

The evolution of the Inter-American System for the Protection of Human Rights and the doctrine of conventionality control

Introduction

The two great wars of the twentieth century brought a revival of constitutional theory. To be precise the resurgence in this regard was a result of mistakes and excesses that occurred in a period marked by violent authoritarian projections against human dignity. Many of these projections were marked by the solid construction of enabling legal systems, based on a normative positivism which called for a too purely formal analysis of the law against a primarily substantial perception of the legal phenomenon.

This turn of constitutional law eventually created, on the one hand, the domestic need to open constitutions to the international environment of instruments for protecting human rights. On the other, it brought the need to structure international systems for the protection of human rights in such a way that states would increasingly start to admit their binding supranational normativity alongside the existing normativity of national constitutions¹. Such interweaving of human

¹ G.J. Bidart Campos, D.E. Herrendorf, *Principios de derechos humanos y garantías*, Buenos Aires 1991, p. 250. "The two facets are inextricably linked. When a state is party to one or more human rights treaties, it takes on an international commitment, an obligation and responsibility to fulfil. This is an international enforceable compliance, while simultaneously enforceable internally in the state's own jurisdiction, precisely because lack of such compliance within the national territory triggers international responsibility" (trans. – L.G.A.C.).

rights standards will eventually cause a multiplication of institutions with similar functions (legislative, executive and judicial) on the one side, and on the other, a multiplication of catalogues of human rights with explicit similarities that make the existence of the multi-level protection² (transconstitutionalism) of human rights clear to the benefit of human beings, both on the national and international level³.

With this movement, states, subject to rights and duties, take on international pledges regarding the promotion and protection of human rights in such a way as to create a spectrum of legal normativity that serves as a shield, mainly for individuals who establish a legal relationship with these states, so that in case of violations, the state's international accountability can be contemplated⁴.

Among the structures that develop internationally, one may point to the overall system of human rights protection, with its centre at the United Nations (UN), and to the regional systems for the protection of human rights which, on the American continent, are centred on the Organization of American States (OAS).

² M. Neves, *Transconstitucionalismo, con especial referencia a la experiencia latinoamericana*, in: *La justicia constitucional y su internacionalización. ¿Hacia un ius cosntitucionale commune en América Latina?*, ed. by A. Bogdandy et al., T. II, Cidade do México, p. 537.

³ S. Albanese, *La internacionalización del derecho constitucional y la constitucionalización del derecho internacional*, in: *El control de convencionalidad*, ed. by S. Albanese (coord.), Buenos Aires 2008, p. 13 et seq.; C. Lafer, *A internacionalização dos direitos humanos: Constituição, racismo e relações internacionais*, Barueri 2005, p. 14; A. Quiroga Leon, *Relaciones entre el derecho internacional y el derecho interno: Nuevas perspectivas doctrinales y jurisprudenciales en el ámbito americano*, "Ius et Praxis" 2005, vol. 11, no. 1, p. 5. "The systems for protecting fundamental rights initially instructed the domestic law of each State through the mechanisms for protection under the constitutions of each of these states (and possibly some constitutional rules later). However, this openly restricted view regarding the recognition of fundamental rights was later superseded by a phenomenon known as the «internationalization of human rights», which operated after World War II. Interestingly, the course of international law has historically involved a course from inside out, i.e. from domestic law to the international sphere. However, the recent history of international human rights exhibits a reverse route, thus marking its peculiarity: from international law it gradually goes «down» to the various national legal systems, at different times and in different historical moments until it is suddenly able to constitute a minimum common denominator of basic rights or inalienable and irrevocable basic rights, as part of the foundations of fundamental or constitutional order of a particular nation" (trans. – L.G.A.C.).

⁴ G.J. Bidart Campos, D.E. Herrendorf, op. cit., p. 250. "The international responsibility of a state that violates an obligation – international or domestic – to give effect to those rights in favour of the men who make up its population is accentuated when there is the possibility that the man accuses the state before a supranational or international tribunal of having violated one or more rights guaranteed in those treaties" (trans. – L.G.A.C.).

It is also important to mention that in Latin America the problem of democratic fragility, which has historically been the hallmark of this continent, remains noticeable. The initial wave of political transformations toward representative democracy came in the late 1960s, at the time when the Inter-American Human Rights System (IAHRS) was established, and which saw dictatorships proliferate across the continent. A second wave began in the 1980s, with the process of democratization across the continent under the protection of mechanisms set out in the IAHRS. The third wave started at the end of the 1990s, and is now more geared to the fulfilment of promises, more focused on the issue of implementing the rights provided for in international treaties, and with the strengthening of existing institutions.

1. System of the Organization of American States and the Inter-American Human Rights System – a necessary distinction

As will be seen, within the OAS there are two systems that exhibit differences, but coexist and communicate, i.e. the system of the Organization of American States and the Inter-American Human Rights System⁵.

The first, the OAS system, was established by the OAS Charter. It comprises 35 states and not only has an OAS Assembly, but also an OAS Permanent Council, the Inter-American Commission of Human Rights (IACommHR) and the Inter-American Council for Integral Development. This system predates the American Convention on Human Rights (ACHR), and also has the goals of protecting and implementing human rights. Over time, it has been based on a democratic clause introduced by the Washington Declaration of 1992, which requires, under penalty of suspension (as imposed against Honduras in 2009), that a democratic regime is preserved as a condition of maintaining the state party as a member. It is a system with a political profile, since it does not have a court, but with this, it does not deny the salutary and effective activity that develops. Alongside that system is another one with which it communicates constantly. Some organs, like the OAS Assembly⁶ and

⁵ Said differentiation is given by A. de Carvalho Ramos, *Processo Internacional de Direitos Humanos*, São Paulo 2012, p. 185 et seq.

⁶ This body is not usually considered part of the IAHRS, but it is submitted that it is currently impossible to suppress it.

the IACommHR, which came into being ten years before the ACHR was opened for signature in 1969, even exist in both systems. Alongside these two organs is the Inter-American Court of Human Rights (IACrHR), the judicial body (created in 1979). This system also has other international treaties on human rights⁷ and is the principal subject of the present study.

2. The regional system of human rights protection on the American continent: the Organization of American States

The regional systems for human rights protection established in the Americas, Africa and Europe were guided by a complementary role⁸ to the global (UN) system which, in turn, acts in the same way with respect to the law of nation states⁹. These continue to have primacy in the process of implementing human rights.

⁷ American Declaration of the Rights and Duties of Man (1948), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988), Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990), Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994), Inter-American Convention to Prevent and Punish Torture (1985), Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities (1999), Inter-American Convention on Forced Disappearance of Persons (1994). All these acts are available on the website of the OAS, <http://www.oas.org> (accessed: 20 X 2014).

⁸ V. Bazan, *Corte Interamericana de Derechos Humanos y Cortes Supremas o Tribunales Constitucionales latinoamericanas: el control de convencionalidad y la necesidad de un diálogo interjurisdiccional crítico*, "Revista Europea de Derechos Fundamentales" 2010, no. 16, Fundación Profesor Manuel Broseta e Instituto de Derecho Público Universidad Rey Juan Carlos, Valencia, España, 2011, p. 22.

⁹ C. Heyns, L. Zwaak, D. Padilla, *Comparação Esquemática dos Sistemas Regionais de Direitos Humanos: Uma Atualização*, "SUR Revista Internacional de Direitos Humanos" 2006, ano 3, no. 4, pp. 161–162. "Although there were initial questions against the establishment of regional systems of human rights, especially by the United Nations with its emphasis on universality, the benefits of having such systems are now widely accepted. Countries in a particular region often have a shared interest in protecting human rights in that part of the world, and the advantage of proximity to influence each other's behaviour and to ensure compliance with common standards, which the global system does not offer. Regional systems also allow regional values to be taken into account when defining the standards of human rights – obviously at risk, if this goes too far, in compromising the idea of the universality of human rights. The existence of regional human rights systems allows enforcement mechanisms that fit better with local conditions than the system of global, universal protection. A more judicial approach to enforcement may be appropriate, for example, in a region like Europe, while an approach that also allows

3. The OAS Charter and the American Declaration of Human Rights

On the American Continent, the regional system based on the Organization of American States emerges as the oldest international system for human rights protection in comparative analysis, since it came into being a few months before the global system based at the United Nations.

The creation of a Latin American legal system can first be found in the treaty signed at the Congress of Panama in 1826, influenced by the ideas of Simon Bolivar and San Martin. In the late nineteenth century, the First International American Conference (1890) saw discussions on the possibility of creating an International Union of American Republics. Following numerous similar conferences in Mexico (1901), Brazil (1906), Argentina (1910), Chile (1923), Cuba (1928), Uruguay (1933), Peru (1938), the Organization of American States was finally founded in Colombia in 1948. It is important to point out that even before its creation, there were already many resolutions and treaties which contributed to shaping the American system itself. These were passed or concluded at the Pan American Conferences, by the Pan American Union and, since 1936, at the consultation meetings of the Foreign Ministers and by bodies such as the Special Board of Jurists of Rio de Janeiro, the Inter-American Defense Board, the Defense Advisory Committee, among others¹⁰.

room for non-judicial mechanisms such as committees and peer review, may be more appropriate in a region like Africa. The global system does not have this flexibility. The treaties that make up the regional human rights systems follow the same format. They set out certain norms – individual rights, especially, but in some cases also the rights and duties of people – that are valid in states that have adopted the system, and create a monitoring system to ensure compliance with these standards in states that have adopted it. The classical format of a monitoring system like this was set by the European Convention on Human Rights 1950. Under this system, once a person has pursued all means to have their rights vindicated by the legal system of their country, she can go to a human rights commission created by the regional system. The commission will give the State an opportunity to respond, and then decide whether there was or not a violation. However, this decision does not by itself carry the force of law. To obtain such a result, the case must be forwarded to the regional human rights court, where binding legal decisions are issued for the concluding whether there was a violation of the treaty by the Member State” (trans. – L.G.A.C.).

¹⁰ J. Hitters, O. Fappiano, *Derecho internacional de los derechos humanos*, T. I, vol. 1, Buenos Aires 2007, p. 370; A. de Carvalho Ramos, *Processo Internacional...*, p. 190 et seq.

The Ninth International Conference of American States, which took place in Bogota (Colombia) in 1948, saw a definite success in creating an American system with the approval of the Charter of the OAS¹¹ and the proclamation of the American Declaration of the Rights and Duties of Man (ADRDM).

The OAS Charter has one hundred and forty-six articles and primarily has a structural function of referring to bodies and authorities. By contrast, the ADRDM has thirty-eight articles and its substantial function is to declare rights and duties. Its preamble includes expressions that denote the environment that surrounded its creation with references to the need to understand that the rights of individuals do not derive from the nation states in which they are regarded as citizens, but rather derive from their own attributes as human beings. The preamble also contains the pledge that “the international protection of the rights of man should be the principal guide of an evolving American law” and that this dedication does not relieve the primacy of nation states to protect them within their territories, but that there should be a stimulus for further strengthening international human rights “as conditions become more favorable”¹². In terms of its content, in addition to rights,

¹¹ The Charter of the OAS has been signed by twenty-five American States and achieved the minimum ratification threshold of two-thirds of its signatories in 1951. The Charter was first amended by the Protocol of Buenos Aires in 1967, under which the IACommHR became a principal organ of the OAS. Some further amendments were later introduced to the Charter through the Protocol of Cartagena de Indias in 1985, the Protocol of Washington in 1992 and the Protocol of Managua in 1993.

¹² It is worth reproducing the preamble of the American Declaration of the Rights and Duties of Man in full, not only for its historical value, but for its prospective content: “WHEREAS: The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness; [t]he American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality; [t]he international protection of the rights of man should be the principal guide of an evolving American law; [t]he affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable, [...]”, <http://www.oas.org/en/iachr/mandate/Basics/declaration>.

it also deals with the duties of man. This fact makes ADRDM an international instrument of wider scope than the Universal Declaration of Human Rights¹³.

Historically, the ADRDM did not arise naturally as a normative instrument of the IAHRs¹⁴, but worked initially as a tool to aid in the interpretation of inter-American law under Art. 64 of the American Convention on Human Rights (ACHR), and was thus used by the Inter-American Court in preparing its position in its advisory opinions. However, it is gradually acquiring normative force, and can no longer be regarded as a document in which purely political or moral appeals are made, and it does acquire cogent legal force¹⁵. This is especially true when it appears that among the tools that can bring a nation state under investigation of the Inter-American Commission on Human Rights (IACommHR), a violation of the American Declaration of the Rights and Duties of Man can be used independently of another concurrent breach of the tools provided in Art. 23 of the Rules of Procedure of the Commission.

asp (accessed: 20 X 2014). See also Corte Interamericana de Derechos Humanos (Corte IDH), *Interpretação da Declaração Americana dos Direitos e Deveres do Homem no marco do artigo 64 da Convenção Americana de Direitos Humanos*, Opinión Consultiva del 14 VII 1989, OC-10/89, Série A No. 10, para. 34 et seq., http://www.corteidh.or.cr/docs/opiniones/seriea_10_esp1.pdf (accessed: 20 X 2014).

¹³ The Universal Declaration of Human Rights does not deal with the duties.

¹⁴ Inter-American Court of Human Rights (IACrHR), *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion of 14 VII 1989, OC-10/89, Series A No. 10, para. 44, http://www.corteidh.or.cr/docs/opiniones/seriea_10_ing1.pdf (accessed: 20 X 2014). The IACrHR reiterates its position, most recently in the case *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 23 XI 2009, Series C No. 209, p. 13, para. 42, http://corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf (accessed: 20 X 2014): "The Court states that, in effect, it does not have jurisdiction to apply stipulations of the Charter of the OAS within the framework of a contentious proceedings".

¹⁵ In this sense, see J. Hitters, O. Fappiano, op. cit., p. 396. It is interesting to note that after the Argentine constitutional reform of 1994, the American Declaration of the Rights and Duties of Man became part of the federal constitutionality block (see Art. 75 para. 22 of the Constitution of Argentina; *Constitucion de la Nacion Argentina* 23 de Agosto de 1994 (consolidated text Boletín Oficial 1994 No. 27.959)). This means that for Argentine law, it has the same normative force of the other treaties that make up its constitutionality block.

4. The American Convention on Human Rights as the main legislative instrument of the Inter-American Human Rights System

The American Convention on Human Rights (ACHR), also known as the Pact of San José (1969)¹⁶, is the main international treaty of the Inter-American Human Rights System¹⁷, although there are other international treaties and instruments under that system to emphasize the protection of human beings in general and special circumstances¹⁸.

The ACHR is divided into two major thematic sets, a structure, which defines the responsibilities of the IACommHR and the IACrHR and another substantial set in which civil and political rights are defined, along with a brief illustration of social rights and the duties of both states parties and people under their jurisdiction.

Among the duties of states we find the duties: (a) to respect the rights of which they are signatories and (b) to adopt the provisions of domestic law in order to fulfil international obligations (Art. 1 and 2 of the ACHR). As for the duties of the people, there are those to family, community and humanity (Art. 32 of the ACHR).

With regard to human rights, its text presents the following rights: (a) the right to juridical personality, (b) the right to life, (c) the right to human treatment, (d) the right to personal liberty, (e) freedom from

¹⁶ Adopted and opened for signature at the Specialized Inter-American Conference on Human Rights, in José, Costa Rica, on 22 XI 1969. OAS Treaty Series no. 36, B-32; UNTS vol. 1144, no. 17955. ACHR has been ratified by twenty-five American states. Two of these states – Trinidad & Tobago and Venezuela – denounced the Convention on 26 V 1998 and 10 IX 2012 respectively. OAS consists of thirty-four states. See OAS Multilateral Treaties, American Convention on Human Rights, Signatories and Ratifications, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (accessed: 20 X 2014).

¹⁷ See F. Andreu-Guzman, *30 años de la Convención Americana sobre Derechos Humanos – todavía hay mucho camino que recorrer*, in: *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI*, tomo I, Corte IDH, São José da Costa Rica 2001, p. 301.

¹⁸ American Declaration of the Rights and Duties of Man (1948), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (1988), Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990), Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994), Inter-American Convention to Prevent and Punish Torture (1985), Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities (1999), Inter-American Convention on Forced Disappearance of Persons (1994). All these acts are available on the website of the OAS, <http://www.oas.org> (accessed: 20 X 2014).

ex post facto laws (non-retroactivity of law), (f) the right to compensation, (g) the right to privacy (protection of honour and dignity), (h) freedom of conscience and religion, (i) freedom of thought and (j) expression, (k) the rights of the child, (l) the right to reply, (m) the right of assembly (n) freedom of association, (o) the rights of the family, (p) the right to a name, (q) the right to nationality, (r) the right to private property (s) freedom of movement and (t) residence, in addition to (u) the right to a fair trial, (v) freedom from slavery, (w) prohibition of collective expulsion of aliens, (x) the right to equal protection (equality before the law), and (y) the right to judicial protection. Finally, (z) economic and social rights, are summed up to the right to progressive development.

In the current phase, the stress is not on conclusion of new treaties or other international instruments, but rather on thorough realization of human rights and the strengthening of inter-American institutions, especially the IACrHR and the IACommHR.

5. The Structure of the Inter-American Human Rights System

The IAHRs consists of three main organs¹⁹: the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights²⁰, and also the OAS General Assembly.

5.1. The OAS General Assembly

The General Assembly is the most important organ of the OAS for it coordinates its political activities and its mode of action. In addition to having the competence to shape and reform the organs of this multilateral organization, it is also a place for the coordination of international diplomacy and cooperation between member states. Moreover, it is the

¹⁹ There are other organs in the structure of the OAS. However, only the three organs mentioned are directly involved in the approval and implementation of the IAHRs.

²⁰ F.K. Comparato, *A Afirmação Histórica dos Direitos Humanos*, São Paulo 2003, p. 369. "With regard to the surveillance and judgment, in general, the convention followed the European model and not the International Covenant on Civil and Political Rights 1966. Indeed, apart from creating a commission to investigate the facts of violation of its rules, it also created a special court to judge disputes arising there from, namely the Inter-American Court of Human Rights, whose jurisdiction is only binding on those Party States that have accepted it expressly (Art. 62 para. 1)" (trans. – L.G.A.C.).

organ that is the head of the OAS, relates to the United Nations (UN) and other multilateral organizations, and which represents the states before international or national bodies. It also receives and discusses reports that are brought by OAS organs, such as the IACommHR and the IACrHR.

Its relationship with the IACommHR and the IACrHR, with regard to the expedients themselves, is to enforce the decisions issued by these agencies, such as publication and publicity of reports, and also to issue reports for the purpose of shaming member states that have violated human rights²¹ before the international community. As a result of this function, the OAS is also effectively an implementing agency, as it has to give strength to the political decisions of those bodies in order to make life difficult for states regarded as human rights violators. This role as promoter of treaties, international instruments and decisions seals its place as an important organ of the IAHRs, responsible for the realization of human rights, apart from its powers regarding the creation of treaties.

It follows that the OAS Assembly may be understood as part of the IAHRs, since it actively participates in the process of implementing human rights and its actions are usually respected and followed²².

The General Assembly typically meets once a year and holds special meetings as often as necessary, with each member state entitled to one vote.

5.2. The Inter-American Commission on Human Rights

The IACommHR, established in 1959²³, is composed of seven members²⁴ and aims to promote the observance and defence of human rights in the member states, as well as to serve as a consultative body of the

²¹ This role is strengthened because there is no organ whose specific duty it is to supervise the decisions made by the IACrHR, in which the Court is said to rule upon itself. See C.R. Fernández Liesa, *Tribunales Internacionales y espacio Iberoamericano*, Madrid 2009, p. 78.

²² For a contrasting opinion, see A. de Carvalho Ramos, *Processo Internacional...*, p. 190 et seq.

²³ It held its first meeting in 1960.

²⁴ These are elected by the OAS General Assembly from a list of candidates drawn up by the governments of member states and carrying up to three candidates, who need not necessarily be from the state party making the nomination. Indeed, one of the three must be a national of another state party other than the one which tendered the nomination. The term of service is four years with the possibility of renewal, and two judges from the same state party may not serve concurrent terms (according to Art. 34, 36, 37 paras. 1 and 2 of the ACHR).

Organization of American States in this matter²⁵. In addition to the OAS Charter, the ACHR and the ADRDM, it is governed by two specific instruments, its Statute and its Rules. The IACCommHR's decisions are binding on all states parties of the American Convention with respect to the rights within it, and all other members of the OAS in relation to the rights set down in the ADRDM²⁶.

It should be noted that in the proceedings before the IACCommHR, the state may be asked, in a first report, to comply with its obligations within three months. Should it fail to do so, a problem arises. As noted, not all states parties to the ACHR accepted the jurisdiction of the IACrHR. Thus, if the obligation has been breached and the state is subject to the procedure before the IACCommHR, the case will be solved by the latter. Upon failure to accede to the first report, a second report will be issued, again condemning the practice of human rights violations and this report will then be binding²⁷.

Articles 44 and 45 of the ACHR (in addition to Art. 23 and 24 of the Rules of Procedure of the IACCommHR) empower any person, group of persons or legally recognized non-governmental entity in one or more member states of the OAS, to present before the IACCommHR petitions containing denunciations or complaints of violations of the ACHR by a state party (terms of admissibility are defined in Art. 30 of the Rules of Procedure of the Commission). The exhaustion of domestic

²⁵ According to Art. 41 of the American Convention the Commission has the following general tasks: "(a) to promote an awareness of human rights among the peoples of America; (b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; (c) to prepare such studies or reports as it considers advisable in the performance of its duties; (d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights; (e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request; (f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and (g) to submit an annual report to the General Assembly of the Organization of American States".

²⁶ F. Piovesan, *Direitos Humanos e Justiça Internacional*, São Paulo 2011, p. 129.

²⁷ IACrHR, *Loayza Tamayo v. Peru*, Judgment of 17 IX 1997, Merits, Series C No. 33, paras. 78–82, http://www.corteidh.or.cr/docs/casos/articulos/seriec_33_ing.pdf (accessed: 20 X 2014).

remedies²⁸ is one of the core requirements for the admissibility of the petition, along with the lack of international *lis pendens*. According to Art. 25 of the Rules of Procedure, the Commission also has the power to adopt precautionary measures to avoid irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.

The illicit acts may have occurred within a member state of the OAS or in another territory, provided that these acts are performed by agents of a state that is also part of the OAS.

Once the requirements for the petition are met, information is requested from the state on the alleged human rights violations. If necessary, the IACommHR may conduct on-site²⁹ investigations (Art. 48 para. 2

²⁸ Rules of Procedure of the Inter-American Commission on Human Rights modified at its 147th Regular Period of Sessions, held from 8 to 22 III 2013 (entry into force on 1 VIII 2013), <http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf> (accessed: 20 X 2014). "Article 31. Exhaustion of Domestic Remedies. 1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law. 2. The provisions of the preceding paragraph shall not apply when: (a) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. 3. When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record". More on the principle of exhaustion of domestic remedies and its exceptions, see A.A. Cançado Trindade, *O esgotamento de recursos internos no direito internacional*, Brasília 1997, p. 248 et seq. J. Magaroli and S.L. Maculan indicate the following exceptions: the absence of legal regulation for the implementation of due process in the domestic sphere, inability to use existing resources, whether it is access or its absence; unreasonable delay of the decision in a lawsuit; fear of lawyers to present resources; state of destitution that prevents access by the victim; other causes that prevent the effectiveness of resources. Cf. J. Magaroli, S.L. Maculan, *Procedimiento ante el Sistema Interamericano de Derechos Humanos*, Buenos Aires 2012, p. 118.

²⁹ According to B. Santoscoy "[t]he main objective of an on-site observation is to clarify the allegations, investigate the circumstances surrounding them and record these in an objective report, which will subsequently be presented to the political organs of the organization and made public. Thus, the on-site observation fulfils its primary task of observing and reporting to the international community on the human rights situation affecting a particular country" (trans. – L.G.A.C.). Cf. B. Santoscoy, *Las Visitas in loco de la Comisión Interamericana de Derechos Humanos. En: Memoria del seminario el Sistema*

of the ACHR) in respect to which reports will be drafted and sent to the OAS political bodies, or even it may issue precautionary measures in order to prevent irreparable harm.

After examining the matter and the evidence, the IACCommHR may suggest an amicable settlement between the parties (the petitioner and the State). Should the conciliation be unsuccessful, the Commission will issue its conclusions about the case through the report to be brought to the attention of the government in question with recommendations on how to repair damage. These must be met within three months. If the government fails to comply with these recommendations, the IACCommHR may publish its findings in the annual report of the General Assembly of the Organization of American States. The publication itself already represents significant pressure on national governments to correct the situation (the so-called 'power of embarrassment').

If the requests go unanswered within the prescribed period of three months from the date of referral of the report to the state under investigation, the Commission must refer the case to the Inter-American Court, whose jurisdiction is binding on those states parties which have expressly accepted it (Art. 62 of the ACHR)³⁰. For cases in which states are not subject to the jurisdiction of the IACrHR, the Commission usually publishes a second report, as mentioned above. Furthermore, it is the IACCommHR's obligation to monitor compliance with its recommendations.

It must be noted that the amendment to Art. 44 of the new Rules of Procedure of the Commission, which was adopted on May 1, 2001, made mandatory the submission of cases where the state failed to comply with the provisions of the report to the Inter-American Court, pursuant to Art. 50 of the Convention. In the words of F. Piovesan: "[i]f, previously, it fell to the Inter-American Commission, based on a discretionary

Interamericano de Protección De Los Derechos Humanos en el umbral del siglo xxi, T. I, San José, Costa Rica, 23 y 24 de noviembre de 1999, pp. 607–608.

³⁰ By 2014, twenty-two states parties to the ACHR had recognized the jurisdiction of the IACrHR. However, Trinidad & Tobago and Venezuela denounced the Convention in 1998 and 2012 respectively. The Court has no jurisdiction over Barbados, Dominica, and Jamaica – all three states parties did not recognize the competence of the IACrHR whatsoever (Dominica did that even explicitly). It must be noted that the American states which have not become party to the Convention so far, let alone accepted the jurisdiction of the Court, include Canada and the United States (the latter having signed the ACHR on 6 I 1977).

assessment, with no objective parameters, to submit to the Inter-American Court a case that has not reached an amicable solution, with the new Rules of Procedure the submission is done seamlessly and automatically. The system becomes more toned with «legality», reducing the selectivity policy that until then was conducted by the Inter-American Commission” (trans. – L.G.A.C.)³¹.

5.3. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights is the judicial institution within the OAS structure. It was created formally by the ACHR in 1969, and since 1979 has been based in San Jose (Costa Rica). The Court enjoys an advanced degree of autonomy to perform its functions and aims to apply and mainly interpret the ACHR, and other treaties and instruments. Its judges must comply with the requirements of “high moral character” and possession of “recognized competence in the field of human rights”, they must meet the conditions required for the exercise of high judicial office in their states of origin or in the states that propose their candidature, and there cannot be more than one judge of the same nationality.

The IACrHR is composed of seven judges, nationals of member states of the OAS, who are selected according to the procedure established by Art. 53 of the ACHR, from a list submitted by these states. They are elected by an absolute majority in a secret ballot of states parties to the Convention, at the General Assembly. Once elected, they serve for six years, subject to renewal for the same period.

The IACrHR must present an annual report to the OAS General Assembly³², reporting on its activities in the previous year, and should give special attention to cases in which their decisions were not met by the member states that recognize its jurisdiction. In this relationship, there is cooperation between the two bodies in order to more efficiently monitor fulfilment of international treaties that are part of the IAHRs. The Assembly enjoys the prestige of a political body, while the Inter-American Court acts as the technically authorized body to

³¹ F. Piovesan, *op. cit.*, p. 135.

³² Technically, the reports of the IACrHR are analyzed by the Permanent Council, which presents them to the General Assembly of the OAS for approval of a proposed resolution.

interpret and implement the human rights contained in those treaties, and may propose actions that enable the system to work more efficiently.

The powers of the IACrHR are divided into those relating to matters of contentious and advisory character³³.

5.3.1. Jurisdiction of the IACrHR in contentious cases

Access to the IACrHR (Art. 61 of the ACHR) in the American system of human rights can occur in two ways: by referral of the report by the IACommHR from a case analyzed by it, or directly by the state party³⁴. Despite not having the legitimacy of direct access by individuals, NGOs or other parties, with the receipt of the petition (Art. 23 of the Rules of Procedure of the IACommHR), they can autonomously submit their reasons in the course of the proceedings as '*amicus curiae*'.

In the first case, after the petition is received by the IACommHR, and is subsequently processed and properly analysed, the case is referred to the IACrHR, which starts to exercise its competence in vindication of human rights violations. Once the violation is determined, the Court's decisions are binding on the states parties that have recognized its jurisdiction. The recognition of the jurisdiction is given independently and explicitly, that is, the states parties of the Convention must manifest their will to be subjected to the jurisdiction of the IACrHR (Art. 62 of the ACHR)³⁵.

The decisions of the IACrHR are enforceable and it is up to states to comply immediately. Accordingly, the IACrHR has a system for monitoring compliance with its decisions in which it regularly produces

³³ H. Fix-Zamudio, *La protección jurídica de los derechos humanos*, in: "Revista do Instituto Interamericano de Direitos Humanos" 1988, julho-dezembro, San José, Costa Rica, p. 45. Referring to both of these powers, the author comments that "the first, of a consultative nature, is about the interpretation of the provisions of the Convention as well as other treaties concerning the protection of human rights in the American States, the second, of a judicial nature, is to resolve disputes concerning the interpretation or application of the American Convention" (trans. – L.G.A.C.).

³⁴ To date, no complaint has been filed by a state party against another state. The same is true at the IACommHR.

³⁵ UNTS vol. 1144, no. 17955, p. 159. "Article 62 para. 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention".

reports that examine whether the states parties are fulfilling the decisions satisfactorily. If that does not occur, as mentioned previously, the IACrHR must include this breach in its annual report to be submitted to the General Assembly. Information about the breach will be made public at the regular meeting, thus exposing the violating state to embarrassment in front of the other states present at the meeting and to all the repercussions in the media and the international community that it may arise.

As of November 2014, the Court had 361 such decisions in its judgment history³⁶.

5.3.2. Consultative competence of the IACrHR

The IACrHR also has jurisdiction to respond to queries in order to interpret both the ACHR and other human rights treaties that apply in the American states³⁷ and can be prompted to do so both by the organs of the OAS and its member states³⁸. In addition, queries may refer to the compatibility of the domestic laws of member states with the aforementioned international instruments.

³⁶ In that respect see IACrHR, Monitoring Compliance with Judgment, <http://www.corteidh.or.cr/casos.cfm> (accessed: 30 XI 2014); <http://www.corteidh.or.cr/medidas.cfm> (accessed: 30 XI 2014).

³⁷ Corte IDH, "Otros Tratados" Objeto de la Función Consultiva de la Corte (art. 64 Convención Americana sobre Derechos Humanos), Opinión Consultiva OC-1/82, del 24 IX 1982, Series A No. 1, p. 5, para. 14, http://www.corteidh.or.cr/docs/opiniones/seriea_01_esp1.pdf (accessed: 20 XI 2014). "Article 64 of the Convention confers on this Court an advisory jurisdiction that is more extensive than that enjoyed by any international tribunal in existence today. All the organs of the OAS listed in Chapter X of the Charter of the Organization and every OAS Member State, whether a party to the Convention or not, are empowered to seek advisory opinions. The Court's advisory jurisdiction is not limited only to the Convention, but extends to other treaties concerning the protection of human rights in the American States. In principle, no part or aspect of these instruments is excluded from the scope of its advisory jurisdiction. Finally, all OAS Member States have the right to request advisory opinions on the compatibility of any of their domestic laws with the aforementioned international instruments". The English text of the cited opinion is available at http://www.corteidh.or.cr/docs/opiniones/seriea_01_ing1.pdf (accessed: 20 XI 2014).

³⁸ H. Fix-Zamudio, op. cit., p. 47. "As mentioned previously [...], both the Member States of the OAS and the organs of the Organization, in particular the Inter-American Commission, are entitled to request the Court's interpretation of the provisions of the Pact of San José, other treaties concerning the protection of human rights in the American states, and domestic laws as to their compatibility with international precepts (trans. L.G.A.C.).

The Inter-American Court “currently has the broadest advisory jurisdiction of any other international tribunal”³⁹, says J.M. Pasqualucci. He continues:

[t]he Court has exercised jurisdiction to make important conceptual contributions to international human rights law. [...] An advisory opinion, a vehicle much less confrontational than a contentious case and not limited to the specific facts placed in evidence, serve to give judicial expression to the underlying principles of law. [...] Through its advisory jurisdiction the Court has contributed to the uniformity and consistency of the interpretation of the substantive and procedural provisions of the American Convention and other human rights treaties⁴⁰.

As of November 2014, the Court had 22 advisory opinions in its collection⁴¹, contributing to a more solid interpretation of the Convention, as well as giving it a broader reach and tangible mechanisms.

6. The doctrine of conventionality control in the jurisprudence of the Court

‘Treaty control’ or ‘control of conventionality’ (*control de convencionalidad*) is based on Art. 1 para. 1, Art. 2⁴² and 63 of the ACHR, since it is

³⁹ J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge–New York 2003, p. 80.

⁴⁰ *Ibidem*.

⁴¹ See IACrHR, Advisory opinions, <http://www.corteidh.or.cr> (accessed: 30 XI 2014).

⁴² It is worth remembering the dissenting opinion of Judge Cançado Trindade to the IACrHR judgment in the case *Caballero Delgado and Santana v. Colombia*, in which he discusses the interrelation of Art. 1 para. 1 and Art. 2 of the ACHR: “In fact, those two general obligations, – which are added to the other specific conventional obligations concerning each of the protected rights, – are incumbent upon the States Parties by the application of International Law itself, of a general principle (*pacta sunt servanda*) whose source is metajuridical, in seeking to be based, beyond the individual consent of each State, on considerations concerning the binding character of the duties derived from international treaties. In the present domain of protection, the States Parties have the general obligation, arising from a general principle of International Law, to take all measures of domestic law to *guarantee* the effective protection (*effet utile*) of the recognized rights. [...] The two general obligations enshrined in the American Convention – that of respecting and guaranteeing the protected rights (Article 1(1)) and that of harmonizing domestic law with the international norms of protection (Article 2) – appear to me to be ineluctably intertwined. [...] As those conventional norms bind the States Parties – and not only their governments, – in addition to the Executive, the Legislative and the Judicial Powers are also under the obligation to take the necessary measures to give effectiveness to the American Convention at domestic law level. Non-compliance

founded on the mandatory condition that the states parties to the Inter-American Human Rights System take on to adapt their domestic laws to the IAHRs. It is the responsibility of both the Inter-American Court of Human Rights and national courts⁴³ of states parties to uphold the effectiveness of the international human rights treaties within the IAHRs. In addition, national courts are obliged to follow the jurisprudence of the IACrHR and to acknowledge its interpretation of given rules as legitimate and binding. The ACHR, and its protocols and the judgments of the IACrHR form what is called a “block of conventionality”⁴⁴, which is a paradigm for control of the validity of acts⁴⁵ issued by nation states subject to the Inter-American Human Rights System.

‘Block of conventionality’ is the term used by the IACrHR to indicate the rules that serve as a parameter for controlling the validity of the domestic norms under the inter-American law of human rights. It is composed not only of the text of the Inter-American Convention on Human Rights but also of its interpretation based on the jurisprudence of the IACrHR and norms of *ius cogens*.

with the conventional obligations, as known, engages the international responsibility of the State, for acts or omissions, either of the Executive Power, or of Legislative, or of the Judiciary. In sum, the international obligations of protection, which in their wide scope are incumbent upon all the powers of the State, comprise those which pertain to each of the protected rights, as well as the additional general obligations to respect and guarantee these latter, and to harmonize domestic law with the conventional norms of protection, taken altogether. [...]”. Cf. IACrHR, *Caballero Delgado and Santana v. Colombia*, Reparations and Costs, Judgment of 29 I 1997, Series C No. 31, Dissenting Opinion of Judge A.A. Cançado Trindade, p. 3–4, para. 8–10, http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (accessed: 20 X 2014).

⁴³ Cf. IACrHR, *Cabrera García y Montiel Flores v. Mexico*, Preliminary Exception, Merits, Restitution and Legal Costs, Judgment of 26 XI 2010, Series C No. 220, para. 224, http://www.corteidh.or.cr/docs/casos/articulos/seriec_220_ing.pdf (accessed: 20 X 2014). See also *obiter dictum* of the Court in para. 225: “In its case law, this Court has acknowledged that domestic authorities are bound to respect the rule of law, and therefore, they are required to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, all its institutions, including its judges, are also bound by such agreements, which requires them to ensure that all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end”. This passage opens a door to understanding that it is not only judges and other authorities administering justice that must exercise conventionality control.

⁴⁴ E. Ferrer-MacGregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, <http://biblio.juridicas.unam.mx/libros/7/3033/14.pdf> (accessed: 20 X 2014).

⁴⁵ Acts in the broad sense: *judgments, laws, administrative acts, constitutions*.

The essence of the doctrine behind this term refers to the earlier practice of the French Constitutional Counsel, which introduced a “block of constitutionality” to its terminology in 1971. Through the introduction of this term, the French Constitutional Counsel aimed to include in the parameters of control of constitutionality not only the French Constitution of 1958 but also norms of the previous constitutions. This term is used nowadays to explain that the parameters of control of the validity of norms can no longer be understood as solely projecting the text of the norms, but must also be understood by way of its living interpretation. In addition, the best decisions may be reached by understanding that the block of constitutionality forms a unique construction which authorizes the person/organ who interprets the law to apply the hermeneutic constructions within it.

The block of conventionality works for the control of conventionality in the same way the block of constitutionality works for the control of constitutionality.

The term ‘treaty control’ (‘conventionality control’) appeared for the first time in the concurring opinion of Judge Sergio García-Ramírez to the judgment given by the IACrHR on 25 November 2003 in the *Myrna Mack Chang v. Guatemala* case⁴⁶, and then, three years later, in the judgment rendered by the Court in the *Almonacid Arellano et al. v. Chile* case⁴⁷. Since 2006, the IACrHR has started to build the essential elements of this doctrine. According to the Court, “treaty control” means that: a) both the IACrHR and the judges of the member states⁴⁸, while respecting

⁴⁶ IACrHR, *Myrna Mack Chang v. Guatemala*, Judgment of 25 XI 2003, Merits, Reparations and Costs, Judgment of 25 XI 2003, Series C No. 101, *Reasoned Concurring Opinion of Judge Sergio García-Ramírez*, para. 27, http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (accessed: 20 X 2014).

⁴⁷ IACrHR, *Almonacid Arellano et al. v. Chile*, Judgment of 2 IX 2006, Preliminary Objections, Merits, Restitution and Costs, Judgment of 26 IX 2006, Series C No. 154, para. 124, http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf (accessed: 20 X 2014).

⁴⁸ IACrHR, *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Restitution and Costs Judgment of 26 IX 2006, Series C No. 154, para. 124. According to a concurring opinion of Judge *ad hoc* Eduardo Ferrer Mac-Gregor Poisot regarding the judgment of the IACrHR in case *Cabrera García and Montiel Flores v. Mexico*, “[f]rom Article 68(1) it is clear that States Parties to the Pact of San Jose «are committed to compliance with the Court’s decisions in all cases to which they are parties». This cannot limit the task of ensuring that the Inter-American Court’s jurisprudence has «direct effectiveness» in all national States that have expressly recognized its jurisdiction, regardless of whether it concerns a matter in which they have not participated formally as a «material party». Given that the Inter-American Court is the international judicial body of the Inter-American System

the procedural regulations for the allocation of powers laid down in its legislation, have a duty to apply international human rights treaties that form the inter-American human rights law beyond the precedents of the IACrHR, so that any decision taken by the IACrHR is not only binding for all states who are subject to its jurisdiction⁴⁹, but to all signatories of the ACHR; and b) that this control can be exercised even *ex officio*⁵⁰.

The IACrHR is attentive to the need of each state party to the IAHRs to decide sovereignly about the steps they must take or the tools they must

for the Protection of Human Rights, whose essential function is to apply and interpret the Convention, *its interpretations acquire the same degree of effectiveness as the text of the Convention*. In other words, the conventional provisions which States must apply are the result of interpretations of the provisions of the Pact of San Jose (and its additional protocols, as well as other international instruments). The interpretations issued by the Inter-American Court have two purposes: (i) to ensure the Convention's effectiveness in the particular case with *subjective effects*, and (ii) to establish general effectiveness *with the effects of interpreted standards*. Hence, the logic and necessity that the ruling – aside from being notified to the State party in the specific dispute – also be “transmitted to the State Parties to the Convention», so that they have a full understanding of the Convention's regulatory content derived from the interpretation of the Inter-American Court, as the «final interpreter» of the Inter-American *corpus juris*”. Cf. IACrHR, *Cabrera García and Montiel Flores v. Mexico*, Preliminary Objections, Merits, Reparations, and Legal Costs, Judgment of 26 XI 2010, Series C No. 220, *Concurring Opinion of ad hoc Judge Eduardo Ferrer Mac-Gregor Poisot*, p. 22, para. 63, http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (accessed: 20 X 2014).

⁴⁹ Cf. IACrHR, *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 20 XI 2007, Series C No. 169; *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Restitution and Costs, Judgment of 26 IX 2006, Series C No. 154; *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of 29 XI 2006, Series C No. 162; S. García Ramírez, *El control judicial interno de convencionalidad*, “Revista IUS – Revista Científica del Instituto de Ciencias Jurídicas de Puebla” 2011, no. 28, julho-dezembro, p. 139. According to Judge Eduardo Ferrer Mac-Gregor Poisot “[t]he domestic judges, therefore, must apply conventional jurisprudence, including the case-law established in matters in which the State to which they belong is not a party, since what defines the development of the Inter-American Court's jurisprudence is that Court's interpretation of the inter-American *corpus juris* in order to create a standard in the region on its applicability and effectiveness”. Cf. IACrHR, *Cabrera García and Montiel Flores v. Mexico*, Preliminary Objections, Merits, Reparations, and Legal Costs, Judgment of 26 XI 2010, Series C No. 220, *Concurring Opinion of ad hoc Judge Eduardo Ferrer Mac-Gregor Poisot*, p. 18, para. 51. All judgments cited here are available at http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (accessed: 20 X 2014).

⁵⁰ Corte IDH, *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) Vs. Perú*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 24 XI 2006, para. 128, http://www.corteidh.or.cr/docs/casos/articulos/seriec_128_esp.pdf (accessed: 20 X 2014); J.C. Hitters, *Control de constitucionalidad y control de convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos)*, “Estudios constitucionales: Revista del Centro de Estudios Constitucionales” 2009, ano 7, no. 2, pp. 109–128.

use to comply with their decisions. This interrelationship between the inter-American human rights and national systems eventually made the Inter-American Court create instruments called control of conventionality.

In contrast to the situation with the national constitutional court, which has the Constitution and the hierarchical criteria as paradigms, the control of conventionality is founded upon three principles: (a) effectiveness of international treaties, (b) *pro homine*; (c) good faith and *pacta sunt servanda*.

This interrelationship between national and inter-American rules occurs predominantly through a substantial analysis, that is, the rule of law of human rights most favourable to the individual must prevail, so that it gives primacy to human dignity, regardless of the manner or hierarchical status that an international human rights treaty acquires in the national territory, and that its contents are verified as being materially more protective than national standards. Thus, the mere contradiction between the national and inter-American standard does not, of course, lead to the unconventionality, because benchmarking is the focal point of the analysis and depends on a case-by-case examination. In this sense, national courts must also respect the precedents set by the Court in addition to international human rights treaties.

From the formal point of view, it must be said that the IACrHR is not a revision court for decisions made by the judiciary of the states subject to its jurisdiction. These states and their judiciaries are autonomous in the sense of issuing their own particular interpretation of their national law. However, when such a national law derives from or is present in the regional system for protecting human rights, a new question arises, namely that of acting in a complementary way so as to require, as a rule, the exhaustion of domestic remedies in the domestic legal environment. The jurisdiction of the IACrHR is indirect, since the breach of a regionally constructed duty can lead the IACrHR, if so induced, to adopt a stance on a matter relating to interamerican human rights law, specifically in the regional system for protecting human rights. This position might be contrary to the decision of the nation state, effectively condemning it.

Judicial decisions, such as the laws, administrative acts and other state acts are regarded as mere facts⁵¹, or manifestations of a state's will that, should they violate the rights established in the regional

⁵¹ A. de Carvalho Ramos, *Responsabilidade internacional por violação de direitos humanos – seus elementos, a reparação devida e sanções possíveis. Teoria e prática do Direito Internacional*, Rio de Janeiro 2004, p. 136.

system for protection of human rights, imply the responsibility of that state in the international arena. Thus, arguments about domestic law⁵², *res judicata*⁵³, or even disparity between the Constitution and international human rights law do not have the status of reasons that can be taken as legally valid. States parties are simply unable to avoid the application of international treaties or the jurisprudence of the IACrHR on this matter.

⁵² B.B. Gonzales, *La cosa juzgada nacional y el cumplimiento y ejecución de las sentencias de la Corte Interamericana de los Derechos Humanos en los estados parte*, "Revista Estudios Constitucionales" 2006, vol. 4, no. 2, Talca, Chile, pp. 363–392. Specifically, there is an interesting debate in the IACHR. There are also the repercussions of the case *Bulacio v. Argentina*, Merits, Restitution and Costs, Judgment of 18 IX 2003, in Argentine Law.

⁵³ On *res iudicata* see separate opinion of Judge Sergio García Ramírez in the judgment of the IACrHR in the case of *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of 29 XI 2006, Series C No. 162, paras. 12–13, http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf (accessed: 20 X 2014): "Currently, the international Law on human rights, as well as international criminal Law, condemn sham trials the purpose or outcome of which is other than justice and which pursue a goal that is contrary to their intended purpose: injustice, concealed between the folds of a «pseudo» proceeding guided by prejudice and aimed at allowing impunity or violations. Hence the fact that the decisions of international courts on human rights do not necessarily conform to the latest domestic-law decision analyzing the violation of a right (and authorizing or allowing the violation to continue, along with the damage inflicted upon the victim), and that is also why international criminal courts refuse to validate decisions made by domestic criminal courts that are unable or unwilling to get justice done. [...] Does this entail the decline of *res judicata* – a concept frequently brought into question in the realm of criminal law – and the elimination of the *ne bis in idem* principle, creating a general risk to legal certainty? The answer to this question, which *prima facie* seems to be in the affirmative, is not necessarily so. And it is not so because the ideas expressed above do not question the validity of *res judicata* or the prohibition against double jeopardy, provided that both find support in the applicable legal provisions and do not involve fraud or abuse but entail a guarantee for a legitimate interest and the protection of a well-established right. Therefore, there is no attack on the «sanctity» of *res judicata* or the finality of the first trial –viewed, accordingly, as the only possible trial – but against the lack of a legitimate ruling – *i.e.* one legitimized through due process – carrying the effects of a final judgment and suitable to serve as basis for *ne bis in idem*". Cf. IACrHR, *Acevedo Jaramillo et al. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 II 2006, Series C No. 144, para. 167, http://www.corteidh.or.cr/docs/casos/articulos/seriec_144_ing.pdf (accessed: 20 X 2014): "[...] The Court considers that a judgment which has enforceable authority should necessarily be complied with since it entails a final decision, thus giving rise to certainty as to the right or dispute under discussion in the particular case, its binding force being one of the effects thereof. Eventually, the authority of a decision as a final judgment may be challenged when it infringes individual rights which are protected by the Convention and it has been proven that there are grounds for challenging such authority of final judgment, something which has not happened in the instant case".

The IACrHR also applies the doctrine of the transcendence of motivation in its decisions⁵⁴, producing a broadening of the spectrum of use of treaty control by national judges with the use of a technique called constitutional jurisdiction in place of ‘conforming interpretation’.

Thus, regardless of the hierarchical status which the constitutions of the states parties give to the international human rights treaties, for the states which accepted the jurisdiction of the IACrHR and for the sake of the principle of *pacta sunt servanda*, the principle of effectiveness, and especially the principle *pro homine*⁵⁵, if collision occurs, the legal regulation which should prevail is the one which is the most protective, irrespective of whether it has its source at the national or international level (see Art. 29 of ACHR)⁵⁶.

It must be noted that this is a critical and necessary dialogue⁵⁷, in which there is reciprocity, because if the protection of a right is more

⁵⁴ It is interesting to note that this phenomenon also occurs in European law, where the European Court of Human Rights (ECrHR) in Strasbourg gives generalizing effect to its decisions, so that these are not only binding for the parties to the dispute, but can be taken as legal regulations formulated so as to indefinitely disperse the effects and render the precedent binding for other cases. See G. de Vergottini, *Oltre il dialogo tra le corti*, Bologna 2010, pp. 80. Cf. ECrHR Grand Chamber, *United Communist Party of Turkey and others v. Turkey*, Merits and Just Satisfaction, Judgment of 30 I 1988, Reports of Judgments and Decisions 1998-I, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128> (accessed: 20 X 2014).

⁵⁵ M. Pinto, *El principio pro homine. Criterios de hermenêutica y pautas para La regulación de los derechos humanos*, in: *La aplicación de los tratados de derechos humanos por los tribunales locales*, ed. by Centro de Estudios Legales y Sociales – Editorial del Puerto, Buenos Aires 1997, p. 163.

⁵⁶ UNTS vol. 1144, no. 17955, p. 123 et seq.: “Article 29. Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have”. Cf. Corte IDH, *La Colegiación Obligatoria de Periodistas (Arts. 13 y 29 de la Convención Americana sobre Derechos Humanos)*, Opinión Consultiva OC-5/85 del 13 XI 1985, Series A No. 5, para. 52, http://www.corteidh.or.cr/docs/opiniones/seriea_05_esp.pdf (accessed: 20 XI 2014).

⁵⁷ On the need to deepen the critical dialogue between the IACrHR and the national courts, making the protection of rights more concrete see V. Abramovich, *Introducción: Una nueva institucionalidad pública. Los tratados de derechos humanos en el orden constitucional argentino*, in: *La aplicación de los tratados de derechos humanos en el ámbito local. La experiencia*

effective at the national level, this should prevail, even though there are precedents in the jurisprudence of the IACrHR or legal rules derived from treaties or other international instruments⁵⁸. On the other hand, if the IACrHR is to decide a case in which one analyzes the protection of a domestic law that occurs more efficiently than that derived from the Inter-American System of Human Rights, it should refrain from declaring the national act under review unconventional.

This paradigm is built over the prospect that wherever the objectives of the protection of human rights law converge or collide⁵⁹, it is the human being, not the state party, that it supports. It should be noted in this context that in holding the protection of the freedom of individuals to be the ultimate goal of any legal system, what matters is not the *locus* or the source from which this protection derives, but rather the way and intensity of protection itself. Therefore, on the one hand the *pro homine* principle requires a more extensive interpretation of human rights as far as their implementation and protection is concerned. On the other, it necessitates a more restrictive approach to the limitations of human rights. M. Pinto seems to be right when he states that “this principle

de una década, ed. by V. Abramovich, A. Bovino, Ch. Courtis (comps.), CELS – Canadian International Development Agency, Editores del Puerto, Buenos Aires, 2007, pp. VI/VII (CHECAR).

⁵⁸ In this sense, see S. Garcia Ramirez, *op. cit.*, p. 139: “To clarify, as has been done elsewhere in this work, the Inter-American Court’s interpretations may be overtaken by events – international, national provisions, acts of domestic jurisdiction – which recognize individuals’ greater or better rights and freedoms. The international law of human rights is the standard «lowest» right, not the «highest». This conclusion derives immediately from the *pro homine* principle, and is supported by the rules of interpretation contained in Article 29 of the Convention” (trans. – L.G.A.C.).

⁵⁹ Corte IDH, *El Efecto de las Reservas sobre la Entrada en Vigencia de la Convención Americana sobre Derechos Humanos (Arts. 74 y 75)*, Opinión Consultiva OC-2/82 del 24 IX 1982, Series A No. 2, p. 8, para. 29, http://www.corteidh.or.cr/docs/opiniones/seriea_02_esp.pdf (accessed: 20 XI 2014): “modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction”. The English text of the cited opinion is available at http://www.corteidh.or.cr/docs/opiniones/seriea_02_ing.pdf (accessed: 20 XI 2014).

coincides with the fundamental feature of human rights law, that is, always being in favour of a man" (trans. – L.G.A.C.)⁶⁰.

This position, as explained above, takes the view that there is no vertical relationship between the IACrHR and domestic courts, because it assumes that there is no automatic hierarchical supremacy of the decisions made by the IACrHR at the expense of domestic judicial decisions. It is also another way to confront the issue of limitation (or alteration) of state sovereignty, since the point is not about sovereignty when the focus of the protective system is the individual and not the state itself. In essence, it seems that there is insufficient sovereignty to protect the fundamental human rights of the human being.

This is also a break in the separation between monism and dualism, since it comes from a formal (structural) perspective⁶¹. It is not about the

⁶⁰ M. Pinto, *op. cit.*, p. 163.

⁶¹ See A.A. Cançado Trindade, *O legado da Declaração Universal de 1948 e o futuro da proteção internacional dos direitos humanos*, in: *México y las declaraciones de derechos humanos*, ed. by H. Fix-Zamudio, Cidade do México 1999, p. 45. According to A.A. Cançado Trindade "[i]n the context of protecting human rights a classic debate between monists and dualists turns out to be based on false and overcome assumptions: there is here an interaction between international law and domestic law and their own human rights treaties significantly establish the primacy criteria of the rule more favourable to human beings, be it a rule of international law or domestic law" (trans. – L.G.A.C.). The same author is also of the opinion that "[t]he relationship between international law and domestic law has been focused *ad nauseam* in the light of the classic, sterile and idle, controversy between dualistic and monistic, built on false premises. In the protection of their rights, human beings are subject both to domestic law and international law, in both cases awarded with a personality and legal capacity of their own. As is clear from the express provisions of human rights treaties themselves, and the opening of the contemporary constitutional law and the internationally recognized rights, it can no longer insist on the primacy of international law or domestic law, because the primacy of the rule, be it international or domestic, is always that which best protects human rights, the rule most favourable to the victim. Indeed, we find today the coincidence of objectives between international and domestic law regarding the protection of the human beings, and it is fitting, then, to encourage the full development of this logical coincidence" (trans. – L.G.A.C.). Cf. A.A. Cançado Trindade, *Desafíos de la protección internacional de los derechos humanos al final del siglo xx*, in: *Seminario sobre Derechos Humanos*, San José, Costa Rica, IIDH 1997, p. 71. See also C. Landa Arroyo, *Constitución y fuentes del derecho*, Lima 2006, pp. 118–119. In this regard C. Landa expressed the view that "in the dogmatic and practical problems arising from the monistic and dualistic theory, the constitutional position of treaties is assuming a mixed option, through the theory of coordination. The latter characterizes the international law as a right of integration on the basis of international responsibility. Therefore, based on that responsibility, we cannot run to the automatic repeal of internal rules in the event of conflict with their international obligations, but base it on a harmonization *neo ius naturalism integrator*" (trans. – L.G.A.C.).

need for state intermediation for the imposition of this or that rule of law derived from international law or, on the other hand, the pure and simple imposition of a legal norm of international law. Legal standards that are more protective of individuals, or less restrictive of their rights, whether they derive from international treaties or other instruments that do not receive that designation, from constitutions, domestic laws, or judgments, should always prevail. It is thus the role of both the domestic courts and the judges of the IACrHR, working together in a constant dialogue⁶², to establish whether domestic or international rule should prevail in such a case. It is clearly not appropriate for the state court to use the less protective norm of domestic or international law of human rights, and the IACrHR must comply with that assumption⁶³.

This is the spirit of the jurisprudence of the IACrHR, which claims that the intention of international law of human rights is to improve national law. *Contrario sensu*, there is no ability to produce this effect when international law of human rights steps backwards in protecting the rights produced by the states parties in scope of their domestic law⁶⁴.

Conclusions

The Inter-American System of Human Rights has been developed not only by political decisions based on treaties but also by the active way of applying the American Convention of Human Rights based on the

⁶² V. Bazan, *op. cit.*: "In the background, and how it progressed, cooperation between domestic courts and international tribunals does not aim to generate a hierarchical relationship between them and those formalized, but to draw a relationship of cooperation in the «pro homine» interpretation of human rights" (trans. – L.G.A.C.).

⁶³ On the relationship between constitutional courts of Germany, Italy and Spain and the European courts see A. de Carvalho Ramos, *Direitos Humanos na Integração Econômica – Análise Comparativa da proteção de direitos humanos e conflitos jurisdicionais na União Européia e Mercosul*, Rio de Janeiro 2008, p. 256 et seq.

⁶⁴ Corte IDH, "*La Última Tentación de Cristo*" (*Olmedo Bustos y otros*) Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de of 5 II 2001, Series C No. 73, Voto Concurrente del Juez A.A. Cançado Trindade, para. 4: "[...] The American Convention, as well as other human rights treaties, seek, *a contrario sensu*, to have in the domestic law of the States Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws [...] which do not conform to its standards of protection (par. 14)". The English text of the cited concurring opinion is available at the website of the Court. See the case of "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) v. Chile, http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (accessed: 20 XI 2014).

jurisprudence of the Inter-American Court of Human Rights. This work is done not only by judges but also by other national and international authorities.

One of the most significant developments of the system has been the formulation of the theory of the 'control of conventionality'. By means of this doctrine, the American Court of Human Rights emphasized its competence in controlling the validity of national acts and also defined that all judges and any authorities that administer justice on the domestic territory of member states have the duty to control the conventionality of national acts.

The parameters for this control are based on the block of conventionality, formed by the American Convention of Human Rights, the jurisprudence of the Court about the treaty and *ius cogens*.

This relationship between international and domestic legal orders is developing a kind of *ius commune* on the continent and promoting integration through the Grammatik of human rights.

Of course, this movement does not work in the same way and with the same intensity in all countries that are part of the Inter-American Human Rights System. Some of them are more open to this process, while others are more afraid of this kind of "intromission" in domestic orders. In this respect it is submitted here that there is no yielding of domestic law to international human rights law or otherwise *a priori*. The convergence of these two legal regimes takes place out of the best protection of humans. Therefore, in cases of conflict, those legal standards of human rights that are more protective or less restrictive of the individual should prevail. It is irrelevant whether these norms are based upon treaties, other instruments, international law in general, constitutions, laws or judgments.

Furthermore, it is up to any national authority legitimized to the judicial review to carry out the control of conventionality, as the Inter-American Court of Human Rights has repeatedly affirmed. These authorities have the duty to check the level of protection that is produced both domestically and in the international arena and thereby apply the more protective or less restrictive legal rules.

In essence, it is not always the mere opposition between internal and international standards (in addition to international jurisprudence) that renders the first unconventional. The protection deficit in national headquarters may also cause a result that leads to invalidation of an act, or the declaration of its inconventionality.

EWOLUCJA MIĘDZYAMERYKAŃSKIEGO SYSTEMU OCHRONY PRAW CZŁOWIEKA A DOKTRYNA KONTROLI KONWENCYJNOŚCI

Streszczenie

Artykuł przedstawia problematykę międzyamerykańskiego systemu ochrony praw człowieka, utworzone w jego ramach organy oraz ich funkcje. Zaciągnięte przez państwa amerykańskie w ramach tego systemu zobowiązania międzynarodowe do realizacji i ochrony praw człowieka tworzą – w opinii autora – swoiste spektrum prawnej normatywności, która chroni osoby w państwach tych zamieszkujące, a w przypadku naruszeń pociąga za sobą negatywne skutki międzynarodowe.

W artykule podkreślono, że problem wrażliwości demograficznej, cechujący historycznie kontynent południowoamerykański, odgrywał istotną rolę w procesach towarzyszących rozwojowi praw człowieka w tej części świata. Rozwój ten podzielony został się na trzy etapy. Pierwszy, początkowy, etap miał miejsce w późnych latach sześćdziesiątych, kiedy na kontynencie rozprzestrzeniały się dyktatury. Wówczas to doszło do utworzenia międzyamerykańskiego systemu praw człowieka. Podczas drugiego etapu, zapoczątkowanego w latach osiemdziesiątych, nastąpił proces demokratyzacji kontynentu, na fali której podjęto próby zapewnienia odpowiedniej efektywności wprowadzonym mechanizmom ochrony. Etap ten zakończył się pod koniec lat dziewięćdziesiątych. W trakcie trwającego od tego czasu do chwili obecnej trzeciego etapu wzmocniono natomiast powstałe dotychczas instytucje i położono większy nacisk na kwestię realizacji praw ustanowionych na podstawie traktatów międzynarodowych.

W ostatniej części artykułu podjęto próbę wyjaśnienia znaczenia kontroli konwencyjności (*control of conventionality*) sprawowanej przez Międzyamerykański Trybunał Praw Człowieka. W tym kontekście wskazano również na obowiązek wszystkich instytucji wykonujących zadania wymiaru sprawiedliwości – a zatem nie tylko tych pełniących funkcje sędziowskie – stosowania przyjętej przez sądy wykładni praw człowieka. Działanie takie pozytywnie wpływa bowiem na zwiększenie stopnia integracji na kontynencie amerykańskim.

Słowa kluczowe: kontrola konwencyjności – międzyamerykański system praw człowieka – Międzyamerykański Trybunał Praw Człowieka