

LATIN AMERICAN CONSTITUTIONAL LAW: INTEGRATION FROM THE DIALOGUE BETWEEN NATIONAL AND INTERNATIONAL LEGAL SYSTEMS

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***ABSTRACT** There is a constitutional identity in Latin America, which is based primarily on constitutional context approximate, with features like hyperpresidentialism, weak state institutions of control, such as the judiciary and the legislature co-opted, and large periods of authoritarianism, corruption of officials, among others. From the 1980s, starts on the mainland, a period of democratization, with new constitutions (Brazil, Venezuela, Colombia, Peru, Chile, etc..) and refurbishment of existing (Mexico and Argentina). Among the changes made, there is a process of opening the constitutions for the international law of human rights, the strengthening of the institutions of the Organization of American States (OAS). Regarding the Inter-American Court of Human Rights, this becomes more activist, and creates a doctrine called the doctrine of control of conventionality which requires not only the Court itself but the judges of national states to control the validity of national acts (laws, administrative acts, judicial decisions, constitutions) on the grounds of the American Convention of Human Rights (ACHR) and also about the interpretation given by the Court itself about the ACHR. This process of legal integration is thus awarded a new actor, which produces a deepening of a *iusconstitucionale* commune. In my paper and conference, I will discuss this process and the effects of this dialogue between legal systems, especially the courts in the continent.*

Words: Integration. Human Rights. Dialogue. Control of conventionality. Latin American Constitutional Law

1. Integration in a substantial perspective

The regional integration processes developed in South America (Andean Community of Nations, UNASUR and MERCOSUR) have structures and moments that demonstrate that the scope of the regional unit goes through times political, economic and social by which nation states are experiencing, what at any time, can change the course of a planned route their representatives has chosen.

These tendencies of approximation that occurs in the south piece of the continent are defined by the national authorities involved in the processes of integrations. However, it is important to consider varied forms of integration, such as political, economic, legal, cultural, social, denoting that the term permits also different semantic possibilities.

Within the legal and political integration is a subject that interests me more often, which is the integration from human rights. This form of integration is independent of the creation or strengthening of deep structures, since it is more advanced so if you see, because there is already a process in motion that approximates the national states of this part the continent. This is the Inter-American System of Human Rights.

If we go to the existing literature regarding regional integration issue, we note that the theme of the structures of systems integration are treated with extra care, such as

parliaments, decision-making bodies in which ministers or other authorities have a seat, courts, assemblies, among others.

From the substantive perspective there is a similar point which pervades all the south American systems of integration, which concerns the existence of democratic clauses, which demonstrate that human rights as instruments of special protection of minorities, inform these processes. Thus, both in Mercosur, as in CAN and UNASUR, we find presupposed clauses that inform the entire integration process that may relate to the most diverse subjects: economic, infrastructural, cultural, political, etc..

This means that whatever the momentary interests of national states involved, there is a common base material that must pervade not only national constitutions but also the constitutional reality of each of the States Parties to these processes. That is a requirement that democracy is an option not only theoretical, but a reality within these nation states.

The Article 1 of Protocol of Ushuaia, which is an integral part of the constitutive rules of Mercosur, establishes that "The full force of democratic institutions is an essential condition for the development of integration processes between States Parties to this Protocol."

Likewise, the Additional Protocol for the Defense of Democracy, which also integrates the norms constitutive of UNASUR, provides in its Article 1 that "the present Protocol shall apply in the event of disruption or threatened disruption of the democratic order, a violation constitutional order or in any situation that jeopardizes the legitimate exercise of power and the validity of democratic values and principles".

Still, the Andean Community of Nations, signed the "Additional Protocol of the Cartagena Agreement" that establishes a compromise for their community for the democracy Additional Protocol to the Cartagena Agreement" that establishes a commitment for the Andean Community for Democracy that says: "the full force of democratic institutions and the rule of law are essential for political cooperation and integration process economic, social and cultural development in the framework of the Cartagena Agreement and other instruments of the Andean Integration System.

It appears therefore that all the experiences of integration in South American there's a requirement of substantial concurrence between democracy and integrative decisions.

But even supposing differences about the concept of democracy itself, if it's more formal, substantial or procedural, it's recognized that there's always a necessity of realization of human rights.

The dialogue between legal systems as a tool for overcoming potential limiting structures integrationist

In many ways there is a natural difficulty in these processes of integration that is the dependence of extensive negotiations between representatives of national states, approvals for internal organs, attempts at boycotts by opposition groups at the time of implementation of decisions, etc.. Even if there's a formal approach to observe these processes there can be also a complementary process of exchange ideas, which demonstrate that similar experiences lived by the participating national states can be taken seriously by the other countries as *standards* for national government authorities. That's because there's a necessity for a transparent dialogue between countries authorities I different constitutional orders. Within this dialogue, which may occur, as said, with many different authorities, courts play an important role in solving problems that arise.

In this sense, says De Vergotini: "Seems as a consolidated idea that has been occurring intense exchange between the various state courts and, more specifically, between the state and international courts. This will inevitably involve the use of foreign law by state judges and the use of comparison by anyone. Undoubtedly, in recent times we operate within the framework of a common cultural area leading to the approval of the constitutional and international law, all of which has been helped, in our immediate environment, by overcoming ideological barriers in the course the rapprochement of the countries of Eastern Europe to the States of consolidated liberal democracy¹

It is a way of sharing experience that judges form their conscience from the critical observation of judicial decisions, produce an interaction between courts with arguments between identity, means of decision outcomes, which creates a network of communication between courts, or courts of a community.

2. The integration from human rights from the Inter-American System of Human Rights

It is interesting to note that all states participating in both national as Mercosur, Andean Community of Nations and of UNASUR - integration processes that use democratic clauses - are signatories of the American Convention of Human Rights and also of the specific clause that establish their submission to the jurisdiction of the Inter-American Court of Human Rights.

It makes not only the treaties but also the jurisprudence of the Inter-American Court of Human Rights, as determined by the same court, binding law for the states and, complementary, for the judges and other authorities that act like a state *longa manus*, As a consequence, these authorities are submitted not only to the internal law but also to the inter-american law of human rights. In accordance with Marcelo Neves:

"The more adequate way in the issue of human rights seems to be that of a "joint model", or transverse entanglement between legal orders, so that all of them got to have the ability to make a permanent self-reconstruction by learning from each others experiences concomitantly when solving the same legal problems based on constitutional fundamental rights or human rights²"

This concomitant legal orders imposes a different look on the processes of integration, that targets the human person, and not the state as a recipient of legal rules that establish human rights.

Thus, the inter-American human rights law works as a band of this integration process by human rights.

3. The Inter-American Court of Human Rights and the control of conventionality

The IAHR Court is the judicial institution within the OAS structure. Although created by the IACHR, in 1969, it settled in San Jose, Costa Rica, in 1979, where it is based until today. It holds 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 "recognized competence

¹ VERGOTTINI, Giuseppe de. El diálogo entre tribunales. Teoría y Realidad Constitucional, n. 28, 2011, p. 346.

² Neves, Marcelo. Transconstitucionalismo con especial referencia a la experiencia latinoamericana. In VON BOGDANDY, armin. FERRER MAC-GREGOR, Eduardo e ANTONIAZZI, MARIELA MORALES (Coord.). La justicia constitucional y su internacionalización. ¿Hacia un ius constitutionale commune en América Latina?, T. I. Ciudad de Mexico, UNAM, p. 264. In the perspective of the judges it can be seen as a growing construction of a pluralist and global commmunity of Courts, like said SLAUGHTER, Anne-Marie. A Global Community of Courts. *Harvard International Law Journal*, v. 44, n. 01, pp. 191-219, winter 2003.

in the field of human rights," must meet the conditions required for the exercise of high judicial office in the its origin State's or in the State that proposes its name, and there cannot be more than one judge of the same nationality.

3.1. The powers of the IAHR court are divided into contentious and advisory³.

The access to the litigation power of the IAHR Court(ACHR, article 61), in the American system of human rights, can occur in two ways: by referral of the report by the IACHR, from a case analyzed by it, or directly by the Party State⁴. Despite not having the legitimacy of direct access by individuals, NGOs or other parties, with the receipt of the petition (Article 23 of the Regiment of the ICHR), 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 IACHR, followed by its processing and proper research, the case is referred to the IAHR Court that starts from there the exercise of its power to prosecute human rights violations. Once the violation is recognized, the Court's decisions are binding and obligate the party states that have recognized its jurisdiction. The recognition of the jurisdiction is given, independently and explicitly, that is the national states signatories of the Convention must also manifest their will to be subject to the jurisdiction of the IACHR (ACHR, article 62)⁵.

The decisions of the IAHR Court are enforceable it is up to states to immediately comply. Accordingly, the IAHR Court has a system for monitoring compliance with its decisions in which it regularly produces reports that examine whether the national states are satisfactorily fulfilling the decisions. If that does not occur, as mentioned, the IAHR Court must include in its annual report, to be submitted to the General Assembly, information on the breach to be known at the regular meeting and submitting the violating state to embarrassment before other states present at the meeting, with all the repercussions in the media and the international community that it may arise⁶.

Otherwise, the consultative power of the IAHR Court to respond to queries in order to interpret both the ACHR and other human rights treaties that apply in the Americas⁷ and can be provoked both by the organs of the OAS and its member parties⁸.

³ FIX-ZAMUDIO, Hector. La protección jurídica de los derechos humanos. *In* Revista do Instituto Interamericano de Direitos Humanos, julho-dezembro de 1988, San José, Costa Rica, p. 45. About both powers it says, in summary: "the first, of 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 judicial nature, is to resolve disputes concerning the interpretation or application of the American Convention".

⁴ To the present date, no complaint has been filed by a Party State against another state, the same occurring at the IACHR.

⁵ Article 62. 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.

⁶ Up until July 2012, the Court has 245 in its judgment history.

⁷ Corte Interamericana de Derechos Humanos. Opinión Consultiva OC-1/82, de 24 de setembro de 1982, "Otros Tratados" Objeto de la Función Consultiva de la Corte (ART. 64 CADH). "Article 64 of the Convention gives the Court the widest consultative role entrusted to any international tribunal to the present date. All organs of the Organization of American States listed in Chapter X of the Charter, and also any Party State of the Organization, whether or not a party to the Convention, are authorized to request advisory opinions of the Court. The purpose of the consultation is not limited to the Convention, but extends to other treaties concerning the protection of human rights in the American States, and no part or aspect of such instruments is, in principle, excluded from the scope of this advisory role. Finally, is given to all members of the OAS the possibility of seeking views on the compatibility of any of its national laws with the aforesaid international instruments".

Queries can be about the interpretation of the American Convention or other treaties or international instruments of human rights applicable, in addition to the national law of party states in relation to international treaties that apply in the American system and can be sent to both bodies of the OAS and by its member parties⁹.

The Inter-American Court is configured as the “broader jurisdiction in advisory compared to any other International Court”¹⁰, says Jo M. Pasqualucci. He continues: “The court has exercised jurisdiction in order to carry out important conceptual contributions in the field of International Human Rights Law. (...) The advisory opinions, as a mechanism with much less confrontational than litigious cases, not being limited to specific facts connected to the evidence, serve to give legal expression to the legal principles. (...) Through its advisory jurisdiction, the Court has contributed to provide uniformity and consistency in the interpretation of procedural and substantive predictions of the American Convention and other human rights treaties”^{11_12}.

Recently, the member states of the MERCOSUL, - institution that doesn't have a Bill of Rights -, requested for advisory opinion on migrant children before the Inter-American Court of Human Rights for children that are in the territory of these states but with no authorization by the respective country. That's the first time that it happens in our continent and it will serve, as a part of a Bill of Rights, even weak, because there will be an interpretative decision by the ICHR the binds all the 4(four) countries(Brazil, Argentina, Paraguay and Uruguay). As we see, it's a important bridge between the Mercosur and the ISHR, that demonstrate a practical question of transconstitutionalism or multilevel constitutionalism.

3.2. The doctrine of conventionality control in the jurisprudence of the court

The control of conventionality is based on Articles 1.1, 2 and 63 of the ACHR, since it is based on a mandatory condition that the Party States to the Inter-American Human Rights System take on to adequate¹³ their domestic law to the IAHRs. It is the

⁸ FIX-ZAMUDIO, Hector. Op. Cit., p. 47: “As mentioned previously (see paragraph 130 above), both the Member States of the OAS, as well as the organs of the Organization, particularly 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, as well as domestic laws as to its compatibility with international precepts”.

⁹ FIX-ZAMUDIO, Hector. Op. Cit., p. 47: “As mentioned previously (see paragraph 130 above), both the Member States of the OAS, as well as the organs of the Organization, particularly 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, as well as domestic laws as to its compatibility with international precepts”.

¹⁰ PASQUALUCCI, Jo M. *The practice and procedure of the inter-American Court on Human Rights*, p. 80.

¹¹ Jo M. Pasqualucci, Op. Cit., p. 80.

¹² Up until July 2012, the Court has 21 advisory opinions in its collection contributing to a more solid interpretation as well as a broader reach and tangible mechanisms of the Convention.

¹³ On both articles of the ACHR it is worth remembering the dissenting opinion of Judge Cançado Trindade in the case Delgado y Santana versus Colombia (judgement on restitution 01.29.1997) in which he discusses the interrelation of articles 1.1 and 2 of the ACHR: “Actually, these two general duties - in addition to other obligations, specific for each one of the protected rights - are imposed on States parties for the application of international law itself, a general principle (*pacta sunt servanda*) whose source is based on exceptional legal conditions, to seek to build on, beyond the individual consent of each State, considerations about the mandatory nature of the duties arising from international treaties. In the present domain of protection, States Parties have general obligations, arising from a general principle of international law, taking all domestic legal measures to ensure effective protection (*effct utile*) of the rights. The two general obligations established in the American Convention - to respect and guarantee the rights protected (section 1.1) and to bring domestic legislation up to international standards of protection (Article 2) - seem to me ineluctably intertwined. (...) The way the convention's norms are binding to States parties - not just their governments - also to the legislative

responsibility of both the Inter-American Court of Human Rights and national courts¹⁴ of party states, in addition to international human rights treaties effective within the IAHRs, also in the jurisprudence of the IACHR on its interpretation as a legitimate and binding. The ACHR, and its protocols and the judgments of the IAHR court form what is called a "block of conventionality"¹⁵, which is control paradigm of the validity of acts in the broad sense (*judgments, laws, administrative acts, constitutions*) issued by national states subject to the Inter-American Human Rights System.

The term *conventionality control* appeared for the first time, in the case *Myrna Mack Chang v. Guatemala*, judged on November 25, 2003¹⁶, in the concurring vote of Judge Sergio Garcia Ramirez, having been treated by the plenary session in 2006, in the case *Almonacid Arellano v. Chile*¹⁷. Since 2006, the IAHR Court starts to build the essential elements that of this control of conventionality. They are: a) both the IAHR Court and the judges of the national states^{18_19}, while respecting 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 IAHR Court, so that any decision taken by the IAHR Court is not only

and judicial branches, as well as the Executive requires that the necessary steps be taken in order to give effect to the American Convention in the domestic legal system. Out of the convention's obligations, as we know, it is the international responsibility for acts or omissions, whether by the executive, the legislature or the judiciary. In summation, the international obligations of protection in its broad scope link together all branches of government (...)"

¹⁴ "225. This Court has established in its jurisprudence that it recognizes that domestic authorities are subject to the rule of law and therefore are obliged to apply the provisions in the law. But when a State is a party to an international treaty like the Convention, all its organs, including the judges, are also subject to it, which obligates them to ensure that the effects of the provisions of the Convention are not affected by the application of laws contrary to its object and purpose". (Corte Interamericana de Derechos Humanos. Case Cabrera García y Montiel Flores vs. México. Judgment of November 26, 2010. (Preliminary exception, merit, restitution and costs). This passage opens a door to understanding that not only judges and other authorities that administer justice must exercise conventionality control.

¹⁵ FERRER-MAC GREGOR, Eduardo. Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano. Available at <http://biblio.juridicas.unam.mx/libros/7/3033/14.pdf>

¹⁶ Inter-American Court of Human Rights. Case *Myrna Mack Chang Vs. Guatemala*. Judgment of November 25, 2003. (Merit, Restitution and Costs).

¹⁷ Case *Almonacid Arellano y otros Vs. Chile*. Judgment of September 2, 2006 (Preliminary exceptions, merit, restitution and costs).

¹⁸ Inter-American Court of Human Rights. Case *Almonacid Arellano y otros Vs. Chile*. Judgment of September 2, 2006 (Preliminary exceptions, merit, restitution and costs).

¹⁹ According to concurring vote by ad hoc Judge Eduardo McGregor in the Inter-American Court of Human Rights. Case *Cabrera García y Montiel Flores vs. México*. Judgment of November 26, 2010 (Preliminary exceptions, merit, restitution and costs) paragraph 63: "It does not go unnoticed that Article 68.1 provides that States Parties to the Pact of San Jose 'undertake to comply with the judgment of the Court in any case in which they are parties'. This may not limit the jurisprudence of the IACHR to acquire direct effect on all national states who have expressly recognized its jurisdiction, whether resulting from a case where they have not participated formally as a "material part", since the IACHR is the international court of Inter-American System of Human Rights, whose primary function is the application and interpretation of the Convention, Its interpretation acquires the same degree of effectiveness of the conventions text. In other words, the convention's rule to be applied by States is the result of the interpretation of the provisions of the Pact of San Jose (and its additional protocols, and other international instruments). The interpretation by the IAHR Court are projected into two dimensions: (i) to achieve effectiveness in the particular case with subjective effects, and (ii) to establish the effectiveness of the standard general purpose interpreted. Hence the logic and need that the failure, other than reported to the State party to the particular dispute, must also be "transmitted to the States Parties to the Convention", to have full knowledge of the normative content derived from the Court's interpretation of the convention, in its capacity as a "ultimate interpreter" of the Inter-American *corpus juris*".

binding for all states who are subject to its jurisdiction^{20_21_22}, but to all signatories of the ACHR, and b) that this control can be exercised, including *ex officio*^{23_24}.

The IAHR Court is attentive to the need for each of party states to the IAHRs decides, sovereignty, about the event, or the tools they must use to comply with their decisions. This interrelationship between the Inter-American Human Rights and national systems eventually made the Inter-American Court create these instruments called control of conventionality.

Unlike what happens with the national constitutional court, which has the Constitution and the hierarchical criterion as paradigms, the control of conventionality is built 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 favorable to individual must prevail, so that it gives primacy to the human dignity, regardless of the manner or hierarchical status that an international human rights treaty acquires in national territory, but rather, its contents and the verification that it is materially more protective than national standards. Thus, the mere contradiction between national and inter American standard does not, of course, lead to the unconventional, because benchmarking is the center of the analysis and depends on a case by case examination. In this sense, national courts must respect, also, in addition to international human rights treaties, the precedents set by the Court²⁵.

Under the formal aspect alone, it must be said that the IACHR is not a revision court of decisions made by the judiciary of the states subject to its jurisdiction. The national states and their judiciary power are autonomous in the sense of giving their particular interpretation to their national law. However, when such a national law derives or is present in the regional system of protection of human rights, a new question arises, for acting in a complementary way as to require, as a rule, the exhaustion of domestic remedies in the national legal environment, the jurisdiction of the IAHR Court takes place indirectly, since the breach of a regionally constructed duty can lead the IAHR Court, if provoked, to manifest itself on a matter related to ILHR, specifically in the regional system of protection of human rights, in a position contrary to the decision of the national state, condemning him.

²⁰ According to Case Boyce y otros Vs. Barbados, judgement of 11/20/2007; Case Almonacid Arellano y otros Vs. Chile, judgment of 09/26/2006; Case La Cantuta Vs. Perú, judgment of 11/29/2006, amongst others.

²¹ RAMIREZ, Sergio Garcia. El control judicial interno de convencionalidad, Revista IUS – Revista Científica del Instituto de Ciencias Jurídicas de Puebla, no 28, julho-dezembro de 2011, p. 139.

²² Also according to concurring vote by ad hoc judge Eduardo MacGregor in the Inter-American Court of Human Rights. Case Cabrera García y Montiel Flores vs. México. Judgment of November 26, 2010 (Preliminary exceptions, merit, restitution and costs, paragraph 6351. “The national court must therefore apply the convention’s jurisprudence even in those cases where it is not part of the national state to which it belongs, and that what defines the integration of the jurisprudence of the Inter-American Court is the interpretation by the Inter-American Court *corpus juris*, performed in order to create a standard in the area on their applicability and effectiveness”.

²³ Inter-American Court of Human Rights. Case Trabajadores Cesados del Congreso (Aguado Alfaro y otros) Vs. Perú. Judgment of November 24, 2006.

²⁴ HITTERS, Juan Carlos. Control de constitucionalidad y control de convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos), in Estudios constitucionales: Revista del Centro de Estudios Constitucionales, Año 7, N°. 2, 2009, pages 109-128.

²⁵ On the matter, in more depth, see CONCI, Luiz Guilherme Arcaro. O Controle de Convencionalidade no sistema interamericano de Direitos Humanos e o princípio pro homine. In CONCI, Luiz Guilherme Arcaro e PIZZOLO, Calogero. Direito Constitucional Transnacional. Belo Horizonte: Forum, 2012(no prelo).

Judicial decisions, such as the laws, administrative acts, among other state acts are regarded as mere facts²⁶, or events of a state's will that, if they violate the rights established in the regional system of protection of human rights, the rule may cause party liability in the international arena. Thus, even as arguments about the national law, *res judicata*²⁷⁻²⁸, or even opposition between the Constitution and international human rights law does not have the status of reasons that can be taken as legally valid, that is, are unable to avoid the application of international treaties or the jurisprudence of the IAHR Court about it.

The IAHR Court also applies the doctrine of the transcendence of motivation in its decisions²⁹, producing a broadening of the spectrum of use of conventionality control by national judges with the use of a technique we call constitutional jurisdiction in place of "conforming interpretation".

Thus, regardless of the hierarchical status that the national constitutions of the Party States gives to international human rights treaties, the states subject to the jurisdiction of the IAHR Court, - optional, as we have seen - and based on the principles of *pacta sunt servanda*, the effectiveness, and especially the principle *pro homine*³⁰, of legal

²⁶ RAMOS, André de Carvalho. Responsabilidade internacional por violação de direitos humanos – seus elementos, a reparação devida e sanções possíveis. Teoria e prática do Direito Internacional. Rio de Janeiro: Renovar, 2.004, p. 136.

²⁷ GONZALES, Boris Barrios. La cosa juzgada nacional y el cumplimiento y ejecución de las sentencias de la Corte Interamericana de los Derechos Humanos en los estados parte, in Revista Estudios Constitucionales, Talca, Chile, pp. 363-392. Specifically, there is an interesting debate in the IACHR. Also there are the repercussions of Case Bulacio Vs. Argentina. Judgment of September 18, 2003. (Merit, restitution and costs) in Argentinian Law. Also on *res judicata* there is the exceptional vote by judge Sergio García Ramírez in the judgment of *LA CANTUTA*, on September 29, 2006. "12. The international law of human rights at the present time, as well as the international criminal law, disapprove simulated prosecution whose purpose or result is are opposite from justice and seeks an order contrary to the purpose for which they have been arranged: injustice, hidden the folds of a process, held under the sign of prejudice and committed with impunity or abuse. Hence, international justice on human rights does not necessarily conform with the latest internal decision that analyzes the violation of a right (nor authorizes or permits the violation, or the damage done to the victim that persists), and hence international criminal justice refuses to validate the decisions of domestic criminal courts that cannot or will not do justice. 13. Does this mean the decline of *res judicata* - often questioned in criminal matters - and the suppression of *ne bis in idem*, with overall risk to legal certainty? The answer, which *prima facie* may seem so, is not necessarily. It is not, because under the ideas exposed it does not dispute the effectiveness of *res judicata* or the prohibition of a second trial when both are set on the applicable regulations and do not result from fraud or abuse, but guarantee a legitimate interest under a well-established law. You do not fight, then, the "sanctity" of *res judicata* nor the strength of the first trial - a title, then, only possible by judgment - but the absence of a legitimate decision - that is, legitimized through a due process - that is attributed to the principle of *res judicata* and suitability to support the *ne bis in idem*".

²⁸ Case Acevedo Jaramillo y otros Vs. Peru. Judgment of February 7, 2006. Inter-American Court of Human Rights. (...) 167. The Court finds that a judgment as a matter of *res judicata* must necessarily be fulfilled because it is a decision for good, providing certainty about the law or controversy at issue in the case, and its effects is mandatory. Before this Court, it can eventually be discussed the authority of *res judicata* of a decision which affects the rights of individuals protected by the Convention and shows that there are grounds for questioning the *res judicata*, which has not happened in this case."

²⁹ Interesting to note that this phenomenon also occurs in European law, where the Court of Strasbourg, in many situations, gives generalizing effect to its decisions, so that no it is not only binding to the parties to the dispute, but that can be taken as legal regulations formulated so to indefinitely disperse the effects, making the precedent compulsory for other cases, according to . VERGOTTINI, Giuseppe de. Oltre il dialogo tra le corti. Bologna: Il Mulino, 2010, pp. 80, on the case United Communist Party of Turkey and others v. Turkey, judgment of January 30, 1988(133/1996/752/951).

³⁰ PINTO, Monica. El principio *pro homine*. Criterios de hermenêutica y pautas para La regulación de lós derechos humanos. In: La aplicación de lós tratados de derechos humanos por lós tribunales locales: Buenos Aires: Ediar, Centro de Estudios Legales y Sociales- Editorial del Puerto, 1997, p. 163.

regulation should prevail, whether national or international, when most protective (according to article 29, ACHR)³¹⁻³².

It is noted that this is a critical³³ and necessary dialogue, in which there is reciprocity, because if the protection of a right is more effective at a national level, this should prevail, even though there are precedents of the IAHR Court or legal rules derived from treaties or other international instruments³⁴. On the other hand, if the IAHR Court is to decide a case in which one analyzes the protection of a nationwide 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 it is the human being, not the Party States, that support and where the objectives of protection of human rights³⁵ law converge and, accordingly, being the protection of the freedom of individuals the ultimate goal of any legal system, it matters not the way of protection, the intensity of protection, than the *locus* or the source from which the protection derives. The *pro homine* principle requires that interpretation human rights more extensively when we speak of protection, participation or provision, and on the other hand, a more restrictive interpretation of the rights of any rights restrictions. Monica Pinto says that "this principle coincides with the fundamental feature of human rights law, that is, always being in favor of man"³⁶.

³¹ "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."

³² *La colegiación obligatoria de periodistas (arts. 13 y 29 de la Convención Americana sobre Derechos Humanos)*, Opinión Consultiva OC/5, 13 de noviembre de 1985, parr. 52.

³³ On the need to deepen the critical dialogue between the IACHR and the national courts, making the execution of rights more concrete, see ABRAMOVICH, Víctor, "Introducción: Una nueva institucionalidad pública. Los tratados de derechos humanos en el orden constitucional argentino", en ABRAMOVICH, Víctor, BOVINO, Alberto y COURTIS, Christian (comps.), *La aplicación de los tratados de derechos humanos en el ámbito local. La experiencia de una década*, CELS - Canadian International Development Agency, Editores del Puerto, Buenos Aires, 2007, pp. VI/VII.(CHECAR).

³⁴ In this sense, see RAMIREZ, Sergio Garcia. El control judicial interno de convencionalidad, *Revista IUS – Revista Científica del Instituto de Ciencias Jurídicas de Puebla*, no 28, julio-diciembre de 2011, p. 139: "Should clarify – as it 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".

³⁵ The Court has long decided in Inter-American Court of Human Rights, Opinión Consultiva OC-1/82 del 24 de setiembre de 1982: "modern treaties on human rights in general, and in particular the American Convention, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the Contracting States. Its object and purpose is the protection of fundamental rights of human beings, regardless of nationality, both against their own state, as compared to the other parties. in concluding these human rights treaties, States are subject 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".

³⁶ PINTO, Monica. El principio *pro homine*. Criterios de hermenéutica y pautas para La regulación de los derechos humanos. In: *La aplicación de los tratados de derechos humanos por los tribunales locales*: Buenos Aires: Ediar, Centro de Estudios Legales y Sociales- Editorial del Puerto, 1997, p. 163.

This position, as seen, regards the view that there is no vertical relationship between the IAHR Court and national courts, because it assumes that there is no automatic hierarchical supremacy of the decisions made by the IAHR Court at the expense of those nationals' decisions. It is also one other way to label the issue of limitation or alteration of state sovereignty, because we should not talk about sovereignty when the center of the protective system is in the individual and not the state itself. There is not enough sovereignty to protect the fundamental human rights of the human being.

This is a break for the separation between monism and dualism, since it also comes from a formal or structural perspective³⁷, for it is not about the 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 the legal norm of international law. Prevailing legal standards of human rights 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, constitutions, laws, judgments, among others. It is thus both the national court as well as the judge of the IAHR Court job to, in a constant dialogue³⁸, seek whether national or international normativity should prevail, not fitting for the national court to use the less protective of national law or international law of human rights, and the IAHR Court must comply with that assumption³⁹.

³⁷ According to TRINDADE, Antonio Augusto Caçado. O legado da Declaração Universal de 1948 e o futuro da proteção internacional dos direitos humanos. In: FIX-ZAMUDIO, Hector. México y las declaraciones de derechos humanos. Cidade do México: UNAM, 1.999, p. 45: "(...) In 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 favorable to human beings, be it a rule of international law or domestic law". By the same author, see also "The 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 being are subject both to domestic law and international law, in both cases awarded with 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 is always international or domestic that best protects human rights, the rule most favorable to the victim. We find today, indeed, the coincidence of objectives between international and domestic law regarding the protection of the human beings, it is fitting, then, to encourage the full development of this logical coincidence". According to ", CF. TRINDADE, Antonio Augusto Caçado. 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. Also, with some difference, César Landa says 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. So based on that responsibility we cannot run to the automatic repeal of the internal rules in case of conflict with their international obligations, but base it on a harmonization *neo ius naturalism integrator*".According to LANDA ARROYO, César. Constitución y fuentes del derecho. Lima: Palestra, 2006, pp. 118-119.

³⁸ Also BAZAN, Victor. "Corte Interamericana de Derechos Humanos y Cortes Supremas o Tribunales Constitucionales latinoamericanos: el control de convencionalidad y la necesidad de un diálogo interjurisdiccional crítico", *Revista Europea de Derechos Fundamentales*, N° 16, 2° Semestre de 2010, Fundación Profesor Manuel Broseta e Instituto de Derecho Público Universidad Rey Juan Carlos, Valencia, España, 2011: "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".

³⁹ On the relationship between courts (constitutional German, Italian and SPANISH courts) and the European courts, their conflicts and back and forth of each, see RAMOS, André de Carvalho. . *Direitos Humanos na Integração Econômica - Análise Comparativa da proteção de direitos humanos e conflitos jurisdicionais na União Européia e Mercosul*. 1. ed. Rio de Janeiro: Renovar, 2008, p. 256 e ss.

This is the spirit of the jurisprudence of the IAHR Court, which claims to the intention of international law of human rights is to improve national law. *Contrario sensu*, it is not the ability to produce that creates prestige, international law of human rights as step backwards in protecting the rights produced by the national states in their national law⁴⁰.

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⁴⁰ IACHR Court: Case “La Última Tentación de Cristo” (Olmedo Bustos y otros) vs. Chile. Merit, Restitution and Costs. Judgment of February 5, 2001. Serie C No. 73. Concurring vote by Judge A. A. Cançado Trindade, par. 14: “The American Convention and other human rights treaties, look, *contrario sensu*, to have the effect of perfecting the domestic law of Party States, to maximize the protection of rights, bringing, in such a way, whenever necessary, the revision or repeal of national legislation [...] and not conform to its standards of protection”.

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