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Rene Urueña

Global Governance Through Comparative International Law?
Inter-American Constitutionalism and The Changing Role of Domestic Courts in the Construction of the International Law

Cover: *Upper East Side Family*, Diana Chelaru, USA

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Presentations from the Inaugural Annual Junior Faculty Forum for International Law—New York City, May 2012

Dino Kritsiotis, Anne Orford and J.H.H. Weiler

The papers that are presented here for the Jean Monnet Working Paper Series are the result of the inaugural Annual Junior Faculty Forum for International Law held at the New York University School of Law on May 29 and 30, 2012. The Forum is convened by the three of us, and will be held annually in the spring; it will rotate from one year to the next from each of our institutions: from New York, the Forum will head to Nottingham on May 29 and 30, 2013, and, in May 2014, we shall all converge on the University of Melbourne for the third Forum.

We believe that the Forum is an important addition to the international law calendar. It is designed to provide junior faculty from all over the world with a valuable opportunity to receive careful and rigorous feedback on their work in progress from eminent senior scholars in international law and related fields. Each junior faculty member is paired with a senior scholar, who leads a discussion of the work that the junior faculty member presents at the Forum.

The Forum was launched on our website—www.annualjuniorfacultyforumIL.org—attracting a large number of impressive applications from young scholars across five continents. Nine of these applications were selected.

Our meeting in New York—held over two beautiful spring days in Washington Square—was a triumph of intellectual exchange and sustained engagement, and, without exception, the presentations seemed to us to be of such a high standard that they were deserving of a much broader audience. We therefore asked each of those who presented their work in New York—**Christopher Warren** (Carnegie Mellon University), **Michael Fakhri** (University of Oregon), **Sergio Puig** (Stanford University): **Martins Paparinskis** (University of Oxford), **Rose Sydney Parfitt** (American University of Cairo), **Umut Özsu** (University of Manitoba), **René Urueña** (Universidad de Los Andes), **Evan J. Criddle** (Syracuse University; now of William & Mary College of Law), **Alejandro Chehtman** (University Torcuato di Tella)—to consider submitting their presentations to the Jean Monnet Working Paper Series, and it is this impressive collection that you now have before you.

In introducing these presentations for the Jean Monnet Working Paper Series, we would also like to take the opportunity to extend our warmest appreciation to every one of these junior faculty for being part of this experiment—we could have hoped for no finer or more enthusiastic laureates than they to help inaugurate our first Forum. And their work—recorded here—will hopefully inspire other junior faculty to the same cause, and make the Forum a permanent a fixture of the international law calendar.

GLOBAL GOVERNANCE THROUGH COMPARATIVE INTERNATIONAL LAW? INTER-AMERICAN CONSTITUTIONALISM AND THE CHANGING ROLE OF DOMESTIC COURTS IN THE CONSTRUCTION OF THE INTERNATIONAL LAW

By Rene Urueña*

The stage was set. The woman sat silently under the spotlight. The audience had been waiting for her, to hear her. Most knew her story well; but still, it was different to hear of her struggle from her own lips. The stage was set: weeks before, an amateur company had tried on that same place its take on Hamlet; that day, the board outside the auditorium informed: Inter-American Court of Human Rights, 92th Period of Sessions, in Bogotá (Colombia). The stage was set, and the woman told her story: a Chilean judge, lesbian, separated from her children. The Court followed the necessary rituals, the performance had begun.

Introduction

Justice is again national. Or so it would seem by the renewed interest of international legal scholarship in domestic law. Domestic judges are interested in applying international law, and international lawyers are interested in what domestic courts have to say about their craft. In places like the United States, a debate takes place on whether reference to international law by US courts is undemocratic[1], while in other places the pendulum swings in the exact opposite direction: international law is used by courts to protect their independence, and thus reinforcing democracy[2].

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[1] For an argument holding that hat international law suffers from a democratic deficit that makes it unfit for domestic integration, see John O McGinnis and Illya Somin, 'Should International Law Be Part of Our Law', *Stanford Law Review* 59 (2007 2006): 1175. Against this view, proposing that, for any nation consciously to ignore global standards not only would ensure constant frictions with the rest of the world, but also would diminish that nation's ability to invoke those international rules that served its own national purposes, see Harold Hongju Koh, 'International Law as Part of Our Law', *The American Journal of International Law* 98, no. 1 (2004): 43–57

[2] See Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', *American Journal of International Law* 102 (2008): 241. Also: Beatriz Sanchez, 'Cuando Los Derechos Son La Jaula: Transplante Rígido Del Soft Law Para La Gestión Del Desplazamiento Forzado', *Estudios Políticos* 35 (2009): 11–32 .

Much is at stake in the discussion. As power leaves traditional governments and forms a decentralized network of global governance, the need for a conceptual apparatus that explains the interaction between domestic and international laws regains urgency. This essay explores such an issue. It uses the Inter-American Court of Human Rights (hereinafter, IACtHR) as a case study to test the limits and possibilities of our thinking on the role of domestic courts in the construction of international law. It is structured as a critique of what I call here "Inter-American constitutionalism", which is the dominant framework explaining the interaction between the Inter-American system of human rights and domestic courts in Latin America. The first section of this article introduces this concept, and situates it in the context of Latin American politics. The second part, in turn, shows its limits: as legal scholars and advocates, we keep thinking about the interaction between international law and domestic legal systems, either as a problem of top-down constitutionalism, or as an issue of clearly distinguished spaces of national and international jurisdiction: this part of the article explains why neither of these approaches is particularly useful. Lastly, the final section presents elements towards an alternative way of thinking about the role of domestic courts in the international legal order, especially in the Inter-American regime: the norm-creating interaction approach, which is explored in some detail at the end.

This article seeks to puts forward some elements for building a different vocabulary for how we talk, think and teach the role of domestic courts in international law. Its main motivation is not to formulate policy recommendations as to how to enhance or improved the Inter-American regime of human rights, but rather to incite a different way of thinking about this matter, which may be more conducive to effective political mobilization in the region than today's conventional wisdom.

1. The building blocks of Inter – American Constitutionalism

The Inter – American Court of Human Rights (IACtHR) is a regional human rights tribunal effectively operating since 1979. It is an independent tribunal based in San José (Costa Rica) belonging to the Inter – American system of human rights, together with the Inter – American Commission of Human Rights, that based in Washington D.C. Both the Court and the Commission have the power to interpret and enforce the

American Convention of Human Rights of 1969 (IACHR)[3]. The Court was created by the 1969 Convention, while the Commission was established ten years earlier, in 1959, as an organ of the Organization of American States (OAS).

Procedurally, the Inter – American system works as its European equivalent did until 1998, when Protocol No. 11 to the European Convention on Human Rights entered into force[4]. It is a two-track system, in which the Commission acts as a quasi – judicial body with the competence to handle individual complaints against all states belonging to the OAS. If a state is party to the Convention, then such instrument is the basis for the claim; if a state is not party (for example, Canada or the United States), the Commission is still able to handle the complaint, though on the basis of the 1948 American Declaration of the Rights and Duties of Man.

Unlike the European system, where all members of the Council of Europe are required to become parties to the European Convention and to accept the compulsory jurisdiction of the European Court, the Inter – American Court can only decide cases against states that expressly accept its jurisdiction in a separate declaration under Article 62 of the American Convention. At the moment of writing, there were 35 member states of the OAS[5], of which 25 had ratified the Convention[6] , and 22 had recognized the Court's jurisdiction. Cases are brought either by the Commission, or by other states. The Court is only open for these two kinds of complaints: it is not possible for individuals to file claims.

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[3]*American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36 (entered into force 27 August 1978)

[4] Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights," *German Law Journal* 12, no. 5 (2011): 1203–1230, at 1205.

[5]Including Cuba, that was excluded from participation in 1962 but was reinstated in 2009; see. OAS Resolution AG/RES.2438 (XXXIX-O/09)

[6] However, Trinidad and Tobago denounced the Convention in 1998, following a controversy concerning the execution of detainees who had cases pending before the Commission (see generally Natasha Parassram Concepcion, "The Legal Implications of Trinidad & Tobago's Withdrawal From the American Convention on Human Rights," *American University International Law Review* 16, no. 3 (2001): 847). In early 2012, Venezuela's President and Foreign Minister had unequivocally stated their intention to denounce the Convention. No further action had been taken at the time of writing,

As may be seen, the IACtHR has fairly traditional competences in its contentious jurisdiction, common to all regional human rights tribunals. However, it has been quite innovative in the exercise of its jurisdiction and its interpretation of the Convention[7]. One of such innovative exercises is its framing of the interaction between the Inter – American regime and domestic courts in the region. In essence, the IACtHR has understood the system as a wholly integrated regime of human rights, where the Court places itself as an Inter – American Constitutional Court, with the power of striking down domestic legislation; the competence of requiring domestic courts not to apply domestic law that is contrary to the Convention and, as importantly, to the Court´s own interpretation of the Convention. Ultimately, the Court's vision is one of a legal regime with two complementary venues of enforcement: domestic courts and the IACtHR. This vision is built on two pillars: (1) the notion of "control de convencionalidad" (control of conventionality); and, (2) the constitutional provisions that integrate the Inter – American Convention to domestic legal systems in several states in the region.

a. Norm-makers: "Control de Convencionalidad" and the making of Inter-American constitutionalism

The IACtHR has become the center of normative production concerning human rights in the Latin American region. As with many other tribunals, the Court has developed expansive case-law that has made it a veritable "law-making" institution[8]. However, the Court has gone beyond that point, as it has placed itself at the apex a judicial review system that controls domestic legal acts. Such a system ultimately makes the Court a formal source of hierarchically higher norms with direct effect in states. This move has been performed through two complementary mechanisms: the doctrine of "control de convencionalidad", and the Court's interpretation of the exhaustion of local remedies requirement.

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[7] See generally, David Harris, 'Regional Protection of Human of Human Rights: The Inter American Achievement', in *The Inter-American System of Human Rights*, ed. David Harris and Stephen Livingstone (Oxford: Oxford University Press, 1998), 1 – 30.

[8] On lawmaking by international tribunals, see Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', in *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance*, ed. Armin Bogdandy and Ingo Venzke (Heidelberg: Springer, 2012), 3–34.

The concept of "conventionality control" ("control de convencionalidad") is the Court's approach to complementing constitutional review by domestic judiciaries. The idea is that just as domestic courts perform judicial review of domestic norms on the basis of the Constitution (a "constitutionality control" – "control de constitucionalidad"), the Inter-American system gives the power to both domestic and the IACtHR to perform judicial review of domestic norms on the basis of the Convention (a "conventionality control" – "control de convencionalidad")[9]. This doctrine has strengthened the integrated vision of the Inter-American system, making national courts the enforcers of international human rights provisions.

The "conventionality control" works simultaneously in references to a horizontal (national) and a vertical (Inter – American) axis. On the horizontal axis, domestic courts have the obligation to guarantee that national legal systems are in accordance to Inter-American standards[10]. Domestic courts are, therefore, required not to apply domestic norms that violate the Convention. This system is completely decentralized, as it is each domestic court that will decide whether to apply or not the domestic norm it is assessing. Indeed, for the IACtHR, "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

[9] To the extent of my knowledge, in the context of the IACtHR, the notion was first used in 2003 by Sergio García Ramírez in his concurring opinion in Myrna Mack Chang v. Guatemala (see IACtHR, Myrna Mack Chang v. Guatemala, Decision of November 25, 2003 (Merits, Reparations and Costs) para. 27). A year later, Garcia Ramirez elaborated the analogy between domestic constitutional control and "control de convencionalidad" presented above, in his concurring opinion in IACtHR, Tibi v. Ecuador, Decision of September 7, 2004 (Preliminary Objections, Merits, Reparations and Costs), para. 3. The concept is also present in his concurring opinions in ICtHR, López Alvarez V. Honduras, Decision of February 1, 2006 (Merits, Reparations and Costs), para. 30, and in IACtHR, Vargas Areco v. Paraguay, Decision of September 26, 2006 (Merits, Reparations and Costs) paras. 6-7.

[10] Víctor Bazan, "La Corte Interamericana de Derechos Humanos y las cortes nacionales: acerca del control de convencionalidad y la necesidad de un diálogo interjurisdiccional sustentable". Ponencia presentada en el VIII Congreso Mundial de la Asociación Internacional de Derecho Constitucional "Constituciones y Principios". México 6 a 10 de diciembre de 2010. At 5.

Convention"[11]. Such control should be exercised ex-officio by national courts [12], and should be performed considering not only the actual text of the Convention, but also the case-law of the IACtHR, which is "the ultimate interpreter of the American Convention"[13].

On the vertical axis, the IACtHR has played the role of a veritable constitutional tribunal, by expressly holding that domestic laws that violate the Convention "lack legal effects", and have never produced them[14]. While the Court has not used the expression "control de convencionalidad" to label this exercise of jurisdiction, it is clear that the same principle applies: the IACtHR reviews the legality of domestic acts on using the Convention as the standard. For the Court, its decisions are "ipso iure part of domestic legal systems", and are "wholly incorporated" in them[15]. This is an astonishing move and, to some commenters, a first of its kind in international law[16]. And it has very clear effects in domestic politics: in 2008, based on the very decision being discussed here, Peruvian domestic courts sentenced General Julio Salazar Monroe, head of the Peruvian National Intelligence Service (SIN) under ex-President Alberto Fujimori, to 35 years in prison for the kidnapping and murder of students and faculty at the University of La Cantuta[17]. Perhaps mindful of this fact, the Court has used this doctrine sparingly. While present in its most extreme form in cases dealing with amnesties and transitional justice[18], the judicial control by the IACtHR of domestic law has sometimes led to an

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[11]IACtHR, Almonacid-Arellano et al v. Chile, Decision of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs), para. 124.

[12] See IACtHR, *Trabajadores Cesados del Congreso* (Aguado-Alfaro et al) v. Peru , Decision of November 24, 2006 (Preliminary Objections, Merits, Reparations and Costs). Par. 128.

[13] IACtHR, Almonacid-Arellano et al v. Chile, at 124

[14] See IACtHR, *La Cantuta v. Peru*, Decision of 29 November 2006 (Merits, Reparations and Costs), para. 189. In his separate opinion to this decision, Segio García Ramírez argues that domestic laws that violate the Convention are "basically invalid" (paras. 4 – 5).

[15] IACtHR, *La Cantuta v. Peru*, para. 186

[16] Antonio Cassese, "Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?" in Antonio Cassese & Mireille Delmas-Marty (eds) *Crimes Internationaux et Juridictions Internationales* (2002) 13 at 16, quoted in Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', at 1212.

[17] See Human Rights Watch, "Boletín Informativo Human Right Watch", April 10 2008. Available at: http://www.hrw.org/doc/?t=spanish&c=peru

[18] See, for example, IACtHR, *La Cantuta v. Peru*. See also*:* ICtHR, *Barrios Altos v. Peru*, Decision of 14 March 2001 (Merits)

order to change national norms in a "reasonable period of time"[19]. Such orders to change domestic law may even concern the national Constitution, as was the case of Chile and its Constitutional provision that allowed for prior censorship[20].

Inter-American Constitutionalism is, ultimately, a centralized system of international law-making, matched with both centralized and decentralized mechanisms of enforcement. This exercise of power on behalf of the Court, though, is not deemed to be an unconsented intervention in the domestic legal systems of the region, as the IACtHR can only exercise its jurisdiction if domestic remedies for the violation of the Convention have been exhausted, or are insufficient This requisite often takes the procedural form of a preliminary objection to jurisdiction: states object to the Court's jurisdiction, arguing that the victim has failed to exhaust local remedies. In the case of *Velásquez Rodríguez*, the IACtHR established that a state presenting such objection had the burden of proving, not only which were the local remedies that failed to be exhausted by the victim, but also why those remedies were effective and adequate[21]. This assessment of adequateness and effectiveness provides two valuable assets to the construction of Inter-American constitutionalism: first, it reinforces the notion that the Court has the power decide whether domestic law and its application comply or not with the Convention[22]; and, second, it provides a rhetorical shield against criticism for expansive use its powers of the IACtHR, as it establishes the narrative of a reluctant international tribunal that steps in when domestic law is failed or inadequate.

The doctrine of "control de convencionalidad", in both its horizontal and vertical axis, sets the first pillar for the construction of an effective Inter-American constitutionalism. On the one hand, it identifies a single center of international norm-production, and

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[19] For example, IACtHR, *Suarez Rosero*, Decision of 12 November 1997 (Merits); ICtHR *Castillo Petruzzi el al v. Perú*, , Decision of 30 May 1999 (Merits); IACtHR *Fermín Ramírez v. Guatemala*, Decision of 20 June 2005 (Merits)

[20] See IACtHR *"La Última Tentación de Cristo" (Olmedo Bustos y otros) v. Chile*, Decision of 5 February 2001 (Merits and Reparations,)

[21] IACtHR, Velásquez-Rodríguez v. Honduras. Decision of July 29, 1988. (Merits) paras. 59-63

[22] For instance, see IACtHR, Godínez-Cruz v. Honduras. Decision of June 26, 1987 (Preliminary Objections), para. 93; also: IACtHR, Genie-Lacayo v. Nicaragua. Decision of January 29, 1997 (Merits, Reparations and Costs) para. 77.

gives an international Court the power to enforce such legal regime – including the formal power to annul domestic norms (even the Constitution). So far, so well-known: the Inter-American regime would be a perfect fit to the "constitutional mindset[23]" of global governance, where power is exercised in a top-down fashion, on the basis of legal norms adopted in the name of humanity[24].

The Inter-American regime, though, has one further aspect to it: it recruits the domestic courts in the construction of this constitutional framework. Through the horizontal (national) axis of "control de convencionalidad", Inter-American constitutional standards are not only enforced by an international tribunal, but also by domestic courts, which are required to follow the case-law of the international tribunal. In this second aspect, the Inter-American regime is an example of much of the literature being produced on "international law in domestic courts". The work of André Nollkaemper is a case in point. For Nollkaemper, the rule of law requires "accountability" (in the sense that public powers that contravene their legal obligations, whether international or national, are accountable on the basis of the law[25]). This accountability may be provided by international and by domestic courts. However, states are reluctant to subject themselves to international justice. So, "in some states and under some conditions, national courts can fill the missing link in the international rule of law by providing relief when public powers act in contravention of their international obligations[26]". Such would be the role of domestic courts in Latin America. For this to happen, one needs to let go of "dualist" reveries and realize that international

[23] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', *Theoretical Inquiries in Law* 1 (2007): 9–36. Also: Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review* 70, no. 1 (2007): 1–30, at 19.

[24] For a map of global constitutionalism and global administrative law as two species of a distinctively liberal mindset trying to infuse legal regulation back intro global governance, see Rene Uruena, *No Citizens Here: Global Subjects and Participation in International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2012) at 128-139.

[25] André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011) at 5.

[26] Ibid, at 6.

and domestic law are complementary – this, of course, requiring that international law holds supremacy over domestic law[27], as is the case in the Inter-American system.

All of this would lack any real effects without the collaboration of domestic legal systems. Indeed, if the IACtHR would create a doctrine of conventionality and place itself as the ultimate source of judicial review in the region, but domestic courts would simply ignore it and carry on as usual, then one could hardly speak of a significant transformation in the region. However, that is not the case. Domestic regimes in Latin – America have actively incorporated Inter-American human rights standards, thus setting the second pillar for the construction of Inter-American Constitutionalism, as we now turn to see.

b. Norm-takers: Inter-American Constitutionalism and comparative international law in Latin-American

One salient aspect of Latin – American constitutionalism in the late XX century was its consistent openness to international human rights law. Emerging from the hardships of dictatorship and civil wars, most states in the region adopted new constitutions in the couple of decades: Argentina (1994), Bolivia (1994 and 2009), Brazil (1988), Colombia (1991), Dominican Republic (1994, 2002 and 2010), Ecuador (1996, 1998 and 2008), Nicaragua (1987), Paraguay (1992), Peru (1993) and Venezuela (1999). Most of these Constitutions recognize international human rights law as an important aspect of their respective domestic systems, and they do so along a spectrum that finds in the doctrine of "bloque de constitucionalidad" ("constitutional block") the most intense form of integration between domestic and international law.

The notion of "bloque de constitucionalidad" has its inspiration in French law[28] and traveled via the Spanish Constitutional Tribunal[29] to the case-law of several Latin-

[27] See André Nollkaemper, 'Rethinking the Supremacy of International Law', *Zeitschrift Für Öffentliches Recht* 65, no. 1 (2010): 65–85 at 65-67 (elaborating on the implication of the principle of supremacy of international law over domestic systems).

[28] The notion is traditionally traced back to the 1971 decision of the Conseil Constitutionnel (Decision 71-44 DC, 16 July 1971, Liberté d'association, Rec. 29) where it held that the Preamble to the French 1958 Constitution (which in turn refers back to the Preamble to the 1946 Constitution and to the Déclaration

American Constitutional Tribunals, starting in the 1990s. The notion generally refers to an expanded constitutional canon that includes norms not featured in the immediate text of the written Constitution. As such, the notion falls into the debate of the so-called "unwritten Constitution", which has interested US constitutional scholars for some time now[30]. In Latin-America, though, the issue became inextricably linked with the domestic application of international human rights instruments, as these instruments were consistently brought by Constitutional Tribunals in the region to bear on their own expanded constitutional canon; that is, on each system's "constitutional block".

Thus, "bloque de constitucionalidad" became short-hand in the region for giving constitutional status to international human rights law in domestic systems. For example, in Argentina, article 75 (22) of the 1994 Constitution recognizes constitutional status to several human rights treaties, expressly named in the text. For the last decade, this provision has been understood by the Supreme Court as creating a "constitutional block"[31]. Similarly, article 410 of the 2009 Bolivian Constitution refers to human rights treaties as part of the "constitutional block". In Colombia, article 93 of the Constitution also provides that human rights and international humanitarian law instruments, among others, are part of the domestic order[32]. This article, which has been interpreted

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des Droits de l'Homme et du Citoyen) was part of the French constitutional canon. This meant that constitutional review by the Conseil would be undertaken not solely on the basis of the 1958 Constitution, but also on other texts of constitutional standing. The compound of such plurality of texts would form a "bloc de constitutionnalité" – an expression originally coined by in 1970 Claude Emeri (Claude Emeri, 'Chronique Constitutionnelle Et Parlementaire Française - Vie Et Droit Parlementaire', *Revue Du Droit Public Et De La Science Politique En France Et à L'étranger* 3 (1970): 678). The expression was then used often by Louis Favoreu, who gave it its current use (see Louis Favoreu, 'Bloc De Constitutionnalité', in *Dictionnaire Constitutionnel*, ed. Olivier Duhamel and Yves Meny (Paris: P.U.F, 1992), 87–89. On the history of the notion in France, see Charlotte Denizeau, *Existe-t-il Un Bloc De Constitutionnalité?* (Paris: L.G.D.J., 1997) at 7 - 28.

[29] The Spanish Constitutional Tribunal first referred to the notion in 1982, in decision STC 10/82.. See Francisco Rubio Llorente, 'El Bloque De Constitucionalidad', *Revista Española De Derecho Constitucional* 9, no. 27 (n.d.): 9–37 at 23-32.

[30] See Jed Rubenfeld, 'The New Unwritten Constitution', *Duke Law Journal* 51 (2001): 289–305 at 392 - 300.

[31] See, for example, Supreme Court of Argentina, *Verbitsky, Horacio s/ habeas corpus,* V. 856. XXXVIII, 9 February 2004, paras. 5, 13, 39 and 57; Llerena, Horacio Luis s/ abuso de armas y lesiones arts. 104 y 89 del Código Penal -causa N° 3221-, L. 486. XXXVI, May 17 2005, paras. 7, 22, and 28; Dieser, María Graciela y Fraticelli,Carlos Andrés s/ homicidio calificado por el vínculo y por alevosía - causa N° 120/02-, D. 81. XLI. August 6 2006, opinión del Procurador, at 5.

[32] See generally Rodrigo Uprimny, 'El Bloque De Constitucionalidad En Colombia: Un Análisis Jurisprudencial y Un Ensayo De Sistematización Doctrinal', in *Compilación De Jurisprudencia y*

by the Constitutional Court as creating a "constitutional block"[33], includes rights that are not expressly recognized in the Constitution, such as the right to prior consultation embodied in the International Labor Organization (ILO) Convention 169[34]. Another example is Ecuador[35], whose 2008 Constitution provides in article 11(3) for the direct effect of human rights contained in international instruments. In principle, human rights instruments have a lower hierarchy than the Ecuadorian Constitution: however, under article 424, human rights treaties that provide for more favorable rights than the Constitution will prevail in the domestic order, over "any other legal norm or act of public power". Thus, under article 417, domestic law is forbidden from restricting international human rights.

Peru's 1979 Constitution established in article 105 that international human rights treaties had constitutional status. And, while this norm was excluded from the 1993 Constitution, the later text did establish in article 55 that all treaties (not only human rights instruments) are part of national law. On that basis, and invoking also the Constitution's Fourth Transitory Disposition (which stats that domestic rights must be construed in accordance with international human rights), the Constitutional Tribunal of Peru has held that international human rights have constitutional status[36], even expressly referring to a "constitutional block" when referring to ILO Convention 169[37].

Elsewhere in the region, though, the doctrine of "bloque de constitucionalidad" is less useful as an analytical category, because international human rights treaties have no constitutional status. Such is the case in Brazil, where Article 5(2) of 1988 Constitution

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Doctrina Nacional e Internacional, ed. Oficina del Alto Comisionado de Naciones Unidas Para los Derechos Humanos, 2001.

[33] Constitutional Court of Colombia, Decision C- 488 de 2009, drafted by Jorge Iván Palacio Palacio.

[34] Constitutional Court of Colombia, Decision SU-039 de 1997, drafted by Antonio Barrera Carbonell

[35] On the Ecuadorian case law under the 1998 Constituion, see Juan Carlos Riofrio Martinez-Villalba, 'El Bloque De Constitucionalidad Pergeñado Por El Tribunal Constitucional', *Foro - Revista De Derecho* 6 (2006): 227 – 244.

[36]Constitutional Tribunal of Peru, Decision 0047-2004-AI/TC (José Claver Nina-Quispe Hernández, en representación del Gobierno Regional de San Martín), par. 22; Decision Case 5854-2005-AA/TC (Pedro Andrés Lizana Puelles), at par. 23; Decision 00007-2007-PI/TC (Colegio de Abogados del Callao), paras. 12-17.

[37] Constitutional Tribunal of Peru, Decision 05427-2009-PC/TC (Asociación Interétnica de Desarrollo de la Selva), para. 9

provides that the recognition of domestic rights does not hinder other rights from arising from international human rights law and, while there was debate over a "bloco de constitucionalidade"[38], the Supreme Federal Tribunal considered that human rights treaties had infra-constitutional status[39]. However, in 2004, a Constitutional amendment added one section to article 5, according to which human rights treaties approved by a more demanding procedure in Congress would be equivalent to a constitutional amendment. Under this new amendment, the Supreme Federal Tribunal changed its approach and, following the lead of Judge Gilmar Mendes, held that human rights treaties had supra-legal and infra-constitutional status[40]. The minority, represented by the opinion of Judge Celso de Mello in the same case[41], considered that human rights treaties have constitutional status in Brazil, and invokes the work of Antônio Cançado Trindade to that effect[42].

It is not hard to see that international human rights law plays a crucial role in the construction of Latin – America legal systems. Now, as Benvenisti has noted, this may be due to the domestic political economy of judicial independence[43]: in a region of

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[38]See Valério de Oliveira Mazzuoli, 'Os Tratados Internacionais De Direitos Humanos Como Fonte Do Sistema Constitucional De Proteção De Direitos', *Revista CEJ* 6, no. 18 (2002): 120–124.

[39] Supreme Federal Tribunal of Brazil, Ação Direta De Inconstitucionalidade 1.480, 03/09/1997 (drafted by Celso de Mello), which reviewed ILO Convention 158. For the Tribunal, "in the Brazilian legal system, international conventions or treaties are hierarchically subordinated to the normative authority of the Constitution. Consequently, international treaties will have no legal value, if after being incorporated to the system of national positive law they transgress, in its form or subject, the text of the Charter Policy. (...) Once the international treaties and conventions have been incorporated to the domestic legal system, they are located in the same level of validity, effectiveness and authority than the ordinary laws, thus, having towards the latter a relationship of parity. (...) The prevalence of the international treaties or conventions over the ordinary laws is only justified in the case of an antinomy that is resolved through the application of the chronological ("lex posterior derogat priori ") or the specialty criteria". In the same sense, see Recurso Extraordinário 206.482-3, 27/05/1998 (drafted by Maurício Corrêa). The Tribunal thus confirmed its pre – 1988 precedent; see,for example, Supreme Federal Tribunal of Brazil, Recurso Extraordinário nº 80.004, 01/06/1977 (drafted by Xavier de Albuquerque)

[40] See Supreme Federal Tribunal of Brazil, Recurso Extraordinário 466.343-1, 03/12/2008 (drafted by Cezar Peluso)

[41] Supreme Federal Tribunal of Brazil, Recurso Extraordinário 466.343-1, 03/12/2008, at 129. A few weeks after this decision, Judge Celso de Mello would draft an extensive analysis on the existence of a constitutional block in Brazilian law (see Supreme Federal Tribunal of Brazil, Ação Direta De Inconstitucionalidade 514, 24/03/2008).

[42] Ibid.

[43] Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', *American Journal of International Law* 102 (2008): 241.

strong presidencies and populist legislatives[44], courts may have found in international law an unlikely ally to bolster their independence[45]. Moreover, a long history of dictatorships in the region, that closed domestic legal remedies for human rights violations, may have fostered an unusually high reliance on international law on behalf of domestic political activism[46], creating a strong political pressure on domestic legal systems to be more open to international law. Be that as it may, fact is that most domestic systems in the region accept and embrace human rights law – particularly, the Inter- American regime of human rights. Thus, Latin – American law is a landscape best described as an archipelago whose islands are in little contact with each other but which, for different internal reason, find it important to keep in touch with the mainland.

This is not to say that there is no dialogue in the region. Quite on the contrary: there is indeed some emerging evidence of interaction among courts[47], and vibrant projects are emerging that explore the particularity of Latin American legal scholarship and the promise of South – South dialogue[48]. However, such dialogue seems to involve mainly domestic courts and tribunals, which have no formal power over each other. When the Inter-American regime is involved, the idea of dialogue stops, and hierarchy steps in: due to the domestic legal architecture that is predominant in the region, domestic courts are bound by Inter-American legal standards and, more concretely, by the IACtHR 'S interpretation of such standards. Examples of this move abound in the case-law of the

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[44] See generally Olivier Duhamel and Manuel José Cepeda Espinosa, *Las Democracias: Entre El Derecho Constitucional y La Política*, 1. ed., Derecho y Política (Bogotá, Colombia) (Bogotá: Universidad de los Andes, 1997).

[45] For the Colombian case, where the Constitutional Court has strategically used (non-binding) international norms to strengthen the weak hand dealt to it by the Constitution vis-a.-vis the executive and legislative branches of power, see Sanchez, 'Cuando Los Derechos Son La Jaula: Transplante Rígido Del Soft Law Para La Gestión Del Desplazamiento Forzado'.

[46] Sikkink

[47] See for example, Alejandra Azuero, 'Redes De Diálogo Judicial Trasnacional: Una Aproximación Empírica Al Caso De La Corte Constitucional', *Revista De Derecho Publico - Universidad De Los Andes* 22 (2009).

[48] See, for example, César A Rodríguez Garavito, ed., *El Derecho En América Latina: Un Mapa Para El Pensamiento Jurídico Del Siglo XXI* (Buenos Aires: Siglo Veintiuno Editores, 2011). Also: http://www.canaljusticia.org

region: in Argentina[49], Bolivia[50], Brazil[51], Colombia[52], and Peru[53]. In this sense, domestic courts play the role of receptors of international legal standards: instead of participating in the making of international law, domestic courts perceive the Inter-American regime as a source of univocal norms which are to be applied by them, never questioned[54].

Of course, this is not to imply that all domestic courts apply all the time all Inter-American human rights standards to the largest extent possible. On the contrary, there is an important amount of strategic maneuvering on behalf of national courts: standards are applied differently in different countries, depending on domestic political needs. Domestic courts often simply ignore existing international standards that could relevant for deciding the case at hand. As Karen Knop has suggested for domestic courts

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[49] Supreme Court of Argentina, Mazzeo, Julio Lilo y otros s/ recurso de casación e inconstitucionalidad, M 2333 XLII. 13 July 2007 (holding that "the integration of those principles recognized by the international community for the protection of those rights inherent to the human person to the national punitive system, was one of the basic guidelines for the construction of the institutional framework which prompted the Constituent Convention of 1994 to incorporate the international treaties in the same order as the National Constitution (...). In effect they stated that the objective was to 'establish a constitutional policy base on the universalization of human rights, the recognition of the supra-national organs of dispute settlement, such as the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, and the promotion of the advisory opinions of the Inter-American Court", par. 18)

[50] Tribunal Constitucional de Bolivia, Decision 0110/2010-R , 10 May 2010.

[51] Supreme Federal Tribunal of Brazil, Recurso Extraordinário nº 511.961, 17/06/2009, interpreting the right of freedom of expression in accordance with article 13.1 of the American Convention on Human Rights

[52] Constitutional Court of Colombia, Decisions C-067 of 2003, drafted by Marco Gerardo Monroy Cabra (holding that human rights treaties are an interpretative tool to study the constitutionality of domestic legal norms); C-578 de 1995, drafted by Eduardo Cifuentes Muñoz (striking down domestic laws on the basis of international human rights and international humanitarian law standards), C-155 de 2007, drafted by Álvaro Tafur Gálvis (holding that, "in case of conflict between the national legislation and a international treaty or convention that regulates the same subject, the [domestic] authorities shall apply an interpretation directed to harmonize them and to respect Colombia`s international commitments")

[53] Constitutional Tribunal of Peru, Decision 309-2002-HC/TC (incorporating to Peruvian law the right to be judged in a reasonable period of time embodied in article 9 (3) of the International Covenant on Civil and Political Rights and article 7(3) of the ACHR); 1277-99-AC/TC (applying article 14 of the ICCPR to solve a dispute regarding the existence of compensations in the case of a judicial error, and holding that ""if the applicants have sued base on the International Covenant on Civil and Political Rights and not the Political Constitution, is not only because the former has more explicit dispositions regarding the subject of compensation, but also because the content of each fundamental right (as compensation is in the facts of this case) shall be interpreted in accordance with the internal human rights norms (para. 10)".

[54] Against this view, some scholars have argued that in other regions, a kind of Habermasian dialogue may exist between international, supranational and domestic human rights tribunals; see, for example, Aida Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford: Oxford University Press, 2009), at 104 - 106, 112, 115, 126, 131 .

in general, the domestic interpretation of Inter-American standard by Latin American courts is not simply a conveyor belt that delivers international law to the people, but instead implies a process of translation[55] This is also part of Inter-American constitutionalism: when interaction between domestic and international law fails occur, law is also being created. What is also true of the region as a whole is that *if* an Inter-American standard is invoked by domestic courts, it is meant to be an authoritative statement of hierarchically superior norms. Inter-American law is there to be applied, not controverted, and domestic courts are quite content with underscoring their norm – taking status.

The integration of international law by domestic legal system provides the second pillar of Inter-American constitutionalism, and it is useful for both domestic courts and the IACtHR. Domestic courts are able to use Inter – American human rights standards in their reasoning, thus providing with wider justification for their decisions. The IACtHR, in turn, is able to create a direct link between its decisions and domestic constituencies. Despite the fact that the court has traditional powers and judges states, the IACtHR is able to directly influence through this second pillar the law and politics of states in the region and, most importantly, the actual life of individuals. Through this structure, the IACtHR is able to by-pass executive branches in the region (who are often among its most keen contradictors) and have a direct influence in the distribution of power and resources among domestic groups.

Through the constitutional adoption of international human right norms and the doctrine of "control de convencionaldad", the IACtHR has set the basis of a system that could be described as an Inter – American constitutionalism, in the sense that a set of Inter-American legal standards effectively limit the power of domestic political institutions in the region (both in the legislative and the executive branch of power). Such Inter – American constitutionalism, though, is not merely a top – down affair, where the IACtHR adopts standards that have, per se, direct effect in domestic legal

[55] See Karen Knop is right when Karen Knop, 'Here and There: International Law in Domestic Courts', *New York University Journal of International Law and Politcs* 32 (2000 1999): 501 at 505.

systems. Quite on the contrary, it heavily relies on domestic courts and tribunals: sometimes, the IACtHR relies on domestic courts as effective enforcers of Inter – American standards (as is the case with control de convencionalidad). Other times, though, domestic courts are the dysfunctional players in the domestic legal systems that justify the IACtHR stepping into the scene (as is the case of its jurisprudence of exhaustion of local remedies).

Involving domestic courts, though, does not amount to say that such tribunals necessarily play a leading role in the construction of Inter-American constitutionalism. In fact, the system leaves very little space for differing approaches to Inter-American standards by domestic courts. In sharp contrast with recent literature that explores the possibility of a legitimate variety of domestic approaches to international legal norms[56] (just as prior work by Richard Falk[57] and William Butler[58] did decades ago), the Inter-American regime is based on the idea that there is a single correct interpretation of international norms (that of the IACtHR), and that domestic courts should convergence towards it – or else be flatly wrong. From the perspective of the IACtHR, Inter-American constitutionalism is less an exercise of "comparative international law", than an integrated hierarchical system of norms that is enforced by both international and domestic tribunals. From the perspective of domestic courts, this system allows them to present themselves to their domestic constituencies as mere enforcers of the will of the international community, and thus boost the legitimacy of their own decisions. Such status of affairs, though, is starting to change rapidly, a transformation that is explored in the next section.

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[56] For example, Boris N Mamlyuk and Ugo Mattei, 'Comparative International Law', *Brooklyn Journal of International Law* 36 (2011 2010): 385. Also: Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', *International and Comparative Law Quarterly* 60, no. 01 (2011): 57–92.

[57] Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse: Syracuse University Press, 1964).

[58] William Butler, 'Comparative Approaches to International Law', in *Academy of International Law at The Hague, Recueil Des Cours*, vol. 190 (Leiden: Martinus Nijhoff Publishers, 1985), 9.

2. The limits of Inter-American Constitutionalism

The building blocks of Inter-American constitutionalism were developed mostly in the context of massive human rights violations in Latin America, due to dictatorships (as in Argentina, Brazil and Chile, among others) and the "internal enemy" rhetoric against domestic revolutionary groups (as was the case of Colombia and Peru). However, things have changed in the region: most Latin American states are now representative democracies with periodic competitive elections that provide for generous bills of rights in their Constitutions, and more or less independents courts. Massive violation of human rights, while certainly still present, are now the exception[59]. These changes have had an impact on the interaction between Inter – American constitutionalism and domestic legal systems. This section will explore such transformation, in reference to one of the areas where change is more evident: redistribution of resources.

Indeed, while the IACtHR 'S expansive interpretation of its own powers is less than convincing from a legal perspective[60], its claim to legitimacy basically relied on it being on the right side of history. In a region where massive violations of human rights were occurring, and were amnesty was just another word for impunity, the IACtHR understood its role as stepping in to do the job that domestic courts were unwilling or unable to do. The whole construct of Inter-American constitutionalism was based on the premise that there should be little debate about what the right thing to do is: when domestic courts fail, the IACtHR must find some justice for the victims of human rights violations in the region. To be sure, there will be disagreements: perhaps some believe that such a decision by the IACtHR is an unwarranted intervention in domestic affairs, or perhaps others believe that the time for the decision is not good. All these disagreement will be read by the Inter-American constitutionalist as merely "political". The IACtHR finds legitimacy for its decision on the fact that it holds the legal (one could almost say: moral) higher ground, and is taking the right decision that domestic courts

[59]See generally Victor Abramovich, 'De Las Violaciones Masivas a Los Patrones Estructurales: Nuevos Enfoques y Clásicas Tensiones En El Sistema Interamericano De Derechos Humanos', *Revista Sur* 6, no. 11 (2009): 7–40.

[60] For details on the difficulties of the Court's argument, see Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' at 1216.

will not (cannot) take. In the Inter-American constitutionalist mindset, once the IACtHR adopts it judgment, the problem is solved: the amnesty law is declared "without legal effects", the wife of a *desaparecido* gets justice and redress.

However, as the region changes, so do its human rights issues. The IACtHR is increasingly called to adjudicate on human rights issued that concern structural problems of Latin American societies, which have an important impact on the way in which scare resources are distributed within each state - and it has stepped in hesitantly. Perhaps the best example of this transformation is the IACtHR 'S approach towards social and economic rights. In the last decade, the IACtHR has decided cases that could impact in a structural fashion the distribution of resources in a state, as is the case with social security and retirement pensions. Indeed, in the case of the *Five Pensioners*[61], the Court got involved in a complex conflict related to dual and overlapping retirement schemes in Peru, and found that, by changing the amount of the pension received by the complainants, Peru was in violation of their right to property[62].

Now: while much has been said about the justiciability of social and economic right in the Inter-American system[63], what is interesting for our purposes here is the approach adopted by the IACtHR vis-à-vis domestic courts and its self-image as being at the center of an Inter-American Constitutional regime. Those times seem to have passed. This is not the expansive Court of the amnesty decisions that declared "without legal effects" domestic norms. Rather, this is a much more cautious Court, which shows deference toward the Peruvian Constitutional Tribunal and cites it as an authority on the domestic Constitution[64]. In fact, when called to decide whether, through its treatment of the five pensioners, Peru had structurally violated its duty to progressively

[61] IACtHR, Cinco Pensionistas v. Peru. Decision of February 28, 2003 (Merits, Reparations and Costs)
[62] IACtHR, Cinco Pensionistas v. Peru, paras. 93 - 121
[63] See, Pilar Arcidácono, Nicolas Espejo and César Rodríguez Garavito (eds) *Derechos Sociales: Justicia, Política y Economía en América Latina* (Bogotá: Siglo del Hombre Editores/LAEHR, 2010); Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008).
[64] IACtHR, Cinco Pensionistas v. Peru, paras. 98 - 100

develop social and economic rights under article 26 of the Convention[65], the Court held: "economic, social and cultural rights have both an individual and a collective dimension. Their progressive development [...] should be measured [...] in reference to the growing coverage of economic, social and cultural rights in general, and to the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in reference to the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation[66]". The Court therefore declined to decide on the issue[67] - a decision that was celebrated in the concurring vote of Judge De Roux Rengifo, as "it is evident that the controversies that emerged or may emerge from the (substance of the case) can only be resolved by domestic courts[68]".

This approach was confirmed six years later, when the court faced another important case dealing with pensions in Peru. In Acevedo Buendía[69], the Court again declined to rule on the violation of article 26 of the Convention, as it considered that the issue was whether a decision adopted by the Peruvian Constitutional Tribunal was being complied with or not[70]. And what about the enforcement of social and economic rights? The Court accepts that a "flexible" approach is needed, as each state will follow its own particular path, depending on its "economic and financial resources"[71]. Even whet the Court holds that measures that would affect the progressive development of social rights in region would be in violation of the Convention, it still accepts that such norm should not be understood as a prohibition to take measures that restrict the exercise of those rights: "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of

[65] Under Article 26, "the States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires".
[66] IACtHR, Cinco Pensionistas v. Peru, para. 147.
[67] IACtHR, Cinco Pensionistas v. Peru, para. 147
[68] IACtHR, Cinco Pensionistas v. Peru, Concurring opinion by De Roux Rengifo, p. 1
[69] IACtHR, Acevedo Buendía et al. v. Peru. Decision of July 1 2009 (Preliminary Objection, Merits, Reparations and Costs)
[70] IACtHR, Acevedo Buendía et al. v. Peru, para 106.
[71] IACtHR, Acevedo Buendía et al. v. Peru, para 102.

the rights of the [International] Covenant [on Economic, Social and Cultural Right] and in the context of the full use of the maximum available resources [of the State]"[72].

It is important to underscore that there is no inherent legal limit preventing the IACtHR from adopting an astonishing decision in one of these cases, along the lines of what it did in the amnesty decisions. In an pure Inter-American Constitutional mindset, the Court could have engaged in a "conventionality control" of the Peruvian pension system, and argue that, since it violated the right to property, it should be left "without legal effect" – even *ab-initio*, as was the case with the Barrios Altos amnesty decision (also affecting with Peru). The Peruvian government then would have had to reimburse the pensioners, or create a fund for transition between pension regimes, *et cetera*.

The Court's reluctance to get involved in such a messy affair speaks volumes of the limits of Inter-American constitutionalism. If the Court's legitimacy to undertake direct interventions in domestic legal systems could be read as a result of its self-perception as doing the right thing; then its reluctance may be interpreted as sign of a period of self-questioning. In the context of social and economic rights, the Court ends up being called to perform a task of domestic governance: redistribute scarce resources, and decide who wins and who loses among equally deserving parties. Instead of fighting the good fight against impunity, the IACtHR finds itself being asked to distribute poverty among the poor.

In this context, there is less certainty about where and how the Court should weight in. This fact changes the interaction between the IACtHR and domestic courts. Whereas, as we have seen, Inter-American Constitutionalism is based on the idea domestic courts are essentially enforcers of a single correct interpretation of international norms (that of the IACtHR), in this new context domestic courts are perceived as having better information on domestic issues and power disputes – a "political margin of

[72] IACtHR, Acevedo Buendía et al. v. Peru, para 103.

appreciation", in one wills[73]. The IACtHR seems to be looking less for enforcers than for partners in the further development of the Inter-American regime.

Domestic courts, in turn, find themselves in a moment of transition as well. As the IACtHR is called to adjudicate on issues of redistribution or on issues of gender or identity politics (such as gay rights[74] or the protection of women[75]), domestic courts find it less plausible to out-source to the Inter-American regime the legitimacy of their own domestic decision regarding these matters. Ultimately, it becomes less plausible for domestic courts to use the Inter-American regime in order to bolster their independence, when the IACtHR is perceived as one more player a complex political process with several reasonable positions. Consequently, strong hierarchical arguments of the sort found in the Inter-American constitutional mindset become less frequent, and other forms of interaction start to emerge: for example, domestic courts start seeing Inter-American institutions as partners in the enforcement of their own domestic decisions[76].

A particularly relevant aspect of this transformation is civil society[77]. As has been explored by Kathryn Sikkink[78], transnational networks of activists have played a

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[73] Interestingly, the notion of "margin of appreciation" has recently started to be pitched around in dissenting votes in the IACtHR. See, for example, IACtHR, Attala Riffo y niñas v. Chile, Decision of 24 February 2012 (merits) dissenting vote of Judge Perez Perez, paras. 16 and 23

[74] See IACtHR, Attala Riffo y niñas v. Chile, Decision of 24 Febrary 2012 (merits)

[75] See IACtHR, Claudia Ivette González, Esmeralda Herrera Monreal y Laura Berenice Ramos Monárrez *v. México*, Decision of November 16, 2009 (merits)

[76] For example, the Colombian Constitutional Court has begun to heavily on the Inter-American Commission of Human Rights for monitoring the compliance of its decisions on internally displaced population. See for, example, Constitutional Court of Colombia, Decision T-025 of 2004 (drafted by Manuel Jose Cepeda), and Auto 092 of 2008. The Court has also relied in part on the Commission for the development of indicators to monitor compliance with its decisions, see: Rene Uruena, 'Internally Displaced Population in Colombia: A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance', in *Governance by Indicators: Global Power Through Quantification and Rankings*, ed. Benedict Kingsbury et al. (Oxford: Oxford University Press, 2012), 249–280.

[77] Abramovich, 'De Las Violaciones Masivas a Los Patrones Estructurales: Nuevos Enfoques y Clásicas Tensiones En El Sistema Interamericano De Derechos Humanos'.

[78] See Kathryn Sikkink, 'Human Rights Advocacy Networks and the Social Construction of Legal Rules', in *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy*, ed. Yves Dezalay and Bryant Garth (Ann Arbor: University of Michigan Press, 2002), 37–64. Kathryn Sikkink, 'The Transnational Dimension of the Judicialization of Politics in Latin America', in *The Judicialization of Politics in Latin America*, ed. Rachel Sieder, Line Schjolden, and Alan Angell (New York: Palgrave

fundamental role in the transformation of human rights governance in Latin America. During the era of massive human rights violations and authoritarian regimes, Sikkink explains, local activists learned to use a "boomerang effect" where non-state actors, faced with repression at home, would seek help in international courts and organizations, in order to bring pressure to their respective government from above[79]. In line with the Inter-American constitutionalist mindset, the goal of activism in this context was to bypass the failed domestic judiciary, and get a hierarchically superior order by the IACtHR against a state.

During this period of time, the IACtHR was successful in establishing a direct link with civil society organizations in the region, without (even despite) the mediation of national governments. This thick network of transnational activists became knowledgeable and successful in using the system through "boomerang" strategies. As importantly, they began to play the role of translators of domestic, grassroots, grievances into Inter-American vernacular[80]. Through this processes, the network of human rights activists became the constituency of Inter-American constitutionalism: they came to have collective expectations about the system, which were not mediated by the diplomatic representatives of their respective states before the OAS.

However, as Latin American states turned to democracy, the boomerang effect became an insider/outsider strategy[81]: despite focusing, in principle, on the newly created domestic spaces for the protection of human rights, activists that learned the importance of the Inter-American regime during the hard years of dictatorship will still keep that alternative open, designing strategies that are completely oblivious of the

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Macmillan, 2005), 263–292. Kathryn Sikkink and Carrie Booth Walling, 'The Justice Cascade and the Impact of Human Rights Trials in Latin America', *Journal of Peace Research* 44, no. 4 (2007).

[79] See Kathryn Sikkink and Margaret Keck, *Activists Beyond Borders* (Ithaca, N.Y: Cornell University Press, 1998). The boomerang effect was there then expanded into a five-phase dynamic "spiral model", which tried to explain domestic changes triggered by transnational activism. See Kathryn Sikkink and Thomas Risse, 'The Socialization of International Human Rights Norms into Domestic Practices', in *The Power of Human Rights: International Norms and Domestic Politics*, ed. Thomas Risse, Kathryn Sikkink, and Stephen Ropp (Cambridge: Cambridge University Press, 1999), 1–38.

[80] On the role of "translators" in transnational human rights activism, see Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), Chapter 7.

[81] Sikkink, 'The Transnational Dimension of the Judicialization of Politics in Latin America' at 278-293.

national/international divide[82]. In this new context, activism is less about bypassing the domestic judiciary, and more about the social construction of transnational norms involving both domestic and international courts[83].

Such insider/outsider strategies are based on expectations that the IACtHR's constituency has of the system, built throughout the years. Perhaps victim of its own success, the Court's role is now not one of appearing at the last minute to save the day, when all hope is lost. On the contrary, the Court is now expected to act, as a matter of principle. Its legitimacy, defined as the acceptance by its constituency, depends on its continued involvement with the agendas put forward by activists – be them pensions, gay rights, prior consultation of indigenous populations[84], or whatever issue is more pressing in domestic politics at a given time. And that is, precisely, the point: for better or for worse, the IACtHR is now part of the domestic political landscape of each state in the region.

This transformation means that the Court becomes involved, not in the top-down process of Inter-American constitutionalism, but in the mundane tasks of governance: moderating expectations, pondering interests, having an eye to the redistribution of domestic wealth and power. It may, for example, end up supporting one side of a domestic struggle for resources, thus disempowering the other side of that struggle, as is the case with the debate on prior consultation in oil-rich Ecuador[85]. Or it may decide to weight in in favor the moral views of a specific segment of a domestic society, thus undermining the political options of those holding the opposite view, as is the case of gay rights in the mostly Catholic Chile[86]. The point is not that these cases are

[82] For example, the domestic women´s movement in Colombia was successful in deploying international human rights arguments to advance their position before domestic courts. See Julieta Lemaitre Ripoll, *El Derecho Como Conjuro: Fetichismo Legal, Violencia y Movimientos Sociales* (Bogotá: Siglo del Hombre Editores, 2009) at 197 - 237.
[83] Sikkink, 'Human Rights Advocacy Networks and the Social Construction of Legal Rules', at 39-54.
[84] IACtHR , Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Decision of June 27, 2012 (merits and reparations)
[85] IACtHR , Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Decision of June 27, 2012 (merits and reparations)
[86] IACtHR, Attala Riffo y niñas v. Chile, Decision of 24 Febrary 2012 (merits)

substantively or legally unsound; but rather that, through these cases, the IACtHR becomes involved in the practice of transnational governance.

One could argue that there is nothing new about this kind of challenges for a Constitutional Court. For decades, Courts around the world have had to face difficult challenges to their legitimacy when they give orders of complex enforcement[87], structural injunctions[88], or when they adopt far reaching decisions dealing with social and economic rights in the Global South[89]. The problem is that the IACtHR is *not* an actual Constitutional Court: despite the fact that, in its Inter-American constitutionalist mind-set, the Court carved for itself a space that allowed it to act as if really were one, the fact is that the reasons why the IACtHR (and not domestic courts) should be the one facing such challenges. As the region moves toward local democracy, stronger domestic courts and a vibrant civil society, the idea of an allegedly apolitical, top-down, deeply hierarchical, Inter-American constitutionalism seems more the remains of a bygone era.

The Inter-American regime, though, has much to contribute to justice and social emancipation in the region during this new period. Due to the expectations of its constituency, it is more engaged than ever by local activists in their insider/outsider strategies. The potential of channeling this new form of interaction towards a better protection of human rights in the region is enormous. The problem is that we lack a vocabulary to think about this new reality. As scholars, we seem to be prisoners of the constitutional mindset, and continue thinking about the interaction between the IACtHR and domestic legal systems, either as a problem of top-down constitutionalism, or as an issue of clearly distinguished spaces of national and international jurisdiction. As we seen, neither of these approaches is particularly useful. The last section of this

[87] Abram Chayes, 'The Role of the Judge in Public Law Litigation', *Harvard Law Review* 89 (1976): 7.
[88] An structural injunction is a "formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution" (Owen Fiss, 'The Allure of Individualism', *Iowa Law Review*, (1993) 78, 965 at 965). For an introductory piece on the US side, see: Owen Fiss, *The Civil Rights Injunction* (1978) at 7; on the South African approach, see: Danielle Hirsch, 'A Defense of Structural Injunctive Remedies in South African Law' *Oregon Review of International Law*, (2007) 9, 1 at 10-18
[89] See the case studies on India, Brazil, South Africa and Colombia in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008).

article presents elements to develop an alternative way of thinking about the role of domestic courts in the international legal order, especially in the Inter-American regime: norm-creating interaction.

3. Beyond Inter-American Constitutionalism: Norm-Creating Interaction

One way forward, beyond the prison of constitutionalism, is to think of the interaction between domestic and international legal systems as a matter of creative interaction, in which domestic law is transformed by international law, which is in turn transformed by the former, in a never ending loop. In creative interaction, the question is not whether domestic courts in Latin America enforce an Inter – American standards of human rights, but rather to inquire about the new forms of law that emerge from the interaction between domestic courts and the IACtHR. This implies that an understanding of the units is not sufficient to understand the whole. Admittedly, this is a distinctively descriptive enterprise: it is not intended to propose the means to enhance the "Inter-American rule of law". Its inspiration is, precisely, that all the talk about the Inter-American Constitutionalism obscures the power asymmetries that are built into our current understanding of the relation between domestic and international law.

In order to think in terms of creative interaction, the starting point is not the strict division between national and international implicit in Article 38 of the ICJ's Statute, and neither is it vertical structure of Inter-American constitutionalism as evidenced in the amnesty decision. Rather, our starting point is the regime complexes that apply to a certain area of global governance. To do so, a fruitful place to begin may be some of the lessons learned from the debate of fragmentation in international law; *i.e.*, the emergence of specialized and relatively autonomous rules or rule-complexes, legal institutions and spheres of legal practice at the international level[90]. It is well documented that international law has been suffering from "fragmentation anxiety",

[90] International Law Commission. *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (Finalized by Martti Koskenniemi) UN Doc. A/CN.4/L.682 (2006), par. 8.

and that such issue has stirred one of the central debates taking place in contemporary legal scholarship - I will not dwell further into such debate[91].

Human rights law and, in particular, the Inter-American regime of human rights, are examples of such specialized areas, where a set of rules and institutions have emerged in relatively autonomy. This specialized regime, though, is not a subjectless autopoietic "system", in the Luhmanian sense, as understood by Teubner and Fischer – Lescano [92]. It is, rather, a group of people that interact, on the basis of the rules contained in the Inter-American Convention of Human Rights, to push their own agendas and fulfill their mandates. They constitute a community of practice[93], composed by different actors: transnational NGO's that bring cases before the IACtHR, grassroots organizations that protect victims on the ground, clinics at law schools that file amicus briefs, domestic courts that interpret and apply the Convention and IACtHR case law, civil servants that work on human rights for domestic governments, scholars writing and teaching Inter-American human rights law, and, of course, the IACtHR, among others

To be sure, all these actors have different, even conflicting, views of human rights: that matters not. The community of practice is not constituted around a single goal, but rather a shared common understanding of what they are doing and why[94]. The Inter-American human rights community of practice shares collectively held background knowledge: its institutions, its participants, its challenges, and its realities. In this

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[91] See Uruena, *No Citizens Here: Global Subjects and Participation in International Law* at 36 - 43 and accompanying footnotes..

[92] See G. Teubner and A. Fischer – Lescano, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" 25 *Michigan Journal of International Law* (2004) 999.

[93] Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (London and New York: Routledge, 2005) at 11. The following use of the notion of community of practice, as well as the idea of shared understandings, is influenced by the enlightening approach proposed in Stephen J. Toope and Jutta Brunnée, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010). Brunné's and Toope's argument, though, seeks to unpack the notion of international legal obligation through a reinterpretation of the Fullerian criteria of inner morality of law. My interest is not in legal obligation, nor in compliance with international law; for that reason, I focus solely on their description of interactional international law-making, and not in their effort to provide a normative basis for that process.

[94] Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, at 22

framework, each actor proposes its view of Inter-American human rights, and through continuous interaction with other actors, the international norm is settled – and may be unsettled later again, by further interaction.

From this perspective, both the idea of a sharp division between domestic and international, on the one hand, and the hierarchical mindset of a top-down constitutional layout, with the Court at the top, on the other, stops making sense freely The community of practice includes both domestic and international actors: national courts, the IACtHR, domestic administrative agencies, scholars – in other words, all those who belong to the community of practice contribute the interaction that creates norms.

Time

Part of the problem with the Inter-American constitutional mindset is its conception of time, as it conceives the interaction between domestic courts and the IACtHR as a matter of discrete encounters that happen once and will never happen again. This problem is well-known in game theory, where the difference between single (isolated) and iterated games has been studied extensively[95], an idea that has gained some traction in international law as well[96]. My intention is not to present yet another rational choice approach of international law. The crucial point here is that iteration creates an interaction that is qualitatively different from that of discrete contacts. Time is, as they say, of the essence. As we have seen, civil society has grown to have expectations of the IACtHR. There is no reason to think that other participants of the community of practice (even the Court itself) have not developed similar expectations on the basis of their continuous encounters. Unlike the mindset of Inter-American constitutionalism,

[95] See Larry Samuelson and George Joseph Mailath, *Repeated Games and Reputations: Long-run Relationships* (Oxford: Oxford University Press, 2006), at 1 - 14 (introducing the basics if iterated games).

[96] See John Setear, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', *Harvard International Law Journal* 37, no. 1 (1996): 139–230 (arguing that the law of treaties is can be understood as promoting "formally delineated series of structured interactions between parties ("iterations")", and that such a design promotes cooperation). John K Setear, 'Treaties, Custom, Iteration, and Public Choice', *Chicago Journal of International Law* 5, no. 2 (2005): 715 (arguing that, from this iterative perspective, leaders are more likely to choose treaties as the legal from of their international obligations, instead of customary law).

the interaction approach presumes that the actors interact with expectation towards an unknown number of interactions.

Iteration in this case changes not only the strategies, but changes the game itself - in game-theory parlance, the norm-making interaction of the Inter-American human rights community of practice is a dynamic evolution game[97]. This idea has been explored by constructivist international relations as well: the interaction between agents transform the structure, which in turn also triggers transformations in the interests and strategies of the agents[98]. In sharp contrast, Inter-American constitutionalism believes that the structure is immutable, and all that agents can do is simply adapt to it, trying to get whatever benefits they can reap from an all-powerful centralized center of norm production. Against this view, the norm-making interaction approach suggests that the interests of the actors are not static, but rather merge into each other endlessly, and in turn transform the legal structure that frames their interaction. Instead of reifying each actor or legal order (national/international) and presenting them as machines that collide or coexist, repel or impose over each other, interaction in the community of practice transforms the terms of engagement; in other words, the game evolves. Human rights law that results of the interaction is not causally triggered by dominant strategies of participants in the community, but should be rather understood on its own, in the context of the regulatory space that is defined by the specialized regime created by the Pact of San José.

This dimension of time and constant change implies that creative interaction is not a matter of regulation/non regulation. Scholars, practitioners and activists who work on from an Inter-American constitutional mindset act as if the world was being created every time that a domestic court applies an Inter-American standard, as if there was somehow a legal lacuna that is then filled by international law. The exact opposite is

[97] "In an evolving game, the game structure evolves as it iterates due to internal changes resulting from the operation of institutions responding to external events, such as new scientific or technological findings, that cause the underlying game structure to change". Brett Frischmann, 'A Dynamic Institutional Theory of International Law', *Buffalo Law Review* 53, no. 3 (2003): 679–809 at 682.

[98] See Alexander Wendt, "The Agent-Structure Problem in International Relations" (1987) 41 *International Organization* 335; Adler, *Communitarian International Relations*, at 5-6

truth: this interaction occurs in a dense environment of laws and regulation, based on the expectation an unknown number of interactions. Therefore, the norm-creating interaction approach implies that new human rights law is created when the participants of the community of practice interact, and also when they fail to do so. This lack of interaction has to be read as a choice that was made, and not a fortuitously occurring event. Lack of interaction in a the Inter-American human rights community is also a matter of norm-making interaction - if a domestic court decides that no international law is relevant in a case, or when an international court sees domestic law as a mere "fact", all of this is new regulation, choices that can be contested and resisted.

Comparative international jurisprudence

Inter-American constitutionalism is also too focused on legal norms and court decisions, yet fails to take into account the crucial role played by legal theory in the creation of norms. Indeed, it downplays to the role played by legal scholars in its very own construction: if anything, it overlooks the fact that constitutionalism, in itself, is a contestable way of understanding the international community[99]. And even if it does consider legal theory, it does so as if human rights jurisprudence were homogenously and univocally understood and interpreted in Peru, Ecuador, or within the IACtHR. This is clearly not the case. Legal theories have a place of origin, and have a place of reception. They are often created as a contribution in specific domestic debates, and have been transplanted to understand Inter-American issues, a dynamic that is lost in Inter-American constitutionalism.

In contrast, a norm-making interaction approach highlights the role of scholars as participants of the community of practice, and allows us to see the contribution of legal scholarship in the development of Inter-American human rights law, and the varied understandings that different scholars bring to the community of practice. Legal theory is transnational, in the sense that it is deployed, read and misread differently in each

[99] See Rene Uruena, 'Espejismos Constitucionales: La Promesa Incumplida Del Constitucionalismo Global', *Revista De Derecho Público, Universidad De Los Andes* 24 (2010).

domestic setting[100]. This effort of "comparative international jurisprudence" [101] opens important spaces for mapping power in the interaction of the Inter-American community of human rights.

Comparative legal theory is particularly important in this sense. Comparative law provides a vocabulary of the relative autonomy of the legal language[102], legal functionalism[103], legal transplants[104], and legal pluralism[105], which are all central to understanding the Inter-American regime of human rights as the result of the interaction of a community of practice.

Moreover, such a focus on theory also permits to foreground what can be generally called difference-based approaches to international law. Scholars and practitioners approach international law differently, depending on their own respective background. This idea has been around for some time now, as non-western states tried in the 1960's and 1970's to argue that their own approach to international law was different and should be considered seriously[106]. In the post-Cold War era, this idea migrated to the

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[100] For a proposing a map of readings, misreading and strategic appropriations in Latin America of transnational legal theories originating from the US and Europe, see generally Diego Eduardo López Medina, *Teoría Impura Del Derecho: La Transformación De La Cultura Jurídica Latinoamericana*, 1st ed. (Bogotá: Legis, 2004)

[101] This concept appears first in William Ewald's works on comparative law, where he proposes the comparative study of the intellectual conceptions that underlie the principal institutions of one or more foreign legal systems. See William Ewald, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?', *University of Pennsylvania Law Review* 143, no. 6 (1995): 1889–2149. William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', *The American Journal of Comparative Law* 43, no. 4 (1995): 489–510.

[102] See David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', *Utah Law Review* 1997, no. 2 (1997): 545–637 at 629 - 633 (arguing that comparative lawyers participate in governance by engaging in a wider debate on the nature of law and its relation to society) .

[103] See Ralf Michaels, "The Functional Methods of Comparative Law" in Mathias Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2006) 339 at 340 (presenting functionalism as both the mantra and the *bête noire* of comparative law)

[104]See Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge', *Theoretical Inquiries in Law* 10 (2009): 723 (providing an account of what the literature on legal transplants has achieved so far and arguing that legal transplants as social acts performed by individuals call for a study of the "micro" level of engagement with legal change by individuals).

[105] See Paul Schiff Berman, 'Global Legal Pluralism', *Southern California Law Review* 80 (2007 2006): 1155 at 1169 - 1179 (summarizing the relevance of legal pluralism for the international legal order).

[106] See KRR Sastry, 'Hinduism and International Law', in *Academy of International Law at The Hague, Recueil Des Cours*, vol. 117 (Leiden: Martinus Nijhoff Publishers, 1966), 503. For a more recent summary

third world approaches to international law (TWAIL)[107], which propose that this distinctive approach can be compared to other views (and by others, one normally think Western and mainstream).

However, it is surprising to see that the Inter-American system of human rights has been mostly spared of any critique from a TWAIL perspective. Much literature on the IACtHR seems particularly interested in its comparison with the European Court in Strasbourg, and it seems useful to remember 19th and early 20th Century Latin American international lawyers, men like Andrés Bello and then Alejandro Alvarez, who believed it possible to speak of a (Latin) American international law, which could be compared to its European equivalent. Interestingly, though, this Latin American international law was not intended to be an alternative to (European) international law, but was rather meant to be a platform for gaining entrance to the club of civilized nations. Thus, Creole Latin American lawyers were ultimately interested in a self-imposed variant of international law's civilizing mission[108]. The norm-creating interaction approach, by registering the contribution of legal scholarship to the community of practice, allows the conversation of whether such an assessment could be made in reference to contemporary Inter-American human rights law.

Risks of the norm-creating interaction approach

The analytical unit of the norm-creating interaction approach is specialized regimes; in this case, the Inter-American regimes of human rights. This choice carries some costs that need to be discussed. Perhaps the two main challenges refer to (a) the issue of

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of the earlier Third World scholars, see: B S Chimni, 'Towards a Radical Third World Approach to Contemporary International Law', *ICCPL* 5, no. 2 (2002): 14–26.

[107] See generally B S Chimni, 'Third World Approaches to International Law: A Manifesto', *International Community Law Review* 8, no. 1 (2006): 3–27.

[108] On the notion of creole legal consciousness, see Liliana Obregón, 'Completing Civilization: Creole Consciousness and International Law in Nineteenth Century Latin America', in *International Law and Its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2006), 247., on Alvarez, see Liliana Obregón, 'Noted for Dissent: The International Life of Alejandro Álvarez', *Leiden Journal of International Law* 19, no. 04 (2007): 983).

normative standards of law-making and (b) the issue of "tunnel vision"[109]. In what remains if this paper, I will briefly discuss each of them.

Let us begin by the problem of normativity. The challenge can be summarized in the following way: while it makes sense to think about law-making by interaction in the context of the Inter-American system of human rights, one is left unable to distinguish between law and non-law. That is, if all the options brought to the table by participants of the community of practice have law-making potential, then how are we to identify the *real* Inter-American human rights law that results of the interaction?

This problem presupposes that there is a point of view that is external to the community of practice, which would allow an external observer to apply a threshold of legality, thus defining what is law and what is not. In fact, the opposite is truth: Inter-American human rights law is what the community of practice says it is. The IACtHR is part of the community, then it will have an important say in the law-making. But also domestic courts are participants, and transnational networks of activism. They are all parts of the interaction that creates Inter-American human rights law. The line between law-making and law-applying has to collapse. The search for an external criterion to define legality can be hardly reconciled with idea of law-making through interaction – which may be read as one of the main challenges to Brunneé's and Toope's interactional approach[110].

More serious, though, is the problem of "tunnel vision". By definition, specialized international regimes exist in order to regulate a certain area of global politics or production: that is, they are only concerned with that specific issue, and not with wider societal concerns. The Inter-American human rights regime is not concerned with, say, economic development, or the environment. Using specialized regimes as an analytical unit risks losing sight of an overarching narrative of a "good" society.

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[109] For an introduction of the problem of "tunnel vision", see Gunther Teubner and Peter Korth, 'Two Kind of Legal Pluralism: Collision of Transnational in the Double Fragmentation of the World Society', in *Regime Interaction in International Law: Facing Fragmentation*, ed. Margaret Young (Cambridge: Cambridge University Press, 2012), 23–54 at 37.

[110] See Martti Koskenniemi, 'The Mystery of Legal Obligation', *International Theory* 3, no. 2 (2011): 319–325.

Moreover, specialized regimes, such as the Inter-American human rights system, are not static objects. Instead, they are put together in order to achieve a goal that is not given by the specialized regime itself, but rather by external political forces that see international law as one more of their tools to achieve their needs. In this sense, a specialized regime like may play the part intended by the powerful. What is more, the Inter-American regime of human rights may have hegemonic ambitions, in the sense that they would seek to expand their world-view, placing its goal as more important (or universal) in detriment of the goals of other regimes[111]. Adopting such unit of analysis could obscure important differences of power and, in fact, could perpetuate as neutral the structure of "specialized regimes", which is a specific creation of the powerful.

This move, in turn, could end up empowering the narrowly defined experts that decide what the ultimate goal of the regime is. These are the actors that participate of the Inter-American community of practice, who become the ultimate insiders. Indeed, because the mindset of these regimes is wholly instrumental, then a certain a transnational elite that acts outside democratic or legal checks of accountability ends up being empowered by global specialized regimes[112]. Thus, the norm-making interaction approach could play into this expert-power base, legitimizing what is only the result of the (functional) agenda of domination.

All of these are important challenges. The norm-making interaction approach, though, does not see specialized regimes as objects whose characteristics exist outside political choices. Quite on the contrary, this approach embraces the fact that the tunnel vision of specialized regimes is able to obscure differences of power. However, these differences of power may be foregrounded through a combination of three strategies. First, the inclusion of domestic political forces in the Inter-American community of practice may

[111] A discussion of regimes as hegemons that seek to expand their sphere of influence can be found in Martti Koskenniemi, 'Hegemonic Regimes', in *Regime Interaction in International Law: Facing Fragmentation*, ed. Margaret Young (Cambridge: Cambridge University Press, 2012), 305–323 .

[112] For a discussion of expertise as a technology of governance in the specialized regime of global water governance, see Rene Uruena, 'Expertise and Global Water Governance: How to Start Thinking About Power over Water Resources', *Anuario Mexicano De Derecho Internacional* 9 (2010)

provide elements to compensate the "tunnel vision" problem. It may allow for other variables, closer to domestic interests, to creep into process of specialized legal reasoning, thus providing the decision maker with more "contextualizing elements" when they adopt a decision. This strategy may not go too far, as domestic interests may in fact be represented by domestic elites seeking to favor specialized decision making, instead of grass-root movements seeking to democratize governance[113].

A second strategy may prove more productive. Norm-making interaction occurs not only within a given community of practice (such as the Inter-American), but also of the contact between communities of practice belonging to different specialized regimes. Thus, new law emerges also when the Inter-American human rights community interacts with the environmental law community of practice, or the international investment law community of practice. In this "external" interaction, tunnel vision may diminish and contestation may appear.

The most evident arena of contestation is, of course, definition. Such is the third strategy of foregrounding power in the context of specialized regimes. The norm-creating interaction approach understands the Inter-American regime as ductile and porous, because its definition includes no act of formal public authority, but rather the decision of experts defining a specific issue as "human rights" – a decision that can be contested. In fact, this definition is the necessary first step of resistance, as it prevents the deployment of the structural bias implicit in the regime that is not desired[114]. Moreover, this process of contested definition may imply that regimes are transformed as they interact: there is no reason why the Inter-American regime of human rights cannot become a regime of human rights–environment protection, or an Inter-American system of human rights and international humanitarian law.

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[113] For this problem in the context of judicial reform in Colombia, César Rodríguez-Garavito, 'Towards a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America', in *Lawyers and the Rule of Law in an Era of Globalization*, ed. Yves Dezalay and Bryant Garth (New York: Routledge, 2011), 155 – 181.

[114] On structural bias see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd ed. (Cambridge: Cambridge University Press, 2005) at 600.

4. Last act

The stage was set. The woman sat silently under the spotlight. Karen Atala told her story. The Inter-American Court of Human Rights decided she had been, indeed, wronged. This is only the beginning: the life of the international law is not in the judges asking the questions on the stage. Its soul lives in the audience.

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