

SYMPOSIUM:  
THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW IN LATIN AMERICA  
AN ALTERNATIVE APPROACH TO THE CONVENTIONALITY CONTROL DOCTRINE

*Ariel E. Dulitzky\**

Judge Eduardo Ferrer Mac-Gregor presents a very clear and concise description of the main contours of the conventionality control theory articulated by the Inter-American Court of Human Rights (“Court,” “Tribunal,” or “Inter-American Court”).<sup>1</sup> So, I will not repeat his masterful explanation, which states, in brief, that the conventionality control requires all State authorities, particularly judges, to apply the American Convention on Human Rights (“the Convention”) as interpreted by the Court.

While there are a variety of ways that the conventionality control can be interpreted in good faith, an absolutist interpretation may lead to unintended, and undesirable, consequences. In this absolutist interpretation, the Convention becomes an integral component of the domestic legal system and is transformed from a complementary or subsidiary international treaty creating international obligations into a domestic norm hierarchically superior to all laws, including the national constitution. And in this transformation the Court is the final and sole proper interpreter of the Convention. The expansive language in its latest decisions suggest that the Court has adopted the absolutist view of the conventionality control. This article focuses on the problems with this absolutist interpretation, and suggests an alternative approach.

The inter-American system was conceived as subsidiary to the national rights protection system.<sup>2</sup> The subsidiarity principle stems from the idea that States have the primary responsibility to protect the rights of individuals; if they fail to do so, the American Convention (through the Court and the Inter-American Commission on Human Rights) act as a complement to domestic laws and practices in redressing victims. Subsidiarity is also premised on the understanding that local actors, including judges, are better suited to understand what measures may be most effective for internalizing human rights norms in distinct national contexts.

In this traditional understanding, the Convention was not required to be part of the hierarchical order of domestic legal systems. States were only required to effectively guarantee the conventional rights. In the past, the Court always insisted that domestic norms, including the constitution, need to conform to the Convention.<sup>3</sup>

*\* Clinical Professor of Law and Director of the Human Rights Clinic, and Director of the Latin American Initiative at the University of Texas at Austin.*

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<sup>1</sup> Eduardo Ferrer Mac-Gregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93 (2015).

<sup>2</sup> American Convention on Human Rights, Nov. 21, 1969, 1144 UNTS 143, preamble. Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT’L L. 389, 438 (2009).

<sup>3</sup> *See, e.g., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC- 14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, para. 58 (Dec. 9, 1994).

But until *Almonacid v. Chile*, the Tribunal never required judges to directly apply the Convention. It always left the question of how to secure such compatibility to the judicial authorities' discretion.

The doctrine of conventionality control, by contrast, requires, as a matter of international obligation, that the Convention be incorporated as domestic law. At least that is how the doctrine appears to be understood by the Court, and how it is explained by Judge Ferrer Mac-Gregor. The Court also requires States to grant the Convention a higher status than any other domestic norm: in *Almonacid v. Chile*, it announced that domestic judges must check the compatibility of all State action, whether constitutional or legislative, with the American Convention as a matter of international and domestic law.<sup>4</sup> But neither the text of the Convention nor the general principles of international law specify how, exactly, the Convention should be domestically incorporated, or if it should rank at any particular level in the domestic system.

In addition, the conventionality control challenges the traditional concept that a State may commit itself to protect human rights by ratifying a human rights treaty, but those rights may not be self-executing on the domestic plane. By instructing domestic courts not to enforce national laws that violate the Convention, the treaty becomes self-executing regardless of what the domestic legal system establishes. As such, the conventionality control makes the Inter-American Court, rather than the State, the final interpreter on how the American Convention should be translated into domestic law.

This understanding resembles the European Union (EU) model more than it does the European human rights system model. Community law dominates domestic law in the EU. European law could not be overridden by domestic law.<sup>5</sup> This is exactly the same position that the Inter-American Court takes with regard to the American Convention. But the Convention is a human rights treaty that neither creates nor intends to create an inter-American legal system. Indeed, the Inter-American Court's position is even more extreme than the requirements and practices of a fully developed integration system such as the EU. European national courts have accepted the supremacy and direct effect of community law and routinely set aside national legislation when it conflicts with EU laws.<sup>6</sup> Yet European domestic courts have not accepted the idea that European law prevails over domestic constitutions as is required by the Inter-American Court.

By placing the Convention above national legal orders, including national constitutions, it appears that the Court conceives of the Convention as a federal constitution, transforming the Court into a federal supreme court. For instance, the Supremacy Clause of the U.S. Constitution not only stipulates that the Constitution, the laws of the United States, and international treaties "shall be the supreme Law of the Land" but also commands local and state judges to disregard any other conflicting rule in the laws or constitution of their state.<sup>7</sup> This is exactly what the Court requires from Latin American judges. But, again, the Convention is not a federal constitution. The Organization of American States is not a federal State. And the Inter-American Court is not a federal supreme court.

<sup>4</sup> *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 154, (Sep. 26, 2006).

<sup>5</sup> E.g., *Consolidated Version of the Treaty on the Functioning of the European Union*, 2010 O.J. (C 83) 1, 343. See, e.g., Court of Justice of the European Union Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1146.

<sup>6</sup> Arthur Deyevre, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?*, 9 EUR. CONST. L. REV. 139, 140 (2013).

<sup>7</sup> U.S. CONST. art. VI, cl. 2. Similar provisions are found in article 33 of the Argentine Constitution and article 133 of the Mexican Constitution. Art. 33, *CONSTITUCIÓN NACIONAL* [Const. Nac.] (Arg.); *Constitución Política de los Estados Unidos Mexicanos*, CP, art. 133, Diario Oficial de la Federación [DOF], últimas reformas 10-02-2014 (Mex.).

No conventionality control or similar theory has been adopted by the European Court of Human Rights (European Court). The strong debate on whether the European Court should provide “individual” or “constitutional” justice is well known.<sup>8</sup> Those who see the European Convention as a constitution and the European Court as a constitutional court argue that the European system has many constitutional characteristics and is increasingly acquiring constitutional status; the European Convention is “a constitutional instrument of European public order.”<sup>9</sup> Similarly, Judge Ferrer Mac-Gregor explains that conventionality control contributes to the construction of an intra-regional legal order, or the formation of a *ius commune*.

But no one in Europe argues in favor of granting the European Court the power to nullify domestic legislation, or that domestic courts must exercise conventionality control of domestic legislation, including the constitution, as the Inter-American Court does. As Judge Ferrer Mac-Gregor says, some compare the Inter-American Court to a “kind of constitutional tribunal for the region.” The clearest expression of the Court’s role as an inter-American constitutional court is when the Inter-American Court both asserts the incompatibility of a domestic norm with the Convention and also assumes the power to invalidate those domestic norms as it did in the famous *Barrios Altos v. Peru* case. The Court decided that Peru’s amnesty law was incompatible with the American Convention, and ruled that “consequently, [the law] lack[s] legal effect,”<sup>10</sup> and even that the lack of legal effect “has generic effects” beyond the *Barrios Altos* case itself.<sup>11</sup>

*Barrios Altos* and *Almonacid*, read together, show that the constitutionalization process is a project that the Court initiated a decade and a half ago. It is ambitious, but surprisingly has not generated the strong debate that is taking place in Europe.

In this absolutist approach, the Court asks local tribunals to exercise both judicial review and conventionality control, even if those tribunals have no such constitutional authority. The Court ignores that Article 2 of the Convention requires that the rights be guaranteed in accordance with “constitutional processes.” As Judge Ferrer Mac-Gregor explains, the Court tries to overcome this by stating that judges should exercise conventionality control within their powers, despite the fact that judges, in most countries, must apply their constitution. How can judges exercise conventionality control in a country where judicial review is concentrated in a constitutional or supreme court?<sup>12</sup> Additionally, several Latin American constitutions explicitly require the compatibility of international treaties with the constitution and allow constitutional courts to declare the unconstitutionality of treaties, even where human rights treaties are granted a special status.<sup>13</sup> Moreover, the Court has required that judges perform this conventionality control *ex officio* or *sua sponte*, when in many countries judges are forbidden to do so.

The conventionality control theory is also used by the Court to impose its authority as final interpreter of the Convention. The Court argues that the parameter of conventionality control is not only the Convention, but also its own case law. The Court is betting that Latin American tribunals, despite coming from the civil law traditions, with a lesser emphasis on case law and precedents, will follow the Court’s jurisprudence. If the

<sup>8</sup> See, e.g., Steven Greer & Andrew Williams, *Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?*, 15 EUR. L.J. 462, 466 (2009).

<sup>9</sup> *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 22 (1995).

<sup>10</sup> *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, para. 51 (Mar. 14, 2001).

<sup>11</sup> *Barrios Altos v. Peru*, Interpretation of the Judgment of the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, Sec. VII, para. 2 (Sept. 3, 2001).

<sup>12</sup> For example, Colombia, Peru, Costa Rica, and Guatemala, to name a few.

<sup>13</sup> E.g., CONSTITUCIÓN DE 2009 DEL ESTADO PLURINACIONAL DE BOLIVIA, art. 202.9; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 82; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241.10; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 272.e.

conventionality control theory is successful, then there could be thousands of judges interpreting the Convention through the Inter-American Court's jurisprudence. Domestic judges will become inter-American judges at the national level.

There is some logic to the proposition that domestic tribunals should follow inter-American precedents. The opinions of the Court have highly persuasive force, as they come from the judicial body created to interpret the Convention. Consistency and procedural-economy reasons also call for courts to follow those precedents. In fact, many Latin American judges in many countries follow the Court's jurisprudence. If states do not follow the Court's interpretation it is possible that eventually the Court may rule on the case according to its own precedent.

However, the Court's insistence that judges view its case law as binding precedent may be problematic in two ways. First, although policy and judicial economy reasons may justify adhering to the Court's decisions, such reasons do not create a legal obligation. The treaty does not establish that the Court's decisions are binding on States not parties to a particular case, or that national courts must respect the Court's jurisprudence. Article 68.1 requires states to "undertake to comply with the judgment of the Court in any case to which they are parties," but is otherwise silent.

Second, the Court's approach fails to acknowledge and give due weight to the jurisgenerative role of its fellow courts in the region. In fact, Latin American judges had been using the Convention to interpret constitutional rights for decades prior to *Almonacid*, and have often had the opportunity to interpret how a provision of the Convention applies in a particular matter before the Inter-American Court does.<sup>14</sup> Recently the Court has been citing, on a regular basis, domestic decisions that are consistent with its own interpretation of the Convention.<sup>15</sup> The weakness of the Court's approach, however, is that its citation of domestic cases is very unprincipled. The Court has no proper theory on the value of those Latin American precedents in interpreting the Convention.

According to the conventionality control, as Judge Ferrer Mac-Gregor describes, national judges are proper interpreters, guardians, and enforcers of the Convention, just as the Court is. Thus, the Court should analyze this national jurisprudence and respect its authority. The Court should also be more serious about the often-mentioned jurisprudential dialogue, meaning the reciprocal influence between national courts and the Inter-American Court. In a true dialogue the Court would discuss national courts' jurisprudence in an open-minded yet critical fashion.<sup>16</sup> Judicial dialogue implies "reciprocal intellectual give and take,"<sup>17</sup> rather than the Court's recitation of national precedents. As Judge Ferrer Mac-Gregor explains, the conventionality control could serve as a bridge to increase judicial dialogue, but so far the Court had failed to use that bridge.

On the other side of the coin, conventionality control requires national courts to apply the Convention as interpreted by the Court. Thus, in cases where jurisprudence from the Inter-American Court exists, as Judge Ferrer Mac-Gregor explains, the degree of freedom for national courts is limited. However, there are several

<sup>14</sup> *E.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/12/1989, "Microómnibus Barrancas de Belgrano S. A.", impugnación, Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1989-312-2490) (Arg.).

<sup>15</sup> For instance, in *Sarayaku*, the Court cites national legislation and case law relating to prior, free, and informed consent by indigenous peoples from countries that had ratified the Convention (Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay, Peru, and Venezuela), countries that had not ratified the Convention (Belize, Canada, and the United States), and even countries outside the region (New Zealand). The Kichwa Indigenous People of Sarazaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 164 (June 27, 2012).

<sup>16</sup> *Cf.* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 66, 70 (2004).

<sup>17</sup> VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 71 (2010).

legitimate reasons why a national court might depart from the inter-American precedents. A mechanical application of the Court's decisions undermines the dynamic nature of the Convention.<sup>18</sup> Conditions may have changed since the Court's precedent, requiring a new inter-American interpretation. A mechanical application of the Court's case law could even affect the very judicial independence of Latin American judges.<sup>19</sup> And, unlike the Court, domestic judges see the Convention as only one more legal norm to apply. Of course, clear guidelines should be developed to allow the possibility of rejecting the jurisprudence of the Court when compelling reasons require it.

### *An Alternative Approach To The Conventionality Control*

The doctrine of conventionality control seeks to embed the American Convention in national legal systems in order to provide solutions where subsidiarity fails.<sup>20</sup> To be effective, the principle of subsidiarity generally relies on functioning democracies, particularly those with an independent and effective judiciary. For decades, the Court did not have this privilege, as most of its cases involved issues where grave and massive human rights violations took place, or where the national courts were either powerless or unwilling to intervene. So, perhaps it is not surprising that the Court sought new tools and theories to deal with these structural issues and problems. Rather than giving leeway to Latin American states on how to incorporate and use the Convention, the Court took a more forceful position, requiring that the Convention be fully integrated into the domestic legal system.

Today, however, after almost thirty years of a sustained move to more stable democratic governance in Latin America, the Court should have more confidence in the judiciaries of the region. Indeed, as noted above, the Court was following a trend initiated by Latin American constitutions when it insisted that courts grant constitutional status to human rights treaties.<sup>21</sup> In many states, the Convention is already incorporated into the "constitutional bloc," which refers to a cluster of laws and norms, including the constitutional text as well as certain treaties with constitutional status, against which judges must review legislation. In these countries, however, the conventionality control became part of the judicial review due to the decisions of the constitutional framers; it was not imposed as a legal obligation coming from the Inter-American Court.

If the Court were to reconceive the conventionality control as a partnership with national courts, it could again embrace the foundations of the subsidiarity principle: domestic actors are better suited to understand the most effective way to internalize human rights norms in their local context. This alternative approach understands that the conventionality control facilitates and promotes socialization<sup>22</sup> and transnational processes<sup>23</sup> and

<sup>18</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, para. 114 (Oct. 1, 1999).

<sup>19</sup> As the Inter-American Court has said, independence of judges means that "they should not feel compelled to avoid dissenting with the reviewing body which, basically, only plays a distinct judicial role that is limited to dealing with the issues raised on appeal by a party who is dissatisfied with the original decision." Apitz Barbera v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, para. 84 (Aug. 5, 2008).

<sup>20</sup> See, e.g., Laurence R. Helfer, Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, 19 EUR. J. INT'L L. 125, 136–137 (2008).

<sup>21</sup> See the Constitutions of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

<sup>22</sup> E.g., Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621, 635–638 (2004).

<sup>23</sup> Harold Hongju Koh, Review Essay, Why Do Nations Obey International Law? 106 YALE L.J. 2599, 2656 (1997).

acknowledges the role that domestic courts play in promoting (or hampering) social change<sup>24</sup> and domestic implementation of international human rights law.<sup>25</sup> Domestic courts operating within this newly expanded inter-American system, and having to justify or criticize the State's official policies in terms of the inter-American human rights discourse, become essential actors in this socialization process.<sup>26</sup> This inter-American discourse influences and could strengthen domestic courts.

At the same time, domestic courts become a source of legitimacy and authority for the decisions of the Court. If national courts use the inter-American precedents, they provide the Court with social legitimacy. The Court needs to be aware that its authority and legitimacy depend, in large part, on the existence of a community of Latin American judges who are engaged with its precedents and interact with it, but who also monitor the Court's decisions and standards by applying (or rejecting) them.

In other words, the Court should see Latin American judges as active participants in the creation of inter-American law. In fact, since the Court decides only about a dozen cases per year, national judges will often act with no specific interpretive guidance. The only precedents on the content of the Convention will come from those domestic judges.<sup>27</sup> This decentralized system of conventionality control is already creating a strong Latin American jurisprudence on the Convention.<sup>28</sup>

This alternative approach also calls for the Court to recognize that while many Latin American tribunals had been applying the Convention before the explicit requirement made by the Court, many other Latin American courts did not. Similarly, after *Almonacid* some tribunals embraced the conventionality control doctrine.<sup>29</sup> But it is also the case that some high courts squarely reject the decisions of the Inter-American Court either in concrete cases involving their own countries or by refusing to apply inter-American precedents.<sup>30</sup> Thus the Court should understand its relationship with local tribunals as a strategic and somehow contested partnership.

Further, domestic judges, unlike the Court, apply both domestic law and international human rights law. Thus the Court should reject the idea that national courts are “a simple compliance mechanism for international law;

<sup>24</sup> See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AJIL 768, 775 (2008).

<sup>25</sup> E.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 306–307 (1998).

<sup>26</sup> See, e.g., Par Engstrom & Andrew Hurrell, *Why the Human Rights Regime in the Americas Matters*, in HUMAN RIGHTS REGIMES IN THE AMERICAS 29, 39 (Mónica Serrano & Vesselin Popovski eds., 2010).

<sup>27</sup> For instance, there are no cases on the nonimposition of the death penalty on pregnant women, American Convention, art. 4.5; the right to compensation, art. 10; the right to assembly, art. 15; or most aspects of freedom of religion, art. 12.

<sup>28</sup> For instance, a search of the case law of the Peruvian Constitutional Court referring to the American Convention recovers over 250 decisions; and over 400 decisions for the Mexican Supreme Court and 495 for only 2013 by the Costa Rican Constitutional Chamber.

<sup>29</sup> E.g., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 31/8/2010, “Videla, Jorge Rafael y Massera, Emilio Eduardo s/recurso de casación”, Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2010-333-1657) (Arg.); Tribunal Constitucional Plurinacional de Bolivia [Plurinational Constitutional Tribunal of Bolivia], noviembre 7, 2011, Sentencia Constitucional 1888/2011-R; Corte Constitucional [C.C.] [Constitutional Court], agosto 23, 2012, M.P: Jorge Iván Palacio, Sentencia T-653/12 (Colom.); Corte de Constitucionalidad [Constitutional Court], febrero 14, 2012, Expediente 3334-2011 (Guat.); Resolución dictada por el Tribunal Pleno en el expediente varios 912/2010 y Votos Particulares formulados por los Ministros Margarita Beatriz Luna Ramos, Sergio Salvador Aguirre Anguiano y Luis María Aguilar Morales; así como Votos Particulares y Concurrentes de los Ministros Arturo Zaldívar Lelo de Larrea y Jorge Mario Pardo Rebolledo, Pleno de la Suprema Corte de Justicia [SCJN] (Mex.); Tribunal Constitucional de Peru [Constitutional Court of Peru], agosto 8, 2012, M.P: César Humberto Tineo Cabrera, Expediente 00156-2012-PHC/TC.

<sup>30</sup> See Tribunal Supremo de Justicia [T.S.J.] [Supreme Tribunal of Justice], Sala Constitucional diciembre 18, 2008, M.P: Arcadio Delgado Rosales, Expediente No. 08-1572, (Vene.); Suprema Corte de Justicia [Supreme Court], M. L., J. F. F. O.—Denuncia—Excepción de inconstitucionalidad arts. 1, 2 y 3 de la Ley no. 18.831, 22 febrero 2013, M.R.: Jorge O. Chediak González, IUE 2–109971/2011, Sentencia No. 20 (Uru.); Tribunal Constitucional [Constitutional Court], 23 septiembre 2013, Expediente TC-05-2012-0077, Sentencia TC/0168/13 (Dom. Rep.), and S.T.F., 2008/148623, Relator: Min. Eros Grau, 29.4.2010, 180, DIÁRIO DO JUDICIÁRIO [D.J.e.], 19.09.2011, para. 42 (Braz.).

in effect, not judges, but police.”<sup>31</sup> In this new approach the Court needs to understand that for national judges, the Convention is only one element in the mosaic of different constitutional and legal provisions. Thus, national interpretation may differ considerably from an interpretation based on the Convention alone, as the Court does.<sup>32</sup> Additionally, national judges should have flexibility to decide cases, taking into consideration not only the case law of the Court but also their evolving socio-political, economic, cultural, and historic context. For these reasons, the Court must accept that national courts should have at least a “modicum of independent interpretative authority.”<sup>33</sup>

In the following paragraphs I provide examples of the new model and partnership that I am proposing. In *Bulacio v. Argentina*, the Court established that it was a violation of the American Convention for states to apply the statute of limitations in a criminal case investigating the excessive use of force by police which resulted in a youth’s death. The Court ordered the reopening of the criminal case.<sup>34</sup> When reviewing the resulting petition to reopen the case, the Argentine Supreme Court was very critical of the decision of the Inter-American Court because it restricted the rights of the police officer who was being accused of the death of Mr. Bulacio. But the national court, despite these reservations, said that Argentina was under a constitutional and international obligation to comply with the inter-American decision.<sup>35</sup> In other words, despite disagreeing with the Inter-American Court’s decision on constitutional grounds, the Argentine court accepted the ruling and enforced it. In its decision on supervising compliance with its judgments, the Court referred to the decision of the Argentine court, but without mention of the Supreme Court’s critique. Further, it failed to acknowledge the importance of a high tribunal ordering compliance with an inter-American judgment as a matter of obligation, and despite its own disagreement with it.<sup>36</sup> A true partnership would have required engaging in a conversation where the Court could have expanded its reasoning justifying the decision, and acknowledging the importance of the national court’s approach. Not only did the Court fail to do so, but it said that the obligation to investigate the case was still pending. It spoke not a single word supporting the local judges’ courageous decision.

In a subsequent case, reflecting the concerns expressed by the Argentine Supreme Court, the Inter-American Court changed its case law on this point, but without much explanation.<sup>37</sup> The Court did not acknowledge that it was changing its prior decision nor that it did so based on the critique by Argentina’s tribunal, as it would have been required under my proposed model. In fact, we know that these were the reasons for the change. In a separate opinion, Judge Garcia Ramirez referred to “the reflections that the Supreme Court of Argentina has revealingly and constructively expressed in its decisions”<sup>38</sup> and added:

[t]he coordination of the continental [sic] system of human rights, in the defense of human rights, should be the result of a protective trend of dialogue combining the contributions of the international

<sup>31</sup> See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT’L L. & POL. 501, 502–03 (2000).

<sup>32</sup> See Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT’L L.J. 359, 376 (2005) (discussing integration in the context of Europe).

<sup>33</sup> Helfer, *supra* note 20, at 137.

<sup>34</sup> *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 100, paras. 116-121 (Sep. 18, 2003).

<sup>35</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, “*Espósito, Miguel Angel s/ incidente de prescripción de la acción penal promovido por su defensa*”, Voto de Jueces Maqueda y Zaffaroni, considerando (Arg.)

<sup>36</sup> *Bulacio v. Argentina*, Monitoring Compliance with Judgment. Order of the Court, Inter-Am. Ct. H. R., Paras. 10 and 12 (Nov. 26, 2008).

<sup>37</sup> *Albán Cornejo et al. v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 171, para. 111 (Nov. 22, 2007).

<sup>38</sup> *Albán Cornejo et al. v. Ecuador*, Merits, Reparations and Costs, Opinion Judge Garcia Ramirez, Inter-Am. Ct. H. R. (ser. C) No. 171, para. 25 (Nov. 22, 2007).

and national jurisdictions. The construction of a corpus juris and its applications are the product of collective thought, which, in turn, is the expression of convictions, values, principles, and shared work . . . Hence, an international tribunal will more than welcome the reflections of a domestic court.<sup>39</sup>

Even with this clear message, Judge Garcia Ramirez made no explicit reference to the decision of the Argentine Supreme Court. Nor did he acknowledge that the Inter-American Court was changing its case law. Significantly, Judge Garcia Ramirez insisted that the Court “has not changed its view. It has more specifically or better formulated it, acting on the concerns raised by the domestic courts.”<sup>40</sup> In order to meet my criteria for what constitutes a genuine dialogue, the Court should go further than Judge Garcia Ramirez’s statements. In a revised conventionality control model, the Court would engage with the Argentine Supreme Court’s reasoning. It would recognize the appropriateness of the domestic decision; and it would explicitly acknowledge the change in its own previous decision based on the critique of a domestic tribunal. In this way, the local courts would know that the Court (and not only a single member of it) is willing to engage and recognize the contributions of local judges in the creation of inter-American law.

Another example on how to make a true partnership refers to some of the promotional activities of the Court. The Tribunal has the practice of organizing sessions in different countries. During those special sessions, in addition to its hearings on specific cases, the Court organizes seminars or workshops. For instance, during its 51st Special Session in Paraguay, the Court organized a seminar on “Inter-American Justice and Judicial Dialogue.”<sup>41</sup> The panelists were judges and clerks from the Inter-American Court. For the panel on “Conventionality Control and the Impact of the Inter-American Court’s decision: A Comparative View,” the panelists were the President and Secretary of the Court. Similarly, during its 53rd Special Session in Honduras, the Court organized another seminar with the same name. The keynote speaker in this seminar was the President of the Inter-American Court, Judge Sierra Porto and the four panelists were the Secretary of the Court and three law clerks from the Court.<sup>42</sup>

Not a single domestic judge was invited to either of these seminars to make a presentation about conventionality control or judicial dialogue from a national perspective. No national judge was asked to present on how they apply the Convention, what challenges they face in using the case law of the Inter-American Court, how the inter-American case law is translated domestically or their views on how to improve the Court’s engagement with the local judiciary. Inclusion of domestic judges would have been an example of what a genuine partnership in the construction of conventionality control requires.

### *Conclusion*

Despite the shortcomings of the Inter-American Court’s analysis and use of the conventionality control, I firmly believe in the need for an integrated inter-American model that merges Latin American constitutional law and inter-American law. The Court should develop this integrated model in a serious, consistent, coherent, and systematic way. My basic proposition is that the Court must assume that Latin American judges are essential and central actors in this new framework. Domestic judges are at the forefront of developing the scope and content of the Convention. In most areas and in most situations, national judges will be the first to interpret the Convention. In many instances, in fact, there will be strong and firmly developed case law prior to the Court’s intervention.

<sup>39</sup> *Id.* at para. 26.

<sup>40</sup> *Id.* at para. 31.

<sup>41</sup> See Corte Suprema de Justicia de Paraguay, *Seminario “Justicia Interamericana y Diálogo Jurisprudencial”*.

<sup>42</sup> See International Justice Resource Center, *Inter-American Court of Human Rights holds 53<sup>rd</sup> Extraordinary Session* (Sep. 1, 2015).



In order to succeed in the Convention's domestication process, the Court must recognize the important political role that judges play. As judges are the ones deciding the content of constitutional and conventional rights, the prospect of success for the Court relies heavily on how those judicial authorities follow its determination. As such, the Court needs to become an ally of judicial authorities at the national level and also transform them into its own allies. The first step in this direction will be to take seriously what judges are saying and deciding in similar situations. It requires the Court to engage in a substantive bidirectional dialogue with national judges.