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A STRUGGLE FOR PRIMACY:

THE CASE FOR THE DOMESTIC PRIMACY OF THE CONTINENTAL CONVENTIONS OF HUMAN RIGHTS IN EUROPE AND THE AMERICAS

by Juan Felipe Lozano Reyes

LL.M. SHORT THESIS
COURSE: The Law and Practice of the European Court of Human Rights.
PROFESSOR: Eszter Polgari
Central European University
1051 Budapest, Nador utca 9.
Hungary

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ABSTRACT

The purpose of this work is to show that the international jurisdictions derived from the European and American Human Rights Conventions have advanced towards the consolidation of an obligation on the Member States to recognize the primacy of said international instruments in the internal legal order. Starting from explaining how this doctrine can be derived from the "conventionality control" created by the Inter-American Court of Human Rights, this paper analyses similar doctrines in the case-law of the European Court of Human Rights that also show a tendency towards affirming that States have a duty to put to the European Convention at the top of the legal hierarchy. Finally, this work exemplifies some of the reactions that States can assume in the face of the doctrine of primacy through references to the cases of Colombia, Spain, Hungary and Venezuela.

INTRODUCTION

Nowadays, there is no doubt that the creation of a network of international institutions for the protection of human rights has been one of the most important legal advances since World War II. This international network of institutions has allowed citizens from all over the world to seek compensation for the violation of their rights when the institutions of their countries have failed to protect them. Among the institutions of this international protection system, those that were created on the basis of continental treaties stand out, given their special characteristics as guarantors of human rights in a middle ground between the national authorities and the institutions placed at the level of the United Nation's system of protection.

The most important examples of these regional protection mechanisms are the European system, created for the implementation of the European Convention on Human Rights and the Inter-American system of Human Rights, whose main document is the American Convention on Human Rights. These two systems share the characteristic of having a judicial body, competent to resolve individual claims and issue judgements that decide on the international responsibility of the States against whom these claims are directed. I am referring, of course, to the European Court of Human Rights (hereinafter, ECtHR) and the Inter-American Court of Human Rights (IACtHR), respectively.

Through its work, this courts have become important regional actors, contributing with their rulings to the protection of human rights and the strengthening of democracy in their respective regions. Even so, they have also been the subject of controversy that naturally arise from the exercise of their functions and the evolution of jurisprudence. Indeed, the Courts have often been accused of being "too activist" or of having exceeded their competences for taking decisions that appear to interfere in matters that Member States see as an exclusive competence of the national authorities.

Although it can be argued that the decisions of the courts that can lead to accusations of overstepping their boundaries are not the most common, the existence of this critiques show that the Courts are in a delicate position from which they must find a balance. On the one hand, if they demonstrate judicial activism and/or interpret the Conventions in a way that grants broad powers to the international jurisdiction, they take the risk of antagonizing the Member States to the point that these can eliminate funding, withdraw from the Conventions or simply ignore the decisions of the Courts. However, on the other hand, if they are too deferential with the States, their very existence loses its meaning, as they would be declining their function of enforcing the international treaties, thus turning the Conventions into "dead letter".

Whit this background in mind, this paper intends to analyse one of the most creative mechanisms through which the Courts can affirm their competence and the enforceability of the Conventions while granting States an adequate range of action. Namely, the idea that the continental Conventions on human rights shall enjoy primacy within the internal legal order of their Member States. I will argue that this idea can be made explicit by taking as a starting point the Inter-American Court's doctrine of the "conventionality control" which entails the obligation of national authorities to verify whether their actions and norms are in compliance with the Inter-American human rights treaties and the IACtHR's jurisprudence.

By describing the characteristics and consequences that the IACtHR has developed for conventionality control, I intend to show that it entails an obligation for the States to place the American Convention and the Inter-American jurisprudence at the top of their internal legal hierarchy. Then, using the Inter- American conventionality control as a comparator, I will argue that the Council of Europe and, especially, the European Court of Human Rights have also advanced towards affirming the primacy of the European Convention within its Member States. In this sense, although none of these institutions has explicitly affirmed a duty of the state authorities to verify the "conventionality" of their laws, I will claim that jurisprudential

advances of the ECtHR allow us to sustain that there is a movement in this regard within the European sphere.

My argument will be presented as follows. First, I will provide some remarks about how I understand "primacy" for the purposes of this work. Next, I will explore the concept of conventionality control and the degree of primacy of the American Convention that emerges from it. For this purpose, I will make an analysis of relevant Inter-American jurisprudence on the matter, as well as references to some commentators from the region. My aim, in this first section, is to show that conventionality control implies the primacy of the American Convention in the internal order, at least, for two reasons: a formal one, since only by only by accepting a degree of primacy within the domestic order can it be justified that the national authorities are obliged to verify the compliance of national norms with international standards. Second, a substantial reason, in view of the effects that the IACtHR has granted to the conventionality control with respect to the national law of the Member States - such as the obligation to modify domestic legislation or, even, their Constitution, as will be seen later.

These elements constitute what I will call the "maximalist approach" of the IACtHR, in the sense that the Inter-American Court have tried to stablish general principles to be applied across the board in the Member States of the American Convention, granting those States a minimum space for discretion. Form this, I will put the focus on the ECtHR and its jurisprudence to show that it has oscillated between two poles: a minimalism approach, rooted in the emphasizing of the principle of subsidiarity and a maximalist one, more like that adopted by the IACtHR. My aim is to conclude that, even if the principle of subsidiarity may be regarded as favouring less intrusive influence of the European Court over the Member States, the truth is that both approaches tend to affirm the necessity for the Member States to establish the primacy of the European Convention in their domestic order.

As it can be seen, the first sections of this thesis are related to study how the International Courts have established the doctrine of primacy; in a sense, they are dedicated to analysing this doctrine as it was created and developed "from above". Thus, even though it is not the principal objective of this work, the last section will be devoted to exemplifying some attitudes that Member States of the Conventions can take regarding this tendency for primacy; in other words, to show how has been the reaction "from below". For that purpose, I will refer to the cases of Colombia, Spain, Hungary and Venezuela, since these countries are representative of the different positions within the spectrum of attitudes that States can take in relation to the primacy doctrine.

Although it is not my intention to present an exhaustive list of attitudes that States can assume or even a comprehensive examination of the aforementioned States, I think that bringing up these cases as examples helps to demonstrate that, as International Courts are trying to assert their position in the continental public order, States have also reacted by trying to reconcile the old understanding of constitutional supremacy with the growing influence of inter-national law of human rights. This reconciliation, as will be seen, can take the form of a relatively good relation between the national and the international sphere (as is the case in Colombia and Spain), a sort of tense relation as in Hungary or a very conflictive one, as it is happening with Venezuela. Finally, I will draw some conclusions.

Preliminary Remarks: What does “primacy” stands for?

Traditionally, the concept of "primacy" of a legal norm has been understood according to the classical Kelsenian formulation[1], which describes the legal system as a staggered system of norms that are related to each other according to the principle of hierarchy. In this way, the system can be described graphically as a pyramid in which higher hierarchical norms grant validity to those of the lower strata. In its original form, this way of conceiving the order leads to a monism in which international and domestic law make up a single legal system, whose main source of validity are the norms of superior hierarchy, namely, those contained in the Constitution or those derived from international law.

However, as Negishi points out, this possibility of categorically affirming the primacy of some norms or others is in question today.[2] Indeed, despite the enormous influence that international law has on national legal systems, the assertion by some States of their sovereignty has led them to affirm the primacy of their own Constitution to resist attempts of international integration. The author exemplifies this tendency by bringing up judicial decisions of countries such as the United States and their resistance to comply with the judgments of the ICJ or of countries in Europe or Latin America that have expressed their reluctance to comply with judgements of international courts that, they consider, violate its Constitution.[3]

On the other hand, the primacy of the Constitution is not guaranteed either. While most of the constitutional texts are written in such a way that they contain practically the same rights as international instruments, it is also true that the national courts have adopted international

[1] Kelsen, Hans. n.d. Pure theory of law. n.p.: Gloucester, Mass.: Peter Smith, c1967, 1989.
[2] Yota Negishi, ‘The Pro Homine Principle’s Role in Regulating the Relationship between Conventionality Control and Constitutionality Control’ (2017) 28 European Journal of International Law 457 <https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chx030> accessed 23 February 2018. Pp. 461-462.
[3] Negishi refers, for example, to the decisions of the Italian Constitutional Court according to which judges can only use ECtHR jurisprudence when it is already "consolidated" or the recent decisions of the Supreme Court of Venezuela, which has indicated that the judgments of the Inter-American Court that contradict the Constitution can not be applied. Ibid, p. 462.

standards in their own jurisprudence, in what Góngora Mera has called "the constitutionalization of human rights treaties from below",[4] in contrast to the constitutionalization "from above" (that has been promoted by international courts and that is studied throughout this work)[5]. In this sense, whether through the adoption of interpretations in accordance with international standards or the direct incorporation of these in constitutional texts, international law is increasingly intertwined with national laws.

With this, Negishi aims to demonstrate the need to rethink the classical notion of the legal system as a pyramid, given that this representation no longer fully accounts for all the interactions that occur within the ordering and, especially, the struggle for primacy in the vertex. For this reason, the author argues that a new (and better) model can be formulated from the perspective of legal pluralism, in which the pyramid is replaced by a trapezoid in which the supreme norm is composed of both constitutional provisions and international standards, with a set of common values on top.

This new representation would not be based on the principle of Kelsen's supremacy, but on the *pro homine* principle and the emphasis on the substantial protection of rights over the formal assignment of a hierarchical position within the system. In the terms of Flavia Piovesan, the idea is to change from an "hermetical – closed pyramid focusing on the *State approach*" to the "permeable trapezium focusing on the *human rights approach*",[6] giving the legal system a

[4] M.E. Góngora Mera, Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication (2011), at ch. 2. Cited in Yota Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control' (2017).

[5] This is not to say that the processes "from below" or "from above" are completely separated: as will be seen, some efforts to delegate the assessment of convention compliance to national courts (i.e. Conventionality control), were initiated by the international courts ("from above") but require the willingness of national authorities to be implemented "from below". I want to thank Professor Ezter Polgari from bring this point into my attention.

[6] Piovesan, 'Direitos humanos e diálogo entre juridições', 19 Revista Brasileira de Direito Constitucional (2012) 67, at 68–72 (emphasis in original). Cited in Negishi (n 1). P. 465.

feature of permeability and openness that allows it to incorporate principles and rules from other legal orders, such as the international one.[7]

Given that the purpose of this paper is not to discuss the notion of primacy of legal norms, I have no intention to argue further for or against the general argument of legal pluralism. This position, however, is useful because it throws light on a crucial issue: the dynamics of current constitutionalism, with the so-called internationalization of constitutional law and constitutionalization of international law, prevent to categorically affirming the primacy of the Constitution or international law. On the other hand, the argument of legal pluralism manages to capture that, currently, the validity of a legal norm not only depends on compliance with formal criteria, but there is a threshold of substantial validity.

In fact, most contemporary constitutions are written or interpreted in a way that imposes the obligation to respect internationally recognised human rights in all actions of the authorities as a condition of their validity. However, this is not a reason to completely reject the notion of formal validity that derives from the Kelsenian theory because it remains as a widely used criterion to decide whether or not a rule belongs to a particular legal system as it is an objective criterion to assess its validity and is a much easier method than the substantive examination of compliance to human rights' standards.

For these reasons, the notion of primacy that I will use in this work combines components of both positions. In this way, I will assume that the primacy of a legal norm implies accepting that it is in the highest position within a given normative system, in the sense that it serves as a parameter to determine the formal and substantial validity of other norms of lower hierarchy.

[7] Al respecto, ver M. Wendel, Permeabilität im europäischen Verfassungsrecht: Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich (2011), at 28–30. Also, Morales Antoniazzi, 'El nuevo paradigma de la apertura de los órdenes constitucionales: una perspectiva sudamericana', in A. von Bogdandy and J.M. Serna de la Garza (eds), Soberanía y Estado abierto en América Latina y Europa (2014) 233, at 243–247. Cited in Negishi (n 1). P. 465.

All this, recognizing that there is an unresolved tension between constitutional law and international law at the top of the hierarchy, even though there is a tendency for the content of both to present more similarities than differences regarding the guarantee of substantial rights.

Thus, for example, when I affirm that the conventionality control implies the primacy of the Inter-American treaties in the internal order, what this means is that States have the duty to have these treaties as one of the sources of validity of other norms within their own legal system, in some kind of interaction with their own Constitution. As will be seen later, even though the International Courts have a relatively clear conception of the place that the Conventions should occupy in the internal legal order of the States, the latter differ as to the degree of influence that the international law should have in their respective orders. In the development of this text I hope to make this tension evident through the analysis that will be presented next, as well as with the examples of Colombia, Chile, Spain and Hungary that I will explain at the end of this thesis.

CHAPTER 1

The doctrine of "conventionality control" in the jurisprudence of the Inter-American Human Rights Court.

Origins and Development

Since its first years of existence, the Inter-American Court of Human Rights (hereinafter IACtHR) has proven to be a powerful regional mechanism for the protection of human rights, whose influence in the signatory countries of the American Convention on Human Rights cannot be denied. Through its jurisprudential work, the IACtHR has made visible some of the most important cases of human rights violations on the continent, helping to strengthen the American democracies. Likewise, in the legal field, it has contributed to the creation of doctrines of such importance, that have impacted the way in which the Member States of the American Convention on Human Rights relate to international law.

One of the most important and controversial developments has been the so-called "conventionality control" (in Spanish, "*control de convencionalidad*"), created by the IACtHR through its jurisprudence at the beginning of the 2000s. The conventionality control can be defined, in general terms, as the *ex officio* judgment that must be made by the national authorities according to their own competences, especially the judicial ones, about the conformity of the state law with the Inter-American international treaties.[8] Specifically, the comparison must be made with the American Convention and other Inter-American human rights treaties, as well as the interpretation that the IACtHR gives to them.

[8] See IACtHR. Case J vs. Peru. Judgment of November 27, (Preliminary Objection, Fund, Reparations and Costs 2013). I believe that this definition captures the more general notion of what conventionality control is, despite the difficulty of providing a finished definition of the concept since it has evolved in the jurisprudence of the IACtHR over time.

As Olano García has pointed out,[9] the first mentions of the term "conventionality control" date from the year 2003, specifically, from the use given to it by the Inter-American judge, Sergio García Ramírez, in his reasoned vote in *Myrna Mack Chang v. Guatemala (*2003). In this seminal approach, the concept is used to describe the work of the IACtHR, in the sense that its main function is to establish whether the actions of the Member States are or are not in accordance with the standards contained in the American Convention. It is worth noting that, in his use of the term, Judge García Ramírez was referring to the Convention – based mandate of the IACtHR and not to the type of control that will be developed years later, from 2006 onwards.

Experts agree that the decision which gave rise to the notion of conventionality control as it is understood today was the case of *Almonacid Arellano et al. v Chile* of September 26, 2006.[10] Mr Almonacid Arellano was a school teacher and a militant of the Communist Party in Chile under the dictatorship of Augusto Pinochet. On September 16, 1973, he was arrested by police ("carabineros") who shot him at the exit of his house and in the presence of his family, being pronounced dead the next day. In 1978, the Chilean Congress adopted the Law Decree No. 2.191, which granted amnesty to all persons who had committed crimes between 1973 and 1978.

Due to this last norm, the crime committed against Mr Arellano was not properly investigated, nor were the perpetrators. For this reason, in 1998, the family of Mr. Arellano filed a complaint before the Inter-American Commission on Human Rights, alleging the international responsibility of the Chilean State for the violation of the rights enshrined in Articles 8 (guarantees judicial proceedings) and 25 (judicial protection) of the American Convention on

[9] Hernán Alejandro Olano García, 'Teoría Del Control de Convencionalidad' (2016) 14 Estudios constitucionales 61. P. 64.
[10] IACtHR, Case of Almonacid Arellano and others v. Chile. Judgement of 26 de septiembre de 2006. (Preliminary Objections, Merits, Reparations and Costs).

Human Rights. In its application to the IACtHR, in addition to supporting the claims of the family, the Commission also asked the Court to declare that Chile had breached the obligations contained in Articles 1.1 (Obligation to respect rights) and 2 (Duty to adopt provisions in domestic law) of the Convention, for the failure to investigate and punish those responsible for the murder of Mr Almonacid Arellano.

In its final judgement, the IACtHR found that the Chilean State was responsible for the violations of the Convention that had been alleged. This decision is important within the corpus of Inter-American jurisprudence for several reasons: first, it strengthened the IACtHR's already recurring practice of extending the scope of its judicial orders beyond mere pecuniary reparation. This was achieved by ordering Chile to "ensure that Decree Law No. 2.191 does not continue to represent an obstacle to the investigation, prosecution and, where appropriate, punishment of those responsible for other similar violations (to that suffered by Mr. Almonacid) occurred in Chile".[11]

Second, in the most important aspect for the purposes of this work, the IACtHR conceptualized the conventionality control doctrine. To define this concept, it is convenient to reconstruct the argument presented by the Court: first, it reaffirmed a rule that had already been included in previous jurisprudence and which refers to the fact that, by international custom, "a State that has concluded an international agreement, must introduce in its internal law the necessary modifications to ensure the execution of the assumed obligations".[12] According to the Court, it is in accordance with this principle that Article 2 of the American Convention establishes the "Duty to Adopt Provisions in Domestic Law":

[11] IACtHR, Case of Almonacid Arellano et al. Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs), Resolution No. 5.
[12] Cf. Case of Garrido and Baigorria. Judgment of August 27, 1998. Reparations; Case of Baena Ricardo et al. Judgment of February 2, 2001, para. 179, cited in Case of Almonacid Arellano et al. Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs), para. 117.

Article 2. Domestic Legal Effects

> 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.

Thus, the Court indicated that this obligation has two aspects, that of suppressing the norms and practices contrary to the Convention, on the one hand, and the adoption of measures to guarantee conventional rights, on the other.[13]

The judges argued that amnesty laws such as Decree Law No. 2,191 of 1978 imply *de facto* impunity for crimes against humanity, which is "overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes a violation of the Convention and general international liability for the State".[14] At this point, there is an important interpretive advance: after finding an incompatibility between the Decree and the Convention, the Court concluded that the national law has no effect for the case studied or for any similar case involving the alleged commission of crimes against humanity. Therefore, Chile had the obligation to repeal that rule otherwise it would have continued to be in violation Article 2 of the American Convention.

From this argument it can be affirmed that the obligation contained in Article 2 of the Convention is directed mainly to the legislative powers of the Member States, since they are the ones who originally have the power to create or repeal norms. However, the Court indicates that this also binds the judicial powers in cases in which the Parliament has failed to comply with that obligation because the judges, as a part of the State, are also bound by the Convention. In the words of the IACtHR,

> 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

[13] Almonacid Arellano et al., par. 123.
[14] Íbid., par. 119.

> 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.[15]

Thus, for the IACtHR, the conventionality control is a logical consequence of the obligations assumed by the States when signing the American Convention. In this regard, it should be noted that, from the reasoning in *Almonacid,* the Court seems to understand that the obligation derived from Article 2 of the Convention: i) mainly binds legislators and other authorities to ensure that the regulations they issue comply with the Inter-American Law and to repeal those that are contrary to it, ii) impose on judges the burden of establishing whether domestic legislation complies with the Convention and iii) authorizes the Inter-American Court to declare without effect an internal norm of a State if it violates the Convention and none of the internal authorities has explicitly repealed it.[16]

Since *Almonacid Arellano*, the IACtHR has repeatedly referred to the conventionality control, giving greater clarity to its scope and purposes. For example, in *Boyce et al. v. Barbados*, it stated that this type of control is based on the Vienna Convention on the Law of Treaties, in the sense that it obligates States to fulfil their international commitments in good faith, which means that they cannot invoke the provisions of domestic law as a justification for non-compliance with the former.[17] In this case, the Court reviewed the so-called "State Crimes Law against the Person" of Barbados, which provided the death penalty by hanging for certain crimes, as well as the conditions of detention in the prisons of the country.

[15] Íbid., par. 124.
[16] For another version on the normative consequences that derive from the control of constitutionality, see Diego Germán Mejía-Lemos, 'Sobre La Doctrina Del Control de Convencionalidad: Una Apreciación Crítica de La Jurisprudencia Relevante de La Corte Interamericana de Derechos Humanos' (2014) 14 Anuario Mexicano de Derecho Internacional 117.
[17] Case of Boyce et al. v. Barbados. Judgment of November 20, 2007. (Preliminary Objection, Merits, Reparations and Costs), pars. 77 – 78.

Although the national courts had found that this law was in accordance with the Constitution of Barbados, the IACtHR criticized the judicial entities for their limited approach, and their reluctance to determine if the law was also "conventional" - this is, in compliance with the American Convention. Indeed, the IACtHR found that death by hanging amounted to a cruel, inhuman or degrading punishment, prohibited by the Convention and that the criminal system of Barbados was not up to the Inter-American standards. In consequence, it ordered the State of Barbados to commute some of the deaths sentences and to modify its legislation to comply with the principles set out in the Convention and the IACtHR's jurisprudence.[18]

In other decisions, the IACtHR has indicated that conventionality control binds all national authorities[19] and that these, but especially the judiciary (at all levels), have the duty to perform this control *ex officio* within the framework of their powers and in accordance with the procedural arrangements of each legal system.[20] The Court has also clarified that the Convention is not the only parameter of conventionality, but so are other Inter-American human rights treaties, such as the Inter-American Convention on Forced Disappearance, the Inter-American Convention to Prevent and Punish Torture and the Convention of Belem do Pará on the Rights of Women, as well as the interpretation of them by the IACtHR.[21]

Interestingly, contrary to a possible position that can interpret the conventionality control as an undue interference of the Inter-American system in the internal order of States, the IACtHR has maintained that the control's existence reinforces the principle of subsidiarity that governs

[18] Ibid. Operative Paragraphs 7 – 12.
[19] For example, in the Case of the Santo Domingo Massacre v. Colombia (2012), the Court indicated that all authorities and bodies of a State Party to the Convention have the obligation to exercise a 'control of conventionality'. Cfr. Case of the Santo Domingo Massacre v. Colombia judgment of November 30, 2012 (Preliminary objections, merits and reparations), par. 142
[20] Cfr. Cases of Aguaro Alfaro & others v. Perú (2006), Heliodoro Portugal v. Panamá (2008), Radilla Pacheco v. Mexico (2009), Rosendo Cantú v. Mexico (2010), Liakat Ali Alibux v. Surinam (2014), cited in IACtHR. "Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalidad". 2015.
[21] Cfr. Case of Gudiel Alvarez and others v. Guatemala Judgment of November 20, 2012. (Merits, Reparations and Costs) (2012).

international justice. Thus, in *Santo Domingo Massacre v. Colombia*, the Court recalled that "State responsibility under the Convention can only be demanded internationally after the State has had the opportunity to declare the violation and repair the damage caused by its own means"[22] so that the duty of state authorities to apply conventionality control is consistent with their original competence of dealing with possible violations of human rights within their jurisdictions.

In that same judgment, the Court indicated that it conceives of the conventionality control as a form of "dynamic and complementary control of the obligations of the States to respect and guarantee human rights".[23] It is complementary, because the international bodies only complement the task that the national authorities must comply with in principle (as a consequence of the principle of subsidiarity), and dynamic, because the way in which that control shall be exercised "can be shaped and harmonized" using the decisions of national courts as expressed in the fact that, on many occasions, the IACtHR has used them in its own judgments.

The reception of the conventionality control doctrine: literature overview.

The development of the notion of conventionality control by the IACtHR has had an important impact on the legal culture of the member countries of the American Convention. The difficulty of conceptualizing a doctrine that has been in constant development, as well as the questions it generates about the competence of the IACtHR to create obligations in the head of the national judicial authorities have generated an important controversy in which academics and judicial authorities of all Member States have had their say. On one side, there are positions like those

[22]IACtHR, Case of Santo Domingo Massacre v. Colombia. Judgement of 30 of November of 2012 (Preliminary objections, merits and reparations), par. 142.
[23] Ibid. Par. 143.

of Karlos Castilla, for whom conventionality control is merely a way of masking the general obligation to apply international law.

In addition to criticizing the IACtHR's lack of consistency in the development of the concept, Castilla argues that the conventionality control is nothing more than a new way of naming what was already clear: the States that have signed a treaty commit themselves to comply with the obligations that derive from it.[24] Thus, for Castilla, the fact that the IACtHR has insisted that the American Convention does not impose a specific model to carry out the conventionality control, shows that "the control of conventionality (…) is not really any system, model or criterion of control or normative evaluation, but only, a reiteration of the existing obligation that the States have of applying the ACHR".[25] From this, he concludes that the conventionality control cannot derive any primacy or new relationship of the Convention with the hierarchy of national norms, beyond the existing relationship between these norms and international law in general.

The position of Castilla is, however, insular in the field of specialized literature. In general, the experts accept that the conventionality control is an institution with special characteristics that cannot be reduced to a mere expression of the obligation to apply international law in the domestic sphere. As Alexei Julio points out in his commentary on Castilla's article,

> The idea behind the concept of conventionality control as a non-application of domestic legislation that is contrary to the Convention and the jurisprudence of the Court should be examined in more detail. That is, it is not a mere conforming interpretation of domestic legislation (...), but rather a true interpretative decision not to apply domestic law and, instead, apply a legal source to which a higher hierarchy is recognized.[26]

[24] Karlos A Castilla Juárez, 'Control de Convencionalidad Interamericano: Una Mera Aplicación Del Derecho Internacional' [2014] Revista Derecho del Estado. P. 161.
[25] Ibid. p. 162.
[26] Alexei Julio Estrada, 'Comentario Al Artículo "Control de Convencionalidad Interamericano: Una Mera Aplicación Del Derecho Internacional", de Karlos A. Castilla Juárez' [2015] Revista Derecho del Estado 51 <http://revistas.uexternado.edu.co/index.php/derest/article/view/4199> accessed 7 March 2018.

However, even recognizing that the conventionality control is an original contribution of Inter-American jurisprudence, several commentators have expressed their disagreement with the scope that the IACtHR has given to it. Thus, for example, Diego Mejía Lemos has argued that, by instituting conventionality control, the IACtHR has exceeded its powers.[27] In his concept, the existence of this type of control cannot be derived from the text of the American Convention, nor do the treaties grant the IACtHR the competence to create obligations for national courts or to carry out an abstract review of the law of the Member States.

Likewise, Mejía affirms that, in any case, many countries in the region already include in their constitutions the so-called "constitutional block" (such as Colombia), not only rendering the conventionality control irrelevant but also turning it into a source of confusion about the correct application of international law in the domestic sphere.[28] This author's objections are not minor if one considers that, as he himself points out, the consequences derived from the conventionality control have led some States to claim that the IACtHR "acts *ultra vires*, as argued by the Government of Venezuela in its instrument of denunciation of the Convention".[29]

In contrast to the most critical positions, the conventionality control has also been widely defended in the specialized literature as a mechanism of utmost importance for the protection of human rights in a continent that still has serious problems in that regard.[30] Thus, these readings purpose a less formalistic approach than those positions similar to Mejia's and place greater emphasis on the substantial implications of conventionality control. In this sense, as argued by Gonzalo Aguilar, conventionality control is justified insofar as it makes national

[27] Mejía-Lemos (n 14).
[28] Ibid. pp. 146 – 147.
[29] Ibid. p. 119.
[30] Some authors maintain that conventionality control has served to give legal basis to judicial investigations into serious and systematic violations of human rights in countries such as Colombia. I will develop this point further in the final section of this paper. In this regard, see Manuel Fernando Quinche Ramírez, 'El Control de Convencionalidad y El Sistema Colombiano' (2009) 163 Revista Iberoamericana de Derecho Procesal Constitucional 163.

judges the guardians of rights contained in international instruments, as well as key actors when it comes to "shielding the State from potential intervention of an international jurisdiction in cases of breach or violation of treaties".[31]

The intensity of the academic discussion shows that the last word on the nature of conventionality control is far from being said, especially considering that it can further be developed by the IACtHR, due to the jurisprudential nature of the notion. Even so, it is possible to make clear that the IACtHR intends, with this doctrine, that Inter-American law be used as a parameter of interpretation and validity by the judiciaries of the Member States. The following section will seek to argue, then, that this claim of the IACtHR implies that the Inter-American juridical corpus must enjoy some degree of primacy within the national systems of the Member States of the American Convention.

The conventionality control and the primacy of the American Convention in the internal order of the Member States.

Having made a review on the characteristics of conventionality control in the previous section, I will argue below that this type of control implies that the American Convention and the rest of the Inter-American legal corpus must enjoy primacy in the internal order of the Member States of the Inter-American System. In other words, I will suggest that if a national judge finds a conflict between a national norm and the Convention in exercise of conventionality control, the latter shall prevail, and that s/he can only come to this conclusion if we accept that the Convention enjoys a higher rank within the national legal system. Although this seems a necessary consequence derived from the type of control that is intended to be exercised with the conventionality control, the truth is that it is not an obvious circumstance, given that the

[31] Gonzalo Aguilar Cavallo, 'The Control of Conventionality: Analysis in Comparative Law' (2013) 9 Revista Direito GV 721. P. 724.

same jurisprudence of the IACtHR has been careful not to indicate explicitly that the Convention should enjoy supremacy within the legal systems of the Member States.

There are two main complementary reasons to think that the conventionality control implies the primacy of the Convention in domestic law. On the one hand, only by accepting that the Inter-American norms must have a privileged place within the hierarchy of legal norms can it be justified that the national authorities are obliged to contrast their actions and rules with those, in order to verify that they comply with international standards. On the other, the same jurisprudence of the IACtHR has led us to believe that the Convention should enjoy a substantial primacy, in view of the effects that it has granted to the conventionality control with respect to the national law of the Member States - such as the obligation of State's officials to make interpretations that conform to the American Convention and to modify domestic legislation or, even, their Constitution, as will be seen later.

I have pointed out that the first reason to affirm that Inter-American corpus should enjoy primacy at the domestic level is a formal one: only by placing it at the top of the hierarchy, one can justify the existence of a procedural obligation on the part of the national authorities to establish whether domestic laws are adequate to the conventional standards. Indeed, if the IACtHR had considered that the Inter-American treaties enjoy the same or lower hierarchy than national norms, then it would be illogical, from a formal point of view, to affirm that the authorities have the obligation to compare these norms with the Convention to determine their validity.

This formal argument can can also be presented by drawing a parallel between the control of constitutionality and the conventionality control, even though it can be argued that they are not the same.[32] Just as the control of constitutionality presupposes accepting that the Constitution

[32]As an example of the position that affirms that conventionality control is not assimilable or reducible to a form of control of constitutionality, see Walter F Carnota, 'La Diferenciación Entre Control de Constitucionalidad,

is the highest standard and that it contains the substantial principles on which a State is founded, conventionality control also requires that the Convention and its related treaties enjoy a privileged place within the system of legal hierarchy. Otherwise, it is not possible to justify that the national authorities are obliged to adapt their actions and norms to the standards contained in them.

In that sense, this parallelism between conventionality control and constitutionality control has led some authors such as Dulitzky to describe the IACtHR as an "Inter-American constitutional court"[33] for, in his view, the conventionality control is "an attempt to place the Convention as an inter-American constitution and the Court as an inter-American constitutional court".[34] To support this idea, Dulitzky not only refers to the fact that the language used by the IACtHR to refer to the conventionality control has much similarity with that of constitutional control, but also shows how the Court itself has used the latter as model to conceptualize conventionality.

In that sense, the IACtHR would be framed in an international trend (in which the European Court is also found), through which international courts have endeavoured to show that their function is more similar to that of the constitutional courts that to that of the appellate courts. This means that their function is to set common standards through the solution of paradigmatic cases that reflect the most important problems with respect to human rights in the region, in opposition to trying to solve all the individual complaints that are lodged before them.[35] Also, as Dulitzky points out, this "constitutional function" of international tribunals have been reinforced by the fact that the IACtHR, for example, has assumed the power to invalidate domestic norms which are contrary to the Convention and not only to declare such

Control de Convencionalidad y Control de Compatibilidad.' [2011] Anuario iberoamericano de justicia constitucional 51.

[33] Ariel E Dulitzky, 'Inter-American Constitutional Court - The Invention of the Conventionality Control by the Inter-American Court of Human Rights, An [Article]' [2015] Texas International Law Journal 45.

[34] Ibid. P. 66.

[35] Ibid.

incompatibility, such in *Barrios Altos v. Perú*.[36] In this case, the IACtHR declare that an amnesty law in Peru was not in conformity with the Convention an, thus, "lacks legal effect" in the Peruvian order and not only in regard to the case itself.[37]

This last issue leads us to the second, substantive, reason to affirm the Convention's primacy in domestic order. This one derives from the conception established by the IACtHR, according to which the conventionality control is the logical consequence of the duty of the States to comply with their international obligations. In other words, since the Member States have committed themselves to comply with the obligations contained in the Inter-American treaties, it would make no sense for them to adopt rules contrary to the principles contained in them. What is important, besides, is the special character of the Inter-American treaties, as they deal with human rights, so it seems to be important that the Convention and the other treaties enjoy a special position within the legal systems, to guarantee the survival of democratic systems.[38]

To substantiate that the IACtHR does consider that the primacy of the Inter-American human rights treaties must prevail at the national level, it is enough to observe the effects that its jurisprudence has granted to the conventionality control. Thus, although one of the principles that governs the conventionality control is that the authorities of the Member States are free to exercise this type of control in accordance with their own jurisdictions and procedures, the judgments of the IACtHR allow us to affirm that Inter-American treaties must be at least at the same level as the Constitution of the Member States.

[36] IACtHR, Case of Barrios Altos v. Peru. Judgment of March 14, 2001. (Merits).
[37] Ibid. par. 171. Cited in Dulitzky (n. 33), p. 67.
[38] It should be noted what the IACtHR said in its Advisory Opinion OC-2/82, par. 29: "(…) modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose are the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction".

As observed in cases such as *Almonacid Arellano,* the IACtHR has not limited itself to declaring the international responsibility of the defendant States but has ordered them to modify norms within their legal system or the initiation of new investigations, for example. Thus, in the *Suarez Rosero v. Ecuador,*[39] the Court considered that a rule of the Criminal Code of Ecuador constituted a *per se* violation of Article 2 of the Convention, for which reason it should be deemed without validity inside the national order. In the same sense, the Court ordered Peru to modify norms that allowed the prosecution of civilians by the military[40] and to Mexico that it should "adapt its domestic law to the Convention" with respect to the norms that govern the so-called "trial of protection of the rights of the citizens".[41]

In these cases, the Court studied Member States' norms of legal nature in order to determine whether or not they were in accordance with the provisions of the Convention and reaffirmed the obligation of the States to carry out that same kind of examination on the internal level. With these in mind, it could be said that the IACtHR understands that the conventionality control must be carried out over norms of inferior status to the constitutions, with which the Inter-American treaties would enjoy a "constitutional status" within the legal systems of the Member States.

However, the decision adopted by the Court in the case of "*The Last Temptation of Christ" (Olmedo Bustos and Others) v. Chile*[42] suggests that the conventionality control should be performed even upon the Constitutions of the Member States, so that they should not adopt constitutional norms that are contrary to the Inter-American treaties. In this case, the Court had

[39] IACtHR. Case of Suarez Rosero v. Ecuador. Judgment of November 12, 1997. Series C No. 35, paragraph 98 and resolution No. 5.
[40] IACtHR. Case of Castillo Petruzzi and others v. Peru. Judgment of May 30, 1999. Series C No. 52, Resolution No. 14.
[41] IACtHR. Case Castañeda Gutman v. the United States of Mexico. Judgment of August 6, 2008. Series C No. 184, Resolution No. 6.
[42] IACtHR. Case of 'The Last Temptation of Christ' (Olmedo Bustos and others) v Chile. Judgement of 5 of February 2001. (Preliminary objections, merits and reparations).

to analyse the possible violation by Chile of the rights contained in Article 13 (Freedom of Expression and Thought) and 12 (Freedom of Conscience and Religion) of the American Convention, to the detriment of the plaintiffs. The complaint was based on the judicial censure imposed against the cinematographic exhibition of the film "The Last Temptation of Christ", confirmed by the Supreme Court of Chile in 1997. At the time, the decision of the Chilean Supreme Court was based on Article 19, numeral 12 of the Political Constitution of Chile of 1980, which established a "censorship system for the exhibition and advertising of film production".[43]

Among its considerations, the IACtHR recalled that Article 13.4 of the Convention establishes the prohibition of prior censorship, except in cases where it is used to protect children and adolescents. Since the film had been previously censored for all audiences, this measure was considered to be outside the limitations allowed by the Convention. What is interesting about the analysis of the IACtHR is that it determined that Chile's international responsibility was not caused by the decision of its judicial authorities to censor the film, but from the existence of the constitutional norm that established said system of censorship. To the eyes of the IACtHR, this Chilean constitutional text was, *per se*, contrary to the provisions of the American Convention.[44]

Given that *The Last Temptation of Christ* is an older judgement than *Almonacid Arellano*, the IACtHR did not use the expression "conventionality control". However, it did fully lay the foundations of that doctrine when affirming the interpretation that Article 2 of the American Convention obliges States to adapt their internal legislation to the standards contained in it.[45] In consequence, Chile's omission to modify its constitution to eliminate prior censorship

[43] Ibid.
[44] IACtHR. Case of 'The Last Temptation of Christ' (Olmedo Bustos and others) v Chile. Judgement of 5 of February 2001. (Preliminary objections, merits and reparations).
[45] Ibid. Par. 85 – 88.

implied a breach of that international obligation and, consequently, the IACtHR ordered the Chilean State to "modify its domestic legal system, within a reasonable time, in order to suppress prior censorship (...)" which, in practical terms, implied a mandate to reform the Constitution.[46]

It seems that the consequence of *The Last Temptation of Christ* is that even the most superior norms within the order of a State (i.e., those contained in the Constitution) should be subject to a conventionality control by the national authorities. In other words, in order to avoid a declaration of international responsibility, the legislative powers of the Member States must ensure that the constitutional provisions (as any other law) do not contradict the American Convention and proceed to amend those who do. With this, the IACtHR affirmed the supremacy of the international obligations contained in the Inter-American treaties. In this way, even though it can be affirmed nowadays that the totality of the constitutions of the Member States are written in such a way that they are in conformity with the Convention, the Chilean case is a permanent reminder that the principles and rights contained in the American Convention prevail even over those contained in national constitutions.[47]

In that sense, by demanding that States must adapt their norms (including their Constitutions) to the standards established in the American Convention and their own jurisprudence, it can be said that the IACtHR has opted for a *maximalist approach* on the role that the Inter-American law should have in the internal orbit of the States, in the sense that it has opted for creating a corpus of standards that the Member States should apply, instead of letting them a space for discretion for the interpretation and application of the Convention. Therefore, some authors

[46] Ibid. Resolution No. 4.
[47] Olano García (n 9). P. 77

such as Claudio Nash, have argued that there is no place for the doctrine of "margin of appreciation" (as it is understood by the European Court) in the IACtHR's jurisprudence[48].

For the author, the IACtHR has never refrained from establishing comprehensive standards for Member States to comply with nor has it considered that they are in a better position to resolve certain issues related to conventional human rights, as the European Court has done.[49] In this regard, the only margin that the IACtHR has guaranteed to the States is some room for maneuver to determine how to implement the provisions of the Convention or the orders of the Court, but has never renounced to evaluate the factual or legal assumptions of the Court. the cases based on the privileged position that States may have to resolve these matters.[50] This, finally, is reinforced by the fact that the IACtHR has not made use of the doctrine of margin of appreciation (being able to do so) in cases similar to those where the ECtHR did, such as those related to freedom of expression and sexual and reproductive rights.[51]

[48] Claudio Nash Rojas, `La doctrina del margen de apreciación y su nula recepción en la jurisprudencia de la Corte Interamericana de Derechos Humanos`, acdi-Anuario Colombiano de Derecho Internacional, 2018, 11, pp. 71-100. doi: dx.doi.org/10.12804/revistas.urosario.edu.co/acdi/a.6539. In the same sense, Mauricio Iván del Toro Huerta, 'El Principio De Subsidiariedad En El Derecho Internacional De Los Derechos Humanos Con Especial Referencia Al Sistema Interamericano' Instituto de Investigaciones Jurídicas de la UNAM 39 <https://archivos.juridicas.unam.mx/www/bjv/libros/5/2496/7.pdf> accessed 29 March 2018. However, some authors do maintain the existence of an Inter-American margin of appreciation, even if it is not as strong as in Europe. For example, Faúndez, Héctor, El Sistema Interamericano de Protección de los Derechos Humanos. Aspectos institucionales y procesales, 2ª ed., Instituto Interamericano de Derechos Humanos, San José, 2004, p. 71, citado en Claudio Nash Rojas (n. 48), p. 84.

[49] Ibid. p. 84 – 89.

[50] For example, "in Castañeda Guzmán v. Mexico, the Inter-American Court recognized the absence of a single Latin American electoral model (and) recognized the state power to regulate the exercise and opportunities to such rights. Likewise, it recognized that the restrictions may be other than those established by the Convention. This is very similar to the margin of appreciation in a strict sense. But the Court also clarifies that this regulation must be subject to international control:

> (…), The measures that States adopt to guarantee the exercise of conventional rights are not excluded from the jurisdiction of the Inter-American Court when a violation of the human rights provided for in the Convention is alleged. Consequently, the Court must examine whether one of those aspects related to the organization and regulation of the electoral process and political rights, the exclusive nomination of candidates for federal office by political parties, implies an undue restriction on human rights. enshrined in the Convention (IACtHR, Case of Castañeda Gutman v. Mexico (2008), paragraph 161)". Claudio Nash Rojas (n. 48), p. 90.

[51] For example, in Artavia Murillo et al. (in vitro fertilization) vs. Costa Rica (2012), in which the IACtHR had to decide on the compatibility with the Convention of a law that prohibited in vitro fertilization in Costa Rica, and did not resort to certain strategies that the European Court has used in similar cases, such as the regional consensus or the margin of appreciation of the State. Most notably, in the case of Parrillo v. Italy, where the ECtHR "found no violation of Article 8 (right to respect for private life) of the European Convention on Human Rights in a case concerning a ban under Italian Law no. 40/2004, preventing the plaintiff from donating to scientific research

This insistence of the IACtHR to set general standards with little deference towards the discretion of the States allows inferring that the principle of subsidiarity does not have, in the Inter-American sphere, the strength that it has in the European. This does not mean that it does not play a role, but it has been expressed above all in the reiterated emphasis that the IACtHR has placed on pointing out that it is not an appellate court.[52] Likewise, subsidiarity has served the IACtHR to indicate that its competence does not include determining the criminal liability of an individual in cases involving the conventional right to a fair trial.[53] Finally, it has been used as justification for the requirement of exhaustion of domestic remedies prior to resorting to international jurisdiction, even though this requirement admits exceptions.[54]

This restricted use of the subsidiarity principle had lead professor Mauricio del Toro to affirm that, for the IACtHR, subsidiarity is only a procedural principle without a substantive dimension, since the Court has not made use of the margin of appreciation doctrine, as it was argued above.[55] As will be seen in the next section, this stand in contrast to the understanding of the principle of subsidiarity by the European Court of Human Rights, which has placed a lot more weight in that principle, leading more prominence to a *minimalist perspective* in its interaction with national authorities with some *maximalist approaches*, as will be seen below.

embryos obtained from an in vitro fertilisation which were not destined for a pregnancy. The Court considered at the outset that Italy was to be given a wide margin of appreciation on this sensitive question, as confirmed by the lack of a European consensus and the international texts on this subject". ECtHR, Case of Parrillo v. Italy (application no. 46470/11), 27 August 2015.

[52] For example, IACtHR Genie Lacayo v. Nicaragua. Judgment of January 29, 1997. (Merits, Reparations, and Costs).

[53] See, for example, IACtHR, Fermín Ramírez v. Guatemala. Judgment of June 20, 2005. (Merits, Reparations and Costs).

[54] Cfr. IACtHR, Velásquez Rodríguez v. Honduras. Judgment of July 29, 1988 (Merits, Reparations and Costs).

[55] del Toro Huerta (n 48).

CHAPTER 2

The European experience: is there a tendency within the Council of Europe to establish the conventionality control and the primacy of the European Convention?

Introduction

In principle, it is true that the jurisprudence of the European Court of Human Rights (hereinafter, ECtHR) has not developed an explicit concept like the conventionality control within the Council of Europe (CoE). Even more, given the emphasis that the ECtHR has given to the so-called "margin of appreciation" of the Member States, the deference that it has shown for them on some issues and the limited scope of the reparation that the ECtHR is allowed to provide, it could be thought that the Council of Europe is far from consolidating the doctrine of primacy of the European Convention of Human Rights among its members.

However, as will be shown below, it is possible to argue that the Council of Europe`s institutions have made progress in creating mechanisms that, if fully implemented, would lead to the institution like the conventionality control. My objective in this section is to show that, in relation to the ECtHR, there are two tendencies that seem contradictory to each other, but that can serve, by different means, to consolidate the primacy of the European Convention in the national systems of the Member States. One of these trends is toward minimalism, with the emphasis that the CoE has placed on the principle of subsidiarity based on the "Declaration of Interlaken" (2010) and the outstanding position that national authorities have in the interpretation and implementation of the Convention.

In view that the centrality of the principle of subsidiarity is the official policy of the CoE and the ECtHR at present, I will dedicate a part of this chapter to explain the evolution and the characteristics of this principle. Then, I will argue that, although the principle may serve to

justify a more limited and passive role of ECtHR with respect to Member States, it is certain that it has been used as a way of reminding national authorities of their obligation to implement the Convention at all levels of the State and, especially, in the judiciary. Although this does not imply, in itself, the primacy of the European Convention, it does suggest a tendency towards the formal primacy of this international instrument and the standards set by the ECtHR.

The second trend is a maximalist one, more similar to that adopted by the IACtHR, which points towards a substantial primacy of the European Convention in national law. Given that this trend does not have an "official" character in the same sense as that related to the principle of subsidiarity, I propose to trace it through three specific aspects of ECtHR jurisprudence: the substantial limits to the principle of subsidiarity, the European Convention as "an instrument of European public order"[56] and the influence that pilot-judgments may have on national legal systems. It should be clarified, however, that my objective is to show that from these aspects it is possible to derive a maximalist vein in the ECtHR jurisprudence, so I will not exhaustively explore these aspects, but point out how they can lead to a tendency in favour of the primacy of the European Convention.

At the same time, this is not an exhaustive list of maximalist trends in European jurisprudence. In fact, one can convincingly argue that, for example, the doctrine of autonomous concepts can easily fit into this category, since it implies that the ECtHR gives a "conventional" definition of some terms that appear in the Convention, without taking into consideration the meaning that those same terms have in the domestic legal orders.[57] Those autonomous concepts are part of the maximalist approach because, even if Member States are not explicitly obliged to abide

[56] The origins of this doctrine can be traced back to ECtHR, Case of Loizidou V. Turkey. (Application no. 15318/89), 18 December 1996. Par. 75.
[57] As a landmark case in this regard see, for example, ECtHR, Case of Engel And Others V. The Netherlands Application No. 5100/71, Judgment of 23 November 1976.

by the ECtHR's definition of these concepts, they still tend to use them, to avoid been caught in an understanding of the concept that is in breach of the European Convention.[58]

Also, I will deliberately refrain to study the process of integration between the CoE and the European Union. Although it can be said that this process might have consequences for the doctrine of primacy, I want to focus on principles that have had its origin in the Convention and in the ECtHR's jurisprudence and that do not depend on external factors such as the politics of the EU. In this regard, it can be said that this are established doctrines that can be expected to be used in the future, even if the integration of the EU turns out to be impossible.

Finally, I must point out that, in order to show the tendency towards the primacy of the European Convention in the internal order more explicitly, I will proceed to compare these aspects with the Inter-American developments explained in previous sections. Thus, by using the IACtHR as a comparator for what the conventionality control and the primacy of a regional Convention should entail, I intend to show that the ECtHR also has found ways to enforce the notion that the European Convention shall enjoy a position of prominence within the national systems even if the European jurisprudence has not address these issues explicitly.

The minimalist approach

The emphasis in the principle of subsidiarity

It is well known that, after the fall of the Berlin Wall and the consequent increase of the Member States of the Council of Europe, the system of protection of human rights created by the European Convention had to face an excessive increase of requests which led the CoE's Member States to adopt first Protocol No. 11 and later Protocol No. 14. The latter, which entered into force in 2010 and modified the functioning of the European Court of Human Rights (hereinafter, ECtHR) to streamline its procedures. Furthermore, that same year a deeper process

[58] For a more in dept analysis about this notion, see George Lestas, 'The Truth in Autonomous Concepts: How to interpret the ECHR', EJIL, 2004, Vol. 15 No. 2, 279-305 in http://www.ejil.org/pdfs/15/2/351.pdf.

of reform began (the so-called "Interlaken Process") and has involved the holding of five high level conferences (Interlaken - 2010, Izmir - 2011, Brighton - 2012, Oslo - 2014 and Brussels - 2015) with the objective of establishing mechanisms that will allow the long-term effectiveness of the system established by the Convention.

The main consequence emerging from the "Interlaken Process" has been the strengthening of the principle of subsidiarity as a fundamental pillar of the functioning of the European System for the Protection of Human Rights, with the primary purpose to deal with the huge backlog of cases that the EctHR had at the time. Through this emphasis, the System has sought to pressure States to comply with their obligation to implement the Convention's rights internally. With this, it has been tried to achieve, at least, three objectives: first, alleviate the political pressure on the ECtHR by some States that have accused the Court of exceeding their competences.[59] Second, alleviate the burden of cases that reach the ECtHR and thus guarantee its effective functioning.[60] Third, it has put even more emphasis in the obligation contained in Article 13 of the Convention by which States shall provide effective remedies for violations against the Convention that are committed within their territory, to avoid being condemned by the ECtHR.[61]

With these in mind, one might think that referring to the principle of subsidiarity is not a good strategy if one wants to show that there is a CoE tendency to affirm some degree of primacy of the European Convention in the domestic law of the Member States. Indeed, it could be argued that the importance that is being granted to the national judge in the protection of conventional rights implies that the ECtHR is conceding them a degree of discretion regarding the

[59] See R Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487 <https://academic.oup.com/hrlr/article-lookup/doi/10.1093/hrlr/ngu021> accessed 2 March 2018.
[60] High Level Conference on the Future of the European Court of Human Rights, "Interlaken Declaration", February 19, 2010. Retrieved from http://echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf, last accessed on 8th of February, 2018.
[61] See Spano (n 53).

interpretation and application of the Convention. The latter is, to some extent, true: as I will explain later, the ECtHR has not opted for a maximalist approach to the Convention as the IACtHR has done but has used a more subtle and deferential approach when affirming the prevalence of the Treaty, following the official position of the CoE.

However, analysing how the principle of subsidiarity is currently understood, I intend to make explicit two assumptions that underlie its application: on the one hand, that the degree of deference that the ECtHR grants to the States depends on whether they actually apply the Convention internally and grant it a privileged place within his legal system. On the other hand, I will argue in the next section that, despite its importance, the principle of subsidiarity is not absolute and, therefore, there are areas of conventional law in which States have very limited discretion (i.e. absolute rights), with which the ECtHR is in a position to make its interpretation of the Convention prevail over that carried out by the national authorities.

The principle of subsidiarity in the CoE and the ECtHR jurisprudence

The principle of subsidiarity is not new in the field of international law nor did it appear at European level with the Interlaken reform process. Since 1968, for example, in its ruling in the so-called "*Belgian Language case*",[62] the ECtHR had affirmed that its role is subsidiary *vis-à-vis* the national authorities, which are free to adopt the measures they deem necessary to guarantee the rights contained in the Convention. Thus, even though the European Convention on Human Rights (ECHR) does not explicitly mention this principle yet,[63] ECtHR jurisprudence has expressly identified that it derives from Articles 1 (obligation to respect human rights), 13 (right to an effective remedy) and 35 (admissibility criteria).

[62] ECtHR, Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium' (Application no 1474/62;. 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (merits), 23 July 1968.
[63] Protocol No. 15 is expected to add principle of subsidiarity to the Preamble of the Convention once it enters into force.

This notion has remained constant over the years. In *Kudła v Poland*, for example, the ECtHR held that:

> By virtue of Article 1 (which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention.[64]

Subsequent decisions as *Cocchiarella v Italy*[65] and *De Souza Ribeiro v France*[66] have reaffirmed that the origin of the principle of subsidiarity is found in these conventional provisions. Likewise, as Mowbry points out, the ECtHR has also referred to Article 19 of the Convention as one of the sources of the principle of subsidiarity, recognizing that it cannot substitute the interpretation that the courts of first instance have made of the evidence and of the facts, given that the international court has inherent limitations when collecting evidence or establishing the veracity of events that occurred a long time ago.[67]

As Alaistair Mowbray argues, the development of the principle of subsidiarity in the jurisprudence of the ECtHR can be divided into three "eras". The first includes the original use that the "first" ECtHR gave to the principle, prior to 1998. The second refers to the use given to it by the ECtHR between November 1998 (when the new full-time Court came into operation) and the start of the Interlaken Process. The third is the "post-Interlaken" era.[68] Following Petzold's arguments,[69] Mowbray suggests that the first era is of special importance because it delineated two elements of the doctrine on the principle of subsidiarity (one

[64] Application No 30210/96, Merits and Just Satisfaction, 26 October 2000. Par. 152.
[65] Application No 64886/01, Merits and Just Satisfaction, 29 March 2006. Par. 28
[66] Application No 22689/07, Merits and Just Satisfaction, 13 December 2012. Par. 77.
[67] A Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 Human Rights Law Review 313 <https://academic.oup.com/hrlr/article-lookup/doi/10.1093/hrlr/ngv002> accessed 2 March 2018.
[68] Ibid. p. 320
[69] Petzold, 'The Convention and the Principle of Subsidiarity' in Macdonald, Matscher and Petzold (eds), The European System for the Protection of Human Rights (1993) at 42. Cited in Mowbry (n. 55), p. 321.

procedural and one substantial) that would be refined with the subsequent development of the jurisprudence and the Reform Process.

The procedural aspect refers to the requirement of the ECtHR that the applicants have exhausted the domestic legal proceedings as a prerequisite for their claims to be admitted in Strasbourg and to the rule that the international tribunal cannot be used as an appellate court. The substantial one, on the other hand, refers to three jurisprudential tendencies through which the ECtHR had limited its analysis of state actions based on the principle of subsidiarity. The first tendency is that by which the ECtHR would refrain itself from supplanting the national courts when interpreting the national law.[70] The second, refers to situations "where the Convention placed 'a duty of specific conduct on the part of the competent national authority'".[71] Finally, the third trend was the one inaugurated with the creation of the margin of appreciation, being *Handyside v. UK*[72] the paradigmatic sentence that illustrates this consequence derived from subsidiarity.

The full-time ECtHR operating from 1998 maintained the trends developed during the first era, especially with regard to the requirement to exhaust domestic remedies and to point out that States are the first to guarantee the rights contained in the Convention. Mowbry, however, shows the appearance of a tension between the judges of this first ECtHR on the scope that the principle of subsidiarity should have. This tension refers to whether the role of the Court is to establish demanding standards that States must comply with (as seems to be the maximalist approximation of the IACtHR) or, on the contrary, if the principle of subsidiarity only requires

[70] As a paradigmatic example, Mowbry cites the case of X and Y v The Netherlands Application No 8978/80, Merits and Just Satisfaction, 26 March 1985, at par. 29.
[71] Petzold (n. 57) at 52. Cited in Mowbry (n. 55), p. 321.
[72] Application No 5493/72, Merits, 7 December 1976.

the establishment of minimum standards that facilitate cooperation between States and ECtHR and compliance with the Convention by the former.[73]

This same era saw the emergence of concern over the number of cases that were arriving to Strasbourg and the use of subsidiarity as a mechanism to affirm the need for States to provide effective judicial remedies. Likewise, the creation of pilot - judgements, from 2004, allowed the ECtHR to defer to the national authorities the resolution of a multitude of cases that present similar characteristics. As will be seen later, this type of judgment is an example in the tension between minimalism and maximalism within the ECtHR, even though European jurisprudence itself has maintained that they are an expression of the principle of subsidiarity.[74]

The trend in favour of strengthening the principle of subsidiarity reaches its point of further development with the ECtHR reform process that began with the First Interlaken Conference (2010), which inaugurated the third era. In the Declaration that resulted from that first meeting, the Conference reiterated "the obligation of the States Parties to ensure that the rights and freedoms set forth in the Convention are fully secured at the national level and calls for the strengthening of the principle of subsidiarity" and stressed "that this principle implies a shared responsibility between the States Parties and the Court".[75] As telling as this is of itself, it is the

[73] Mowbray (n 49). exemplifies this tension making a reference to *Ocalan v. Turkey* (Application No 46221/99, Merits and Just Satisfaction, 12 May 2005). In this case, The ECtHR decided that the presence of a military judge in a trial implied a violation of Article 6 (1) of the Convention, even though the Republic of Turkey had introduced a constitutional reform eliminating the participation of that type of judges in compliance to a previous judgement in a similar case. The members of the ECtHR who disagreed with the ruling argued that:

> Inherent in a system based on the principle of subsidiarity is loyal cooperation between a supranational judicial body, such as this Court, and the States which have adhered to the system. Imposing standards that are too high does not appear to us to be the best way of encouraging such cooperation or of expressing satisfaction to the States that provide it (Joint Partly Dissenting Opinion of Judges Wildhaber, Costa, Caflisch, Turmen, Garlicki and Borrego Borrego, para 9).

[74] As it was stated in ECtHR, Kuric´ and Others v Slovenia. Application No 26828/06, Just Satisfaction, 12 March 2014, at para 134. Further reference to this will be made later.

[75] High Level Conference on the Future of the European Court of Human Rights, "Interlaken Declaration", February 19, 2010. Retrieved from http://echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf, last accessed on 8th of February, 2018. PP. 6 – 9

Action Plan adopted at that Conference that is the most important indicator for showing a tendency towards the consolidation of a notion of primacy of the European Convention.

In this Plan, the Conference addressed the issue of "Implementation of the Convention at the National Level", noting that the Member States are the first called to implement and guarantee the rights established in said international treaty; therefore, it urged the countries to carry out actions so that their national authorities know and implement conventional standards. Likewise, the Conference asked the States to ensure that they are attentive to the development of the jurisprudence of the ECtHR, so that they can take measures to prevent future violations. Finally, it was recommended that, if necessary, modifications be made to domestic legislation to provide an effective remedy at the national level to redress violations of the rights contained in the Convention.[76]

Subsequently, the Declaration of Interlaken was reinforced by the Note of the Jurisconsult on the Principle of Subsidiarity, which explains what is the content of this principle according to ECtHR jurisprudence. The Note emphasizes that the subsidiarity that is predicated on the Convention system is different from that of the European Union, for example, while the latter implies a "competitive subsidiarity" in which the functions of the Member States "compete" with those assigned to the EU. The one that derives from the Convention, for its part, does not imply competition but "harmonization" or "complementary subsidiarity", in the sense that the ECtHR's work is to act only when the national authorities have failed to ensure the effective guarantee of conventional rights.[77]

It is telling that the Jurisconsult had used the word "harmonization", (although in the end he had opted for "complementarity"), because it suggests the need for national and conventional

[76] Ibid.
[77] "Interlaken Follow – Up. Principle of Subsidiarity". Note by the Jurisconsult, 08 of July 2010, p. 2. Retrieved from http://echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf, last accessed on 8th of March of 2018.

legal systems to have some degree of adaptation to each other and not just complementation. In this sense, "harmonisation" recalls the obligation of the Member States of the American Convention to adapt (or harmonize) their domestic legislation to the standards of the Convention. However, it is not necessary to elaborate on interpretations to find similarities in both systems with regard to subsidiarity since the primary notion is the same: the Member States of the Conventions are the first obligated to guarantee them internally, with which the content of these must be effective in their national legal systems and not only at the international level.

Likewise, just as the Inter-American Court has emphasized the important role played by national courts in the implementation of the American Convention, while stressing that this is an obligation that falls to all public authorities, the Jurisconsult's Note states that among the authorities called to guarantee conventional rights, the judiciary has a prominent role for its special position when it comes to protecting individual rights. However, the Note clarifies that the obligation to enforce the European Convention at the domestic level also covers all the national authorities "capable of influencing the lives and legitimate interest of 'everyone within their jurisdictions'",[78] so that it also includes Legislative and the Executive Power.

Finally, it is worth mentioning that the Jurisconsult related the principle of subsidiarity to the doctrine of the margin of appreciation, to indicate that this is based on the notion that local authorities are in a better position to resolve cases on alleged violations of rights contained in the Convention, so the role of the International Court should be, in principle, residual. However, the Court has been clear in indicating that this margin can vary considerably depending on the circumstances and on the right in question, which has led it to affirm that in

[78] Ibid. Par. 12.

cases where the margin of appreciation is more limited, this is linked to a more rigorous "European supervision".[79] I will return to this point in the next section.

If I have stopped at the Declaration of Interlaken and its implications (reflected in the Note by the Jurisconsult), it is because it was the starting point of the reform process of the European Court, in which the principle of subsidiarity, as we have seen, has taken a preponderant role. In this sense, the Conferences and the subsequent Declarations are a continuation of the work begun in Interlaken, insisting on the importance of this principle being one of the pillars of the European system. The Izmir Declaration (2011), for example, placed greater emphasis on the need to adopt concrete practical measures that would reduce the workload of the Court. It also recommended the adoption of a system of preliminary opinions through which national courts could consult the Court before issuing a final judgment in each case, which will later be implemented by the Protocol 16.

At the Conference held in Brighton (2012), the language of the Declaration is in tune with the jurisprudential developments, by subscribing to the doctrine that subsidiarity is closely linked to that of margin of appreciation, urging the Court to use them constantly in its judgments. This detail is important because it shows that these principles have been adopted by the CoE as part of the Convention's system, even though they are not explicitly contained in this Convention but were a development of the Court. At the last high-level conference, held in Brussels in 2015, what started as a timid recommendation in Interlaken and was being refined with the different Conferences that followed, appears as the central element of the reform process of the European Court. In this sense, this last Declaration is practically only dedicated to emphasizing the need for States to apply the Convention in their domestic legislation and prevent cases from reaching *en masse* in Strasbourg.

[79] See, for example, ECtHR, Sidiropoulos and Others v. Greece, 10 July 1998; Stoll v. Switzerland, 10 December 2007; Demir and Baykara v. Turkey, Grand Chamber Judgment, 10 November 2008; among many others.

There is no other more important example of the above, than the inclusion in the Brussels Declaration of a section dedicated to the "implementation of the Convention at the national level", which is, perhaps, the greatest affirmation in favour of the functional incorporation of the European Convention in the internal order of States as a standard of validity and interpretation of domestic law:

> The Conference recalls the primary responsibility of the States Parties to ensure the application and effective implementation of the Convention and, in this regard, reaffirms that the national authorities and, in particular, the courts are the first guardians of human rights ensuring the full, effective and direct application of the Convention – in the light of the Court's case law – in their national legal system, in accordance with the principle of subsidiarity.

Finally, it should be noted that the ECtHR reform process did not remain solely in Declarations, but was reflected in amendments to the European Convention; specifically, in the adoption of Protocols 15 and 16. The former will explicitly introduce the principle of subsidiarity in the preamble of the Convention and indicate that judges and national authorities are the first called to guarantee conventional rights which is why they enjoy a "margin of appreciation" subject to the supervision of the Court, once it gets ratification from all Member States.

Protocol 16, for its part, was a direct result of the Brighton Conference and established the procedure by which the high courts of the Member States can request advisory opinions from the ECtHR regarding the application or interpretation of conventional rights. Although this procedure is not mandatory, it does serve to increase the influence that the Court of Strasbourg has at the national level, as well as the interaction between the States and the continental system of protection.

The principle of subsidiarity and the case for the Convention primacy.

Over the years and in view of the emphasis that has been placed on the principle of subsidiarity since the Declaration of Interlaken, one might think that the minimalist approach has gained ground. Not surprisingly, Judge Robert Spano of the ECtHR has named the current trend as

"the age of subsidiarity" in which the starting point is the consensus around "that the Convention is not an instrument of human rights unification, as can be derived from Article 53 of the Convention, but only lays down minimum standards".[80] For the Judge, this trend has allowed the ECtHR to improve its democratic credentials by granting more room for manoeuvre to State authorities by incorporating in its judgments the analysis of the procedures that national authorities have followed to determine whether a violation of the Convention:

> With this *qualitative, democracy-enhancing approach*, the Court's reformulation or refinement of the principle of subsidiarity, and the margin of appreciation, introduces a clear procedural dimension that can be examined on the basis of objective factors informed by the defendant government in its pleadings.[81]

The prevalence of the principle of subsidiarity could lead one to think, then, that we cannot speak of a tendency towards the affirmation of the primacy of the Convention by the ECtHR, precisely because of the prevalence that national authorities have regarding the interpretation and application of this. However, I think it is possible to argue that there are elements to affirm this primacy, even from the minimalist approach that comes with the emphasis placed on subsidiarity, as I will argue.

The first thing that must be said is that the prevalence of the principle of subsidiarity cannot be confused with the idea that the application of international conventions is a faculty of the States. On the contrary, the principle of subsidiarity is only the expression that of the fact that the Convention must play a role in the domestic order precisely because it is an international treaty that the States Parties have committed to comply with it. This idea, despite its obviousness, is the same one that the IACtHR uses to support the doctrine of conventionality control. In effect, the ratification of the Conventions is, in itself, the expression that the States have obliged

[80] Spano (n 53). P. 492.
[81] Spano (n 53). P. 499.

themselves to apply, internally, a series of common standards for the protection of human rights.

Given that human rights treaties do not create obligations between States but between these and those under their jurisdictions (as the IACtHR also has pointed out), Judge Spano admits that in the European context, "it seems self-evident that the existence and quality of domestic review of Convention compatibility, either with legislative measures or administrative decisions in individual cases, is crucial",[82] for the purpose of building and applying the margin of appreciation as an expression of the principle of subsidiarity. It is surprising the language used by the Judge, considering that the expression "domestic review of Convention compatibility" seems to resonate with "conventionality control". Even if it does not seem that Judge Spano is referring to the type of control as the one that the IACtHR demands from the authorities of the Member States of the American Convention, it is interesting that he considers self-evident that the emphasis placed on subsidiarity requires the States to create procedures to verify, at least in specific cases, the compatibility with the European Convention.[83]

Another aspect that may arise from Judge Spano's assessment, is that the existence of effective judicial remedies that provide people with appropriate solutions to violations of conventional rights at the national level is a way to diminish the chances that these States will be declared as internationally responsible. In this sense, this consequence of strengthening the principle of subsidiarity at the CoE level is similar to that which the IACtHR has pursued with the conventionality control: that the possibility that judges can decide on the conventionality of a measure or a situation, means avoiding said case must be resolved by an international instance. This not only implies a lower case – log for international tribunals, but also means that the State is complying with its international obligations.

[82] Spano (n 53). P. 499 – 500.

As understood above, the principle of subsidiarity in Europe is not a mechanism to affirm the sovereignty of the States against the activity of the ECtHR but, on the contrary, one to force the States to apply international standards internally. In this regard, the ruling issued by the Grand Chamber of the ECtHR in *Fabris v. France,*[84] in which the applicant alleged the violation of Article 14 (prohibition of discrimination in conjunction with Article 1 of Protocol No. 1 (protection of property), in view of the fact that he could not exercise his rights of inheritance because he was considered by a French court as the illegitimate child of a married woman. The Grand Chamber, noting that European jurisprudence on the prohibition of discrimination based on the legitimacy of birth had been established decades ago,[85] reproached the French court for not having taken that principle into account when deciding on that case.

In its ruling, the ECtHR argued that "where an applicant's pleas relate to the "rights and freedoms" guaranteed by the Convention the courts are required to examine them with particular rigor and care and that this is a corollary of the principle of subsidiarity",[86] with which he affirmed the obligation of the national courts to take into account, in their decisions, the jurisprudence of Strasbourg as an expression of subsidiarity, especially in cases in which rights that are contemplated in the European Convention are in question. Even more, for the ECtHR, this is an obligation perfectly "compatible with States' express acknowledgment of their shared responsibility for the effective implementation of the Convention in the Brighton Declaration".[87]

The statements made by the ECtHR in *Fabris v. France* could have been made, in the same sense, in a hypothetical judgement by the IACtHR. In fact, as I have said before, one of the obligations deriving from conventionality control is that national judges must consider the

[84] Application No 16574/08, Merits, 7 February 2013.
[85] Specifically, in Marckx v. Belgium (application No. 6833/74), Judgement of 13 June 1979.
[86] Ibid. para. 72.
[87] This conclusion is Mowbray's, (Mowbray (n 49)., but it is supported by the Grand Chamber's claim in Supra n 71 at para 3.

established jurisprudence of the IACtHR as a parameter of interpretation. With this rule, the ECtHR seems to be asking the national judges to conduct a sort of European conventionality control, applying in concrete cases the rules that derive from the jurisprudence of Strasbourg when conventional rights are at stake.[88] Although it is true that the ECtHR does not require that this evaluation should be carried out with respect to laws or acts of the government, it does seem to require that this examination be carried out, at least, in judicial cases.

The analysis of the principle of subsidiarity has allowed to establish that there is a development within the CoE and in ECtHR jurisprudence to affirm the obligation of the Member States to use the Convention (and, to some extent, ECtHR jurisprudence) as a source of validity for their legal systems and to apply it on a daily basis. Now, does this mean that the ECtHR understands that its jurisprudence and the European Convention on Human Rights should enjoy primacy in these legal systems? The answer, only from the perspective of the principle of subsidiarity, cannot be positive because the principle only requires that the States apply the Convention internally, but it is not a criterion to determine which position it should occupy within their legal systems. In contrast, to argue in favour of primacy, I will now refer to certain more maximalist approaches within ECtHR jurisprudence that can lead to think that there is also a tendency in that sense.

The maximalist approach

As argued in the previous section, the principle of subsidiarity has made it possible to affirm the obligation to apply the Convention at the state level, although it remains a principle of a minimalist nature, in the sense that it does not provide the ECtHR with the possibility of establishing unique and common standards for the Member States of the CoE to reach. This

[88] The recent judgement in Al-Dulimi and Montana Managment Inc. v. Switzerland, (Application no. 5809/08, 2016) is telling in this regard. In it, the ECtHR indicated, inter alia, that the national authorities shall stablish whether the inclusion of an individual in the list of sanctioned persons of the U.N. Security Council is arbitrary under the standards set in the European Convention. Otherwise, if they do not act this way, the State is liable to be considered in breach of Article 6 of the Convention by the European Court.

circumstance, together with the doctrine of the margin of appreciation, has provoked the criticism of some academics who consider that the international protection of human rights demands a less deferential approach towards States by international courts. Some have even advocated eliminating the principle of subsidiarity from those that govern international human rights law, to avoid that States have the freedom to define the content of these rights.[89]

The reality is, however, that for practical and political reasons the principle of subsidiarity continues to play a leading role in the adjudication process of international human rights courts. In the case of the ECtHR, as already mentioned, this has led to a minimalist interpretation of the scope of its jurisdictional activity. Even so, there are decisions that allow us to affirm that within the jurisprudence of the ECtHR have also had some maximalist tendencies that advocate a greater influence of the Convention in the internal orders of the States, which would bring us closer to a doctrine of conventional primacy in national contexts. This type of decisions are those pertaining a). substantial limits to the principle of subsidiarity; b). the interpretation of the European Convention as an instrument of continental public order and c). the so called "pilot-judgments" for systemic violations of the European Convention in the Member States.

Substantial limits to the principle of subsidiarity.

For that purpose, I will consider the substantial limits to the principle of subsidiarity and the margin of appreciation. One is the distinction between qualified and absolute rights. While admitting limitations, there may be greater diversity in the interpretations that States make of the qualified rights, so that the ECtHR may admit a greater margin of manoeuvre when it comes to applying and interpreting them. In contrast, with respect to absolute rights, the ECtHR has argued that the margin of appreciation of the States is practically non - existent, since they are the most inalienable rights and that do not admit any limitation.

[89] See, for example, William M Carter Jr, 'Rethinking Subsidiarity in International Human Rights Adjudication' (2008) 30 Hamline J. Pub. L. & Pol'y 319.

Thus, in cases pertaining the rights protected by Articles 2 and 3 of the Convention, for example, the ERCtHR has stressed that they are absolute in the sense that they create obligations for Member States which cannot be balanced either against other rights or against the pursuit of any legitimate interest.[90] Likewise, the ECtHR has established that States enjoy a reduced margin of appreciation in cases related to racial or ethnic discrimination[91] or when an "intimate aspect of private life" is at stake under Article 8, among others.[92] For the purposes of this paper, it is necessary to observe that the narrower the margin of appreciation of the States with respect to an issue, the more influence (in normative terms) European jurisprudence will have within these areas, since national authorities have fewer options and are more pressured to follow the standards set by the international court in its decisions to avoid subsequent declarations of international responsibility.

The reduction of the scope of the margin of appreciation in these cases allows the ECtHR to affirm the weight of its own jurisprudence on the actions of the national authorities by notifying States that, with respect to certain rights and issues, the European supervision will be stricter. Although the strategy adopted by the ECtHR seems to be subtler than the one adopted by its Inter-American counterpart, the consequence of this approach is necessarily maximalist, in the sense that the ECtHR sets standards with respect to these matters with the intention that States will abide by them in similar situations that arise in the future.

A second substantial limit, which allows the ECtHR to impose its interpretation of the Convention in the States' internal order is the doctrine of considering the European Convention as a "living instrument". This aspect is of paramount importance because it gives precedence to the jurisprudence of the continental courts with respect to national authorities and their

[90] ECtHR, Pretty v United Kingdom, Application No. 2346/02, Merits, 29 April 2002.
[91] See ECtHR, D.H. v the Czech Republic, Application No. 57325/00, 13 November 2007.
[92] See ECtHR, Dudgeon v United Kingdom, Application no. 7525/76, 23 September 1981.

interpretation of international instruments. This doctrine was created from the early years of the ECtHR, with cases like *Tyrer v. UK* (1978)[93], in which it had to decide on whether the juvenile corporal punishment practiced in the Isle of Man constituted degrading punishment in the light of the Convention. The ECtHR determined that the acceptance of this practice by the population could not be considered in favour of its existence, since the European Convention had to be read in the light of present - day conditions and the standards commonly accepted in Europe. Since there was a consensus among the European Estates that these practices were degrading, the ECtHR understood that this type of punishment could not be considered as adjusted to the European Convention.[94]

The doctrine of the living instrument has evolved over the years but, in general, it can be said that it encompasses three aspects: first, the Convention must be interpreted in the light of present – day conditions or standards in a way in which the original intentions of the drafters are rarely considered. Second, these standards shall be common or shared among the Member States of the Convention before they become endorsed by Strasbourg. Third, the ECtHR will not ascribe especial importance to the interpretation that a respondent State considers to be the acceptable standard in a given case.[95] As a result, this doctrine has led the ECtHR to make an "evolutive interpretation" of the Convention, which allows it to depart from the meaning and scope that States give to the conventional rights and, at the same time, to impose across the board an authorized interpretation that must be taken into account by the Member States in the future.

Although the ECtHR has been cautious in restricting the margin of appreciation based on the doctrine of the "living instrument", it is also true that the appeal to common European standards

[93] ECtHR, Tyrer v. United Kingdom, Application No. 5856/72, 15 March 1978.
[94] Ibid. Par. 31.
[95] George Letsas, *The ECHR as a living instrument. Its meaning and legitimacy* in Andreas Føllesdal, Birgit Peters and Geir Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European, and Global Context.* (New York: Cambridge University Press, 2013 2013). P. 109.

has allowed it to enforce a certain interpretation of the Convention on States without losing legitimacy. Even though this approach seems subtler than that of the IACtHR, the truth is that the latter also makes constant references in its decisions to judgements of the national courts of the Member States of the American Convention. By establishing this dialogue, the IACtHR intends to demonstrate that its interpretations have some basis in the social reality of the continent and that they are not just an original formulation of the international tribunal.

The Convention as "an instrument of European public order".

According to the ECtHR, the European Convention is a special type of treaty, given that it deals with human rights and, therefore, is an instrument of "European public order" for the protection of individual human beings. For Wilhaber,[96] this can be interpreted as the ECtHR doing, at least, one of the following statements:

> "a) to achieve effective application of the ECHR in all territories of all Member States (…); or b) to a special, constitutional character of the ECHR, which should be given primacy over national law, being an instrument of both international law and the municipal legal systems of the Member States (either in all its aspects or with respect solely to its core principles); or c) to a special, constitutional character of each specific judgment or decision of the ECtHR (since according to Art 46(1) the States 'undertake to abide by the final judgment of the Court in any case to which they are parties', judgments to which other States are parties will ordinarily be observed as precedents). (…)".[97]

Although the ECtHR has not used this doctrine extensively,[98] it is one of the most explicit appeals to the primacy of the European Convention in the internal order of States. It should be noted that, in the American context, there is also a notion of "Inter-American public order" that

[96] Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199694495.001.0001/acprof-9780199694495-chapter-11> accessed 14 March 2018.

[97] Ibid. P. 207.

[98] Wildhaber (n 75). identifies the following decisions as the main ones that refer to this doctrine: Al-Adsani v United Kingdom, Application No. 35763/97 (2001), para 55.; Loizidou v Turkey (Preliminary Objections) Series A no 310 (1995), paras 75 and 93; Banković v Belgium et al Application No. 52207/99 (2001), para 80; Bosphorus Hava Yollari, Turizm ve Tikaret, Anonim Şirketi v Ireland, Application No. 45036/98 (2005), para 156; Ireland v United Kingdom Series A no 25 (1978), para 239; Mamatkulov and Askarov v Turkey Applications No. 46827/99, 46951/99 (2005), para 100.

originates from the Convention and must be protected by the organs of the Inter-American system for the protection of human rights. Thus, the Rules of Procedure of the IACtHR indicate that the cases before it may be presented by the Inter-American Commission, *inter alia*, "when the Inter-American public order of human rights is affected in a significant manner".[99]

Since the IACtHR has not, however, defined the concept of "Inter - American public order of human rights", it is not possible to determine whether this concept can be assimilated with that used by the ECtHR. However, if one considers the normative consequences that the IACtHR has ascribed to the conventionality control, it may well be assumed that the American public order could imply something like what Wildhaber concludes with respect to European one. This conclusion can be reached, because the notion of public order evokes a series of principles and standards which constitute the most important norms of an entire region, those on which the rest of the legal system is structured. Thus, to sustain the existence of a continental public order may imply requiring that the States put the Conventions on human rights into places of preeminence of the normative hierarchies.

This notion is reinforced by the thesis presented by the ECtHR in the recent case of Al-Dulimi and Montana Management Inc. v. Switzerland, in which the Court indicated that the defense of European public order requires the States to carry out a type of control that, in the terms of the ECtHR, can easily be assimilated to a conventionality control. Thus, in that judgment, the Strasbourg court stated that:

> The Court further observes that, the Convention being a constitutional instrument of European public order (see Loizidou v. Turkey (preliminary objections), 23 March 1995, § 75, Series A no. 310, and Al-Skeini and Others, cited above, § 141), the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One

[99] Rules of Procedure of the Inter – American Court of Human Rights (2009), Article 35. In http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf , last retrieved 21 march 2018.

> of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle. Even in the context of interpreting and applying domestic law, where the Court leaves the national authorities very wide discretion, it always does so, expressly or implicitly, subject to a prohibition of arbitrariness (see García Ruiz v. Spain [GC], no. 30544/96, §§ 28-29, ECHR 1999-I, and Storck v. Germany, no. 61603/00, § 98, ECHR 2005-V).[100]

As can be seen from the fragment quoted, the ECtHR links the survival of European public order to the obligation of the States to ensure a "level of scrutiny of Convention compliance". Although this statement seems to imply a less strict type of control than that required by the IACtHR and that the ECtHR does not define what is the acceptable level of this scrutiny, it is clear that it made explicit mention of the obligation of national authorities to interpret domestic legislation in accordance with the principles of the European Convention and to guarantee a level of conformity between this two, even taking into account the wide margin of discretion they have for dealing with national law.

The pilot - judgments and their influence in the formulation of national public policies.

In addition to the doctrines discussed above, the ECtHR currently has a procedure that has served, through its jurisprudence, to directly influence the modification of national legislation or practices that are contrary to the European Convention. I am referring to the pilot - judgments, "introduced for cases where there is a systemic or structural dysfunction in the country concerned which has given or could give rise to similar applications before the Court".[101]

[100] ECtHR, Case of Al-Dulimi and Montana Managment Inc. v. Switzerland, Application no. 5809/08, 2016. Par. 145.

[101] ECtHR, *Factsheet – Pilot Judgements*, Press Release. February 2018. In https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf, last retrieved in 20 march 2018.

The pilot-judgments deserve a comment for effects of the subject that occupies us: although the ECtHR has understood that these judgments are an expression of the principle of subsidiarity, they are also a case of maximalist approach insofar as they force the States to the implementation of a series of specific measures and to reach standards designed and defined by the ECtHR. Thus, while the State implements these measures, the ECtHR may suspend the analysis of cases that fall within the scope of the pilot – judgement:

> Another important aim of the pilot-judgment procedure is to allow the speediest possible redress to be granted at domestic level to the large numbers of people suffering from the general problem identified in the pilot judgment, thus implementing the principle of subsidiarity which underpins the Convention system (…) It may thus be decided in the pilot judgment that the proceedings in all cases stemming from the same problem should be adjourned pending the implementation of the relevant measures by the respondent State.[102]

As Wildhaber points out, in some of the most representative cases of this type of sentence (in particular, the cases of *Broniowski* and *Hutten-Czapska*),[103] The ECtHR has established general measures that the States must adopt in order to adapt their legislation to the Convention.[104] The author emphasizes that, in these cases, the ECtHR was able to extend the scope of its orders because they were the result of a kind of dialogue between the Constitutional Court of Poland and the international court, which allowed for more specific measures.[105] However, in cases like *Burdov v. Rusia,*[106] in which a State that has traditionally been not very collaborative with the ECtHR was involved, the Court limited itself to requiring the State to implement national mechanisms for an effective judicial remedy to the plaintiffs, within six months.

[102] ECtHR, Kuric´ and Others v Slovenia. Application No 26828/06, Just Satisfaction, 12 March 2014, at para 134.
[103] ECtHR, Broniowski v Poland. Application No. 31443/96, 22 June 2004 & Hutten-Czapska v Poland. Application No. 35014/97, 19 June 2006.
[104] Wildhaber (n 86). P. 222.
[105] Ibid.
[106] ECtHR, Burdov v Russia (No 2). Application No. 33509/04, 15 January 2009.

However, even though the measures enforced upon Russia are not so specific, the truth is that they do imply that the State must modify its domestic legislation, which goes far beyond simply ordering economic reparations in favour of the plaintiffs. In this sense, although the decisions of the ECtHR have not reached the scope of those taken by the Inter-American Court, (forcing States to modify their Constitution or reopen criminal investigations, for example), the pilot - judgments had allowed the ECtHR to issue general orders to the States that certainly imply a significant degree of influence of the ECtHR in the internal functioning of States, making its case law a parameter for the interpretation of norms or the adoption of certain public policies.

Preliminary conclusions

The previous sections show that the ECtHR has maintained a 'tension' between the minimalist and the maximalist approaches, even when the former is the official one, in view of the adoption of the principle of subsidiarity as a fundamental pillar of the European system for the protection of human rights. Minimalism, on the one hand, has been expressed in the use of the doctrine of the margin of appreciation in favour of the Member States, through which the ECtHR gives them prevalence in the task of interpreting and applying the European Convention. Likewise, it implies that the ECtHR has usually refrained from establishing an explicit obligation for the national authorities to apply at the national level general standards or interpretations of the content of conventional rights, regardless of national differences.

On the other hand, the same ECtHR has established certain substantial limits to the principle of subsidiarity, as well as a body of jurisprudence that points more to a maximalist approach, in the sense that it has established general principles and obligatory interpretations of the Convention on States. Likewise, some procedures, such as pilot- judgements, have allowed the ECtHR to order States to modify their legal system and adjust some of their practices to the requirements of the European Convention. Although this approach has been more limited, it

does suggest that the effectiveness of the European Convention depends on the fact that, at least in certain cases, the ECtHR assumes a more active role and imposes its interpretation on what can be done by national authorities.

However, noting the existence of these two approaches, I have also tried to show that they lead to a similar result: both the application of the principle of subsidiarity and the maximalist features of European jurisprudence point to the need for States to directly apply the Convention European in its internal ordering. This direct application implies, on the one hand, that States provide effective judicial remedies to address violations of rights contained in the Convention, as well as that judges use ECtHR decisions as a parameter of interpretation to decide on such violations. On the other hand, under certain conditions, States must adapt their domestic legislation and practices to better reflect the content of the European Convention and the interpretation that the Court of Strasbourg has made of it, which also suggests that the direct application requires that the Convention should be placed in the top (or close to it) of the normative hierarchy.

These effects have important similarities with those that the IACtHR has contemplated for the American Convention through the conventionality control. In that sense, as was said in the first sections of this paper, the Inter-American Court also requires the States that their national authorities use the American Convention and their own judgments as parameters of interpretation. Likewise, the American States have the obligation to modify their domestic legislation or to interpret it in accordance with the American Convention. Furthermore, as the IACtHR has indicated with respect to its own judgments, the judicial activity of the ECtHR also serves to enable the States to adapt their domestic legislation and prevent future declarations of international responsibility against them.

It is true, however, that between these jurisdictions there is a difference of degree: while the approximation of the IACtHR has been decidedly maximalist, the ECtHR's approach has been "softer"; while the IACtHR has affirmed explicitly and categorically that Inter-American jurisprudence should be a parameter of interpretation in all the Member States of the Convention, the primacy of the ECtHR's jurisprudence has been affirmed through what the Jurisconsult call a "*de facto erga omnes* effect"[107] of its decisions within the space covered by the ECHR, which means that the interpretations made by the ECtHR are expected to be followed by the Member States' authorities in cases related to conventional rights, but without an explicit obligation within the Convention or the jurisprudence to do so.

Finally, it can be said that international tribunals have assumed these positions for reasons ranging from political and administrative convenience to the real commitment to achieve the effective guarantee of human rights in their respective continents. In effect, the doctrines presented here have allowed both the IACtHR and the ECtHR to alleviate their burden of pending cases and, to a certain extent, recharge their democratic credentials in the face of accusations that they are exceeding their powers. In the same way, they have allowed them to revitalize the obligation of the States to guarantee, internally, the conventional rights of their citizens through the actions of their national authorities. While these advances have been well received by many States Members of the Conventions, others have maintained a relationship that is more conflictive with the scope that international jurisprudence has developed. The last section of this work, therefore, will be dedicated to illustrating how some Member States of both systems have received these doctrines, with the objective of exemplifying some of the attitudes that States can adopt with respect to the perspective of conventional primacy within the national's orders.

[107] Note by the Jurisconsult, n. 64. Par. 26. In contrast, it can be argued that the effect that the IACtHR has granted its own jurisprudence could be deemed to be a "*de iure erga omnes* effect".

CHAPTER 3

The reception of the primacy doctrine in the Member States

So far, I have described how international courts have tried to frame their efforts to affirm the primacy of Conventions in domestic law as an expression of the principle of subsidiarity and sovereignty of States. In this regard, the IACtHR has emphasized that the conventionality control is a direct consequence of the pacta sunt servanda principle and of the obligation that the same States have decided to acquire with respect to guaranteeing the rights contained in the American Convention. The ECtHR, for its part, has made great efforts to show that the national enforcement of the European Convention is an application of the principle of subsidiarity and not a way to increase the influence of Strasbourg outside of its competence.

Although in some Member States these doctrines have been well received and have been used to improve national judicial remedies for human rights violations, in others the reception has not always been favourable, in view of their implications with respect to state sovereignty and to the internal politics of the States. Indeed, from the point of view of sovereignty, it is one thing to say that States have committed themselves to guarantee conventional rights and to comply with the judgments of international tribunals and another that States must adopt or modify their legislation (and even its Constitution) and its practices so that they are in accordance with the dictates of international organizations.

As will be seen in the examples to which I will refer below, seldom do States assume an all-or-nothing position with respect to the doctrines created by international tribunals. Except for the extreme case of Venezuela, which has decided to withdraw from the American Convention, the fact is that most of the Member States of the Conventions assume more or less complacent attitudes towards international supervisory mechanisms. Many times, for example, this relationship between the Cortes and the national authorities depends on the political

environment in the Member States and, to a large extent, how open the national legislation is to external influence.

To illustrate these situations, I will make a comparison between the way Colombia, Venezuela, Spain and Hungary have reacted to the advances of international jurisdiction. I have chosen these countries because they represent most of the attitudes that Member States of the Conventions can take before the doctrines that have been discussed throughout this work: both Colombia and Spain seem to be located in the sector of the spectrum in which are the countries most open to international influence. Hungary is at an intermediate point and Venezuela at the other extreme, having taken the necessary steps to withdraw from the American Convention.

To begin with, it must be said that all the Constitutions of these countries explicitly recognize some degree of primacy of international treaties on human rights in domestic law. There are certain differences in the details: the Colombian Constitution establishes that, in addition to primacy, the rights contained in the domestic legislation must also be interpreted in accordance with international treaties.[108] The one of Venezuela, on the other hand, indicates that the public powers will have to guarantee the rights and fundamental guarantees "in accordance with the Constitution, the human rights treaties signed and ratified by the Republic and any laws developing the same".[109]

In the case of Spain, the primacy is given by the mandate that the rules that develop the rights contained in the Constitution must be constructed in accordance with the Universal Declaration of Human Rights and the treaties ratified by the country.[110] Finally, the Hungarian Constitution explicitly states the obligation that domestic law should conform with international law, even

[108] Article 93. Constitution of the Republic of Colombia, 1991.
[109] Article 19. Constitution of the Bolivarian Republic of Venezuela, 1999.
[110] Article 11. Constitution of the Kingdom of Spain, 1978.

granting the Constitutional Court power to "examine any regulation for conflict with any international treaties".[111]

Of course, these articles have received different interpretations from the Constitutional Courts of those countries since, in general, they have the power to interpret the constitutional text. In that sense, the way these Courts have understood these articles has determined, to a large extent, the interaction between international and national law and the influence of the first on the second. Thus, the analysis that I will make next will focus on the constitutional jurisprudence of these countries, even though I may mention other areas of domestic law such as criminal justice, in which international tribunals have had special influence.

Colombia: an ambiguous constitutional primacy

In the case of Colombia, since the first years of the Constitution of 1991, the Constitutional Court has been inclined to vindicate the importance of the Inter-American Court of Human Rights, not only for continental public order but, especially, for the guarantee of human rights in the Andean country. Thus, for example, in Judgment T-447 of 1995, the Colombian Court indicated that the international mechanisms for the protection of human rights "represent an undoubted democratic advance" and that "they are a projection in the international field of the same principles and values [of human dignity, freedom and equality] defended by the Constitution".[112]

Note that the wording of this last fragment does not mention that the Constitution must conform to the dictates of international justice, but that the latter should be understood as a projection of the principles that were already in the constitutional text. This formulation has been maintained in subsequent years and its consequences, basically, can be summarized in two

[111] Articles Q and 24. Constitution of Hungary, 2011.
[112] Constitutional Court of the Republic of Colombia, Judgement T-447, 23 october of 1995. Cited in Carlos Ayala Corao, 'La Doctrina De La "Inejecución" De Las Sentencias Internacionales En La Jurisprudencia Constitucional De Venezuela (1999-2009)' 73. P. 87.

aspects: first, Article 93 of the Constitution has been interpreted in the sense that it refers to the so-called "block of constitutionality", according to which the the prevalence of human rights treaties must be understood to mean that they are *incorporated* into the Constitution once the respective ratification process has been completed and they have passed a judicial constitutional review.[113]

Second, when considering treaties as part of the Constitution, the direct consequence is that the primacy of international agreements is the same as that enjoyed by regular constitutional norms within the Colombian legal system. With this, the possibility suggested by the IACtHR in *The Last Temptation of Christ* is discarded, in the sense that the American Convention and Inter - American jurisprudence not have the potential to require the modification of the Colombian Constitution. It is true, however, that the 1991 Constitution does not contain norms that conflict with the Convention as the Chilean Constitution did, but it can be said that, for purposes of hierarchy, the American Convention does not have a supra - constitutional character in Colombia.

Of course, the positive consequence is that, when making part of the Constitution, human rights treaties should be used by national authorities as a parameter of interpretation of other norms and as rules for the solution of cases.[114] This position, however, has caused the Colombian Constitutional Court to have an ambiguous relationship with the doctrine of conventionality control and, in particular, about the role that the jurisprudence of the IACtHR must have in the internal order. In this regard, it is very useful to make a reference to the Judgement C-327 of 2016,[115] in which the Court had to perform the constitutionality control on Article 90 of the Civil Code, according to which "The legal existence of every person begins at birth, this is, by

[113] Mónica Arango Olaya, 'El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional colombiana' [2006] Precedente. Revista Jurídica 79 <http://www.icesi.edu.co/revistas/index.php/precedente/article/view/1406> accessed 26 March 2018. P 80.
[114] Ibid. Pp. 82 – 83.
[115] Constitutional Court of the Republic of Colombia, Judgement C – 327, 22 July of 2016.

separating completely from his mother". This article had previously served the Court as an argument, *inter alia*, to support the decriminalization of abortion in previous decisions, considering that embryos were not entitled to the same intensity of protection as it should be bestowed on those who were already legal persons.

Despite the fact that on a previous occasion the Constitutional Court had decided that said norm was in accordance with the Constitution,[116] the plaintiffs alleged that the Court had not conducted a conventionality control and, therefore, had not considered the possibility that the Civil Code's article contravened Article 4 of the American Convention on Human Rights, according to which the right to life must be protected from the conception. The Court had to face directly, then, the question about whether it was its function to carry out a conventionality control apart from that of constitutionality. To resolve this issue, the Court reiterated that the American Convention is mandatory in Colombia at the same level at the Constitution and reviewed its own jurisprudence regarding the status of international jurisprudence in national law.[117]

In its analysis, the Court found that it has moved between two poles: one in which it is considered that international jurisprudence is binding and another that understands that in Colombia, "there is no conventionality control".[118] However, the most widespread doctrine is an intermediate one, in which the international jurisprudence is deemed as a relevant interpretation criterion. In this sense, the bulk of the decisions that have been issued on the issue have determined that, although the IACtHR judgments contain the authentic interpretation of the American Convention, this interpretation "cannot be automatically transplanted into the Colombian system as an exercise of conventionality control that does not

[116] Constitutional Court of the Republic of Colombia, Judgement C-591, 07 December of 1995.
[117] Constitutional Court of the Republic of Colombia, n. 89. Par.
[118] For example, Constitutional Court of the Republic of Colombia, Judgement C-028 de 2006.

take into account the particularities of the internal legal order (...)",[119] which empowers the Constitutional Court to depart from the international interpretation if the case in hand demand it.[120]

In this regard, the Court explained that the case under study should be decided based on the interpretation given by the IACtHR to Article 4 of the American Convention in *Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*.[121] On that occasion, when analysing the conventionality of the prohibition of in vitro fertilization that had entered into force in Costa Rica, the international tribunal established that the Article 4 of the Convention could not be considered absolute, but should be read in accordance with the rights to private and family life and the right to freedom contained in Article 7 and 11 of the American Convention.[122] In view of that interpretation, the Colombian Court decided that the Civil Code rule did not contravene the American Convention and that, therefore, it could not be declared contrary to the National Constitution either.

The Judgement C-327 of 2016 is not only illustrative about the different attitudes that the Colombian Court has taken with respect to international jurisprudence, but it is an example of those tensions in itself. At the end of the day, as Justice María Calle Correa pointed out in her concurring opinion,[123] despite the fact that the ruling emphasizes that the Court did not perform a conventionality control, but simply used international jurisprudence as a criterion of interpretation among others, the truth is that the decision is based on an abstract analysis about the conformity of the national law with the international treaty and the interpretation that the IACtHR has made of it. In other words, the Court seems to have made a conventionality control

[119] Constitutional Court of the Republic of Colombia, Judgement C-442 de 2011, cited in Judgement C – 327 of 2016, par. 24.
[120] Ibid.
[121] IACtHR, Case of Artavia Murillo and others ("in Vitro fecundation") vs. Costa Rica. Judgement of 28 November of 2012, (Preliminary objections, merits and reparations).
[122] Ibid. Par. 110 – 112.
[123] Justice María Victoria Calle Correa, Concurrent Opinion to the Judgement C – 327 of 2016.

under the argument that it was using the jurisprudence of the IACtHR only as a criterion. This leads the Justice Correa to conclude that not only the conventionality control exists in Colombia, but that the Constitutional Court performs it routinely.[124]

This reluctance of the Colombian authorities (not only the Constitutional Court) to carry out an explicit conventionality control has had consequences in the international arena. To illustrate this, it is worth mentioning the example brought by Professor Oswaldo Ruiz Chiriboga related to the standards that the IACtHR has established on military jurisdiction:

> In 1997 the IACtHR adopted two decisions against Peru, because the applicants (civilians) had been tried before military tribunals. The Court considered that in doing so Peru violated the victims' rights to be heard by a competent, independent, an impartial tribunal pursuant to Article 8(1) [of the American Convention]. Later on, Peru was sanctioned by the Court five more times for the same reasons. The Court also ruled that military officers shall not be brought before military tribunals if they are accused of human rights violations.
>
> Colombia, Chile, and Mexico, instead of amending their similar legal provisions or carrying out a conventionality control, applied those provisions in criminal procedures before their national courts. The three Member States were later sanctioned by the IACtHR.[125]

However, the truth is that the Colombian approach to international jurisprudence has been done in friendly terms, there being an explicit commitment on the part of the Constitutional Court to incorporate in its judgments the interpretative criteria of the IACtHR and to make effective the principles contained in the American Convention. Likewise, in terms of compliance with the

[124] Ibid.

[125] Oswaldo Ruiz-Chiriboga, 'The Conventionality Control: Examples of (Un) Successful Experiences in Latin America' (2010) 3 Inter-Am. & Eur. Hum. Rts. J. 200. P. 213. The two first decisions against Perú are "IACtHR (Judgment) 17 September 1997, Loayza-Tamayo v. Peru; IACtHR (Judgment) 3 November 1997, Castillo-Pdez v. Peru". The next five cases against Perú were "IACtHR (Judgment) 30 May 1999, Castillo-Petruzzi et al. v. Peru; IACtHR (Judgment) 29 Septmeber 1999, Cesti-Hurtado v. Peru; IACtHR (Judgment) 16 August 2000, Durand and Ugarte v. Peru; IACtHR (judgment) 18 August 2000, Cantoral-Benavides v. Peru; IACtHR (Judgment) 25 November 2004, Lori Berenson-Mejía v. Peru". The cases against Colombia, Chile and Mexico are: "In relation to Colombia: IACtHR (Judgment) 5 July 2004, The 19 Tradesmen v. Colombia; IACtHR (Judgment) 15 September 2005, Mapiripdn Massacre v. Colombia. In relation to Chile: IACtHR (Judgment) 22 November 2005, Palamara-Iribarnev. Chile; IACtHR (Judgment) 26 September 2006, Almonacid-Arellano et al. v. Chile. In relation to Mexico: IACtHR (Judgment) 23 November 2009, Radilla-Pacheco v. Mexico; IACtHR (Judgment) 26 November 2010, Cabrera-Garcia and Montiel-Flores v. Mexico". All of them cited in Ruiz-Chiriboga. Footnotes No. 59-61.

rulings, the Andean country has normally provided the individual reparation measures ordered by the IACtHR and has reopened the judicial processes in cases in which the international court has demanded it.[126] In that sense, the position assumed by Colombia in the Americas is similar to that adopted by the Kingdom of Spain within the Council of Europe. As will be seen, the Spanish doctrine and jurisprudence have also struggled with the position of the European Convention and the ECtHR's jurisprudence within the domestic legal order of the State given conflictive interpretations of the relevant constitutional provisions.

Spain: a model of good relations.

As is the case with Colombia, the Article 96.1 of the Spanish Constitution also establishes that international treaties will be considered mandatory for the country once the ratification process has been completed and have been published in the Official Gazette. In general, the standard interpretation of this article indicates that international human rights treaties do not enjoy a supra-constitutional status but are located above domestic legislation and below the Constitution. As pointed out by Gómez Fernandez,[127] the "infra-constitutionality" of the treaties is derived from the provision contained in Article 95.1, according to which "The conclusion of an international treaty that contains stipulations contrary to the Constitution will require prior constitutional review." However, the wording of this Article has also served to support the opposite: given that the Constitution does not prohibit the celebration of treaties containing provisions contrary to it, it could be said that the treaties have primacy over the Constitution in that they can force its reform.[128]

[126] For example, as a consequence of the IACtHR ruling in Rodríguez Vera and Others (Desaparecidos del Palacio de Justicia) V Colombia, Judgment of November 14, 2014 (Preliminary Objections, Merits, Reparations and Costs), the Office of the Attorney General had to reopen investigations already closed with the objective of determining the fate of persons who were forcibly disappeared during the guerrilla takeover of the building of the Supreme Court of the country, in 1985. Since the judgment of the IACtHR and the consequent reopening of proceedings, it has been possible to establish the whereabouts of the remains of some of these persons.

[127] Itzíar Gómez Fernández, *Conflicto y cooperación entre la Constitución Española y el derecho internacional* (Tirant lo Blanch 2005).

[128] Ibid. P. 101 – 118. Even so, as Martinico points out, the Spanish Court itself has considered that international treaties do not have constitutional status at least in the Judgment 30/1991. Cited in G Martinico, 'Is the European

In any case, human rights treaties do serve as the main criterion for the interpretation of constitutional rights, in accordance with the provisions of Article 10.2 of the Constitution, which states that the "The rules relating to fundamental rights and freedoms that the Constitution recognizes will be interpreted in accordance with the Universal Declaration of Human Rights and international treaties and agreements on the same matters ratified by Spain". Based on this norm, the European Convention has become a standard of interpretation of the Spanish Constitution even though the Constitutional Court of Spain, in a position similar to that assumed by the Colombian Court, has resisted asserting that international treaties cannot be autonomous parameters to decide on the validity of national standards;[129] in other words, the Spanish Court has not been prone to exercise a conventionality control.

However, as quantitative studies have shown with respect to Spanish constitutional jurisprudence, the Constitutional Court makes constant references to ECtHR jurisprudence as a criterion of interpretation as well as the provisions contained in the European Convention.[130] In this sense, although the question of whether ECtHR jurisprudence is mandatory is still the subject of debate, the repeated and unquestioned use of the European jurisprudence by the Spanish Constitutional Court allows to assert that it should be used by all the Spanish courts.[131] For Aída Torres Pérez, the main reason that the Constitutional Court has had to follow ECtHR jurisprudence has been the need to avoid future violations and declarations of international responsibility against Spain,[132] to the point that, in at least one case, the Court has indicated

Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 European Journal of International Law 401 <https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chs027> accessed 23 February 2018.

[129] See Constitutional Court of the Kingdom of Spain, Judgements 120/1990, Legal Basis (LB)3; 137/1990, LB 3; 214/1991, LB 1; 77/1995, LB 2; 51/1996, LB 1. Cited in Aída Torres Pérez, *Report on Spain*, in Giuseppe Martinico and Oreste Pollicino, *The national judicial treatment of the ECHR and EU laws: a comparative constitutional perspective* (Europa Law Publishing 2010). P. 461.

[130] Alejandro Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos: el artículo 10.2 de la Constitución Española* (Consejo General del Poder Judicial 1999). Pp. 156 – 169.

[131] Ibid.

[132] Aída Torres Pérez, n. 102. P. 461.

that this jurisprudence is not only a criteria of interpretation, but has direct application in the Spanish legal system.[133]

There is, however, a problem at the level of implementation of ECtHR rulings, given that there is no law to reopen or correct procedures that violated the European Convention. Although, exceptionally, some people have turned to the constitutional complaint for the Constitutional Court to order the reopening of proceedings based on ECtHR judgments,[134] this continues to be a problem to the point that government agencies have recommended the creation of a new judicial mechanism that allow the review of proceedings.[135] On the other hand, the rulings of the ECtHR have led to legislative changes in the Spanish legal system, such as the amendment to the Law of Civil Procedure that occurred on the occasion of the decision against Spain in the case of *Pérez de Rada Cavanilles v. Spain*,[136] for violation of Article 6 of the Convention (right to access to justice).

Despite the absence of a specific mechanism for the reopening of procedures that have been declared in violation of the European Convention in Strasbourg, the fact is that Spain has maintained a favorable attitude towards the application of the Convention in its internal order, as well as the principles set by the ECtHR in its jurisprudence. This is highlighted by Ripol Carulla, considering that it is symptomatic of the good relations between Spain and the continental system of protection that the Committee of Ministers of the CoE has accepted all

[133] Constitutional Court of the Kingdom of Spain, Judgement 303/1993, LB 8.
[134] For example, Constitutional Court of the Kingdom of Spain, Judgement 245/1991 issued after the decision by the ECtHR in Barberá, Messegué y Jarbado v. Spain, 14 april, 1990.
[135] *Report of the Council of State on the Incorporation of European Law within the Spanish Legal System*, 14 February 2008, p. 316 – 318.
[136] ECtHR, Case of Pérez de Rada Cavanilles v. Spain, Application No. 28090/95, 28 October 1998. Cited in Aída Torres Pérez (n. 102), p. 466. Another example is the case of *Union Alimentaria Sanders S.A.* (Application No. 11681/85), in which Spain was convicted for not having resolved a judicial claim within a "reasonable period of time" and, thereby, having incurred in violation of Article 6.1 of the European Convention. As Ripol Carulla points out, this ruling was the "material cause" for the adoption of the Demarcation and Judicial Plan Act of 1988, which involved the reorganization of the Spanish Judicial Branch. Santiago Ripol Carulla, *El sistema europeo de protección de los derechos humanos y el derecho español la incidencia de las sentencias del Tribunal Europeo de Derechos Humanos en el ordenamiento jurídico español* (Atelier 2007). P. 119.

the reports that the country has submitted regarding compliance with the judgments of the ECtHR.[137] For these reasons, the author suggests that Spain is a good example of how it is possible to build a cooperation between the ECtHR and the national courts, despite the fact that the Law derived from the European Convention does not imply a degree of integration as profound as that of, for example, the Law of the European Union.[138]

Hungary: the primacy at risk

Hungary, on its part, has the more recent Constitution of all the four countries (2011). In general, it has been understood that the 2011 Constitution did not modify the status that the Convention already had before the reform; that is, subordinated to the Fundamental Law, but superior to all other legislation.[139] However, some of its provisions had arisen some questions about whether they meet the standards of the European Convention. Thus, for example, in an analysis carried out shortly after the promulgation of the new Fundamental Law, James McBride argued that the apparent supremacy of treaties in the domestic order, suggested by the aforementioned Article Q, was being challenged by other constitutional norms that seem openly contrary to the principles established in Strasbourg.[140] As McBride points out, the risk of these provisions depends, to a large extent, on the interpretation that the judicial bodies make

[137] Ripol Carulla (n 124). P. 137.
[138] Ibid. P. 185 – 189.
[139] Eszter Polgari, 'The Hungarian Constitutional Court's Case with the ECHR: An Ambivalent Relationship' 3 <https://verfassungsblog.de/the-hungarian-constitutional-courts-case-with-the-echr-an-ambivalent-relationship/>, 22 June 2016. About the status of the European Convention in Hungarian Law before the 2011 reform, see Pal Sonevend, `Report on Hungary` in Martinico and Pollicino (n 126). This status can also be interpreted as mandating that the Constitution should also be interpreted in accordance to international treaties. In this regard, see Chapter on Hungary by Nóra Chronowski, Tímea Drinóczi, and Ildikó Ernszt in Dinah Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion (Oxford Univ Press 2011).
[140] Among them, for example, the indication that the Hungarian Constitution, in its National Avowal, does not recognize a statute of limitations "for inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorship", the fact that the prohibition of discrimination contained in Article XV (2) does not include sexual orientation as one of the prohibited grounds and the institution of life imprisonment without parole, without any kind of mitigation regarding the seriousness of the offense or the circumstances of the offender. In Jeremy McBride, 'Trees in the Wood: The Fundamental Law and the European Court of Human Rights', *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012) <http://www.jstor.org/stable/10.7829/j.ctt2tt27x.18>.

of them, given that their wording allows for readings that may favour to a greater or lesser degree the compliance with the European Convention.

That is why it is important to analyse the relationship that the Hungarian Constitutional Court has had with ECtHR jurisprudence and the degree of influence that is guaranteed to the latter in Hungarian constitutional rulings. In this regard, it can be said that this relationship has been "ambiguous", as described by Eszter Polgari[141]: for several years since Hungary ratified the Convention, the Constitutional Court referred to the Strasbourg jurisprudence in a consistent manner, although without recognizing special status and without giving it a considerable effect. Only until 2011, when the legislature began to use its powers to "discipline" the Court and erode constitutional guarantees, the Court initiated a "substantial reinterpretation of the role of international law in constitutional adjudication".[142] Consequently, "from 2011 onwards justices increasingly turned towards standards and safeguards outside of Hungary, and the relevance of the ECtHR's case-law references".[143]

Thus, in Decision No. 61/2011, regarding possible review of constitutional amendments, the Constitutional Court indicated that "(I)n case of certain fundamental rights the Constitution formulates the core content of the right in the same way as an international treaty (like the International Covenant on Civil and Political Rights or the European Convention on Human Rights). In these cases the level of protection offered by the [CCt] may not be lower than the level of protection guaranteed internationally (particularly as elaborated by the [ECtHR])."[144] The Court went further and clarified that "in line with the principle of *pacta sunt servanda* the jurisprudence of the ECtHR has to be followed even if it contradicts the prior case-law of the

[141] Eszter Polgari (n 136).
[142] Ibid.
[143] Ibid.
[144] Constitutional Court of Hungary, Decision No. 61/2011. Cited in Eszter Polgari (n 136).

Constitutional Court",[145] explicitly establishing that all Hungarian authorities should comply with the standards set by the ECtHR.

This means that the European jurisprudence shall enjoy, at least, "interpretive priority even in abstract review or constitutional complaint procedures where the petitioner (mainly due to lack of standing) fails to claim conflict with international treaties".[146] The conclusion of Polgari is that, even if this rule is still in force, the case - law of the Constitutional Court shows that its application has varied depending on the composition of the Court, so that while some judges adopt interpretations with explicit and strong connections with European jurisprudence, others are more critical of it.[147] In any case, even if the degree of acceptance of the criteria established in Strasbourg depends on the composition of the Hungarian Court, it could be thought that the case of Hungary is not so different from that of Colombia or Spain, in the sense that its constitutional jurisdiction has been respectful (in general terms) of the interpretations developed by the international tribunal.

The reality, however, is that the Hungarian case is different because of the political circumstances in which its institutional life has developed since the adoption of the new Fundamental Law and which have had consequences in its relations with international organizations. As several experts have pointed out,[148] the adoption of the new Constitution meant a crucial moment in the consolidation of a political program that has undermined the rule of law, constitutionalism and democratic guarantees, in a development that has been

[145] Ibid.
[146] Eszter Polgari (n 136).
[147] Ibid.
[148] See, for example, R Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 International Journal of Constitutional Law 279 <https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mov012> accessed 1 April 2018; the Chapter on Hungary by Nóra Chronowski, Tímea Drinóczi, and Ildikó Ernszt in Dinah Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion (Oxford Univ Press 2011) and Nóra Chronowski and Márton Varju, 'Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law' (2016) 8 Hague Journal on the Rule of Law 271 <http://link.springer.com/10.1007/s40803-016-0037-7> accessed 1 April 2018.

denominated as the passage from a "rule of law" to a form of "rule by law".[149] As described by Chronowski and Varju, to understand this idea it must be taken into account that, in the legal environment pre-2010, the principle regarded as the fundamental construction of the Hungarian legal system was that 'the rule of law cannot be achieved against the rule of law'.[150]

After 2010, however, this principle has been increasingly relegated, as the Government and the parliamentary majority have modified the Constitution and the law to achieve an ad hoc legal regime for their own political platform. In addition to the adoption of controversial constitutional norms in the original version of the Basic Law, such as those indicated by McBride, a recurring practice has been to modify the Fundamental Law to circumvent judicial control and introduce measures that had previously been declared unconstitutional by the Constitutional Court. The result has been the expansion of the Government's power (supported by the parliamentary majority) and the reduction of the incidence capacity of the Constitutional Court, to the detriment of the rule of law and the guarantees of contemporary constitutionalism.[151]

Given these circumstance, the importance of Hungary for the purposes of the task at hand, is that its current situation demonstrates a different attitude, a more hostile one, which can be assumed with respect to the primacy of the Regional Human Rights Conventions. Indeed, even though this primacy is recognized in the Constitution and in the jurisprudence of the Constitutional Court, the Hungarian context allows us to observe what happens when this status is put into question by other branches of power. In this regard, although the Hungarian Government has not shown the same level of combativity with respect to the ECtHR as against the decisions of the European Union's bodies,[152] the rulings that the Strasbourg court has issued

[149] Chronowski and Varju (n 145).
[150] Constitutional Court of Hungary, Decision 11/1992. Cited in Chronowski and Varju (n 145). P. 273.
[151] Chronowski and Varju (n 145); Uitz (n 145).
[152] 'Visegrád Four Slam "blackmail" by Brussels on Migrants' <https://www.euractiv.com/section/justice-home-affairs/news/visegrad-four-slam-blackmail-by-brussels-on-migrants/> accessed 2 April 2018.

with regard to the rights of the migrants against Hungary have caused the Hungarian Prime Minister to pronounce himself publicly in favour of the reform of the ECtHR, on the grounds that its judgments are a "threat to the security of EU people and invitation for migrants".[153]

Although it is unlikely that Hungary will withdraw from the Council of Europe given the political and economic consequences this would cause, the fact is that there is a clear risk that, at least in the domestic order, the Hungarian government will increasingly deviate from international standards.[154] This risk is increased by the possibility of a Constitutional Court composed of judges under the influence of the majority party, with which the doctrine of primacy of the European Convention can loose its force as a criterion of interpretation in judicial decisions. This would only deepen the already fragile rule of law in the country, given that the primacy of the Convention can serve as a way of affirming democratic principles against the authoritarian impulse of the party that holds power.

Venezuela: the return of the constitutional supremacy

As I will now argue, the political and legal situation in Hungary brings this country closer to a position like that of Venezuela than to Colombia or Spain. In this regard, we must begin by noting that Article 23 of the Venezuelan Constitution of 1999 establishes the role of international treaties on human rights, indicating that they will enjoy a status comparable to constitutional norms and will prevail internally, provided that they contain provisions more favourable than those existing in Venezuelan law. Likewise, it indicates that these treaties will have "immediate and direct application by the courts and other organs of the Public Power."

[153]Sarantis Michalopoulos, 'Orban Attacks the European Court of Human Rights' <https://www.euractiv.com/section/global-europe/news/orban-attacks-the-european-court-of-human-rights-at-epp-congress/> accessed 2 April 2018.

[154] This does not mean that these changes in domestic legislation do not have the potential to provoke adverse reactions in the international arena. In fact, as evidenced by the multiple comments that the Venice Commission made regarding the new Fundamental Law, the CoE bodies are preoccupied with what is happening in Hungary. However, what I intend to point out is that the dismantling of the rule of law is occurring through the gradual modification of domestic laws, so that it will take time before the International Community finds a situation that merits a more determined international intervention.

Furthermore, in contrast to the other constitutions analysed, Venezuela makes express reference to the right to access to effective international judicial complaint in its Article 31:

> Everyone has the right, on the terms established by the human rights treaties, pacts and conventions ratified by the Republic, to address petitions and complaints to the intentional organs created for such purpose, in order to ask for protection of his or her human rights.
>
> The State shall adopt, in accordance with the procedures established under this Constitution and by the law, such measures as may be necessary to enforce the decisions emanating from international organs as provided for under this article.

These norms show that treaties such as the American Convention should be part, at least, of the block of constitutionality in Venezuela, in a sense analogous to what happens in Colombia. As Carlos Ayala points out, this conception is not new within the Inter - American context, but it is also progressive, in the sense that it elevated the possibility of people to go to international organizations to protect their rights at a constitutional level. Likewise, it made explicit the obligation of the national authorities to comply with the judgments of the international courts.[155] In this regard, despite the fact that most States consider that this is a logical consequence of the general obligation to comply with treaties, the Venezuelan Constitution makes progress in linking such compliance with the guarantee of fundamental rights.

The jurisprudential reality, however, has shown to contradict this interpretation of the constitutional articles, since the Constitutional Chamber of the Supreme Court of Venezuela, (in charge of the control of constitutionality), has created different doctrines to hinder the national application of the Inter - American standards. This trend, which had its origin in Ruling 386 of 2000 (one year after the new Constitution was enacted), has resulted in the exercise of a constitutionality review over the judgements of the IACtHR that has denaturing the purpose of the international system and has allowed the Venezuelan State to defy the dictates of the

[155] Carlos Ayala Corao, `La Doctrina De La "Inejecución" De Las Sentencias Internacionales En La Jurisprudencia Constitucional De Venezuela *(1999-2009)*` (Fundación Manuel García Pelayo 2010) <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2895/7.pdf>.

international tribunal. As a paradigmatic example, Ayala refers to the Ruling 1,942 de 2003 that "clearly established that rulings issued by international courts, with special reference to the IACtHR, must comply to the Constitution, so those that infringe it or that are dictated without exhausting the internal proceedings in Venezuela, "cannot be applied in the country"".[156]

In these rulings, the Constitutional Chamber has taken to the extreme the doctrine of constitutional supremacy, assuming an autochthonous interpretation (and contrary to that assumed by the IACtHR) of Article 2 of the American Convention, understanding that the mandate for States to apply the conventional law means that international standards should be adapted to the domestic legal system and not the other way around. In this regard, the Constitutional Chamber ruled out the possibility of becoming a conventionality judge and, on the contrary, declared that it did not recognize any other judicial body as superior to the Supreme Court of Venezuela.[157] Hence, subsequently, the Chamber created the need for the judgments of international courts to have an *exequator* proceeding, before they can be applied in domestic law.[158]

The conflict between the Venezuelan Supreme Court and the IACtHR reached a peak with the decision No. 1.939 of December 18, 2008, through which the Constitutional Chamber declared as "non-enforceable" the Judgment that the IACtHR had issued in the case of *Apitz Barbera and others ("First Court of Contentious Administrative") vs. Venezuela*.[159] In the latter case, the Inter-American Court had declared that the dismissal of the judges of the First Court of the Contentious Administrative Court of Venezuela had been carried out in violation of the judicial guarantees and the due process established in the American Convention, for which reason it

[156] Ibid. P. 99.
[157] Constitutional Chamber of the Supreme Court of Venezuela, Ruling No. 1.942 of 2003.
[158] Ibid. cited in Ayala Corao (n 152). P. 105.
[159] IACtHR, Case of Apitz Barbera and others ("First Administrative Contentious Court") vs. Venezuela. Judgment of August 5, 2008. (Preliminary objection, Merits, Reparations and Costs).

ordered his reinstatement and the payment of indemnities. Not only the Constitutional Chamber decided that this sentence contradicted the Venezuelan constitutional order, but it even requested the Executive Branch of Venezuela to proceed to denounce the American Convention on Human Rights, arguing that its jurisdictional organ (that is, the IACtHR) had usurped the powers of the Supreme Court.[160]

As the cited authors have pointed out, these decisions may be due to a tendency towards the systematic erosion of constitutional and democratic guarantees in Venezuela. In that sense, it is symptomatic that judgment No. 1939 had its origin in an "action of constitutional control" promoted by the Executive before the Supreme Court, which proceed with it despite the fact that such action was not existent in the Venezuelan legal system at that moment. The resulting judgement, clearly favourable to the interests of the Venezuelan Executive, would serve years later (2012) as one of the arguments presented by the Government of Venezuela to announce its willingness to withdraw from the American Convention on Human Rights, arguing, furthermore, that the Inter-American system is politically co-opted by interests contrary to those of the Venezuelan Government and, therefore, has taken decisions in excess of its powers in order to harm that State.[161]

The denunciation of the American Convention by Venezuela can be interpreted, too, as a sample of the risks to which international courts are exposed when pushing for a doctrine of primacy of the Conventions in the internal order. Thus, although the Venezuelan case is

[160] Constitutional Chamber of the Supreme Court of Venezuela, Ruling No. 1.939 of 2008, Cited in Ayala CORAO (n 152); Allan R Brewer-Carías, 'El Juez Constitutional Vs. La Justicia Internacional en Materia de Derechos Humanos.' [2009] Revista de Derecho Público 9 <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,%204,%20607,%20Juez%20Constitutional%20vs.%20Justicia%20INTERNACIONAL%20DDHH.%20RDP%20116.doc.pdf>.

[161] Bolivarian Republic of Venezuela, "Letter Sent by The Bolivarian Republic Of Venezuela To The Organization Of American States (OAS) To Make Official The Country's Withdrawal From The Inter-American Human Rights Court" and "Grounds Sustaining The Denunciation By The Bolivarian Republic Of Venezuela Of The American Convention On Human Rights Filed Before The OAS General Secretariat" (2012) In http://www.minci.gob.ve/wp-content/uploads/downloads/2013/09/DISCURSO-CIDH-20-9-13-web.pdf

extreme, the truth is that it is not far from the Hungarian situation, in which a State hostile to international intervention can easily use the most maximalist doctrines against the international tribunals themselves, accusing them of usurping the competences of the Member States.

Does this mean that the International Courts should abandon what I have called "the maximalist approaches" and opt for a more deferential attitude towards state sovereignty? Although this is not an issue that can be easily resolved, the benefits that these courts have brought in their respective regions for the advancement of a public order respectful of human rights seem to suggest that, despite the shortcomings and possible excesses of the systems, it is preferable to bet on the primacy of the Human Rights Conventions and the jurisprudence of these jurisdictional bodies. After all, not doing so could have worse consequences.

CONCLUSIONS

First, conventionality control implies an obligation on the Member States of the American Convention to verify that their domestic legislation (including constitutional norms) and the actions of their public authorities conform to the standards set by the Convention and by the IACtHR. According to the development that this concept has had in the Inter-American jurisprudence, the non-conformity between some national norms and the Convention, implies the invalidity of the first.

Thus, the conventionality control, by its nature, implies that States have the duty to put the American Convention at the top of the national normative hierarchy, since otherwise it could not be justified that national laws and constitutions must derive their formal and substantial validity of Inter-American standards. The expansive nature of Inter-American standards and the IACtHR's insistence on creating common principles for the región, make it possible to affirm that the Court has assumed a maximalist approach in its jurisdictional exercise.

Second, ECtHR jurisprudence, for its part, has made use of two approaches: a minimalist and a maximalist one. The first approach is based on the principle of subsidiarity, through which national authorities are the first called to apply the European Convention in their respective jurisdictions. Through the analysis of how the ECtHR and the specialized literature have interpreted the principle, I have come to the conclusion that this should not be understood as an authorization for States to interpret and apply the Convention in a discretionary manner but should do so following the guidelines set by the ECtHR.

On the other hand, even accepting that the principle of subsidiarity implies a greater deference towards the States in terms of interpretation and application of the Convention, certain jurisprudential developments allow us to affirm that the ECtHR has also developed a maximalist tendency within its jurisprudence. This trend, of a more expansive nature, can be exemplified by the substantial limits to the principle of subsidiarity, the idea of the Convention as an instrument of European public order and the competence of the Court of Strasbourg to issue pilot - judgements that can exercise a high degree of influence on national policies.

Based on the foregoing, I can conclude that there is important evidence that the ECtHR has also developed its jurisprudence towards an obligation of the national authorities of the Member States to verify whether their domestic legislation is in accordance with the Convention, in a doctrine that could resemble a European conventionality control. Thus, given that the European developments present important similarities with the Inter - American ones, it is possible to conclude that there is indeed a tendency within the European jurisprudence towards the affirmation of the primacy of the European Convention of Human Rights in the legal system of the Member states.

Third, in view of the developments of international jurisprudence, the Member States of the respective Conventions have adopted a range of attitudes as a reaction to the influence of

international law on internal orders. Through the analysis of the attitudes adopted by the Constitutional Courts of Colombia, Spain, Hungary and Venezuela, I have exemplified four of these attitudes. The Colombian case made it possible to show what happens when an American Court refuses to accept its role as judge of conventionality but, at the same time, ends up practicing as such in its eagerness to apply the most favourable standards in terms of human rights. The reference to Colombia showed, then, a situation in which the dialogue between national and international jurisdiction has been more prolific than the national authorities explicitly admit.

For its part, with the Spanish case, I have exemplified those States that, although they do not accept the supra-constitutionality of the Conventions, openly recognize the binding nature of the jurisprudence emanating from the international jurisdictional bodies. Thus, the Spanish Constitutional Court has granted binding status to the ECtHR rulings and constantly resorts to these as a criterion of authority or as a reason for its decisions. Thus, although there are certain difficulties in the implementation of the reparation measures and in the procedures to adapt domestic legislation to the standards established by the ECtHR, the Spanish case shows that it is possible to have a judicial system willing to reconcile the national legislation with international standards.

On the other hand, I have used Hungary as a sample of what can happen with respect to the relationship between a State and the International Courts when there is a government willing to erode democratic and constitutional guarantees. Hungary is, at the time of writing, the example of a country in tension, while formally recognizing the primacy of international standards, but, at the same time, advancing a reform process that contradict the established standards by the court of Strasbourg. In that sense, it remains to be seen what the consequences will be (at the national and international levels) of eroding the primacy of the Convention internally.

Finally, with Venezuela I wanted to show that the insistence of the international courts to expand their radius of action, even if it is a well-intentioned strategy, can lead some Member States to feel so attacked in their sovereignty, that they definitively break with the international system of protection of human rights. This constitutes a loss, both for the international community, and for those within the jurisdiction of the State that has decided to withdraw from the system. This people will suffer both the loss of the possibility to complaint before an international tribunal but, also, the consequences of their national authorities being free from the obligation to apply international standards that, many times, are more progressive than the national ones.

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