What Do We Mean When We Talk About Judicial Dialogue?: Reflections Of A Judge Of The Inter-American Court Of Human Rights

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This article discusses a phenomenon difficult to ignore in the relations among national and international courts and tribunals in the twenty-first century: "judicial dialogue," or the practice of using the reasoning of other national or international courts to arrive at a better understanding of human rights. The article explains how (a) the judicialization of international justice and (b) the increasing incorporation of international human rights law into domestic legal systems have created a shared regulatory and functional identity among national and international judges concerning the protection of human rights. Both phenomena have been cause and effect in laying the foundations of a global judiciary that is in constant interaction. The article further argues that judicial dialogue contributes to coordinating this constant interaction among judges of different latitudes. To illustrate this process, the article analyzes the dialogue that the Inter-American Court of Human Rights has conducted "horizontally" with the European Court of Human Rights, and "vertically" with the constitutional tribunals and supreme courts of the states parties to the American Convention on Human Rights. The article concludes by reflecting on the need for judges to maintain an open and progressive attitude toward the reconfiguration of the judicial function in the twenty-first century.

I. INTRODUCTION

There is an extensive literature on the subject of judicial dialogue.[2] While this literature has begun to develop a general theory of the concept,

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2. A number of articles and books have dealt with the topic of judicial dialogue. *See generally* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Francis G.

rarely have the protagonists of the dialogue themselves taken part in the theorizing.[3] This article seeks to contribute to the academic discussion on this topic from the perspective of a judge of the Inter-American Court of Human Rights[4] who is himself a "participant" in judicial dialogue. The Inter-American Court participates in this dialogue with other courts and international tribunals (*e.g.*, the European Court of Human Rights and the International Court of Justice), and with the tribunals and high courts in the states parties to the American Convention on Human Rights.[5] This practice has generated a rich jurisprudence that maintains a balance between global jurisprudential developments and the unique legal characteristics of the Latin American and Caribbean states.

Before presenting some reflections, it is important to make two conceptual clarifications. The first concerns the concept of judicial dialogue itself,[6]

Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEX. INT'L L. J. 547 (2003); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L. J. 487 (2005); Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?*, 32 N.C. J. INT'L L. & COM. REG. 259 (2006); Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, EUR. J. OF LEGAL STUD. (2007); NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW (Andre Nollkaemper & Janne E. Nijman eds., 2007); LAURENCE BURGORGUE-LARSEN, DIÁLOGO JUDICIAL: MÁXIMO DESAFÍO DE LOS TIEMPOS JURÍDICOS MODERNOS (2013); Ricardo Lorenzetti, *Global Governance: Dialogue Between Courts*, EUROPEAN UNIVERSITY INSTITUTE (2010), http://cadmus.eui.eu/bitstream/handle/1814/15235/RSCAS_PP_2010_03-Lorenzetti.pdf [https://perma.cc/RJ8E-4FUN]; Melissa Waters, *The Future of Transnational Judicial Dialogue*, 104 AM. SOC'Y INT'L L. PROC. 465 (2010); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011); RODRIGO BRITO MELGAREJO, EL DIÁLOGO ENTRE LOS TRIBUNALES CONSTITUCIONALES (2011); Javier García Roca, *El Diálogo entre el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales en la Construcción de un Orden Público*, 30 TEORÍA Y REALIDAD CONSTITUCIONAL 183 (2012); RAFAEL BUSTOS GISBERT, PLURALISMO CONSTITUCIONAL Y DIÁLOGO JURISPRUDENCIAL (2012); DIALOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES (Eduardo Ferrer Mac-Gregor & Alfonso Herrera Garcia eds., 2013); AYALA CORAO, CARLOS, DEL DIÁLOGO JURISPRUDENCIAL AL CONTROL DE CONVENCIONALIDAD (2013); Andre Nollkaemper, *Conversations Among Courts: Domestic and International Adjudicators*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare Romano, Karen Alter, & Yuval Shany eds., 2013); LUIS JIMENA QUESADA, JURISDICCIÓN NACIONAL Y CONTROL DE CONVENCIONALIDAD: A PROPÓSITO DEL DIÁLOGO JUDICIAL GLOBAL Y DE LA TUTELA MULTINIVEL DE DERECHOS (2013); THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW (Ole Kristian Fauchald & Andre Nollkaemper eds., 2014); MARA GÓMEZ PÉREZ, JUECES Y DERECHOS HUMANOS: HACIA UN SISTEMA JUDICIAL TRANSNACIONAL (2014).

3. *See generally* A.A. CANÇADO TRINDADE, OS TRIBUNAIS INTERNACIONAIS E A REALIZACAO DA JUSTICA (2015) (providing, as an author, an example of a judge that has discussed the relevance of the dialogue among international courts as a vehicle for jurisprudential "cross-fertilization"); Gustavo Zagrebelsky, *Jueces constitucionales (Discurso oficial pronunciado frente al Presidente de la República el 22 de abril de 2006 en Roma, Italia, con motivo de la celebración del quincuagésimo aniversario de la Corte Constitucional italiana)*, 12 PENSAMIENTO CONSTITUCIONAL 495 (2007).

4. Hereinafter "Inter-American Court," "Court," or "Inter-American Tribunal."

5. Hereinafter "American Convention," "Convention," or "San Jose Pact."

6. For different approaches to the meaning of judicial dialogue, *see* Anne-Marie Slaughter, *supra* note 2, at 99–100 (suggesting that courts and other quasi-judicial bodies are increasingly entering into a dialogue among themselves); Manuel Eduardo Góngora-Mera, *Diálogo Policéntrico*, *in* DICCIONARIO DE DERECHO PROCESAL CONSTITUCIONAL Y CONVENCIONAL 586 (Eduardo Ferrer Mac-Gregor, Fabiola Martinez, & Giovanni A. Figueroa eds., 2014) (observing that judicial dialogue takes place with no hierarchical institution that unifies different criteria among different courts); GIUSEPPE DE VERGOTTINI,

which can be defined as the practice of domestic and international courts using the reasoning of other courts to construct a better interpretation of a legal norm contained in a constitution or treaty. In the human rights context, the dialogue aims to promote the cross-fertilization of constitutional and international standards of human rights protection among courts of different jurisdictions. For that reason, it can be practiced at different levels: (a) between domestic courts; (b) between international courts; or (c) between domestic and international courts. In all these cases, the dialogue relies on a "reciprocal deference" that allows for the existence of a free and lively interaction among courts. Yet this interaction also seeks to respect differences among courts, acknowledging the particular rules applicable in a given court's jurisdiction, varying spheres of competence as defined by domestic law and unique cultural identities.[7]

Without a doubt, judicial dialogue is a phenomenon that has emerged from the practice of the courts and tribunals themselves.[8] They have led the way, and it has fallen to scholars and judges to theorize the process. This leads to a second clarification: judicial dialogue is at an early stage (both in theory and practice) in its process of development and will continue to advance in the coming years. It is reasonable to expect that the practice of judicial dialogue will expand in this age of blurring of boundaries and openness to the exterior. Globalization, in transforming the traditional concept of sovereignty, has "opened the door" to greater interaction between national and supranational judicial institutions.[9] In this context, an isolationist attitude seems to be at odds with the contemporary *modus operandi* of domestic and international courts.[10]

With these clarifications in mind, it is possible to explain the structure of this article, which proceeds in three parts. The first reflects on how the phenomena of the internationalization of justice and the constitutionalization of international human rights law (IHRL) have allowed the emergence of cosmopolitan judges who use criteria derived from other courts (both

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MÁS ALLÁ DEL DIÁLOGO ENTRE TRIBUNALES: COMPARACIÓN Y RELACIÓN ENTRE JURISDICCIONES 31–39 (2014) (suggesting that the concept of "dialogue" properly refers only to the influence that courts receive from foreign sources of law, emphasizing that it is not the same as citing foreign sources and then performing a separate analytical exercise to construct jurisprudential standards).

7. *See* Giuseppe de Vergottini, *Dialogo Jurisprudencial*, *in* DICCIONARIO DE DERECHO PROCESAL CONSTITUCIONAL Y CONVENCIONAL 584 (Eduardo Ferrer Mac-Gregor, Fabiola Martinez, & Giovanni A. Figueroa eds., 2014).

8. *See generally* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES (Tania Groppi & Marie-Claire Ponthoreau eds., 2013) (discussing how constitutional judges use decisions of other courts in the process of decisions).

9. *See* Armin Von Bogdandy, *Pluralism, Direct Effect and the Ultimate Say: On the Relationship Between International Law and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397, 400 (2008); Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 64 (2003).

10. *See* BURGORGUE-LARSEN, *supra* note 2, at 140 (explaining that constitutional and Supreme Court judges tend to cite national and foreign precedents as a regular exercise, especially now that technological developments allow relatively easy access to foreign sources of law); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 158–59 (1993).

national and international) to enrich their own judicial decisions. The second part shows a practical example of judicial dialogue by describing how the Inter-American Court has dialogued "horizontally" with the European Court and "vertically" with some of the high courts and tribunals of the states parties to the American Convention. The third part addresses peripheral issues of judicial dialogue, outlining some ideas on the developing reconfiguration of the judicial function, the future of this new form of coordination between courts and tribunals, and the possible impact that judicial dialogue might have on the interpretation of IHRL in the twenty-first century.

The goal of this article is to encourage collaborative discussion on the benefits of judicial dialogue as a mechanism for coordinating the constant interaction among courts of different latitudes on human rights issues, but without sacrificing the freedom of those same courts to decide cases in accordance with the rules and principles of their own legal systems. In other words, this article seeks to make an invitation to have a dialogue about judicial dialogue.

II. First Part: Globalization and the Cosmopolitan Judge

A. *The Increasing Judicial Activity at the International and Domestic Levels*

During the last few decades, international tribunals have had an increasing role in dispute settlement in areas that have been traditionally handled exclusively at the domestic level. Since the 1990s, we have witnessed the creation of new international tribunals for solving a diverse range of problems and increased activity of already existing bodies. Examples of this phenomenon include the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,[11] the establishment of the International Criminal Court in 2002,[12] and the increased number of issues submitted to the jurisdiction of existing international tribunals.[13] In the case of the Inter-American Court, one can identify a significant increase in the

11. *See* Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 Am. J. Int'l L. 28 (2013).

12. *See* Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 126, 37 I.L.M. 999 [hereinafter Rome Statute]. *See generally* William A. Schabas, An Introduction to the International Criminal Court (4th ed. 2011).

13. *See* European Court of Human Rights, Overview 1959-2014 (2015), http://www.echr.coe.int/Documents/Overview_19592014_ENG.pdf [https://perma.cc/Q6NJ-E6AW] (noting that the European Court of Human Rights has exponentially increased the number of cases decided since 1998); Stephanie Brewer & James L. Cavallaro, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 Am. J. Int'l L. 769 (2008) (discussing the growing number in both number and activity of regional human rights tribunals and the role of supranational courts in this context).

number of disputes submitted and the number of judgments rendered since the beginning of the twenty-first century.[14]

The judicialization of international controversies is a relatively new phenomenon, but one of strong relevance for international law. It demonstrates the will of states to develop — and submit themselves to — judicial mechanisms that allow for the rules derived from international law to be respected and enforced.[15] This judicialization of international law is particularly important in the system of IHRL, which is horizontal, flexible, decentralized, and has enforcement mechanisms that rarely include the threat of coercion.[16] Given these specific characteristics of the IHRL system, international judicial bodies play a fundamental role. They are capable of interpreting, applying, and developing the law. They provide certainty and coherence to the system, promoting state compliance with international obligations via judicial mechanisms separate from the political decisions made by states in the conventional context of managing their international relations.[17]

The increased activities of the courts and tribunals have been accompanied by another relevant aspect: the role of national judges vis-à-vis IHRL. In several countries, a new era has been established in the relationship between IHRL and domestic law, especially in Europe and Latin America, characterized by the increased incorporation of the former into the latter.[18] This is again a reflection of the will of states; there is a stronger presence of IHRL in the domestic order because that is the way the judicial bodies (which are, after all, state institutions) want it to be. Slowly, international law has expanded its horizons to regulate areas that traditionally belonged to exclusively domestic domains. International law regulates a great number of subjects that overlap with the competencies of national authorities (human rights being a prominent example), and states have accepted this

14. *See* INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2015, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2015.pdf [https://perma.cc/XC9E-S3YR] (noting that 37 cases were submitted to the Court in the period from 1979 to 2000, compared to 193 cases from 2001 to 2015).

15. *See* Karen J. Alter, *Do International Courts Enhance Compliance with International Law?* 25 REV. ASIAN & PAC. STUD. 51 (2003) (discussing the way that international courts may be changing international politics by enhancing state compliance with international law).

16. *See* PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 4 (2013) (discussing fragmentation resulting from the existence of a decentralized system of international law).

17. *See generally* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 10 (1994) (pointing out that although the judiciary at the international level addresses only a limited percentage of disputes, its decisions have a relevant influence in the manner by which the international community understands international law).

18. *See generally* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION AND PERSUASION (Dinah Shelton ed., 2011); EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), REPORT ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN DOMESTIC LAW AND THE ROLE OF COURTS (December 8, 2014), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e [https://perma.cc/9GEK-3FJL] (providing a full overview of the regimes of incorporation in different legal systems around the world).

new condition by signing and ratifying international commitments, and also (and this is crucial) by incorporating international law into the domestic realm.[19]

The open attitude of states towards IHRL — primarily manifested in rules of constitutional law — has been significant, especially considering that in some cases this attitude has been accompanied by an active commitment of domestic judges to enforce IHRL in cases subject to their jurisdiction.[20] At least, this has been the Latin American experience, as will be analyzed further, *see* infra *III.III.I.* In effect, domestic judges who enjoy a mandate in domestic law for applying IHRL have made the rules of international law effective. In other words, faced with a lack of centralized international executive, legislative, and judicial powers — at least such as we know them at the domestic level — state authorities have been the ones to ensure the effectiveness of IHRL.[21]

In this way, national courts have become the natural adjudicators of IHRL, since they frequently are called to interpret and apply IHRL. When they do so correctly, they prevent a controversy from reaching the international level, which strengthens the subsidiary nature of the international legal order.[22] For this reason, the efficacy of IHRL depends on its nationalization or constitutionalization in the national realm and its enforcement by domestic authorities (especially domestic judges). In other words, IHRL — as long as it does not have mechanisms analogous to the states' mechanisms to validate its rules and principles and to enforce them with a threat of coercion — finds in state institutions its best allies in guaranteeing its effectiveness in the national realm.

B. Functional and Normative Identity Between National and International Judges

It is possible to hold that an extensive incorporation of IHRL into the domestic legal order generates a shared normative and functional identity

19. *See, e.g.*, Rodrigo Uprimny, *Recent Transformations of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1592 (2011) (discussing the incorporation of international law into domestic legal systems of Latin America).

20. *See* VENICE COMMISSION, *supra* note 18, ¶ 87.

21. *See id.* (discussing warranty mechanisms such as the "diffuse review of compatibility" that assist in the incorporation of international human rights law and the expansion of fundamental rights at the domestic level).

22. Subsidiarity, in the context of IHRL enforcement mechanisms, has been defined by the European Court of Human Rights as the notion that "national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions." S.A.S. v. France, 2014-III Eur. Ct. H.R. 351, 373. *See also* Antonios Tzanakopoulos, *Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy*, *in* 3 SELECTED PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 155, 156–57 (James Crawford & Sarah Nouwen eds., 2010) (discussing the notion that the "natural judge" of international law is the domestic judge); Gerald L. Neuman, *Subsidiarity*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 360, 364 (Dinah Shelton ed., 2013) (discussing the rule of exhaustion of local remedies as a manifestation of the principle of subsidiarity).

among national and international judges as they interpret, apply, and develop the same legal provisions. The national judge and the international judge perform the same roles, although on different legal bases: the first acts in virtue of a constitutional norm, and the second in virtue of an international norm. This similar yet distinct identity is the starting point in the identification of a network of operators in a judiciary that works toward the same goal: the global realization of human dignity. In human rights matters, the system tends to become unitary, because all human beings possess an inherent dignity, which is the cornerstone of the idea of human rights. In this sense, some have argued that judges who participate in the human rights enterprise are members of a global community of courts.[23]

If this is true, then it is relevant to ask: how should the functions of this global community be deployed in practice? And what are the consequences of the existence of diverse courts and tribunals performing overlapping tasks? These questions are relevant, partially because of the risk that each national court or tribunal might arrive at different or even contradictory conclusions, despite relying on the same legal instruments. A question is the legal certainty of the scope of the obligations assumed by states, and therefore the rights recognized and protected by different courts. In this sense, judicial coherence and integration are desirable goals.

The lack of coherence could generate injustices for those who have the misfortune to live in a jurisdiction that adheres to a different or less protective interpretation of international standards. As a result, it is crucial to find an adequate mechanism that allows greater coherence in the interpretation and application of international norms in different jurisdictions. The legitimacy and normative strength of IHRL norms, and the certainty about its content, will increase as more courts consistently apply a specific norm of IHRL in a manner that provides a better protection of human rights.[24] But any methodology that seeks more uniformity must not seek to coerce judges to apply IHRL the same way, as in a hierarchical system that requires top-down uniformity (unless, of course, there is a legal obligation that mandates judges to consider the decisions of a court as precedent). But in the absence of such legal obligation, there is freedom for judges to promote homogeneity between their decisions and the decisions of other courts and jurisdictions.

At this point, a new question becomes apparent: how can courts achieve more legal certainty without sacrificing the pluralism that the diversity of human and social reality implies? A first answer is that normative coher-

23. *See* DE VERGOTTINI, *supra* note 6, at 71.

24. *See* Pierre-Marie Dupuy, *The Unity of Application of International Law at the Global Level and the Responsibility of Judges*, 1 EUR. J. LEGAL STUD., no. 2, 2007, at 29–30 (discussing the connection between affirming the existence of the global judicial system and the unity in the application of international law at the domestic level). *See generally* Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265 (2009) (listing some benefits that come with the maintenance of the coherence of a legal system).

ence requires that every similar factual situation be treated similarly. In consequence, every substantive difference between the criteria adopted among different tribunals must be explained and justified.[25] But even when a judge distinguishes between the facts of one case and another, or explains why he or she applied a different criterion to similar facts, a fundamental question arises: how can courts determine the coherent normative criteria in the first place?

C. Judicial Dialogue as a Mechanism of Coordination Between the Global Judiciary

Judicial dialogue is a mechanism that allows that question to be answered. The judicial dialogue is a practice that promotes integration or normative coherence on a global scale. Through judicial dialogue, the integration of IHRL is facilitated by promoting a general openness to the jurisprudential developments of other jurisdictions. Through the dialogue, the judiciary, either international or domestic, can make a decision with knowledge of the jurisprudence rendered on a specific matter developed by a tribunal that has previously solved similar cases involving IHRL norms.[26] This practice, I argue, allows courts to explain and justify reasoning on human rights matters in a more effective way.

The dialogue also allows judges to be more conscious about the environment in which they operate, making them aware that they belong to an international legal community in which everyone contributes to the development of a global normative system in benefit of the human person.[27] It is true that every court and tribunal solves concrete issues when they are submitted to their jurisdiction, and that these issues must be solved applying the valid legal rules of the domestic legal system. So in this context, judicial dialogue has the virtue of not introducing foreign legal norms into a domestic legal system, but of allowing the decision to rest on better grounds by taking into consideration the interpretation that other judges have rendered in similar cases. This flexibility in the practice of judicial dialogue means that "bad" use of foreign standards does not affect directly the law of a particular state.

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25. Technology gives judges the tools to access the judgments of national and international courts and tribunals where international law is enforced. *See, e.g.*, OXFORD REPORTS ON INTERNATIONAL LAW IN DOMESTIC COURTS, http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts [https://perma.cc/9EJN-7TTA]. Domestic judges must be aware of the developments in the most important jurisdictions that deal with questions similar to those presented before domestic courts.

26. *See generally* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Fifth Session, U.N. Doc. A/58/10, at 267–74 (2003) (discussing the dangers of fragmentation and the necessity that courts and tribunals in different jurisdictions pay attention to each other's jurisprudence).

27. *See generally* Andre Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5 CHINESE J. INT'L L. 301 (2006) (discussing how the decisions of domestic courts may influence the decisions of an international court, with reference to the International Court of Justice).

In its best version, however, the practice of judicial dialogue allows each court to contribute to the progressive development of IHRL.[28] But because of its nature, judicial dialogue is inherently a flexible methodology that does not aim to produce absolute uniformity in each case decided by domestic courts. In judicial dialogue, it is natural and valid to find diverse discrepancies and criteria among diverse courts of different jurisdictions. This is one of the benefits of this practice — it opens a court to the wealth of opinions and to the practical knowledge of judges who have faced similar concrete problems in a different context. It is important to notice, however, that the dialogue will only take place "if the parties are involved in a common project. If there is no acceptance of this premise, there is only interaction, but not dialogue."[29]

In this form, judicial dialogue invites different actors to "experiment cooperatively with appropriate criteria when the valid constitutional and conventional legal frameworks are not exhaustive,"[30] but to keep in mind that dialogue emerges as a response to the need of deploying effectively the roles assigned in a global community of judges. Due to the lack of an organic and comprehensive system of rules that determines the way in which the relationships between the different hierarchies of courts in different states should be arrayed, the judge must apply foreign criteria to interpret the foreign law in good faith.[31] Thus, when judges in particular jurisdictions employ foreign precedents to give content to their domestic legal framework, this is a decision taken freely and for the sake of constructing a better decision.[32]

This does not mean that there is a legal obligation for each court or tribunal to be a participant in judicial dialogue, or that they must take into consideration the criteria that other tribunals have taken in a similar matter. However, the tendency to remain isolated in a "judicial monologue" can be a dangerous attitude for the protection of human dignity. It prevents the citizens of a specific community from benefiting from the developments that take place in other jurisdictions, especially those advances regarding the protection of human rights. Taking an isolated attitude correspondingly limits the capability of the judge to perform her duties in a way that allows individuals to take advantage of the development of the global understand-

28. *See* WEBB, *supra* note 16, at 194–202 (discussing how judicial dialogue positively affects integration of international law).

29. Armin Von Bogdandy, *Ius Constitutionale Commune Latinoamericanum: Una aclaración conceptual*, *in* Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos 3, 14 (Armin Von Bogdandy, Hector Fix Fierro, & Mariela Morales Antoniazzi eds., 2014) (author's personal translation).

30. DE VERGOTTINI, *supra* note 6, at 91.

31. *Id.* at 291.

32. *Id.* at 180. *See also* LAURENCE BURGORGUE-LARSEN, *supra* note 2, at 116 (discussing how the dialogue that started in Europe in the context of European Community Law — and that transformed domestic judges into "conventional judges of communitarian law" — has been exported to other regions and other areas of law, like the protection of human rights in the Inter-American System).

ing of the requirements of human dignity.[33] In this sense, the judges should not be close-minded and stay in their "ivory towers," because analogous problems with potentially similar solutions exist across the five continents.

Along these lines, we agree with the position of Justice Stephen Breyer, who defended, in a famous debate with Justice Antonin Scalia, the relevance of foreign law for American adjudication.[34] Justice Breyer argued that, although it is true that foreign law is not binding on American courts, judges around the world face similar problems when adjudicating cases, notwithstanding the cultural and legal particularities of a specific political community. Thus, when judges face great uncertainty about controversial legal questions, what has been decided by other judges of other jurisdictions could reasonably serve to help us to "[open our] eyes to what is going on elsewhere, taking what [we] learn for what it is worth."[35]

Certainly there could be legitimate concerns, like those expressed by Justice Scalia, about the potential selective use of foreign law with a "result-oriented approach" that invites manipulation.[36] But a bad use of law (whether at the domestic or the international level) is something that could happen at many levels, and not just with the use of foreign or international law. The use of decisions of tribunals in other jurisdictions, just as the use of any subsidiarity means of interpretation, presupposes the good faith and the technical capacity of the judge who is interpreting a constitution or a treaty. There might be a discussion about the best way of avoiding the dangers of judges misusing foreign law to justify preconceived and unjust decisions, but the existence of this danger is not enough reason to plainly reject the use of foreign and international law for constitutional interpretation.

D. The Inter-American Court as a "Participant" of the Judicial Dialogue

Once the operational framework of the cosmopolitan judge is set, it is possible to analyze how the Inter-American Court has implemented judicial dialogue during its years of labor. Naturally, I will only refer to a parcel of the great phenomenon of judicial dialogue, because trying to cover all the phenomenon on a global level would be an endless labor and would exceed the purpose of this article. However, it is worth noting that the analysis of the practice of the Inter-American Court regarding judicial dialogue is par-

33. *See generally* Steven R. Ratner, *From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA (2011) (discussing how the challenge to legal positivism manifested in the emergence of multilateral human rights treaties has engaged international lawyers on debates around the world on global justice).

34. *See* Antonin Scalia and Stephen Breyer, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

35. *Id.* at 524.

36. *Id.* at 530.

ticularly fruitful given its privileged position. On one side, its nature as a human rights regional tribunal allows it to dialogue with its counterpart in Strasbourg (the European Court of Human Rights); on the other side, it performs similar functions to those practiced by some national tribunals in the region, with whom it shares a common legal tradition.[37]

In this context, there are two aspects of judicial dialogue that the Inter-American Court practices and that I wish to highlight: (a) with the European Court,[38] and (b) with the national constitutional and supreme courts in Latin America. Both aspects relate to the same phenomenon, although they have different characteristics. Analyzing the two aspects is equivalent to analyzing two sides of the same coin. Both sides have contributed in a crucial way to the institutional development and jurisprudence of the Inter-American Court. The joint presentation of both aspects is novel, as both subjects have usually been treated separately. But I consider that a sketch of the overall praxis is fundamental to better understanding the mission and function of the Inter-American Tribunal, and the function of judicial dialogue in general.

III. Second Part: The Praxis of Judicial Dialogue Within the Inter-American Court

A. *The Beginning of the Dialogue: Inter-Tribunal Communication Between the Inter-American Court and the European Court*

Since the beginning of its work in 1979, the Inter-American Court elected to cultivate a close relationship with its European counterpart. The experience of the European Tribunal was crucial for the construction of a regional court that was grappling with the complexity of the challenges facing it. In the middle of the Cold War, military and dictatorial regimes in Brazil, Argentina, Paraguay, Chile and Uruguay were systematically perpe-

37. *See* Sergio Garcia Ramirez, *The Relationship between Inter-American Jurisdictions and States (National Systems): Some Pertinent Questions*, 5 Notre Dame J. Int'l & Comp. L. 115, 119 (2015) (suggesting that the nations of the Americas — especially those of Latin America — are walking together to the "definitive reign — not merely discursive, but in practice — of human rights). *See also* Paolo Carozza, *The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights*, 5 Notre Dame J. Int'l & Comp. L. 153, 154 (2015) (critiquing the approach followed by the institutions of the Inter-American System on not considering the existence of two legal traditions within the states parties to the Organization of American States).

38. This does not mean that the judicial dialogue that the Inter-American Court exercises exists only with the European Court. There are other international tribunals with which the Court dialogues, among them the International Criminal Court and the African Court of Peoples and Human Rights. The analysis in this article is focused only on the dialogue between the Inter-American Court and the European Court because the later tribunal was the first regional human rights tribunal to exist in recent times, and because it has had a relevant influence in the jurisprudence of the Inter-American Court. It is worth noticing that since the beginning of its functioning the Inter-American Court has had an "open spirit" regarding the use of the jurisprudence of the European Court. For an analysis of the use of international criminal law and the influence of international criminal courts in the jurisprudence of the Inter-American Court, *see generally* Huneeus, *supra* note 11.

trating acts of torture and enforced disappearances.[39] The situation was no different in Central America, and aside from some exceptions (Costa Rica being the best example), the common thread across a significant number of countries was the massive violation of human rights.[40] In this way, nearly eight years passed before the Inter-American Court formally began its work, marked by its first resolution in exercise of its contentious jurisdiction in 1987 in the *Velázquez Rodríguez v. Honduras*.[41] A year later, the Inter-American Court issued its first judgment on the merits.[42]

i. *The Jurisprudential Value From the European Court*

Since *Velásquez* the Inter-American Court has had an open attitude toward the rich jurisprudence of the European Court, not hesitating in leaning "cautiously and abundantly on the jurisprudence of its homologue in Strasbourg. Simply, it was about trying to ensure the legitimacy of its decisions by relying on a jurisprudence that was older and better known, and hence endowed with unquestionable 'authority.'"[43] When analyzing the incipient work of the Inter-American Tribunal during its first years, it is important to realize that while this Court was going through an important initial period of legitimization and validation, its European homologue had already gone a long way. The ECHR was set up in 1959, and since 1998 it has sat as a full-time court with an individual complaint mechanism.[44] In 2008, it issued its 10,000th judgment on alleged violations of civil and political rights in the European context.[45] Thus, the reference to the experience of an already established regional tribunal proved to be a strategy that legitimized the work of the Inter-American Court, both from a substantive perspective (in the strength of its conclusions) and a practical one (in the resolution of specific questions).

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39. *See* Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 61–77 (Nov. 24, 2010); Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154., ¶ 82 (Sept. 26, 2006); Goiburú et al. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 61 (Sept. 22, 2006); Gelman v. Uruguay, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 33–40 (Feb. 24, 2011).

40. *See* Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 147 (July 29, 1988); "White Van" (Paniagua Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 89 (Mar. 8, 1998); Heliodoro-Portugal v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 84–97 (Aug. 12, 2008).

41. Velásquez-Rodríguez v. Honduras, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1 (June 26, 1987).

42. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988). It is worth mentioning that before the decision in *Velasquez*, the Court had already issued eight decisions in the exercise of its advisory jurisdiction.

43. LAURENCE BURGORGUE-LARSEN, *supra* note 2, at 152.

44. EUROPEAN COURT OF HUMAN RIGHTS, THE COURT IN BRIEF, http://www.echr.coe.int/documents/court_in_brief_eng.pdf [https://perma.cc/GE3T-ZC2D].

45. *Id.*

The Court's use of the jurisprudence of the European Court has been constant and wide-ranging. The Inter-American Court does not hesitate to turn toward the jurisprudence of the European Court to analyze, develop, and define its own jurisprudence. It is possible to affirm that, in its thirty-six years of labor, the references to the European precedents have been fundamental in the construction of the *Inter-American Corpus Juris*. The dialogue has taken place across diverse subjects, both procedural and substantive. Referring to every example of dialogue would exceed the scope (and purpose) of this work, but it is useful to mention some important examples.

Regarding procedural issues, the Inter-American Court has taken jurisprudential inspiration on topics such as: the timing of when preliminary objections must be raised by states,[46] the scope of the facultative clause of its mandatory jurisdiction,[47] the development of principles such as estoppel and the previous recognition of the international responsibility of the state,[48] the competence to determine the validity of a reservation,[49] the time to present individual petitions,[50] including their requirements,[51] and the

46. *See* Dacosta-Cadogan v. Barbados, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 18 (Sept. 24, 2009) (citing decisions of the European Court in the cases of De Wilde v. Belgium, 12 Eur. Ct. H.R. (ser. A) (1971), Foti v. Italy, 56 Eur. Ct. H.R. (ser. A) (1982), and Bitiyeva and X v. Russia, App. Nos. 57953/00, 37392/03 (Eur. Ct. H.R. 2007). *See also* Chocron, Chocron v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 227, ¶ 21 (determining that, in case that the State does not raise a preliminary objection for lack of exhaustion of domestic remedies before the Inter-American Commission, then it has forfeited the possibility of using this means of defense before the Court—and relying again on the jurisprudence of the European Court in De Wilde v. Belgium, 12 Eur. Ct. H.R. (ser. A) (1971), Foti v. Italy, 56 Eur. Ct. H.R. (ser. A) (1982), and Bitiyeva and X v. Russia, App. Nos. 57953/00, 37392/03 (Eur. Ct. H.R. 2007)).

47. *See* Ivcher Bronstein v. Perú, Merits, Competence Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 47 (Sept. 24, 1999) (referring to the decision of the European Court in the case of Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) (1995)).

48. *See* Acevedo Buendía et al. ("Discharged and Retired Employees of the Controller") v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶ 57 (Jul. 1, 2009) (citing the European Court in the following terms: "The European Court of Human Rights has also applied the principle of estoppel regarding objections over the jurisdiction and admissibility put forward by the State in an untimely way," and specifically referring to the cases of Mizzi v. Malta, 2006-I Eur. Ct. H.R. 193, Tuquabo-tekle and others v. the Netherlands, App. No. 60665/00 (Eur. Ct. H.R. 2005), Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) (1980), and De Wilde, Ooms and Versyp v. Belgium, 12 Eur. Ct. H.R. (ser. A) (1971)).

49. *See* Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 303 (Nov. 29, 2009) (citing the decision of the European Court in Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) (1988)).

50. *See* Artavia Murillo et al. (in vitro fertilization) v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 35 (Nov. 28, 2012) (referring to the following cases: Sabri Güneş v. Turkey, App. No. No. 27396/06 (Eur. Ct. H.R. 2012), Büyükdağ v. Turkey, App. No. 28340/95 (Eur. Ct. H.R. 2000), Fernández-Molina González and Others v. Spain, 2002-IX Eur. Ct. H.R. 329, and Zakrzewska v. Poland, App. No. 49927/06 (Eur. Ct. H.R. 2008)).

51. *See* Mémoli v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 30 (August 22, 2013) (citing the following cases of the European Court in order to interpret article 46(1)(b) of the American Convention: P.M. v. the United

scope of a request for interpretation of a judgment.[52] Likewise, there are criteria that have been incorporated in relation to the burden of the proof of the state,[53] and the effectiveness of domestic remedies.[54] With the passing of the years, the Inter-American Court has also developed its own procedural jurisprudence, but it has not spared in reinforcing such criteria with the jurisprudence of the European Court.[55]

Regarding substantive issues, the Inter-American Court has turned to the European jurisprudence to reinforce the criteria in cases of forced disappearances.[56] It has analyzed in detail the multiple and complexly interconnected elements of forced disappearance,[57] and has conceptualized its constitutive elements.[58]

Kingdom, App. No. 6638/03 (Eur. Ct. H.R. 2005) and Kemevuako v. The Netherlands, App. No. 65938/09 (Eur. Ct. H.R. 2010).

52. *See* Suarez Rosero v. Ecuador, Interpretation of the Judgment of Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 51, ¶ 20 (May 29, 1999) (affirming the Court's position on reparations in the sense that "the interpretations of a judgment shall not alter in any respect of any issue that the Court decided 'with binding force,'" citing the European Court's decisions in Allenet de Ribemont v. France, 1996-III Eur. Ct. H.R. 903 and Hentrich v. France, 1997-IV Eur. Ct. H.R. 1285).

53. *See* Brewer Carias v. Venezuela, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 278, ¶ 84 (May 26, 2014) (referring to the position of the European Court to reaffirm its position that "it is not the task of the Court, or of the Commission, to identify *ex officio* the remedies that remain to be exhausted . . . [T]he Court stresses that it is not incumbent on the international organs to rectify a lack of precision in the State's arguments," citing the case of Bozano v. France, 111 Eur. Ct. H.R. (ser. A) (1986)).

54. *See* Caballero Delgado y Santana v. Colombia, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 17, ¶ 60 (January 21, 1994) (following the position of the European Court in the sense that "objections of inadmissibility that have not been specifically invoked in timely fashion by the Government should not be examined by the Court, since the time-limit for presentation by the Government has expired; in addition, the time to raise these objections is at the very start of proceedings before the Commission, that is, at the stage of initial examination of admissibility, unless it proves impossible to interpose them at the appropriate time for reasons that cannot be attributed to the government," referring specifically to the case of Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) (1980)).

55. *See* Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 25 (August 31, 2012) (citing the European Court to sustain its position that "it is not the Court's or the Commission's duty to identify *ex officio* the domestic remedies pending exhaustion," referring to the cases of Deweer v. Belgium, 35 Eur. Ct. H.R. (ser. A) (1980), Foti v. Italy, 56 Eur. Ct. H.R. (ser. A) (1982), Jong, Baljet and van der Brink v. The Netherlands 77 Eur. Ct. H.R. (ser. A) (1984), and Bozano v. France, 111 Eur. Ct. H.R. (ser. A) (1986)).

56. *See* Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 22–24 (Nov. 29, 2009) (illustrating how the Court has built its jurisprudence regarding forced disappearance through its own reasoning, decisions of other international institutions, and the jurisprudence of the European Court, specifically citing Loizidou v. Turkey, 1996-IV Eur. Ct. H.R. 2216, Papamichalopoulos and Others v. Greece, 260-B Eur. Ct. H.R. (ser. A) (1993), Agrotexim and Others v. Greece, 330-A Eur. Ct. H.R. (ser. A) (1995), and Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1).

57. *See* Tiu Tojin v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 190, ¶ 85 (November 26, 2008) (citing Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1552, Çakıcı v. Turkey, 1999-IV Eur. Ct. H.R. 583, Ertak v. Turkey, 2000-V Eur. Ct. H.R 157, Timurtas v. Turkey, 2000-VI Eur. Ct. H.R. 303, Tas v. Turkey, App. No. 24396/94 (Eur. Ct. H.R. 2000), and Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1).

58. *See* Velasquez Rodriguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 151 (July 29, 1988) (referencing various international bodies of the United Nations to understand the complexity of the crime of forced disappearances, including the Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, the UN General Assembly, the Eco-

In the same sense, the Court has defined the obligations of the state regarding the individuals under its custody, using the jurisprudence of the ECHR to reinforce the interpretation of the scope of the obligations of the state as guarantor of an individual under custody.[59] It has taken into account the jurisprudence of the European Tribunal to determine specific aspects of due process,[60] the obligation to provide arguments for the resolutions as a guarantee of the correct administration of justice,[61] the obligation to provide information in criminal cases,[62] the execution of judgments as an integral part of the trial,[63] the obligation to execute the judgments within a reasonable term,[64] the guarantees against an arbitrary expulsion,[65] the procedures that must be followed for the solicitors of asylum and refuge,[66] the protection of the family in procedures that arise from

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nomic and Social Council, and the Subcommission for the Prevention of Discrimination and Protection of Minorities).

59. Bulacio v. Argentina, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 138 (September 18, 2003) (referring extensive jurisprudence of the European Court on the subject, including Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260, Salman v. Turkey, 2000-VII Eur. Ct. H.R. 365, Timurtas v. Turkey, 2000-VI Eur. Ct. H.R. 303, Selmouni v. France, 1999-V Eur. Ct. H.R. 149, Ribitsch v. Austria, 336 Eur. Ct. H.R. (ser. A) (1995), and Tomasi v. France, 241-A Eur. Ct. H.R. (ser. A) (1992)).

60. *See* Revern Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 197, ¶ 70 (June 30, 2009); Chocron, Chocron v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 227, ¶ 98 (in both cases the Court referred to the jurisprudence of the European Court in order to point out a consensus on a substantive question, citing the cases of Campbell and Fell v. the United Kingdom, 80 Eur. Ct. H.R. (ser. A) (1984), Langborger v. Sweden, 155 Eur. Ct. H.R. (ser. A) (1989)).

61. *Chocron, Chocron* at ¶ 118 (referring to Hadjianastassiou v. Greece, 252 Eur. Ct. H.R. (ser. A) (1992)).

62. Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 90 (Nov. 29, 2009) (referring to Imakayeva v. Russia, 2006-XIII Eur. Ct. H.R. 363).

63. *See* Acevedo Buendía et al. ("Discharged and Retired Employees of the Controller") v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶ 71 (Jul. 1, 2009) (referring to Hornsby v. Greece, 1997-II Eur. Ct. H.R. 496, Popov v. Moldova (no. 1), App. No. 74153/01 (Eur. Ct. H.R. 2005), Assanidze v. Georgia, 2004-II Eur. Ct. H.R. 221, Jasiúniene v. Lithuania, App. No. 41510/98 (Eur. Ct. H.R. 2003), and Burdov v. Russia, 2002-III Eur. Ct. H.R. 121).

64. *See* Furlan and Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 150 (August 31, 2012) (referring to the cases of Di Pede v. Italy, 1996-IV Eur. Ct. H.R. 1346, Silva Pontes v. Portugal, 286-A Eur. Ct. H.R. (ser. A) (1994), Zappia v. Italy, 1996-IV Eur. Ct. H.R. 1403, Robins v. The United Kingdom, 1997-V Eur. Ct. H.R. 1801).

65. *See* Nadege Dorzema et al v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 171 (Oct. 24, 2012) (referring to the cases of Andric v. Sweden, App. No. 45917/99 (Eur. Ct. H.R. 1999) and Èonka v. Belgium, 2002-I Eur. Ct. H.R. 14 to define the meaning of "collective" expulsion of aliens).

66. *See* Pacheco Tineo Family v. Plurinational State of Bolivia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 156 (Nov. 25, 2013) (referring to Gebremedhin v. France, 2007-II Eur. Ct. H.R 131 and Jabari v. Turkey, 2000-VIII Eur. Ct. H.R. 369 in order to define the procedural guarantees that asylum seekers are entitled to enjoy under international law).

the expulsion of minors and their parents,[67] among other substantive questions.

ii. *Judicial Dialogue as a Two-Way Path: the Reception of the Jurisprudence of the Inter-American Court by the European Court*

In considering incorporation of the European criteria into the jurisprudence of the Inter-American Court, one may ask if in some way the latter Court has influenced the task of the European Court, or if it has rather been a one-way communication. There could be good reasons to think this, because the European Tribunal has issued more judgments than its American counterpart. This could give the impression of a wholesale importation of criteria by the Tribunal of San José. However, the consolidation of the jurisprudence of the Inter-American Court in its thirty-six years of existence has not gone unnoticed by the European Court.

Some developments of the Inter-American Court have been of much interest to the European Court, especially with the enlargement and transformation of the European system to include Eastern European countries.[68] Some of these countries faced similar problems to the ones Latin-American countries have faced during the last decades, such as episodes of enforced disappearances and torture provoked by the practices of dictatorial or authoritarian regimes.[69] Hence it is unsurprising that the jurisprudence of the Inter-American Court acquired larger relevance for the European Court than in previous years. In this sense Laurence Burgorgue-Larsen notes that openness to the exterior has been extensive because

> it is a tool for the judge to "have an idea," to be informed, with the purpose of analyzing the shared trendlines at a system level of the States parties, but also the systems external to the realm of the Convention, to determine the common denominator, and therefore, with the purpose of deciding if a violation of the Convention could arise from a particular State act.[70]

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67. *See Pacheco Tineo Family* at ¶ 228 (citing Joined Cases C-356/11 and C-357/11, O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto, 2012 E.C.R. 776 support the position that children are true subjects of law).

68. In August 2012, the European Council published a report mentioning cases in which the European Court cited the jurisprudence of the Inter-American Court. According to the report, the European Court made reference to 25 cases of the Inter-American Court. See EUROPEAN COURT OF HUMAN RIGHTS, REFERENCES TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND INTER-AMERICAN INSTRUMENTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf (2012) [https://perma.cc/2HE5-4J8R].

69. *See, e.g.*, HUMAN RIGHTS WATCH, THE 'DIRTY WAR' IN CHECHNYA: FORCED DISAPPEARANCES, TORTURE AND SUMMARY EXECUTIONS (2001), https://www.hrw.org/reports/2001/chechnya/RSCH0301.pdf [https://perma.cc/KL6S-GVA3]; Ophelia Claude, *A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence*, 5 INTERCULTURAL HUM. RTS. L. REV. 407 (2010).

70. DE VERGOTTINI, *supra* note 6, at 313.

In this way the political, social, and cultural differences between both regions have not been an obstacle for the European Court when using the jurisprudence of the Inter-American Court.[71] It is true that the European Court has dialogued less with its Latin American homologue to establish the scope of the rights protected by the European Convention. But this disparity may occur, to a great extent, because of the differences in the types of cases that each Tribunal faces, and the different political realities of both regions, more than as a matter of principle. In other words, the European Court has not rejected the use of the jurisprudence of the Inter-American Court by actively deciding not to employ it, but rather because there are no occasions to dialogue.[72] The evidence for this is that the European Court has used the jurisprudence of the Inter-American Court on those "paths" where the latter has already walked. For example, in a particularly serious matter for the respect of human rights — the enforced disappearances of individuals — one can suggest that the jurisprudence of the Inter-American Court "inspired" the European Court in the construction of its own jurisprudence.[73]

Other examples include the use of the jurisprudence of the Inter-American Court to determine the binding force of the provisional measures to ensure the decisions on merits and protect the petitioners,[74] and to discuss the exclusion of civilians from military jurisdiction,[75] solitary confinement,[76] inhumane treatments,[77] restrictions to the death penalty,[78] and,

71. *Id.* at 12–16 (discussing the use of the jurisprudence of the Inter-American Court in the interpretation of the European Convention and noting that the European Court has used the jurisprudence of the Inter-American Court in the following cases: Mamatkulov and Askarov v. Turkey, 2005-I Eur. Ct. H.R. 293, Sergey Zolotukhin v. Russia, App. No. 14939/03 (Eur. Ct. H.R. 2009), Varnava and Others v. Turkey, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (Eur. Ct. H.R. 2009), and Zontul v. Greece, App. No.12294/07 (Eur. Ct. H.R. 2012)).

72. Several factors may explain the disparity in the dialogue: (i) the Inter-American Court has resolved just 187 cases exercising its contentious jurisdiction (up to January 2015); (ii) the judges neither work full time in the Tribunal nor live in San José, Costa Rica; and (iii) the majority of issues submitted to the contentious jurisdiction of the Inter-American Court are related to criminal questions that fortunately have not been present with the same frequency in Europe as in Latin-America (such as enforced disappearances of persons, extrajudicial executions, torture, etc.).

73. *See* Timurtas v. Turkey, 2000-VI Eur. Ct. H.R. 303; Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1552 (in both cases, the European Court cited the decision of the Inter-American Court in the case of Velasquez Rodriguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988)). *Cf.* Heliodoro Portugal v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 112 (Aug. 12, 2008) (reflecting on the Court's earlier reasoning in previous cases).

74. *See* Maszni v. Romania, App. No. 59892/00 (Eur. Ct. H.R. 2006) (citing the decisions of the Inter-American Court in the case of Durand and Ugarte v. Peru, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 89 (Dec. 3, 2001)).

75. *See* Ergin v. Turkey (no. 6), App. No. 47533/99 (Eur. Ct. H.R. 2006) (citing the decision of the Inter-American Court in the case of Durand and Ugarte v. Peru, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 89 (Dec. 3, 2001)).

76. *See* Babar Ahmad and Others v. the United Kingdom, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (Eur. Ct. H.R. 2012) (citing the decision of the Inter-American Court in the case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 150 (Jul. 5, 2006)).

more recently, the standards regarding the enforcement of amnesty laws.[79] In relation to this last subject, in May 2014 the Great Chamber of the European Court used the jurisprudence of the Inter-American Court when referring extensively to the judgment of *Gelman v. Uruguay* to solve the case of *Marguš v. Croatia*.[80]

B. Dialogue Between the Inter-American Court and the National Courts and Tribunals in Latin-America: Towards the Consolidation of a Ius Constitutionale Commune *in the Region*

There is another approach to the dialogue that represents a "different side of the same coin": the dialogue sustained among the Inter-American Court and the national courts and tribunals in Latin America. The purpose of this dialogue is the full implementation of the international human rights obligations by the states parties to the Inter-American System of Human Rights. This dialogue has been possible thanks to the constitutional "openness" of domestic legal systems to the incorporation of IHRL, which has allowed a progressive materialization of the international human rights obligations in the domestic realm through the action of the judiciaries and by political actors.[81]

The openness of constitutional law included a privileged recognition of some norms of IHRL in the hierarchy of norms in the national level,[82] and

77. *See* Opuz v. Turkey, App. No. 33401/02 (Eur. Ct. H.R. 2009) (citing the decision of the Inter-American Court in the case of Velasquez Rodriguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988)).

78. *See* Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 985 (citing 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, ¶ 134 (Oct. 1, 1999).

79. *See generally*, Eduardo Ferrer Mac-Gregor and Pablo González Domínguez, *Death Penalty, Amnesty Laws, and Forced Disappearances: Three Main Topics of the Inter-American Corpus Juris in Criminal Law*, 5 NOTRE DAME J. INT'L & COMP. L. 63, 97 (2015) (describing the European Court of Human Rights' use of the jurisprudence of the Inter-American Court on amnesty laws).

80. Marguš v. Croatia, App. No. 4455/102014 (Eur. Ct. H.R. 2014) (referring to the case of Gelman v. Uruguay, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011)). In September 2014, the European Court also made reference to the standards of the Inter-American System in the case of Mocanu and Others v. Romania, App. Nos. 10865/09, 45886/07 and 32431/08 (Eur. Ct. H.R. 2014), discussing the prescription of crimes and the adoption of amnesty laws for crimes committed during the period of democratic transition in Romania. Judge Pinto de Alburqueque also cited the position of the Inter-American Court in his concurring opinion to that judgment.

81. *See* Sergio García Ramírez, *The Relationship between Inter-American Jurisdictions and States (National Systems): Some Pertinent Questions*, 5 NOTRE DAME J. INT'L & COMP. L. 115, 126–34 (describing the "bridges" that connect international law with domestic legal systems). *See generally* Sergio García Ramírez et al., *Presentación*, 1 DIÁLOGO JURISPRUDENCIAL. DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS. TRIBUNALES NACIONALES. CORTE INTERAMERICANA DE DERECHOS HUMANOS (2006). The latter journal was created in 2006 in a joint effort by the Inter-American Court of Human Rights, the Inter-American Institute of Human Rights, and the Legal Research Institute of the National Autonomous University of Mexico, with the purpose of promoting the reception by national tribunals of the decisions of the Inter-American Court.

82. *See* Art. 75 § 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (establishing that the constitutional hierarchy includes certain human rights treaties).

in the adoption of open clauses of interpretation.[83] These elements meant that, in some states, international human rights norms prevail over any other norm of domestic law (through "primary" or "prevelance" clauses).[84] These changes do not only require a new conception of the work of legal operators at the domestic level, but also invite a comprehensive reflection on the validity of the classic monist and dualist theories that historically have been used to explain the relationship between IHRL and domestic legal systems.[85] In this same sense, the new Latin American reality provides an increasingly protagonist role to judges, who are the ones in charge of giving full effectiveness to the new legal frame through judicial remedies.[86]

The judicial dialogue in the region is the result of the previously described phenomenon of (a) constitutional openness towards IHRL and (b) an idea that judges play a central role in the protection of human rights. Its fundamental purpose is to deploy at the domestic level, and fundamentally throughout the action of the Judiciary, the *Inter-American Corpus Juris*. This "body of laws" is composed by the regional human rights treaties in the Inter-American System and the jurisprudence of the Inter-American Court.[87] In this context, judicial dialogue takes places as an exercise based on non-hierarchical relationships, but in which the Inter-American Court plays a determinant role for the establishment of standards in matters of human rights. The dialogue occurs in a context characterized by respect for interdependence and reciprocity. Yet, the Inter-American Court, as the ultimate interpreter of the American Convention, has a privileged place regarding the determination of new standards on human rights for the region.[88]

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83. *See* Hector Fix-Zamudio, *El derecho internacional de los derechos humanos en las constituciones latinoamericanas y en la Corte Interamericana de Derechos Humanos*, 1 REVISTA LATINOAMERICANA DE DERECHO 141, 141–80 (2004). *See also* CONSTITUCIÓN POLITÍCA DE COLOMBIA [C.P.] art. 93; CONSTITUCIÓN POLITÍCA DE PERU, Transitory Provision 4; CONSTITUCIÓN DE LA REPUBLICA DOMINICANA art. 74 § 4; Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).

84. *See* MANUEL GÓNOGORA MERA, INTER-AMERICAN JUDICIAL CONSTITUTIONALISM: ON THE CONSTITUTIONAL RANK OF HUMAN RIGHTS TREATIES IN LATIN AMERICA THROUGH NATIONAL AND INTER-AMERICAN ADJUDICATION 91 (2011) (discussing so-called "primary clauses," *i.e.*, constitutional provisions that recognize treaties as part of the internal legal order, and provide that international law prevails over domestic law in cases of conflict).

85. *See generally* Giorgio Gaja, *Dualism—A Review*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW, *supra* note 2, at 52.

86. *See generally* Juliane Kokott, *From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization*, *in* CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS 74 (Christian Starck ed., 1999) (suggesting that the implementation of international law does not depend exclusively on the action of the judiciary and that other branches of government are often involved in this delicate question—but nonetheless that the enforcement of international human rights norms tends to fall to the judiciary).

87. *See* 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, ¶ 116 (Oct. 1, 1999).

88. American Convention art. 67 [hereinafter American Convention] ("The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."); Tibi v. Ecuador, Preliminary

Maybe it is for this reason that judges at the state level have looked towards the jurisprudential work of the Inter-American Court to understand the scope of different elements of the *Inter-American Corpus Juris* in domestic law. The Inter-American Court has been an actor in the protection and consolidation of human rights in those states submitted to its jurisdiction,[89] building common values that the national judges should put in practice.[90] This does not mean that the jurisprudence of the Inter-American Court is the only source for understanding the scope of international norms of human rights in Latin America. Some courts and tribunals at the national level have provided a wide range of protection of rights through their own interpretations, thus providing judicial examples for their colleagues in the region as well as for the same Inter-American Tribunal.[91]

Because of the previously mentioned phenomenon, the jurisprudence of the Inter-American Court does not hesitate to identify the "national judge" as an "Inter-American judge."[92] In other words, it has not ceased to recognize the value of the interpretations of the international instruments carried out by the national judges. The moment has come to see

> judicial bodies of the democratic States apply in a natural and systematic way the American Convention on Human Rights as it is interpreted by the judge in San José. In a way, this can be seen as a new stage that is open, and that should be characterized by the dissemination of the Inter-American jurisprudence among the States.[93]

Judicial dialogue, in this context, "can begin as an interaction between two national courts that can later result in an interaction with the Inter-Ameri-

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Objections, Merits, Reparations and Costs, Judgment, Separate Concurring Opinion of Judge Sergio Garcia Ramirez, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 7 (Sept. 7, 2004).

89. *See* Mariela Morales Antoniazzi, PROTECCIÓN SUPRANACIONAL DE LA DEMOCRACIA EN SURAMÉRICA: UN ESTUDIO SOBRE EL ACERVO DEL IUS CONSTITUTIONALE COMMUNE (2015). *See also* BURGORGUE-LARSEN, *supra* note 2, at 46–48 (discussing how the Inter-American Court observes practical realities when deciding reparations that states must pay).

90. *See* Laurence Burgorgue-Larsen, *supra* note 2, at 59.

91. *See* Corte Suprema de Justicia de la Nación [CSNJ], 14/7/2008, "Alianza UNEN c. Estado Nacional Ministerio del Interior y Transporte s/ promueven acción de amparo" (Arg.) (referencing the decision of Castañeda Gutman v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184 (Aug. 2008)); Suprema Corte de Justicia [SCJN], 10/2012, First Chamber, "Amparo directo 8/2012" (Mex.) (referencing the decision of "The Last Temptation of Christ" (Olmedo-Bustoset al.) v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001)).

92. Cabrera Garcia and Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Reasoned Concurrent Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 24 (Nov. 26, 2010) (suggesting that the doctrine of conventionality control converts the domestic judge into an "Inter-American Judge").

93. BURGORGUE-LARSEN, *supra* note 2, at 261. (author's personal translation). *See generally* Carozza, *supra* note 9, at 38–78 (discussing international human rights law in light of the principle of subsidiarity).

can Court; likewise, an interaction between the Inter-American Court and a national court can receive influences from other national courts."[94]

However, it is important to clarify that the precedent established by the Inter-American Court has a privileged role in this multidirectional judicial dialogue that includes national tribunals. It is expected that fundamental constitutional rights are interpreted in light of the *Inter-American Corpus Juris*, in connection with the international standards as interpreted by the Inter-American Court, which is the last interpreter of the American Convention. In this way, in the praxis of the Inter-American dialogue, the Inter-American Court assumes a role of *primus inter pares* with respect to the high tribunals of the different states of the region.[95] On this basis, the Inter-American Court has outlined a series of procedural rules and international obligations that "diminish the liberty of national judges in order to promote the openness of the national judges in relation to the [Court in San Jose]. This regulated dialogue is . . . vertical."[96]

With this background in mind, it is possible to explain how, in practice, some norms for regulating the legal relationship between national courts and the Inter-American Court have been established, and why judicial dialogue has been the first step for the construction of a *Jus Constitutionale Commune* for Latin America.

i. *From Judicial Dialogue to the Conventionality Control*

a. A Map of the Status Quo: the Different "Intensities" of Judicial Dialogue in Latin America

Judicial dialogue in Latin America is grounded on the constitutionalization of human rights on the national level (*i.e.*, its recognition with constitutional hierarchy).[97] The foundation of the dialogue is further rooted in the necessity of applying the most favorable standard to the human individual (*i.e.*, the *pro personae* principle), regardless of whether this standard comes from an internal or an international source of law (*e.g.* from a constitution or from a treaty).[98] In other words, judges should not apply the minimum standard provided by their domestic law, because at all times they must try to provide the highest protection offered by the normative instruments within their reach.[99] In performing this function, judges should take into

94. Gongora Mena, *supra* note 6, at 588 (author's personal translation).

95. *See id.*

96. *See* Burgorgue-Larsen, *supra* note 2, at 165.

97. *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, §§ 2-3, art. 6–10 (Braz.); CONSTITUCIÓN POLITÍCA DE COLOMBIA [C.P.] art. 93; CONSTITUCIÓN POLITÍCA DE GUATEMALA art. 46; CONSTITUCIÓN POLITÍCA DE PERU, Transitory Provisions 3 and 4.

98. *See* American Convention art. 29(b); Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 1 (Mex.); CONSTITUCIÓN POLITÍCA DE COLOMBIA [C.P.] art. 93 (discussing the duty to interpret domestic law in accordance with international law, and that the norm that provides a better protection of rights shall prevail in case of conflict).

99. Gongora Mena, *supra* note 6, at 588.

consideration the jurisprudence of the Inter-American Court to establish the scope of the human rights recognized in international treaties, as well as in their own constitutional texts. It is in this sense that we can talk about "verticality" in the dialogue, which is subjected to diverse degrees of "intensity."

The intensity levels of the dialogue are determined by the "bindingness" of the American Convention — and therefore the import of the Inter-American Court's jurisprudence — on the States Parties to the American Convention. Those states that are members of the Organization of American States, but that have not ratified the Pact of San José (which recognizes the compulsory jurisdiction of the Inter-American Court), are located in the "minimum" level of intensity. There are ten countries in total in this category: the United States, Canada, and the majority of the English-speaking Caribbean countries.[100] A second level of intensity, which can be described as a "low" level of intensity, can be found among those states that have signed and ratified the American Convention, but that have not accepted the compulsory jurisdiction of the Inter-American Court. There are three countries in this low level of intensity: Jamaica, Dominica, and Grenada.

A third level of intensity appears in those countries that have ratified the American Convention but that have subsequently withdrawn from it. In this "medium" level of intensity, two countries can be found: Trinidad and Tobago, who withdrew from the Convention in 1998, and recently Venezuela, who did it in 2012.[101] These cases are considered in the medium level of intensity because, in accordance with Article 78 of the American Convention, such withdrawal cannot have the effect of "releasing the State Party concerned from the obligations contained in the Convention with respect to any act that may constitute a violation of these obligations, and that has been taken by that state prior to the effective date of denunciation." Thus, the Inter-American Court still has jurisdiction in cases against Trinidad and Tobago and Venezuela in specific circumstances, even after the denouncement of the Convention.[102]

The fourth level of intensity, which could be called "high" or "full" intensity, characterizes the twenty Latin American countries that have adhered to the American Convention, and have accepted and retained the

100. Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and the United States.

101. *See* American Convention art. 78 ("The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance.").

102. *See generally* Caesar v. Trinidad and Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123 (March 11, 2005), and Hillaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94 (June 21, 2002) (both providing examples of decisions taken by the Court even after the relevant state denounced the Convention).

compulsory jurisdiction of the Inter-American Court.[103] This last degree of intensity is where it is possible to observe the existence of the jurisprudential dialogue in a more substantial way in the Inter-American System, starting with the Pact of San José and the decisions of the Inter-American Court. The dialogue is probably facilitated by certain characteristics shared by many of these countries: the majority of them are Spanish-speaking and enjoy a common heritage of 200 years of constitutionalism, which is in turn reflected in the rights recognized in their constitutions and the mechanisms for their protection.[104]

States where judicial dialogue is fully practiced have, in many cases, opened the door of constitutional law to IHRL, especially through the incorporation of the instruments of the Inter-American *Corpus Juris*.[105] This is reflected in constitutional provisions of several states of the region — although certainly not in all of them — as well as in the resolutions of their highest justice tribunals. The paradigmatic example of this condition is the Political Constitution of the Argentinian Nation, which recognizes a list of human rights instruments — including the American Convention — which "under the conditions under which they are in force, stand on equal level to the Constitution, but do not repeal any article in the First Part of this Constitution, and should be understood as complementary of the rights and guarantees recognized by it."[106] In this same sense the Supreme Court of Justice of the Argentinian Nation established in the case of *Ekmekdjan c/ Sofovic* (1992) that:

> It should be kept in mind that when the Nation ratifies a treaty that was signed with another State, it obliges itself internationally so that its administrative and jurisdictional bodies apply this treaty to those situations that such treaty contemplate, as long as it contains provisions specific enough of those situation[s] that make possible its immediate application [and that] the interpretation of the Pact [of San José] should also be guided by the jurisprudence of the Inter-American Court of Human Rights, one of whose objectives is the interpretation of the Pact of San Jose.[107]

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103. Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, and Uruguay.

104. *See generally* Paolo Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281, 302 (2003) (discussing the legacy of Latin-American constitutionalism since the nineteenth century).

105. This does not mean that States not parties to the American Convention cannot be participants in the judicial dialogue, but it is clear that those States that are bound by the American Convention (and therefore by the Court's jurisprudence) have a more intense dialogue.

106. Art. 75 § 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

107. Corte Suprema de Justicia de la Nación [CSJN], 7/7/1992, "Ekmekdjan c/Sofovic" ¶ 21 (Arg.).

The case of Colombia is notable in this context because the Constitutional Court has recognized that the "constitutional block" established in the Constitution is integrated with the norms and principles that, even implicitly, could be employed as parameters of interpretation in the framework of "conventionality control."[108] These principles and norms include human rights treaties and the jurisprudence of the Inter-American Court. The Colombian Constitutional Court has also established that the jurisprudence of the Inter-American Court is an indispensable reference that should be respected when interpreting the Constitution and part of the sources utilized by the legal actors.[109] Initially, the jurisprudence of the Inter-American Court was considered binding at an internal level, although it was later regarded as a "relevant hermeneutic criterion."[110]

Nowadays, there are numerous Latin American states whose constitutions and high court decisions have welcomed the incorporation of the *Inter-American Corpus Juris* in their respective national legal systems: Bolivia,[111] Costa Rica,[112] Ecuador,[113] Guatemala,[114] Honduras,[115] Mexico,[116] Dominican Republic,[117] Peru,[118] and Venezuela.[119] Some other states, however, have

108. *See* CONSTITUCIÓN POLITÍCA DE COLOMBIA [C.P.] art. 93; Corte Constitucional [Constitutional Court], enero 19, 2000, Sentencia C-010/00 (Colom.); Cabrera Garcia and Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 224–33. (Nov. 26, 2010).

109. *See* de Vergottini, *supra* note 6, at 94; Corte Constitucional [Constitutional Court], enero 19, 2000, Sentencia C-010/00 (Colom.); Corte Constitucional [Constitutional Court], agosto 23, 1996, C-406/96 (Colom.).

110. *See* Corte Constitucional [Constitutional Court], enero 19, 2000, Sentencia C-010/00 (Colom.).

111. *See* Constitutional Tribunal of Bolivia, May 10, 2010, File No. 2006-13381-27-RAC, at III.3.

112. *See* Constitutional Chamber of the Supreme Court of Justice of Costa Rica, May 9, 1995, File 0421-S-90, at VII.

113. *See* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, art. 417 ("The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the nonrestriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied").

114. *See* CONSTITUCIÓN POLITÍCA DE GUATEMALA art. 46; Constitutional Court of the Republic of Guatemala, July 17, 2012, File No. 1822-2011.

115. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 15 ("Honduras supports the principles and practices of international law, that promote the solidarity and self-determination of peoples, nonintervention and the strengthening of universal peace and democracy. Honduras proclaims as inevitable the validity and obligatory execution of arbitral and judicial sentences of an international character").

116. *See* Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 1 (Mex.) ("In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.").

117. *See* Supreme Court of Justice of Dominican Republic, Nov. 13, 2003, Decision No. 1920-03.

118. *See* Constitutional Tribunal of Peru, Jul. 21, 2006, File No. 2730-2006-PA/TC.

119. *See* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 23 ("The treaties, pacts and conventions relating to human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions con-

not followed the same path, and still conceive their constitutional systems in a much closer connection with the traditional view that courts protect the rights recognized in the national constitution. This is the case of Chile and Brazil, for instance. Still, the tendency toward openness is undeniable.

Of course, the constitutionalization of IHRL does not constitute a dispositive factor in the acceptance of international standards. The existence of constitutional rules of incorporation is not sufficient to guarantee the efficacy of IHRL because it is also necessary that judges actually enforce IHRL in their day-to-day practice. In other words, the attitude of judges is the determinant factor in promoting the consideration and acceptance of IHRL at the domestic level. Judges "have ended up accepting the standard, forced by the circumstances — that is, by the imperious need of interpretative harmony of fundamental rights."[120]

b. The Doctrine of Conventionality Control

1. The Theorization of Conventionality Control as a Guide for Latin American Authorities

The increasing constitutionalization of IHRL and the acceptance of a conventional jurisprudence as a hermeneutic guide to interpreting the American Convention have led the Inter-American Court to establish an obligation for the judicial authorities — and later on for all state authorities — to adhere to what is called the doctrine of "conventionality control."[121] The design of this doctrine was made considering the regional openness of constitutional law toward the incorporation of IHRL (either through constitutional reform or through interpretation). In other words, the Court "dialogued" with the states of the region to determine the characteristics and the scope of the doctrine of conventionality control.

This doctrine has a strict adherence to the obligations that arise from Article 2 of the American Convention, in regard to the duty of the States Parties to adopt provisions of domestic law that allow the effectiveness of the Convention on a national level.[122] It is one of the latest and more effective efforts derived from the jurisprudence of the Inter-American Court to

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cerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power."). It is important to remember that, as mentioned above, the government of Venezuela denounced the American Convention in 2013.

120. BURGORGUE-LARSEN, *supra* note 2, at 224.

121. *See generally* Cabrera Garcia and Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Reasoned Concurrent Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 29 (discussing the origins and characteristics of the doctrine of conventionality control); CLAUDIO NASH, CONTROL DE CONVENCIONALIDAD: DE LA DOGMÁTICA A LA IMPLEMENTACIÓN (2013).

122. American Convention art. 2 ("Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.").

encourage the fulfillment of the obligation of the states to "respect" and "ensure" the human rights recognized in the Pact of San José on a national level. In 2006, the doctrine emerged in the judgment of *Almonacid Arellano v. Chile,* which involved a case related to the issuance and application of an amnesty law that allowed the impunity of those responsible for serious violations of human rights.[123] The Court established the following:

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "*conventionality control*" *between the domestic legal provisions, which are applied to specific cases, and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.*[124]

Later, in the case of the *Dismissed Congressional Employees of the Congress v. Peru* the Inter-American Court clarified that "the organs of the Judiciary should exercise not only a control of constitutionality, but also of 'conventionality' *ex officio* between domestic norms and the American Convention, evidently in the context of their respective spheres of competence and the corresponding procedural regulations."[125] Also, the Court stated that the conventionality control is complementary to the constitutional control, and should be applied even in a potential context of normative and practical impairment, in order to ensure real access to justice.[126]

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123. *See* Douglass Cassel, *El fallo Almonacid de la CIDH, y las obligaciones que de allí emanan para el Estado de Chile, in* JUSTICIA, DERECHOS HUMANOS Y EL DECRETO LEY DE AMNISTÍA 81, 81–88 (Paulina Veloso ed. 2010); Douglass Cassel, *La Corte Interamericana de Derechos Humanos, in* VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA 151 (2007) (analyzing the implications derived from the decision of *Almonacid*).

124. Almonacid Arellano et al v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sep. 26, 2006) (emphasis added).

125. Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 128 (Nov. 24, 2006) (emphasis added).

126. *Id.* ¶ 128–29. These principles were reiterated in the following cases: Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 79 (Nov. 20, 2007); Heliodoro-Portugal v. Panama, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 180 (Aug. 12, 2008); Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 339 (Nov. 29, 2009); Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits,

The doctrine of conventionality control evolved in *Cabrera García and Montiel Flores v. México* in 2010, where the Court made a fundamental remark on the scope of the conventionality control. It determined that, aside from judges, the different "bodies linked to the administration of justice in all levels" should make use of the conventionality control *ex-officio*.[127] In the same judgment, the Court made an extensive recognition of the courts and tribunals of the highest level in the region that have applied conventionality control, explicitly showing that the phenomenon of the incorporation of different elements of the *Inter-American Corpus Juris* enjoys a comprehensive legitimacy in several States Parties to the Convention.[128]

In *Gelman v. Uruguay*, the Inter-American Court made another important remark on the context in which the conventionality control must be practiced.[129] This case refers to the adoption and application of the *Ley de Caducidad de la Pretensión Punitiva del Estado (LCPPE)* of 1986, which had extensive popular support at the time of its adoption. However, the LCPPE prevented the investigation and punishment of serious violations of human rights perpetrated by military and police agents within the framework of the military dictatorship in that country. Consistent with its previous jurisprudence on matters of amnesty, the Inter-American Court noted that there was an obvious incompatibility of such a law with the American Convention.[130] Hence it did not have any legal effect. The Inter-American Court did not hesitate to remember that the national judges and even the congress have an obligation to look after the effectiveness of IHRL: "even against the public opinion, [. . .] what was fundamental and existential was the importance of the underlying values of the American Convention, interpreted by

Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 208 (May 26, 2010); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 311 (Aug. 24, 2010); Fernández Ortega et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment. Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 234 (Aug. 30, 2010); Rosendo-Cantú and other v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 219 (Aug. 31, 2010); Ibsen Cárdenas and Ibsen-Peña v. Bolivia, Merits, Reparation and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 217, ¶ 202 (Sep. 1, 2010); Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 287 (Nov. 23, 2010); Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment. Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 106 (Nov. 24, 2010).

127. Cabrera Garcia and Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 224–33 (Nov 26, 2010).

128. *Id.* (referencing to decisions of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, the Constitutional Tribunal of Bolivia, the Supreme Court of Justice of Dominican Republic, the Constitutional Tribunal of Peru, the Supreme Court of Justice of the Argentinian Nation, and the Constitutional Court of Colombia, in order to show how some tribunals exercise conventionality control).

129. *Gelman v. Uruguay*, Merits, and Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 193 (Feb. 24, 2011).

130. *See Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 44 (March 14, 2001).

the Court: the conventionality control is the instrument of this dynamic."[131]

The development of the conventionality control doctrine has also modified the normative strength of the jurisprudence of the Inter-American Court. In the resolution regarding *Monitoring Compliance with Judgment of the Gelman Case* in 2013, the Inter-American Court determined that there are two manifestations of the obligation of state authorities when exerting conventionality control: first, in those cases where there is a judgment against the state to which an authority belongs; and second, in those cases where the authority does not belong to the state that was a party in a particular controversy.[132] In the first case, the Court concluded that all the authorities should practice conventionality control on the basis of the jurisprudence of the Court given that they are obliged to comply with the American Convention, and because the Inter-American Court is the last interpreter of the treaty.[133]

Finally, the Court established in its advisory opinion on the *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* that, in exercise of conventionality control, the authorities of the state must take into account the standards developed in advisory opinions and not just the standards decided in contentious cases. In the Court's view, the standards developed in the advisory opinions allow the achievement of the effective respect of human rights guarantees in a preventive way, which is the purpose of the American Convention.[134]

2. *The Effects of Conventionality Control in Diverse Jurisdictions in the Region*

The conventionality control doctrine has contributed to the jurisprudential dialogue between the Inter-American Court and national tribunals by being an effective tool for the incorporation of the Inter-American standards judicially. In some cases — as will be analyzed in the next paragraphs — it has even produced structural changes on the constitutional norms and the jurisprudential criteria on the national level, especially with those related to the way in which the elements of the *Inter-American Corpus Juris* are incorpo-

131. *See* BURGORGUE-LARSEN, *supra* note 2, at 245 (noting that, after *Gelman*, the Court referred to conventionality control in the following cases: Chocron Chocron v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment,. Inter-Am. Ct. H.R. (ser. C) No. 227, ¶ 164–171 (Jul. 1, 2011); *Lopez Mendoza v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 233, ¶ 226–27 (Sep. 1, 2011); *Fontevecchia y D'Amico v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 93 (Nov. 29, 2011).

132. *See Gelman v. Uruguay*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of March 20, 2013, ¶67.

133. *See Gelman v. Uruguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. March 20, 2013), http://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13_ing.pdf. *See also id.,* Reasoned Concurrent Opinion of Judge Eduardo Ferrer Mac-Gregor, ¶ 22–33.

134. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (Ser. A) No. 21, ¶ 13 (Aug. 19, 2014).

rated by the national judiciary when solving specific cases. Three examples clearly illustrate this phenomenon.

The first is the case of Mexico. The Supreme Court of Justice of the Nation (SCJN) recognized the existence of an obligation of all Mexican judges to perform a diffuse conventionality control in fulfillment of the Inter-American Court's judgment in *Radilla-Pacheco v. Mexico.*[135] Partially to comply with the Inter-American Court's judgment, the SCJN established that the national judges are empowered to perform a "diffuse conventionality control," which allows them not to enforce an anti-conventional norm for the particular case without making an invalidity declaration, which is an authority solely reserved for the federal tribunals.[136] Previous to this decision, in Mexico there was a concentrated control system of constitutional review.

The decision of the Mexican Supreme Court was widely influenced by two central facts. First, Mexico had been condemned in a time frame of two years, on four previous occasions, in judgments of the Inter-American Court, for reasons similar to the situation in *Radilla.*[137] Second, Mexico had enacted an important constitutional reform in 2011, which recognized the constitutional rank of human rights norms provided on international treaties and created tools — recognized on a constitutional level — that favor their effective application by the national legal operators. These tools include: the principle of consistent interpretation, the *pro personae* principle, and the recognition of the principles of universality, interdependence, indivisibility, and progressivity and of the obligations of prevention, investigation, punishment and reparation of human rights violations.[138]

On the other side, the SCJN established in April 2014 that the jurisprudence of the Inter-American Court is binding for Mexican judges as long as it is more favorable for the person, even if it is about jurisprudential criteria that has not been created in cases where the Mexican State has not been

135. *See* Suprema Corte de Justicia [SCJN], 4/10/2011, File No. 912/2010, "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" (Mex.).

136. *Id.*

137. *See generally Rosendo-Cantú and other v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216,(Aug. 31, 2010); Cabrera Garcia and Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010) (both analyzing violations of the right to fair trial, provoked by the use of military jurisdiction in cases where members of the military forces were involved in human rights violations committed against civilians).

138. *See* Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 1 (Mex.). The principles recognized in Article 1 of the Mexican Constitution are still taking form, and it is still early to define their content with precision. For a first approximation, *see* Luis Vázquez and Sandra Serrano, *Los principios de universalidad, interdependencia, indivisibilidad y progresivida: Apuntes para su aplicación práctica ("The Principles of Universality, Interdependence, Indivisibility, and Progressiveness: Notes for their Practical Application"), in* La Reforma Constitucional de Derechos Humanos: Un Neuvo Paradigma (Miguel Carbonell and Pedro Salzar eds., 2011).

party of the procedure.[139] The legal argument of these criteria is the very same first article of the Mexican Constitution, which places human rights norms (it does not matter if they come from a national or international source) on the top of the normative hierarchy of the Mexican legal system, and recognized the above-mentioned principles of constitutional interpretation. These changes have reconfigured the system of legal sources of the Mexican legal system, and have opened the door to a fruitful jurisprudential dialogue between the institutions of the Inter-American system and the national tribunals of Mexico.

The second example is Argentina. Previously, in the 2007 case *Mazzeo, Lulio Lilo et al.*, the Supreme Court of Justice of the Argentinian Nation (SCJNA) expressly referred to the conventionality control doctrine (as was established by the Inter-American Court in its jurisprudence in *Almonacid*) as part of its reasoning to determine the nullity of a pardon granted by the President of Argentina in benefit of those presumed responsible for the commission of acts of torture.[140] To reach this conclusion the SCJNA also extensively considered the duty that the states have under several sources of IHRL to investigate, identify and punish those responsible for serious human rights violations, in consideration of the protection of the rights of the victims and their families.[141]

The third example is Paraguay. Along similar lines in 2013, the Supreme Court of Justice of Paraguay (CSJP) determined the unconstitutionality of a denial by an appeals tribunal of a writ of *amparo* (a kind of individual action for the vindication of a constitutional right) brought by a citizen who wanted to know how many agents worked in a municipality, what positions they held, and how much they earned.[142] The CSJP determined that the information requested from the authorities should be delivered by the authorities of the executive power, because the right to freedom of thought and expression includes the protection of the right to information under control of the state.[143] The Supreme Court arrived at this conclusion by taking into consideration not only Article 28 of its Constitution (which establishes that the sources of information are public), but also the interpretation of the Inter-American Court in *Claude Reyes v. Chile.*[144]

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139. Suprema Corte de Justicia [SCJN], 4/25/2014, Tesis P./J. 21/2014 (Mex.).

140. Corte Suprema de Justicia de la Nación [CSNJ], 13/7/2007, "Mazzeo, Lulio Lilo y otros s/ rec. de casación e inconstitucionalidad," ¶ 20–21 (Arg.).

141. *Id.* at ¶ 22–23.

142. *See* Corte Suprema de Justicia del Paraguay, 10/15/2013, Acción de inconstitucionalidad en el juicio: "Defensoría del Pueblo c/ Municipalidad de San Lorenzo s/ Amparo" (Ac. y Sent. No. 1.306) Gaceta Judicial 2013 (No. 4) at 156, ¶ 19.

143. *See id.* at ¶ 22.

144. *See* Claude Reyes et al. v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sep. 19, 2006).

3. *Conventionality Control, Mechanisms of Interpretation, and* Pro Personae *Principle*

To conclude on the subject of conventionality control, it is important to highlight that this doctrine is not a tool that seeks to impose on states a homogenous view in matters of human rights. The *pro personae* principle and the logic of normative pluralism is found in the genesis of conventionality control. States preserve the freedom to adopt more protective criteria than those provided by the *Inter-American Corpus Juris.*[145] The duty to apply the more protective criteria arises from the very same Article 29 of the American Convention, which establishes norms of interpretation and whose *raison d'etre* is that, when faced with the possibility to apply two or more norms, due normative balancing must be made and the one that provides a greater enjoyment to human rights must be chosen.[146]

IHRL is indeed the genesis of the *pro personae* principle. States have the right to expand the level of protection of human rights through their national laws, and international law cannot serve as a reason to limit those rights. In this sense Rodolfo E. Piza Escalante, a former Judge of the Inter-American Court, reasoned that "[i]n this respect, it appears that the fundamental criterion which creates the very nature of human rights requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted. This fundamental criterion, the *pro homine* principle of the Law of Human Rights, leads to the conclusion that immediate and unconditional enforceability is the rule and that conditional enforcement is the exception."[147] When applied to constitutional law in general and to conventionality control in particular, this principle serves as a parameter for state authorities to always choose the standard (either national or international) that expands the protection of rights.

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145. Cabrera Garcia and Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Reasoned Concurrent Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 38. *See also* Court Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Court, Reasoned Concurrent Opinion of Judge Eduardo Ferrer Mac-Gregor, ¶ 52 (Inter-Am. Ct. H.R. March 20, 2013), http://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13_ing.pdf.

146. American Convention art. 29 ("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.").

147. Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/85, Concurrent Opinion of Judge Piza Escalante at ¶ 36 (Inter-Am. Ct. H. R. (ser. A) No. 7 (Aug. 29, 1986).

The Inter-American Court is conscious that IHRL contains the minimums of protection of human rights, and not the maximum that the states can and should guarantee to the people subjected to their jurisdiction. It is for this reason that the Inter-American Court has interpreted the American Convention in light of the criteria established by the national tribunals in matters of human rights, when they exercise conventionality control (meaning, when domestic courts decide cases on the bases of the American Convention and the jurisprudence of the Court). In other words, the Inter-American Court has recognized, in its own judicial action, the value that national courts have on giving a greater protection to human rights, and has even used this criterion to guide its own decisions.[148] It is in this sense that it is possible to affirm that the Inter-American Court has dialogued with its counterparts on the national level when performing conventionality control on the international level.

Conventionality control is a unique phenomenon in the relationships between national tribunals and international courts. There is nothing similar in the European realm, in part because it lacks a disposition as the one established in Article 2 of the American Convention, which: "[i]mposes, and does not induce like in Europe, the conformity of the national legislative systems with the conventional norm."[149] Conventionality control has become one the most important elements in the construction of the Latin-American *Ius Constitutionale Commune* when operating as a legal institution that has strengthened the jurisprudential dialogue between the national authorities of states parties to the Convention and the Inter-American Court, contributing for the creation of common standards in matters of human rights for all the region–based in the *pro personae* principle.[150]

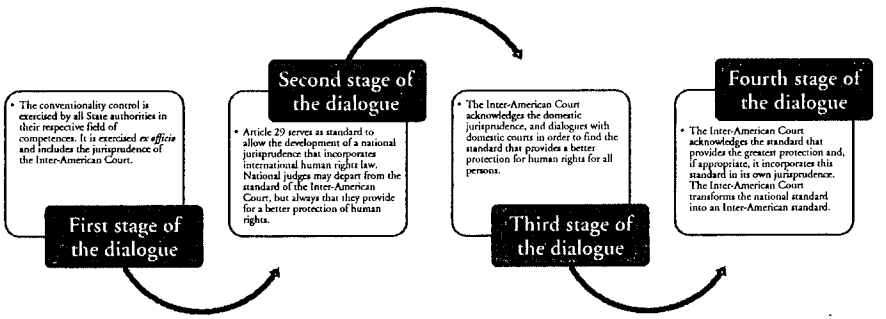
The existence of conventionality control has allowed the national authorities to use the *Inter-American Corpus Iuris* — including the jurisprudence of the Inter-American Court — as a normative guide for the resolution of cases that involve the protection of human rights in the national realm. As expressed by Armin Von Bogdandy, "the *Ius Constitutionale Commune* is based on the respect for human rights, the Rule of Law, and democracy [and] implies a new public law in this region: the transformation in the

148. *See* Artavia Murillo et al. (in vitro fertilization) v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 260–62 (Nov. 28, 2012).

149. *See* JIMENA QUESADA, CONTROL DE CONSTITUCIONALIDAD Y CONTROL DE CONVENCIONALIDAD: HACIA LA FORMACIÓN DE UN DERECHO CONSTITUCIONAL EUROPEO 285–317 (2010); BURGORGUE-LARSEN, *supra* note 2, at 241 (noting that a theory like conventionality control has not developed in Europe); Kail Ambos and Maria Laura Böhm, *Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿Tribunal tímido vs. Tribunal audaz?*, *in* DIALOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES, *supra* note 2, at 1057, 1075–76.

150. *See generally* Ariel E. Dulitzky, *El impacto del control de convencionalidad ¿un cambio de paradigma en el sistema interamericano de derechos humanos?*, *in* TRATADO DE LOS DERECHOS CONSTITUCIONALES 533, 560 (Julio Cesar Rivero ed. 2014) (criticizing the current doctrine of conventionality control, but still recognizing the need for an integrated Inter-American System where international law and constitutional law converge).

basic structure of public law [which offers] a proposal of guidance in the complex current situation."[151] The following graph contributes to the understanding of the cycle of conventionality control and the judicial dialogue, and the process of forming the *Ius Constitutionale Commune.*



IV. Third Part: Reflections on the Practice of Judicial Dialogue

Up to this point, I have given a brief overview of how the Inter-American Court engages in judicial dialogue with its counterpart in Strasbourg and with national courts in Latin America (*i.e.*, what has been referred to respectively as "horizontal" and "vertical" dialogue), and how these judicial relationships have allowed judges to import and export standards that reinforce the highest protection of individuals at both the national and regional levels. With this background in mind, it is now possible to reflect about the practice of judicial dialogue more generally. It is particularly useful to reflect on the reconfiguration of the judicial endeavor in light of the dialogue, and the implications that this reconfiguration has for the development and effectiveness of IHRL.

A. *The Reconfiguration of the Judicial Endeavor*

i. *Judicial Monologue and the Abstainers Courts and Tribunals: Rebels With or Without a Cause?*

The judicial dialogue is a phenomenon that comes from the practice between national and international courts. One of its most important characteristics is the freedom of participation. There is no international code of procedural rules that regulate the communication between courts, or that

151. Armin Von Bogdandy, *Ius Constitutionale Commune Latinoamericanum: Una Aclaración Conceptual* in Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos, *supra* note 2, at 2; Construcción y Papel de los Derechos Sociales Fundamentales: Hacia un Ius Constitutionale Commune en América Latina (Armin Von Bogdandy, Héctor Fix-Fierro, Mariela Morales Antoniazzi, and Eduardo Ferrer Mac-Gregor eds., 2011).

establish at least the existence of an obligation to be part of the dialogue. As discussed, the idea of judicial dialogue emerges from the practice of judges in different jurisdictions. For this reason, it should not surprise anyone that within this freedom, there are courts that have maintained a closed attitude. They have not kept an open mind towards other options. This may be due to different reasons: it may be that a court considers itself finite, or that there is some sort of self-sufficiency because its constitutional system is complete, and therefore there is no need to take into account the reasoning that comes from other latitudes. The decision to enter the dialogue or abstain from it is a political decision that is subjected to the convictions of those who hold the judicial function in a particular country.[152]

There is no doubt that the legitimacy and the authority of national and international courts and tribunals are based on the legal instrument that brings them to life and that regulates their activities (*e.g.*, the legitimacy of an international court is based in a treaty and of a constitutional court in the constitution), and to that end it does not depend on any "foreign" legal instrument. The authority of their decisions comes from their very own constitutive instrument, which means that it is in the exercise of their judicial sovereignty that the recourse to the criteria coming from abroad is facultative. In other words, the judicial dialogue is not a *sine qua non* condition for a court to carry out its functions. Therefore, the reasons why a particular court decides not to take into account a foreign precedent should not be prejudged in abstract.[153] However — as a user of the judicial dialogue, and as judge of a human rights regional tribunal — I firmly consider that, at least in this realm, judicial dialogue facilitates a better understanding of rights.

The judicial dialogue helps judges to decide cases with greater consistency, and even to make a turn in their precedents when taking into consideration the progress that has been made in other regions. All of this contributes to the full effectiveness to human rights. In a democratic society the unrestricted respect of human rights is a primordial issue, and the judges cannot overlook this. Why, then, should judges not consider the decisions of counterparts with whom they have share tasks? Can the important judicial progresses that take place daily really be ignored simply because they come from somewhere else? If there have been more protective interpretations in other regions, reasons to disregard such interpretations should be important and be duly justified. What is definitely unhelpful is ungrounded close-mindedness stemming from what may be called "judicial egocentrism."

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152. *See* de Vergottini, *supra* note 7, at 586.

153. *See Mashavha v. President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC) para. 51 (S. Afr.) (rejecting the use of foreign law as a method of constitutional interpretation, given the distinctive "political, social, and economic history of South Africa").

The participation of judges in judicial dialogue increases the richness of the communication and the universalization of human rights. In this sense it is not that dialogue is a matter for a few or that the same are always involved, but to promote a live interaction and mutual reciprocity between different jurisdictions from different states and different regions. As has been noted throughout this article, such interpretative value can play in favor of the individual, and in favor of the same courts that engage in the dialogue.[154] The judicial dialogue adopted as a daily methodology by the courts reconfigures the judicial function, incorporating the judge within a cosmopolitan phenomenon for the benefit of the universal protection of human rights. For this reason, it is possible to affirm that "[a]dapting to the new configuration of the judicial relationships is vital, notwithstanding the risk of failure."[155]

ii. *Coherence and Constance of the Precedent of Court as Cardinal Elements of Judicial Dialogue*

A second aspect in which the dialogue benefits the judicial function is that it promotes a perfecting of the interpretative task of every court. By knowing that there are other courts that would be attentive to the jurisprudential developments of other regions, the national and international courts that decide to actively participate in the dialogue will seek to exhibit more solid argumentation and strengthen their institutional legitimacy through constant and coherent "jurisprudential lines." Of course, generating solid arguments is relevant for any judicial body in any circumstance,[156] but it seems that the dialogue accentuates such values by being the "letter of introduction" of the court to the exterior.

Once the judicial dialogue is underway, a new crucial objective is providing the necessary coherence on the scope of the norms.[157] The existence of clear and strong argumentation is fundamental for generating constant and coherent precedents, which become the tools of communication, and therefore cardinal elements, of the judicial dialogue. This does not mean that a court is prevented from changing its criterion or that there should be an absolute alignment with the exterior, but that any change in the jurisprudence must be explained and contextualized. The dialogue does not imply — and in my view has no pretense of — homogenization, but it does seek

154. BURGORGUE-LARSEN, *supra* note 2, at 80.

155. *Id.* at 234 (author's personal translation).

156. *See generally* Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT (2007) (analyzing the practice of the International Court of Justice on the use of precedents). *See also* Chapman v. the United Kingdom, 2001-I Eur. Ct. H.R. 41, ¶ 70, Christine Goodwin v. the United Kingdom, 2002-VI Eur. Ct. H.R. 346, ¶ 74, and Mamatkulov and Abdurasulovic v. Turkey, App. Nos. 46827/99 and 46951/99, ¶ 105 (Eur. Ct. H.R. 2003) (all pointing out the necessity for consistency and predictability in the Court's decisions).

157. *See* Nathan Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals* 15 LEIDEN J. INT'L L. 485 (2002) (noting the potential fragmentation of international law due to a proliferation of tribunals and courts, but suggesting judicial dialogue as a solution).

for courts to have a reciprocal growth in an environment where the communication is favored.

But the legitimacy of the dialogue is not merely construed with formal issues, such as coherence and logic in the judgments, but through the existence of substantive criterions that protect the rights of the people. My perspective as an Inter-American judge has allowed me to show that the openness of states and other international tribunals toward international human rights institutions takes place as long as there is assurance that the jurisprudential development — which occurs at the international level — will always provide the greater protection of human rights. In this sense, as long as the Inter-American standard is coherent with this objective, there will be greater persuasive force and a better approach to dialogue by other judicial bodies — especially at the state level. The same happens with the legitimacy of the national tribunals.

This is an important reason why courts — at both the national and the international level — should keep a protective attitude, because there can always be decisions that act against the basic premise that the decisions of national and international tribunals should be promoting a more extensive protection of human rights. By being immersed in the judicial dialogue, today more than ever it is key that national and international tribunals maintain congruence in their jurisprudential criteria on human rights. The job of the Inter-American Court has an impact on the particular case, in the region, and possibly also on an international level. Any modification in the jurisprudential criteria — especially when there is a backlash in the realm of protection of the human rights of the victims — can also have a harmful domino effect.[158]

B. And with the Judicial Dialogue . . . Where are we Moving? The Progressiveness and Universality of Human Rights

Finally, it is worth reflecting on the future of the judicial dialogue and where it is taking us. The first part of this article specified that the judicial dialogue is a phenomenon where both national and international bodies, as well as quasi-jurisdictional bodies, participate. This part also stated that the dialogue involves a series of practices that do not necessarily mean looking outside with the purpose of enriching the judicial criteria, but instead a cumulus of activities that have been grouped into this concept (like the meetings of members of the judiciary of different countries).[159] Against this

158. *See Brewer Carias v. Venezuela*, Preliminary Objections, Judgment, Dissenting Opinion of Judges Ventura Robles and Ferrer MacGregor, Inter-Am. Ct. H.R. (ser. C) No. 278, ¶ 2 (May 26, 2014). (arguing that the Court acted against the premise that human rights tribunals must decide cases always trying to guarantee a higher protection of human rights).

159. *See, e.g.*, A DIALOGUE BETWEEN JUDGES: WRITINGS OF THE SUMMIT OF PRESIDENTS OF CONSTITUTIONAL, REGIONAL AND SUPREME COURTS (Carlos Pérez Vázquez & Javier Hernández Valencia eds., 2014).

diversity on the practice of judicial dialogue, it would be a titanic task to establish some guidelines on the future of this topic; thus I will try to stick solely to the judicial dialogue in the realm of human rights with a basis in what has been presented here.

Human rights have two inherent characteristics that possibly allow us to determine the future of the judicial dialogue: progressiveness and universality. In regard to progressiveness, in a conscious way with other courts, the Inter-American Court has determined that human rights treaties are living instruments, whose interpretation has to accompany the evolution of time and the development of living conditions.[160] This evaluative interpretation accords with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties.[161] Understanding this "evolutive view of the interpretation of the treaty"[162] has resulted in a more open attitude towards the standards that come from other jurisdictions.[163] In that sense the dialogue will continue taking place and developing in the future.

Universality has been an ideal of human rights since the adoption of the Universal Declaration of Human Rights. The way in which the dialogue contributes to the construction of this ideal is a highly complex subject, which is not possible to explore in depth here.[164] For now it should simply be noted that, on the international level, there is need for jurisprudential coordination to guarantee unity in the interpretation and application of IHRL. The judicial dialogue is an effort of coordination, but it is still too soon to establish that all judges move forward in the same way, with the same purposes, and with the same normative objectives. This is a task that is just beginning.

For example, the rules and principles that have arisen in regard to the conventionality control doctrine, and of the existence of a *Jus Constitutionale Commune* within Latin America, are an effort on the regional level to coordi-

160. *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Reasoned Concurrent Opinion of Judge A. Cançado Trindade, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶ 1 (Sep. 16, 2003). *See* also Mikael Rask Madsen, *The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, *in* THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 43 (J. Christoffersen & M. Rask Madsen eds., 2011) (analyzing the European Convention on Human Rights as a living instrument). The European Court itself has reflected on this topic in Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R., ¶ 71 (ser. A) (1995) and *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, ¶ 101.

161. *See* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansion at the Service of the Unity of International Law*, 21 EUR. J. INT'L. L., 585 (2010) (analyzing the methods of interpretation followed by the Inter-American Court under Art. 29 of the Convention).

162. *See Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 245 (Nov. 28, 2012)

163. Manuel Eduardo Gongora Mena, *Diálogo Coevolutivo*, *in* DICCIONARIO DE DERECHO PROCESAL CONSTITUCIONAL Y CONVENCIONAL, *supra* note 6, at 583 (developing the notion that the decisions of courts are not developed in isolation, but that they evolve in interaction with a mutualist universal system of law).

164. *See generally* DE VERGOTTINI, *supra* note 6, at 266 (offering potential critiques to the idea of judicial dialogue as a vehicle to achieve the universalization of human rights).

nate the operators and to always provide the best protection of human rights. To date, it is possible to affirm that the dialogue in the Inter-American System drives the creation of "a common cultural space,"[165] which integrates the levels of universal, international, and national human rights standards. But this is a one-of-its-kind effort, in a very specific section of the world map, and which still has a long way to go in theory as well as in practice. It is still to be seen how the judicial dialogue is carried out on a much wider scale, and if this contributes to the highly desired universality of human rights.[166]

It is also important to be attentive to the coordination with an African system that expressly recognizes treaties as subsidiary sources of interpretation, and that has used the jurisprudence of other regional bodies to determine the scope of their own constituent instruments.[167] It is also necessary to be aware of the dialogue among many other national courts that are not part of a regional human rights system, but belong to universal systems of protection. Possibly the dialogue between the Inter-American Court, the European Court, and the African Court on Human and Peoples' Rights could encourage the formation of a universal *Jus Commune*,[168] a *Jus Commune* for humanity.[169] Possibly judicial dialogue would help to create a global judicial system that would include the creation of new regional systems of human rights protection, or the creation of a universal tribunal of human rights.[170] Perhaps this is one of the most ambitious goals of the judicial dialogue in the field of human rights, since it would allow the existence of a well-coordinated and harmonious relationship between IHRL and domestic law, and between international and domestic judicial bodies.

V. Conclusion

This article has reflected on how the existence and functioning of international courts in human rights, along with the phenomenon of incorporation of international human rights law in domestic legal systems, has resulted in a fruitful vertical and horizontal judicial dialogue between inter-

165. de Vergottini, *supra* note 7, at 584.

166. *See generally* Paolo Carozza, *"My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights* 81 Tex. L. Rev. 1031 (2003) (analyzing the idea of *ius commune* and its potential relevance for the understanding of human rights).

167. *See* African Charter on Human and Peoples' Rights (African (Banjul) Charter on Human and Peoples' Rights) art. 60–61, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 57 (Oct. 26, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

168. *See* Burgorgue-Larsen, *supra* note 2, at 6.

169. *Id.* at 30.

170. *See generally* Malcolm D. Evans, *The Future(s) of Regional Courts on Human Rights*, in Realizing Utopia: The Future of International Law (Antonio Cassese ed., 2012) 261, 268–73; Dinah L. Shelton & Paolo Carozza, Regional Protection of Human Rights (2013).

national and national courts, and in the creation of procedural institutions like conventionality control. These phenomena have been cause and effect of an erosion of the concept of sovereignty, a condition that has allowed international and national courts to be capable of regulating human activity consistent with increasingly unified normative standards. This phenomenon — it has been argued — benefits the legal certainty in the protection of human rights for all the members of the human family. For that reason, the idea of judicial dialogue might continue expanding its horizons, for instance as much as the African Court of Human and People's Rights continues to expand its jurisprudence.

The article has further explained how the practice of judicial dialogue represents a promising path to achieving a healthy balance between two questions that seem contradictory: the better harmonization of the criteria of courts and tribunals, especially on human rights matters; and the respect of the legitimate space of freedom that states have to expand the human rights and freedoms of those persons subjected to their jurisdiction. The example of the dialogue that the Inter-American Court has had with its counterpart in Strasbourg, and with the Latin-American tribunals, show the fruits that this methodology has to offer for the relationships between courts in the twenty-first century. This interaction allows us to affirm that "[i]n recent times, we are moving into the framework of a common cultural space that leads to the standardization of a constitutional and international jurisprudence."[171]

171. Giuseppe de Vergottini, *El Diálogo entre Tribunales*, 28 Teoría y Realidad Constitucional 335, 346 (2011).