THE DOCTRINE OF CONVENTIONALITY CONTROL

Between Uniformity and Legal Pluralism in the Inter-American Human Rights System

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Cambridge – Antwerp – Portland

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Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

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ISBN 978-1-78068-627-1
D/2018/7849/30
NUR 828

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Peer Reviewed
Content

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

FOREWORD

One of the greatest and most persistent challenges of constructing a global system for the protection of human rights has always been how to bring international norms into a sustainable, healthy relationship with domestic constitutional systems.

It is self-evident that without strong domestic law and institutions, no global system of human rights protection could even aspire to be effective. Just as human rights pervasively get undermined and violated at local levels, so it is that they need to be protected and brought to life "in the small places, close to home," as Eleanor Roosevelt noted. And it is equally clear that international norms and institutions by themselves, cannot simply substitute for and displace the structures and institutions and habits of local communities in the protection of human rights. Distant, limited in scope and capacity, and detached from the social contexts in which the rule of law and the protection of human rights must take root if they are to be made real, international norms and institutions alone, cannot be the guarantors of human dignity everywhere and for everyone.

Yet, since the mid-twentieth century the nations of the world and their citizens have not been content to leave the demands of human dignity to the uncertain and inconsistent vagaries of domestic authorities. Rather, we have dedicated ourselves to drawing up universal norms of human rights, translating them into positive law backed by institutions, and struggling to establish adherence to and respect for them. The experience of human wrongs, of the most egregious violations of human rights, has taught us all too clearly that local communities, even under the most favorable conditions of the constitutional rule of law, always bear within them temptations to tyranny and abuse. For their own viability and strength, they need the accountability and the constraints that can come from recognized universal standards of human rights.

This inescapable tension has played itself out over the last seven decades in the drafting of treaties and the creation of international courts no less than in the halls of constitutional assemblies and the jurisprudence of high courts around the world. It is necessarily a tension that is permanent and structural to the global protection of human rights. It is constantly open to revision and renegotiation, as dynamic as the shifting sands of law, politics and culture. In each era we need to judge anew the conditions of the proper relationships between the transnational and domestic dimensions of human rights protection.

So it has been in the Inter-American human rights system. As the hemisphere has evolved from its high-water mark of criminal regimes, which used massive

and systematic violations of human rights as intentional instruments of policy, to a predominance of constitutional democratic regimes (however endemically weak they may be in terms of political institutions and social inclusion, in many cases), so have the role of and the needs for the supranational human rights institutions changed with respect to domestic constitutional systems. We have witnessed the work of the Inter-American Commission and Court of Human Rights evolve from a primary concern for gross and systematic violations of non-derogable rights and *jus cogens* norms to more complicated and debatable questions of the balancing of multiple constitutional rights and liberties in the give-and-take of pluralistic democratic politics. We should not expect that the respective roles of international courts and domestic courts, and the interrelationship between them, could or should remain static under those conditions of epochal change.

This is the context in which the Inter-American Court's judicially-created doctrine of "conventionality control" must be situated. Originating in the Court's efforts to bring about a greater accountability for gross and systematic human rights violations at the end of an era dominated by dictatorships (as ably demonstrated by Pablo González-Domínguez here), it is now being debated and defined in relation to the proper responsibilities and prerogatives of constitutional courts in democratic polities. How it will evolve from here involves, on the one hand, nothing less than the core institutional legitimacy and effectiveness of international tribunals, and on the other hand, the political integrity of self-governing democracies.

To its most fervent proponents, conventionality control is an obvious and unproblematic logical aspect of the international protection of human rights. Obligations assumed by States oblige all of the separate powers of the States, and domestic law has never and should never excuse noncompliance with international obligations. Human rights as "universal" norms ought to have priority over other conflicting law. And judicial supremacy, extended into the international sphere, is as necessary to the interpretation and protection of human rights as adjudication is to the rule of law in any other context.

To its detractors, instead, conventionality control is an arrogant and brazen power grab by an Inter-American Court bent on "constitutionalizing" the Inter-American system by arrogating to itself the same sort of supremacy and direct control of domestic judiciaries that the European Court of Justice used to constitutionalize the European Union. It lacks any grounding in the text or intent of the American Convention on Human Rights, and it is fundamentally antidemocratic in its orientation.

The Inter-American Court cannot, on its own, mediate between those poles. Its jurisprudence on conventionality control, as we can see in this book, is shifting and not entirely consistent or clear. More fundamentally, the complex relationship between domestic and international juridical orders that

conventionality control aims to capture and shape is precisely that: a *relationship*. No attempt to impose it in a one-sided way, without dialogue and exchange, conflict and compromise, among the relevant institutional actors, could work.

Without sustained dialogue that is supported by rigorous, balanced reflection and analysis, the uncertain experiment that conventionality control represents will fail. We must acknowledge honestly that conventionality control is not just an obvious and uncontroversial application of existing principles. It is, indeed, a new and bold way of approaching the entrenched challenge of relating domestic and international legal orders, a way that offers both peril and promise. Dictated from above, or substantively collapsing into a crude assertion of international judicial control and supremacy over constitutional systems, it would only be likely to backfire and provoke a justified but destructive resistance to the entire regional enterprise. But pursued with a sophisticated and intelligent sensitivity to the respective virtues and limitations of democratic self-governance, constitutionalism, and universal norms, it has the potential to serve as a source of integrative strength for human rights in the Western Hemisphere and beyond. Its promise, present in potential but still far from being realized, is to contribute an important building block to the emergence of an authentically global *Jus Commune* of human rights that our fragmented world sorely needs. Whether it is capable of realizing that potential, remains to be seen in the evolution of the theory and practice of the doctrine, in courts (international and domestic), in political life, and in scholarly reflection.

So it is essential to approach it with care – that is, with both openness and critical realism, and without polemic – as this book seeks to do. The threshold difficulty in forming an adequate judgment about conventionality control is to take a non-reductive approach. It requires an understanding of the distinctive perspectives and principles of *both* constitutional law *and also* public international law; embracing *both* the aspirational universality of human rights *and also* the irreducible importance of the local and particular in making human rights real; appreciating *both* the essential need for proper judicial control in the field of human rights *and also* the dark side of juristocracy for democratic politics and institutional legitimacy; being aware of *both* the strengths and achievements of global constitutionalism *and also* the value of constitutional identity, pluralism, and tolerance on the global stage.

Underlying this book's approach to conventionality control is the appeal to the principle of subsidiarity as an overarching theoretical key within which to harmonize those different and often contrasting elements that have to be kept in play and in balance. The principle of subsidiarity is not a magic bullet; it provides no formulaic solutions to the puzzle of conventionality control. But in contrast to the relatively sterile and dualistic understanding of the problem that emerges from sovereignty-based frameworks, subsidiarity does at least begin by addressing international and domestic law in terms of promoting

"*both … and*" rather than "*either … or.*" It favors the building of a universal common good, genuinely oriented toward fostering a common understanding of the dignity of every human being, but lived out concretely in the specificities of local communities, including the diversity and integrity of their distinctive constitutional systems and traditions. That is a challenge that anyone who cares about the future of human rights ought to think about and be engaged in.

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ACKNOWLEDGMENTS

Special thanks are due to Professor Paolo G. Carozza, to Judge Eduardo Ferrer Mac-Gregor Poisot and to Professor Douglass Cassel for their invaluable intellectual and moral guidance and their encouragement to write this book. Thanks are also due to Judges Eduardo Vio Grossi and Humberto Sierra Porto, and to Pablo Savedra Alessandri and Alexei Julio Estrada, for their intellectual and professional guidance during my time in the Inter-American Court of Human Rights, which was extremely helpful to gaining a better understanding of the theory and practice in the Inter-American Human Rights System.

I am extremely grateful to my friends and colleagues that supported me along the way, especially to those in the J.S.D. Program and in the University of Notre Dame Law School: Pier Pigozzi, Andrés López, Soledad Bertelsen and Samuel Tilahun; and to those in the Inter-American Court who commented on my work or helped me to refine arguments and perspectives on human rights questions: Bruno Rodriguez, Alfredo Ortega, Jorge Errandonea and Romina Sijniensky. Most importantly, I wish to thank my family and Ginny for all their constant and unconditional love and support throughout this exciting and enriching academic, professional and personal journey. I will be always deeply grateful to you.

I am deeply grateful to Tom Scheirs and to the editorial team of Intersentia for all their diligent work on this book. I am also grateful to the anonymous reviewers of the book proposal and for their critical comments.

Finally, I am deeply appreciative of the generous support for this project provided during my time at the University of Notre Dame by the Center for Civil and Human Rights, the Kellogg Institute for International Studies, the National Council of Science and Technology (Conacyt), the Rowe Fund of the Organization of American States, the Inter-American Court of Human Rights and the Legal Research Institute of the National Autonomous University of Mexico.

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