The Inter-American Court of Human Rights and Conventionality Control: Dialogue or Dominance?

La Corte Interamericana de Derechos Humanos y el control de convencionalidad: ¿Diálogo o dominio?

Walter Carnota[1]

Abstract: During the past seventeen years, the Inter-American Court of Human Rights (IACtHR) based in San José, Costa Rica, has taken substantial steps to ensure compliance with its decisions. It devised a brand-new tool, known as 'conventionality control' (CC), which bears some resemblance to the judicial review paradigm sketched out by the U.S. Supreme Court in the famous Marbury v. Madison decision (1803). It also has more immediate historical connections with 'control of community law' exercised by the European Court of Justice (ECJ). CC basically compels national judges to uphold both San José de Costa Rica Treaty provisions and Inter-American Court of Human Rights case law.

[1] Ph.D. in Law (University of Buenos Aires), Professor of Institutions of Public Law and Integration Law at the University of Buenos Aires, Academic Director of the Ph.D. in Law at the National University of Lomas de Zamora.

This Court has stressed in the past the need for effective national compliance of its rulings. Now domestic judges are not only bound by their national constitutional and legislative framework, but also by the Treaty and its supra-national interpretation. Tensions mount as Supreme and/or Constitutional Courts are no longer in fact final, at least as far as human rights are concerned. Sovereignty is blurred and constitutional supremacy is jeopardized. Conventionality control discourse is linked to the Latin American cultural and political traditions of ineffective judicial oversight and lack of full enforcement of judicial decisions. However, despite its will, the IACtHR will have to bolster its own political and even administrative performance, if it wants to effectively impose this new standard on national judicial bureaucracies.

Keywords: Inter-American Court of Human Rights. Conventionality Control. Transnational Judicial Dialogue. Domestic Judiciaries.

Resumen: En los últimos diecisiete años, la Corte Interamericana de Derechos Humanos tomó medidas adicionales para asegurarse el cumplimiento de sus decisiones. Con ese objetivo ideó un nuevo instrumento llamado ‘control de convencionalidad’ (CC), que se asemeja al paradigma del control de constitucionalidad elaborado en la famosa sentencia de *Marbury c. Madison* de 1803. Tiene también una conexión más inmediata con el ‘control de comunitariedad’ que ejerce el Tribunal Europeo de Justicia. El CC básicamente obliga a los jueces nacionales a aplicar la Convención Americana de Derechos Humanos y el derecho sentencial de la Corte Interamericana. Esta Corte ha enfatizado en el pasado acerca de la necesidad del cumplimiento de sus sentencias.

Ahora, los jueces internos no sólo están vinculados por las constituciones nacionales y el entramado legislativo, sino por el Pacto y su interpretación supranacional. Los conflictos aumentan a medida que las decisiones de los Tribunales Supremos y Constitucionales no son finales, al menos en materia de derechos humanos. La soberanía se desdibuja y la supremacía constitucional queda amenazada. El discurso del CC está atado a las tradiciones culturales y políticas de América Latina de una supervisión judicial ineficaz y de falta de cumplimiento de las decisiones judiciales. Sin embargo, pese a su voluntad, la Corte Interamericana tendrá que fortalecer su actuación tanto política como administrativa si quiere imponer eficazmente este nuevo criterio en las burocracias judiciales nacionales.

Palabras clave: Corte Interamericana de Derechos Humanos. Control de Convencionalidad. Diálogo judicial transnacional. Tribunales internos.

Recibido: 27.8.2023 Aceptado: 26.12.2023

Summary

1. Introduction

This paper aims to explore the full implications and meaning of a new standard developed by the Inter-American Court of Human Rights (IACtHR) called 'conventionality control' (CC). Many experts and IACtHR case law consider that CC has brought upon a new dimension in the protection of human rights within the Western Hemisphere. It has been used as an absolute rule when dealing with the legal effects of transitional politics. It has cast aside in many countries core constitutional guarantees such as *res judicata*, legality, *non bis in idem*, and other criminal law safeguards when dealing with prosecution of human rights violations. As a result, heightened tensions between the internal legal order (including a country's constitution[2]) and its allegiance to the San José de Costa Rica Treaty of 1969, also known as the American Convention on Human Rights, ensued.

Federal polities such as Argentina, Brazil and Mexico, where decentralized judicial review is prevalent (in contrast to centralized

[2] Mazzuoli (2013:19). This author dwells this conclusion from IACtHR case law (notably, *La Última Tentación de Cristo* v. *Chile,* 2001).

control systems such as Chile's, or dual ones, like, for instance, the Peruvian example) are especially vulnerable. Many judicial layers exist as a direct result of federalism ranging, at the center, from first-instance federal judges to federal Courts of Appeals, or, at the subnational level, from local judges to its highest court. Do in fact all these judicial levels now actively practice CC?[3] Will the IACtHR punish those national bureaucracies which fail to do so? Does the IACtHR have political or even managerial skills to effectively police wayward —or ignorant— judiciaries?

Generally, the extant literature dealing with this brand-new institution has ranged from widespread support of a supposedly by-product derived from Treaty law to 'patriotic' resistance of a covert attempt to impose external power upon national judicial sovereignty. There have been no nuanced approaches focused on its actual effects, neither have studies been conducted on how CC plays out with the emerging transnational discourse between the IACtHR and Supreme and/or Constitutional Courts, or even between the IACtHR and non-apex courts down the line.

[3] To fuel further controversy, the IACtHR maintained that it does not advance 'one specific model' of CC or of judicial review. *Liakat Ali Alibut* v. *Suriname* (2014) (Toledo, 2022:46). This view gives credence to the fact that 'the rooting of a structure of constitutional review is indeed a process of 'legal acculturation' which requires adaptation of many elements of not only legal but also political and socio-legal nature', each of these structures 'having adapted one or the other main theoretical model to its own constitutional environment' (Paris, 2016, 8).

2. Historical Background

When constitutions began to be written in the late 18th century, they lacked a specific device in order to make their provisions stick. Even the U.S. Constitution of 1787 did not include an automatic remedy if authorities failed to comply with its provisions. Constitutions, mainly in the French revolutionary vision, were highly rhetorical. They became political documents, rich in symbolism, which rarely entailed specific legal consequences. As Rohr clearly stated (1995, 11),

> *The French republican principle of rule of law differed markedly from the predominant understanding of the same principle in the United States. For Americans, the Constitution, ratified by the people in 1787-1788, was deemed to be a 'higher law' than statutes enacted by the peoplés representatives in Congress and one to which these statutes should conform. French jurists would concede a certain priority to a constitution over an Act of Parliament in the sense that elected representatives might be expected to observe their constitution. In reality, however, nothing could be done about a wayward parliament that ignored this expectation.*

Historically, the U.S. Supreme Court self-generated this tool (Bickel, 1962, 1; Tribe, 2008, 47) in *Marbury v. Madison*,[4] in order to uphold federal constitutional supremacy. Judicial review became thus the law of the land. Constitutional hierarchy was at last enforceable.

After the First and Second World Wars, many countries chose 'Constitutional Courts' as their preferred venue for constitutional adjudication (Czekoslovakia in 1920, Austria in 1920, Spain in 1931, Italy

[4] 1 Cranch 137 (1803).

in 1948 and 1956, Germany in 1949) (Cappelletti, 1981: 625). Based on the writings of famous Austrian legal scholar Hans Kelsen, many post-Second World War constitutional texts advocated a centralized system of judicial review (the so-called 'second generation Constitutional Courts'). This path was taken again in the 1970s (Portugal in 1976 and 1982; Spain in 1978; Perú in 1979); in the 1980s (South Korea in 1988), in the 1990s (Colombia in 1991; Russia in 1993; South Africa in 1996) and even in this century (Belgium in 2007; Dominican Republic in 2010) by many other countries around the world.

Judicial review may be aptly termed as 'judicialization from without' (Vallinder, 1995, 16). Somehow, at the dawn of the 20th century, it still seemed that national judicial review was inadequate so as to autonomously assure full compliance with decisions. Besides, transnational justice widened its horizons as the century drew to a close, as crimes began to be tried by multiple jurisdictions, mainly in international fora (i.e., the International Criminal Court, ICC) besides domestic tribunals. The former became relevant not only within the international criminal justice system. For example, the European Court of Justice sitting in Luxembourg had been since the early 1960s the main driver for European integration and development of European Law (Tolley, 2010, 231) and started a dialogue with constitutional courts, even preventing national judges to implement domestic legislation against EU treaties and case law (De Vergottini, 2010, 115). Other lesser-known, 'quasi-judicial' bodies, such as MERCOSUR's 'Permanent Review Court' (TPR), have slowly begun to gain visibility in regional trade affairs.

3. The Relevance of the IACtHR

The Inter-American Court of Human Rights experience should not be decoupled from the democratizing process of late twentieth Century. 'By the turn of the millennium, nineteen of the twenty Latin American countries were ruled by the "third wave" of democratization that affected the entire world' (Kline and Wade, 2018, 27). As far as judicial politics is concerned, the hypothesis of 'transnational judicial dialogue' not only implies horizontal interaction among apex Courts. It also involves vertical relationships between domestic Constitutional and/or Supreme Courts, on the one hand, and regional or worldwide jurisdictions, on the other (for example, national courts and the IACtHR, Fix-Zamudio and Ferrer Mac-Gregor, 2009, 82). How binding are universal or regional decisions? Do interactions always lead to supra-nationality, like in the EU? As jurisdictions multiply and overlap, which one will ultimately prevail in the event of conflicting views and policies? How legal globalization plays out with all national judges, not just with apex Courts? Is it more than dialogue involved here? Is the IACtHR adopting a newly conceived 'supremacist' stance? As the IACtHR agenda is rapidly expanding, covering new rights, possible collisions with ordinary public policies may take place, especially since the IACtHR did not develop a 'margin of national appreciation' doctrine as its European counterpart did, which sugarcoats domestic consumption of international standards, making them more palatable to domestic political elites.

Unlike the pre-existing Inter-American Commission of Human Rights, which was founded in 1959, the IACtHR was initially implemented in 1979

as part of the San José de Costa Rica Treaty framework which had been adopted ten years before. Both are integral parts of the Inter-American Human Rights System (IAS), but only the IACtHR is a full-fledged court of law. It is composed of seven judges, elected for six-year terms, drawn on a personal basis from the roster of OAS Member States. They serve part-time and must be 'jurists of the highest moral authority' with substantial human rights expertise.[5] They are based in Costa Rica's capital city of San José. (The Commission is located instead in Washington, D.C., and it is not a court by any means; it mainly performs fact-finding, monitoring, reporting and mediating missions.)

The relationship between the Inter-American Commission of Human Rights and the IACtHR has not been thoroughly studied. Each institution has independently received a fair amount of interest by the extant literature, but strangely enough, scant attention has been devoted to the all-important dynamic between these two bodies. Both are closely intertwined, since the work all the way up to the Court is firstly prepared and then processed by the Commission.

Sometimes, the Commission has displayed a considerable degree of activism which later on prevented litigation at the IACtHR. In 1999, for example, the Commission recommended that Chile should change its 1980 constitutional design, dating back from the Pinochet era, which allowed for eight appointed Senators alongside a plurality of elected ones. Subsequently, Chile amended its Constitution and the Chilean Senate became a fully elected Chamber. The report's majority based its

[5] Article 52 (1), San José de Costa Rica Treaty.

findings on the facial contradiction between an unelected Legislature and political participation rights enshrined in Article 23 of the Treaty. However, it duly noted in passing that its mission did not lay in the constitution-making business, an argument further stressed by dissenting Commissioner Robert K. Goldman.

Argentina had a long, historical dispute within the Commission stemming from claims made by the country's pensioners. During the 1990s, several laws were enacted so as to cap benefits and put a lid on continuous litigation spawned by the fact that inflation and recurrent economic crises had all but eroded Social Security incomes. Pensioners submitted their case to the Inter-American Commission at the start of the century. After almost a decade of endless negotiations, a compromise was struck with the Argentine government, which promised not to appeal lower-echelon judicial decisions which fell under existing Argentine Supreme Court case law. Piecemeal resolutions prevented this plan to ultimately succeed.

Often, the Commission has issued reports condemning amnesty legislation in Argentina, Chile, El Salvador, Haiti, Peru and Uruguay. In several occasions, these recommendations went unheeded by national governments and the Commission had to complain to the IACtHR as a venue of last resort.

By contrast, access to the IACtHR is more restricted, because the San José de Costa Rica Treaty bequeaths standing to sue status exclusively on the Commission and Treaty signatory States.[6] Individuals as such are not

[6] Article 61 (1), San José de Costa Rica Treaty.

empowered by the Treaty to trigger litigation, although significant procedural changes in 2000 and 2009 have given victims enhanced participation[7] during proceedings. Now, NGOs provide substantial support structure and assistance to victims. Originally, the Commission and Member States were the only actors in town.

Gradually, victims have been able to act judicially as such. Now they can file briefs and present evidence to support allegations, although they cannot yet file suits on their own. The Commission, on the other hand, now plays a rather prosecutorial role more than that of an actual party, the letter of the Treaty notwithstanding. These reforms have tried to mollify charges of a 'democratic deficit', which usually have been levelled against the IACtHR, since 'individuals, groups, and NGOs cannot initiate a case before the Inter-American Tribunal' (Antkowiak and Gonza, 2017, 16). In sum, 'in the Inter-American systems, only states and the Inter-American Commission may refer cases to the IACtHR. Judicial justice is thus accessed indirectly, with the Commission acting as gatekeeper' (Hampson, Martin and Viljoen, 2018, 179).

Strategic litigation began in earnest at the dawn of this century, as pensioners, women, aboriginal peoples and other marginalized groups began to reshape the IACtHR docket. These stakeholders sought individual or collective international relief so as to advance their causes in the domestic front. As Scribner argues (2011, 9): 'Despite a spotty

[7] This is part of a global trend. 'Individuals and groups enjoy greater recognition as subjects of international law, as seen in the expansion of legal regimes and enforceable mechanisms in the fields of international human rights law, international refugee law, and international criminal law' (Ip, 2010, 642).

compliance record, supranational rulings provide political and social actors with authoritative rights-based legal arguments and process reform that can be leveraged in the political process to achieve change.'

Human rights had been grossly violated in many parts of Latin America during the 1970s and 1980s prior to democratization. Illegal practices such as abductions, tortures and summary extra-judicial executions were commonplace, since dictatorships mushroomed throughout the region. Despite (formal) constitutional and even international constraints, military governments by-passed these theoretical hurdles and imposed blanket amnesties later on which put constraints on future civilian transitional rule.

The IACtHR advanced interpretation of various rules related to criminal prosecution and procedural guarantees. During its first two decades, its caseload was focused on the tragic disappearance of people under military rule. Many times the Court faced the difficult problem of national compliance of its rulings, as a result of a general resistance to International law by domestic judges. But immediately after it was established in September, 1979, the Court had more pressing concerns: only a small fraction of OAS Member States had admitted its jurisdiction. So the IACtHR first handed down ten advisory opinions (known as OC, for its acronym in Spanish), only after which litigation began in earnest in 1986 (its first decision, *Velázquez Rodríguez*, dates from 1987[8]). As

[8] There was also a factor of 'institutional rivalry' between the Commission and the Court, in which the former would not refer cases to the latter, as described by former judge –and Holocaust survivor- Thomas Buergenthal (2005:269). After the *Viviana Gallardo* mishap as a product of that rivalry, the Commission submitted the so-called *Honduran Cases* to the IACtHR for adjudication. Ventura Robles (2017:5).

doctrines were initially concocted in the abstract, a distinctive 'vague' flavor has pervaded the IACtHR all along since its very founding.[9]

Table No. 1: IACtHR First Twenty Advisory Opinions (OCs)

OC No.	Year	Topic
1	1982	IACtHR Advisory Role
2	1982	Treaty Reservations
3	1983	Death Penalty
4	1984	Naturalization
5	1985	Assn. of journalists
6	1986	Legal Restrictions
7	1986	Right to Reply
8	1987	Habeas Corpus
9	1987	Judicial guarantees during times of emergency
10	1989	American Declaration of Rights and Duties of Man
11	1990	Exceptions to Exhaustion of Internal Remedies

[9] Staton, Jeffrey K.and Romero, Alexia, 'Clarity and Compliance in the Inter-American Human Rights System', Paper presented at the Interim Meeting of the IPSA Research Committee on Comparative Judicial Studies, Irvine, California, July, 2011.

12	1991	Judicial Guarantees
13	1993	Inter-Amer. Commission
14	1994	Intl. Liability of States
15	1997	Reports of Inter-Amer. Commission
16	1999	Consular Assistance
17	2002	Legal Condition of Children
18	2003	Undocumented Migrants
19	2005	Inter-Amer. Commission
20	2009	Ad-Hoc Judges

Domestic judges were at first not entirely persuaded by these IACtHR efforts. Latin American judicial elites had closely followed the 'technical-bureaucratic' pattern during most of the 20th.century, like in many parts of the world (Griffith, 1997, 290). Application of legislation involved a supposedly strictly mechanical and neutral interpretative operation; constitutional (or, even worse for that matter, international) principles were cast aside as irrelevant (Zaffaroni, 1994, 273). International Law was largely seen as a flawed (i.e., toothless) by-product of hegemonic powers such as the U.S., the then existing U.S.S.R., France or Britain (the U.N. Security Council main veto players). Constitutional clauses were reduced to a 'political' status with no legal bite whatsoever.

'External' law such as foreign or international law was blatantly opposed or ignored, so military governments in the area found themselves with scarce (if any) oversight by judicial bodies. In this way, the military enjoyed total control, as they had already managed to wrest away elective (executive and legislative) power from civilians.

From a strictly normative standpoint, enforcement of IACtHR judgments should not pose any significant problem, if one refers directly to Article 68 of the San José Treaty. However, in spite of explicit conventional (i.e. treaty) language, Latin America has a strong tradition of Executive predominance and 'delegative democracy' (to use O´Donnell's terms) which usually hinders, or at least substantially delays, judicial compliance. Recurrent economic crises and emergencies have left Executives —not courts— with the 'last word' (Carraud, 2005, 175).

Subsequently, more litigation at the IACtHR took place, as part of the 'rights revolution' experienced elsewhere.[10] Statistics show that from 2000 up to 2003, seven rulings were issued per year by the IACtHR, with the exception of 2001 (20 rulings). Twenty decisions were handed down in 2005 and twenty-three in 2006 (Caputi and Salvatelli, 2010, 160). From 1987 to 2003, the IACtHR decided 35.71% of total cases, but from 2003 up to 2009, the Court solved the remaining 64.28%. Topics also shifted

[10] It has been argued that in U.S. history, 'passage of the Civil War Amendments, arising as they did from the long slave-emancipation struggle in which the language of rights figured prominently, contributed greatly to the connection between the Constitution and rights aspirations in popular culture' (Epp, 1998, 31). Writing about Argentina, Smulovitz observes that 'in the early 1980s, Argentine society discovered the benefits of the law. The visibility of the trials against the junta commanders due to human rights violations and other trials that took place in that period transformed the perceptions of the law and the role of the judiciary' (2009, 75).

from the classical, dictatorships-era disappearances cases, to more 'social-oriented' issues (Aguilar Cavallo, 2010, 3), including pensions, indigenous people's rights, gender discrimination and the environment, a trend which accelerated later on in the 2010s. IACtHR case law started to increase dramatically both quantitatively and qualitatively in the early 2000s. Its doctrines began to have a self-proclaimed 'evolving' character and nature. As Pasqualucci concludes (2003, 12): 'The increasing breadth of rights litigated is important for the evolution of the Inter-American human rights system in that the Court's caseload is coming to reflect the spectrum of rights protected by the Convention.'

Additionally, increasing recognition of multiculturalism in recent Andean constitutions (i.e., Ecuador and Bolivia), triggered new conflicts between indigenous customary law and IACtHR case law.

Latin American Constitutional and Supreme Courts (in centralized and decentralized adjudication scenarios) have begun to rely on IACtHR precedent for their own rulings.[11] Domestic judicial actors realized that these new criteria enjoyed widespread recognition, since this body of law sprung from the democratization process of the 1980s. The Court became in this way a source of new human rights judicial stances in both its adversarial and advisory[12] roles. Member States were now more eager to abide by Inter-American Court standards not only out of its prestige; they also had their own stake on its membership, even though judges do

[11] IACtHR decisions have an 'international' character, not a 'foreign' streak (Mazzuoli, 2015, 143).

[12] Even Canada alluded to IACtHR advisory powers in the Quebec Secession Reference Case of 1998. On Canadian Supreme Court Advisory Opinions, Mathen (2019). Belize has quoted IACtHR case law even though it does not acknowledge its jurisdiction.

not formally represent States on an official capacity because they are selected on grounds of personal and professional intellectual proficiency.

Furthermore, the so-called 'new constitutionalism' school of thought places enormous confidence in judges to advance democracy (i.e., the military junta trial in Argentina in 1985). Restorative justice (such as the Pinochet affair showed after his detention in London in 1998) became relevant in many Latin American post-authoritarian processes (Hirschl, 2004, 191). One of the core tenets of 'new constitutionalism' is that new human rights may be unearthed by judges[13] and that is not deferent to legislative action (Santiago, 2010, 178).[14] Many Latin American high courts (now frequently quoted by the IACtHR), notably, Colombia and to a lesser extent, in Argentina and Costa Rica, have followed 'new Constitutionalism' overtly or as a hidden influence (Carbonell, 2007, 11). The subtext of many IACtHR decisions has a distinctive 'new constitutionalism' tone, sometimes even explicitly quoting its leading scholars such as Italian legal philosopher Luigi Ferrajoli.

Language used by the IACtHR in many of its rulings reflects the inflections and nuances of 'new constitutionalism'. Arguments such as the salience of human rights, the relevance of *ius cogens* and the demolition of barriers regarding national legal orders have all been standard fare in most IACtHR decisions and advisory opinions.

Several Latin American high courts, like Argentina's, have frequently resorted to human rights, framing disputes in 'rights talk' and choosing to

[13] Contrary to this belief, the Constitution of Bolivia (2009) emphasizes 'original intent' as an optimal method of interpretation (Article 196, section II).
[14] Conversely, it is prone to judicial activism.

defer to Inter-American case law, in a so-called 'plurality of constitutional sources' context (Lorenzetti, 2010, 5). For instance, Argentine Supreme Court Justice Enrique Petracchi, despite personal doubts, had cast his vote upholding Alfonsin's 'due obedience' legislation in 1987, sparring in this way lower-ranking military officers of trials (Helmke, 2005, 134). However, in 2005, he voted to strike down this law (*Simon*), echoing the Inter-American Court of Human Rights key decision in *Barrios Altos v. Perú*.

As Sikkink (2011, 274) observes:

> *The sentences of the Inter-American Court also provided jurisprudential resources for more activist judges in domestic cases against the amnesty laws before domestic courts. When human rights lawyers brought cases against the amnesty laws before domestic courts, some judges began to declare such laws contrary to domestic and international law.*

4. Origins and evolution of CC

CC is patterned after classical judicial review (some legal scholars effectively erase the boundaries of both: see Moroni Romero, 2011, 67). Just like legislation was to be consistent with the Constitution, as stated in *Marbury*, all internal norms (including a country's Constitution) should now be in sync with the San José de Costa Rica Treaty, an international convention signed under constitutional authority. Some authors even refer to CC as a 'regional *Marbury*' (Abel, 2011, 1), or as a stepping stone towards building up regional law (Trebucq, 2011, 1).

Simple as it seems, CC poses huge political and legal dilemmas: How does it square with a country's constitutional setting, should conflicts with the Treaty arise? Are Member States conceding a considerable amount of sovereignty in the name of a vague construction concocted by the IACtHR? Should essential Criminal Law principles such as non-retroactivity and *res judicata* be left aside entirely if the IACtHR says so in order to effectively punish military perpetrators against basic human rights, or should they always be preserved against all odds since due process is an integral part of the entire human rights package?

CC origins can be traced back to two concurring opinions written by IACtHR Judge Sergio García Ramírez in the cases of *Chang v. Guatemala* (2003) and *Tibi v. Ecuador* (2004) (Abel, 2011, 1; Hitters, 2010, 12). The judge's personal history is also relevant here. Garcia Ramirez was a Mexican politician closely aligned with the infamous Revolutionary Institutional Party (PRI), which had dominated the Mexican political scene for more than 60 years. He first served as Labor Secretary in the late 1980s. Then, in 1994, he lost a primary challenge to Jorge Salinas de Gortari, who afterwards became the country's ill-fated President (in fact, he was the last PRI Head of State, his government ridden with corruption scandals and economic crises). Three years later, García Ramírez became an IACtHR judge. In some academic writings, he hinted at what eventually would become CC. At the start of the century, he wrote a chapter in a four-volume treatise, in which he proposed future trends for the IACtHR (García Ramirez, 2003, 1587). He emphasized the distinction between 'constitutionality' and 'internationality', stressing that States could

internationally be held liable if treaty obligations were not met, even in the absence of domestic sanctions. These ideas would be the cornerstones of CC in his (now well-known) judicial concurrences in 2003 and 2004. García Ramírez (2011, 2) showcased the IACtHR 'as court of big cases —leading cases— involving or suggesting big definitions. Expectedly, these decisions will be taken and understood as binding and not merely advisory, and they will permeate internally into laws, judicial decisions, public policies and finally, culture.'

CC could be easily construed as one of these 'big definitions' its creator craved for. IACtHR-wide acceptance of this doctrine started with the *Almonacid Arellano* case decided on September 26, 2006. Mr Almonacid Arellano had been a Chilean Communist Party activist who was killed at the outset of the military government of Pinochet which grabbed power in September, 1973. His killers were set free under amnesty legislation. The transnational Court eventually held that Chile breached its obligations under Articles 1, 2, 8 and 25 of the (Inter) American Convention on Human Rights, since it had kept on the books the amnesty decree passed by the Pinochet government which impeded Mr Arellano's murderers to be prosecuted and convicted. Civilian courts (even the Chilean Supreme Court) had been adamant to wrest these cases away from military control.[15] In sum, the Inter-American Court found Chile in violation of judicial access and independence treaty provisions.

[15] Chilean scholars such as Andrés Bello, Jorge Hunneus, Alejandro Silva Bascuñan, Enrique Silva Cimma and Patricio Aylwin classically espoused the view that international treaties rank on a par with internal laws (Mohor Abuauad, 2001, 122).

Cases such as *Almonacid* have reappeared in many parts of Latin America during the political transition to democracy. In Mexico, for example, the Supreme Court handed down a decision in *Los Halcones* (Becerra Ramirez, 2006, 205), where it refused to apply international standards which consider that genocide and related crimes fall outside the statute of limitations perimeter.[16] *Almonacid* in Chile posed similar questions, as *Arancibia Clavel* (2004) and *Mazzeo* (2007) did in Argentina. This decision was an extraordinary slap in the face to the Chilean transition, as it forced authorities to cope with the realities of an unsavory past.

All these claims pit internal due process constitutional clauses (which hold that criminal rules are prospective: Reynolds, 1987, 99) against international customary and conventional norms that specify that murder in a genocide context is not covered by statute of limitations provisions. Generally, national courts argue that considerable time has elapsed since these crimes were committed and that prosecution cannot be easily carried out. Many reply that these crimes have universal effects (Cassese, 2003, 318) and must not remain unpunished because of formal or procedural technicalities.

This first batch of CC prose came in rather tepidly, as the IACtHR stated that it was exercising 'a sort of' CC. Subsequent decisions showed more boldness, as the Court reasserted itself and affirmed CC. On Nov. 24, 2006, the IACtHR repeated its 'conventionality' holding in *Trabajadores*

[16] A substantial constitutional reform amended Article 1 of the venerable Mexican Constitution (written in 1917), giving prominence to human rights and the *favor persona* standard.

Cesados del Congreso (Aguado Alfaro et al.) v. Peru. Here, the regional Court had to grapple with the status of 257 Peruvian legislative workers who had been fired by the Alberto Fujimori government in 1992 when it shut down Congress. On Nov. 29, 2006, CC was used again in *La Cantuta v. Perú* (involving this time amnesty legislation), and one year later, on November 20, 2007, the IACtHR applied the CC yardstick again, this time in a death penalty case against Barbados[17] (*Boyce v. Barbados*), even calling the British Judicial Committee of the Privy Council (JCPC) and the Caribbean Supreme Court to task for not fully assessing the impact of Barbados' international obligations. The Court reiterated its 'conventionality' parameter later on, in cases such as *Heliodoro Portugal v. Panama* (2008) and in others involving Mexico (2009), Colombia (2010), Mexico again (three times in 2010), Paraguay (2010), Bolivia (2010), Panama again (2010), Brazil (2010), Uruguay, Venezuela (2011) and Argentina (2012).

Paraguay's case is quite revealing of new IACtHR interests. The Court found Paraguay guilty not only of breaching typical procedural guarantees (this time, against an indigenous community), but also for not protecting aboriginal communal property and discriminating against the Xakmak Kasek people.

Also significant among the newer cases is *Velez Loor v. Panama*. This decision addressed a rather new subject for the Court, namely the

[17] Barbados is the only former British colony member of the OAS which still recognizes IACtHR jurisdiction (Trinidad and Tobago bailed out precisely on dealth-penalty grounds: Parassram, 2001, 847).

situation of undocumented migrants.[18] Jesús Velez Loor, an Ecuatorian national, had unlawfully entered Panama in 2002. He was detained, tortured, and convicted without due process of law. Finally, the IACtHR awarded Mr.Velez Loor money reparations. Panama was also ordered to investigate into his allegations of torture and found that the country's migration legislation was inconsistent with the treaty.

Brazil's 1979 amnesty law (Law Number 6683) was deemed 'unconventional' in the famous *Gomes Lund* case, decided on November 24, 2010. Amnesty legislation had been upheld by the STF when it ruled on a suit brought on by the Brazilian bar association, but instead the IACtHR found Brazil in violation of several Treaty of San José clauses related to criminal procedure guarantees and freedom of speech, requiring Brazilian authorities not to impede investigation and punishment of human rights violations committed against the guerrilla uprising in the Araguaia River region.

The case against Uruguay (Gelman) in 2011 went to the heart of concerns about the scopr of CC under democratic governance. It deemed that this country's Expiration Law was 'unconventional', in the same vein its Supreme Court had previously struck it down as unconstitutional in another case (Sabalsagaray Curutchet). However, it stated that majority rule (the Expiration Law had been supported by two referenda in 1989 and 2009) would not stand in the way of CC (paragraph number 239). CC

[18] Previously, seven years before, the IACtHR had issued an advisory opinion regarding the status of undocumented migrants (see Table No.1).

trumps democracy? Subsequently, the Uruguayan Congress repealed the Expiration Law so as to adapt the country to IACtHR guidelines.

Table No. 2: List of cases where 'conventionality control' was part of reasoning (2006-2011)

Date	Plaintiff	Defendant State
09-26-2006	Almonacid Arellano	Chile
11-24-2006	Trabajadores Cesados Del Congreso (Aguado Alfaro *et al*)	Peru
11-29-2006	La Cantuta	Peru
11-20-2007	Boyce	Barbados
08-12-2008	Heliodoro Portugal	Panama
11-23-2009	Radilla Pacheco	Mexico
05-26-2010	Manuel Cepeda Vargas	Colombia
08-24-2010	Xakmok Kasek	Paraguay
08-30-2010	Fernandez Ortega	Mexico
08-31-2010	Rosendo Cantu	Mexico
09-01-2010	Ibsen Cardenas and Ibsen Peña	Bolivia

11-23-2010	Jesus Velez Loor	Panama
11-24-2010	Gomes Lund	Brazil
11-26-2010	Cabrera Garcia and Montiel Flores	Mexico
02-24-2011	Gelman	Uruguay
09-01-2011	Leopoldo Lopez Mendoza	Venezuela

Table No. 3: Main issues concerning each CC case

Case	Main Issue	Secondary Issue
Almonacid Arellano v. Chile	Amnesty Legislation	Judicial Guarantees and Protection
Trabajadores Cesados del Congreso v. Peru	Judicial Guarantees and Protection	-
Boyce v. Barbados	Death Penalty	Judicial Guarantees and Protection
Heliodoro Portugal v. Panama	Disappearance of People/ Extra-Judicial Killings	Judicial Guarantees and Protection
Radilla Pacheco v. Mexico	Disappearance of People	Judicial Guarantees and Protection

Manuel Cepeda Vargas v. Colombia	Extra-Judicial Killing	Judicial Guarantees and Protection
Xakmok Kasek v. Paraguay	Indigenous Lands	Judicial Guarantees and Protection
Ines Fernandez Ortega v. Mexico	Sexual Assault and Torture	Judicial Guarantees and Protection
Valentina Rosendo Cantu v. Mexico	Sexual Assault and Torture	Judicial Guarantees and Protection
Ibsen Cardenas And Ibsen Peña v. Bolivia	Disappearance of People	Judicial Guarantees and Protection
Jesus Velez Loor v. Panama	Undocumented Migrants	Judicial Guarantees and Protection
Gomes Lund v. Brazil	Amnesty Legislation	Judicial Guarantees and Protection
Teodoro Cabrera Garcia et al v. Mexico	Torture	Judicial Guarantees and Protection
Gelman v. Uruguay	Amnesty Legislation	Judicial Guarantees and Protection

Lopez Mendoza v. Venezuela	Political Rights	Judicial Guarantees and Protection

As Table No. 2 vividly shows, there are always a cluster of human rights involved in these disputes (mostly deriving from rights affected by the military before democratization began). However, judicial behavior and performance was also being screened, and in the case of *Trabajadores Cesados*, it was the main right in question. Professor Alexandra Huneuus, of the University of Wisconsin at Madison, concludes (2010, 108) that

> *Because of the requirement to exhaust local resources unless those resources are somehow inadequate, the Inter-American Court often ends up judging local judiciaries. In addition, claimants often turn to the Inter-American System with claims of due process violations, and the Inter-American Court has repeatedly asked national courts to reopen closed cases.*

CC is theoretically rooted in the core of international law, namely *pacta sunt servanda* (the binding nature of international treaties), good faith interpretation of international obligations and the ban on the use of internal norms to bypass bilateral or multilateral agreements so as to render them effective (the so-called principle of *effet utile*). This doctrine was not entirely new: the EU had spearheaded *sua sponte* 'community control' when the ECJ issued its Simmenthal decision in 1978 (Fernandez Segado, 2009, 1367).

According to international law, domestic rules are mere 'facts' with no overriding power over it.[19] Do judges suffer, as Sagües suggests (2010, 1247), a 'divided loyalty' syndrome, having to choose between their allegiance to the national Constitution and their observance of the San José de Costa Rica Treaty?

CC thus had initially a two-fold meaning: a) as a centralizing weapon of the IACtHR so as to consolidate its body of case law; b) as a decentralized burden put on the shoulders of national judges to adapt its decisions to IACtHR criteria (Ferrer-Mac Gregor, 2010, 185). Like in many transnational justice settings (Roth-Arriza and Bernabeu, 2009, 297), the IACtHR is undergoing a 'hybridization process' by which its influence is being absorbed by national judiciaries, and even by non-judicial actors (*Gelman v. Uruguay*, 2011, which requires CC to be implemented by all state actors).

5. Legal Implications

From a legal standpoint, centralized CC presents significant challenges for decentralized judicial review systems (such as Argentina's and Mexico's), where there is no unique apex court dealing with constitutional matters and, conversely, where all ordinary judges are

[19] Conversely, there was a time when foreign law was deemed just for internal procedural purposes as a fact', since absolute territoriality prevailed (e.g. Article 13 of the former Argentine Civil Code). This attitude sternly contrasts with contemporary mores; foreign sources of interpretation 'may' now even called in, as Article 39, South African Constitution (Klug, 2006: 289) shows.

empowered with broad constitutional screening powers on a case-by-case basis such as in the United States after *Marbury*.

CC has been an easy way-out for national apex Courts to effectively transfer judicial responsibility to the IACtHR. This transnational body wields considerable influence and prestige, since it is perceived as less corrupt and more insulated from domestic petty politics. John Stack observed (2005, 131) that '[t]he Court speaks with a moral authority that no other hemispheric institution can muster -embracing the rule of law, fundamental due process concerns, and the steadfast conviction that state power must be held accountable to open democratic institutions'.

By often quoting the IACtHR, national courts are able to put the blame on the San José Court and avoid paying internal political costs should conflicts flare up. But not all the talk surrounding CC was crystal-clear from the very beginning. As Bianchi (2010, 1091) points out, CC 'may be a harmless and simple play of words, or it can mean a dangerous loss of judicial sovereignty.'

Some authors realistically observe that the IACtHR is presently ill-suited for such a momentous task. Its decisions are not widely published and fully reported (except perhaps for the Court's own revamped website); its holdings are extremely long (Sagués, 2010, 1246) and vaguely worded; decisions are dotted with confusing *dicta*; concurring and dissenting opinions abound; structurally, the Court lacks adequate financing (Pasqualucci, 2003, 346) and handles a crowded docket. As mentioned before, stakeholders do not have direct access to

seek redress (Vivanco, 1994, 86, Landa Arroyo, 2005, 28), as Europeans do.

In spite of its considerable weight, some national Courts have attempted to sugarcoat or even challenge San José rulings under the guise of interpretation. Professor Alexandra Huneeus shows in comparative fashion how the Chilean Supreme Court, the Argentine Supreme Court and the Supreme Tribunal of Venezuela engaged in games of rebellion (Huneeus, 2010, 112).

These three cases in fact tell very different stories. The Chilean judiciary acted until *Almonacid Arellano* in a conservative bent, while the Venezuelan Court was illustrative of the so-called Latin American 'New Left'. The Argentine Supreme Court, contrary to what Huneeus suggested, was not interested in the outright rejection of San José de Costa Rica rulings. On the judicial proceedings under consideration (*René Jesús Derecho*), the Argentine Court kept a safe distance from what it was a complex statute of limitations issue. It acted indifferent rather than defiant.[20] The Argentine Court usually toed at the outset of CC the IACtHR line (*Mazzeo* in 2007; *Videla* in 2010) even without any request by the parties involved. This peaceful coexistence would briefly come to an end

[20] In 1999, the Peruvian Congress revoked IACtHR jurisdiction (Salado Osuna, 2004, 73), but after the Court´s refusal, the post-Fujimori transitional government of Valentín Paniagua switched gears and retook it (Fix- Zamudio, 2002, 33). As hostility increased between Trinidad and Tobago and the IACtHR, this country also opted out, for good.

with the *Ministerio de Relaciones Exteriores* decision rendered by the Argentine Supreme Court in February, 2017.[21]

Venezuela openly defied an IACtHR ruling which ordered three senior judges to be reinstated or compensated (*Apitz Barbera*). The Venezuelan Supreme Court did not only refuse to abide by this decision; it even asked the country's President to withdraw the country from the IAS (Inter-American System of Human Rights) completely (Brewer Carias, 2009, 133). There is a brand of the Latin American left that happens to be stridently nationalistic (Madrid, 2010:589), and this episode provides a good example of it. In September, 2011, another interesting case arose also against Venezuela, this time involving specifically CC. The plaintiff argued in Lopez Mendoza that his political rights had been impinged upon, since administrative proceedings prevented him to run for mayoral office despite the fact that the San José Treaty only accepts criminal convictions as a bar against candidates. The IACtHR finally ruled against Venezuela, following the letter of Article 23 of the Treaty.

In many cases, the IACtHR is blocking any interpretative margin by throwing out domestic qualms and establishing a unique valid yardstick (the one created by the IACtHR itself). Hard cases are reduced to simple 'black and white', pre-ordained options, with little room for maneuvering more nuanced solutions, especially when amnesties are at stake (Elias, 2011, 181). The Court conceived CC in a general and nebulous way;

[21] The IACtHR subsequently insisted that it could nullify domestic judicial decisions and the Argentine Supreme Court followed the IACtHR line via administrative fiat. Nonetheless, it was firmly established by both Courts that the IACtHR was not a 'fourth instance' of sorts.

commentators and scholars throughout Latin America have tried to 'read in' more contents (Rey Cantor, 2008; Nogueira Alcalá, 2007; Quinche Ramirez, 2009) as key decisions were handed down (*Almonacid* and its sequels) with no clear guidelines stemming from these first collection of cases.

Because the Court has historically lacked sufficient political support from the OAS (Pasqualucci, 2003, 343) (the umbrella under which the whole system operates), it performs as a highly atypical and unorthodox body with covert political overtones. The Court aims to foster a 'human rights culture' and pursues 'constitutionalization of the San José Treaty' (Hennebel, 2009, 91), despite its own denials. More than legal arguments are involved here. For instance, there is a scarce relationship between CC and the legality principle as defined in a constitutional document; rather, CC is poised to assure international law (and, by extension, IACtHR) predominance.

Theoretically, CC does not address the problem of internal validity of laws;[22] it must just examine their consistency with international law standards (Seminara, 2009, 358), so as to make them practically effective (*effet utile*). It is firmly based in *ius cogens*, which consists of the body of international law peremptory customary rules. Fassbender explains (2007, 278):

[22] Sometimes, the IACtHR considers internal remedies as ineffectual (*Furlan* v. *Argentina*).

> *The ius cogens perspective of international constitutional law is a particularly value-oriented one because all the rules presently recognized as ius cogens (in the first place, the prohibitions on genocide, aggression, slavery, and of trading in human beings, and the rights of peoples to self-determination) are substantive in nature and have a human rights dimension.*

Fifty years ago, the U.S. Supreme Court elevated one of its landmark rulings —*Brown v. Board of Education of Topeka*— to 'supreme law of the land' status in *Cooper v. Aaron* (1958) (Whittington, 2007, 3; Tribe, 2008, 17); likewise, the IACtHR is working under a similar assumption, blending the San José Treaty with its own interpretation of it. The pattern is similar to Cooper's holding.

It is evident that along this way frequent tensions between international law and domestic procedures sprung from territoriality and sovereignty occur (Sieghart, 1997, 47) as the *Artavia Murillo v. Costa Rica* case on *in vitro* fertilization demonstrates CC spawns vertical, general and top-down relationships between the IACtHR and national judges, irrespectively of rank or jurisdiction. As a result, the IACtHR is prone to confer controversial abstract and expanding effects on its decisions (Hitters, 2008, 154), beyond explicit Treaty of San José language, as I will later examine on the topic of social rights since 2017.

Another crucial legal taxonomy distinguishes 'repressive' CC (as the one sustained in the first cases) from 'constructive' CC (*Radilla Pacheco*, ruled in 2009, and its saga), the latter involving an interpretative reading 'in accordance with' the Treaty and IACtHR case law (Sagüés, 2017:372). A

parallel distinction involves the consequences of *res judicata* (between the actual parties of an adversarial case) and an irradiating effect of *res interpretata* (a persuasive vein of IACtHR decisions).

One of the main issues to deal with is whether a real and frank judicial dialogue will occur, or if a 'monologue' will take place instead (Contesse, 2017: 425), failing to establish proper connecting 'bridges' between the IACtHR and national legal orders (Paul Díaz, 2019, 77).

6. Political Implications

By sharing IACtHR criteria, some high courts may not only strive for a greater degree of legitimacy, but may also be looking for an 'insurance policy' (to borrow from Tom Ginsburg's famous catchword) should rulers turn against them in unstable, hyper-presidential contexts like it happened in Perú and Venezuela (*Tribunal Constitucional*, *Apitz Barbera*), where the San José Court had to step in so as to assure some semblance of judicial independence. These High Courts will not 'strategically defect' (Helmke) from the IAS, since it may prove useful for their own political survival later on in the future.

Using the decentralized approach as well, the IACtHR is clearly starting a conversation with national judiciaries across the board, not only just with apex courts, trying to enlist their support as spokespeople for the IAS. More transparent judicial selection processes and longer job stability for judges in the Western Hemisphere make lower courts an ideal audience for the IACtHR to push forward its democratization

agenda which began in the 1980s. Many lower-instance judges may be eager to continue IACtHR judicial stances in the process.

Courts act strategically in general (the U.S. Supreme Court has been studied extensively on this field), and the IACtHR is no exception to this rule. 'Strategic' decision-making means interdependent choice: an individual's action is, in part, a function of her expectation about the actions of others' (Epstein and Knight, 1998, 12). This feature is accentuated in the context of an international court, which deals with independent States. But as Baum persuasively argues (2006, 60), audience-oriented models may trump purely strategic ones:

> *Perhaps more important, a perspective that incorporates judges interest in what their colleagues think of them leads to expectation that differ from those of strategic models…judges can be expected to cooperate with their colleagues more than strategic considerations alone would dictate. Because judges value the regard of their colleagues for its own sake, they take opportunities to demonstrate friendliness and good will.*

Decentralized CC invites all judges to engage in transnational judicial discourse and action. There is an 'expanding research agenda in judicial politics that explores interaction between judges facing multiple and shifting audiences and an increasingly complex political and legal environment' (Scribner, 2011, 272). Clearly, the regional Court is entering a second phase in its quest for more aggressive decision compliance, shoring up its legacy and identifying potential enforcers. Former Mexican Supreme Court Justice José Ramón Cossío Díaz (2009, 160), notes that 'the possibility of recognizing the existence of more than one authorized

interpreter of regional human rights treaties opens up completely new ways of building up protection for human rights in the region'.

The IACtHR is not primarily intent on fully replacing national apex courts, since at least in theory it has no bearing on the architecture of domestic institutions. Its core is the San José de Costa Rica Treaty, and its context is the IAS. However, it seems to be exerting a 'supremacist stance' (with an activist streak, akin to the Marbury Court: Goldstone, 2008, 234), which is a rather weird path for a rather weak court to take, where no gray areas seem to exist in conventional interpretation. In fact, it presently lacks strength to entertain, for instance, lower-intensity scrutiny standards such as managerial or experimentalist review. Evidently, the IACtHR is engaging in something more than transnational judicial discourse when it brandishes CC as forcefully as it has done in the recent past. Perhaps, as examined in regard to the South African Constitutional Court (Young, 2010, 420), the IACtHR is involved in 'peremptory review' closely associated with a supremacist Court seeking to achieve political transformation through punishments and rewards to national governments. A *bona fide* reading of the San José Treaty will keep the CC muscle at bay; perceived resistance to its clauses (and to its IACtHR authoritative interpretation), on the other hand, may result in overturning national legislation as 'unconventional.'

Will CC fully invade other non-traditional areas of adjudication such as economic and social rights, as the last years suggest? Will the IACtHR strike down regressive social legislation as 'unconventional'? Is 'conventionality' limited to the San José Treaty or it may otherwise

encompass all remaining Inter-American human rights treaties as well, as Carlos Ayala (2016, 323) advocates? Will the IACtHR finally 'redeem' the Treaty of San José before the eyes of skeptics?[23]

CC poses the difficult question of defining the exact boundaries between national judiciaries and the IACtHR. Now it has become a judicial body mainly involving Civil Law countries, but with a Common Law streak of robust judge-made rules.

7. The Last Decade (2013-2023)

As a matter of fact, the last ten years (2013-2023) attest to a vigorous reaffirmation of CC as a cornerstone in the IACtHR judicial process in both its contentious and advisory facets. Three principal variables can be highlighted in this regard:

A. CC is seen as part of a wider transformative phenomenon. CC is not only a means to an end, an effective instrument to spur judicial uniformity, but also an effective device of Inter-American supremacy *vis-à-vis* domestic actors, mainly courts. IACtHR Judge Eduardo Ferrer (2017, 321), a key agent in this whole process, explains:

[23] Working under the premise that the U.S. Constitution is not a finished document, Balkin (2011) argues that it will eventually be 'redeemed' of sins past (slavery) and present (inequality). A similar case may be made for the Treaty of San José, often criticized as ineffectual.

> *The CC has become one of the most important engines for the construction of a Ius Constitutionale Commune in Latin America. As a legal institute that strengthens jurisprudential dialogue between domestic institutions and the Inter-American Court, it promotes the creation of a common human rights standard in the states parties to the Convention…Considering that the doctrine of CC fosters the evolution and effectiveness of this common constitutional law, it is undoubtedly one of its core mechanisms.*

Constitutional provisions are superseded by CC worries. As a result, some authors write about a 'conventionalized Constitution' (Sagüés, 2016: 13). National Constitutions act as recycled documents with Treaty and IACtHR ingredients. Dialogue gave way to a new Inter-American legal setup. Constitutional law has now an arch monist, 'internationalist' flavor and CC is at the heart of increased harmonization and even overlapping.

B. New rights have been discovered by the IACtHR, accentuating previous trends in matter-jurisdiction expansion. Health concerns were addressed in *Poblete Vilches v. Chile* (2018) and *Cuscul Pivaral v. Guatemala* (2018), labor claims were highlighted in the pivotal case of *Lagos del Campo v. Perú* (2017), and pension mobility rights in *Muelle Flores v. Perú* (2019). The 'social agenda' of the Court emerged with force and even passion, causing in turn dissonant voices within IACtHR ranks, since the San José de Costa Rica Treaty catalog is not explicit in this area. The Court acted as a 'positive legislator,' echoing global trends everywhere (Brewer-Carias, 2011). Several dissenting and concurring opinions of judges filed in those cases (for instance, by Humberto Sierra Porto and Eduardo Vio Grossi) point out that vacuum, stating that interdependence and indivisibility of

Article 26 claims within the Convention textual framework is an 'act of creation' rather than of strict adjudication, objecting to direct justiciability of economic and social rights under Article 26 of the Convention (De Paz González, 2018, 160). Access undoubtedly has become more fluid, spawning definitional confusion in the midst.

Subject-matter expansion is also evident in the last Advisory Opinions issued by the IACtHR. The Court began to deal with groups rights (OC 22/2016), environmental concerns (OC 23/2017), same-sex discrimination (OC 24/2017)[24] and the like, emphasizing that CC is also possible within the advisory realm.[25]

C. Subsidiarity is increasingly in conflict with CC, since it ate away many national competences over human rights (López Latorre and Ibarzábal, 2018, 468).

8. Concluding Remarks

The foregoing analysis suggests that CC is not as innocent or benign as it looks at first glance. It has huge legal and political implications, as closer interactions between the IACtHR, national Supreme or Constitutional Courts, and all other domestic non-apex courts become apparent. It can be an effective way of introducing IACtHR criteria to the

[24] Previously, it had been addressed on CC grounds in the *Atala Riffo* contentious case against Chile (2012). Labor discrimination was pitted against religious beliefs in *Pavez Pavez* v. *Chile* (2022), sparking another individual opinion by Judge Sierra Porto based on non-justiciability of the plaintiff's claim before the IACtHR.
[25] For instance, in OC 22/2016, the IACtHR asserted that Advisory Opinions act as preventive CC tools.

lower ranks of the judiciary, where activism is more aggressive and visibility is not as prominent as in high courts. Local judges also are bent on cleaning up their act, so following the IACtHR line could provide a fruitful strategy for both Inter-American and national courts in search of greater legitimacy. The IACtHR devised an interesting ploy which by-passes supreme and constitutional courts, and triggers direct transnational judicial dialogue without any middlemen. Legal reasoning behind CC is cumbersome, a complex mix of principles such as *pacta sunt servanda*, *effect utile*, good faith and *pro persona* standards, which often run in full circle. There is no explicit or even implicit derivation from treaty language so as to institutionalize IACtHR intervention.

Drawing from the functionalist, Mertonian dichotomy of manifest and latent functions, it can be concluded that uniformity within the IAS performs as the manifest function so as to prevent multiple interpretations of human rights problems throughout the continent. However, latent functions are typically less visible, but nonetheless present in CC: the necessity to streamline the Court's docket with 'big cases' and avoid future litigation in all levels of national judiciaries.[26] The relationship between the IACtHR and ordinary (i.e., non-apex courts) has not been fully studied yet, so CC is an indispensable starting point for future scientific research in Latin American comparative judicial politics dealing with 'top-down' emerging solutions.

Evidently, there is, indeed, a limit 'of "dialogue" as a metaphor for inter-level court interaction' (Daly, 2017, 16). CC is part of a dynamic,

[26] CC is a 'duty' (*Urrutia Laubreaux* v. *Chile,* 2020) bestowed upon all state organs.

innovative and fluid endeavor, an unfinished by-product (Ramelli Arteaga, 2019:104) of a larger enhancement project in the Americas regarding human rights.

References

Abel, Federico (2011), 'El control de convencionalidad como mecanismo para la integración entre el Derecho interno y el Derecho interamericano', La Ley, May 20.

Aguilar Cavallo, Gonzalo (2010), 'La Corte Interamericana de Derechos Humanos y los derechos sociales', in Revista Iberoamericana de Derecho Procesal Constitucional, no 13.

Antkowiak, Thomas M.and Gonza, Alejandra (2017), *The American Convention on Human Rights (Essential Rights)*, Oxford University Press.

Ayala, Carlos (2016), 'The judicial dialogue between international and natiponal courts in the Inter-American human rights system', in Schenin, Martin ; Krunke, Helle and Aksenova, Marina (Eds.), *Judges as Guardians of Constitutionalismn and Human Rights,* Elgar Publishing.

Balkin, Jack M., (2011), *Constitutional Redemption (Political Faith in an Unjust World),* Harvard University Press.

Becerra Ramírez, Manuel (2006), 'Comentarios sobre la sentencia de la Suprema Corte de Justicia de la Nación en el caso de Los Halcones', in Cuestiones Constitucionales (Revista Mexicana de Derecho Constitucional), no. 14.

Baum, Lawrence (2006), *Judges and Their Audiences (A Perspective on Judicial Behavior)*, Princeton University Press.

Bianchi, Alberto (2010), 'Una reflexión sobre el llamado 'control de convencionalidad", in La Ley, vol. E.

Bickel, Alexander M. (1962), *The Least Dangerous Branch: The Supreme Court at the Bar of Politics,* Bobbs-Merrill.

Brewer-Carias, Allan R. (2009), 'La interrelación entre los Tribunales Constitucionales en América Latina y la Corte Interamericana de Derechos Humanos y la cuestión de la inejecutibilidad de sus decisiones en Venezuela', in Anuario Iberoamericano de Justicia Constitucional, no.13.

— (2011), *Constitutional Courts as Positive Legislators,* Cambridge University Press.

Buergenthal, Thomas (2005), 'New Upload: Remembering the Early Years of the Inter-American Court of Human Rights', 37:l NYU Journal of International Law and Politics.

Cappeletti, Mauro (1981), 'Nécessité et légitimité de la justice constitutionnelle', in Revue Internationale de Droit Comparé, no. 2.

Caputi, Claudia, and Salvatelli, Ana (2010), 'Manifestaciones de la globalización en la jurisprudencia de la Corte Suprema sobre el Derecho Administrativo', in La Ley, *Suplemento Extraordinario Administrativo 75 Aniversario.*

Carbonell, Miguel (2007), 'El neoconstitucionalismo en su laberinto', in Carbonell, Miguel (Ed.), *Teoría del Neoconstitucionalismo (Ensayos escogidos),* Trotta.

Carraud, Michel (2005), 'Les mutations constitutionnelles récents dans les États andins', in Bernard, Marie-Julie, and Carraud, Michael (Directors), *Justice et Démocratie en Amérique Latine,* Presses Universitaires de Grenoble.

Cassese, Antonio (2003), *International Criminal Law*, Oxford University Press.

Contesse, Jorge (2017), "The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights", in International Journal Of Constitutional Law, vol. 15, 414-435.

Cossío Díaz, José Ramón (2009), 'Constitutional Justice in Iberoamerica: Social Influence and Human Rights', in 2 (1) Mexican Law Review.

Daly, Tom Gerald (2017), 'Brazilian 'Supremocracy' and the Inter-American Court of Human Rights: Unpicking an Unclear Relationship', in Pedro Fortes, Boratti, Larissa, Andrés Palacios Lleras et al., *Law and Policy in Latin America (Transforming Courts, Institutions, and Rights),* Palgrave MacMillan.

De Paz González, Isaac (2018), *The Social Rights Jurisprudence in the Inter-American Court of Human Rights,* Elgar.

De Vergottini, Guiseppe (2010), *Más allá del diálogo entre tribunales (Comparación y relación entre jurisdicciones),* Civitas Thomson Reuters.

Elias, José Sebastián (2011), 'Justicia transicional y justicia internacional (A propósito del caso 'Gomes Lund')', in Revista De Derecho Comparado, vol. 19.

Epp, Charles R. (1998), *The Rights Revolution*, The University of Chicago Press.

Fassbender, Bardo (2007), 'We the Peoples of the U.N.: Constituent Power and Constitutional Form in International Law', in Loughlin, Martin and Neil Walker, *The Paradox of Constitutionalism (Constituent Power and Constitutional Form),* Oxford University Press.

Fernández Segado, Francisco (2009), *La justicia constitucional: una visión de Derecho Comparado*, vol. I, Dykinson.

Ferrer Mac-Gregor, Eduardo (2010), 'El control difuso de convencionalidad en el Estado constitucional', in Fix-Zamudio, Héctor, and Valadés, Diego, *Formación y perspectivas del Estado en México,* UNAM and El Colegio Nacional.

— (2017), "The CC as a Core Mechanism of the *Ius Constitutionale Commune",* in von Bogdandy, Armin, Ferrer Mac-Gregor, Eduardo, Morales Antoniazzi, Mariela et al. (Editors), *Transformative Constitutionalism in Latin America (The Emergence of a New Ius Commune),* Oxford.

Fix Zamudio, Héctor (2002), 'Eficacia de los instrumentos protectores de los derechos humanos', in Anuario Mexicano de Derecho Internacional, no. 2.

Fix-Zamudio, Héctor and Eduardo Ferrer Mac-Gregor (2009), *Las sentencias de los tribunales constitucionales,* UNAM, IMDPC and Porrúa.

García Ramírez, Sergio (2003), 'El futuro del Sistema Interamericano de Protección de los Derechos Humanos', in Ferrer Mac-Gregor, Eduardo (Coordinator), *Derecho Procesal Constitucional,* vol. 2, Porrúa.

— (2011), 'Diálogo con Sergio García Ramírez. Derecho Internacional y Derechos Humanos', in La Ley Actualidad, October 27th.

Goldstone, Lawrence (2008), *The Activist (John Marshall, Marbury v. Madison and the Myth of Judicial Review*), Walker Publishing.

Griffith, J.A.G. (1997), *The Politics of the Judiciary*, Fontana Press.

Hampton, Francoise; Martin, Claudia and Viljoen, Frans (2018), 'Inaccessible apexes: Comparing access to human rights courts and commissions in Europe, the Americas and Asia', in International Journal of Constitutional Law, vol. 16, no. 1.

Helmke, Gretchen (2005), *Courts Under Constraints (Judges, Generals and Presidents in Argentina),* Cambridge University Press.

Hennebel, Ludovic (2009), 'La Cour Interamericaine des Droits de l´Homme : Entre Particularisme et Universalisme', in Hennebel, Ludovic and Hélene Tigroudja, 'Le Particularisme Interaméricain des Droits de l´Homme', A. Pedone.

Hirschl, Ran (2004), *Towards Juristocracy (The Origins and Consequences of the New Constitutionalism)*, Harvard University Press.

Hitters, Juan Carlos (2008), '¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos? (Control de constitucionalidad y convencionalidad)', in Revista Iberoamericana de Derecho Procesal Constitucional, no. 10.

— (2010), 'Control de constitucionalidad y control de convencionalidad. Comparación', in Revista Fac. Direito Sal De Minas, vol. 26, no. 1.

Huneeus, Alexandra (2010), 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in Couso, Javier A.; Huneeus, Alexandra and Sieder, Rachel (Editors), *Cultures of Legality: Judicialization and Political Activism in Latin America*, Cambridge University Press.

Ip, Eric C. (2010), 'Globalization and the future of the law of the sovereign state', in International Journal of Constitutional Law, vol. 8, no. 3.

Kline, Harvey F. and Wade, Christine J. (2018), 'The Latin American Tradition and Process of Development', in Kline, Harvey F.; Wade, Christine J. and Wiarda, Howard J. (Editors), *Latin American Politics and Development,* Westview Press.

Klug, Heinz (2006), 'South Africa: From Constitutional Promise to Social Transformation', in Goldsworthy, Jeffrey (Ed.), *Interpreting Constitutions (A Comparative Study),* Oxford University Press.

Knight, Lee, and Epstein, Jack (1998), *The Choices Justices Make*, Congressional Quarterly.

Landa Arroyo, César (2005), 'El Sistema Interamericano de Derechos Humanos: Balance y Perspectiva', in Landa Arroyo, César (Comp.), *Jurisprudencia de la Corte Interamericana de Derechos Humanos*, Palestra.

López Latorre, Andrés and Ibárzabal, Milagros (2018), 'Sexta Etapa (2013-2018): La Corte de la Igualdad', in Santiago, Alfonso, and Bellocchio, Lucia (Dirs.), *Historia de la Corte Interamericana de Derechos Humanos (1978-2018),* Thomson Reuters La Ley.

Lorenzetti, Ricardo (2010), 'Global Governance: Dialogue between Courts', Robert Schuman Center for Advanced Studies, European University Institute, RSCAS Policy Paper no. 3.

Madrid, Raúl (2010), The Origins of the Two Lefts in Latin America, in Political Science Quarterly, vol. 125, no. 4.

Mathen, Carissima (2019), *Courts Without Cases (The Law and Politics of Advisory Opinions,* Hart Publishing.

Mazzuoli, Valerio De Oliveira (2013), 'Preambulo. Comentario', in Mazzuoli, Valerio De Oliveira and Gomes, Luis Flavio, *Comentários a Convencao Americana do Direitos Humanos (Pacto de San José de Costa Rica),* Thomson Reuters Revista Dos Tribunais.

— (2015), *Curso de Direitos Humanos,* Editora Método.

Mohor Abuauad, Salvador (2001), 'La jerarquía normativa de los tratados internacionales', in Navarro Beltrán, Enrique (Ed.), *Veinte Años de la Constitución Chilena 1981-2001,* LexisNexis.

Moroni Romero, Lucas (2011), '¿Corresponde hablar de control de convencionalidad en el ordenamiento jurídico argentino?', Jurisprudencia Argentina, August 31.

Nogueira Alcalá, Humberto (2007), 'Los desafíos de la sentencia de la Corte Interamericana en el caso Almonacid Arellano', in 2 Revista de Derecho.

Paris, Marie-Luce (2016), 'Setting the Scene: Elements of constitutional theory and methodology of the research', in Bell, John and Paris, Marie-Luce (Editors), *Rights-Based Constitutional Review (Constitutional Courts in a Changing Landscape),* Elgar Publishing.

Pasqualucci, Jo M. (2003), *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press.

Paul Díaz, Alvaro (2019), "Los enfoques acotados del control de convencionalidad", in 87 (246) Revista de Derecho de la Universidad de Concepcion, July-December, 49-82.

Parassram Concepción, Natasha (2001), "The Legal Implications of Trinidad and Tobago´s withdrawal from the American Convention of Human Rights", in American University International Law Review, vol. 16, no. 3.

Quiche Ramírez, Manuel Fernando (2009), 'El control de convencionalidad y el sistema colombiano', in 12 Revista Iberoamericana de Derecho Procesal Constitucional.

Ramelli Arteaga, Alejandro (2019), *Diálogos entre la Corte Interamericana de Derechos Humanos y los jueces constitucionales latinoamericanos,* Tirant Lo Blanch.

Rey Cantor, Ernesto (2008), *Control de Convencionalidad de las Leyes y Derechos Humanos*, Porrúa.

Rohr, John A. (1995), *Founding Republics in France and America: A Study in Constitutional Governance*, University Press of Kansas.

Reynolds, Noel B., (1987), 'Constitutionalism and the Rule of Law', in Bryner, Gary C., and Reynolds, Noel B., *Constitutionalism and Rights*, Brigham Young University.

Roht Arriaza, Naomi, and Bernabeu, Almudena (2009), 'Justicia trasnacional como proceso híbrido', in Almqvist, Jessica, and Espósito, Carlos, 'Justicia Transicional en Iberoamérica', Centro de Estudios Políticos y Constitucionales.

Sagüés, Néstor Pedro (2010), 'Dificultades operativas del control de convencionalidad en el sistema interamericano', in La Ley, vol. D.

— (2016), 'De la Constitución Nacional a la Constitución 'convencionalizada", in Ferrer Mac-Gregor (Coord.), *Derecho Procesal Constitucional Transnacional,* Porrúa.

— (2017), *La interpretación judicial de la Constitución (De la Constitución nacional a la Constitución convencionalizada,* Porrúa.

Salado Osuna, Ana (2004), *Los Casos Peruanos ante la Corte Interamericana de Derechos Humanos,* Normas Legales.

Santiago, Alfonso (2010), *En las fronteras entre el Derecho Constitucional y la Filosofía del Derecho (Consideraciones iusfilosóficas acerca de algunos temas constitucionales),* Marcial Pons.

Scribner, Druscilla (2011), 'Courts, Power, and Rights in Argentina and Chile', in Helmke, Gretchen and Ríos-Figueroa, Julio, *Courts in Latin America*, Cambridge University Press.

— (2011), 'Strategic Litigation in the Inter-American Court', Paper presented to the Interim Meeting of the IPSA Research Committee on Comparative Judicial Studies, Irvine, California.

Seminara, Letizia (2009), *Les effects des arréts de la Cour interaméricaine des droits de Íhomme*, Bruylant.

Sieghart, Paul (1997), *The International Law of Human Rights,* Oxford University Press.

Sikkink, Kathryn (2009), 'The Transnational Dimension of the Judicialization of Politics in Latin America', in Sieder, Rachel; Schjolden, Line, and Angell, Alan, *The Judicialization of Politics in Latin America,* Palgrave Macmillan.

Smulotivitz, Carolina (2009), 'Petitioning and Creating Rights: Judicialization in Argentina", in Sieder, Rachel; Schjolden, Line, and Angell, Alan, *The Judicialization of Politics in Latin America,* Palgrave Macmillan.

Stack, John F. Jr. (2005), 'Constructing Human Rights in the Americas: Institutional Development and Practice in the New World', in Volcansek, Mary L. and John F. Stack, Jr., *Courts Crossing Borders (Blurring the Lines of Sovereignty*), Carolina Academic Press.

Staton, Jeffrey K. and Romero, Alexia, (2011), and Romero, Alexia, 'Clarity and Compliance in the Inter-American Human Rights System', Paper presented at the Interim Meeting of IPSA Research Committee on Comparative Judicial Studies, Irvine, California.

Toledo, Pablo R. (2022), 'Introducción al Control de Convencionalidad: Dimensiones y alcances", in Toledo, Pablo R. (Dir.), *Control de Convencionalidad*, Ad-Hoc.

Tolley, Michael C. (2010), 'Fundamental Rights, the European Court of Justice, and European Integration', in Jackson, Donald W., Tolley, Michael C., and Volcansek, Mary L., (Editors), *Globalizing Justice (Critical Perspectives on Trasnational Law and the Cross-Border Migration of Legal Norms),* SUNY.

Trebucq, Silvia (2011), 'El control de convencionalidad: Su ejercicio por parte de los tribunales nacionales', La Ley, April 29.

Tribe, Laurence H. (2008), *The Invisible Constitution*, Oxford University Press.

Vallinder, Torbjörn (1995), 'When the Courts Go Marching In', in Tate, C. Neal, and Vallinder, Torbjörn, *The Global Expansion of Judicial Power*, New York University Press.

Ventura Robles, Manuel E. (2017), *Corte Interamericana de Derechos Humanos (Memorias),* Porrúa.

Vivanco, José Miguel (1994), 'International Human Rights Litigation in Latin America: The OAS Human Rights System', in Kaysen, Carl; Pastor, Robert A., and Reed, Laura W. (Editors), *Collective Responses to Regional*

Problems: The Case of Latin America and the Caribbean, American Academy of Arts and Sciences.

Whittington, Keith (2007), *Political Foundations of Judicial Supremacy*, Princeton University Press.

Young, Katharine G. (2010), 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review', in International Journal of Constitutional Law, vol. 8, no. 3.

Zaffaroni, Eugenio Raúl (1994), *Estructuras Judiciales*, Ediar.