

## The Emergence of a More Conventional Reading of the *Conventionality Control Doctrine*

Álvaro Paúl

Le rôle du Canada à l'égard de la protection des droits de la personne  
au sein des Amériques

Canada's Role in Protecting Human Rights in the Americas

El papel de Canadá en la protección de los derechos humanos en las  
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[See table of contents](#)

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Article abstract

*The Inter-American Court of Human Rights developed a doctrine called conventionality control. In general terms, this doctrine is somewhat similar to the idea of judicial review of legislation, but applied in a transnational forum. According to the Court, conventionality control would require domestic judges and other bodies of States parties to the American Convention on Human Rights (ACHR) to depart from domestic legislation that runs counter to the ACHR or the Inter-American Court's interpretation of the ACHR. Many scholars contend that the application of this doctrine should be carried out even if the domestic bodies that apply it have no constitutional power to do so. Others have a more restrictive interpretation and consider that domestic bodies would have to apply it to the extent of their power, according to their national constitutions. Apparently, the latter interpretation is gaining a wider support, which is desirable, because only this reading would be compatible with the principles of international law, and possibly accepted by all member States.*

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## The Emergence of a More Conventional Reading of the *Conventionality Control* Doctrine

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ÁLVARO PAÚL\*

### ABSTRACT

*The Inter-American Court of Human Rights developed a doctrine called conventionality control. In general terms, this doctrine is somewhat similar to the idea of judicial review of legislation, but applied in a transnational forum. According to the Court, conventionality control would require domestic judges and other bodies of States parties to the American Convention on Human Rights (ACHR) to depart from domestic legislation that runs counter to the ACHR or the Inter-American Court's interpretation of the ACHR. Many scholars contend that the application of this doctrine should be carried out even if the domestic bodies that apply it have no constitutional power to do so. Others have a more restrictive interpretation and consider that domestic bodies would have to apply it to the extent of their power, according to their national constitutions. Apparently, the latter interpretation is gaining a wider support, which is desirable, because only this reading would be compatible with the principles of international law, and possibly accepted by all member States.*

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### KEY-WORDS:

*Inter-American Court of Human Rights, Conventionality Control, Interpretation, American Convention of Human Rights, Domestic Rule of Law.*

### RÉSUMÉ

*La Cour interaméricaine des droits de l'homme a formulé une doctrine intitulée : contrôle de la conventionnalité. De manière générale, cette doctrine est passablement*

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semblable à l'idée de la révision judiciaire des règles de droit mais s'appliquant dans un forum transnational. Selon la Cour, le contrôle de la conventionnalité exigerait que les juges nationaux et les autres autorités étatiques, qui sont parties à la Convention américaine des droits de l'homme (CADH), se détachent de la législation nationale allant à l'encontre de la CADH ou de l'interprétation de la CADH faite par la Cour interaméricaine. Plusieurs chercheurs soutiennent que cette doctrine devrait être appliquée même si les autorités étatiques la mettant en œuvre n'ont aucun pouvoir constitutionnel pour ce faire. D'autres ont une interprétation plus restrictive et considèrent que les autorités nationales auraient à l'appliquer dans les limites de leur pouvoir, selon les constitutions nationales. Apparemment, cette dernière interprétation gagne en popularité, ce qui est souhaitable, car seule celle-ci est compatible avec les principes de droit international, et serait possiblement acceptée par tous les États membres.

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**MOTS-CLÉS :**

*Cour Interaméricaine des droits de l'homme, contrôle de conventionnalité, interprétation, Convention américaine relative aux droits de l'homme, État de droit national.*

**RESUMEN**

*La Corte Interamericana de Derechos Humanos ha desarrollado una doctrina llamada control de convencionalidad. En términos generales, esta doctrina es en cierto sentido similar a la idea del control de constitucionalidad, pero a nivel transnacional. Según la Corte, el control de convencionalidad requeriría que los jueces nacionales y otros órganos de los Estados partes de la Convención Americana sobre Derechos Humanos (CADH) se aparten de la legislación nacional que sea contraria a la CADH o a la interpretación que de ella haga la Corte Interamericana. Gran parte de la doctrina sostiene que la aplicación del control de convencionalidad debiera ser realizada incluso si los órganos encargados de aplicarla no cuentan con la competencia constitucional para hacerlo. Otros tienen una interpretación más restringida y consideran que tales órganos debieran aplicar el control de convencionalidad sólo en la medida de sus competencias, de acuerdo a su constitución nacional. Aparentemente esta última interpretación está ganando apoyo, lo que es adecuado, porque solo esta lectura sería compatible con los principios del derecho internacional y, eventualmente, aceptada por todos los Estados miembros.*

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**PALABRAS CLAVES:**

*Corte Interamericana de Derechos Humanos, control de convencionalidad, interpretación, Convención Americana de Derechos Humanos, estado de derecho nacional.*

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**TABLE OF CONTENTS**

Introduction.....	277
I. Overview of the conventionality control doctrine.....	278
A. General description of the doctrine.....	278
B. Scholarly developments and the intertwining of the doctrine with judicial review.....	283
II. The extensive approach.....	287
A. Preliminary issues.....	287
B. Inter-American case law and the extensive approach.....	289
C. Complexities of the extensive approach.....	292
III. Restrictive approaches.....	295
A. General description.....	295
B. Complexities of the restrictive approach.....	298
C. The Court’s chance to adopt a more <i>conventional</i> conventionality control.....	300
Conclusions.....	301

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**INTRODUCTION**

The Inter-American Court of Human Rights (hereafter the Court) has a paramount place in the international human rights protection system of the Americas. Aware of its role, the Court aims to have a wide impact on the human rights landscape of the hemisphere. In this context, the Court developed a doctrine called *control de convencionalidad* (conventionality control) which seeks greater effect of its own judgments. The concept of *control de convencionalidad* was adopted because of its similarity with the Spanish expression for judicial review—understood as the judicial authority to decide on the constitutionality of certain laws<sup>1</sup>—(*control de constitucionalidad*).<sup>2</sup> The Inter-American Court has translated this concept into English in at least ten different

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1. Erwin Chemerinsky, *Constitutional Law*, 4th ed (New York: Wolters Kluwer Law & Business, 2013) at 1.

2. Eduardo Ferrer Mac-Gregor Poisot, “El Control de Convencionalidad en la Jurisprudencia de la Corte Interamericana de Derechos Humanos (A Una Década de su Creación: 2006–2016)” in Mariela Morales Antoniazzi and Miriam Henríquez Viñas, eds, *El Control de Convencionalidad: Un Balance Comparado a 10 Años de Almonacid Arellano vs Chile* (Santiago: Ediciones Der, 2017) 37 at 39–40.

ways,<sup>3</sup> but we will simply use the expression “conventionality control.” This expression sounds odd, but it is the most commonly used.

Scholars have written much about conventionality control, its origins and its implications.<sup>4</sup> In general terms, this doctrine is somewhat similar to the idea of constitutional control or judicial review, but with some key differences, mainly, its application in the transnational sphere. This doctrine is rather new, so its contours are not starkly clear, and legal scholars and domestic judiciaries have different understandings of it.

According to certain interpretations of the conventionality control doctrine, the Inter-American Court would be claiming to have supra-national powers, surpassing those of any other international or regional tribunal (they would even be higher than those of the Court of Justice of the European Union, and comparable only to those of domestic constitutional courts).<sup>5</sup> Such interpretations seem to align with the Court’s rulings (as we will discuss when dealing with the extensive view) but carry significant implications. Fortunately, there are some authors and judges who, making use of some statements of the Court are interpreting the doctrine of conventionality control in a more restricted fashion. If this narrower interpretation is accepted, the doctrine of conventionality control would overcome its own complexities, to be recognized more globally as a legitimate and international law-abiding doctrine that could be widely supported.

## I. OVERVIEW OF THE CONVENTIONALITY CONTROL DOCTRINE

### A. General description of the doctrine

The Inter-American Court first articulated the doctrine of conventionality control in its 2006 case *Almonacid Arellano v Chile*,<sup>6</sup> although

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3. Álvaro Paúl, “Translation Challenges of the Inter-American Court of Human Rights and Cost-Effective Proposals for Improvement” (2012) 5 Inter Am Eur Hum Rights J Rev Interam Eur Derechos Hum 3 at 10–11.

4. For a detailed account of this doctrine, see Ariel E Dulitzky, “An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights” (2015) 50 Tex Int Law J 45.

5. *Ibid* at 60–62.

6. *Almonacid Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) (2006), Inter-Am Ct HR (Ser C) No 154, at paras 123–125 [*Almonacid Arellano*]. Some authors see the roots of this doctrine in other judgments. Ferrer Mac-Gregor Poisot, *supra* note 2 at 38–40.

Judge García Ramírez had laid down its foundations a few years earlier, in a number of separate opinions.<sup>7</sup> Prior to this, the Court took a very different approach to the ACHR's direct effect.<sup>8</sup> Because of its relatively recent creation by the Court, there are "important unresolved and controversial aspects of its normative foundations and legal effects."<sup>9</sup> In its more than ten years of existence, the content of this doctrine has changed in ways that are substantive. Some authors consider these changes to be inconsistent,<sup>10</sup> but others believe that they are simply part of a gradual process of creation and definition of a doctrine by the judiciary.<sup>11</sup> Before describing this doctrine in greater detail, it is important to clarify that the *American Convention of Human Rights* (ACHR) is binding on States Parties, the same as the Inter-American Court's judgments in relation to the Defendant State.<sup>12</sup> Thus, when making reference to the Court's case law as non-binding, this article refers to cases where the State was not a party.

As stated above, there are different readings of the scope of the conventionality control doctrine. Nevertheless, it is possible to say that—according to most interpretations of the Court's rulings—this doctrine requires domestic judges, and every other body that applies the law within a State party to the ACHR, to assess whether domestic laws are compatible with the ACHR and the Inter-American Court's interpretation of it; if they are incompatible, the doctrine would require judges to set aside or refrain from enforcing their domestic laws.<sup>13</sup> This

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7. E.g. *Tibi v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) (2004), Inter-Am Ct HR (Ser C) No 114, separate concurring opinion of Judge García Ramírez at para 3; and *López-Álvarez v Honduras* (Merits, Reparations and Costs) (2006), Inter-Am Ct HR (Ser C) No 141, concurring opinion of Judge García Ramírez at para 30.

8. Ximena Fuentes Torrijo, "International and Domestic Law: Definitely an Odd Couple" (2008) 77 *Rev Juríd Univ P R* 483 at 485–87.

9. Paolo G Carozza & Pablo González Domínguez, "The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights: A Reply to Jorge Costesse" (2017) 15:2 *Int J Const Law* 436 at 437. See Karlos A Castilla Juárez, "¿Control Interno o Difuso de Convencionalidad? Una Mejor Idea: La Garantía de Tratados" (2013) 13 *Anu Mex Derecho Int* 51.

10. *Ibid* at 56–68.

11. E.g. Sergio García Ramírez, "Control de Convencionalidad" in Morales Antoniazzi & Henríquez Viñas, *supra* note 2, 17 at 22–23; and Alexei Julio Estrada, "Comentario al Artículo 'Control de Convencionalidad Interamericano: Una Mera Aplicación del Derecho Internacional', de Karlos A Castilla Juárez" (2015) 34 *Rev Derecho Estado* 51 at 52–53.

12. The sole exception to this would be a breach of the principle *extra compromissum arbiter nihil facere potest*.

13. *Gelman v Uruguay* (Monitoring Compliance with Judgment, Order of the Court) (2013), Inter-Am Ct HR at para 69.

obligation would also apply in situations where the Inter-American Court's interpretation of the ACHR was issued in a judgment concerning a different State,<sup>14</sup> and even if this interpretation counters domestic constitutions.<sup>15</sup> Another development of the doctrine is to include, within the expression "conventionality control," the Inter-American Court's main role: the adjudication of whether a State violated the ACHR or some other instrument over which the Court has jurisdiction.<sup>16</sup>

In the Court's own words, the bodies of any of the State's branches which "perform judicial duties should exercise not only control of constitutionality, but also of 'conventionality' *ex officio* between the domestic norms and the [ACHR], evidently in the context of their respective spheres of competence and the corresponding procedural regulations."<sup>17</sup> When performing this conventionality control, domestic agents or officials must "take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court,"<sup>18</sup> because the Court considers itself to be "the ultimate interpreter of the ACHR."<sup>19</sup> In *Gelman v Uruguay* the Court claimed that judges had the mission to make the ACHR prevail over domestic norms, interpretations and practices that may hinder the fulfillment of the Court's

14. *Almonacid Arellano*, *supra* note 6 at paras 124, 127.

15. *Boyce et al v Barbados* (Preliminary Objection, Merits, Reparations and Costs) (2007), Inter-Am Ct HR (Ser C) No 169, at paras 75–80 [*Boyce*].

16. E.g. Instituto Interamericano de Derechos Humanos, *Manual Auto-Formativo para la Aplicación del Control de Convencionalidad Dirigido a Operadores de Justicia* (San José de Costa Rica: Instituto Interamericano de Derechos Humanos, 2015) at 105–09. This action is often called "concentrated conventionality control." This conception might have originated from García Ramírez's opinion in the *Aguado Alfaro* case, where he stated:

there is a control of 'conventionality' deposited in international—or supranational—tribunals, created by human rights conventions, which entrust these organs of the new regional human rights justice with the interpretation and application of the respective treaties and with ruling on facts that allegedly violate the obligations set out in the conventions that give rise to the international responsibility of the State which ratified the convention or acceded to it.

*Aguado Alfaro et al v Peru* (Dismissed Congressional Employees) (Preliminary Objections, Merits, Reparations and Costs) (2006), Inter-Am Ct HR (Ser C) No 158, separate opinion of Judge Sergio García Ramírez, at para 5 [*Aguado Alfaro*].

17. *Vélez-Loor v Panama* (Preliminary Objections, Merits, Reparations and Costs) (2010), Inter-Am Ct HR (Ser C) No 218, at para 287 [*Vélez-Loor*].

18. *Cabrera-García & Montiel-Flores v Mexico* (Preliminary Objections, Merits, Reparations and Costs) (2010), Inter-Am Ct HR (Ser C) No 220, at para 225 [*Cabrera-García*].

19. *Ibid.*

rulings.<sup>20</sup> The Court also extended its doctrine of conventionality control to the interpretations it makes in its advisory opinions, which would be some kind of "preemptive conventionality control."<sup>21</sup>

The framers of the ACHR had no intention of creating anything like *conventionality control*. The only moment where a similar idea was explicitly mentioned within the Inter-American system was during the discussion of the *American Declaration of the Rights and Duties of Man* (hereafter American Declaration), not of the ACHR.<sup>22</sup> However, the framers of the American Declaration abandoned this idea when they agreed that this declaration would have no binding effect.<sup>23</sup> By contrast, the framers of the ACHR discussed nothing similar; even though some representatives considered that some norms of the ACHR were directly applicable.<sup>24</sup> Nevertheless, the Inter-American Court of Human Rights claims that it is possible to extract the doctrine of conventionality control from some treaty provisions. The doctrine would be "the result of a progressive and innovative interpretation of articles 1(1) and (2) of the ACHR and of articles 26 and 27 of the *Vienna Convention on the Law of Treaties* (VCLT)."<sup>25</sup> Ferrer Mac-Gregor Poisot argues that articles 29 and 25 of the ACHR also play a role in the creation of conventionality control.<sup>26</sup>

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20. *Gelman v Uruguay*, *supra* note 13 at "considerando" 73. This has been interpreted as domestic authorities having a stronger duty to exercise conventionality control when the Court has explicitly declared the "unconventionality" of a particular norm (Pablo González Domínguez, "La Doctrina del Control de Convencionalidad a la Luz del Principio de Subsidiariedad" (2017) 15:1 *Estud Const* 55 at 72). However, it is difficult to fully agree on whether it is possible to speak about a stronger or lesser *duty* in international law. The cited author seems to consider that whenever the duty is strong, the State must strictly follow the standard established in the judgment, whereas a State with a weaker duty may find different ways of applying the Court's standard (*ibid* at 88–90).

21. *Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System (Interpretation and Scope of Article 1(2), in Relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24–25, 29–30, 44, 46 and 62(3) of the American Convention on Human Rights, as Well as of Article 8(1)(A) and B) of the Protocol of San Salvador* (Advisory Opinion OC-22/16) (2016), Inter-Am Ct HR (Ser A) No 22, at para 26 (in Spanish) (Author's translation).

22. Álvaro Paúl, *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana* (Mexico: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2017) at 50–53.

23. *Ibid.*

24. See e.g. Secretaría General de la Organización de los Estados Americanos, *Conferencia Especializada Interamericana sobre Derechos Humanos: Actas y Documentos*, OEA/Ser.K/XVI/1.2, San José, Costa Rica, 7–22 de noviembre de 1969 (Washington, DC: Secretariat of the Inter-American Commission on Human Rights, 1973) at 38, 40.

25. Carozza & González Domínguez, *supra* note 9 at 438.

26. Ferrer Mac-Gregor Poisot, *supra* note 2 at 63.



Article 2 of the ACHR is probably considered the most important basis of conventionality control. This article provides:

Where the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or *other measures* as may be necessary to give effect to those rights or freedoms.<sup>27</sup>

Some scholars believe that conventionality control could be considered one of the “other measures” adopted for giving effect to the rights and freedoms of the ACHR.<sup>28</sup> However, the same article provides that States must do this according to their “constitutional processes,” which can hardly refer to conventionality control. Furthermore, article 2 does not require judicial reviewers to assess whether domestic provisions conform with the ACHR and its interpretation by the Inter-American Court of Human Rights.

The innovative interpretation of the Court is thus overly expansive in its reach, as we will now see when describing the doctrine’s complexities. For the moment, it is our contention that the creation of a doctrine like conventionality control is not tantamount to interpreting rights in an evolutive fashion. The interpretation of applicable norms is part of an adjudicator’s responsibilities, whereas the definition of the effects of a court’s judgments—particularly within the domestic sphere of States—is part of the legislator’s realm of responsibility (in this case, member States to the ACHR).

The Court has also extended the doctrine of conventionality control to areas that surpass the doctrine’s original purpose. For instance, in a resolution to monitor Uruguay’s compliance with the *Gelman* decision, the Court ruled that conventionality control had a significant role in the implementation of its own judgments, especially when the Court’s reparations included remedies that must be fulfilled by domestic judiciaries.<sup>29</sup> However, the *implementation of remedies* imposed on a State party by an unfavourable judgment differs from direct domestic applicability of the Court’s *case law*. It has always been understood that

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27. *American Convention on Human Rights*, adopted at the Inter-American Specialized Conference on Human Rights, 22 November 1969, San José, Costa Rica [emphasis added].

28. González Domínguez, *supra* note 20 at 67.

29. *Gelman v Uruguay*, *supra* note 13 at “*considerando*” 73.

domestic implementation of remedies established by the Court's judgments depends on States' legislation. In fact, the ACHR provides in article 68(2) that the "part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedures governing the execution of judgments against the State."<sup>30</sup> Therefore, it is perplexing to see this association between conventionality control and domestic implementation of judgments.

Conventionality control is somewhat puzzling; it is created by Inter-American Court's *obiter dicta* for the purpose of binding the States, but the binding authority of these *obiter dicta* depends on the States' granting it;<sup>31</sup> importantly, because member States are only bound "to comply with the judgment of the Court in any case to which they are parties,"<sup>32</sup> not with all of the Court's rulings. In other words, the Court's authority to create law that alters States' domestic regulations related to the incorporation of international law and jurisprudence could only exist if these very States grant the Court's judgments a binding power beyond the actual case that the Court is deciding.

## B. Scholarly developments and the intertwining of the doctrine with judicial review

Latin American scholarship has elaborated on conventionality control, giving definitions, asserting its alleged legal sources and developing many other elements of this doctrine. Some scholarly writings have a seemingly dogmatic faith in conventionality control, and because of this, see no drawback in this doctrine.<sup>33</sup> Furthermore, a significant number of scholars do not question the source of "mandatory" conventionality control, i.e. the Court's rulings, and whether these

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30. Some States have no domestic rules, but other States, such as Peru or Costa Rica, have laws that regulate it. See *Ley que Regula el Procedimiento de Ejecución de Sentencias Emitidas por Tribunales Supranacionales*, Statute No 27775, Peru 2002; and *Convenio para la Sede de la Corte Interamericana de Derechos Humanos*, Statute No 6889, Costa Rica 1983, Art 1(27).

31. Only domestic constitutions may grant Inter-American Court's case law the quality of being a binding source of law. Miriam Lorena Henríquez Viñas, "La Polisemia del Control de Convencionalidad Interno" (2014) 24 *Int Law Rev Colomb Derecho Int* 113 at 129.

32. *American Convention on Human Rights*, *supra* note 27, art 68(1).

33. These authors could be somewhat equated to those that Burgorgue-Larsen calls "enthusiastic authors." Laurence Burgorgue-Larsen, "Chronicle of a Fashionable Theory in Latin America. Decoding the Doctrinal Discourse on Conventionality Control" in *The Inter-Am Court Hum Rights: Theory and Practice, Present and Future* (Cambridge: Intersentia, 2015) 647 at 665–69.

rulings were issued within the scope of the Court's competence. As we know, adjudicators cannot issue binding judgments beyond their competence (*extra compromisum arbiter nihil facere potest*).<sup>34</sup>

Among the developments of this doctrine, some scholars sustain that domestic judges take on a secondary role as "Inter-American judges,"<sup>35</sup> because they would be the first bodies in charge of applying the ACHR and the Inter-American Court's interpretation of it.<sup>36</sup> Authors have also proposed different classifications of conventionality control, for instance:

- *concentrated* conventionality control would be applied by the Inter-American Court,
- *diffuse* conventionality control would be applied by domestic bodies,<sup>37</sup>
- *weak* conventionality control would require interpreting domestic legislation in accordance with the ACHR and the Court's case law,
- *strong* conventionality control would allow abrogating or annulling a domestic statute in contradiction with the Court's case law<sup>38</sup> (we will often refer to this distinction in this paper),
- *primary* (or internal) conventionality control would be that exercised by domestic bodies,
- and *subsidiary* (or international or external) conventionality control would be that performed by the Inter-American Court;<sup>39</sup> etc.

One of the most significant developments of the doctrine of conventionality control was made by the Court itself. Two months after

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34. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, reprinted ed (Cambridge: Cambridge University Press, 2006) at 261.

35. *Cabrera-García*, *supra* note 18, separate concurring opinion at para 24. Eduardo Ferrer Mac-Gregor Poisot, "Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights" (2015) 109 AJIL Unbound 93 at 97.

36. Ferrer Mac-Gregor Poisot, *supra* note 2 at 63.

37. *Cabrera-García*, *supra* note 18, concurring opinion of Judge Ferrer Mac-Gregor Poisot at para 22.

38. Pablo Contreras Vásquez, "Análisis Crítico del Control de Convencionalidad" in Manuel Antonio Núñez Poblete, ed, *La Internacionalización del Derecho Público* (Santiago: Thomson Reuters, 2015) 425 at 426.

39. Instituto Interamericano de Derechos Humanos, *supra* note 16 at 63, 105. The alternative names are taken from Henríquez Viñas, *supra* note 31 at 116.

the first case in which the Court referred to conventionality control, it seemed to tailor the scope of this doctrine: in *Aguado Alfaro et al (Dismissed Congressional Employees) v Peru*, the Court stated that domestic bodies must exercise conventionality control "in the context of their respective spheres of competence and the corresponding procedural regulations."<sup>40</sup> Since then, the Inter-American Court has repeated this statement, which is, however, unclear. This is especially so if this phrase is analyzed in conjunction with the rest of the Court's rulings defining the doctrine. Because of this lack of clarity, this statement has given rise to different approaches to conventionality control.

In the next sections, we will refer to two different ways of interpreting the aforementioned caveat. Nevertheless, as a preliminary remark, we note that some scholars consider that the phrase "in the context of their respective spheres of competence and the corresponding procedural regulations" means that, even though all judges must exercise conventionality control in its weak form (*i.e.* interpret domestic laws in accordance with the ACHR and the Court's interpretation of it), only those who can perform judicial review may carry out conventionality control in its strong form (*i.e.* rejecting the application of domestic laws that run counter the Court's interpretation of the ACHR).<sup>41</sup> This position intertwines conventionality control with judicial review.

One of the main defenders of this interpretation is the Inter-American Judge Eduardo Ferrer Mac-Gregor Poisot. In his separate opinion to the case *Cabrera & Montiel v Mexico*, he seems to affirm the connection between conventionality control and judicial review, based on some Latin American constitutions that refer to human rights treaties, and on some highest courts' decisions ruling that these treaties have a constitutional rank.<sup>42</sup> According to these constitutions and rulings, the ACHR would have acquired a constitutional status in some States.<sup>43</sup> Hence, when the domestic bodies in charge of exercising judicial review analyze the compatibility of domestic laws with their constitutions, they should also analyze their compatibility with the treaties that

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40. *Aguado Alfaro*, *supra* note 16 at para 128; *Vélez-Loor*, *supra* note 17 at para 287.

41. An example of these scholars is given in the next paragraph.

42. *Cabrera-García*, *supra* note 18, concurring opinion of Judge Ferrer Mac-Gregor Poisot at paras 25–26.

43. *Ibid.*

are incorporated into their constitutions. Ferrer Mac-Gregor Poisot also notes that some domestic judiciaries have developed the theory of the “constitutional block.”<sup>44</sup> According to this theory, those in charge of the constitutional review should not only contrast legal norms with the constitution of a State, but also with the “constitutional block,” which would include other norms with a constitutional status. The judiciaries may consider that these norms include some treaties and their interpretation by the relevant international bodies.<sup>45</sup> This would be the reason why Ferrer Mac-Gregor Poisot believes that the bodies with power to exercise judicial review may also engage in conventionality control.

There are two problems with this interpretation. The first is that the Inter-American Court as a whole has never made a connection between the competence to exercise judicial review and conventionality control—although Sagüés considers that it has.<sup>46</sup> Furthermore, the Inter-American Court does not affirm that State bodies must perform conventionality control because of their States’ constitutional incorporation of the ACHR, but because of the mere fact of their being parties to the ACHR.<sup>47</sup> In fact, the Court considers that the status of being a party to the ACHR creates the duty to directly apply the Court’s interpretations of the ACHR.<sup>48</sup> Notwithstanding, even if the Court would have made a connection between judicial review and conventionality control, the Court has no power to rule on the competence of domestic courts, and thereby intertwine the two concepts. The second problem is that judicial review and conventionality control have several differences.<sup>49</sup>

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44. On the constitutional block, see Alexandra Huneeus, “Constitutional Lawyers and the Inter-American Court’s Varied Authority” (2016) 79:1 *Law Contemp Probl* 179 at 186.

45. *Cabrera-García*, *supra* note 18, concurring opinion of Judge Ferrer Mac-Gregor Poisot at para 26.

46. Néstor Pedro Sagüés, “Obligaciones Internacionales y Control del Convencionalidad” (2010) 8:1 *Estud Const* 117 at 121–22. Sagüés considers that if judges have no power to submit “unconventional” cases to a judge who may exercise strong conventionality control, they should find creative ways for there to be conventionality control, *ibid* at 122. Hence, Sagüés may consider that judges with no power to exercise *strong* conventionality control could still find creative ways of ensuring that there is a conventionality control, even by exercising it themselves.

47. E.g. *Cabrera-García*, *supra* note 18 at para 225.

48. E.g. *ibid*.

49. Castilla Juárez, *supra* note 9 at 68–75.

## II. THE EXTENSIVE APPROACH

### A. Preliminary issues

Some authors contend that the expression "in the context of their respective spheres of competence and the corresponding procedural regulations" does not restrict the doctrine's breadth. Hence, domestic bodies should carry out conventionality control even if they have no express constitutional power to do so (or to exercise judicial review over their laws in relation to their constitution). Among them we find Allan Brewer-Carías, who considers that the expression "in the context of..." means that domestic bodies must exercise conventionality control according to their competence in light of factors such as the matter of the claim, the hierarchy of the adjudicator and the territory over which the adjudicator has competence.<sup>50</sup> He considers that no regard should be paid to whether these bodies have the power to apply the ACHR directly or to dismiss domestic legislation.

An example of this way of understanding the Court's statement would be the following: if somebody wishes to have a domestic amnesty law declared void—following the Inter-American Court's case law on the matter<sup>51</sup>—, he or she would have to appear before a court that is competent to judge the violator, *i.e.* a criminal court (competent according to the matter) of first instance (competent according to the hierarchy), and located in the area where the crime took place (competent according to the territory, if this is the applicable rule). By contrast, the person wanting to have this amnesty law declared void could not appear before a family court, because this body has no competence according to the matter. Another example would be that of a person wishing to obtain survivors' pension benefits from his or her deceased homosexual partner, according to the Inter-American Court's case law,<sup>52</sup> in spite of a domestic law granting this benefit only to

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50. Allan R Brewer Carías, "El Control de Convencionalidad, con Particular Referencia a la Garantía del Derecho a la Protección Judicial Mediante un Recurso Sencillo, Rápido y Efectivo de Amparo de los Derechos Humanos," at 17, online: <[allanbrewercarias.com/biblioteca-virtual/%C2%93el-control-de-convencionalidad-con-particular-referencia-a-la-garantia-del-derecho-a-la-proteccion-judicial-mediante-un-recurso-sencillo-rapido-y-efectivo-de-amparo-de-los-derechos-humanos/>](http://allanbrewercarias.com/biblioteca-virtual/%C2%93el-control-de-convencionalidad-con-particular-referencia-a-la-garantia-del-derecho-a-la-proteccion-judicial-mediante-un-recurso-sencillo-rapido-y-efectivo-de-amparo-de-los-derechos-humanos/>).

51. See Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights" (2011) 12:5 Ger Law J 1203.

52. See *Duque v Colombia* (Preliminary Objections, Merits, Reparations and Costs) (2016), Inter-Am Ct HR (Ser C) No 310.

heterosexual couples.<sup>53</sup> This person would have to ask the appropriate social security body (competent according to the matter)—regardless of whether it is public or private<sup>54</sup>—, with jurisdiction over the domicile of the worker who died (competent according to the territory) to dismiss the relevant domestic law.<sup>55</sup> The issue of whether domestic legislation grants courts the power to invalidate a particular norm would be irrelevant to this way of understanding conventionality control. Other scholars share Brewer Carías's position; in fact, Néstor Sagüés considered that most scholars—at the time—agreed that it was not necessary for judges to have the power to exercise judicial review in order to apply conventionality control, even if applying it obliged them to declare a domestic statute to be void.<sup>56</sup> Sagüés mentions, for instance, Ernesto Rey Cantor.<sup>57</sup> Nogueira Alcalá is another scholar who considers that all judges and other bodies who exercise adjudicative functions should engage in conventionality control.<sup>58</sup> Miriam Henríquez, who is critical of the doctrine, considers that the Inter-American Court sought to expand the competences of all authorities, in order to require them to exercise conventionality control.<sup>59</sup> Ariel Dulitzky, another critical scholar, considers that the expression “in the

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53. In this matter, see *ibid.*

54. The Inter-American Court has held States responsible for violations committed by private companies, when they have not been redressed by the domestic courts of States. See *Suárez-Peralta* (Preliminary Objections, Merits, Reparations and Costs) (2013), Inter-Am Ct HR (Ser C) No 261 [*Suárez-Peralta*]; *Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations and Costs) (2017), Inter-Am Ct HR (Ser C) No 340 [*Lagos del Campo*].

55. In this example there would be no need to distinguish according to the level of the body.

56. Néstor Pedro Sagüés, “El ‘Control de Convencionalidad’ en el Sistema Interamericano y sus Anticipos en el Ámbito de los Derechos Económico-Sociales. Concordancias y Diferencias con el Sistema Europeo,” at 427-28, online: <[www.corteidh.or.cr/tablas/r27778.pdf](http://www.corteidh.or.cr/tablas/r27778.pdf)>. However, Sagüés subsequently seems to have nuanced his statement. Néstor Pedro Sagüés, “Obligaciones Internacionales y Control de Convencionalidad” in Instituto de Justicia Constitucional Corte de Constitucionalidad & Asociación Cívica Instituto de Gobernanza, eds, *Opus Magna Constitucional Guatemalteco* (2011) 272 at 276.

57. Sagüés, *supra* note 46 at 121.

58. This seems to be the case in Humberto Nogueira Alcalá, “Los Desafíos del Control de Convencionalidad del *Corpus Juris* Interamericano para las Jurisdicciones Nacionales” (2012) 45:135 *Bol Mex Derecho Comp* 1167 at 1175–1178. Nogueira reaffirms this in a book contribution where he states that Chilean courts should exercise strong conventionality control, even though they cannot engage in judicial review of legislation. Humberto Nogueira Alcalá, “Sistema Interamericano de Protección de Derechos Humanos, Control de Convencionalidad y Aplicación por Parte de las Jurisdicciones Nacionales” in Humberto Nogueira Alcalá, ed, *La Protección de Los Derechos Humanos y Fundamentales de Acuerdo a la Constitución y El Derecho Internacional de Los Derechos Humanos* (Santiago: Centro de Estudios Constitucionales de Chile – Librotecnia, 2014) at 405.

59. Henríquez Viñas, *supra* note 31 at 125.

context of their respective..." is an overly simplistic way in which the Court tries to overcome the problem of asking judges to perform actions beyond their constitutional empowerment.<sup>60</sup>

## B. Inter-American case law and the extensive approach

In general terms, the extensive interpretation is more in line with the Inter-American Court's case law.<sup>61</sup> First, this is suggested by the Court's terms, because it does not rule that judges must only exercise conventionality control *if they have competence* to do so, but that they *must exercise* conventionality control within their area of competence. To this reasoning, it is possible to counter-argue that judges *must* always exercise at least a weak conventionality control but *may* exercise a strong conventionality control if they have the power to annul or ignore domestic legislation.<sup>62</sup> However, many judgments of the Court assume that domestic courts or other bodies should engage in a *strong* conventionality control, even if they are not legally entitled to do so, as we will now show.

The case *Boyce v Barbados*, which the Court decided after *Aguado Alfaro*, provides the first example. This case relates to the Barbadian Constitution, which denied Barbadian courts the competence to exercise the constitutional review of laws enacted before November 30, 1966.<sup>63</sup> This prohibition even applied to the then highest judicial authority of Barbados, the United Kingdom-based Judicial Committee of the Privy Council (JCPC). However, the Inter-American Court stated that "Barbadian courts, including the [JCPC], and now the Caribbean Court of Justice, must also address whether the law in Barbados restricts or violates the rights recognized in the [ACHR],"<sup>64</sup> even if these laws were enacted before 1966. In other words, the Court considered itself competent to grant domestic courts the power to review the conventionality of a statute, in light of its own interpretation of the

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60. Dulitzky, *supra* note 4 at 60.

61. Dulitzky seems to agree with this when stating that the expansive language of the Court suggests that it adopts the "absolutist interpretation" of conventionality control, *ibid* at 52.

62. Ferrer Mac-Gregor Poisot, *supra* note 2 at 63–64.

63. *Boyce*, *supra* note 15 at para 75.

64. *Ibid* at para 78. Furthermore, the Court claimed that the JCPC's decision "was arrived at by a purely constitutional analysis that did not take into account the State's obligations under the ACHR as interpreted by this Court's jurisprudence," *ibid* at para 77. The Court also ruled: "The analysis of the JCPC should not have been limited to the issue of whether the [relevant statute] was unconstitutional. Rather, the question should also have been whether it was 'conventional,'" *ibid* at para 78.



ACHR, even if this went against the Barbadian Constitution. This judgment is particularly interesting because it affected a dualist State, *i.e.* one that, following the British tradition, requires incorporating international treaties before they can have domestic effects. The Court did not ignore that the Barbadian legislation had not incorporated the doctrine of conventionality control, but this did not prevent it from requiring Barbados to act according to this doctrine. This behaviour is dismissive of the dualistic approach to international law.

Some may say that the *Boyce* judgment was simply an exception, but there are other similar examples. One of them relates to the case of *Artavia Murillo v Costa Rica*, where the Inter-American Court declared that a ban on the technique of in-vitro fertilization (IVF) was contrary to the ACHR.<sup>65</sup> Following this decision, the government promoted the legislative approval of bills regulating the matter, but public apprehensions prevented the Legislative Assembly from adopting the new legislation. Subsequently the executive attempted to approve IVF through the enactment of a decree, but the Costa Rican Supreme Court declared it invalid, because it breached the principle of legality and the democratic principle.<sup>66</sup> The Supreme Court ruled that the legislature was the sole body entitled to approve legislation relating to IVF.<sup>67</sup> Afterwards the Inter-American Court decided, when monitoring Costa Rica's compliance with the judgment, that this State's way of proceeding was inadequate, because the Inter-American Court's decision in *Artavia Murillo* had the immediate effect of authorizing IVF.<sup>68</sup> It also declared that the decree that the Supreme Court annulled should be deemed valid, so that IVF could be readily performed.<sup>69</sup> These rulings of the Inter-American Court went beyond the purpose of a decision that was meant to assess whether the State fulfilled or not a remedy ordered by the Court. However, what is more important for our analysis is that they show that the Inter-American Court is unconcerned with domestic norms establishing competence and procedural requirements.

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65. *Artavia Murillo et al ("In vitro fertilization") v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) (2012), Inter-Am Ct HR (Ser C) No 257 [*Artavia Murillo*].

66. Sala Constitucional de la corte suprema de justicia [Constitutional chamber of Supreme court], 3 February 2016, Exp 15-013929-007-CO, Judgment No 2016001692 (Costa Rica), online: <invitro56ddacffc283e-pgja-sentencia-costarica-casofiv-es-pdf>.

67. *Ibid.*

68. *Artavia Murillo et al v Costa Rica* (Monitoring Compliance with Judgment, Order of the Court) (February 26, 2016), Inter-Am Ct HR, "*considerando*" 26 (in Spanish only).

69. *Ibid.*, "*considerando*" 36 (in Spanish only).

The Inter-American Court's extensive approach is also noticeable in situations where it rules that amnesty laws are "incompatible *ab initio*" with the ACHR,<sup>70</sup> and that because of this, "such 'laws' have not been capable of having effects, nor will [they] have them in the future."<sup>71</sup> In other words, the Court declares these statutes to be void, which implies that the Inter-American Court is conferring itself the power to exercise judicial review over domestic jurisdictions' legislation. Hence, domestic courts would have no need to invalidate these statutes, because the Inter-American Court itself bars them from applying the statutes. Similarly, in *Radilla-Pacheco v Mexico*, the Court ruled that statutes that are contrary to the object and purpose of the ACHR lack effect from the moment of their enactment.<sup>72</sup> This is consistent with what happened in *Almonacid Arellano v Chile*, where the Inter-American Court stated that the judiciary should refuse to apply the amnesty law,<sup>73</sup> in spite of the fact that in Chile the Constitutional Court is the sole body that can exercise judicial review.<sup>74</sup>

*Liakat Ali Alibux v Surinam* is also revealing. In this case, the Inter-American Court ruled that it did not impose on States an obligation to have constitutional courts, and that the ACHR "does not impose a specific model for the regulation of issues of constitutionality and [conventionality control]."<sup>75</sup> Nevertheless, the Inter-American Court recalled "that the obligation to [exercise conventionality control] is delegated to all bodies of the State, including its judges and other mechanisms related to the administration of justice at all levels."<sup>76</sup> In other words, it seemed to rule that, regardless of whether the State establishes a Constitutional Court, all State bodies were still obliged to engage in conventionality control (probably even a *strong* conventionality control). Some authors consider, countering our position, that this statement of the Court means that States are free to determine

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70. *La Cantuta v Peru* (Merits, Reparations and Costs) (2006), Inter-Am Ct HR (Ser C) No 162, at para 189.

71. *Ibid.*

72. Spanish version of *Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations, and Costs) (2011), Inter-Am Ct HR (Ser C) No 209, at para 339 (the English version states the exact opposite of what the Spanish authentic version provides; on this matter, see Paúl, *supra* note 3).

73. *Almonacid Arellano*, *supra* note 6 at paras 123–24.

74. *Constitución Política de la República de Chile*, 1980, Decreto supremo No 1.150, c X art 93.

75. *Liakat Ali Alibux v Suriname* (Request of Public Hearing, Order of President of the Court) (2012), Inter-Am Ct HR at para 124 [*Liakat Ali*].

76. *Ibid.* The Spanish version is clearer in showing that it refers to conventionality control.

whether their domestic bodies—and which domestic bodies—must engage in conventionality control (strong or weak).<sup>77</sup> It would be desirable for this to be the proper reading of the Court's rulings. However, there is no explicit ruling or statement of the Court supporting such reading.

At last, there is an argument of *a maiori ad minus*; if the Court believes that domestic bodies should follow its rulings, even if that means invalidating domestic substantive statutes, why would the Court be so interested in these bodies abiding by domestic procedural rules that prevent them from applying the ACHR? In other words, if the Court considers that domestic bodies have a duty to exercise conventionality control and thereby cease to apply substantive domestic statutes that are contrary to its rulings, why would the Court consider that procedural domestic statutes preventing the exercise of conventionality control are not inapplicable?

### C. Complexities of the extensive approach

The extensive approach to the doctrine of conventionality control reveals serious difficulties. This explains why many scholars and some domestic highest courts oppose the doctrine of conventionality control.<sup>78</sup> Legal scholarship has described the downsides of conventionality control in some length.<sup>79</sup> Some problems of the extensive approach are the following:

- a) The ACHR does not establish conventionality control. Even those who consider that it is legally grounded, such as Judge Ferrer-McGregor Poisot, are only capable of showing a set of provisions that jointly—and rather unconvincingly—

77. González Domínguez, *supra* note 20 at 74.

78. Selected examples from scholarly literature include: Max Silva Abbot, "Control de Convencionalidad Interno y Jueces Locales: Un Planteamiento Defectuoso" (2016) 14:2 *Estud Const* 101; Dulitzky, *supra* note 4; Castilla Juárez, *supra* note 9; Ezequiel Malarino, "Acerca de la Pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales Nacionales" in Christian Steiner, ed, *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional* (Montevideo: Konrad-Adenauer-Stiftung e. V., 2011) 435. Examples of case law contrary to conventionality control are: Uruguay, Suprema Corte de Justicia, *ML, JFF, O. – Denuncia – Excepción de Inconstitucionalidad* arts 1, 2 y 3 de la Ley No 18.831, IUE 2–109971/2011, Feb. 22, 2013, at IIIa (at 12–24). See also Argentina, Corte Suprema de Justicia de la Nación, *Fontevicchia y D'Amico v Argentina*, 2017, at paras 6–14 (where the Supreme Court of Argentina even questions whether it would be obliged to reverse a decision based on an amnesty law).

79. *Ibid.*

would set the legal basis of this doctrine.<sup>80</sup> As a result of this lack of legal foundation, the Court would be breaching the principle *extra compromisum arbiter nihil facere potest* (the "principle of competence")<sup>81</sup> when creating conventionality control.

- b) By creating the doctrine of conventionality control (if the extensive approach is followed), the Inter-American Court would be appointing itself as a supranational court whose decisions must be followed by national bodies, even though States have not given their consent to this.<sup>82</sup>
- c) States would be bound by what was decided by the Inter-American Court in a case where they were not heard as a party.<sup>83</sup> This would violate the principle of *audiatur et altera pars*.
- d) The extensive approach dismisses that only the State has the power to decide the relationship between its national legal order and international law.
- e) It assumes that the ACHR should rank higher than any national norm—domestically speaking—including the constitution of a State.<sup>84</sup> This would go against the rule of law,<sup>85</sup> because domestic bodies are bound to follow, firstly, what is stated in their own constitution.

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80. Ferrer Mac-Gregor Poisot, *supra* note 2 at 96.

81. Cheng, *supra* note 34 at 261. This principle "requires that a tribunal should decide strictly in accordance with its constitutional law, on pain of nullity," *ibid*.

82. In Dulitzky's words, conventionality control "places the ACHR and its inter-American judicial interpreter, the Court, at the top of the legal order." Dulitzky, *supra* note 4 at 47. Similarly, conventionality control, "by demanding that national judges apply the ACHR over domestic legislation as interpreted by the Court, positions the Inter-American Court as a kind of inter-American constitutional court." *Ibid* at 48.

83. Néstor Pedro Sagüés, "Derecho Internacional y Derecho Constitucional. Dificultades Operativas del *Control de Convencionalidad* en el Sistema Interamericano" in Helen Ahrens, ed, *El Estado Derecho Hoy En América Latina. Libro Homenaje A Horst Schönbohm* (Berlín, México (DF): GIZ – Konrad Adenauer Stiftung, 2012) 21 at 29.

84. Sagüés, *supra* note 46 at 124–25.

85. The first time that the Court mentioned the expression "conventionality control," it was framed as some kind of exception to the domestic rule of law, *Almonacid Arellano*, *supra* note 6 at para 124. The concept of the rule of law is rather contested. The *Black's Law Dictionary* gives these two relevant definitions: "The supremacy of regular as opposed to arbitrary power; the absence of any arbitrary power on the part of the government," and "[t]he doctrine that every person is subject to the ordinary law within the jurisdiction; the equal subordination of all citizens and classes to the ordinary law of the land," Bryan A Garner, ed, *Black's Law Dictionary*, 10th ed (Minnesota: Thomson Reuters, 2014) at 1531.

- f) It grants the Inter-American Court's interpretations the same status as a provision of the ACHR, even though the Inter-American Court is not this treaty's authentic interpreter.<sup>86</sup>
- g) It "adopt[s] a radically monist approach to the relationship between international and national law."<sup>87</sup> This is particularly complex in the Americas, where one third of independent States are dualist in relation to international treaties.<sup>88</sup> Dualist States would not accept an extensive approach to the doctrine of conventionality control.<sup>89</sup>
- h) The Court is not subject to an adequate system of checks and balances in its duty to interpret the ACHR. Therefore, the adoption of the extensive approach to conventionality control would give the Court the power of an absolute legislator.
- i) The application of an extensive approach to conventionality control is anomalous in States where only one or a few courts can exercise constitutional control. In these States, most courts would have no jurisdiction to review the constitutionality of statutes (even though they are familiar with their Constitution) but would be granted the power to review the "conventionality" of statutes in relation to the ACHR (even though they are not commonly aware of inter-American case law developments).
- j) The Inter-American Court of Human Rights has found that private bodies may also violate the ACHR, and that domestic

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86. The Court is only the interpreter of the ACHR in specific cases, not the sole and final interpreter of the ACHR in general. As the Permanent Court of International Justice recognized in the *Jaworzina Advisory Opinion*, "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it." *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, 1923 PCIJ (Ser B) No 8 at 37. Hence, the authoritative interpreters of the ACHR are States themselves.

87. Binder, *supra* note 51 at 1204. The author of this paper understands the difficulties of the distinction between monist and dualist incorporation of international law but uses this distinction because its simplicity makes the issue of conventionality control easier to understand.

88. Mainly English-speaking Caribbean countries. Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, 2nd ed (New York: Routledge-Cavendish, 2008) at 217.

89. It would not be acceptable because dualists stress "that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other" (Malcolm N Shaw, *International Law*, 8th ed (Cambridge – New York: Cambridge University Press, 2017) at 97). Thus, the ACHR and the Court's interpretation of it would only have effect at the international plane, unless domestic laws were to give them some effect, which is exactly what the conventionality control doctrine—at least in its extensive approach—would try to overcome.

courts must redress these abuses.<sup>90</sup> Some of these violations are committed while private bodies are providing public services, such as health and higher education. In these areas, there may be some laws that counter the ACHR or the Inter-American Court's interpretation of it. As a result, if we follow the reasoning involved in the extensive interpretation of conventionality control to its logical conclusions, it may even end up granting private bodies the power to dismiss legislation that fails to conform to the Inter-American Court's standards.

In addition to these points, the extensive approach shares some problems with more restrictive approaches. This work describes below the restrictive approaches and its difficulties.

### III. RESTRICTIVE APPROACHES

#### A. General description

Former Judge García Ramírez, the initiator of the doctrine of conventionality control, issued a separate opinion to the *Aguado Alfaro* case, where he considered that there is a gap between domestic and international legal systems, and that it is possible to "build a bridge" between both legal orders.<sup>91</sup> This would actually happen "when a constitution grants the highest value to international human rights treaties or when it establishes that, in cases of difference or discrepancy, the norm that contains the maximum guarantees or most extensive rights for the individual will prevail."<sup>92</sup> García Ramírez stated that if this connection is "clear and categorical," or if it is, at least, "sufficient and intelligible, and that is not lost in uncertainties or a diversity of interpretations," and only then, "the national courts can and must conduct their own control of 'conventionality.'"<sup>93</sup> This would be a *diffuse* conventionality control if domestic judges are to apply international law.<sup>94</sup>

The statements of García Ramírez entail that domestic courts would be allowed to exercise strong conventionality control only if their system grants the ACHR a constitutional status. Unfortunately, it is not

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90. See e.g. *Suárez-Peralta*, *supra* note 54; and *Lagos del Campo*, *supra* note 54.

91. *Aguado Alfaro*, *supra* note 16 at para 10, separate opinion of Judge García Ramírez.

92. *Ibid.*

93. *Ibid* at para 11.

94. *Ibid* at para 12.

possible to affirm as a fact that the Court endorsed Judge García Ramírez's statement, because separate opinions represent an individual point of view of a judge and are not representative of the Court's majority understanding of a particular matter.<sup>95</sup> In fact, the Court has never clarified what it means by the phrase "in the context of their respective spheres of competence and the corresponding procedural regulations." This allows the existence of different understandings of the Court's statement.

Several scholars—possibly inspired by Judge García Ramírez's statements—consider that the expression "in the context of their respective spheres of competence and the corresponding procedural regulations"<sup>96</sup> means that domestic bodies can only exercise conventionality control if their Constitution grants them the power to do so. For instance, Carozza and González Domínguez contend that this is the meaning of conventionality control since the *Aguado Alfaro* decision.<sup>97</sup> More importantly, some judges of the Inter-American Court adopt a similar view. Not only Judge García Ramírez opines this. Similarly, Judge Ferrer Mac-Gregor Poisot considers that only the bodies that can exercise judicial review are entitled to apply conventionality control in its strong vein, that is, as allowing them to declare a statute to be void.<sup>98</sup> Judge Vio Grossi also shares a restrictive position, but probably narrower than that of García Ramírez. He simply states that the Inter-American Court's

[...] case law is binding only for the State that has undertaken to comply with the "*judgment of the Court*" in the case to which it is a party, and that, for the other States Parties to the Convention it is only a subsidiary source of public international law, in other words, a "*subsidiary means for the determination of rules of law.*"<sup>99</sup>

95. We stress this because this basic notion has been contested by Laurence Burgogme-Larsen, who considers that "concurring opinions are meant to guide *in fine* domestic judges; they are meant to refine, explain and conceptualize domestic judges' new role." Burgogme-Larsen, *supra* note 33 at 660.

96. *Aguado Alfaro*, *supra* note 16 at para 128; *Vélez-Loor*, *supra* note 17 at para 287.

97. Carozza & González Domínguez, *supra* note 9 at 439.

98. Ferrer Mac-Gregor Poisot, *supra* note 2 at 63–64.

99. [Emphasis of the Court]. *Sic. Wong Ho Wing v Peru* (Preliminary Objection, Merits, Reparations and Costs) (2015), Inter-Am Ct HR (Ser C) No 297, dissenting opinion of Judge Vio Grossi, at 18–19. He has held similar opinions in *Cruz-Sánchez et al v Peru* (Preliminary Objections, Merits, Reparations and Costs) (2015), Inter-Am Ct HR (Ser C) No 292 dissenting opinion of Judge Vio Grossi,

Other authors contend that conventionality control can only be applied domestically if there are constitutional clauses that open the doors of the domestic legal system to international law, and which grant human rights treaties a constitutional hierarchy<sup>100</sup> (these clauses would be the bridges between both legal orders, envisaged by Judge García Ramírez).

All these restrictive positions are radically different to that of Brewer Carías, who considers that the expression "in the context of..." has nothing to do with whether these domestic bodies are competent to exercise judicial review.<sup>101</sup> As we can see, there are at least two restrictive interpretations of conventionality control. The first tends to consider that, whenever the Court rules that all *State authorities* must engage in conventionality control,<sup>102</sup> it means that they must exercise a weak conventionality control, that is, to interpret domestic legislation in accordance with the ACHR. Only those who have the power to perform judicial review would be empowered to engage in a strong conventionality control, that is, to cease to apply domestic norms that are contrary to the Inter-American Court's interpretation of it. This position is probably influenced by an interpretation of Mexico's Supreme Court, which has ruled that conventionality control must be performed according to the regulations of the judicial review.<sup>103</sup> This view has been adopted by other highest domestic courts of the Americas, such as the Plurinational Constitutional Tribunal of Bolivia.<sup>104</sup>

The second position does not equate the power to perform judicial review with the power to engage in a strong conventionality control. In order to allow domestic bodies to perform conventionality control, it requires the fulfillment of certain conditions. States would need to have a legal norm that interrelates their domestic legal systems with

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*in fine*, and *Gómez-Murillo et al v Costa Rica* (2016), Inter-Am Ct HR (Ser C) No 326, dissenting opinion of Judge Vio Grossi, introduction (in Spanish only).

100. Miriam Henríquez Viñas & José Ignacio Núñez Leiva, "Control de Convencionalidad en Chile. Un Soliloquio en 'El Laberinto de la Soledad'" in Morales Antoniazzi & Henríquez Viñas, *supra* note 2, 375 at 379.

101. Brewer Carías, *supra* note 50 at 17.

102. *Andrade-Salmón v Bolivia* (Merits, Reparations and Costs) (2016), Inter-Am Ct HR (Ser C) No 330, at para 93.

103. Brewer Carías, *supra* note 50 at 17.

104. Tribunal Constitucional Plurinacional, 2017, Judgment 0084/2017 at 32 (Bolivia). This Tribunal has a broad view of conventionality control and considers that even the National Constitution may be invalidated if it runs counter to the case law of the Inter-American Court. *Ibid* at 17 and 19.



international law, such as an immediate constitutional incorporation of international law. In such cases, these legal orders would need to define whether the Inter-American Court's case law has a binding nature. The specific issue of whether domestic bodies should consider Inter-American case law as forming part of the ACHR would also depend on whether their municipal legal systems take precedents into account, particularly, international precedents. For example, Costa Rica's Supreme Court considered that, since the Inter-American Court is the "natural" interpreter of the ACHR, its interpretations of it would have "in principle" the same value as the norm that is interpreted.<sup>105</sup> This understanding is fully compatible with the State's power to define the relationship between domestic and international law.

## B. Complexities of the restrictive approach

The restrictive approach that was first mentioned (the one requiring weak conventionality control to be applied in all cases, and *strong* conventionality control to be applied by bodies with the authority to conduct judicial reviews) inherently makes an analogy between conventionality control and judicial review. The problem with this interpretation is that judicial review is not the same as conventionality control. Hence, it is inaccurate to conclude that all judges that engage in judicial review automatically have the power to perform a *strong* conventionality control. Several factors condition the possibility of making an analogy between judicial review and conventionality control. The most important is whether the national constitution gives international treaties, or at least the ACHR, the same hierarchy as the constitution, which is not always the case<sup>106</sup> (even within States that grant jurisdiction to the Inter-American Court, the relationship between their municipal law and international law is particularly dissimilar).<sup>107</sup>

The most significant—albeit hypothetical—arguments that can be directed exclusively against the restrictive approach would be that the extensive approach has a higher potential to increase the reach of

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105. Corte Suprema (1995), Exp 0421-S-90, No 2313-95 (Costa Rica), "*considerando*" VII (author's translations). It would also be the case of Bolivia, according to its Constitutional Tribunal. Tribunal Constitucional Plurinacional, 2017, Judgment 0084/2017 at 19 (Bolivia).

106. E.g. Argentina and Nicaragua.

107. See Instituto Interamericano de Derechos Humanos, *supra* note 16 at 113–121. Some States grant international law a constitutional hierarchy—some even mention the ACHR in their constitutions—while others are rather silent on this matter; see *ibid.*

the Inter-American Court's decisions. However, this argument is contestable, because the effectiveness of conventionality control, as it is currently applied, still depends on the receptiveness by State parties. For instance, in the case of Chile, the reception of the doctrine of conventionality control has been near to non-existent.<sup>108</sup> This attitude cannot be associated with contempt of the Court, because Chile has been included among the "top five compliers" with the Court's decisions.<sup>109</sup> It therefore seems that other domestic factors will have a higher influence on the reception of the Court's interpretations than the Court's creation of the doctrine of conventionality control.

Another argument against the restrictive approach is that it may go against the Court's rulings, because the Court affirms that State bodies have a *duty* to perform conventionality control (according to their respective spheres of competence and procedural regulations). However, according to the restrictive approach, States would have the freedom to determine the extent to which they will allow conventionality control—even to have no conventionality control at all. Therefore, States bodies would actually have no *duty* to engage in it.

Some other problems identified with the restrictive approach, which are shared with the extensive approach, are the following:

- a) The Inter-American Court does not follow a system of precedents and is not absolutely consistent in its interpretation of the ACHR.<sup>110</sup> This does not facilitate States' application of conventionality control, which requires not only applying the ACHR, but also the Inter-American Court's interpretation of it.
- b) When interpreting the ACHR, the Court uses several international instruments that are beyond the Inter-American system of human rights.<sup>111</sup> It may use non-ACHR treaties when deciding cases against States that have ratified them. Hence, if the doctrine of conventionality control requires all States subject to the Court to apply its case law, it would end up asking some States to apply interpretations that the

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108. Henríquez Viñas & Núñez Leiva, *supra* note 100 at 401–02.

109. Darren Hawkins & Wade Jacobi, "Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights" (2010) 6:1 J Int Law Int Relat 35 at 62.

110. Álvaro Paúl, "Decision-Making Process of the Inter-American Court: An Analysis Prompted by the 'In Vitro Fertilization' Case" (2014) 21:1 ILSA J Int Comp Law 87 at 92–93.

111. *Ibid* at 98.

Court reached after considering treaties that do not bind them. This result would be unacceptable.

- c) Some authors consider that the doctrine of conventionality control is contrary to the principle of subsidiarity,<sup>112</sup> although others consider the exact opposite.<sup>113</sup>

### C. The Court's chance to adopt a more *conventional* conventionality control

In this paper, we described two approaches to the doctrine of conventionality control. One of them, the extensive approach, has several problems that make it incompatible with well-known rules of international law, and even with the text of the ACHR.<sup>114</sup> By contrast, the restrictive approach grants States more flexibility and decision-making power in the way they apply this doctrine. It understands that conventionality control can only be applied by domestic bodies entitled to do so according to their own domestic legislation or, at least, that bodies with no specific entitlement can only apply a *weak* conventionality control, while the domestic bodies entitled to perform judicial review can apply a *strong* conventionality control. The restrictive interpretation would be compatible with international law only if it is applied by bodies that have the power to exercise conventionality control according to their national constitution. This empowerment may be granted explicitly by the law, or tacitly, if the constitution integrates the ACHR into its provisions (in which case judicial review would include the analysis of the compatibility of domestic laws and the treaties that are part of the constitution).<sup>115</sup> By saying this, we disagree with the position sustaining that judges who are entitled to exercise judicial reviews have some kind of automatic entitlement to apply conventionality control.

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112. Dulitzky, *supra* note 4 at 47, and Carlos Alberto Gabriel Maino, "El Control de Convencionalidad y las Dificultades que Ofrecen las Interpretaciones de la CIDH" (2016) 81 *Prudentia Iuris* 31 at 36–37.

113. E.g. Burgorgue-Larsen, *supra* note 33 at 658. Others consider that the doctrine exists within a system that presupposes subsidiarity. García Ramírez, *supra* note 11 at 25.

114. E.g. with article 2 of the ACHR, which requires States to give effect to the rights and freedoms established in this ACHR, "in accordance with their constitutional processes and the provisions of this Convention."

115. As is the case with Argentina.

Since we are at a historical moment in which the content of the doctrine of conventionality control is developing and unclear, it is still timely for the Inter-American Court to adopt the restrictive position; in particular, the position that requires a clear bridge between the Inter-American Court's case law and domestic legal systems. Should the Court endorse this position as its own, it would be adopting a view that is compatible with general rules of international law and with the domestic rule of law. Some judges of the Inter-American Court have demonstrated a restrictive position, thus giving the Court the possibility to define the doctrine of conventionality control in a more confined and restrictive way. On the contrary, maintaining the doctrine of conventionality control in its extensive interpretation is not sustainable, based on a lack of legal standing within the ACHR, and the fact that it may be contrary to certain States' constitutions. There is, in this regard, an emerging body of scholarly literature that is wary of the application of the extensive approach. Finally, since you can catch more flies with honey than vinegar, the adoption of an extensive approach by the Inter-American Court may ultimately have the negative and paradox effect of deterring States from adopting the doctrine of conventionality control.

## CONCLUSIONS

Sergio García Ramírez, a former president of the Inter-American Court and initiator of the doctrine of conventionality control argued that if the Court and State parties do not agree on their understanding of conventionality control, these contradictions could lead to a decay of the continental protection of human rights.<sup>116</sup> Without weighing on the accuracy of this statement, it shows that there is plenty involved in the correct understanding of conventionality control.

There are at least two readings of this doctrine. The first, the extensive approach, considers that all domestic bodies should always exercise conventionality control—even if it entails invalidating domestic statutes that are contrary to the interpretations of the Inter-American Court—regardless of whether these bodies have the power to exercise judicial review. The second reading, the restrictive approach, considers that domestic bodies can only exercise conventionality control if they

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116. García Ramírez, *supra* note 11 at 23.

have the power to engage in it. Within the context of this interpretation, some authors consider that all domestic bodies must exercise at least a *weak* conventionality control, and that only the bodies with competence to exercise judicial review must perform a *strong* conventionality control. This reading, however, engenders new dilemmas, namely, that it fails to explain why the bodies that exercise judicial review would be automatically empowered to engage in a *strong* conventionality control, since there are many differences between judicial review and conventionality control. A second reading within the restrictive approach requires a more specific bridge between international law and domestic legal systems, such as the incorporation of the ACHR into the State parties' constitutions, in order to justify the application of the doctrine of conventional control.

Should the Court adopt the extensive approach to the application of conventionality control, States may find it difficult to accept this doctrine, due to its lack of a normative basis and overly broad effects. By contrast, if the Court clearly adopted the restrictive position, allowing States to define the hierarchical position and incorporation of the ACHR into their legal systems—and to follow their own legal traditions on the matter of precedents—, it would eliminate any obstacles to the application of the doctrine of conventionality control. This position would be more compatible with the autonomy of States in determining the scope and application of international law in their domestic legal orders.