



THE RELATIONSHIP BETWEEN INTER-AMERICAN JURISDICTION AND STATES (NATIONAL SYSTEMS): SOME PERTINENT QUESTIONS



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THE RELATIONSHIP BETWEEN INTER-AMERICAN JURISDICTION AND STATES (NATIONAL SYSTEMS). SOME PERTINENT QUESTIONS*

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SUMMARY: 1. Introduction. 2. The course of democracy. 3. The “American Voyage”. 4. Some actors in the System: civil society and emerging actors. 5. Role of the Inter-American Court of Human Rights (I-A Court). 6. National reception of IHRL (International human rights law). 7. Constitutional bridge. 8. Other points. 9. The jurisdictional bridge. 10. Force of IHRL provisions. 11. Control of conventionality. 12. Reparations. 13. Appendix of conclusions on control of conventionality.

1. 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 (I-A Court). This implies examining the work of an international or supranational jurisdiction which has been called upon to render justiciable “decisions and transformations”¹ of great importance, that have opened the way forward, overcoming innumerable obstacles during recent decades².

What is involved is a relatively recent experience, and of course a tentative one, that remains far – but ever less so, viewed historically -- from firmly taking root and yielding the results hoped for by proponents when the System was founded³, with the adoption of the Pact of San José in the Conference of 1969⁴ and the installation of the I-A Court⁵.

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¹ I refer to the name of a recent work in which I have examined this issue, in respect to my country. *Cfr.* García Ramírez, Sergio, and Del Toro Huerta, Mauricio, *México ante la Corte Interamericana de Derechos Humanos. Decisiones y transformaciones*, Mexico, UNAM, Instituto de Investigaciones Jurídicas/Porrúa, 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.” González Morales, Felipe, *Sistema Interamericano de Derechos Humanos*, Valencia, Tirant Lo Blanch, 2013, p. 58, 290-291 y 457 and ss.

³ *Cfr.* García Bauer, Carlos, *Los derechos humanos, preocupación universal*, Guatemala, Universidad de San Carlos, 1960, pp. 113.

⁴ *Cfr.* OAS, *Conferencia Especializada Interamericana sobre Derechos Humanos. San José, Costa Rica, 7-22 de noviembre de 1969. Actas y documentos. OEA/Ser.K/XVI/1.2*, reprinted 1978, Washington, D.C, Secretary General, Organization of American States, pp. 349-351.

⁵ *Cfr.* Various, *Corte Interamericana de Derechos Humanos. Memoria de la instalación*, 2da. ed., San José, Costa Rica, Inter-American Court of Human Rights/European Union, 1999.

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 1999⁶ and reduced in 2013⁷ – is of course closely related to the conditions of the subcontinent – country by country, and collectively – and with the 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 note – 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 advert 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 System⁸.

2. *The course of democracy*

The development of the relations between the Inter-American tribunal – and even more the System⁹ – 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

⁶ Barbados was the last State that accepted the contentious jurisdiction of the Court, June 4, 2000. On the hand, Dominica was the last State that ratified the American Convention on Human Rights, June 11, 1993. Cfr. IACHR, <http://www.cidh.org/basicos/Basicos3.htm>

⁷ Venezuela deposited its denunciation of 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. Cfr. OAS, http://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos_firmas.htm#Venezuela:

⁸ There are significant differences, even in the midst of the “same America.” Such is the case in the Caribbean, which coincide geographically (though not completely; take into account the case of Suriname, a continental country). States with 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 having the country provide advisory opinions; cfr. Mark Kirk, “Should the United States Ratify the American Convention on Human Rights?” *Revista IIDH*, no. 14, July-December 1991, pp. 85-89). A less distant option could be the approach of Canada. Cfr. *Enhancing Canada’s Role in the OAS. Canadian Adherence to the American Convention on Human Rights. Report of the Standing Senate Committee on Human Rights*, The Senate, May 2003, pp. 58 and ss.

⁹ It is necessary to fully understand the system, which encompasses much more than the international monitoring bodies. Understand, in a real sense, the States, OAS, civil society (and its institutions), emerging actors (journalists, various professions, academia, Ombudsman, public defenders). Cfr. García Ramírez, *La Corte Interamericana de Derechos Humanos*, México, Porrúa, 2007, pp.38-42. Within this framework, the political mission of the OAS is essential and unfolds in various acts. It has failed to recognize of the Inter-American Court as an organ of the OAS. On this subject, cfr. Buergenthal, Thomas, “The Inter-American Court, Human Rights and the OAS,” *Human Rights Law Journal*, vol. 7, 1986, pp. 162-164.

instrument¹⁰, that would have seemed impractical only a few years ago and pursuant to which it is now possible to consider collective actions in defense of democracy¹¹, a controversial topic. These relations now advance, stand still, or retreat, in accordance with actions taken by democratic nations¹².

In general, the American Constitutions embody the ideals of democracy and fundamental rights¹³; 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 guarantee¹⁴.

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 liberties¹⁵.

Latin American constitutions fall within the category of those which are called “nominal” or “semantic”¹⁶, more discursive than normative. This reality reflects an old colonial

¹⁰ Thus, the Inter-American Democratic Charter, 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), whose preamble reaffirms “the promotion and protection of human rights is a fundamental condition for the existence of a democratic society,” and which reiterates that “democracy is indispensable for the effective exercising of fundamental liberties and human rights (...).”

¹¹ Relating to this question, *cfr.* Nikken, Pedro, “Análisis de las definiciones conceptuales básicas para la aplicación de los mecanismos de defensa colectiva de la democracia previstos en la Carta Democrática Interamericana,” *Revista IIDH*, no. 43, January-June 2006, pp. 13 and ss.

¹² *Cfr.* Cañado Trindade, Antonio, “Democracia y derechos humanos: el régimen emergente en la promoción internacional de la democracia y del Estado de Derecho,” in Varios, *La Corte y el Sistema Interamericano de Derechos Humanos*, Rafael Nieto Navía (editor), San José, Costa Rica, 1994, pp. 515 and ss. See also, *cfr.* González Morales, *Sistema Interamericano...*, *op. cit.*, p. 457. Likewise, *cfr.* Becerra Ramírez, *El control de la aplicación del Derecho internacional*, Mexico, Universidad Nacional Autónoma de México, 2013, p. 122.

¹³ In this sense our constitutions respond to what has been called the “constitutional State with a common European and Atlantic mark.” Haberle, Peter, *El Estado constitucional*, trans. Héctor Fix-Fierro, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2001, p. 3. Additionally, *cfr.* Colomer Viadel, Antonio, *Introducción al constitucionalismo iberoamericano*, Madrid, Ediciones Cultura Hispánica, 1990, pp. 102-103.

¹⁴ *Cfr.* Calamandrei, Piero, *Proceso y democracia*, trans. Héctor Fix-Zamudio, Buenos Aires, Ediciones Jurídicas Europa-América, 1960, p. 56.

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 the state human rights protection in the region, beyond statements about substantive democracy and social justice. *Cfr.* Nikken, Pedro, “La pobreza en la perspectiva de los derechos humanos y la democracia,” Varios, *¿Quién responde por los derechos humanos de las poblaciones más pobres en América Latina y el Caribe? Democracia vs. desigualdad (2007-2011)*, San José, Costa Rica, IIDH, 2012, pp. 128, ss., and 204-207.

¹⁶ *Cfr.* Loewenstein, *Teoría de la Constitución*, 1st reprinting of 2da. ed., trans. Alfredo Gallego Anabitarte, Barcelona, Ariel, 1979, p. 218. About this characteristic of Latin American constitutions, *cfr.* Quiroga Lavié,

saying, common to the nations of “our America” of José Martí¹⁷: the orders of the Crown are respected, but not carried out¹⁸. Thus was incubated a dual reality – and a dual legitimacy and legality – from which we have yet to liberate ourselves.

3. The “American Voyage”

In writing on this or 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 wind¹⁹, from a certain point of departure²⁰, 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 War²¹; nor is it identical – although there are points of similarity – to that which has been carried out with enormous effort in Africa.²². Each

Humberto, *Derecho constitucional latinoamericano*, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1991, pp. 17-19.

¹⁷ Cfr. Martí, José, “Nuestra América”, *La Revista Ilustrada*, New York, January 10, 1891, and *El Partido Liberal*, Mexico, January 30, 1891. See a review of this topic in Martí, *Nuestra América*, Caracas, Venezuela, Fundación Biblioteca Ayacucho, 2005.

¹⁸ Cfr. Ots Capdequi, José María, *Historia del derecho español en América y del Derecho indiano*, Madrid, Aguilar, 1969, p. 89.

¹⁹ Cfr. García Ramírez, “La Corte Interamericana de Derechos Humanos ante la pena de muerte,” in Various, *Por la abolición universal de la pena de muerte*, Antonio Muñoz Aunión (coord.), Valencia, Tirant Lo Blanch, 2010, p. 229; *Control judicial de convencionalidad*, I, Poder Judicial del Estado de Aguascalientes, Mexico, 2012; “El control judicial interno de convencionalidad,” *Revista IUS*, México, vol. 5, no. 28, julio-diciembre, 2011, http://www.scielo.org.mx/scielo.php?pid=S1870-21472011000200007&script=sci_arttext, and “La ‘Navegación Americana’ de los derechos humanos: hacia un *ius commune*,” in Various, *Ius constitutionale commune: rasgos, potencialidades y desafíos*, Fix-Fierro, Héctor y Morales Antoniazzi, Mariela (coords.), Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas/Instituto Max Planck, 2014, en prensa.

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 *Los derechos humanos y la jurisdicción interamericana*, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2002, pp. 5 and ss. Relating to this material is an illustrative reflection by Paolo G. Carozza, “From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights”, *Human Rights Quarterly*, USA, The Johns Hopkins University Press, vol. 25, no. 2, May 2003, pp. 281 and ss.

²¹ There has been a frequent comparison between the European and American experiences. We cite, for example, Fix-Zamudio, Héctor, “Reflexiones sobre la Corte Europea e interamericana de Derechos Humanos,” *Similitudes y divergencias entre los sistemas de protección regional de los derechos humanos*, Mexico, Comisión Nacional de Derechos Humanos, 2000, pp. 99 and ss.; and Various, in *El diálogo entre los sistemas europeo y americano de derechos humanos*, Javier García Roca, Pablo Antonio Fernández, Pablo Santolaya and Raúl Canosa (eds.), Pamplona, Civitas/Thompson Reuters, 2012. Also, cfr. Various, *International Protection of Human Rights*, Sohn, Louis B. y Buergethal, Thomas (eds.), Indianapolis, The Bobbs-Merrill Co. Inc., 1973.

²² The African System is based on the African Charter on Human Rights and Peoples’ Rights, adopted by 53 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. Cfr. Saavedra Álvarez, Yuria, “El sistema africano de derechos humanos y de los pueblos. Prolegómenos”, *Anuario Mexicano de Derecho Internacional*, Mexico, Instituto de Investigaciones

voyage reflects particularities which identify it and mark its rhythm: it has its own chronology and movements, and its own characteristic “style,” and it must overcome its own particular obstacles²³. It adjusts, then, to the conditions of the region in which it navigates: it is linked to its circumstances in “Ortega-like” fashion²⁴.

It is essential to understand this specificity – not to praise or denigrate, but to understand it – 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 system²⁵.

It is evident that the American context has shaped the structure and offices of the Inter-American Commission and Court. It is found in the origin of their limitations and their possibilities; in the “reasons” or lack thereof for their membership²⁶ (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); in the

Jurídicas de la Universidad Nacional Autónoma de México, vol. VIII, 2008, pp. 671-712, <http://biblio.juridicas.unam.mx/revista/pdf/DerechoInternacional/8/cmt/cmt20.pdf>, Fischel de Andrade, José H., “El sistema africano de protección de los derechos humanos y de los pueblos. Primera parte”, *Estudios básicos de derechos humanos*, Costa Rica, t. VI, 1999, 448-462, <http://biblio.juridicas.unam.mx/libros/libro.htm?l=1840>.

²³ The answer on the greater or lesser success of the Court in the performance of their duties “depends on the political climate of the Americas and the attitude of the American governments towards human rights in general,” Buergenthal points out in Buergenthal, Thomas, Norris, Robert E. and Shelton, Dinah, *La protección de los derechos humanos en las Américas*, Madrid, Instituto Interamericano de Derechos Humanos/Civitas, 1990, p. 55.

²⁴ Regarding the influence, ideas and democratic expressions, with different manifestations, in the European and American systems, *cf.* Úbeda de Torres, Amaya, *Democracia y derechos humanos en Europa y en América. Estudio comparado de los sistemas europeo e interamericano de protección de los derechos humanos*, Madrid, Reus, 2007.

²⁵ On that subject, *cf.* García Roca, Javier, *El margen de apreciación nacional en la interpretación del Convenio Europeo de Derechos Humanos: soberanía e integración*, Cizur Menor, Cuadernos Civitas/Instituto de Derecho Parlamentario/Thomson Reuters, Navarra, 2010; Vergottini, Giuseppe, *Más allá del diálogo entre tribunales. Comparación y relación entre jurisdicciones*, trans. Pedro J. Tenorio Sánchez, pról. Javier García Roca, Cuadernos Civitas/Thompson Reuters, Pamplona, 2010, pp. 110-111, and Delmas-Marty, Mireille, who argues that this national margin is the “master key” of what she calls “orderly pluralism,” *Le pluralisme ordonné*, Ed. du Seuil, París, 2006, p. 75. Likewise, *cf.* Blackburn, Robert, “The Institutions and Processes of the Convention,” in Various, *Fundamental Rights in Europe. The ECHR and its Member States, 1950-2000*, Robert Blackburn & Jörg Polakiewicz (eds.), Oxford University Press, pp. 24 and ss.; and Faúndez Ledesma, Héctor, *El Sistema Interamericano de Protección de los Derechos Humanos. Aspectos institucionales y procesales*, 3ra. ed., San José, Costa Rica, Instituto Interamericano de Derechos Humanos, 2004, pp. 62 and ss. 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.” Sagüés, Néstor, *La interpretación judicial de la constitución. De la constitución nacional a la Constitución convencionalizada*, Mexico, Porrúa/IMPDC, 2013, p. 338.

²⁶ . In this area it appeared for a long time that the issue of ad-hoc judges and of national judges appeared in contentious proceedings. On this subject, *cf.* the criticism Faúndez formulated about the figure of ad-hoc judges within the jurisdiction of human rights, in “La composición de la Corte Interamericana de los Derechos Humanos,” *Revista de Derecho Público*, Caracas, Venezuela, nos. 57-58, January-June 1994, pp. 29-32. The Inter-American Court modified its traditional interpretation of Article 55 of the ACHR, under the terms of the *Advisory Opinion OC-20/2009*, September 29, 2009. Under this opinion the figure of the ad-hoc judge remained excluded.

scarcity of their material resources²⁷, 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 nations²⁸; in debates over the force of the resolutions emitted by the international organs of the System; 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 instruments²⁹; 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 jurisdiction³⁰.

All this enters into the sum of the up’s and down’s, vicissitudes, advances and setbacks of the American voyage, and in the complex of relations between the international organs (especially the Court) and the national systems³¹.

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,³² given the dominant ideas about sovereignty and domestic jurisdiction³³.

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). OAS, AG.RES. 1827 (XXXI-0-01, Resolution 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. *Cfr.* Inter-American Court, <http://www.corteidh.or.cr/index.php/es/al-dia/aportes-donaciones>. In fact, the first effective contributions to finance the Inter-American public defense came from the Norwegian government.

²⁹ 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” (emphasis added). Asdrúbal Aguiar Anguiano 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.” *La democracia en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, Observatorio Iberoamericano de la Democracia, 2012, p. 11.

³⁰ *Cfr.* Saavedra Alessandri, Pablo and Pacheco Arias, Gabriela, “Las sesiones ‘itinerantes’ de la Corte Interamericana de Derechos Humanos: un largo y fecundo caminar por América,” in Various, *Recepción nacional del Derecho internacional de los derechos humanos y admisión de la competencia contenciosa de la Corte Interamericana*, García Ramírez y Mireya Castañeda (coords.), Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas/Secretaría de Relaciones Exteriores/Corte Interamericana de Derechos Humanos, 2009, pp. 37 and ss.

³¹ 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.” *Cfr. El Sistema Interamericano...*, *op. cit.*, 1007 and ss.

³² *Cfr.* Buergenthal, “Recordando los inicios de la Corte Interamericana de Derechos Humanos,” *Revista IIDH*, San José, Costa Rica, no. 39, January-June 2004, p. 11. See also, *cfr.* González Morales, *Sistema Interamericano...*, *op. cit.*, 43-44.

³³ *Cfr.* García Bauer, *Los derechos humanos...*, *op. cit.*, pp. 297 and ss. Today, the issue of human rights is part of the catalog of the “globalized áreas” in which appear “shared sovereignties.” Becerra Ramírez, Manuel, Povedano Amezola, Adriana and Téllez Carvajal, Evelyn, “La soberanía en la era de la globalización,” in *Soberanía y juridificación de las relaciones internacionales*, Manuel Becerra Ramírez and Klaus Theodor Müller Uhlenbrock (coords.), Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas Facultad de Estudios Superiores Acatlán, 2010, p. 66.

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 for their effective guarantees. In the relationship between the Court and the States, telltale markers of the old debate are often seen. It is also seen in the variety of positions taken in the capitals of States, none of which are monolithic³⁴. 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 jurisdiction³⁵.

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 a State culminating in its unilateral withdrawal from the jurisdiction of the Court, after which the Court fortunately and energetically rejected this approach and found a reasonable solution³⁶; 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 review³⁷. The Court itself has suggested and undertaken processes of review, such as that which culminated in its current Regulation³⁸. In academic doctrine there are arguments that it “is timely and useful to pause in the road and substantially review the Court”³⁹.

³⁴ Cfr. García Ramírez y Benavides, Marcela, *Las reparaciones en la jurisdicción interamericana de derechos humanos*, Mexico, Porrúa, 2014, cap. 5, pending publication.

³⁵ Cfr. Grossman, Claudio, “Reflexiones sobre el Sistema Interamericano de Protección y Promoción de los Derechos Humanos,” in Various, *La Corte y el Sistema Interamericano...*, *op. cit.*, pp. 254-255.

³⁶ Among the “crises” of the System, which impacted or impact the work of the Commission and the Court, it appeared that Peru would purportedly withdraw from the jurisdiction of the Inter-American Court, without denouncing the Convention. About the removal and return of Peru to the jurisdiction of the Court, *cfr.* Landa Arroyo, César, *Tribunal Constitucional y Estado Democrático*, 3ra. ed., Lima, Palestra Editors, 2007, pp. 867 and ss.; García Ramírez, “Una controversia sobre la competencia de la Corte Interamericana de Derechos Humanos,” in *Estudios Jurídicos*, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2000, pp 389 and ss.; and in *La jurisdicción internacional. Derechos humanos y justicia penal*, Mexico, Ed. Porrúa, 2003, pp. 389 and ss.; Cerna, Christina, “Questions on International Law raised by Peru’s ‘withdrawal’ from de Inter-American Court of Human Rights”; Ossa Henao, Carmela, “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),” in Various, *Os rumos do Direito Internacional dos Direitos Humanos. Ensayos en Homenagem ao Professor Antônio Augusto Cançado Trindade. Liber Amicorum Cançado Trindade*, Renato Zerbini Ribeiro (coord.), Porto Alegre, Brazil, Sergio Antonio Fabri, ed., 2005, t. V, pp. 323-352 and 353-392; and Cassel, Douglass, “El Perú se retira del Corte ¿afrontará el reto el Sistema Americano de Derechos Humanos,” *Revista IIDH*, no. 29, January-June 1999, pp. 69 and ss. *Cfr.* the resolutions of the Inter-American Court on this issue in *Caso Ivcher Bronstein*. Jurisdiction. Judgment September 24, 1999, paras 36, 46, 49, 50 and 53; and *Caso del Tribunal Constitucional*. Jurisdiction. Judgment September 24, 1999, paras. 35, 45, 48, 49 and 52.

³⁷ Take into account the “reflection” of 2012-2013, 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. The Inter-American Commission adopted Resolution 1/2013 (March 18, 2013) which incorporated various changes in the functioning of this body of the OAS.

³⁸ In other stages, the Court proposed “a comprehensive process of shared reflection (which) could provided useful suggestions to correct, reform, advance, and consolidate.” *Cfr.* Reports of the President on the Inter-American Court, Sergio García Ramírez, before the Commission on Juridical and Political Affairs and the General Assembly of the OAS, in 2004 and 2005.

4. *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 development 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 organizations⁴⁰, as well as in the extensive presentation of *amicus curiae* briefs before the Inter-American jurisdiction⁴¹, as permitted by the Regulation of the Int.-Am. Court⁴².

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 victims⁴³. The actions of the public defenders helped establish the “Inter-American defender.”⁴⁴

5. *Role of the Inter-American Court*

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, which establishes, by means of addressing large themes in especially transcendent cases, the criteria which will guide the national courts in a broad process of their reception of Inter-American Law. In thirty years of work⁴⁵, the Inter-American Court has gradually reinforced this

³⁹ This is the opinion of Becerra Ramírez, who provided a list of changes that, in his opinion, require the jurisdiction of the Inter-American Court. *El control de la aplicación...*, *op. cit.*, pp. 158-159.

⁴⁰ *Cfr.* Krsticevic, Viviana, “El papel de las ONG en el Sistema Interamericano de Protección de los Derechos Humanos. Trámite de casos ante la Corte Interamericana de Derechos Humanos,” Various, *El Sistema Interamericano de Protección de los Derechos Humanos en el umbral del siglo XXI. Memoria del Seminario. Noviembre de 1999*, San José, Costa Rica, Inter-American Court of Human Rights, 2001, t. I, p. 409, González Morales, *Sistema Interamericano...*, *op. cit.*, pp. 213 and ss.; and García Ramírez, *La Corte Interamericana...*, *op. cit.*, p. 39.

⁴¹ *Cfr.* Shelton, Dinah, “The Participation of Nongovernmental Organizations in International Judicial Proceedings,” *American Journal of International Law*, vol. 88, no. 4, October 1999, pp. 638 and ss. The Ombudsman of Central American acted as *amicus curiae* for the purposes of *O-C18/03*, September 17, 2003, through their technical secretariat, which then fell to the Inter-American Institute of Human Rights.

⁴² *Cfr.* Articles 2.3 and 44 of the Rules adopted by the Inter-American Court, February 4, 2010, and which entered into force on June 1st of the same year.

⁴³ *Cfr.* García Ramírez, *La Corte Interamericana...*, *op. cit.*, pp. 41-42.

⁴⁴ *Cfr.* Articles 2.11 and 37 of the Rules of the Inter-American Court, 2010.

⁴⁵ . 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. Regarding this situation, *cfr.* Buergenthal, “Recordando los inicios...,” *op. cit.*, pp. 20 and ss.; and González Morales, *Sistema Interamericano...*, *op. cit.*, pp. 46-47. About the initial problems that generated the coexistence of the Commission and the Court, *cfr.* Various,

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.

Nowadays, the Inter-American Court is an organ which 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 instance⁴⁶; 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 – and 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 Court⁴⁷. After thirty years the statistics of complaints and judgments are not very high⁴⁸.

6. National reception of International Human Rights Law (IHRL)

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 order⁴⁹. 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; and perhaps neither is it absolutely necessary to achieve unanimity by overriding contrary ideas and wills.

There are factors which mitigate the conflict, such as the growing recognition of the special nature of human rights treaties⁵⁰; and there exist, above all, paths of

“Regional approaches to Human Rights: the Inter-American experience”, *American Society of International Law, Proceedings of the 72nd Annual Meeting*, Washington, D.C., 1978, pp. 197 and ss.

⁴⁶ This statement, highlighted various times by the System's organizational bodies, was reiterated by the autor 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. *Cfr.* García Ramírez, *La Corte Interamericana...*, *op. cit.*, p. 205.

⁴⁷ 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 (Article 45.2 c and d).

⁴⁸ Note that the number of cases subject to this Court's jurisdiction is reduced—and agrees 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: 18 in 2008, 19 in 2009, 9 in 2010, 18 in 2011, 21 in 2012, and 16 in 2013.

⁴⁹ Regarding the normative range of international treaties on human rights, *cfr.*, among other authors, Ayala Corao, Carlos, “La jerarquía de los tratados de derechos humanos,” *Variosu, El futuro del Sistema Interamericano de protección de los Derechos Humanos*, San José, Costa Rica, Instituto Interamericano de Derechos Humanos, 1998, 141 and ss.

⁵⁰ *Advisory Opinion OC-02/82*, of the Inter-American Court, *El efecto de las reservas sobre la entrada en vigencia de la Convención Americana sobre Derechos Humanos*, September 24, 1982, para. 29. 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 case *Ivcher Bronstein v. Perú*. Merits, Reparations, and Costs. Judgment on February 6, 2001, paras. 42-45. In regards to this issue and the interpretation of treaties on human rights, *cfr.* Sagüés, *La interpretación judicial...*, *op. cit.*, p. 331, and Caballero Ochoa, José Luis, *La*

understanding that constitute true “bridges”⁵¹ between the international and national legal orders, sowing harmony where there was division and confrontation.

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 sources of law. Thus 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 order⁵². It occurs in the most diverse fields, but the one that concerns me here is IHRL, whose characteristics differ from those of other fields of the international legal order. So when I refer in the following 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-up’s” 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 we will attempt to do *infra*, what is the forcé of the international norms *vis a vis* the national 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, whose effectiveness is recognized by many national constitutions, as we will see below, and international “soft law”⁵³, which strengthens through the formation of ever more general and influential standards.

incorporación de los tratados internacionales sobre derechos humanos en España y México, Mexico, Porrúa, 2009, pp. 13 and ss.

⁵¹ Cfr. García Ramírez, in various references, among them, “La ‘navegación americana’...,” in Various, *Ius constitutionale commune...*, *op. cit.* See also, “Recepción de la jurisprudencia interamericana sobre derechos humanos en el derecho interno,” *Anuario de Derecho Constitucional Latinoamericano 2008*, Montevideo, Konrad Adenauer Stiftung, 2008, pp. 353 and ss.; and *Control judicial...*, *op. cit.*, pp.17-18.

⁵² On the domestic reception of international law, its pathways, characteristics, and implications, *cfr.* Shelton, Dinah, “Introduction,” *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*, New York, ed. Dinah Shelton, Oxford University Press, 2011, pp. 1 and ss. And García Ramírez and Castañeda Hernández, Mireya, *Recepción nacional del Derecho internacional de los derechos humanos y admisión de la competencia contenciosa de la Corte Interamericana*, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas/Secretaría de Relaciones Exteriores/Corte Interamericana de Derechos Humanos, 2009, pp. 17 and ss.

⁵³ Cfr. Del Toro Huerta, Mauricio Iván, “El fenómeno del *soft law* y las nuevas perspectivas del Derecho Internacional”, *Anuario Mexicano de Derecho Internacional Público*, vol. VI, 2006, pp. 513-549; Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int’l Comp. L.Q. 850, 1989; and Gruchalla-Wesierski, *A Framework for Understanding Soft Law*, 30 MacGill L.J. 37, 1984.

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”⁵⁴. This recognizes what has been called a universal, multi-directional dialogue, built on common universal values⁵⁵.

The Inter-American Court has promoted this dialogue, both in relation to other international tribunals – and non-judicial organs, such as human rights treaty committees — and in relation to domestic tribunals. This last is increasingly frequent and constructive⁵⁶.

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 which enrich (*cross fertilize*) the reasoning and decisions of the tribunals in dialogue⁵⁷.

7. Constitutional bridge

In considering what I have called “bridges” or “paths,” it is worth considering first and foremost the constitutional bridge⁵⁸. If the basic objection to the entry of International Law is State sovereignty, and this has its supreme expression in the Constitution of a republic, then naturally the first path of linkage is found within the rubric of the fundamental law⁵⁹. From there the consequences will spread throughout all the normative framework, as they properly should in a constitutional State. The

⁵⁴ Vergottini, Giuseppe de, *Más allá del diálogo entre tribunales. Comparación y relación entre jurisdicciones*, trans. Pedro J. Tenorio Sánchez, Pamplona, Cuadernos Civitas/Thompson Reuters, 2010, p. 39.

⁵⁵ Ayala Corao, *Del diálogo jurisprudencial al control de convencionalidad*, Caracas, Editorial Jurídica Venezolana, 2012, p. 2012.

⁵⁶ On the dialogue between international and national tribunals, *cfr.* Ayala Corao, *Del diálogo jurisprudencial...*, *op. cit.*, pp. 53 and ss.

⁵⁷ Ayala Corao stated that the reception of jurisprudence, like the effect of dialogue between courts, “must have a useful effect, i.e., 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.” *Cfr.* *Del diálogo jurisprudencial...*, *op. cit.*, pp.22-23.

⁵⁸ Recall the commentary of Germán J. Bidart Campos, when he affirmed that “the internal reception of international law on human rights does not engender conflicts as between international law and democratic constitutions there is a common denominator that reconciles the two together.” “La interpretación de los derechos humanos en la jurisdicción internacional y en la jurisdicción interna,” in Various, *La Corte y el Sistema Interamericano...*, *op. cit.*, p. 51.

⁵⁹ From this context emerges the case of the “internationalization of universal human rights” within the “universal community of constitutional states.” Häberle, *El estado constitucional*, *op. cit.*, p. 75. *Cfr.*, *asimismo*, Caballero Ochoa, *La incorporación de los tratados internacionales...*, *op. cit.*, pp. 39 and ss.; And Fix-Zamudio, Héctor, “El Derecho internacional de los derechos humanos en las constituciones latinoamericanas y la Corte Interamericana de Derechos Humanos,” en Fix-Zamudio, *Justicia constitucional, ombudsman y derechos humanos*, 2da. ed., Mexico, Comisión Nacional de Derechos Humanos, 2001, pp. 44 and ss.

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”⁶⁰.

United States constitutional law influenced Latin American normative frameworks in the 19th century⁶¹. Recent decades have seen important constitutional reforms in various American nations, with different formulations but a single goal: the primacy of human rights⁶² 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 region⁶³.

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 rights⁶⁴; it extends jurisdictional guarantees; it diminishes and rationalizes the conditions for suspensions and restrictions of rights, which on occasion amounted to nothing less than a “constitutional dictatorship”⁶⁵. 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 democracy⁶⁶, not to suppress them.

⁶⁰ Vergottini, Giuseppe de, *Más allá del diálogo entre tribunales. Comparación y relación entre jurisdicciones*, trans. Pedro J. Tenorio Sánchez, pról. Javier García Roca, Cuadernos Civitas/Thompson Reuters, Pamplona, 2010, p. 88.

⁶¹ Cfr. Galeana, Patricia, “Historia comparada de los procesos independentistas de las Américas,” in Various, *Historia comparada de las Américas. Sus procesos independentistas*, Patricia Galeana (coord.), Mexico, Siglo XXI Editores, 2010, p. 19.

⁶² Regarding the actual presence human rights in the consitutional dynamics and relations between the State and society, Caballero Ochoa, José Luis, *La incorporación de los tratados internacionales sobre derechos humanos en España y México*, Mexico, Porrúa, 2009, pp. 45 and ss.

⁶³ Cfr. Góngora Mera, Manuel Eduardo, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication*, San José, Instituto Interamericano de Derechos Humanos, 2011, pp. 243 and ss; and Ayala Corao, *Del diálogo jurisprudencial...*, *op. cit.*, pp. 90 and ss.

⁶⁴ Cfr. Góngora Mora, *Interamerican Judicial Constitutionalism...*, *op. cit.*, pp. 161 and ss. On the reception of this concept from the IHRL in Argentina, *cfr.* Pizzolo, “La relación entre la Corte Suprema...,” in Various, *El control...*, *op. cit.*, pp. 193, and in Mexico the conclusions reached by the Supreme Court of Justice to discuss the contradictory content of 293/2011, August 26 to September 3, 2013, which can be seen in the minutes from public meeting no. 88 on September 2. Cfr. [http://www.scjn.gob.mx/PLENO/Lista_Actas_de_las_Sesiones_Publicas/88%20-%2020%20de%20septiembre%20de%202013%20\(2\).pdf](http://www.scjn.gob.mx/PLENO/Lista_Actas_de_las_Sesiones_Publicas/88%20-%2020%20de%20septiembre%20de%202013%20(2).pdf). For an analysis of this question, *cfr.* García Ramírez and Morales, *La reforma constitucional...*, *op. cit.*, pp.334 and ss.

⁶⁵ Cfr. Valadés, Diego, *La dictadura constitucional en América Latina*, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1974, pp. 47 and ss. On the suspensión of the exercise of rights and freedoms in conformity with the ACHR, *cfr.* Medina Quiroga, *La Convención Americana...*, *op. cit.*, pp. 45 and ss.

⁶⁶ On this subject, *cfr.* Meléndez Padilla, Florentín, *La suspensión de los derechos fundamentales en los estados de excepción según el derecho internacional de los derechos humanos*, San Salvador, Imprenta Criterio, 1999, pp. 109 and ss.; and Valadés, Diego, *La dictadura constitucional...*, *op. cit.*, pp. 47 and ss.

Important expressions of this reform movement can be found in the Constitutions of Peru, of 1979⁶⁷, and of Argentina, especially the latter⁶⁸. 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 which was realized not long afterward⁶⁹.

I find interesting, and instructive, the conclusions which 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; 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”⁷⁰.

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 order⁷¹.

Such provisions embody the principle *pro homine* or *pro persona*⁷² -- adopted by the Inter-American Court, among other bodies – which resolves, in terms favorable to the

⁶⁷ Article 101: “In the case of conflict with the treaty (international as signed by Peru) the former prevails.” Article 105: “The provisions contained in human rights treaties have constitutional hierarchy. They cannot be modified except by the procedure governing the reform of the Constitution.” Article 305: (Titled “Constitutional Guarantees and the purpose of the Warranty Court): “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.” An important precedent is found in Article 46 of the Constitution of Guatemala in 1985, but Article 105 of the Peruvian Constitution of 1979 recognizes with “more strength” the primacy of international law in human rights. *Cfr.* Fix- Zamudio, Héctor, *Justicia constitucional, Ombudsman y Derechos Humanos*, Mexico, Comisión Nacional de los Derechos Humanos, México, 1993, p. 452.

⁶⁸ Before the constitutional reform of 1994, Argentina recognized as obligatory decisions adopted through transnational justice. *Cfr.* Gozaini, Osvaldo Alfredo, “El impacto de la jurisprudencia del sistema interamericano en el derecho interno,” in Various, *El control de convencionalidad*, Susana Albanese (coord.), Buenos Aires, Ediar, 2008, pp. 98 and ss.

⁶⁹ The second paragraph of Article 75 establishes the relationship between declarations and treaties that possess constitutional standing. 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. *Cfr.* Vanossi, Jorge R., “Los tratados internacionales ante la reforma de 1994,” in Various, *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Martín Abregú and Christian Curtis (comps.), Buenos Aires, Centro de Estudios Legales y Sociales, 1997.

⁷⁰ Abramovich, Víctor, “Prólogo” to Various, *La aplicación de los tratados sobre derechos humanos en el ámbito local. La experiencia de una década*, Víctor Abramovich, Alberto Bovino and Christian Curtis (comps.), Buenos Aires, Puerto Ed., 2007, p. II. In a similar vein, *cfr.* Pizzolo, Calogero, “La relación entre la Corte Suprema de Justicia y la Corte Interamericana de Derechos Humanos a la luz del bloque constitucional federal,” in Various, *El control...*, *op. cit.*, pp. 189 and ss.

⁷¹ *Cfr.* The Colombian constitutions (Arts. 93 and 94), Bolivia (Arts. 13. II, 13.IV and 256), Brazil (Art. 5.LXXVII.2), Ecuador (Arts. 417 and 424), Guatemala (Art. 46), Haití (Art. 19), Mexico (Art. 1º), Panama (Art. 17), Perú (Arts. Transitorio Cuarto y 3), Dominican Republic (Arts. 74.1, 74.3 and 74.4), Uruguay (Art. 72), and Venezuela (Art. 23).

⁷² Regarding this principle, its reach and limitations, *cfr.* Sagüés, *La interpretación judicial...*, *op. cit.*, pp. 325-326.

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 which restricts internationally recognized rights⁷³. Attention should be paid to this phenomenon, which is inconsistent with the general obligations of a State Party to the American Convention⁷⁴.

8. Other bridges

In the second place, there is the path of ordinary legislation, through provisions which 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 this regard there have been only a few laws of implementation⁷⁵. 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 do not have, and on which the efficacy of Inter-American jurisprudence depends in appreciable measure⁷⁶.

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 a good instrument for receiving rights and giving them concrete practical application⁷⁷.

⁷³ Cfr. García Ramírez and Morales, Julieta, *La reforma constitucional sobre derechos humanos (2009-2011)*, 3ra. ed., Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas/Porrúa, 2013, p. 338. A current, highly relevant source estimates that a constitution prevails when it stipulates limitations or restrictions on internationally recognized rights. Cfr. Luna Ramos, Margarita Beatriz, “Supremacía constitucional y control de convencionalidad,” in Various, *El control de convencionalidad y las cortes nacionales. La perspectiva de los jueces mexicanos*, Paula M. García Villegas Sánchez Cordero (coord.), Mexico, Porrúa, 2013, pp. 30-39.

⁷⁴ 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 the American Convention (Articles 1 and 2). On the obligation to take action, cfr. Medina Quiroga, *La Convención Americana...*, *op. cit.*, pp. 21 and ss.

⁷⁵ For example, in Mexico the Law on State Responsibility (la *Ley de responsabilidad patrimonial del Estado*) (<http://www.diputados.gob.mx/LeyesBiblio/pdf/LFRPE.pdf>) and the General Law of Victims (la *Ley general de víctimas*) (<http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV.pdf>). In the case of Peru, Article 115 of Constitutional Procedural Code (*Código Procesal Constitucional*), http://tc.gob.pe/Codigo_Procesal.html

⁷⁶ 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).

⁷⁷ Here, for example, Mexico has embarked on the development of a so-called National Human Rights Program. Cfr. http://www.segob.gob.mx/es_mx/SEGOB/Programa_Nacional_de_Derechos_Humanos. See also, cfr. García Ramírez and Morales, Julieta, *La reforma constitucional...*, *op. cit.*, p. 45.

On the same horizon of reception are the formation and consolidation of a culture of human rights⁷⁸. 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 cultivated⁷⁹ -- 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 expansion of the punitive apparatus⁸⁰, 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*⁸¹. 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 justice⁸², a topic associated with an

⁷⁸ Cfr. Various, *Hacia una cultura de los derechos humanos. Un manual alternativo de los derechos humanos, de los derechos fundamentales y del derecho a la educación*, Alfred Fernández (ed.), Ginebra, Universidad de Verano de Derechos Humanos y del Derecho a la Educación, 2000.

⁷⁹ Cfr. García Ramírez, *Los derechos humanos y el derecho penal*, 2da. ed., Mexico, Miguel Ángel Porrúa Librero-Editor, 1988, pp. 175-176.

⁸⁰ Cfr. Ferrajoli, Luigi, “Criminalidad y globalización,” *Iter Criminis*, Mexico, third reprinting, no. 1, pp. 78 and ss.; Vogel, Joachim, “Derecho penal y globalización,” trans. Manuel Cancio Melia, *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, no. 9, 2005, pp. 117 and ss.; and Erbeta, Daniel, “Postmodernidad y globalización: ¿hacia dónde va el Derecho penal?” in Varios, *El Derecho privado ante la internacionalidad, la integración y la globalización*, Carlos A. Hernández (coord.), Buenos Aires, Facultad de Derecho de la Universidad de Buenos Aires, 2005, pp. 79 and 83.

⁸¹ 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.” Delmas-Marty, Mireille (dir.), *Procesos penales de Europa (Alemania, Inglaterra y País de Gales, Bélgica, Francia, Italia)*, trans. Pablo Morenilla Allard, Ed. Eijus, Zaragoza (Spain), 2000, pp. 40-41. See also, cfr. García Ramírez, “Reflexiones sobre democracia y justicia penal,” in Arroyo Zapatero, Luis A., and Berdugo Gómez de la Torre, Ignacio, *Homenaje al Dr. Marino Barbero Santos. In memoriam*, Ed. de la Universidad de Castilla-La Mancha/Ediciones Universidad Salamanca, Cuenca, 2001, vol. I, pp. 300 and 33.

⁸² A topic that calls for careful examination, in light of the principles that govern a State's obligation of justice and those of reality which impose conditions and restrictions. See, for example, the analysis of this subject made by José Zalaquett, “Derechos humanos y limitaciones políticas en las transiciones democráticas del Cono Sur,” *Revista IIDH*, no. 14, July-December 1991, pp. 91 and ss. 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.” (p. 131). See also, cfr. Burgogue-Larsen, “La lutte contre l’impunité dans le système interaméricain des Droits de l’homme,” Various, *Los derechos humanos frente a la impunidad. Cursos de Derechos Humanos de*

unwavering rejection of impunity, which the Court has highlighted in its jurisprudence and which remains as one of the “weak flanks” of the System⁸³; and on the other hand, the training of justice officials in matters of human rights⁸⁴, and including, more ambitiously, the intervention of the State – an intervention of undeniable cultural significance – in order to remove deep-rooted patterns that factors militating against human rights⁸⁵. The Court has likewise rejected settlements between victims and perpetrators that are inconsistent with public order in criminal matters and with human rights⁸⁶.

9. The jurisdictional bridge

We now come to another bridge between the international and national orders: the jurisdictional path⁸⁷. 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 reserve 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 vigorously⁸⁸. They go so far as to argue that the international judgment obligates some powers – one sector of the State -- while others remain immune from this interference⁸⁹.

Donostia-San Sebastián, vol. X, Bilbao, 2009, pp. 89 and ss. The responses of the Inter-American Court against attempts to circumvent the pursuit of these facts have been “intransigent,” *idem*, p. 90.

⁸³ *Cfr. Caso Barrios Altos vs. Perú*. Merits. Judgment March 14, 2001, para. 41; *Caso Gomes Lund y otros (“Guerrilha do Araguaia”) vs. Brasil*. Preliminary objections, merits, reparations and costs. Judgment November 24, 2010, para. 147; *Caso Gelman vs. Uruguay*. Merits and reparations. Judgment February 24, 2011, para. 232, and *Caso Masacres de El Mozote y lugares aledaños vs. El Salvador*. Merits, reparations and costs. Judgment October 25, 2012, para. 283. On the invalidity of criminal and procedural concepts that block the investigation and prosecution of serious crimes, *cfr.* Cassel’s study, “Lecciones de las Américas: lineamientos para una respuesta internacional ante la amnistía de atrocidades,” *Revista IIDH*, no. 24, July-December 1996, pp. 277 and ss., González Morales, *Sistema Interamericano...*, *op. cit.*, pp. 268 and ss., Burgorgue-Larsen, “La lutte contre ...,” in Various, *Los Derechos Humanos...*, *op. cit.*, pp. 89 and ss.

⁸⁴ *Cfr.*, for example, *Caso González y otras (“Campo Algodonero”) vs. México*. Preliminary objections, merits, reparations and costs. Judgment November 16, 2009, paras. 541-542.

⁸⁵ *Cfr. ibidem*, paras. 531-543.

⁸⁶ 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. *Cfr. Caso Garrido y Baigorria vs. Argentina*. Reparations and costs. Judgment August 27, 1998, para. 73.

⁸⁷ In Europe, the impact of international human rights law is relevant—through the 1950 Convention—through the jurisprudence of the constitutional tribunals. There is talk of a “conventional nationalization” in this area. *Cfr.* Burgorgue-Larsen, “L’influence de la Convention européenne sur le fonctionnement des Cours Constitutionnelles,” *Revue internationale de droit comparé*, no. 2, April-June 2008, p. 265.

⁸⁸ 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.” *Caso del Tribunal Constitucional vs. Perú*. Merits, reparations and costs. Judgment January 31, 2001, para. 112. See also, *cfr.* García Ramírez, *El debido proceso. Criterios de la jurisprudencia interamericana*, Mexico, Porrúa, 2012, pp. 25 and ss.

⁸⁹ 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 does not “decide whether certain individuals are guilty or not and should or should not be prosecuted.” *Caso Huilca Tecse vs. Perú*. Merits, reparations, and costs. Judgment March 3, 2005, paras. 105-106. Decisions on these matters fall to domestic criminal jurisdictions.

The jurisdictional reception – the route for the realization of control of conventionality, a topic I will address at the end of this note – departs from a double premise: judges are the primordial guarantors of human rights⁹⁰ 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”⁹¹; in 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 actors⁹². 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 – in order to carry out activities related to public safety or national security⁹³.

10. Force of IHRL provisions

The Inter-American Court has addressed the content and force of the provisions of IHRL, a topic which 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, that 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 norm⁹⁴.

Doubt has frequently been expressed as to the binding or merely orientational – the equivalent of “suggestive” – character of decisions of the Inter-American Court⁹⁵. A

⁹⁰ Cfr. García Ramírez, *El debido proceso...*, *op. cit.*, pp. 35 and ss., and Various, *La justicia como garante de los derechos humanos: la independencia del juez*, San José, Costa Rica, European Union, Instituto Latinoamericano de Naciones Unidas para la Prevención del Delito y Tratamiento del Delincuente, 1996.

⁹¹ Cfr. My vote in relation to the judgment in *Caso Myrna Chang vs. Guatemala*. Merits, reparations and costs. Judgment November 25, 2003, paras. 27-31.

⁹² Cfr. *Caso de las Masacres de Ituango vs. Colombia*. Judgment July 1, 2006, paras. 125.1, 125.25 and 133; and *Caso de la "Masacre de Mapiripán" vs. Colombia*. Judgment September 15, 2005, paras. 121-123. Likewise, cfr. Medina Quiroga, Cecilia, *La Convención Americana: teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial*, San José, Costa Rica, Universidad de Chile, Facultad de Derecho, Centro de Derechos Humanos, 2003, pp. 28 and ss.

⁹³ Cfr., for example, *Caso de las Masacres de Ituango vs. Colombia...*, *cit.*, paras. 125.1, 125.25 and 133; *Caso de la "Masacre de Mapiripán" vs. Colombia...*, *cit.*, paras. 121-123; and *Caso Blake vs. Guatemala*. Merits. Judgment January 24, 1998, paras. 75 and ss.

⁹⁴ Article 62.3 of the American Convention states: “the 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.” 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. *El control de la aplicación...*, *op. cit.*, pp. 47-49 and 128.

⁹⁵ The issue of being of a binding 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 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.” The Inter-American Court has addressed this issue

distinction is proposed that “calibrates” the reach of these decisions 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 States 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 which is a party in the case⁹⁶. In the second situation, the Court’s opinion does not bind anyone, although it could be “significant” – interesting, worthy of attention – for all. The Court itself has accepted this distinction⁹⁷, which is challenged by academic doctrine⁹⁸ and nuanced in the position of a State which recognizes the normative efficacy of a decision which it solicited by requesting an advisory opinion⁹⁹.

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 which is party to the litigation, and on the other hand, minimizes the effects of the decision with respect to States not parties to the case in which the decision is made¹⁰⁰.

Obviously, the Court’s findings of fact in the litigation and their consequences – whether the State is liable or not – operate only *inter partes*. But 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.

through its relevant judgments in *Casos Caballero Delgado y Santana vs. Colombia*. Merits. Judgment December 8, 1995, para. 66, and *Loayza Tamayo vs. Perú*. Merits. Judgment September 17, 1997, paras. 80-81. *Cfr.* Gozáini, “El impacto de la jurisprudencia...,” in Various, *el control...*, *op. cit.*, pp. 109-111.

⁹⁶ 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. *Caso Gelman vs. Uruguay*. Monitoring compliance with judgment. Resolution March 20, 2013, paras. 87-88.

⁹⁷ 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.” *Otros tratados objeto de la función consultiva de la Corte (Artículo 64 de la Convención Americana sobre Derechos Humanos)*. *Opinión consultiva OC-1/82*, September 24, 1982, para. 51.

⁹⁸ *Cfr.* Gómez Robledo, Alonso, *Derechos humanos en el Sistema Interamericano*, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas/Porrúa, 2000, p. 46; and Faúndez Ledesma, *El Sistema Interamericano...*, *op. cit.*, pp. 989 and ss.

⁹⁹ So acted Costa Rica. For more in this regard, *cfr.* Sala Constitucional (Sala IV) de la Corte Suprema, *Acción de inconstitucionalidad no. 412-5-90*, Judgment November 13, 1985.

¹⁰⁰ 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 effect.” He is less emphatic regarding his position on advisory opinions. *Cfr.* “¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos? (Control de constitucionalidad y de convencionalidad)” in Various, *El control difuso...*, *op. cit.*, pp. 255 and ss.

For good reasons and with growing force, the answer has emerged that best fits the design of international law of human rights (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 the 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--.

Because the Court has been conferred the power to interpret the Convention, which is a positive legal order for all States Parties to it, the Court possesses the capacity to define the meaning and scope of the corresponding norms, 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 cases¹⁰¹. This binding character of the jurisprudence¹⁰² of the Court applies both to advisory opinions¹⁰³ -- 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 judgments¹⁰⁴. This does not mean that the obstacles which on occasion generate resistance in the internal judicial order have disappeared¹⁰⁵. All in all, it may be affirmed that on the basis of that binding effect – and with this cement –

¹⁰¹ “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 [...]” *Caso Gelman vs. Uruguay*. Monitoring..., *cit.*, para. 69.

¹⁰² I use this term in its broadest understanding, that encompasses the fruit of the jurisdiction: “that is to say 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.

¹⁰³ 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. *Cfr. El Sistema Interamericano...*, *op. cit.*, pp. 989 and ss.

¹⁰⁴ It has done this since the judgment in *Caso Cabrera García y Montiel Flores vs. México*. Preliminary objections, merits, reparations and costs. Judgment November 26, 2010, under the heading “Adaptation of domestic law with international standards of justice,” where it alludes to the the recognized judgments of the Inter-American Courts by the High Courts of Costa Rica, Bolivia, the Dominican Republic, Peru, Argentina and Colombia. *Cfr. paras. 226 and ss.* The resolution on monitoring compliance in the *Caso Gelman vs. Uruguay* of March 20, 2013 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. *Cfr. “El control de convencionalidad...”* in Various, *El control difuso...*, *op. cit.*, pp. 431 and ss.

¹⁰⁵ *Cfr. Gozaíni, “El impacto de la jurisprudencia del sistema interamericano en el derecho interno,”* in Various, *El control...*, *op. cit.*, pp. 83-84. With respect to the posible conflicto between constitutional courts and ordinary courts, “it 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.” *Ibidem*, pp. 91-92.

the orientation “receptor of [Inter-American] jurisprudence,” with full force, has reached domestic tribunals of diverse rank and has spread among the totality of the member States of the System, 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*¹⁰⁶.

11. Control of conventionality

The previous discussion is closely related – by imposing conditions – with a derivative concept – one thereby conditioned – which is gaining importance in various countries of the region, with differing emphasis: the control of conventionality¹⁰⁷. This constitutes “a guarantee designed to obtain the harmonious application of applicable law”¹⁰⁸, 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 Convention¹⁰⁹. This entails a matching, a confrontation, a comparison between the national acts and the conventional norms – stressing the

¹⁰⁶ Article 29 of the American Convention on Human Rights: “Nothing in this Convention shall be interpreted as meaning: a) permitting any Party State, 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 in accordance with the laws of any Party State or by virtue of another convention to which one of these States is party; c) excluding other rights or guarantees that are inherent in the human personality or derived from a representative democratic form of government; and d) excluding or limiting the potential effects of the American Declaration of Rights and Duties of Man and other international acts of the same nature.”

¹⁰⁷ On the origin of the doctrine of control of compliance, *cf.* Vergottini, Giuseppe de, *Más allá del diálogo...*, *op. cit.*, 2010, p. 112; Rey Cantor, *Control de convencionalidad de las leyes y derechos humanos*, Mexico, Porrúa, 2008, pp. 46 and 167-171; Hitters, Juan Carlos, “Control de constitucionalidad y control de convencionalidad. Comparación,” Buenos Aires, *La Ley*, 2009, pp. 1-5; Sagüés, “El control de convencionalidad...,” Various, *La justicia constitucional...*, *op. cit.*, p. 449; Sagüés, “El control de convencionalidad en el Sistema Interamericano y sus anticipos en el ámbito de los derechos económico-sociales. Concordancias y diferencias con el Sistema Europeo,” in Various, *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales*, Eduardo Ferrer Mac-Gregor Poisot (coord.), Mexico, FUNDAP, 2012, p. 422; Sagüés, *La interpretación judicial...*, *op. cit.*, pp. 344-346; Ferrer Mac-Gregor, “Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano,” in Various, *ibidem*, pp. 132-133; Bazán, Víctor, “Estimulando sinergias: de diálogos jurisprudenciales y control de convencionalidad,” *ibidem*, pp. 15 and ss.; Ayala Corao, Carlos, *Del diálogo jurisprudencial al control de convencionalidad*, Caracas, 2012, pp. 133 and ss., 142, n. 502 and 147 n. 509; Caballero Ochoa, José Luis, *La interpretación conforme. El modelo constitucional ante los tratados internacionales sobre derechos humanos y el control de convencionalidad*, 2da. reprint, Mexico, Porrúa, 2013, pp. 75-76; and Rosales, Emmanuel, “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 Various, *El control de convencionalidad y las cortes nacionales...*, *op. cit.*, 2013, p. 180.

¹⁰⁸ Albanese, Susana, “La internacionalización del derecho constitucional y constitucionalización del derecho internacional,” in Various, *El control...*, *op. cit.*, p. 15.

¹⁰⁹ 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 compliance. *Cfr.* “Controles de convencionalidad de las leyes,” in Various, *El control difuso...*, *op. cit.*, pp. 393 and ss.

preeminence of the conventional norms – which are the subject matter of the Court’s analysis and the reason for its determinations¹¹⁰.

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 *infra*, 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 1º of the Mexican Constitution, and even on private parties). This observance or subordination reflects the duty which 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 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 organ¹¹¹.

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 development¹¹². The Inter-American Court has formulated definitions and specificities concerning control of conventionality, which have brought about an important evolution in this regard¹¹³. Nonetheless, there still does not exist among the countries of our region a universally accepted conception of control of conventionality, or of the procedure or method for exercising it, or of its consequences; nor in regard to the subjects empowered to apply it,¹¹⁴ nor the

¹¹⁰ Only the Inter-American Court—not national judges—can exercise control of compliance. *Cfr.* Castilla Juárez, Karlos A., “El control de convencionalidad. Un nuevo debate en México a partir de la sentencia del *Caso Radilla Pacheco*,” in Various, *El control difuso...*, *op. cit.*, p. 91.

¹¹¹ “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.” Reasoned opinion of Justice García Ramírez in the *Caso Tibi vs. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment September 7, 2004, para. 3. In the same vein, *cfr.* reasoned opinion of Justice García Ramírez in the *Caso Trabajadores Cesados del Congreso (Aguado Alfaro y otros) vs. Perú*. Preliminary objections, merits, reparations and costs. Judgment November 24, 2006, para. 4.

¹¹² *Cfr.* Reasoned opinion of Justice García Ramírez in the *Caso Myrna Mack Chang vs. Guatemala...*, *cit.*, para. 27.

¹¹³ *Cfr.*, on this matter, the commentary of Becerra Ramírez (“the concept of control of compliance (...) that the doctrine has developed in recent years has several inaccuracies”) and his examination of the evolution of compliance control. *El control de la aplicación...*, *op. cit.*, pp. 123 and ss.

¹¹⁴ 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

situations to which it should be applied¹¹⁵. 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 suggests – makes obvious – the need to carry out an orderly reexamination 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 guarantees¹¹⁶. 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 suffer¹¹⁷.

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 Tribunal¹¹⁸.

There are stages or “seasons” in the Inter-American jurisprudential development in regard to control.¹¹⁹ 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 – apply 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 function – jurisdictional – should serve those ends and

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. *Del diálogo jurisprudencial...*, *op. cit.*, pp.162-164.

¹¹⁵ “Compliance control has a complementary nature and therefore is an exceptional mechanism that is not exercisable in all cases.” Flores Navarro, Sergio and Rojas Rivera, Victorino, *Control de convencionalidad*, Mexico, 2013, Editorial Novum, p. 27.

¹¹⁶ “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,” Various, *El control de convencionalidad...*, *op. cit.*, p. 87.

¹¹⁷ On the necessity of organizing compliance control in a form that harmonizes law and the construction of an *ius commune*, avoiding the “derailment” of this concept, *cfr.* García Ramírez, “Prólogo” to Flores Navarro and Rojas Rivera, *Control de convencionalidad...*, *op. cit.*, pp. XX-XXI. See also, *cfr.* García Ramírez, *Control judicial...*, *op. cit.*, pp. 9 and ss.

¹¹⁸ This has raised questions. *Cfr.*, for example, Becerra Ramírez, *El control de la aplicación...*, *op. cit.*, pp. 156-157.

¹¹⁹ Burgogue-Larsen indicates that this concept has developed in three stages: “aparición del deber de control (*Caso Almonacid*); establecimiento de los contornos de esta obligación (*Caso Trabajadores Cesados del Congreso*), y “teorización” del control (*caso Cabrera García y Montiel Flores*). La erradicación de la impunidad. Claves para descifrar la política jurisprudencial de la Corte Interamericana de Derechos Humanos,” in Various, *El control difuso...*, *op. cit.*, p. 38.

should not be limited to adjudicating violations of internal legal norms. For that purpose, they should exercise a kind of control of conventionality (*Caso Almonacid vs Chile*)¹²⁰.

This judicial mission as guarantor of human rights – based on their national Constitutions and on IHRL – is valuable 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 subsidiarity¹²¹. 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 tribunal¹²².

Accordingly, then, the Inter-American Court understood that the emerging doctrine of control of conventionality would be exercised by national adjudicators¹²³, in the manner in which the Inter-American Court, by its very nature the controller of conventionality, exercised this function in the international sphere¹²⁴. 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 procedures¹²⁵, a reasonable addition in practical terms and unassailable in legal terms, since it is respectful of the rule of law¹²⁶ governing the activities of the courts and, in general, of all authorities. This mission would be exercised by the adjudicator *motu proprio*, in the

¹²⁰ “The Court is aware that domestic judges and courts are subject to the rule of law and, therefore, are required to apply the provisions of the law. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the state apparatus, are also subject to it, forcing them to ensure that the effects of the provisions of the Convention are not adversely affected by implementation of laws contrary to its object and purpose, and that from the beginning without legal effect. In other words, the judiciary must exercise a sort of “conventionality control” between the domestic legal provisions that apply in specific cases and the American Convention on Human Rights. In this task, the judiciary must take into account not only the treaty, but also the interpretation thereof made by the Court, the ultimate interpreter of the American Convention. (emphasis added). *Caso Almonacid Arellano y otros vs. Chile*. Preliminary objections, merits, reparations and costs. Judgment September 26, 2006, para. 124.

¹²¹ *Cfr.* Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law”, *American Journal of International Law*, vol. 97, no. 1, January 2003, pp. 38 and ss. 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.

¹²² *Cfr.* García Ramírez, *Control judicial...*, *op. cit.*, pp. 46-47.

¹²³ As in the aforementioned judgment in the *Caso Almonacid Arellano vs. 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.” García Morelos, Gumesindo, “El control judicial difuso de convencionalidad de los derechos humanos por los tribunales ordinarios en México,” in Various, *El control difuso...*, *op. cit.*, p. 207. See also, *cfr.* Castilla Juárez, Karlos A., “El control de convencionalidad...” *ibidem*, pp. 87 and ss.

¹²⁴ *Cfr.* García Ramírez, *Control judicial...*, *op. cit.*, pp. 42 and ss.

¹²⁵ *Idem*. It has been written that this remark about the powers and procedural regulations must be interpreted as a way to “adjust” control. *Cfr.* Ferrer Mac-Gregor, “El control de convencionalidad...” in Various, *El control difuso...*, *op. cit.*, p. 147. On this subject and, in general, on compliance control, *cfr.* the reasoned opinion of Ferrer Mac-Gregor as judge on the Inter-American Court in the *Caso Cabrera García y Montiel Flores vs. México*. Preliminary objections, merits, reparations and costs. Judgment November 26, 2010.

¹²⁶ *Cfr.* García Ramírez, *Control judicial...*, *op. cit.*, X-XI, 54 and 65.

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.” (*Caso Trabajadores Cesados del Congreso vs. Perú*)¹²⁷.

It bears mention 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 controls¹²⁸.

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” (*Caso García y Montiel Flores vs. México*)¹²⁹. 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 training¹³⁰: not only judicial secretaries, among whose functions is that of substitution

¹²⁷ “When a State has ratified an international treaty like the American Convention, its judges are also subject to it, which obligates them to ensure that the effectiveness of the Convention is not reduced or annulled by the application of laws contrary to its object and purpose. In other words, the judicial organs must exercise not only constitutional control by also “conventionality” *ex officio* between internal norms and the American Convention, clearly from within their respective powers and corresponding procedural regulations. This function should not be limited exclusively to the statements or actions of the plaintiffs in each case, although it does not imply that his control must always be exercised, without considering other procedural and substantive materials that are admissible and proceed from such actions.” (emphasis added). *Caso Trabajadores Cesados del Congreso (Aguado Alfaro y otros) vs. Perú*. Preliminary exceptions, merits, reparations and costs. Judgment November 24, 2006, para. 128. 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 *Caso Velásquez Rodríguez*. Merits. Judgment July 29, 1988, para. 163.

¹²⁸ 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...*, *op. cit.*, pp. 54-56.

¹²⁹ “This Court has established in its jurisprudence a recognition that domestic authorities are subject to the rule of law, and that, for this reason, they are obligated to apply the provisions of the law. But when a State is party to an international treaty like the American Convention, all of its organs, including its judges, are subject to it, which obligates them to ensure that the provisions of the Convention are not undermined by the application of rules contrary to its object and purpose. Judges and bodies related to the administration of justice on all levels are obliged to exercise *ex officio* control of “conventionality” between internal norms and the American Convention, evidently within their respective powers and the corresponding procedural regulations. In this task, the judges and bodies related to the administration of justice must have in mind not only the treaty, but also how that treaty has ultimately been interpreted by the Inter-American Court.” (emphasis added). *Caso Cabrera García y Montiel Flores vs. México*. Preliminary objections, merits, reparations and costs. Judgment November 26, 2010, p. 225.

¹³⁰ 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. *Cfr.*

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 (*Caso Gelman vs. Uruguay*)¹³¹. Certainly, all officials are obligated to comply with the provisions of the national Constitution and international treaties¹³². Now, one thing is the general mission of compliance, and another is the mission of “control” of the acts of other authorities. 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 2013¹³³. He suggested caution that

Alcalá-Zamora y Castro, Niceto, *Panorama del derecho mexicano. Síntesis del Derecho procesal*, Mexico, Universidad Nacional Autónoma de México, Instituto de Derecho Comparado, 1966, pp. 47 and ss.

¹³¹ “The very existence of a democratic regime does not guarantee, per se, lifelong respect for international law, including international law on human rights, which has been well-regarded even by the Inter-American Democratic Charter. The democratic legitimacy of certain facts or events in a society is limited by international standards and obligations to protect human rights recognized in treaties such as the Convention, so that the existence of a true democratic system is determined by its formal features as much as its substantial ones, which causes, particularly in cases of serious violations of the rules of international law, the protection of human rights to constitute an absolute limit on majority rule, that is to say, on the realm of the “capable of being decided” by democratic majorities in instances in which one should also prioritize the control of “conventionality” (*supra* para. 193), which is the function and task of every public authority and not just the judiciary (...)” (emphasis added). *Caso Gelman vs. Uruguay*. Merits and reparations. Judgment February 24, 2011, para. 239. 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.” “*All of the State authorities*, are under the obligation to exercise *ex officio* control of “conventionality” between internal norms and the American Convention, within their respective jurisdictions and corresponding procedural regulations. This task must take into account not only the treaty itself, but also the interpretation thereof made by the Inter-American Court, the ultimate interpreter of the American Convention.” *Caso Gelman vs. Uruguay*. Supervisión..., *cit.*, para. 66. Cossío, José Ramón, “Primeras implicaciones del Caso Radilla,” Various, *El control de convencionalidad...*, *op. cit.*, p. 72. For his parte, 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. *Cfr. Del diálogo jurisprudencial...*, *op. cit.*, pp. 113 and ss.

¹³² 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 [...]”

¹³³ “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

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 regime¹³⁴. 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 regulation¹³⁵, 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 law¹³⁶. There has even been suggested a solution half way between absolutely diffuse control and concentrated control, taking note of regimes which could serve this end, such as the

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 exercising 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.” *Discurso pronunciado por el Juez Diego García-Sayán en la inauguración del 48 Periodo Extraordinario de Sesiones de la Corte Interamericana de Derechos Humanos*, held in Mexico City on October 7-11, 2013, <http://vimeo.com/76435830>.

¹³⁴ 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.” Cossío, José Ramón, “Primeras implicaciones del Caso Radilla”, *El control de convencionalidad...*, *op. cit.*, p. 71. See also, *cf.* Caballero Ochoa, José Luis, *La interpretación conforme...*, *op. cit.*, p. 80, who recognizes that the Inter-American Court “has not tried to impose (on national courts) the specifics” of the control. *Ibidem*, p. 85.

¹³⁵ On this subject, *cf.* Vergottini, *Más allá del diálogo...*, *op. cit.*, pp. 106 and ss.; Sagüés, “El ‘control de convencionalidad’ como instrumento para la elaboración de un *ius commune interamericano*,” in Various, *La justicia constitucional y su internacionalización, ¿Hacia un Ius Constitutionale Commune en América Latina?*, Armin von Bogdandy *et al.* (coord.), Mexico, Universidad Nacional Autónoma de México/Instituto de Investigaciones Jurídicas/Max Planck Institut, 2010, t. II, pp. 451, and ss.; and Serna de la Garza, José María, *Impacto e implicaciones constitucionales de la globalización en el sistema jurídico mexicano*, Mexico, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, pp. 279 and ss. 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 legislatures 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.” “Presentación” of García Ramírez, *Control judicial de convencionalidad...*, *op. cit.*

¹³⁶ *Cf.* Albanese, “La internacionalización...,” in Various, *El control...*, *op. cit.*, pp. 25 and 44.

constitutional questions procedure of Spanish law¹³⁷. 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 Chamber¹³⁸.

It should be recalled that some countries in the region have a tradition of diffuse control; others, of concentrated control, which is deeply rooted and in general functions well¹³⁹. 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.¹⁴⁰.

I mentioned that each country may have particularities in regard to the immediate effects of control of conventionality¹⁴¹, as well as in regard to the problems which judges may encounter in applying control, above all if control is established suddenly, without sufficient preparation for its application or new provisions to protect human rights, which implies the need for important changes¹⁴².

¹³⁷ Article 162 of the Spanish Constitution states that “when a judicial organ considers, in some process, a regulation having the force of law applicable to the case, the validity of which depends on the judgment, would be contrary to the Constitution, must bring the question before the Constitutional Court, for cases in the form and with the effects established by the law, that in no case shall be eclipsed.” On this constitutional configuration, *cf.* Corzo, Edgar, *La cuestión de inconstitucionalidad*, Madrid, Centro de Estudios Constitucionales, 1998, pp. 171 and ss. 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 compliance control.

¹³⁸ Sagüés, “El control de convencionalidad en el sistema interamericano...,” in Various, *El control difuso...*, *op. cit.*, p. 431. Apart from the doctrine of the Court of the European Union on the “overt 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. *Cfr.* “El control judicial de la ley con base en tratados internacionales sobre derechos humanos,” in Various, *El control difuso...*, *op. cit.*, pp. 459-461.

¹³⁹ *Cfr.* Sagüés, “El control de convencionalidad...,” Various, *La justicia constitucional...*, *op. cit.*, pp. 454-455.

¹⁴⁰ On compliance control by national judges, *cf.* Flores Navarro, Sergio and Rojas Rivera, Victorino, *Control de convencionalidad*, *op. cit.*, pp. 152 and ss.; Various, *El control de convencionalidad...*, *op. cit.*, pp. 235 and ss.; and Nogueira Alcalá, Humberto, “Los desafíos del control de convencionalidad del *corpus iuris* interamericano para los tribunales nacionales, en especial, para los tribunales constitucionales,” in Various, *El control difuso...*, *op. cit.*, pp.341 and ss.

¹⁴¹ Take into account, as a benchmark, the immediate effects of a nearby figure: the control of constitutionality.

¹⁴² 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 división 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,” *cf.* Sandoval, Francisco Javier, “El activismo judicial o la dictadura de los jueces. Análisis del modelo de control difuso sobre derechos fundamentales de prestación asistencial,” in Various, *El control de convencionalidad...*, *op. cit.*, pp. 200-201.

It is not possible for me to refer to all countries, but I can propose the example of my own¹⁴³. 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”¹⁴⁴ of a norm, or its “expulsion” from the domestic legal order, according to the circumstances¹⁴⁵. How can we resolve the 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?¹⁴⁶

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 fairness¹⁴⁷.

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 protection of human rights. Under a “principle of solidarity,” the European Court would see its pronouncements applied in States which were not litigants in the case before the Court

¹⁴³ 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, *cf.* Sánchez Cordero de García Villegas, Olga María del Carmen, “La tutela multinivel de los derechos fundamentales ante el nuevo paradigma constitucional,” in Various, *El control de convencionalidad...*, *op. cit.*, pp. 8-9.

¹⁴⁴ 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 exploding it from the legal system entirely. Aguirre Anguiano, Sergio Salvador, “Derechos humanos en México ¿un mandato de convencionalidad o de constitucionalidad?,” in Various, *El control de convencionalidad...*, *op. cit.*, pp. 49-50.

¹⁴⁵ In its analysis of *Caso Rosendo Radilla Pacheco*, the Mexican Supreme Court of Justice established, with binding force for the courts, a model of compliance control 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 and/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 and/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 and/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. *Cfr.* <http://www.scjn.gob.mx/2010/pleno/Documents/Taquigraficas/2011/Julio/p120110714.pdf>.

¹⁴⁶ It is necessary that the legislatura 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.” Ruíz Matías, Alberto Miguel and Ruíz Jiménez LL.M, César Alejandro, “El principio *pro homine* en el sistema jurídico mexicano,” *El control de convencionalidad...*, *op. cit.*, p. 142.

¹⁴⁷ On this subject, *cf.* Various, *Control de convencionalidad para el logro de la equidad*, Mexico, Suprema Corte de Justicia, 2012. This work forms part of a series that promotes the introduction of “gender perspective in judging.” Silva Meza, Juan, “Prólogo,” *ibidem*, p. IX.

in which the pronouncement was made¹⁴⁸. 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.”¹⁴⁹.

12. Reparations

I should not extend myself further in this note. 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 and original contribution to the international regime of human rights¹⁵⁰. 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 José¹⁵¹ and in the criteria established by the Inter-American Court¹⁵².

The American – that is, 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 on the general – not only the individual – 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.

13. Appendix of conclusions on control of conventionality

¹⁴⁸ On this topic, *cf.* Parliamentary Assembly of the Council of Europe, Resolution 1226 of September 28, 2000, “Execution of judgments of the European Court of Human Rights”: “[...] (3. 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”), <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=16834&Language=EN> *Cit. Caso Gelman vs. Uruguay. Supervisión...*, *cit.*, p. 20, n. 49.

¹⁴⁹ Inter-American Court, *Caso Mostacciolo Giuseppe c. Italia*, March 29, 2006. Grande Chamber, para. 125. *Cit.* Albanese, “La internacionalización...,” in Various, *El control...*, *op. cit.*, p. 22.

¹⁵⁰ *Cfr.* Pasqualucci, Jo., *The Practice and Procedure of the Inter-American Court of Human Rights*, UK, Cambridge University Press, 2003, p. 289; and Antkowiak, Thomas, M. “Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond” in *The Columbia Journal of Transnational Law*, vol. 46, no. 2, 2008, pp. 351 and 355.

¹⁵¹ *Cfr.* García Ramírez, *La Corte Interamericana...*, *op. cit.*, pp. 72 and ss.; 138 and ss.; 271 and ss.

¹⁵² *Cfr.* Shelton, *Remedies in International Human Rights Law*, New York, Oxford University Press, 2000, pp. 172 and ss. In regards to reparations, *cf.*, Faúndez Ledesma, *El Sistema Interamericano...*, *op. cit.*, pp. 778 and ss.; and “Reparaciones e indemnizaciones en la Convención Americana de Derechos Humanos,” *Revista de la Facultad de Ciencias Jurídicas y Políticas*, Venezuela, Universidad Central de Venezuela, year XLII, no. 103, 1997, pp. 17 and ss. *Cfr.* likewise, García Ramírez and Benavides, Marcela, *Consecuencias jurídicas del hecho ilícito...*, *op. cit.*, pending publication.

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, in cases before it and in which it applies norms consistent with its subject matter jurisdiction.
- 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^o of the Constitutional), 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 extend considerably 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 which 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 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 regard 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 which 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*.¹⁵³

¹⁵³ Cfr. García Ramírez and Morales, *La reforma constitucional...*, *op. cit.*, pp. 300-302.