SYMPOSIUM:
THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW IN LATIN AMERICA
CONVENTIONALITY CONTROL
THE NEW DOCTRINE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

*Eduardo Ferrer Mac-Gregor**

Introduction

One of the most recent and most effective efforts of the Inter-American Court of Human Rights (Inter-American Court) to increase the level of compliance with the American Convention on Human Rights (ACHR) has been the creation of the "conventionality control" doctrine. The Inter-American Court describes this as a "mechanism for the application of International Law," mainly "International Human Rights Law, and specifically the American Convention and its sources, including this Court's jurisprudence."[1]

This doctrine creates the international obligation on all state parties to the ACHR to interpret any national legal instruments (the constitution, law, decrees, regulations, jurisprudence etc.) in accordance with the ACHR and with the Inter-American *corpus juris* more generally (also called the "block of conventionality").[2] Wherever a domestic instrument is manifestly incompatible with the Inter-American *corpus juris,* state authorities must refrain from application of this law, in order to avoid any violation of internationally protected rights. State authorities should exercise this conventionality control *ex officio*, whilst ensuring they always act within the framework of their respective competences and the corresponding procedural rules, as defined internally by states.

This essay will describe the origins and development of this new doctrine, emphasizing its unique aspects and legal foundation. The essay closes by arguing that conventionality control is a practice that is consonant with democratic values, and one that helps make human rights effective.

Background

Despite some earlier precedents, especially in the case of *Suárez Rosero v. Ecuador*, the clearest starting point for the doctrine is found in *Barrios Altos v. Peru*; the leading case on the incompatibility of amnesty and "self-

* *Judge at the Inter-American Court of Human Rights and Professor and Senior Researcher at the National Autonomous University of Mexico (UNAM).* *Some of the ideas presented here are based on previous academic work and especially on our individual opinions in the cases* Cabrera García and Montiel Flores v. Mexico*;* Gelman v. Uruguay*, monitoring compliance*, *and* Liakat Ali Alibux v. Suriname.

Originally published online 11 November 2015.

[1] Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Court, para. 65 (Inter-Am. Ct. H.R. Mar. 20, 2013).

[2] For more on the "block of conventionality", see our opinion in the case Cabrera García and Montiel Flores v. Mexico, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 220, especially paras. 26, 44-55, 61 and 66 (Nov. 26, 2010).

amnesty" laws with the Convention.[3] In this case, the Inter-American Court considered that the domestic laws under examination "lack[ed] legal effect" given their manifest incompatibility with the ACHR. Thus, they could no longer constitute any sort of obstacle to the investigation of the facts of the case, nor to the identification and punishment of those responsible, "nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated."[4] In the interpretation of the judgment on the merits, the Inter-American Court declared that the passing of a law which is manifestly contrary to the ACHR represents, in and of itself, a violation of the convention and therefore gives rise to international liability. For this reason, and "given the nature of the violation resulting from amnesty laws . . . the judgment on the merits in the Barrios Altos case has *general effects*."[5] As Casesse states: "it is the first time that an international court determines that national laws are devoid of legal effects within the state system where they have been adopted and consequently obliges the state to act as if these laws have never been enacted."[6] Another important case was *"The Last Temptation of Christ"* (*Olmedo Bustos et al.) v. Chile*, in which the Inter-American Court exercised conventionality control over the Chilean constitution.[7] As a result of this practice, the Inter-American Court has been compared to a kind of constitutional court for the region, with a remit different to that of the European Court of Human Rights.[8]

The expression "conventionality control," however, was first used by Judge García Ramírez in his separate opinions in cases such as *Myrna Mack Chang v. Guatemala* (which followed the *Barrios Altos* precedent). Ramírez stated

> [a]t the international level, it is not possible to divide the State, to bind before the Court only one or some of its organs, to grant them representation of the State in the proceeding—without this representation affecting the whole State—and excluding other organs from this treaty regime of responsibility, leaving their actions outside the "conventionality control" that involves the jurisdiction of the international court.[9]

The idea was further developed in *Tibi v. Ecuador*: "if constitutional courts oversee 'constitutionality', the international human rights court decides on the 'conventionality' of those acts";[10] and, finally, in *Vargas Areco v. Paraguay*, which highlighted that the "'control of compliance' [is] based on the confrontation of the facts at

[3] *See* the case Suárez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 35 (Nov. 12, 1997); Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 75 (Mar. 14, 2001).

[4] Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 75, para. 44 (Mar. 14, 2001).

[5] Barrios Altos v. Peru, Interpretation of the Judgment on the Merits, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 83, para. 18 (Sep. 3, 2001) (emphasis added).

[6] ANTONIO CASSESE & MIREILLE DELMAS-MARTY, CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONALES 13, 16 (2002); *see also* Cristina Binder, *The prohibition of amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1212 (2011).

[7] "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 73 (Feb. 5, 2001).

[8] *See* Laurence Burgorgue-Larsen, *La Corte Interamericana de Derechos Humanos como tribunal constitucional*, *in* IUS CONSTITUTUTIONALE COMMUNE EN AMÉRICA LATINA 421 (Armin von Bogdandy et al. eds., 2014); *see also*, Eduardo Ferrer Mac-Gregor, *La Corte Interamericana de Derechos Humanos como intérprete constitucional. Dimensión transnacional del derecho procesal constitucional*, *in* 3 MEMORIA DEL IV CONGRESO NACIONAL DE DERECHO CONSTITUCIONAL 209 (Diego Valadés & Rodrigo Gutiérrez Rivas eds., 2001).

[9] Myrna Mack Chang v. Guatemala, Merits, Reparations, and Costs, Separate Opinion of Judge Sergio García Ramírez, Inter-Am. Ct. H. R. (ser. C) No. 101 para. 27 (Nov. 25, 2003) (Translator's note: in the IACHR's official English translation of the judgment, the phrase "*control de convencionalidad*" appears as "treaty control", not "conventionality control" as above).

[10] Tibi v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Sergio García Ramírez, Inter-Am. Ct. H. R. (ser. C) No. 114, para. 3 (Sep. 7, 2004).

stake and the provisions of the American Convention."[11] Later, Judge Cançado Trindade also referred to conventionality control as a mechanism for the application of international human rights law at the national level.[12]

Creation And Development

The doctrine was formally created by the decision in *Almonacid Arellano et al v. Chile* in 2006.[13] This case focused on the international liability of the Chilean state arising from its adoption and implementation of Decree 2191 in 1978, which granted a general amnesty to all those responsible for crimes committed between 11 September 1973 and 10 March 1978. Judicial implementation of the decree had the immediate effect of terminating all investigations and closing the case file on the extrajudicial execution of Luis Alfredo Almonacid Arellano, who had been executed by police in the context of widespread human rights violations following General Augusto Pinochet's coup d'etat in 1973. In line with its jurisprudence on transitional justice, the Inter-American Court declared the Chilean amnesty decree null and void *ab initio*. It determined that, in cases where the legislature fails in its duty to abolish laws which contravene the ACHR, the judiciary remains bound to respect and guarantee the rights protected by the Convention. As such, judges must exercise conventionality control and ensure that provisions of the American Convention are not undermined by the implementation or application of laws which contravene its object and purpose.

Two months later, this precedent was reiterated, albeit with slight variation, in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru.*[14] This ruling effectively cites the *Almonacid Arellano* criteria for conventionality control, but refines these in two ways: (i) conventionality control arises "*ex officio*," without necessarily being requested by any party; and (ii) it must be exercised within the framework of authorities' respective competences and the corresponding procedural rules.

Since this stage, the Inter-American Court has applied and refined aspects of "conventionality control" in 25 contentious cases, increasing its scope to cover not just judges and judicial entities, but also authorities more generally,[15] including the legislature,[16] and making its exercise relevant to achieving compliance with Inter-American rulings.[17] Reference to conventionality control has now been made in judgments involving the international liability of fourteen different states: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Guatemala, Mexico, Panama, Paraguay, Peru, the Dominican Republic, Uruguay and Venezuela—over half of the states which have recognized the contentious jurisdiction of the Inter-American Court.

The parameters of the conventionality control mechanism have also been set by resolutions other than final judgments in contentious cases. Upon recently adopting advisory opinion No. 21, the Inter-American Court stated

[11] Vargas Areco v. Paraguau, Merits, Reparations, and Costs, Separate opinion of Judge Sergio García Ramírez, Inter-Am. Ct. H. R. (ser. C) No. 155, para. 6 (Sep. 26, 2006).

[12] Dismissed Congessional Employees (Aguado Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Antonio Augusto Cançado Trindade, Inter-Am. Ct. H. R. (ser. C) No. 158, paras. 2-3 (Nov. 24, 2006).

[13] Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 154, para. 124 (Sep. 26, 2006).

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

[15] Cabrera García and Montiel Flores v. Mexico, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 220, para. 225 (Nov. 26, 2010).

[16] Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221, para. 239 (Feb. 24, 2011).

[17] Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Court, para. 65 (Inter-Am. Ct. H.R. Mar. 20, 2013).

> that the different organs of the State must carry out the corresponding control of conformity with the Convention, based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is "the protection of the fundamental rights of the human being."[18]

The Court clarified that

> the interpretation given to a provision of the Convention (*res interpretata*)[19] through an advisory opinion provides all the organs of the Member States of the Organization of American States (OAS), including those that are not parties to the Convention . . . with a source that . . . also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights.[20]

Legal Foundation

The legal grounding of conventionality control is located principally in articles 1.1, 2, and 29 of the ACHR, and in articles 26 and 27 of the Vienna Convention on the Law of Treaties. Articles 1.1 and 2 of the ACHR outline state duties to develop practices which ensure effective observance of the rights and freedoms enshrined in the pact, thereby requiring that national laws be interpreted in such way as to comply with their obligations to respect and guarantee rights. Article 29 of the ACHR sets out authorities' duty to enable the enjoyment and exercise of rights established in the ACHR to the fullest extent possible, by effecting the most favorable interpretation of laws for this to occur. Finally, the duty of states to ensure compliance with their obligations under the ACHR are reinforced, in a subordinate manner, by the principles of good faith, effectiveness and *pacta sunt servanda*, as well as by a judicial ban on drawing on domestic law as a means to justify failure to comply with treaties (in accordance with articles 26 and 27 of the Vienna Convention). Collectively, these aspects provide the legal basis of conventionality control.

In my view, article 25 of the ACHR additionally forms part of the legal basis of judicial conventionality control, in that this provision refers to the right to simple, prompt and effective recourse to a competent court or tribunal for "protection" against acts that violate the fundamental rights recognized by the constitution, the laws of the state concerned or by the convention itself. Accordingly, this provision constitutes an integral element of rights, in that it sets out a *right to the guarantee of fundamental rights* enshrined in the Convention and in national sources.[21]

[18] Rights and Guarantees of Children in the Context of Migration and / or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H. R. (ser. A) No. 21, para. 31 (Aug. 19, 2014).

[19] The expression "interpretation given to a provision of the Convention" is used for the first time in the Monitoring Compliance with Judgment in the case Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Court, from para. 67 (Inter-Am. Ct. H.R. Mar. 20, 2013); *see also* my separate opinion in this same case regarding the distinction between direct effects for the parties (*res judicata*) and indirect effects for ACHR signatory states (*res interpretata*) of the Inter-American judgment, and its relation to conventionality control, Gelman v. Uruguay, Monitoring Compliance with Judgment, Separate Opinion of Judge Eduardo Ferrer Mac-Gregor, in particular, from para. 22 (Inter-Am. Ct. H.R. Mar. 20, 2013).

[20] Rights and Guarantees of Children in the Context of Migration and / or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H. R. (ser. A) No. 21, para. 31 (Aug. 19, 2014).

[21] *See* Liakat Ali Alibux v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor, Inter-Am. Ct. H. R. (ser. C) No. 276 (Jan. 30, 2014).

Composite Elements

The factors which shape the doctrine of conventionality control can be classified as follows: (i) the authorities to which it applies, (ii) the extent to which authorities should exercise the control, and (iii) the body of laws which trigger the duty to practice conventionality control.

With respect to the *first element*, it can be argued that the control is far reaching and involves all state authorities (be they executive, legislative or judicial bodies) as the duty to respect and guarantee rights, as detailed in articles 1.1, 2 and 29 of the ACHR, applies to the state as a whole and, as such, cannot be subject to the divisions of power created under domestic law. Nevertheless, responsibility for complying with this obligation falls principally on the judiciary and/or courts, tribunals and constitutional courts because of their central role in the domestic judicial order in protecting fundamental rights (national ones and those from the convention), as set out in articles 25 (judicial protection) and 1.1 of the ACHR (duty to respect and guarantee). As such, national judges, irrespective of their rank, level of authority or area of specialism, must act as the primary and authentic guardians of the rights enshrined in the ACHR. In this way, domestic judges also become a type of Inter-American judge.

The above does not mean that all authorities should exercise conventionality control to the same extent, as the precise way in which this is carried out is determined by national law. This *second element* was addressed in *Dismissed Congressional Employees v. Peru*, where the Court determined that authorities (judges, in this case) should exercise conventionality control "*ex officio*," but "evidently in the context of their respective spheres of competence and the corresponding procedural regulations."[22] Accordingly, the practice of conventionality control can be significantly broader in systems of diffuse control, for example, where all judges have the power to refrain from applying laws in a particular case if it is deemed that this would violate the national constitution. By contrast, the level of control will diminish in those systems where powers to interpret constitutionality are more centralized, though the obligation to adopt an interpretation in agreement with the ACHR, in any case, remains. The fact that different levels of control exist does not, of course, impact authorities' duty to carry out the control *ex officio* and in accordance with their spheres of competence and the corresponding procedural regulations.

The laws which serve as the basis for conventionality control are those outlined in the Inter-American *corpus juris*; the real "block of conventionality." This includes the international human rights treaties created within the OAS, and other relevant soft law instruments which qualify the extent of obligations outlined in international treaties.[23] Accordingly, the body of laws which set the parameters of control are those set out in: the ACHR and its two additional protocols on Economic, Social and Cultural Rights (Protocol of San Salvador) and on the Abolition of the Death Penalty; other treaties, such as the Inter-American Convention to Prevent and Punish Torture; the Inter-American Convention on Forced Disappearance of Persons; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Pará"); and the Inter-American Convention on the Elimination of All Forms of Discrimination against Person with Disabilities. Of course, the body of laws which give rise to conventionality control will vary in each case, depending on whether a state has signed, ratified or acceded to the instrument and taking into

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

[23] *See* American Convention on Human Rights, Nov. 21, 1969, 1144 UNTS 143, art. 29 b) and d); *see also* Familia Pacheco Tineo v. Bolivia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 272, para. 143 (Nov. 25, 2013) (The Court ruled that article 29 d) enables the Court to interpret the ACHR in light of other sources of international law relevant to the subject in question (in this particular case, international refugee law). This criteria could also be applied to the interpretation of other articles of the convention, such as art. 26.)

account any reservations which do not contravene the objective and purpose of the treaty. Taken together, these laws can be viewed as constituting an authentic "block of conventionality" (which eventually may also include a "block of conventionality" at the national level).

However, a key part of the doctrine of "conventionality control" (since the leading case of *Almonacid Arellano*) has been the obligation on states not just to apply the ACHR—and the Inter-American *corpus juris* more generally—but also to interpret this *corpus juris* in the same manner as the Inter-American Court. This body's interpretation of the provisions of the Convention does not merely include sentences passed in contentious cases, but also those contained in other resolutions it has passed. As such, the interpretations also include those relating to the resolution of provisional measures; to monitoring of compliance with judgments; and even those in requests for interpretation of the judgment, as per article 67 of the ACHR. Similarly, interpretations deriving from advisory opinions, highlighted in article 64 of the pact, should also be considered, precisely because the purpose of these is "the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states."[24]

National authorities must therefore apply the jurisprudence from the Convention (provided that this is more favorable in the terms set out in article 29 of the ACHR), including from cases in which the state in question has not been involved. This is because the jurisprudence of the Inter-American Court is determined by the interpretations that this body makes of the Inter-American *corpus juris* with the aim of creating regional standards regarding its applicability and effectiveness. This aspect is considered to be of the utmost importance to gaining an accurate understanding of conventionality control. Seeking to reduce the obligatory nature of the Convention's jurisprudence to just those cases in which the state has been a "direct party" would equate to a negation of the very essence of the ACHR; the obligations of which are accepted by national states when signing, ratifying or acceding to the Convention, and from which international liabilities arise where states fail to comply.

In effect, the "normative power" of the ACHR is that which is defined by the Inter-American Court. The Court's interpretations regarding the provisions of the Convention *acquire the same status as the provisions themselves* because, in reality, the "regulations of the convention" are a result of the "interpretation of the convention" that the Inter-American Court delivers as an "autonomous judicial institution whose purpose is the application and interpretation"[25] of the Inter-American *corpus juris*. In other words, it is the interpretations of the ACHR which ultimately constitute its jurisprudence.

Objectives

In light of the above, it is possible to identify at least *three main objectives* of the doctrine of conventionality control.

The *first* is to prevent the implementation of national laws which are manifestly incompatible with the Inter-American Convention and which are null and void *ab initio*; as is the case with amnesty laws which enable impunity for cases of forced disappearance, extrajudicial executions, crimes against humanity and other serious human rights violations.

The *second* objective is to serve as a mechanism which allows all state authorities to satisfactorily meet their obligations to respect and guarantee the rights protected under the ACHR and other treaties; and to comply with rulings against the state to which these authorities belong. In this manner, the doctrine seeks to bolster the

[24] *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(Sep. 24, 1982).

[25] Organization of American States, *Statute of the Inter-American Court of Human Rights*, Oct. 1 1979, art. 1.

complementarity (subsidiarity) of national and Inter-American systems and to create a genuinely "integrated system" of human rights protection.

The *third* and final objective is to serve as a bridge or medium through which to facilitate and increase *dialogue*, especially *judicial dialogue*, between national courts and the Inter-American Court on the subject of human rights, and for this to enable the effective realization of these rights. It accordingly represents a key component in the creation and unification of a *ius constitutionale commune* which protects the dignity of all individuals and strengthens constitutional democracy in the region.