Revus
Journal for Constitutional Theory and Philosophy of Law / Revija za ustavno teorijo in filozofijo prava

40 | 2020
Revus (2020) 40

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Electronic version
URL: http://journals.openedition.org/revus/5838
DOI: 10.4000/revus.5838
ISSN: 1855-7112

Publisher
Klub Revus

Printed version
Number of pages: 45-62
ISSN: 1581-7652

Electronic reference
Claudina Orunesu, « Conventionality control and international judicial supremacy », *Revus* [Online], 40 | 2020, Online since 14 August 2020, connection on 12 September 2020. URL : http://journals.openedition.org/revus/5838 ; DOI : https://doi.org/10.4000/revus.5838

Conventionality control and international judicial supremacy

Some reflections on the Inter-American system of human rights

Claudina Orunesu

1 The conventionality control

1 The process of internationalization of the mechanisms of human rights protection constitutes a very significant conquest of humanity. In particular, the Inter-American System for the protection of Human Rights introduced a procedure that seeks to guarantee a balance between the States Parties for the protection of human rights. Each State commits itself to respect a plexus of rights embodied in the American Convention on Human Rights (ACHR) and recognizes the competence of certain supranational bodies (the Inter-American Commission and Court) that are responsible for reviewing the effective enforcement of such rights in the domestic jurisdiction.[1]

2 In this context, the so-called conventionality control doctrine has been devised as a tool to ensure the harmonious application of current law and preserve the primacy of the human rights international legal order at the local level.[2]

3 The American Convention on Human Rights establishes that the Inter-American Court is the competent body to "comprise all cases concerning the interpretation and application of the provisions of [the] Convention that are submitted to it".[3] The Inter-American Court is authorized to declare whether there has been a violation of any of the clauses of the Convention and, in the event that this happens, it may order that the affected party be guaranteed the enjoyment of the violated rights, the consequences of the measure or situation that violated the rights in question be remedied and, if applicable, that a fair compensation be paid.[4]

4 In this normative framework, in 2006 the Inter-American Court referred for the first time to the so-called *conventionality control* doctrine. In the case "Almonacid Arellano and others vs. Chile" the court held:

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[5]

5 In other words, according to the Court, in order to guarantee the supremacy of the American Convention, domestic judges, as officials of the State, must carry out a control of adequacy of the rules of domestic law and verify that they do not contravene conventional norms. Judges are assigned such a duty because if they are under an obligation to apply a certain set of rules, Convention included, they are also under an obligation to solve all possible conflicts within that set of norms, preserving the supremacy of the Convention.[6]

6 Nevertheless, note that the Inter-American Court has not limited itself to maintaining that municipal judges must control the compatibility of domestic laws with the text of the American Convention. It held that they must also take into account "the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention".

7 This view of conventionality control, which also involves a particularly strong notion of international judicial supremacy, was developed over the years and arguably constitutes a consolidated doctrine of the international tribunal. However, in recent times certain objections seem to be arising around the doctrine and the particular style with which the Inter-American Court exercises it.[7] Therefore, I will first examine the foundations that support the doctrine of conventionality control in its current configuration, i.e., the supremacy of both conventional law and the interpretative criteria fixed by the Inter-American Court. The exploration will show that certain versions of this doctrine may lead to paradoxical consequences and raise doubts concerning the role the Inter-American Court of Human Rights plays today in the adjudication process of the Convention.[8] Then, I will evaluate the possibility of a reformulation of the doctrine using as a starting point a recent decision of Argentina´s Supreme Court that posed a serious challenge to it.

2 The supremacy of conventional law

8 As noted above, the control of conventionality proclaimed by the Inter-American Court aims to guarantee the supremacy of the convention for the protection of human rights over domestic law. The argument claims that, since judges have the duty to apply the law of their country, and since that implies interpreting it, if a State has ratified the American Convention, then its judges also have the obligation to guarantee that its provisions prevail over domestic norms that are in conflict with it.

9 This means that the Inter-American Court adopted a certain position regarding the hierarchical level that should be assigned to conventional norms in the internal

domain. This position admits a weak and non-problematic reading, as well as a strong and controversial one. According to the first, the duty to exercise the conventionality control by the Judiciary of the States Parties implies that conventional norms should prevail in the domestic level over ordinary laws, so that they must be accorded supralegal hierarchy and, perhaps, even constitutional hierarchy. According to the second reading, the conventionality control doctrine, according to words used in its formulation, implies the supremacy of conventional provisions over "internal legal norms" without any qualification, which is tantamount to including *all internal legal norms*, including constitutional ones. On such a basis, it has been argued that "*the conventionality control thesis wants that the Convention always prevails, ...with respect to the Constitution, and that it should be interpreted 'according to' and not against the Convention. It means the domestication of the Constitution by the Convention*".[9]

10 The grounds for this second reading – that conventional rules have supremacy over any provision of domestic law, including constitutional ones — allegedly rest on some provisions of the Vienna Convention on the Law of Treaties. In particular, Article 26 that establishes the principle *pacta sunt servanda*, and Article 27 that claims a State cannot invoke compliance with a domestic law provision as an excuse for noncompliance of obligations derived from an international treaty.[10] However, those clauses are equally applicable to bilateral treaties. Therefore, their scope is limited to the responsibility of States in the international sphere, and by themselves have no impact over the normative hierarchy of human rights conventions within domestic law. Otherwise, it would mean that any bilateral treaty should also be recognized at a supra-constitutional level, which is absurd. Not to mention that the Vienna Convention is itself an international convention, so that any argument pretending to justify, in one of its provisions, the hierarchy of international conventions in domestic legal systems is irremediably doomed to failure as question begging.

11 If we distinguish two hierarchical levels within a national legal system, the constitutional one and the legal one, the reception of conventional law in municipal legal systems could have a) sub-legal level; b) legal level; c) supra-legal but sub-constitutional level; d) constitutional level or e) supra-constitutional level.

12 Of these alternatives, the doctrine of conventionality control is only incompatible in a strict sense with the first two, but perfectly congenial with any of the others. However, the lack of any distinction in the arguments of the Inter-American Court, and the content of some of its pronouncements — as in the ruling "The Last Temptation of Christ"[11] – seem to support the strong interpretation, according to which the Inter-American Court demands that conventional dispositions be assigned maximum normative hierarchy, even over constitutional norms.

13 If we were dealing with international standards from another source, perhaps this idea would not be so problematic. But in the case of conventional law, it is very difficult to accept that they should be recognized as a higher hierarchy within municipal systems even over those rules that accord domestic organs the power to conclude, on behalf of the State, international treaties. In such a case, the valid relations — understood as authorized normative creation — between conventional and domestic law would become circular. The validity of conventional norms depends by its nature on the concurrent will of the national States that subscribe to it. However, under this reading, the doctrine of conventionality control would claim that the validity of all domestic

norms of each State Party depends, in turn, on its conformity with the provisions of the Convention.[12]

14 The paradoxical character of this conclusion becomes clear when we examine the internal dispositions that allow the reception of the conventional norms. Of course, it can happen that the very constitution of a State confers supremacy to all or some human rights conventional norms over the totality of domestic law, as it occurs in Colombia and Guatemala.[13] However, this need not be the case in every State. To cite a single example, in Argentina with the constitutional reform of 1994, provisions of human rights conventions have been granted "constitutional hierarchy", although with certain restrictions (they *"do not abrogate any section of the First Part of this Constitution and* [...] *should be understood as complementing the rights and guarantees recognized"* in it).[14] Accepting the strong reading of the doctrine of conventionality control, would make that clause of the Argentine Constitution in conflict with the Inter-American Convention, and thus it should be declared that it *"ha(s) not had any legal effects since (its) inception".*[15]

15 The implicit assumption of this strong thesis seems to be that the Inter-American Convention protects human rights more broadly and favourably than national laws. This may usually be true, but it is not necessarily true. Moreover, that assumption is literally denied by the terms of the Convention itself. In the subparagraph b) of Article 29 it says that

> No provision of this Convention shall be interpreted as [...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

16 In conclusion, it seems there is no sufficient ground for interpreting that the control of conventionality implies recognizing the supremacy of the Inter-American Convention over the constitutional provisions of the States Parties. There is no article of the Convention that assigns such a hierarchy, and a mere construction of the Inter-American Court cannot have such effect, since the Court does not have any jurisdiction to modify the internal law of the States Parties, even less in the case of their constitutional provisions.

3 The binding nature of the interpretive criteria of the Inter-American Court

17 The second problem that arises when considering the doctrine of conventionality control is that the Inter-American Court has not limited itself to maintain that judges should control the compatibility of domestic laws with the text of the Inter-American Convention. When performing that task, they should also take into consideration "the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention".[16]

18 Once again, there are here at least two possible readings of this directive issued by the Inter-American Court, one weak and perfectly reasonable, and the other strong and problematic. According to the first, when judges control the compatibility of domestic law with the Inter-American Convention, they should "take into account" the interpretations of the Inter-American Court in the sense that that they cannot ignore them. Therefore, if there is relevant jurisprudence of the Inter-American Court on the

question to solve in the case, domestic judges should consider it, and if they decide to depart from the reading offered by the Inter-American Court of the clauses of the Inter-American Convention, they should offer arguments to justify their position. In more detail, the reasoning that judges should make in those situations can be summarized as follows. First, they should verify whether there is jurisprudence of the Inter-American Court on the question to solve. Second, they must determine what is the underlying doctrine or *ratio* that emerges from them. Third, they must examine the applicability of that doctrine to the specific case at hand. Fourth, they must determine if there are internal legal reasons that are contrary to the applicability of the doctrine derived from the jurisprudence of the Inter-American Court. Fifth, in such a case, they must decide whether in the specific case it should be followed or not, and provide in any case a due justification of their decision.[17]

19 Under this understanding, the interpretation of the Inter-American Court should "serve as a guide" or standard for domestic courts regarding the interpretation of the provisions of the Inter-American Convention, which means that such interpretive criteria is binding but not mandatory for similar situations.[18] It is binding because, to the extent that a State Party has accepted the jurisdiction of the Court, it must take into due account those criteria, but it is not mandatory except in those cases in which the State is directly involved as reported for a violation.[19]

20 The strong reading of this thesis claims that the interpretative criteria of the Inter-American Court must be followed by the States Parties, not only in cases in which they have been denounced,[20] but also in any other cases, and not only when they are expressed in judgments but also in advisory opinions. Consequently, according to this understanding, the rulings of the Inter-American Court have the value of precedents with *erga omne*s effect, just like the *stare decisis* doctrine of the American Supreme Court.[21]

21 Following Raz's terminology, it could be said that in the weak version, the precedents of the Inter-American Court are binding in the sense of offering a first-order reason for action, i.e., a factor that would count in favour of following the interpretation of the Convention offered by the Court. By contrast, in the strong version, the precedents of the Inter-American Court are binding in the sense of offering a protected reason for action, i.e., a combination of a first-order reason to follow its interpretative criteria and a second-order reason that requires leaving aside other interpretations that might conflict with the former.[22]

22 The fundamental difficulty that arises from the strong reading of this thesis is that it entails a correlative and severe limitation of the powers of interpretation of national judges, who would be bound to follow blindly the interpretations of the Inter-American Court. However, as previously pointed out, the basic argument to justify the conventionality control was that judges must control the supremacy of the Convention because they have the duty to apply, among others, its provisions, and in cases of conflict should privilege the highest hierarchy. This, in turn, implies a necessary power of interpretation of the potentially conflicting texts, since it is impossible to exercise such kind of control without interpreting.

23 The Inter-American Court may of course justify *its own* exercise of conventionality control with this kind of argument and, at the same time, pretend that its jurisprudence is mandatory in the strong sense. It can also extend the argument to justify the conventionality control by internal judges by upholding the weak version of

the binding nature of its decisions. What is pragmatically incoherent is grounding the duty of national judges to exercise conventionality control over internal rules in their powers of interpretation and application of the law and, at the same time, restricting their powers to interpret conventional rules.

24 The implicit assumption in the strong reading of the thesis under consideration is that the Inter-American Court is for some reason in a better position to determine the content and scope of human rights than the internal judiciary. This idea is associated with the claim that the Court is the "ultimate interpreter" of the Convention, with support in article 62, paragraph 1, of the Convention. Nonetheless, here it is of crucial importance not to identify the finality of a judicial decision with its infallible nature, as Herbert Hart correctly pointed out.[23] It is one thing to maintain that the pronouncements of the Inter-American Court are ultimate or final, meaning definitive, i.e., they cannot be challenged before any other organ as a result of Article 67 of the Convention (*"The decision of the Court shall be final and not subject to appeal"*). It is an entirely different thing to argue that they are infallible. The final character of a certain pronouncement does not necessarily guarantee correction since the standards of correction of a judicial decision are independent of the final or definitive character it may possess.

25 It is unsurprising then that the strong reading of the thesis may lead the tribunals to face strong dilemmas when making their decisions. For example, the Argentine Supreme Court in "Espósito"[24] explicitly asserted that it did not share the restrictive criterion of the rights of defense, nor the pronouncement within a reasonable period that derived from the decision of the Inter-American Court in "Bulacio v. Argentina",[25] and that rejected the national provisions on extinguishment of criminal actions to the case, privileging the right to judicial protection of the victims. However, the Supreme Court decided to follow it because a contrary decision could bring about the international responsibility of Argentina:

> [T]he paradox that arises is that the only possible way to comply with the duties imposed on the Argentine State by the international jurisdiction of human rights is by strongly restricting the rights of defense and to a pronouncement within a reasonable period, guaranteed to the accused by the American Convention. However, since such restrictions were ordered by the international tribunal responsible to ensure the effective compliance with the rights recognized by the Convention, despite the indicated reservations, it is the duty of this Court, as part of the Argentine State, to comply with it within the framework of its jurisdictional power.

26 In other words, the Argentine Supreme Court considered that the Inter-American Court was wrong. However, in order to avoid international responsibility, it held that the interpretations of the Inter-American Court should be followed in the internal domain even when they are wrong, and even when the Supreme Court knows they are wrong.[26]

4 The conventionality control challenged

27 There is no doubt that the IACtHR´s conventionality control doctrine is nowadays under scrutiny and that even some decisions of domestic high courts depart from the stronger version of it.[27] In this regards, Argentina offers a paradigmatic example for analysis.

28 As indicated above, Argentina for many years embraced through different rulings, and practically without reserve, the conventionality control doctrine elaborated by the Inter-American Court. However in 2017, in an unexpected decision that position seems to have changed.

29 In 2001, the Supreme Court declared a publishing company and two of its directors, Jorge Fontevecchia and Héctor D'Amico, responsible for the damages caused by the publication of two articles in 1995 in the magazine *Noticias* that referred to the active Argentine President being the father of an unacknowledged son.[28] The defendants raised a claim against Argentina before the Inter-American Human Rights System. The Inter-American Court decided that the responsibility imposed on the journalists was a violation of Article 13 of the American Convention since it affected the right to freedom of expression.[29] For this reason, it ordered, among other measures, that the Argentine State *"must set aside the civil sentence imposed on Mr. Jorge Fontevecchia and Mr. Hector D'Amico, as well as all of its consequences"*.[30] In 2016, in the second monitoring of the sentence, the Inter-American Court considered that although the Argentine State had complied with most of the mandates of the Court's judgment, it had not revoked the civil conviction as previously ordered.[31]

30 In the face of this requirement, in 2017 the Argentine Supreme Court ruled by majority that it could not be forced to comply with the supranational decision to "nullify" a domestic sentence. The Supreme Court claimed that the Inter-American Court was not a fourth instance with the power to review or nullify state judicial decisions since its jurisdiction has subsidiary, reinforcing and complementary nature. According to the Argentine Court, the request of the Inter-American Court to "cease the effects" of the domestic ruling amounts to "revoking" it, and that such procedure exceeded the powers granted by the convention.[32] It added that *"to invalidate the ruling of this Court that has the authority of* res judicata *is one of the situations in which restitution is legally impossible in the light of the fundamental principles of Argentine public law"*. However, the Court also made clear that this decision *"does not imply denying the binding nature of the decisions of the Inter-American Court, but only to understand that the obligation arising from art. 68.1 must be circumscribed to the matter over which the international tribunal has jurisdiction"*.[33]

31 In the following Monitoring Compliance ruling of October 18, 2017, the Inter-American Court responded harshly to the arguments of the Argentine Court:

> States Parties to the Convention cannot invoke provisions of constitutional law or other aspects of domestic law to justify a lack of compliance with the obligations contained in that treaty [...] it is not a question of solving the problem of the supremacy of international law over the national one in the domestic order, but only of enforcing that to which the sovereign States committed themselves.[34]

32 However, the Inter-American Court recognized the necessity of clarifying the expression "to cease the effects" used in its decision, and said that in order to comply with it, the State did not need to "revoke" such rulings. Furthermore, the Inter-American Court added that Argentina could adopt some other type of legal act, different from the review of the sentence, such as the elimination of its publication from the web pages of the Supreme Court of Justice and Judicial Information Center, or that its publication be maintained but some type of annotation be made indicating that this judgment was declared in violation of the American Convention by the Inter-American Court.[35]

33 The Argentine Court finally took this path and proceeded to set down the following legend: *"This sentence was declared incompatible with the American Convention on Human Rights by the Inter-American Court (judgment of November 21, 2011)".* [36]

34 I will not analyze here all the arguments, merits and demerits, of the decisions of both courts.[37] I am more interested in showing that this debate is a symptom of the need to rethink not only the exercise, but also the foundations upon which the particular version of the conventionality control of the Inter-American system has been legitimized.

35 It is clear that the exercise of conventionality control exponentially magnifies the challenge of the classical countermajoritarian objection against judicial review.[38] First, judicial review may be defended arguing that the constitution was democratically voted for and, therefore, both the formulation of the bill of rights and the competence assigned to the judges to interpret them would have a democratic origin. However, in the case of the conventionality control, the system of approval and sanction of the Convention is far more questionable in terms of its democratic legitimacy of origin, as well as the power to control the compatibility of the provisions of domestic law with those of the Convention. As we have already seen, such a power is not expressly formulated in the text of the Convention, but emerges from a doctrinal construction elaborated by an international organ.

36 Second, the invalidation by judges of domestic law based on conventional provisions would not only mean the imposition of a countermajoritarian limit on ordinary legislation but, in its more extreme versions could even involve the invalidation of constitutional clauses.

37 Third, when we accept the binding character of the jurisprudence of the Inter-American Court, the conventionality control exercised by the Inter-American Court itself, and even the one exercised by domestic jurisdictional bodies, also strengthens the objection to the dictatorship of the judges – now of international judges. Constitutional democracy in the countries of the Inter-American System would be, according to this criticism, "what the majority decides, provided it does not violate what the Inter-American judges understand that constitutes the content of the basic rights".[39] Besides, when we consider the selection procedures of the members of the Inter-American Court, the countermajoritarian objection acquires even greater weight. [40]

38 Of course, even recognizing this democratic deficit, it could be argued that there are other reasons of equal or greater weight that justify the control of conventionality as built in the practice of the Inter-American Court. In a certain sense, that was the path chosen by the Inter-American Court itself. In "Gelman", the Inter-American Court denied all relevance to the deliberative process that led Uruguay to issue the so-called "Expiry Law", stating that

> the protection of human rights constitutes an impassable limit to the rule of the majority, i.e., to the forum of "what is possible to be decided" by the majorities in the democratic instance, that should also prioritize "control of conformity with the Convention" (supra parag. 193), which is a function and task of any public authority and not only the Judicial Branch.[41]

39 Faced with this vision of the mandatory nature of its own interpretations, the Inter-American Court seems to be adopting some version of the so-called theory of the *forbidden territory* that protects certain values and rights, which are considered

fundamental,[42] and taking the role of privileged interpreter and defender of them. This way of legitimizing the conventionality control is clearly not procedural but substantive, and comprises of either some kind of moral objectivity which makes those values true and accessible, or of the assumption that they have the general support of the people. This strategy has important limits. In this regard, Waldron has pointed out that

> [the] substantive legitimacy eludes the hard work that legitimacy really has to play. Substantive legitimacy persuades those people who support the outcome of the judicial decision and who share the substantial merits of it. However, legitimacy has to make its more complex work with those who substantively oppose the outcome of the judge's decision. And, by definition, what we have called substantive legitimacy is incapable of developing this work.[43]

40 I think this is the crucial problem posed by cases like "Fontevecchia". The legitimacy of the conventionality control requires taking into consideration the aptitude it has, as an institutional design and practice, to persuade others to accept and support its decisions even when they disagree with them.[44] In other words, the required legitimacy is not substantive but procedural in nature. The claim made by the Argentine Court in favour of a national *margin of appreciation* may be in this sense a viable strategy.

41 The doctrine of the national margin appreciation has its origins in the jurisprudence of the European Court of Human Rights in order to grant a degree of deference to the states when guaranteeing the rights it protects.[45] In "Fontevecchia" this concept is defined in the concurring vote of Judge Rosatti as a sphere of sovereign reservation, which implies that *"it is impossible for international law — either of normative or jurisprudential source — to prevail automatically, without scrutiny, over the constitutional order"*.[46]

42 It is important here to identify the relevant elements for such scrutiny. First, it may refer to the meaning of the normative formulations at stake, or to the inclusion of individual cases in the generic cases defined by already interpreted normative formulations. In this sense, the margin of appreciation would be particularly useful in those cases where automatic compliance with a decision of international tribunals collides with other rights of constitutional or conventional rank that are considered particularly valuable.

43 Second, the margin of national appreciation may refer to the determination of the remedies required to repair a right whose violation has been declared at the international level.[47] The decision in the last monitoring of the Inter-American Court in "Fontevecchia" can be interpreted in such a light. However, beyond accepting the possibility of choosing remedies, the Inter-American Court has not been receptive to admitting any national margin of appreciation at all, which is consistent with its insistence on affirming the mandatory nature of its interpretative criteria. The words of the former Judge of the Inter-American Court, Cançado Trindade, are illustrative of this position:

> The doctrine of the so-called 'margin of appreciation' flourished ... in the application of the European Convention of Human Rights, as a deference to the supposed 'wisdom' of the organs of the State as to the best way to give effect to the decisions of the conventional protection bodies in the field of domestic law. This doctrine presupposes the existence of truly democratic states, with an undoubtedly autonomous judiciary ... This doctrine could only have developed in a European system of protection that was believed to be exemplary, typical of a Western Europe (before 1989) relatively homogeneous in terms of its perceptions of a common

> historical experience ... It can no longer be assumed, with the same apparent security of the past, that all the States that make up its regional protection system are true States of Law. Thus, the doctrine of "margin of appreciation" requires serious reconsideration. Fortunately, this doctrine has not found an explicit parallel development in the jurisprudence under the American Convention on Human Rights. [48]

44 It seems that the underlying reason for the rejection of the margin of national appreciation is to think that its admission necessarily amounts to enabling areas of non-compliance with the rights protected by international convention. However, an alternative reading is possible, according to which the admission of a margin of national appreciation at all levels, and especially at the level of the identification of norms, is seen as an opportunity to enable participation in the discussion around the scope of our rights in the Inter-American system.

45 The increasingly frequent invocations of the need for an inter-court dialogue as a tool to alleviate the deficiencies of democratic legitimacy of origin and exercise in the Inter-American practice, call upon the abandonment of the strong thesis regarding the obligatory nature of the Inter-American Court's interpretative criteria.[49] Of course, when invoking the margin of appreciation doctrine, national organs should not assimilate it to a simple formula of non-compliance, but as a means to take the opinions of the organs of the Inter-American system seriously, to offer strong arguments when they do not share those opinions, and to be willing to find alternative remedies. Provided those steps are respected, the articulation of the conventionality control with margins of national appreciation may provide an opportunity to reconstruct the practice in a way that does not see the human rights protection process, at the adjudication level, in a pure adversarial way — courts vs. courts, Inter-American system vs. States —, but as part of a common construction.

—***Acknowledgments.***— *Part of the analysis developed here has been previously presented in Orunesu & Rodríguez 2017. I want to acknowledge the useful comments of two anonymous referees.*

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NOTES

1. See Albanese 2008: 17; Gozaíni 2008: 81.

2. See Mac-Gregor 2015; Sagüés 2010b: 134.

3. ACHR, Article 62.

4. ACHR, Article 63.

5. I/A Court H.R., Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154. This criterion was ratified by the Inter-American Court in I/A Court H.R., Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158; I/A Court H.R., Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162; "I/A Court H.R.; Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169; I/A Court H.R., Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186. Previously, this expression had been used rather isolated in some cases. See Judge Sergio García Ramírez' separate opinion in I/A Court H.R., Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101 and I/A Court H.R., Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114. See also Rights and Guarantees of Children in the Context of Migration and / or in Need of International Protection, Advisory Opinion OC-21/14, I/A Court. H. R. (ser. A) No. 21, August 19, 2014.

6. This argument is very similar to the one used two centuries earlier by the Supreme Court of the United States in "Marbury v. Madison" (5 U.S. 137, 1803) for the justification of judicial review. This power was not expressly stated in the constitutional text of 1787, as neither does the conventionality control in the text of the Convention. The Inter-American Court clarified in successive rulings who were the organs in charge of exercising the conventionality control, stressing that "the organs of the Judiciary should exercise not only a control of constitutionality, but also of "conventionality" ex officio between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations", I/A Court H.R., Case of the Dismissed Congressional Employees (I/A Court H.R., Aguado Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, I/A Court H.R., Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 26, 2010 Series C No. 220. In I/A Court H.R., Case Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011 Series C No. 22, the Court added that "the control of the conformity to the Convention (...) is a function and task of any public authority and not only the Judicial Branch".

7. See, for example, Dulitzky 2015, Gargarella 2015, Contesse 2017.

8. On the tensions due to the role taken by the Inter-American Court see Contesse 2016; Contesse 2017; and Soley & Steininger 2018.

9. Sagüés 2010a; see also Hitters 2009, Mac-Gregor 2015, Nash Rojas 2013.

10. This was the argument used in I/A Court H.R., Case Almonacid Arellano by the Inter-American Court. For a reconstruction of the scope that the editors of the Vienna Convention assigned to these articles, quite different from the sense attributed to them by the Inter-American Court, see Contesse 2017: 7-8.

11. I/A Court H.R., Case of 'The Last Temptation of Christ' (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73. See also I/A Court H.R., Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, I/A Court H.R., Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013. Series C No. 260.

12. For a different reading of the monistic and dualistic theses regarding the relations between international and national law, see Rodríguez & Vicente 2009.

13. See article 93 of the Colombian Constitution and article 46 of the Guatemalan Constitution. The constitutional courts of both countries, in an attempt to harmonize the international provisions with the constitutional ones, have elaborated the doctrine of "constitutionality block" (bloque de constitucionalidad). For an overview on this issue, see Chethman 2018, Urueña 2019, Ochoa Escriba 2018.

14. On the scope of such restrictions, see Vanossi & Dalla Vía 2000: 322; Rosatti 2012. The Supreme Court of Argentina reinterpreted these norms since the case "Giroldi, Horacio" (CSJN, 1995, Fallos 318:514) assuming, even before the "Almonacid Arellano" decision, the obligatory nature of the interpretative criteria of international organs.

15. I/A Court H.R., Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154.

16. I/A Court H.R., Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154.

17. These were the criteria suggested by the Attorney General Office of Argentina in "Jorge E. Acosta", March 10, 2010, No. 93/2009, A.

18. As indicated by the Supreme Court of Justice of Argentina with respect to the Inter-American Commission decision in "Bramajo, Hernán Javier s/ incidente de excarcelación - causa n° 44.891" (CSJN, 1996, Fallos 319: 1840).

19. See Gozaíni 2008: 104. In "Gelman v. Uruguay", the Inter American Court distinguished the effects of its own interpretations depending on whether the State had been a part or not in the international process. In the first case, the State would be obliged to comply with the decision and apply it. In the second case, the Court said that all State authorities "...are bound by the Treaty, and should abide by it and take into account the precedents and judicial guidelines of the Inter-American Court" (I/A Court H.R., Court H.R., Case of Gelman v. Uruguay. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of March 20, 2013.) Here the expression "take into account the precedents of the Tribunal" is perfectly compatible with the weak reading.

20. This seems clear from the text of article 68 of the Inter-American Convention.

21. The Inter-American Court held that "the Judiciary shall take into consideration not only the treaty but also the interpretation the Inter-American Court, final interpreter of the American Convention, has made of it. Therefore, it is necessary that the constitutional and legislative interpretations regarding the material and personal competence criteria of military jurisdiction in Mexico be adjusted to the principles established in the jurisprudence of this Tribunal" (I/A Court H.R., Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209). See also I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, I/A Court H.R., Case of Norín Catrimán et al. (Leaders, Members and Activist of the

Mapuche Indigenous People) v. Chile. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279.

22. See Raz 1990: 35-48 and 73-84. For a brief presentation of the many difficulties that the rationale of exclusive reason offers, see Rodríguez 2012: 127-145.

23. See Hart 1961: 141-147.

24. "Espósito, Miguel Ángel s/ incidente de prescripción de la acción penal promovido por su defensa" (CSJN, 2004, Fallos 327: 5668).

25. I/A Court H.R., Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100.

26. Similarly, by majority in "Derecho, René". By contrast, the dissent opinion claimed, "The binding nature of the decisions of the Inter-American Court of Human Rights is out of the question in order to safeguard the obligations assumed by the Argentine State. However, accepting that this has the consequences pretended by the appellant would imply to assume that the Inter-American Court has the power to decide on the criminal responsibility of a specific individual, who has not been a party in the international process, and in respect of which the Inter-American Court neither declared, nor could declare, his responsibility ... Under such conditions, a decision as the alleged one would not only imply an undue restriction to the defendant's right of defense (since he has neither been present nor heard in the proceedings before the Inter-American Court), but would also place the Argentine State in the paradoxical situation of fulfilling its international obligations at the cost of a new violation of rights and individual guarantees acknowledged by the National Constitution and the Human Rights treaties that are part of it" (CSJN, 2011, "Derecho, René s/incidente de prescripción penal", Fallos 334: 1504, dissent opinion by Judges Fayt and Argibay).

27. See, for example, Decision TC/0256/14 of the Constitutional Court of the Dominican Republic and the Contradiction of Theses 293/2011 of the Supreme Court of Mexico. For an analysis of several disagreements with the Inter-American Court of Human Rights decisions see Soley and Steininger 2018. In April 2019 Argentina, Brazil, Chile, Colombia and Paraguay issued a Joint Declaration to the Inter-American Commission on Human Rights that emphasized the role the subsidiarity principle and the margin the appreciation doctrine should play in the Inter-American System of Human Rights.

28. "Menem, Carlos c/Editorial Perfil S.A. y otros s/ daños y perjuicios", CSJN, 2011, Fallos 324: 2895.

29. I/A Court H.R., Case of Fontevecchia and D`Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238.

30. In terms of reparations, the Inter-American Court also ruled that the decision was per se a form of reparation, that the State should carry out the publications set forth in the Judgment on Merits, Reparations and Costs, in accordance with the provisions of paragraph 108 thereof, and that it should provide the amounts referred to in paragraphs 105, 128 and 129 of the Judgment within a period of one year counted from legal notice (I/A Court H.R., Case of Fontevecchia and D`Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238).

31. I/A Court H.R., Case of Fontevecchia and D'Amico v. Argentina. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 22, 2016. The previous monitoring ruling had been on September 19, 2015 where it was established that the Argentine government had failed to comply with its obligation to report the state compliance with the judgment. I/A Court H.R., Case of Fontevecchia and D'Amico v. Argentina. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of September 1, 2015

32. "Ministerio de Relaciones Exteriores y Culto s/informe sentencia dictada en el caso 'Fontevecchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos",

(majority vote). More serious seems to be the decision of the Constitutional Court of the Dominican Republic that declared in 2014 that the instrument of ratification of the ACHR was unconstitutional, and therefore the decisions of the Inter-American Court ceased to be binding (Judgement TC/0256/14).

33. CSJN, "Ministerio de Relaciones Exteriores y Culto s/informe sentencia dictada en el caso 'Fontevecchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos", Fallos 340: 47, majority vote.

34. I/A Court H.R., Case of Fontevecchia and D'Amico v. Argentina. Monitoring Compliance with Judgement. Order of the Inter-American Court of Human Rights of October 18, 2017, paragraph 14.

35. I/A Court H.R., Case of Fontevecchia and D'Amico v. Argentina. Monitoring Compliance with Judgement. Order of the Inter-American Court of Human Rights of October 18, 2017.

36. Resolution 4015/17, 5/12/2017.

37. The literature on this issue is enormous. See, for instance, Abramovich 2017; Alegre 2017; Clerico 2018; Saba 2017.

38. See Bickel 1962. Waldron 2006 is a locus classicus on this subject. On the limits of the countermajoritarian argument against judicial review see Orunesu 2012.

39. For a similar argument regarding domestic judicial review, see Bayón 2000.

40. The judges of the Inter-American Court are selected by the OAS General Assembly from a list of candidates proposed by the States Parties to the Convention, by secret ballot and by an absolute majority among the States Parties to the Convention. See article 53 of the ACHR and articles 4 to 9 of the Inter-American Court Statute. The deficiency in terms of democratic credentials of the selection mechanism is evident. The Statute of the Inter-American Court does not even require that the parliaments of the States parties participate in the formation of the list of candidates.

41. I/A Court H.R., Case Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221.

42. See Garzón Valdez 1989. Ferrajoli offers a similar idea through the formula "the sphere of the undecidable". See Ferrajoli 2007.

43. Waldron 2018: 18.

44. See Waldron 2018: 16.

45. About this doctrine and its development see, for example, Brauch 2012, Clérico 2018, Acosta Alvarado & Nuñez Poblete 2012, Føllesdal 2016, Føllesdal 2018, Krisch 2008, López Alfonsin 2017, Iglesias Vila 2017.

46. Paragrapgh 5 of Judge Rossati opinion. In the joint opinion of Judges Lorenzetti, Highton and Rosenkrantz, the national margin of appreciation is connected with the principle of subsidiarity. I believe that the concept of subsidiarity used by the Argentine Court here is different from the one taken into account by the Inter-American Court. As expressed in its Supervision resolution, subsidiarity is understood in purely procedural terms: the Inter-American system is subsidiary in the sense that it renders operative once the national instances have been exhausted. The sense that the Argentine judges seem to invoke in the majority opinion is one that seems to overlap with the concept of national margin of appreciation, where subsidiarity is assimilated to deference. Gargarella suggests that both, the principle of subsidiarity and the margin of national appreciation would be in a certain sense the same thing, i.e., recognizing a certain margin of deference to certain state actors. However, Gargarella claims that the principle of subsidiarity refers to the legislatures, while the margin of appreciation doctrine concerns the adjudication process (Gargarella 2016). For the different senses of the principle of subsidiarity see, among others, Jachtenfuchs & Krisch 2015, Føllesdal 2016, and Iglesias Vila 2017.

47. It should be added that the margin of appreciation relates to the institutional decisions of national states that translate conventional norms into domestic norms (for example,

incorporating their texts into the constitutional hierarchy through a constitutional reform, or by issuing specific rules that regulate some rights). This sense is acknowledged by the regulations of the Inter-American Convention itself.

48. Cancado Trindade 2001: 386. For an assessment of the possible use of the margin the appreciation doctrine by the Inter-American Court of Human Rights, see Follesdal 2017.

49. The Argentine Supreme Court in "Fontevecchia" used this argument. See Gargarella 2016.

ABSTRACTS

According to the American Convention on Human Rights, the Inter-American Court is the competent body to "comprise all cases concerning the interpretation and application of the provisions of [the] Convention that are submitted to it". In this normative framework, in 2006 the Inter-American Court introduced the so-called conventionality control doctrine. In doing so, it has not restricted itself to maintaining that municipal judges must control the compatibility of domestic laws with the text of the American Convention, but claimed that they must also take into account "the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention". This view of conventionality control, that also involves a particularly strong notion of international judicial supremacy, constitutes a consolidated doctrine of the international tribunal. However, certain objections seem to be arising around the doctrine and the particular style with which the Inter-American Court exercises it. This paper aims to show that the basis of the doctrine of conventionality control in its current configuration, i.e., the supremacy of both conventional law and the interpretative criteria fixed by the Inter-American Court, may lead to paradoxical consequences and raises doubts concerning the role the Inter-American Court plays today in the adjudication process regarding the Convention. Finally, considering a recent challenging decision of Argentina's Supreme Court, some reformulations of the conventionality control doctrine will be explored.

Nadzor konvencionalnosti in vrhovnost mednarodnega pravosodja. Nekaj pomisli o Medameriškem sistemu varstva človekovih pravic. Na podlagi Ameriške konvencije o človekovih pravicah ima Medameriško sodišče pristojnost nad vsemi zadevami, ki so mu predložene v zvez z razlago in uporabo določb Ameriške konvencije. V tem normativnem okviru je Sodišče leta 2006 vzpostavilo t. im. doktrino konvencijskega nadzora. Pri tem se ni omejilo na stališče, da morajo nacionalni sodniki presojati skladnost domače zakonodaje z besedilom konvencije, temveč je trdilo, da morajo pri tem upoštevati tudi razlago konvencije, ki jo poda Sodišče kot njen poslednji razlagalec. Tovrstno razumevanje konvencijskega nadzora, ki vključuje tudi posebej močno pojmovanje vrhovnosti mednarodnega pravosodja, predstavlja ustaljeno doktrino tega mednarodnega sodišča. Vendar pa so se v zadnjem času pojavili določeni ugovori zoper to doktrino in zoper način, na katerega jo Medameriško sodišče izvršuje. Avtorica te razprave pokaže, da doktrina konvencijskega nadzora v sedanji obliki, ki vrhovnost pripisuje tako konvencijskemu pravu kot razlagalnim kriterijem, ki jih vzpostavlja Sodišče, lahko vodi do paradoksalnih posledic in vzbuja dvom v vlogo Sodišča v sodnih postopkih povezanih s Konvencijo. Ob tem nekaj alternativnih oblik doktrine konvencijskega nadzora avtorica preuči tudi v luči nedavne kritične odločitev Argentinskega Vrhovnega sodišča.

INDEX

Keywords: Inter-American Court of Human Rights, conventionality control, judicial supremacy, legal interpretation, judicial dialogue
motsclessl Medameriško sodišče za človekove pravice, konvencijski nadzor, vrhovnost pravosodja, pravno razlaganje, sodniški dialog

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