On the 'Control de Convencionalidad' Doctrine: a Critical Appraisal of the Inter-American Court of Human Rights' Relevant Case Law

Sobre la doctrina del control de convencionalidad: una apreciación crítica de la jurisprudencia relevante de la Corte Interamericana de Derechos Humanos

Diego Germán **Mejía-Lemos***

SUMMARY: I. *Introduction*. II. *The Inter-American Court of Human Rights and the Control de Convencionalidad*. III. *A Critical Appraisal of the Court's Case Law and Conceptual Framework*. IV. *Conclusions*. V. *Bibliography*.

* Associate, Centre for International Law, President's Graduate Fellow, PhD (c), LLM (National University of Singapore); B Mallal Scholar, LLM (New York University); PGDip, LLB (Abogado) (Universidad Nacional de Colombia).

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ABSTRACT: The use of the *control de convencionalidad* doctrine by the Inter-American Court of Human Rights is inconsistent with the American Convention and, even assuming the contrary, for the sake of argument, unsuitable for the Court's purposes. First, neither Article 2 nor other provisions of the American Convention provide a legal basis for the exercise of judicial review by the Court or domestic courts, as set out by the Court. Secondly, the Court's choice of the concept of wrongfulness is unsuitable to fully convey the legal consequences of the exercise of judicial review and inappropriate for the purposes of the Court. Lastly, the use of the *control de convencionalidad* doctrine may undermine the standing of the Court, as exemplified by Venezuela's denunciation of the Convention.

Descriptors: international law, state responsibility, judicial review, *control de convencionalidad*.

RESUMEN: El uso de la doctrina del control de convencionalidad por parte de la Corte Inter-Americana de Derechos Humanos es inconsistente con la Convención Americana, e incluso asumiendo lo contrario, inapropiado para los propósitos que la Corte tiene en mente. En primer lugar, ni el Artículo 2, ni otras disposiciones de la Convención, confieren un fundamento jurídico para el ejercicio de control por parte de la Corte o de jueces internos, en los términos en que la Corte lo propone. En segundo lugar, la elección del concepto de responsabilidad internacional por parte de la Corte es inapropiada para los propósitos de la Corte. Por último, el uso de la doctrina del *control de convencionalidad* puede debilitar de la posición de la Corte, como se observó en la denuncia la Convención por parte de Venezuela.

Palabras clave: derecho internacional, responsabilidad del Estado, control constitucional, control de convencionalidad.

RÉSUMÉ: L'utilisation de la doctrine du *control de convencionalidad* par la Cour Inter-américaine des Droits de l'Homme n'est pas compatible avec la Convention Américaine et, même en supposant le contraire, inadéquat pour les buts de la Cour. D'une part, ni l'Article 2 ni d'autres dispositions de la Convention Américaine ne fournissent une base juridique pour l'exercice du contrôle judiciaire par la Cour ou des juges internes, tel que mis en place par la Cour. D'autre part, le choix du concept d'illicéité par la Cour est inadapté pour les buts de la Cour. Pour conclure, l'utilisation de la doctrine du *control de convencionalidad* peut s'avérer être le facteur déterminant de la fragilisation de la position de la Cour, ainsi qu'en atteste la dénonciation de la Convention par le Venezuela.

Mots-clés: droit international, responsabilité de l'état, contrôle constitutionnel, *control de convencionalidad*.

I. Introduction

This paper will conduct a critical appraisal of the *control de convencionalidad* doctrine, as the conceptual framework put forward by the Inter-American Court of Human Rights for setting out the content of the obligation to adopt measures to give effect to rights enshrined in the American Convention of Human Rights under Article 2 thereof. In particular, it considers the questions of whether the propositions which the Court sets forth on the nature and scope of an obligation of domestic courts to carry out a review of the conformity of the State Parties' internal law and practice with the Convention are a necessary and appropriate means for achieving the legal consequences that the Court intends to attain.

This form of judicial review, which the Court calls "*control de convencionalidad*", and which it expects domestic courts to conduct, as well as its own decisions in the exercise thereof, are of high relevance, as they have formed the basis for claims that the Court acts *ultra vires*, as argued by the Government of Venezuela in its instrument of denunciation of the Convention.[1]

In essence, the Court considers that domestic courts are under an obligation to conduct judicial review of governmental action, including the adoption and amendment of constitutional norms, in order to ensure that such actions are consistent with the Convention as interpreted by the Court. Most importantly, the Court exercises this judicial review. The obligation of domestic courts and power of the Court to carry out this form of judicial review are based on the Court's interpretation of Article 2 of the American Convention. In the exercise of this power, the Court has declared the nullity *ab initio* of several types of norms of the internal

[1] For an analysis of Venezuela's denunciation of the American Convention, vd., *i.a.*, Mejía-Lemos, Diego Germán, "Venezuela's Denunciation of the American Convention on Human Rights", en American Society of International Law, *ASIL Insights*, vol. 17, Issue 1, 2013, available at *http://www.asil.org/insights130109.cfm* (last visited on 3 July 2013). For a comment on a decision in which the Venezuela's Supreme Court set aside the enforcement of a decision of the IACHR in the exercise of *control de convencionalidad*, see *Cfr.*, Pasqualucci, Jo M., *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd Ed., Cambridge, Cambridge University Press, 2013, p. 303.

legal order of member States and provided for additional remedies. More recently, the Court has characterised its exercise of such powers of judicial review as a form of reparation, *i.e.*, of international responsibility.

This paper's main contention is that the Court lacks the power to conduct judicial review, as neither can Article 2, American Convention, serve as a legal basis of judicial review, nor do other provisions of the Convention set out grounds for judicial review. In essence, the Court's intention to establish a form of judicial review and its more contemporary characterisation of the consequence of a State's failure to comply with "conventionality" as a form of reparation, i.e., of international responsibility, are mutually inconsistent.

On the one hand, the grounds of judicial review are wider than those of international responsibility, and, thus, the latter is inappropriate to fully convey the former. Indeed, while judicial review can be based on lack of competence, which supposes the violation of secondary rules, not merely primary rules, or procedural aspects, international responsibility is based on the existence of an internationally wrongful act, which is exclusively based on the violation of primary rules.

On the other hand, to the extent that the Court chooses wrongfulness, the basis of international responsibility, as the legal consequence of incompatibility with the Convention, which is not confined to wrongfulness, but encompasses, most prominently, incompetence or procedural aspects, it mischaracterises the nature of the legal consequences of judicial review proper. Hence, the Court's choice does not serve the purpose of establishing a form of judicial review.

This paper's method is qualitative. Primary and secondary sources are consulted. More particularly, the following sources are taken into account: treaties and other international agreements, acts of international organizations, international law cases, arbitral decisions, and other international legal materials, in addition to scholarship published in books and journals.

The outcome of the above analyses will be a set of propositions setting out the necessary elements for the construction of Article 2 of the Convention pursuant to treaty law and in accordance with relevant applicable international law and State practice. Indeed, this paper seeks to distinguish between elements that are necessary to put forward a

conceptual framework which can produce the legal consequences that the Court seeks to achieve and those that are not necessary and might have unintended consequences that render such conceptual framework inappropriate for the above purpose.[2]

This paper contributes to scholarship on international law, with a particular focus on international legal theory, international human rights law and its interaction with other branches of international law, particularly the law of treaties and of international responsibility,[3] and comparative analyses of human rights treaties, and public law, especially comparative constitutional law and procedures. Indeed, this paper would be the first exhaustive work published in the English language dealing with the nature and scope of States parties' obligations under Article 2 of the American Convention on Human Rights as well as the first critical assessment of the Inter-American Court of Human Rights' jurisprudence on the above subject, including its *control de convencionalidad* doctrine.[4]

II. The Inter-American Court of Human Rights and the *Control de Convencionalidad*

This Part seeks to study the judgments of the Inter-American Court of Human Rights in which it puts forward its conceptual framework, which this paper will consider. It is divided into four sections, namely:

[2] This is **attained by applying the "principle of economy", epitomized in the so-called Ockham** razor, to the Court's arguments in relation to the construction of the above provision.

[3] More specifically, it contributes to scholarship by setting out a conceptual framework for the study of the sources of obligations under human rights treaties and the conditions for the existence of and legal consequences arising out of the breach of obligations binding upon States under human rights treaties, with a particular focus on the Inter-American system and based on recent developments in the above two areas, including the International Law Commission Articles on State Responsibility and scholarship published recently.

[4] There are, nevertheless, monographs which are exhaustive but do not engage in a critical assessment of the control de convencionalidad doctrine. Vd., *i. a.*, Góngora Mera, Manuel Eduardo, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America Through National and Inter-American Adjudication*, Inter-American Institute of Human Rights, 2011.

(1) introduction; (2) the Almonacid Arellano Case; (3) the development of the control de convencionalidad doctrine in subsequent case law and (4) summary.

1. *The Court's control de convencionalidad*

The Spanish nominal phrase "*control de convencionalidad*" has been consistently used in the judgments setting forth the conceptual framework devised by the Court. In the above statement of the research problem, this expression was referred to as a "review of the conformity of the State Parties' internal law and practice with the Convention". As the Spanish version of the judgments studied below is the authentic one, this document will refer to the above expression in its original Spanish version, for the sake of accuracy and consistency.[5]

The Court has set out the content of the *control de convencionalidad* in the following cases, i.a.: *Almonacid-Arellano et al. v. Chile*,[6] *Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*,[7] *La Cantuta v. Peru*,[8] *Boyce et al. v. Barbados*,[9] *Heliodoro Portugal v. Panama*,[10] *Radilla-Pacheco v. Mexico*,[11]

[5] In accordance with paragraph (j) of Articles 56 and 65 of the 2003 and 2009 versions of the Court's Rules of Procedure, respectively, the Court shall indicate which text of a judgment is authentic. In all the cases studied in this document, the Court indicated that the Spanish version is authentic. Therefore, as the Court has not reached a consensus on the translation of the expression "control de convencionalidad" into English, it will be referred to in its original Spanish version.

[6] Inter-Am. Ct. H.R., Case of Almonacid-Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006, Series C No. 154.

[7] Inter-Am. Ct. H.R., Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2006, Series C No. 158.

[8] Inter-Am. Ct. H.R., Case of La Cantuta v. Peru, Merits, Reparations and Costs. Judgment of November 29, 2006, Series C No. 162.

[9] Inter-Am. Ct. H.R., Case of Boyce et al. v. Barbados, Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007, Series C No. 169.

[10] Inter-Am. Ct. H.R., Case of Heliodoro Portugal v. Panama, Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186.

[11] Inter-Am. Ct. H.R., Case of Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009, Series C No. 209.

Xákmok Kásek Indigenous Community. v. Paraguay,[12] *Fernández-Ortega et al. v. Mexico*,[13] *Rosendo Cantú and other v. Mexico*,[14] *Ibsen Cárdenas and Ibsen Peña v. Bolivia*,[15] *Vélez-Loor v. Panama*,[16] *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*,[17] *Cabrera-García and Montiel-Flores v. Mexico*,[18] *Gelman v. Uruguay*,[19] *Vera-Vera et al. v. Ecuador*,[20] *Chocrón-Chocrón v.Venezuela*,[21] *López-Mendoza v. Venezuela*,[22] and *Fontovecchia y D'Amico v. Argentina*.[23]

The following subsections will elaborate on the propositions put forward by the Court in each of the abovementioned judgments.

[12] Inter-Am. Ct. H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay, Merits, Reparations and Costs. Judgment of August 24, 2010. (Only in Spanish) Series C No. 214.

[13] Inter-Am. Ct. H.R., Case of Fernández-Ortega et *al.* v. Mexico, Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 30, 2010, Series C No. 215.

[14] Inter-Am. Ct. H.R., Case of Rosendo Cantú and other v. Mexico, Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010, Series C No. 216.

[15] Inter-Am. Ct. H.R., Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs. Judgment of September 1, 2010, Series C No. 217.

[16] Inter-Am. Ct. H.R., Case of Vélez-Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 23, 2010 Series C No. 218.

[17] Inter-Am. Ct. H.R., Case of Gomes-Lund *et al.* (Guerrilha do Araguaia) v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010 Series C No. 219.

[18] Inter-Am. Ct. H.R., Case of Cabrera-García and Montiel-Flores v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 26, 2010. Series C No. 220.

[19] Inter-Am. Ct. H.R., Case of Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221.

[20] Inter-Am. Ct. H.R., Case of Vera Vera et al. v. Ecuador. Preliminary Objection, Merits, Reparations, and Costs. Judgment of May 19, 2011 Series C No. 226.

[21] Inter-Am. Ct. H.R., Case of Chocrón - Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2011. (Only in Spanish) Series C No. 227.

[22] Inter-Am. Ct. H.R., Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 1, 2011 (Only in Spanish) Series C No. 233.

[23] Inter-Am. Ct. H.R., Case of Fontovecchia y D'Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011.(Only in Spanish) Series C No. 238.

2. *The Almonacid Arellano case: "a sort of" control de convencionalidad*

In the seminal judgment, issued in the *Almonacid Arellano* case, the Court considered, *i.a.*, whether Chile's decisions to maintain in force Decree Law No. 2191, granting a general amnesty, and apply it in the instant case had breached its obligations under Articles 1(1) and 2 of the Convention in relation to the rights to a fair trial and judicial protection of the victim's relatives, enshrined in Articles 8 and 25 of the Convention.[24]

Firstly, the Court referred to the States Parties obligation to adopt measures under Article 2, which it construed as follows: "Pursuant to Article 2 of the Convention, such adaptation implies the adoption of measures following two main guidelines: i) the annulment of laws and practices of any kind whatsoever that may imply the violation of the rights protected by the Convention, and ii) the passing of laws and the development of practices tending to achieve an effective observance of such guarantees. It is necessary to reaffirm that the duty stated in i) is only complied when such reform is effectively made".[25]

With regard to the decision of maintaining in force Decree Law No. 2191, the Court stated that amnesty laws, such as Decree Law No. 2191, constitute a breach of the Convention, which "generates international responsibility for the State", and stated that Decree Law No. 2191 did not "have any legal effects" and could not be an obstacle for the investigation of the crimes in the instant case.[26] The Court concluded that Chile violated Article 2 of the Convention "by formally keeping within its legislative corpus a Decree Law which is contrary to the wording and the spirit of the Convention".[27]

Secondly, the Court stated that in the event that the Legislative Branch does not comply with their obligation to repeal laws contrary to the Convention under Article 2 thereof, the Judiciary is under an obligation

[24] Inter-Am. Ct. H.R., Case of Almonacid-Arellano *et al.* v. Chile, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006, Series C No. 154, para 90.

[25] *Ibidem*, para 118.

[26] *Ibidem*, para 119.

[27] *Ibidem*, para 122.

to refrain from enforcing such laws under Article 1(1).[28] Also, the Court pointed out that pursuant to Article 27 of the Vienna Convention on the Law of Treaties States are bound to comply with their obligations under international law in good faith and, therefore, cannot invoke domestic law as an excuse for non-compliance with international law.[29]

In this vein, the Court put forward statements on the *control de convencionalidad*, which it described using the expression "a sort of", as follows:

a) Domestic courts are bound to respect the rule of law and, therefore, are under an obligation to apply provisions in force in the legal system;
b) Domestic courts "as part of the State apparatus, are also bound by the Convention", as States "have ratified an international treaty such as the American Convention";
c) Domestic courts are bound to "take steps to ensure[30] that all the effects of the provisions embodied in the Convention are not adversely affected by the application of laws which are contrary to its object and purpose and which do not have legal consequences *ab initio*";
d) Domestic courts "must exercise a sort of '*control de convencionalidad*'";
e) The *control de convencionalidad* consists in a comparison "between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights";
f) In the performance of the *control de convencionalidad*, domestic courts must "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".[31]

[28] *Ibidem*, para 123.

[29] *Ibidem*, para 125.

[30] The Spanish verb "velar" is translated into English as "take steps to ensure" given the fact that other suitable options, such as "ensure", might convey the idea that the level of commitment is higher, so that the obligation would be characterized as of result, or "make certain that something will occur or be the case", rather than of means, the latter being the meaning of the Spanish original.

[31] Inter-Am. Ct. H.R., Case of Almonacid-Arellano et al. v. Chile. Preliminary Objec-

The Court found that the application of Decree Law No. 2191 by Chilean domestic courts breached the obligation under Article 1(1) in relation to the rights of the victim's relatives embodied in Articles 8 and 25 of the Convention.[32]

3. *The subsequent relevant judgments of the Court*

The above statement of the *control de convencionalidad* has remained unchanged to a large extent. Nonetheless, the Court has restated certain aspects of the above propositions, as follows:

A. *The Dismissed Congressional Employees (Aguado-Alfaro et al.)* v. *Peru case*

The Court considered, *i.a.*, whether the lack of judicial protection and legal certainty resulting from the entry into force of Decree Law No. 25640,[33] which prevented the victims from challenging their dismissal, had breached Peru's obligations under Articles 1(1) and 2, in relation to the rights embodied in Articles 8 and 25, of the Convention. The Court made the following statements with regard to the *control de convencionalidad*:

a) Domestic courts are bound by the Convention when the State "has ratified an international treaty such as the Convention";
b) Domestic courts are under an obligation "take steps to ensure that the *effet utile* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose";

tions, Merits, Reparations and Costs. Judgment of September 26, 2006, Series C No. 154, para 124.

[32] Inter-Am. Ct. H.R., Case of Almonacid-Arellano *et al.* v. Chile, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006, Series C No. 154, para 128, and operative part, para 2.

[33] Inter-Am. Ct. H.R., Case of the Dismissed Congressional Employees (Aguado-Alfaro *et al.*) v. Peru. Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2006, Series C No. 158, para 121.

c) Domestic courts are bound to carry out not only a review of conformity with the Constitution but also with the Convention (*control de convencionalidad*);
d) The *control de convencionalidad* must be conducted *ex officio*;
e) The *control de convencionalidad* consists of a comparison of "internal norms" with the Convention;
f) The *control de convencionalidad* should be conducted "evidently within the framework of their competences and the corresponding procedural regulations";
g) The *control de convencionalidad* should not be limited to the "statements or acts of claimants";
h) The *control de convencionalidad*, nonetheless, ought not to be always carried out, "without taking into account other procedural and substantive preconditions for the admissibility and suitability of this type of action";[34]
i) Domestic courts must take into account the Court's interpretation of the Convention (as set forth in the *Almonacid Arellano* case, see (2)(f), *supra*).

The Court found that Peru had breached its abovementioned obligations.[35]

B. *The La Cantuta v. Peru case*

The Court considered, *i.a.*, whether the application of self-amnesty laws while they were in force had breached Peru's obligations under Article 2, in relation to rights of the victims' relatives embodied in Articles 4, 5, 7, 8(1) and 25, of the Convention.[36]

The Court held that the obligation under Article 2 of the Convention implies that "domestic law measures must be effective pursuant to the *effet utile* principle"[37] and that the provision "fails to define" the kind of

[34] *Ibidem*, para 128.

[35] *Ibidem*, para 132.

[36] Inter-Am. Ct. H.R., Case of La Cantuta v. Peru, Merits, Reparations and Costs, Judgment of November 29, 2006, Series C No. 162, paras 162- 165.

[37] Inter-Am. Ct. H.R., Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para 171.

measures States must undertake as "it depends on the nature of the rule requiring adjustment and the circumstances of each specific case."[38]

In relation to the *control de convencionalidad*, the Court reproduced the relevant paragraph of its judgment in the *Almonacid Arellano* case after having stated the following: "[f]urthermore, as regards the scope of the State's international liability in that regard, the Court has recently stated that: [...] [The relevant parts of paragraphs 123 to 125 of the judgment in the *Almonacid Arellano* case follow]".[39]

As this paragraph follows the paragraph containing the above statements on the scope of the obligations under Article 2 of the Convention, it seems that the Court intends to convey that the *control de convencionalidad* concerns the scope of the States Parties' international responsibility for the breach of their obligations under Article 2 of the Convention.

The Court found that Peru breached its obligations in the instant case, but considered that since the judgment in the *Barrios Altos v. Peru* case, in which the Court declared that self-amnesty laws had not legal consequences *ab initio*, and which had an *erga omnes* effect, Peru could not have breached its obligation under Article 2 of the Convention.[40]

C. *The Boyce et al. v. Barbados case*

The Court considered, *i.a.*, whether the death penalty legislation and the so-called "savings clause" contained in the Constitution in force, which prevents domestic courts from reviewing the constitutionality of laws enacted before the Constitution in force, had breached Barbados' obligations under Article 2, in relation to the rights enshrined in Articles 4(1), 4(2) and 25(1), of the Convention.[41]

The Court partially reproduced paragraph 124 of the judgment in the *Almonacid Arellano* judgment and stated that, in the instant case, do-

[38] Inter-Am. Ct. H.R., Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para 172.

[39] Inter-Am. Ct. H.R., Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para 173.

[40] Inter-Am. Ct. H.R., Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para 188.

[41] Inter-Am. Ct. H.R., Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, paras 65 – 68.

mestic courts ought not to have restricted the scope of their review to the question of whether the rule under examination was constitutional, for they are under an obligation to consider whether the rule in question was "conventional", or, more specifically, "whether the law in Barbados restricts or violates the rights recognized in the Convention".[42]

The Court found that Barbados had breached its obligations in the instant case.[43]

D. *The Heliodoro Portugal v. Panama case*

The Court considered, *i.a.*, whether Panama's legislation on forced disappearance and torture had breached its obligation under Article 2 of the American Convention in relation to Articles III, of the Inter-American Convention on Forced Disappearance of Persons, and 1, 6, and 8, of the Inter-American Convention to Prevent and Punish Torture.[44]

The Court put forward that Article 2 of the American Convention provided for a general obligation to ensure that domestic laws comply with it, which it described as a "principle", and further stated that the above general obligation implied "that domestic measures must be effective (principle of *effet utile*)".[45] Also, the Court was of the view that the above "principle requires the adoption of two types of measures [...]".

With regard to the *control de convencionalidad*, the Court made the following statement:

a) The *control de convencionalidad* is regarded as a means for achieving "the defense or respect for human rights", within the framework of measures which must be undertaken pursuant to Article 2, "aris-

[42] Inter-Am. Ct. H.R., Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, para 78.

[43] Inter-Am. Ct. H.R., Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, para 80.

[44] Inter-Am. Ct. H.R., Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, paras 176 – 178.

[45] Inter-Am. Ct. H.R., Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para 179.

ing from international commitments concerning the work of the Judiciary";

b) Domestic courts "must ensure the *effet utile* of international instruments so that they are not reduced or annulled by the application of domestic laws and practices contrary to the object and purpose of the international instrument or standard for the protection of human rights".[46]

The Court found that Panama had breached its abovementioned obligations.[47]

E. *The Radilla-Pacheco v. Mexico case*

The Court made statements with regard to the *control de convencionalidad* in the chapter on reparations, under the heading "C. Measures of satisfaction and guarantees of non-repetition" and the corresponding sub-headings "C2. Reforms to legal stipulations, i) Constitutional and legislative reforms in matters of military jurisdiction".

The Court stated that the obligation under Article 2 was not limited to the enactment or repeal of laws and regulations, but also required States Parties to develop practice consistent with the Convention. In this vein, the Court further stated that the existence of a regulation did not guarantee its appropriate application and that, therefore, "the application of the regulations or their interpretation, as jurisdictional practices" should be in conformity with Article 2 of the Convention.[48]

The Court, referring to its jurisprudence in the *Almonacid Arellano* case "[w]ith regard to judicial practices", put forward the following statements:

a) Domestic courts are under an obligation to take steps to ensure that the Convention "is not affected by the application of laws contrary to its object and purpose";

[46] Inter-Am. Ct. H.R., Case of Heliodoro Portugal v. Panama, Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008, Series C No. 186, para 180.

[47] *Ibidem*, paras 209 and 216.

[48] Inter-Am. Ct. H.R., Case of Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009, Series C No. 209, para 338.

b) Domestic courts are under an obligation to ensure that domestic laws "do not lack legal effects *ab initio*".
c) The *control de convencionalidad* should be conducted with respect to "domestic regulations".[49]

F. *The Xákmok Kásek Indigenous Community. v. Paraguay case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "guarantees of non repetition", and reiterated the statement made in the *Radilla-Pacheco* case, and only added that:

a) Domestic courts should review "internal norms", instead of "domestic regulations";
b) While domestic courts must conduct the above review for the purpose set out in 5(a), supra, avoiding that the norms under review "do not lack legal effects *ab initio*", as stated in 5(b), supra, was not expressly considered part of the review's object.[50]

G. *The Fernández-Ortega et al. v. Mexico case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "[m]easures of satisfaction, rehabilitation, and guarantees of non-repetition".

The Court pointed out that domestic courts were under the obligation to exercise the above review, considered that the facts of the case ought to be heard by the ordinary criminal justice system,[51] and, citing the paragraph of the judgment in the *Radilla-Pacheco* case on the *control*

[49] *Ibidem*, para 339.

[50] Inter-Am. Ct. H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. (Only in Spanish) Series C No. 214.

[51] Inter-Am. Ct. H.R., Case of Fernández-Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No. 215, para 237.

de convencionalidad, reiterated that it was not necessary to amend the Constitution, provided that it was construed in conformity with the Convention.[52]

H. *The Rosendo Cantú et al. v. Mexico case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "[m]easures of satisfaction, rehabilitation, and guarantees of non-repetition" and the corresponding subheading "[a]daptation of domestic law".

The Court reiterated its statements on Article 2, to the effect that the application and interpretation of rules must be in compliance with the Convention, and on the *control de convencionalidad*, except for the fact that it referred to "norms" in an unqualified manner.[53]

I. *The Ibsen Cárdenas and Ibsen Peña v. Bolivia case*

The Court considered whether Bolivia had breached its obligations under Articles 1(1) and 2, in relation to the rights to fair trial and judicial protection of the victim's relatives, embodied in Articles 8 and 25, of the Convention, and Articles III and IV on the Convention on Forced Disappearance.

The Court reiterated its statements on the *control de convencionalidad* set out in the *Radilla-Pacheco* case,[54] and found that Bolivia had breached its abovementioned obligations.[55]

J. *The Vélez-Loor v. Panama case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "guarantees of non-repetition" and the

[52] *Ibidem*, para 238.

[53] Inter-Am. Ct. H.R., Case of Rosendo Cantú and other v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216, para 219.

[54] Inter-Am. Ct. H.R., Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs. Judgment of September 1, 2010. Series C No. 217, para 202.

[55] I*bidem*, paras 212 and 226.

corresponding subheading "[m]easures to ensure that the Panamanian legislation on migratory matters and its application be compatible with the American Convention on Human Rights" and reiterated its statements on the *control de convencionalidad* as set forth in the *Xákmok Kásek Indigenous Community. v. Paraguay* case.[56]

K. *The Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil case*

The Court considered, *i.a.*, whether Brazil's Amnesty Law had breached its obligations under Articles 1(1) and 2, in relation to the rights enshrined in Articles 8 and 25, of the Convention.[57]

The Court reaffirmed statements a) and b), set out in the *Radilla-Pacheco v. Mexico* case, and b), c) and d), put forward in the *Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru* case.[58] Furthermore, it referred to good faith under Article 27 of the Vienna Convention on the Law of Treaties and stated that States Parties obligations "bind all the powers and organs of the State" and that they are bound to ensure "compliance with conventional obligations and its effects (*effet utile*)".[59]

The Court found that Brazil had breached its obligations in the instant case.[60]

L. *The Cabrera-García and Montiel-Flores v. Mexico case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "guarantees of non-repetition" and the subheading "adapting domestic law to international standards regarding justice".[61]

[56] Inter-Am. Ct. H.R., Case of Vélez-Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para 287.

[57] Inter-Am. Ct. H.R., Case of Gomes-Lund et al. **(Guerrilha do Araguaia) v. Brazil. Pre**liminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010 Series C No. 219, para 126.

[58] *Ibidem*, para 176.

[59] *Ibidem*, para 177.

[60] *Ibidem*, para 180.

[61] Inter-Am. Ct. H.R., Case of Cabrera-García and Montiel-Flores v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 26, 2010. Series C No. 220.

The Court made the following statements with regard to the *control de convencionalidad*:

a) "[D]omestic authorities" must abide by the rule of law, and, therefore, apply provisions in force in the legal system;
b) "[A]ll [State's] bodies, including its judges" are bound by the Convention "when a State has ratified an international treaty such as the American Convention";
c) All State organs are under an obligation to "take steps to ensure 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 end";
d) Domestic courts "at all levels" are under an obligation to carry out "a sort of '*control de convencionalidad*'";
e) The *control de convencionalidad* is a comparison "between domestic legal provisions and the Convention";
f) Domestic courts must perform the *control de convencionalidad ex officio*;
g) Domestic courts must *control de convencionalidad* "evidently within the framework of their respective competence and the corresponding procedural rules.";
h) Domestic courts must take into account the Court's interpretation of the Convention (as set out in the Almonacid Arellano case, see *supra* (2)(f)).

M. *The Gelman v. Uruguay case*

The Court considered whether the construction and application of the so-called "Expiry Law", which had granted an amnesty, had breached Uruguay's obligations under Articles 1(1) and 2, in relation to the rights embodied in Articles 8 and 25, of the American Convention, and Articles I(b), III, and V of the Inter-American Convention on Forced Disappearance of Persons.[62]

With regard to the *control de convencionalidad*, the Court reiterated, as part of its considerations on the obligation to investigate and punish

[62] Inter-Am. Ct. H.R., Case of Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para 139.

human rights violations,[63] the statement made in the *Cabrera-García and Montiel-Flores v. Mexico* case in its entirety.[64]

The Court found that Uruguay breached its obligations in the instant case.[65]

N. *The Vera-Vera et al. v. Ecuador case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "guarantees of non-repetition",[66] and, in that regard, reiterated its statements set forth in the *Cabrera-García and Montiel-Flores v. Mexico* case, and only added the category of State "organs linked to the administration of justice".[67]

Ñ. *The Chocrón-Chocrón v. Venezuela case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "guarantees of non-repetition",[68] and, in that regard, reaffirmed its statements put forward in the *Vera-Vera et al. v. Ecuador* case, adding that the obligation was binding on domestic courts and other State "organs linked to the administration of justice… at all levels".[69]

O. *The López-Mendoza v. Venezuela case*

The Court referred to the *control de convencionalidad* in the chapter on reparations under the heading "guarantees of non-repetition",[70] and, in

[63] *Ibidem*, para 183.

[64] *Ibidem*, para 193.

[65] *Ibidem*, para 246.

[66] Inter-Am. Ct. H.R., Case of Vera Vera et al. v. Ecuador. Preliminary Objection, Merits, Reparations, and Costs. Judgment of May 19, 2011 Series C No. 226, 162.

[67] *Ibidem*, 164.

[68] Inter-Am. Ct. H.R., Case of Chocrón - Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2011. (Only in Spanish) Series C No. 227, para 225.

[69] *Ibidem*, para 226.

[70] Inter-Am. Ct. H.R., Case of López - Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 1, 2011 (Only in Spanish) Series C No. 225.

that regard, reaffirmed in its entirety the statements put forward in the *Chocrón-Chocrón v. Venezuela* case.[71]

P. *The Fontovecchia y D'Amico v. Argentina case*

The Court considered, *i.a.*, whether Argentina breached its obligations under Article 2 in relation the freedom of thought and expression enshrined in Article 13, of the Convention.[72] The Court reiterated in its entirety the statements on the *control de convencionalidad* put forward in the *Chocrón-Chocrón v. Venezuela* case,[73] and found that Argentina did not breach its obligations in the instant case.[74]

4. *Summary of the Court's conceptual framework*

To conclude, the Court's conceptual framework can be summarized as follows:

a) The Court considers that Article 2 of the Convention is the source of two types of obligations, namely, obligations to enact laws or regulations or adopt practices consistent with the Convention, and obligations to repeal or amend laws or regulations, or suppress practices not in conformity with the Convention;
b) The Court considers that Article 2 of the Convention is the source of an obligation to "take steps to ensure 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 end";

[71] Inter-Am. Ct. H.R., Case of López - Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 1, 2011 (Only in Spanish) Series C No. 226.

[72] Inter-Am. Ct. H.R., Case of Fontovecchia y D'Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011.(Only in Spanish) Series C No. 238, paras 76 – 83.

[73] *Ibidem*, para 93.

[74] *Ibidem*, para 96.

c) According to the Court, the above two general obligations (1) and the third, specific, obligation (2), are binding on States that have "ratified" the Convention, and, therefore, on all State organs;
d) The Court found that there is another specific obligation, only binding on domestic courts and other State organs "linked to the administration of justice" to carry out a *control de convencionalidad*;
e) The purpose of performing control de convencionalidad is to protect the "*effet utile*" of the Convention;
f) The Court does not expressly define the *control de convencionalidad*;
g) From the Court's case law, it follows that the *control de convencionalidad* is:

- A comparison: The plain reading of the Court's statements provides evidence for the proposition that the *control de convencionalidad* consists of a comparison. Although it might be understood as a form of judicial review, it must be borne in mind that judicial review is rather the power of courts to perform an analysis of government measures and determine whether they are compatible with the Constitution. Also, it cannot be understood to be a form of "Inter-American judicial review", for it would imply a confusion between a primary rule setting out obligations with other types of rule, conferring powers and governing remedies depending on the findings of the Court which is entitled to perform a form of judicial review. This distinction is further discussed below.
- The terms of the comparison are (i) domestic norms of any level, including constitutional, and (ii) the Convention as construed by the Court.
- Alternatively, the *control de convencionalidad* may take the form of an analysis of the compliance of specific measures with the Convention as construed by the Court (see *Boyce et al. v. Barbados* case, supra).
- Lastly, the *control de convencionalidad* might be declared as a form of reparation, more particularly, a "guarantee of non-repetition" (see the *La Cantuta v. Peru* case, stating that the *control de convencionalidad* concern the scope of the State's international responsibility and the *Radilla-Pacheco v. Mexico* case and other subsequent cases, in which the Court consistently characterized the *control de convencionalidad* as a form of reparation).

h) The legal consequence of a finding of inconformity between a given domestic measure, be it a norm or specific conduct attributable to the State, is not set out by the Court in its statement of the nature and scope of *control de convencionalidad*. Nonetheless, it seems that the legal consequences are the same attached to norms or practices that the Court considers incompatible with the Convention. This, however, is the consequence of a different rule.

More particularly, the consequence of a finding by the Court that a norm is inconsistent with the Convention is the declaration that it did not have legal consequences *ab initio*. However, it is unclear whether such remedy can be declared by a domestic court performing *control de convencionalidad*. Also, it is unclear whether a domestic court would have to perform *control de convencionalidad* over a norm that is inconsistent with the Convention, for such norms would be deemed null and void *ab initio*, which renders unnecessary and impossible to review something that does not produce any legal consequences.

On the basis of the above summary, the following part briefly discusses the limitations of the above approach and outlines the critical assessment of the Court's conceptual framework.

III. A Critical Appraisal of the Court's Case Law and Conceptual Framework

This Part formulates specific problems raised by the Court's case law and the conceptual framework it sets out, as well as the main conclusions of the critical assessment carried out in the present paper.

1. *Does the American Convention provide a legal basis for the exercise of control de convencionalidad as a form of Inter-American judicial review?*

The Court seems to propose that the *control de convencionalidad* is a form of judicial review, and so do most commentators who have accepted the

conceptual framework put forward by the Court without engaging in an analysis of its content.[75]

This paper will address the above question by addressing the following set of sub-questions: (1). Does the American Convention vest jurisdictional powers in domestic courts? (2) Can the Inter-American Court's judgments vest jurisdictional powers to review the compatibility of domestic measures with the Convention in domestic courts? (3) Are States bound to grant such jurisdictional powers to domestic courts?

This paper puts forward the following propositions, in response to the above questions:

a) The Convention does not govern the conferral of powers on any entity, except for the Court. It is a treaty containing primary norms of international law.

   For instance, the European Union is considered to be subject to the so-called "principle of conferral", according to which "all competences of the Union are conferred upon it by the Member States". [76]

b) The Court cannot vest jurisdictional powers in domestic courts, as it is not within its powers and functions. It can, arguably, declare the existence of obligations the content of which implies the comparison of domestic norms with the Convention for the purposes of determining the compatibility of the former with the latter, but the exercise of such comparison is neither a power to review the conformity of domestic law or measures with the Convention, nor a remedy declared by the Court in judgments, such as the declaration of nullity *ab initio*.

   Indeed, the use of review procedures in international law is limited, as acknowledged by the President of the International Court

[75] Binder, Christina, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", in *German Law Journal*, Vol. 12, No. 05, pp. 1203-1230, p. 1213.

[76] *Cfr.*, Niedobitek, Matthias, "The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective", en *German Law Journal*, Vol. 10, No. 08, 2009, pp. 1267-1276, p. 1272.

of Justice, the principal judicial organ of the United Nations.[77] Indeed, it has been put forward that an international court would only review the compatibility of a treaty with international law if the former may be contrary to *ius cogens* rules, as the Special Court for Sierra Leone observed in its decision in *Prosecutor v Kallon and Kamara*.[78]

More particularly, while international courts and tribunals are deemed to be competent to decide on their own competences, in accordance with the *kompetenz-kompetenz* rule,[79] this competence is limited to matters which pertain to the settlement of disputes, and judicial review is not within the scope of jurisdiction of the Court. Indeed, it has been rightly pointed out that the Court's own interpretation of the scope of its jurisdiction is controversial and most likely unsound.[80]

Lastly, and more importantly, every international court's jurisdiction is consensual and, as such, the scope of jurisdiction, including *ratione materiae*, depends on the consent of states. In this connection, it has rightly been argued out that States parties to the Convention have not accepted, let alone expressly rejected, the Court's exercise of this form of *control de convencionalidad*.[81]

[77] Certainly, the International Court of Justice remains the "principal judicial organ of the United Nations" and, as a result, occupies a privileged position in the international judicial hierarchy. Moreover, it is the only court with a universal general jurisdiction. Lastly, its age endows it with special authority. However, the mechanisms that would enable the Court to assume that status and to take on this role remain extremely limited. Thus while, for example, the International Court of Justice can act as a court of appeal from the decisions of the Council of the International Civil Aviation Organization 22, appeal or review procedures are very seldom used in the international order. *Cfr.*, Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000, available at *http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1* (last visited on 7 July 2013) (footnoted omitted).

[78] *Cfr.* Special Court for Sierra Leone, *Prosecutor v Kallon and Kamara* (Appeals Chamber) (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004, para. 61.

[79] *Cfr.* Pasqualucci, Jo M., *op. cit.*, pp. 117 – 119.

[80] *Cfr.* Binder, Christina, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", in *German Law Journal*, Vol. 12, No. 05, pp. 1203 – 1230, p. 1208.

[81] *Cfr.* Pasqualucci, Jo M., *op. cit.*, p. 303.

c) As the American Convention contains primary rules setting out obligations binding upon the states parties and rights, most prominently those accorded to individuals, it contains neither secondary rule grating to the Court or the domestic courts of states parties the power to perform a form of "Inter-American judicial review" of domestic law and measures, nor primary rules establishing an obligation binding upon states parties to grant their domestic courts such powers under their internal law.

The above statements are based on basic distinctions of legal theory applied to international law, and, more particularly, on the distinctions between primary and secondary norms, powers and obligations and other legal situations, as explained below.

The distinction between primary and secondary norms is of particular relevance, for the former's function is to govern directly the conduct of the norms addressees, whereas the latter's one is to regulate the process through which primary norms are created, applied and enforced.[82] Nonetheless, the distinction is not coextensive with the meaning attributed to it by the ILC,[83] which is limited to distinguish rules governing any international legal obligation from those concerning the legal relationship arising out of their breach, *i.e.*, international responsibility.[84]

Primary norms govern obligations, permissions or prohibitions (*i.e.*, obligations to abstain from certain behaviors) applicable with respect to conducts, either actions or omissions; accordingly, conducts' normative statuses can be described as obligatory, prohibited, permitted, or facultative, *i.e.*, when a subject of law is accorded a liberty, in which case a choice of action, either expressly protected or not by legal norms, is granted, so that both engaging in and refraining from the conduct in

[82] See Hart, Herbert, *The Concept of Law*, Oxford, Oxford University Press, 1961, p. 77 (arguing that law must be conceived of as the union of primary and secondary rules); Sartor, Giovanni, "Legal Reasoning, A Cognitive Approach to the Law", en Pattaro, Enrico (coord.), *A Treatise of Legal Philosophy and General Jurisprudence,* Vol. 5, Dordrecht, 2005, p. 614.

[83] Pellet, Alain, "The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts", in Crawford, James, Pellet, Allain, Olleson, Simon, The Law of International Responsibility, Oxford, Oxford University Press, 2010, p. 76.

[84] David, Eric, "Primary and Secondary Rules", en James Crawford et al., op.cit., p. 29

question are permitted.[85] Additionally, the concept of right[86] refers to the legal position of subjects of law with respect to whom other such subjects are under an obligation to undertake certain conduct or course of conduct, *i.e.*, an entitlement to the performance of an obligation.[87] In this connection, it should be noted that "protection" of liberties by legal norms implies that both a set of permissions to act and refrain from acting, in conjunction with a set of rights to act and not to act, are provided for by the legal system.[88] Furthermore, it is worth noting that protected liberty is not to be confused with factual liberty, *i.e.*, the actual ability to make a choice of action effective.[89]

Secondary norms in accordance with legal theory, on the other hand, confer legal powers to create, apply and enforce legal norms, *i.a.*[90] In sheer contrast to primary norms, the role of secondary norms is to provide for the distribution of power among the diverse organs within the institutional structure of a legal system so that legal norms can be created, applied and enforced. For this reason, legal powers cannot be reduced to permissions.[91] Consequently, while the conferral of legal power is logically coupled with a permission to exercise them, mere permissions or even rights dot not necessarily entail the bestowal of

[85] Sartor, Giovanni, op.cit., pp. 455 – 499; Alexy, Robert, *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2002, pp. 140 et sq.

[86] The concept of right is crucial in legal theory, and a complete reference to it goes beyond the scope of inquiry of this study. See, generally, regarding this concept, Raz, Joseph, *The Morality of Freedom*, New York, Oxford University Press, 1986.

[87] Under Article 42(a), Articles on the Responsibility of States for Internationally Wrongful Acts, "a State must have an individual right to the performance of an obligation, in the way that the State party to a bilateral treaty has *vis-á-vis* the other State party", James Crawford, *The System of International Responsibility*, in James Crawford *et al.*, *op. cit.*, p. 23.

[88] As to the protection of a liberty through the granting of international rights, see, Jennings, Robert, Watts, Arthur, *Oppenheim's International Law,* 9th ed., vol. I, London, Longman, 1992, p. 12: "it is important that that freedom is derived from a legal right (…), and is subject ultimately to regulation within the legal framework of the international community".

[89] Indeed, the "factual" freedom of action of States is legally restricted by international law, Jennings, Robert, Watts, Arthur, *op. cit.*, p. 13.

[90] See Hart, Herbert, *op. cit.*, p. 77: "Secondly, there are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers)…".

[91] See, Alexy, Robert, *op. cit.*, p. 151: "The concept of power must be clearly distinguished from the concept of permission…".

correlative legal powers. The legal positions arising under secondary norms range from legislative to adjudicatory powers. With regard to the latter type of legal power, the legal positions of the person in whom or entity in which adjudicatory power is vested is "jurisdiction" and; that of those not subject to it, "immunity".[92]

In the realm of public international law, the high degree of decentralization of public power entails that the functions performed through the exercise of legal powers are distributed among the members of the international community so that the power to create international legal norms is conferred to States as a general rule, and, to a lesser extent, to international organizations.

Under general international law, unlike municipal legal orders, the function of application and enforcement of norms is not performed through a compulsory system of dispute settlement.[93]

Nonetheless, given the prohibition on the use of force or threat in international relationships under Article 2(4), UN Charter, States must have resort to pacific methods of settlement of disputes as a general rule.

Among these, dispute settlement by international arbitration or international courts, as a method characterized by the fact that proceedings are entertained before a third-party adjudicating upon a dispute through a decision having *res iudicata* effects, is often resorted to.[94]

In this vein, the jurisdiction of international courts and tribunals, regarded by most commentators as a system of implementation of international responsibility,[95] plays a decisive role in the application and enforcement of international law.[96]

[92] On Hohfeld's concepts of power, liability, disability, immunity, Alexy, Robert, *op. cit.*, pp. 132 and 133.

[93] Waibel, Michael, "The Diplomatic Channel", in James Crawford *et al.*, *op. cit.*, p. 1086.

[94] Gilles Cottereau, "Resort to International Courts in Matters of Responsibility", James Crawford *et al.*, *op. cit.*, p.1116

[95] James Crawford, "The System of International Responsibility", in James Crawford *et al.*, *op. cit.*, p. 18.

[96] Alain Pellet, "The Definition of Responsibility in International Law", in James Crawford *et al.*, *op. cit.*, p. 15 (arguing that the exclusion of damage represented and "objectivization" of the law of international responsibility)

The power of international courts and tribunals, nevertheless, is subject, in international law, to the consent of states, and the scope of jurisdiction of such courts is limited in all of its aspects, including *ratione materiae*, by the consent of states.

2. *Is the control de convencionalidad a form of reparation under the law of international responsibility?*

The Court in the *La Cantuta v. Peru* case and the *Radilla-Pacheco v. Mexico* case and subsequent cases, characterized the *control de convencionalidad* as a form of reparation, more particularly, a "guarantee of non repetition".

Characterizing the *control de convencionalidad* as a form of reparation means that it is the consequence of the international responsibility of a State Party to the Convention arising out of the breach of the primary rules contained therein. Therefore, it means that the Court hesitates between considering the *control de convencionalidad* as a 'power' of judicial review of domestic law and measures of the states parties or considering it as a the consequence of a mere 'breach' of the primary rules contained in the Convention. Put simply, the Court's choice to characterize the *control de convencionalidad* as the consequence of a breach of primary rules, instead of characterizing it as a power under the Convention, entails that the Court is changing the entire legal nature of the doctrine, which would be no longer a matter of power, to conduct judicial review, governed by secondary rules, but of obligations and rights, set out in primary rules.

The present paper submits that this ambivalence in unjustified, not only because the Court lacks the power of review of domestic law, as has been explained, but also because the characterization of the outcome of its judicial review as an instance of State responsibility is inconsistent with the purpose of asserting the existence of such a power, if that is the case and if it is assumed, for the sake of argument, that the Convention provides a legal basis for the exercise of such a power.

On the one hand, judicial review, which is the type of review the Court intends to exercise through the formulation and application of

the *control de convencionalidad* doctrine, is the review of legality of governmental action.

The grounds of judicial review comprise a set of norms, both secondary and primary, and can be divided into three categories, namely:

a) Lack of competence (secondary rules creating powers)
b) Breach of procedural rules (secondary rules governing procedures, which are conditions for the validity of certain acts)
c) Breach of certain substantive rules (primary and principles rules setting out the terms of rights and obligations, including prohibition of misuse of powers (*détournement de pouvoir*)).[97]

In the particular case of the European Union, which seems to have inspired the Court in its attempt to establish an Inter-American form of judicial review,[98] the Court is expressly empowered to carry out the review of both the act of member States and of the Union; it is, in terms of the jurisdiction vested in it by the member States, a truly "European Constitutional Court".[99]

Leaving aside the claim, put forward above, that the Court is not empowered by the American Convention to exercise judicial review, it must be noted that for a conceptual framework to be suitable to convey the legal consequences of judicial review, it must use categories which

[97] *Cfr.*, Türk, Alexander, *Judicial Review in EU Law*, Cheltenham, Edward Elgar Publishing, 2010, p. 106.

[98] This is suggested or assumed by some commentators, who draw comnparisons between the Inter-American system and European Union law. Such a comparison is unsound, for the two systems are not comparable and, indeed, in the European context, the only comparable system of protection, that of the European Cout of Human Rights, has adopte dan approach which acknowledges that each state party to the convention has a freedom to determine the manners in which its internal legislation should abide by the obligations set out in the European Convention of Human Rights. *Cfr.* Contesse, Jorge, "The Last Word? Control of Conventionality and the Possibility of Conversations with the Inter-American Court of Human Rights", available at *http://www.law.yale.edu/documents/pdf/sela/SELA13_Contesse_CV_Eng_20130514.pdf*, (last visited on 10 September 2013), pp. 7 and 8.

[99] Cfr., Jacobs, Francis G., "Advocates General and Judges in the European Court of Justice: Some Personal Reflections", in O'Keeffe, David, Bavasso, Antonio, Judicial Review in European Union Law, Vol. 1, Kluwer Law International, The Netherlands, 2000, pp. 17-28, p. 20.

are appropriate to characterise each and every category of grounds for judicial review. Thus, a category which is confined to primary rules is unsuitable for this purpose.

On the other hand, State responsibility, which is the object of rules of customary international law deemed to be codified in the ILC Articles of Responsibility of States for Internationally Wrongful Acts, is defined by the ILC as an obligation established by the secondary rules of international responsibility. The conditions for the existence of this particular type of obligation are attribution and existence of an internationally wrongful act. While attribution is necessary for a finding of international responsibility, wrongfulness under international law is the essential condition for the existence of international responsibility. Indeed, if there is no internationally wrongful act, there is nothing to attribute.[100]

To the extent that international responsibility is the legal consequence of wrongfulness, and that wrongfulness is confined to the existence of a breach of an obligation under a primary rule of international law, international responsibility, as a concept, is unsuitable to describe the legal consequences of breaches of rules which are not primary, such as those which constitute two of the three categories of grounds for judicial review, namely secondary rules governing powers and procedures.

Consequently, international responsibility is a mischaracterization of judicial review proper. Therefore, its use by the Court can only have one of the two following meanings: either the *control de convencionalidad* doctrine is being mischaracterized or, more consistently with the lack of power of judicial review by the Court, the *control de convencionalidad* is characterized just as a form of international responsibility, and, thus, not judicial review proper. In the latter case, the *control de convencionalidad* doctrine is totally unnecessary.

3. *Is the control de convencionalidad suitable for promoting the protection of the rights enshrined in the Convention?*

The most suitable form of promoting a higher level of protection of the rights embodied in the Convention lies in the mechanisms whereby

[100] *Cfr.* U.N. Int'l L. Comm'n, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, in 2 Y.B. Int'l L. Comm'n, (2011).

domestic courts directly apply international law, including the Convention. This has been rightly pointed out by some high domestic courts of States parties to the Convention, such as the Constitutional Court of Colombia. Indeed, even if Courts exercise the *control de convencionalidad*, it overlaps with other mechanisms of incorporation of international law into domestic law already in place. Such mechanisms include the so called *bloc de constitutionalité* doctrine.[101]

As has been observed in relation to the other aspects of the questions discussed in the present paper, the exercise of *control de convencionalidad*, instead of being a means for the efficient protection of human rights, may serve as a reason to justify decisions by States parties to the Convention to oppose to the Court, and even denounce the Convention, as exemplified by Venezuela.[102]

IV. Conclusions

The present paper's findings can be summarised as follows:

The use of the *control de convencionalidad* doctrine by the Inter-American Court of Human Rights is inconsistent with the American Convention and, assuming that it is compatible, unsuitable for the Court's purposes.

First, neither Article 2 nor other provisions of the American Convention provide a legal basis for the exercise of judicial review by the Court or domestic courts. Without prejudice to the competence de la competence rule, judicial review falls outside the scope of jurisdiction *ratione materiae* of the Court's.

Secondly, assuming that the Court has the power to carry out judicial review proper of acts of member States, the use of international responsibility would mischaracterise such power and, thus, its use is unsuitable for the purposes of establishing an Inter-American form of judicial review. In essence, while the grounds for judicial review are

[101] See, for instance, Colombian Constitutional Court, Case C-695/02, Judgment of August 28, 2002; Case C-578/02, Judgment of July 30, 2002 , *i. a.*

[102] *Cfr.* Mejía-Lemos, Diego Germán, *op. cit.*

provided by both secondary and primary rules, namely lack of competence (power), breach of procedural rules (procedure), or of substantive, primary, rules (rights and obligations), the conditions for the existence of international responsibility are confined to wrongfulness, *i. e.*, the breach of obligations under primary rules. Hence, the Court's choice of wrongfulness is unsuitable to fully convey the legal consequences of the exercise of judicial review and inappropriate for the purposes of the Court.

Lastly, the use of the *control de convencionalidad* doctrine is not the most efficient means of protection of human rights under the Convention, as, among other things, it overlaps with more efficient mechanism under the internal law of the States parties to the Convention, which also allow for the protection of rights under the Convention, such as the *bloc de constitutionalité* doctrine, and, most importantly may prove to be the determining factor undermining the standing of the Court, as exemplified by Venezuela's denunciation of the Convention.

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