of Mexican Law: Summary of Procedural Law] 47 (1966).

[134] *See* Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

> The bare existence of a democratic regime does not guarantee, *per se*, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter. The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance, those who should also prioritize "control of conformity with the Convention," which is a function and task of *any public authority and not only the Judicial Branch*.

Id. ¶ 239 (footnote omitted) (citation omitted) (second emphasis added). In regards to the alleged control in the hands of "all the authorities of the country," it has been written, "the authorities of the country, all of them, cannot declare invalid general norms, nor can they cease their application in cases they consider contrary to a human right originating from a constitutional or conventional source." José Ramón Cossío, *Primeras implicaciones del Caso Radilla* [*First Implications of the* Radilla *Case*], *in* El Control de Convencionalidad, *supra* note 66, at 72.

> [*A*]*ll state authorities* have the obligation to exercise *ex officio* a "control of conventionality" between domestic standards and the American Convention, within the framework of their respective spheres of competence and of the corresponding procedural rules. Both the treaty and its interpretation the Inter-American Court, the final

Certainly, all officials are obligated to comply with the provisions of the national constitution and international treaties.[135] Now, the general mission of compliance is one matter, and the mission of "control" of the acts of other authorities is another. I will refer below to the scope of this control.

By being broadened in this sense, the catalogue of "controllers"—which is not synonymous with the totality of all officials who are required to observe national and international norms—automatically includes the control mission of all public servants of all ranks, specializations, and competencies, from members of the public security, and even teachers and health officials, to people in the postal service and officials in the central and decentralized public administration, and so on. There is no doubt as to this extremely broad consequence of the literal language used to define who has the duty of control. If one desires to "rationalize" who has the duty, drawing specific lines, it would be necessary to develop elaborate interpretations or candid and barely pertinent clarifications and rectifications.

It is interesting to note that the doctrine as articulated by the Inter-American Court in its earliest decisions was newly invoked by the President of the Court during the Court's extraordinary session in Mexico City in December 2013.[136]

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arbiter of the American Convention, must be taken into account in this task.

Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Court, "Considering That," ¶ 66 (Inter-Am. Ct. H.R. Mar. 20, 2013) (first emphasis added), http://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13_ing.pdf. For his part, Ayala Corao considers that all the organs of a state must exercise control of conventionality under Article 1 of the ACHR, and distinguishes the category of internal judicial control. *See* AYALA CORAO, *supra* note 57, at 113.

[135] The third paragraph of Article 1 of the Mexican Constitution states: "All authorities, in their jurisdictional spheres, have the obligation to promote, respect, protect and guarantee rights . . . ." CONSTITUTCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.] art. 1, Diario Oficial de la Federación [DOF], 05-02-1917, últimas reformas DOF 10-02-2014.

[136] *See* Diego García-Sayán, President, Inter-Am. Court of Human Rights, Speech at the Opening of the Forty-Eighth Special Session of the Inter-American Court of Human Rights (Oct. 7, 2013), http://vimeo.com/76435830.

> The fact that the decision has been made here, in Mexico, as it has taken a greater or lesser extent in several other countries in Latin America, that national judges acquire a particular role in the control of conventionality is very important because this is an aspect of Inter-American law with enormous relevance for domestic jurisdictions. However, our obligation as a Court is also to promote these types of values and concepts, and also to make a public call for caution as this is an enormously complex issue through which the jurisprudence of this Court has been extremely careful in phrasing and term selection, and I'll allow myself to read a critical paragraph that the Court has repeatedly used in judgments, that says: "judges and bodies related to the administration of justice on all levels are obligated to exercise *ex officio* control of conventionality between internal norms and the American Convention, within their respective jurisdictions and corresponding procedural regulations." In this manner in the jurisprudence of the Court and in practice that is being developed in American countries, compliance control is far from being a situation of every man for himself, and any authority may decide not to apply a rule because the Court has emphasized that excercising control of conventionality is essentially aimed the judiciary and, in second place, is to be done within the framework of the respective powers of each authority, as corresponding regulations establish the internal rules for the constitutional and legislative norms of each country.

Id.

He suggested caution that would favor a healthy limitation of the extent of the duty of control, limiting and channeling it so that it will not overflow its proper banks.

As we have seen, the idea of control of conventionality originally referred to national "judicial" intervention in the examination of domestic norms. This strictly defined the scope of control. In contrast, if the concept is deemed to apply to the examination by any authority of a nation of any act in violation, the scope expands without limit: All examinations of the consistency of a domestic act with an IHRL norm would amount to control of conventionality.

Now consider how this control could be exercised and what would be its legal consequences. The Inter-American Court did not order states to establish regimes of diffuse control, although the Court would probably sympathize with such a regime.[137] The Court left the final decision to states, so long as their solution permits judicial control of conventionality, which is the axis of the proposed system. Given this, it would seem perfectly possible, and useful, to review the circumstances in which control would operate and to adopt the best criteria in light of those circumstances.

This has been recommended by various writers, who are concerned about the effects of an almost total absence of regulation,[138] as well as by the problems that could arise from divergent opinions among courts exercising control, resulting in a breach of the principle of legal security, which is a fundamental element of the rule of law.[139] There has even been suggested a solution half way between absolutely diffuse control and concentrated control, taking note of regimes that could serve this end, such as the constitutional questions involving

[137] Cossío, *supra* note 134, at 71.

> The diffuse control of compliance implies that "when the judges of a country, all of them, consider that the general rule that should apply in a lawsuit is contrary to a human right contained in an international treaty ratified by Mexico, they must cease the application of that provision and accordingly resolve the case.

Id.; *see also* Caballero Ochoa, *supra* note 52, at 80, 85 (recognizing that the Inter-American Court "has not tried to impose [on national courts] the specifics" of the control).

[138] *See* de Vergottini, *supra* note 60, at 106; Néstor Sagüés, *El 'control de convencionalidad' como instrumento para la elaboración de un ius commune interamericano* ["*Control of Conventionality" as a Tool for the Development of an Inter-American* ius commune], *in* La justicia constitucional y su internacionalización [Constitutional Justice and its Internationalization] 451 (Armin von Bogdandy et al. eds., 2010); José María Serna de la Garza, Impacto e implicaciones constitucionales de la globalización en el sistema jurídico mexicano [The Impact and Constitutional Implications of Globalization in the Mexican Judicial System] 279 (2012). Since I undertook the study of compliance control in Mexico, I have emphasized that the Inter-American Court has not ruled on the nature of that control: concentrated or diffuse. It is indispensable, in my opinion, to carefully ponder the most convenient way to control an instrument of legal harmonization, security and justice, that does not direct *ius commune* towards jurisprudential dispersion, which constitutes one of the most grave risks in this area. In this order of considerations, "it is perfectly possible—I might add—that the national legislative organize a consultative regime similar to the questions of constitutionality that offer other national experiences and that permit a unity of interpretation and favor legal security." García Ramírez, Control judicial de convencionalidad I, *supra* note 19.

[139] *See* Albanese, *supra* note 111, at 25, 44.

the procedure of Spanish law.[140] In referring to what he calls the tacit and qualified acceptance of the pronouncements of the Inter-American Court by national courts, one writer indicates that the inferior courts do not generally exercise such control (of conventionality), although they do refer cases to the constitutional chamber for consultation on constitutionality. Some observers see this phenomenon as beneficial in order to avoid divergent interpretations by lower court judges and to establish uniform criteria through the jurisprudence of the constitutional chamber.[141]

It is worth reiterating that some countries in the region have a tradition of diffuse control; others, of concentrated control, which is deeply rooted and, in general, functions well.[142] It is also worth noting that, in some states, there are relatively few judges, while in others the number of judges is extremely large and they have multiple specializations. One must contemplate thousands—not merely dozens or hundreds—of judges, without experience, neither near nor remote, in matters of diffuse control, exercising control over very diverse matters in their respective trenches: civil, criminal, family, mercantile, guarantees, administrative, agrarian, civic justice (or municipal justice of the peace), labor, etc.[143]

I mentioned that each country may have particularities in regard to the immediate effects of control of conventionality,[144] as well as in regard to the problems that judges may encounter in applying control. Above all, the problem that arises

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[140] CONSTITUCIÓN ESPAÑOLA [C.E.], art. 163, B.O.E. n. 311, Dec. 6, 1978 (Spain), *translated in* George E. Glos, *The New Spanish Constitution, Comments and Full Text*, 7 HASTINGS CONST. L.Q. 47, 127 (1979).

> When a court of law considers a legal norm determinative of a case, but of doubtful constitutional validity, it will submit the matter to the Constitutional Court in such cases, in such form, and with such effect, as shall be determined by law, which may in no event permit such decisions to be delayed.

Id.; *see also* EDGAR CORZO SOSA, LA CUESTIÓN DE INCONSTITUCIONALIDAD [THE QUESTION OF UNCONSTITUTIONALITY] 171 (1998) (It is understood that the logic that presides over questions of unconstitutionality with its effects on the subject of jurisprudential unity and legal security can be extended, *mutatis mutandis*, to the control of conventionality).

[141] Sagüés, *supra* note 107, at 431. Apart from the doctrine of the Court of the European Union on the "covert act" and "clear act," Fernando Silva García indicates that this latter concept permits judicial control be made based on case law or ideal materials to sustain a rational and adequate motivation on the part of the national judge. It does not break with the model of concentrated control because there exists jurisprudential support for setting aside national law. *See* Fernando Silva García, *El control judicial de la ley con base en tratados internacionales sobre derechos humanos* [*Judicial Control of the Law Based on International Human Rights Treaties*], *in* EL CONTROL DIFUSO DE CONVENCIONALIDAD, *supra* note 102, at 455, 459–61.

[142] *See* Sagüés, *supra* note 138, at 454–55.

[143] On control of conventionality by national judges, see FLORES NAVARRO & ROJAS RIVERA, *supra* note 118, at 152; *see also* Pablo G. Salinas, *Cumplimiento de las Resoluciones de la Corte IDH* [*Compliance with the Resolutions of the Inter-Am. Ct. H.R.*], *in* EL CONTROL DE CONVENCIONALIDAD, *supra* note 66, at 231, 235; Humberto Nogueira Alcalá, *Los desafíos del control de convencionalidad del* corpus iuris *interamericano para los tribunales nacionales, en especial, para los tribunales constitucionales* [*The Challenges of the Control of Conventionality in the Inter-American Corpus Juris for National Courts, and in particular, for Constitutional Courts*], *in* EL CONTROL DIFUSO DE CONVENCIONALIDAD, *supra* note 102, at 331, 341.

[144] Recall the similar disparities regarding control of constitutionality.

when control is established suddenly without sufficient preparation for its application or new provisions to protect human rights implies the need for important changes.[145]

It is not possible for me to refer to all countries, but I can propose the example of my own: Mexico.[146] If we refer to the examination of dispositions of general application (laws and regulations, which were the subject that originally motivated the enunciation of the doctrine of control) control of conventionality then means "non-application"[147] of a norm, or its "expulsion" from the domestic legal order, according to the circumstances.[148] How can we resolve the

[145] For a critique of the "confusion" generated by the sudden entrance into force of the Mexican constitutional reform of 2001 and its immediate applications ("the lack of a reasonable time to prepare the judiciary on the scope of a such a complex reform has begun to take its toll") and the "indoctrination" to which judges have been exposed ("to break with all that has been done in the past"), and the division between courts "in the delirious celebration that decisions to reform everything can be made from their desktops" and judges "who do not believe that human rights were invented in 2011," see Francisco Javier Sandoval López, *El activismo judicial o la dictadura de los jueces: Análisis del modelo de control difuso sobre derechos fundamentales de prestación asistencial* [*Judicial Activism or Judicial Dictatorship: Analysis of the Model of Diffuse Control over Fundamental Rights of Welfare Assistance*], *in* El control de convencionalidad y las cortes nacionales: La perspectiva de los jueces mexicanos, *supra* note 75, at 200–01.

[146] *See* Olga María del Carmen Sánchez Cordero de García Villegas, *La tutela multinivel de los derechos fundamentales ante el nuevo paradigma constitucional* [*Multilevel Protection of Fundamental Rights in the New Constitutional Paradigm*], *in* El control de convencionalidad y las cortes nacionales: La perspectiva de los jueces mexicanos, *supra* note 75, at 271 (on the effects of the invalidity or inapplicability involving, respectively, removal of invalid norms from the judicial system or omission in the application of an unconventional norm and the direct application of constitutional or conventional dispositions).

[147] Sergio Salvador Aguirre Anguiano, *Derechos humanos en México: ¿Un mandato de convencionalidad o de constitucionalidad?* [*Human Rights in Mexico: A Mandate of Conventionality or Constitutionality?*], *in* El control de convencionalidad y las cortes nacionales: La perspectiva de los jueces mexicanos, *supra* note 75, at 49–50 (The inapplicability of norms "does not implicate a contrasting analysis between legal texts, but a mere comparison of principles and norms as distinguished in constitutional text and in international treaties, in which one can detect that a legal norm attentive to those against contrary to fundamental human rights, at which point it is then correct to nullify the effects of such a contrary standard," a different act than expelling it from the legal system entirely).

[148] In its analysis of *Radilla-Pacheco*, the Mexican Supreme Court of Justice established, with binding force for the courts, a model of control of conventionality and constitutionality that derived from paragraph 339 of the judgment adopted by the Inter-American Court in that case, and that established the following:

> 1) The judges of the Judicial Power of the Federation to have jurisdiction over constitutional controversies, unconstitutional actions and constitutional protection, may declare the invalidity of the rules that contravene the Federal Constitution or international treaties that recognize human rights, to effect only specific cases and without making a declaration of invalidity of the rules that contravene the Federal Constitution or international treaties that recognize human rights; 2) the other judges of the country, in matters within their jurisdiction, may disengage those rules that infringe on the Federal Constitution or international treaties that recognize human rights, to effect only specific cases and without making a declaration of invalidity on the provisions; and 3) The authorities of the country who do not exercise judicial functions, must interpret human rights in a manner that most favors them, without having the authority to declare the invalidity of the rules or disengage them in specific cases.

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problems that would be generated by a "multiplication of non-applications and expulsions," if we have no legislation at hand to provide security and promote justice?[149]

It is worth mentioning an incipient practice that has appeared in the use of control of conventionality as a means to advance, as part of a deliberate strategy, the protection of human rights in certain fields. This can be especially important in cases involving members of vulnerable groups for whom the judges make efforts to extend the benefits of fairness.[150]

The idea of direct application of international norms and judgments by domestic courts is not out of place, to be sure, in the European jurisdictional system for the protection of human rights. Under a "principle of solidarity," the European Court would see its pronouncements applied in states that were not litigants in the case before the Court in which the pronouncement was made.[151] The European Court has noted, "that although the existence of a remedy is necessary, it is not in itself sufficient. The domestic courts must be able, under domestic law, to apply the European case-law directly and their knowledge of this case-law has to be facilitated by the state in question."[152]

XII REPARATIONS

I should not extend myself further in this article. I will allude only to a major aspect of the implications of Inter-American jurisdiction over national systems. I refer to the noteworthy contributions of the Inter-American Court on the subject of reparations. In the opinion of many, this constitutes its most significant

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y su Gaceta, Novena Época, libro I, tomo 1, Octubre de 2011, Página 313, 366 (Mex.).

[149] It is necessary that the legislature clarify "situations that may generate uncertainty in judicial tasks such as, the accountability of judges, the role of national and international jurisprudence, the definition of the concept of 'relative norms of human rights,' the mechanisms for adopting judgments dictated in international circumstances, the reaches of the principle of *pro homine*, among others." Alberto Miguel Ruiz Matías & César Alejandro Ruiz Jiménez, *El principio* pro homine *en el sistema jurídico mexicano* [*The* Pro Homine *Principal in the Mexican Judicial System*], *in* EL CONTROL DE CONVENCIONALIDAD Y LAS CORTES NACIONALES: LA PERSPECTIVA DE LOS JUECES MEXICANOS, *supra* note 75, at 142.

[150] *See* CONTROL DE CONVENCIONALIDAD PARA EL LOGRO DE LA IGUALIDAD [CONTROL OF COMPLIANCE TO ACHIEVE EQUALITY] (Suprema Corte de Justicia de la Nación, Voces sobre Justicia y Género Ser. No. 3, 2012). This work forms part of a series that promotes the introduction of "gender perspective in judging." Juan Silva Meza, *Prólogo* [*Prologue*] to CONTROL DE CONVENCIONALIDAD PARA EL LOGRO DE LA IGUALIDAD, *supra*, at ix.

[151] *See* Eur. Parl. Ass., *Execution of Judgments of the European Court of Human Rights*, 4th Part-Sess., Doc. No. 8808 (2000).

> The principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice.

Id. ¶ 3.

[152] Mostacciuolo v. Italy (No. 2), App. No. 65102/01, Eur. Ct. H.R., ¶ 125 (2006), `http://hudoc.echr.coe.int/eng?i=001-72936`; *see also* Albanese, *supra* note 111, at 22.

and original contribution to the international regime of human rights.[153] From the outset of drafting the American Convention, our region generated innovations in the field of reparations, as can be observed in the history of the current Article 63(1) of the Pact of San José,[154] and in the criteria established by the Inter-American Court.[155]

The Latin American orientation toward this topic favored the structural character of reparations, without losing their traditional role in compensating victims for damages suffered. What has been sought by Inter-American jurisprudence—as can be seen by comparing it to its European counterpart—is to act not only on the individual factors, but the general factors leading to human rights violations.

The Court's generous orientation implies very profound, energetic and complex actions by states, and frequently provokes resistance that goes beyond mere reticence. In order to bring reality up to the demands of IHRL, these actions require a combination of will and resources, which are usually similar or identical to those enunciated by the national constitutions, which are often not respected in practice.

XIII Appendix of Conclusions on Control of Conventionality

I deem it useful to include as an appendix to this work the text, which appears (as a summary of the doctrine of the Inter-American Court on judicial control of conventionality) in a recent publication of which I am co-author. Beginning with the following paragraph, I transcribe that text literally. The reference to national courts refers to those of the Mexican judicial system. The summary of the topic thus permits one to observe the existence of:

> a) Control of conventionality in order to establish the conformity of a national norm (without regard to its character) with an international norm.
>
> b) Control of its own, whether original or external, of conventionality by the supranational tribunal called upon to compare domestic acts with conventional provisions. Without a doubt, the exercise of this control is incumbent on the Inter-American Court of Human Rights, specifically in cases before it and how it applies norms consistent with its subject matter jurisdiction.

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153 *See* Jo M. Pasqualucci, The Practice and Procedure of The Inter-American Court of Human Rights 289 (2003); 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, 355 (2008).

154 *See* García Ramírez & del Toro Huerta, *supra* note 1, at 72, 138, 271.

155 *See* Dinah Shelton, *International Institutions and Tribunals*, *in* Remedies in International Human Rights Law 137, 172 (1999); Faúndez Ledesma, *supra* note 25, at 778; Héctor Faúndez Ledesma, *Reparaciones e indemnizaciones en la Convención Americana de Derechos Humanos* [*Reparations and Compensation under the American Convention of Human Rights*], Rev. de la Facultad de Ciencias Jurídicas y Políticas [J. Fac. Legal & Pol. Sci.], no. 103, 1997, at 17 (Universidad Central de Venezuela) (Venez.).

c) Control by domestic judicial organs (or rather, more broadly, jurisdictional organs, even though the original expression of the Inter-American Court would appear to be restricted to organs of the Judicial Power), and not by administrative organs, which also should observe the international norms of human rights, but this observance has another source (Article 1 of the Constitution), which is different from judicial control of conventionality.

On this point it is necessary to take into account that in recent judgments the Inter-American Court has referred to control of conventionality as a function of "the judges and organs linked to the administration of justice at all levels," an expression which seems to considerably extend the field of application of this function. In addition, the same tribunal has established that control of confidentiality "is a function and task of *any public authority and not only of the Judicial Power*," reiterating that the idea of the state as the principal guarantor of the human rights of persons has "taken form in recent jurisprudence under the conception that *all the authorities and organs of a State Party* to the Convention have the obligation to exercise control of conventionality." (emphasis added). It will be necessary to reflect on the correct interpretation of such broad statements—which raise doubts—in a form, which permits control to operate well.

d) Control subject to the criteria of the supranational tribunal, which is supposed to interpret and apply the treaty that guides the control, except—obviously—when the supranational tribunal has not rendered an interpretation on the point at issue (in which case, the domestic court will render its own interpretation of the treaty).

When the national court deploys control of conventionality in the absence of a supranational interpretation, its decisions do not attain the character of *erga omnes*. In other words, it may fix provisional criteria, inter partes, who are subject to immediate national control, as might occur, for example, through the resolution of conflicts of criteria among the chambers of the [Mexican] National Supreme Court of Justice, Circuit plenaries or collegial tribunals (or through a system of "questions of unconstitutionality," which constitutes an alternative to bear in mind, as we shall see below) and always subject to supranational definitions. In any case, control of conventionality carried out in the domestic sphere is always subject to the possibility of verification on the part of the Inter-American Court.

e) Control favorable to the highest level of protection of the individual. The national tribunals may adopt interpretations more

favorable to the protection of the individual than those established by the supranational tribunal, thereby broadening of the extent of rights and liberties, by means of an interpretation *pro persona* or *pro homine*. It is understood that the tribunals that proceed in this manner would be interpreting precisely the norms that they should apply.

As has already been said, the interpretations of the Inter-American Court can be superseded by acts—international instruments, national provisions, acts of domestic jurisprudence—that recognize greater rights for persons. This conclusion, which derives immediately from the principle *pro persona* or *pro homine*, is supported by the norms of interpretation contained in Article 29 of the American Convention.

f) Control exercised on its own initiative, *motu proprio*, by the organ that carries out this function, without the necessity of a demand or request by the party to the proceeding, which brings into play, as well, the principle of *jura novit curia* and the supplementing of the complaint (for omission or deficiency).

g) Control exercised within the field of competence of the organ which carries it out (and which therefore must be authorized to carry out this mission: thereby respecting the principle of legality in regard to the specific attributes of the adjudicator).

h) Control exercised in conformity with the procedural regulations (which should be foreseen, for this purpose, in the law: thereby respecting the principle of legality in regards to procedure). In this same sphere of procedural legality, it is necessary to respect the formal and material conditions of admissibility and applicability of the actions by which control is exercised.

i) Control subject to guidelines that make it consistent with the general interpretation appropriate to the examination of questions that come before the controlling body, and which favor the gradual adoption of a *jus commune*.[156]

[156] García Ramírez & Morales Sánchez, *supra* note 66, at 300–02.