Part II
Internationalised Constitutional Adjudication

Chapter 1
Application of Conventionality Control Parameters

The first aspect of the internationalisation of constitutional adjudication is that domestic judges are required to exercise control over domestic law in accordance with not only national constitutions but also regional conventions. In the contemporary era, sovereign States have faced heavy pressure from the international community, and consequently, the absolute supremacy of the constitution is relativised through the 'internationalisation of constitution'.[409] Referring to Daniel Thürer's term *kosmopolitische Verfassungsentwicklungen*,[410] Anne Peters rightly captures the recent phenomenon of constitutional development where 'the international community, or at least its most powerful members, have been supervising regime changes and have induced, accompanied, steered, or even installed new state constitutions'.[411]

The applicability of international law within constitutional frameworks has been debated with great interest in theory and practice. On the international level, Article 27 of the VCLT stipulates the supremacy of internal law by prohibiting the invocation of domestic legal provisions as justification for the failure to uphold treaty provisions. Article 46(1) thereof furthermore hinders a State from invoking domestic circumstances as invalidating its consent to be bound by a treaty 'unless that violation was manifest and concerned a rule of its internal law of fundamental importance'. At the domestic level, as is implied in the 'fundamental importance' condition attached to the latter, the problems of whether international law is a part of national law and whether it is applicable before national courts

409 Wen-Chen Chang and Jiunn-Rong Yeh, 'Internationalization of Constitutional Law' in Michel Rosenfeld and A András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1165–84, 1167–1169.

410 Daniel Thürer, 'Kosmopolitische Verfassungsentwicklungen' in Daniel Thürer (ed), *Kosmopolitisches Staatsrecht*, Vol 1 (Schulthess Zurich 2005) 3–39.

411 Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 *Vienna Online Journal of International Constitutional Law* 170–198, 173.

are constitutional in nature.[412] Therefore, the *supremacy of international law* over domestic law cannot duly answer the question of whether domestic courts can utilise human rights conventions in judicial review.

Moreover, human rights conventions and national constitutions share similar catalogues of rights and freedoms for the most part. An empirical study reveals that 'human rights treaties have a significant influence on the catalogue of human rights contained in national constitutions and, on the contrary, it follows from the very nature of human rights treaties that they are the result of reflected experience'.[413] Therefore, a judicial review involving fundamental rights would indicate the inevitable coexistence of conventionality control and constitutionality control. Quoting the IACtHR's expression of this, 'the constitutionality control necessarily implies the conventionality control, exercised in complementary manner'.[414] A conundrum thus arises when domestic courts find certain domestic provisions incompatible with a treaty and abstain from enforcing the treaty provisions. In this situation, no practical necessity would remain to re-evaluate these norms against the yardstick of the analogous catalogue of constitutional rights. Eventually, conventionality control would replace constitutionality control, and the latter's ultimate aim of ensuring the *supremacy of constitution* would also be undermined.

Against this background, national judges have tried to integrate human rights treaties into national constitutions to converge the parallel judicial control mechanisms. The present chapter first examines the battle for supremacy between regional conventions and national constitutions: incorporating regional conventions and regional courts' decisions into national constitutions, on the one hand (Section 1-A), and consubstantial and sovereigntist constitutional contestations against regional conventions, on the other hand (Section 1-B). To alleviate the tension between international and constitutional legal orders, it then unpacks the potential of the *pro homine* principle regarding two points: the *offensive* function as a *sword* to penetrate the border between the international and the national

412 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford University Press 2012) 55–59.

413 Eliska Wagnerova, 'The Direct Applicability of Human Rights Treaties' in Council of Europe (ed), *The Status of International Treaties on Human Rights* (2006) 111–128, 113.

414 *Gelman*, Order (n 375) para 88.

legal order (Section 2-A), and the *defensive* function as a *shield* to preserve constitutional principles and values (Section 2-B).[415]

1. Relationship between Regional Conventions and National Constitutions

A. Supremacy of Regional Conventions over National Constitutions

(i) Incorporating Regional Conventions through National Constitutions

Leaving aside the theoretical battle between dualism and monism, the doctrinal concept of *direct applicability* practically informs the relationship between international and constitutional law. Here it is worth recalling the well-worn *Danzig* formula: 'according to a well-established principle of international law, [...] an international agreement, cannot, as such, create direct rights and obligations for private individuals [b]ut it cannot be disputed that the very object of an international agreement, according to the intention of the Contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.[416] As Yuji Iwasawa carefully categorised, the direct applicability (*Anwendbarkeit*) or 'self-executing' of international law in domestic law normally means 'susceptible of being applied without the need of further measures', which must be distinguished from its domestic legal force (*Geltung*).[417] The function of direct effect is formulated by André Nollkaemper into a duality: on the one hand, 'as a powerful *sword* that courts can use to pierce the boundary of the national legal order and protect individual rights where national law falls short';[418] on the other hand, direct effect serves as a *shield* to 'justify the non-application of international law by the courts, and thereby protect domestic political organs

415 The *pro homine* principle has the potential to be applied beyond the regions of Europe and Latin America. As a Japanese context, for example, Hajime Yamamoto and Yota Negishi, 'Japan' in Fulvio M Palombino (ed), *Duelling for Supremacy: International vs. National Fundamental Principles* (Cambridge University Press 2019) 210–233, 218–219.

416 *Jurisdiction of the Courts of Danzig* (Advisory Opinion), PCIJ Rep Series B No 15 (1928) 17–18.

417 Yuji Iwasawa, 'Domestic Application of International Law' (2016) 378 Recueil des Cours 9–261, 134–144.

418 André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 *European Journal of International Law* 105–125, 112–115 (emphasis added).

and, more generally, domestic values, from review based on international law'.[419]

Alternatively, the internationalisation trend of national constitutions is accelerated by the mandate of *consistent interpretation*, according to which national authorities must construe legislation in conformity with international law.[420] In some countries, national constitutions incorporate an express provision that requires consistent interpretation. For example, the Constitutional Court of South Africa utilises Section 39(1)(b) of the constitution to 'consider international law as a tool to interpretation of the Bill of Rights'.[421] Similarly, Section 11(2)(c) of the Constitution of Malawi has required domestic courts in this country to 'have regard where applicable, to current norms of public international law and comparable foreign case law'.[422] Even lacking an evident constitutional provision, domestic courts often in practice gain inspiration for interpreting legislation from international law. A representative example is the *Charming Betsy* canon that was adopted by the US Supreme Court in a historical judgement in 1804.[423]

The specific contexts of regional human rights protection are also influenced by the *conventionalisation* trends of national constitutions and in more express manners. There indeed exists the 'progressive *rapprochement* between the European domestic orders with regard to the "position" of the ECHR in the national hierarchy of sources'.[424] The best example is found

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419 Ibid 115–117.

420 Antonios Tzanakapoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133–168, 157.

421 Sec 39(1)(b) Constitution of South Africa: When interpreting the Bill of Rights, a court, tribunal or forum [...]must consider international law. Constitutional Court of South Africa, Government of South Africa and ors v Grootboom, Appeal to Constitutional Court, [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC), 4 October 2000, paras 26–31 (ILDC 285 (ZA 2000) analysed by Waruguru Kaguongo).

422 Sec 11(2)(c): In interpreting the provisions of this Constitution a court of law shall [...] take full account of the provisions of Chapter III and Chapter IV. High Court of Malawi, Moyo v Attorney General, Constitutional Review, Constitutional Case No 12 of 2007, 26th August 2009, para 12 (ILDC 1370 (MW 2009) analysed by Mwiza Jo Nkhata).

423 *Murray v Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), 18.

424 Giuseppe Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 *European Journal of International Law* 401–424, 404 (emphasis in original text).

in Austria, where the ECHR has been granted constitutional rank and fully incorporated since 1964.[425] Due to its constitutional status, the Austrian Constitutional Court has the competence to review whether certain acts violate *Strasbourg* law and constitutional criteria.[426] Another example is provided by Article 94 of the Dutch Constitution, which is an open-minded provision for the international community which offers a legal basis for judges in the Netherlands to perform conventionality control of national statutes.[427]

A certain number of States Parties award the ECHR a supra-legislative status, that is, give it primacy over national legislation. For example, in Switzerland international law has priority over national law in situations in which they conflict.[428] In addition, Article 190 of the Federal Constitution is interpreted as a legal basis for the Federal Supreme Court to review the compatibility of a federal statute with constitutional and international law.[429] The Supreme Court has thus helped the ECHR become an essential element of the Swiss legal order 'by the equalization of the ECHR with the Constitution, at least on the procedural level, and by taking into account the conventional guarantees for the concretization of constitutional rights'.[430] As the guarantees under the ECHR and the Federal Constitution

425 Bundesverfafssungsgesetz vom 4. März, mit dem Bestimmungen des Bundesverfassungsfesetzes in der Fassung von 1929 über Staatsverträge abgeändert und ergänzt weden, 59/1964.

426 Philip Cede, 'Report on Austria and Germany' in Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 55–80, 66; Daniela Thurnherr, 'The Reception Process in Austria and Switzerland' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 311–391, 326–328.

427 Gerhard van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands' (2010) 11 *German Law Journal* 275–290, 279–281; Erika de Wet, 'The Reception Process in the Netherlands and Belgium' in Keller and Stone Sweet (n 28) 229–310, 240–241.

428 Daniel Thürer, 'Verfassungsrecht und Völkerrecht' in Daniel Thürer, Jean-François Aubert, Jörg Paul Müller (eds), *Verfassungsrecht der Schweiz* (Schulthess 2001) 179–206.

429 Thurnherr (n 426) 332–335.

430 Helen Keller, 'Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland' (2005) 65 *Zeitschrift für ausläandisches öffentliches Recht und Völkerrecht* 283–349, 307.

run parallel in many areas, there exists a type of *de facto* constitutional control with respect to federal statutes in case of their application.[431]

In Belgium, the Supreme Court of Appeal introduced in the 1971 *Franco-Suisse Le Ski* decision the monistic theory regarding the relationship between treaties and the Belgian Constitution.[432] Moreover, the Constitutional Court has implicitly confirmed its own authority to review the constitutionality of treaties, and therefore maintained its supremacy over treaties.[433] Against this background, there is a 'parallel system of control with ordinary jurisdictions (directly) reviewing the conformity with treaty provisions and the Constitutional Court reviewing the conformity with constitutional provisions'.[434] The Constitutional Court has also occasionally followed ECtHR jurisprudence, and therefore accepted that constitutional and treaty rights form 'an inseparable whole'.[435] A similar parallel judicial control can be found in the French legal system in which Article 55 of the Constitution explicitly recognises the supra-legal rank of treaties. Since the 1975 *IVG* judgement, the Constitutional Council has ruled that it has no jurisdiction to review the conformity of legal provisions in light of treaties.[436] Subsequently, the Court of Cassation and the Council of State performed the important task of judicial review *ex post* based on the ECHR, which had substantively complemented the constitutionality control *ex ante* assumed by the Constitutional Council.[437] Because these parallel systems can permit these ordinary courts to rely on the Strasbourg law rather than constitutional protection, the 2008 constitutional reform introduced the *Question prioritaire de constitutionnalité* (QPC) to ensure the priority of constitutional issues over Convention issues. Under the QPC procedure, if a party raises a constitutional question, the judge must exam-

431 Giovanni Biaggini, 'Switzerland' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (2011) 303–328, 322.

432 Cour de Cassation belge, *Fromagerie franco-suisse Le Ski. État Belge c SA*, arrêt du 27 mai 1971.

433 Matthias E Storme, 'The Struggle Concerning Interpretative Authority in the Context of Human Rights: The Belgian Experience' in Rainer Arnold (ed), *The Universalism of Human Rights* (Springer 2013) 223–235, 227–230.

434 De Wet (n 427) 251.

435 Cour Constitutionnelle belge, Arrêt n° 195/2009 du 3 décembre 2009, B. 7.

436 Conseil constitutionnel de la République Française, Décision n° 74–54 DC du 15 janvier 1975.

437 Didier Maus, 'Nouveux regards sur le contrôle de constitutionnalité par voie d'exception' in Dnys de Béchillon, Pierre Brunet, Véronique Champeil-Desplats and Éric Millard (eds), *L'architecture du droit : Mélanges en l'honneur de Michel Troper* (Economica 2006) 665–678, 675.

ine certain conditions, and if they are met, send the question to the Constitutional Council, not to the ordinary jurisdictions. The QPC mechanism does not isolate but rather reinforces the ECHR guarantees by inducing the Constitutional Council to pay attention to ECtHR jurisprudence.[438] In practice, the Constitutional Council seems to avoid diverging from the jurisprudence of the Strasbourg Court.[439]

The regionalisation of national constitutions has also been accelerated through so-called *consistent interpretation* clauses. Article 10(2) of the Spanish Constitution stipulates that '[t]he norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain'. Through this interpretative clause, the constitutional provisions of fundamental rights are considered incomplete, and open norms are subject to being specified or the content of human rights treaties may be placed there.[440] The ECHR thus rapidly became an important source of reference in the interpretation of the rights and freedoms recognised by the Constitution.[441] As a consequence, although the Constitutional Court maintains a monopoly on authentic interpretation of fundamental rights, it does not prevent ordinary judges from controlling conventionality of national acts by resolving the possible contradictions between constitutional and Strasbourg jurisprudence.[442] In the United Kingdom, the ECHR has become the source of statutory rights through the 1998 Human Rights Act

438 Frédéric Sudre, 'Question préjudicielle de constitutionnalité et Convention européenne des droits de l'homme' (2009) 3 *Revue du droit public et de la science politique en France et a l'etranger* 671–684, 672.

439 David Szymezak, 'Question prioritaire de constitutionnalité et Convention européenne des droits de l'homme : L'européanisation « heurtée » du Conseil constitutionnel français' (2012) 7 *Jus Politicum* 1–23, 11–14.

440 Patricia Cuenca Gómez, 'La incidncia del derecho interncional de los derechos humanos en el derecho interno: la interpretación del Artículo 10.2 de la Constitución española' (2012) 12 *Revista de Estudios Jurídicos* 1–24, 4.

441 Mercedes Candela Soriano, 'The Reception Process in Spain and Italy' in Keller and Stone Sweet (n 28) 393–450, 404.

442 María Isabel González Pascal, 'El CEDH como parte del Derecho Constitucional Europeo' in Queralt Jiménez (ed), *El Tribunal de Estrasburgo en el Espacio Judicial Europeo* (2013) 109–130, 124. For the conventionality control by ordinary jurisdiction, see Jimena Quesada, *Jurisdicción nacional y control de convencionalidad: A propósito del diálogo judicial global y de la tutela multinivel de derechos* (Aranzadi 2013) 119. See also Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 142 (arguing that it seems to be theoretically possible that ordinary judges can

(HRA). Regarding the interpretation of legislation, Section 3(1) of the HRA stipulates that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Furthermore, against the background of the parliamentary supremacy that prohibits domestic judges from invalidating legislation, Section 4 (2) of the HRA provides that '[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility'. While the consistent interpretation under Section 3 serves as the 'prime remedial measure', the declaration of incompatibility under Section 4 functions as 'a measure of last resort' in order to realise conventionality control.[443] In the United Kingdom, where there are no entrenched constitutional rights and the Parliament is supreme, the HRA is gradually becoming a kind of constitutional statute.[444]

Even when formal provisions of consistent interpretation do not exist, the judiciary in practice interprets domestic law in conformity with human rights treaties, and thereby contributes to promoting their hierarchy within constitutional orders. For example, the German Constitutional Court expressed in the 2004 *Görgülü* decision that ECHR and ECtHR jurisprudence function as *Auslegungshilfen* (interpretative aid) for the Basic Law, even though it is not recognised as a direct parameter for constitutional review due to its domestic status as a federal statute.[445] Subsequently, the *Bundesverfassungsgericht* declared the unconstitutionality of legislation regarding preventive detention based on Strasbourg jurisprudence.[446] In the 2007 *Sentenze 'gemelle' № 348 e 349*, the Italian Constitutional Court expounded that ECHR provisions have the rank of *norme interposte*, according to which the constitutionality of domestic law must be

refuse to apply an unconventional statute but in practice this ability of ordinary courts has not given to a high level of judicial activism).

443 *Ghaidan v Mendoza* [2004] 3 WLR 113 paras 38–49 *per* Lord Steyn. See also, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009) at 19ff.

444 Samantha Besson, 'The Reception in Ireland and the United Kingdom' in Keller and Stone Sweet (n 28) 31–106, 55–56.

445 BVerfG, *Görgülü*, 2 BvR 1481/04, Entscheidung vom 14. Oktober 2004, at para. 32.

446 BVerfG, 2 BvR 2365/09, Entscheidung vom 4. Mai 2011. See also, Mads Andenas and Eirik Bjorge, '"Preventive Detention." No. 2 BvR 2365/09' (2011) 105 *American Journal of International Law* (2011) 768–774.

assessed.[447] Following the new formula, the *Corte costituzionale* determined the unconstitutionality of the legislation concerning the refund for unlawful expropriation and found that it was incompatible with the Convention yardstick.[448]

The ACHR has also been a driving force for 'the American internationalization of human rights'.[449] It is now accepted that the ACHR is directly applicable within the domestic legal orders of States Parties.[450] Furthermore, in the Latin American region, the phenomenon of 'the constitutionalization of human rights treaties from below' has been emerging where human rights conventions are incorporated into domestic legal orders with a constitutional rank.[451]

In some States Parties, conventionality control by domestic courts is facilitated by the incorporation of the ACHR into the constitutional hierarchy through constitutional clauses (e.g. Article 75(22) of the 1994 Constitution of Argentina).[452] As an example of a success story, the Supreme Court of Argentina declared in the *Simón Julio Héctor and others* case the unconstitutionality of amnesty law on the basis of conventionality control parameters, including the *Barrios Altos v. Peru* judgement of the IACtHR where Argentina was not the Respondent State.[453] Similarly, the 2010 Con-

447 Corte constituzionale italilana, Sentenze № 348 e 349 del 24 ottobre 2007, at Considerato in diritto para. 4.7 (№ 348) and para. 6.2 (№ 349). See also, Francesca Biondi Dal Monte and Filippo Fontanelli, 'The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System' (2008) 9 *German Law Journal* 889–932, 915–920.

448 Ibid.

449 Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press 2009) 27–60.

450 Héctor Gros Espiell, 'L'appplication du droit international dans le droit interne en amérique latine' in Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz, Vol I (Editoriale Scientifica 2004) 529–549, 537.

451 Manuel Eduardo Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (Inter-American Institute of Human Rights 2011) Chap II.

452 'The American Convention on Human Rights […] in the full force of their provisions, they have *constitutional hierarchy*, do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein'.

453 Suprema Corte de Justicia de la Nación de Argentina, *Simón, Julio Héctor y otros*, Causa No 17.768, Sentencia de 17 de junio de 2005, paras 24–34.

stitution of the Dominican Republic manifestly recognises in Article 74(3) that '[t]he treaties, pacts and conventions concerning human rights, signed and ratified by the Dominican State, have constitutional hierarchy and are of direct and immediate application by the tribunals and other organs of the State'. On the basis of this constitutional provision, the Supreme Court formulated that the Dominican Republic 'has a constitutional system integrated by provisions of equal hierarchy that emanate from two essential normative sources: a) the national, formed by the Constitution and the local constitutional jurisprudence […], and the international, composed of international treaties and conventions, the advisory opinions and decisions emanated from the Inter-American Court of Human Rights; normative sources that as a whole, […] integrate the so-called block of constitutionality'.[454] The newly added Article 5(3) of the 1988 Constitution of Brazil (and the 2004 Amendment No. 45) stipulates that '[i]nternational human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three-fifths of the votes of the respective members shall be equivalent to constitutional amendments'. Based on this article, the Federal Supreme Court held that human rights treaties had acquired supra-legal status, remaining lower in rank than the Constitution yet higher than other laws.[455] However, it should be carefully observed that 'the court not only interpreted the infra-constitutional legislation to ensure it was compatible with the ACHR, but it also interpreted the Constitution itself based on this treaty'.[456] In Chile, Article 5(2) of the 1980 Constitution recognises that 'the sovereignty is limited by the respect for the essential rights emanating from human nature, recognised in the Constitution and international human rights treaties ratified by Chile that are in force'. In terms of this article, human rights treaties have hierarchical superiority over national law.[457] Furthermore, the Constitutional Court has employed human rights treaties, including the ACHR, as the

454 For example, Corte Suprema de Justicia de República Dominicana, Res Nº 1920–2003 de 13 de noviembre de 2003.

455 Supremo Tribunal Federal do Brasil, Recurso Extraordinário Nº 466,343, Julgamento do 3 de Dezembro de 2008.

456 Antonio Moreira Maués, 'Supra-Legality of International Human Rights Treaties and Constitutional Interpretation' (2013) 18 *SUR – International Journal on Human Rights* 205–223, 206–212.

457 José Ignacio Martínez Estay, 'The Impact of the Jurisprudence Inter-American Court of Human Rights on the Chilean Constitutional System' in Arnold (n 433) 63–79, 71–72.

parameter for constitutionality control of national acts.[458] The 1949 Constitution of Costa Rica simply provides in Article 7 that treaties in general 'shall have a higher authority than the laws'. Moreover, the Constitutional Chamber of the Supreme Court has established that 'once the instrument regarding Human Rights in force in Costa Rica not only has a similar value with the Constitution but also grant more rights or guarantees to the persons, they prevail over the Constitution'.[459] Similarly, Article 425 of the 2008 Constitution of Ecuador regulates '[t]he order of precedence for the application of the regulations' and assigns international treaties and conventions a supra-legal rank. The Constitutional Court went a step further by indicating that '[t]he block of constitutionality allows the interpretation of constitutional norms, but additionally, the human rights treaties guide the constitutional judges in identifying essential elements which define the irreplaceable physiognomy of the Constitution. In such a virtue, in order to resolve a juridical problem the Constitution is not the only one to be taken into consideration as other provisions and principles may have relevance to decide such issues'.[460] The 1983 Constitution of El Salvador also stipulates in Article 144 the supra-legal status of treaties in general. Moreover, in order to recapture the relationship between human rights treaties and the Constitution, the Constitutional Chamber of the Supreme Court articulated that 'the confluence between the Constitution and the international human rights law in the protection of the human rights, confirms that the relation between both definitely is *not of hierarchy*, but *of compatibility*, and therefore, the internal law, and the Constitutional law and the constitutional jurisdiction, must open the normative spaces for the international regulation on human rights'.[461] In the same vein, Article 18 of the 1982 Constitution of Honduras solely provides that 'in case of conflict between the treaty or convention, and the Law, the former shall prevail'. However, the Constitutional Chamber of the Supreme Court of Honduras expanded its meaning when stating that 'international treaties

458 Humberto Nogueira Alcalá, 'Diálogo interjurisdiccional, control de convencionalidad y jurispurdencia del Tribunal Constitucional en período 2006–2011' (2012) 10 *Estudios Constitucionales* 57–140, 103–126.

459 Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Exp 0421-S-90, Res N° 2313–95 de 9 mayo de 1995, considerando VI-VII.

460 Corte Constitucional del Ecuador, Sentencia 0001–09-SIS-CC, Caso 0003–08-IS [2009] consideraciones y fundamentos, Bloque de Consttucionalidad.

461 Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Sentencia 31–2004/34–2004/38–2004/6–2005/9–2005 de 6 de junio de 2008, considerando VI (emphasis in original text).

and conventions ratified by the State of Honduras are part of so-called block of constitutionality'.[462] Last, the 1967 Constitution of Uruguay does not clarify the rank of international treaties in the domestic legal order under Article 6. However, in the 2009 *Sabalsagaray Curuchet Blanca Stela* judgement, the Supreme Court declared the unconstitutionality of the Expiry Law because the legal consequences of this law with respect to the right to judicial protection were incompatible with the ACHR. In its reasoning, the Court explicitly stated that 'international human rights conventions are integrated into the Constitution by virtue of Article 72, dealing with inherent rights in human dignity that the international community recognises in such agreements'.[463] Subsequently, the IACtHR recognised in the 2011 *Gelman v Uruguay* judgement that the Supreme Court had 'exercised an appropriate control of conformity with the Convention in respect to the Expiry law'.[464]

Other domestic courts have constitutionalised the Convention through open interpretative clauses. This is epitomised by the 2009 Constitution of Bolivia which incorporates a human rights–oriented approach. Article 13(4) provides that '[t]he rights and duties consecrated in this Constitution shall be interpreted in accordance with the International Human Rights Treaties ratified by Bolivia'. Furthermore, Article 410 provides 'the block of constitutionality composed of the international Treaties and Conventions in the matter of Human Rights and the norms of Communitarian Law, which have been ratified by the country'. According to these provisions, the Constitutional Court 'as the organ in charge of the defence of human rights, the control of constitutionality, also realises between its labours, the control of conventionality, ensuring the compatibility of the internal normative system with the block of constitutionality formally integrated with the Bolivian judicial plexus'.[465] Likewise, the 1991 Con-

462 Sala de lo Constitucional de la Corte Suprema de Justicia de Honduras, Recurso de inconstitucionalidad (acumulado), Nos. 55 y 88, 13 de noviembre de 2007, Considerando 22.

463 *Sabalsagaray Curutchet, Blanca Stela. Denuncia de Excepción de Inconstitucionalidad*, Corte Suprema de Justicia de Uruguay, № 365 [2009] at Fondo para III.8.

464 *Gelman v Uruguay*, IACtHR, Series C No 221, Judgment on Merits and Reparations of 24 February 2011, para 239. However, the IACtHR recently determined that the decision of 22 February 2013 constituted an obstacle for the full compliance with the judgment. *Gelman*, Order (n 375) paras 65–90.

465 Tribunal Constitucional de Bolivia, Exp 2009–20768–42-AL, Sentencia 1907/2011-R de 7 de noviembre 2011, Fundamentos III.4. (De los crímenes de lesa humanidad y la CIDH; y, otras Cortes Control de convencionalidad).

stitution of Colombia gives special treatment to human rights treaties in Article 93 so that they 'have priority domestically'. The same article also requires that '[t]he rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia'. Based on this provision, the Constitutional Court has dynamically developed the doctrine of the block of constitutionality to include ACHR and IACtHR jurisprudence.[466] For example, the Court established that 'the block of constitutionality related to the freedom of expression has to be integrated by international norms, in particular the Pact of San José and the International Covenant on Civil and Political Rights, together with the interpretations which the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the United Nations Human Rights Committee have presented on such texts'.[467] The 1993 Constitution of Peru does not determine the hierarchy of treaties over national law, but simply provides in Article 55 that they form a part of national law. However, fourth of the final and transitory provisions of the Constitution provides that '[r]ules concerning the rights and freedoms recognized by this Constitution are construed in accordance with the Universal Declaration of Human Rights and international treaties and agreements on those rights, which have been ratified by Peru'. Based on this provision, the Constitutional Court endorsed that 'our system of normative sources admits that human rights agreements serve to interpret the rights and freedoms recognized by the Constitution. Therefore, such agreements constitute the constitutionality parameter on the subject of rights and freedoms'.[468] In Mexico, the Constitution does not establish an explicit hierarchy between international treaties and domestic statutes under Article 133. However, through the 2011 Human Rights Amendment and the *Radilla Pacheco* judgement, the Supreme Court clarified the parameter for judicial control based on the Constitution and human rights

466 Sierra Porto, 'La Corte Constitucional colombiana frente al control de convencionalidad' in Edgar Corzo Sosa, Jorge Ulises Carmona Tinoco and Pablo Saavedra Alessandri (eds), *Impacto de las sentencias de la Corte Interamericana de Derechos Humanos* (Tirant lo Blanch México 2013) 427–447, 440–446.

467 Corte Constitucional de Colombia, Exp T-357702, Sentencia T-1319–01 de 7 de diciembre de 2001, Consideraciones y Fundamentos para 6 (Solución).

468 Tribunal Constitucional de Perú, Exp 0047–2004-AI/TC, Sentencia de 24 de abril de 2006, Fundamentos para 22. See in general, Natalia Torres Zúñiga, *El control de convencionalidad: Deber complementario del juez constitucional peruano y el juez interamericano (similitudes, deferencias y convergencias)* (Editorial Académica Española 2013) Chap 3.

treaties as follows: 'The parameter for analysing this type of control which all judges in the state must exercise is integrated as follows: All human rights set out in the Federal Constitution (based on Articles 1 and 133) as well as case law handed down by the Federal Judiciary; All human rights contained in international treaties to which Mexico is a party; Binding criteria of the Inter-American Court of Human Rights set out in rulings in cases in which Mexico was a party, guidelines contained in precedents and case law of the aforementioned Court where Mexico was not a party'.[469]

(ii) Regional Courts Decisions in National Constitutions

When talking about the effects of judgements of international courts, we are reminded of the words of Lord Denning in *Trendtex*: 'International Law knows no rule of *stare decisis*'.[470] Moreover, we can observe that international tribunals have heavily relied on their own precedents to determine rules. While formally limiting the effects of their decisions to the parties in concrete cases, human rights courts have developed jurisprudence in substance that generally extends towards themselves as well as States Parties. Put differently, the guardians of human rights hybridise the *civil law* tradition in treaty provisions and the *common law* tradition in practice. This task is recommended in the *Guidelines* of the ILA Committee on International Human Rights Law: 'All courts accordingly interpret domestic law in conformity with international human rights law. They take the pertinent judgments and decisions of courts and quasi-judicial bodies, also in those cases to which the state was not a party, fully into account and integrate them in their reasoning in good faith'.[471]

On the one hand, the *decisional* authority of their judgements (*res judicata*) obliges only the States Parties in concrete contentious cases (*inter partes*) to comply with the judgements (Article 46(1) o the ECHR and Article 68 of the ACHR). The *res judicata* effect does not allow States Parties to invoke domestic standards for failing to comply with their judgements in accordance with the supremacy of international law. On the other hand, the *jurisprudential* authority of their judgements (*res interpretata*) extends to

469 Suprema Corte de Justicia de la Nación de México, *Radilla-Pacheco v Estados Unidos Mexicanos*, Exp Varios 912/2010, 4, 5, 7, 11, 12 y 14 julio 2011, para 31.
470 *Trendtex Trading Corporation v Central of Bank of Nigeria* [1977] 1 QB 529.
471 *Guidelines* (n 50) para 9(a).

all States Parties beyond individual cases (*erga omnes*).[472] In practice, the ECtHR has repeatedly stated that '[t]he Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.[473] In a similar way, the Strasbourg judges have been aware of their own role in 'determin[ing] issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States'.[474] The IACtHR also explained in *Gelman* that it is necessary 'to exercise control of conformity with the Convention *ex officio*, taking into account the treaty itself and its interpretation by the Inter-American Court, [...] bearing in mind the treaty and, as appropriate, the jurisprudential precedents and guidelines of the Inter-American Court'.[475]

The *erga omnes* normativity of *res interpretata* does not only stem from the jurisprudence accumulated through contentious cases but also accumulates by means of non-contentious or adivisory opinions. The San José Court, which is granted advisory authority under Article 64 of the American Convention, clarified that conventionality control by State organs must be 'based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights

472 Samantha Besson, 'The *Erga Omnes* Effect of Judgments of the European Court of Human Rights: What's in a Name?' in Samantha Besson (ed), *La Cour européenne des droits de l'homme après le Protocole 14: Premier bilan et perspectives* (Schulthess 2011) 125–175, 164–168; Alfredo M Vítolo, 'Una novedosa categoría jurídica: el «querer ser». Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del «control de convencionalidad»' (2013) 18 *Pensamiento Constitucional* 357–380, 373–374; Adam Bodnar, '*Res Interpretata*: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014) 223–262; Christos Giannopoulos, 'The Reception by Domestic Courts of the *Res Interpretata* Effect of Jurisprudence of the European Court of Human Rights' (2019) *Human Rights Law Review* 537–559.

473 *Ireland v the United Kingdom* (n 80) para. 154.

474 *Karner v Austria*, (n 9) para 26. See also, Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' (2011) 12 *German Law Journal* 1231–1259.

475 *Gelman*, Order (n 375) para 69.

system'.[476] The Strasbourg Court also granted advisory jurisdiction on the basis of Protocol No 16 to the ECHR.[477] As is noted in the Explanatory Report to the Protocol, 'there will be hardly any difference in legal force between an interpretation given to the Convention in an advisory opinion and an interpretation given in a judgment'.[478]

The binding nature of human rights judgements has not only a past-oriented *reparatory* aspect but also a future-oriented *preventative* aspect.[479] In the Advisory Opinion on *Gender Identity, and Equality and Non-discrimination with Regard to Same-Sex Couples*, the Inter-American Court dictated that its opinion 'contributes, especially in a *preventive* manner, to achieving the effective respect and guarantee of human rights' and 'can provide guidance when deciding matters relating to the respect and guarantee of human rights in the context of the protection of LGBTI persons, to *avoid possible human rights violations*'.[480] The *ex ante* preventative function of *res interpretata* was also implied for the ECtHR by the 2011 Izmir Declaration, in which the high-level conference characterised 'advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case law, thus providing further guidance in order to assist States Parties in *avoiding future violations*'.[481] In the very first Advisory Opinion under Protocol No 16 in the *Mennesson* case, the Strasbourg Court itself recognised that its opinions' 'value also lies in providing the national courts with guidance on questions of principle relating to the Convention applicable in similar cases'.[482]

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476 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (n 220) para 31.

477 Janneke Gerards, 'Advisory Opinion: European Court of Human Rights (ECtHR)' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2018).

478 Council of Europe, Explanatory Report to Protocol No 16, 5 June 2013.

479 Tribunal Constitucional de Perú, *Colegio de Abogados del Callao c. Congreso de la República*, Perú, Causa N° 00007–2007-PI-TC, Sentencia de 19 de Junio, 2007; ILDC 961 (PE 2007), reported by Salmón Gárate, E.

480 *Gender Identity, and Equality and Non-discrimination with Regard to Same-sex Couples* (n 159) para 171. For the advisory opinon's effects in the domestic sphere, see Jorge Contesse, 'Sexual Orientation and Gender Identity in Inter-American Human Rights Law' (2019) 44 *North Carolina Journal of International Law* 353–385 (emphasis added).

481 High Level Conference on the Future of the European Court of Human Rights, Izmir, Turkey 26 – 27 April 2011, Follow-up Plan, D(1) (emphasis added).

482 Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-child Relationship between a Child Born through a Gestational Surrogacy

The *erga omnes* effect of *res interpretata* is supported by the notion of the collective guarantee of human rights, which prioritises the judgements of regional courts as the central pillar of community-based mechanisms. The CoE Parliamentary Assembly's Resolution 1226 expresses that '[t]he principle of *solidarity* implies that the case law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties)'.[483] It follows from the European mechanism of collective enforcement that 'the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice'.[484] In the Inter-American system, ex-judge Cançado Trindade explained that '[t]he exercise of *garantía colectiva* should not only be *reactive*, when the non-compliance with a judgment of the Court was produced, but also *proactive*, in the sense that all States Parties previously adopt positive measures of protection in accordance with the regulations of the American Convention'.[485] In the Advisory Opinion concerning the *Denunciation of the ACHR and the OAS Charter*, the San José Court opined that even the sovereign decision of denunciation cannot nullify the domestic effects of the Convention's norms which are interpreted as *parámetro preventivo* under the collective mechanism.[486]

The general effects of *res interpretata*, in contrast to the case-specific effects of *res judicata*, permit *margen interpretativo nacional* based on which national authorities can preliminarily realise more protective interpretations of domestic norms than the minimum standards of the courts' jurisprudence. According to Inter-American judge Ferrer MacGregor, re-

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Arrangement Abroad and the Intended Mother, Advisory Opinion (Protocol 16) of 10 April 2019, para 26.

483 The Parliamentary Assembly of the CoE, Resolution 1226 (2000), Execution of judgments of the European Court of Human Rights, para 3.

484 Ibid.

485 Intervención del Presidente de la Corte Interamericana de Derechos Humanos, Juez Antonio Augusto Cançado Trindade, ante el Plenario de la Asamblea General de la Organización de los Estados Americanos, Barbados, 4 de junio de 2002, para 5 (emphasis added).

486 Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations (interpretation and scope of articles 1, 2, 27, 29, 30, 31, 32, 33 a 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States), Series A No 26, Advisory Opinion OC-26/20 of 9 November 2020, paras 90–93.

gional courts' jurisprudence produces a 'relative' interpretative authority inasmuch as no other interpretation exists that grants greater effectiveness to the provision of the Convention in the domestic sphere.[487] Put conversely, the domestic authorities may expand the interpretative standard or even not apply Convention norms when another domestic or international norm exists that makes the right or freedom in question more effective in terms of Article 29 of the American Convention.[488] In the context of Europe, the Strasbourg Court has elaborated what Başak Çalı calls *nascent responsible courts* doctrine, 'allowing domestic courts a larger discretionary space with regard to making rights violation determinations, provided that domestic courts take ECtHR case law seriously'.[489] In practice, the recommendatory wording was adopted as regards *res interpretata* in the 2010 Interlaken Declaration ('calls upon')[490] and the 2012 Brighton Declaration ('enabling and encouraging').[491] This formula suggests 'certainly less than a requirement of strict adherence to ECtHR standards but *leaves room for divergent views of national judges*'.[492] However, such an enlarging of the margin of appreciation is but one side of the equation, and the ECtHR also draws negative inferences from the lack of due Convention diligence in this respect.[493]

487 Ibid, para 69.
488 Ibid.
489 Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights', in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders (Routledge 2016) 144–161.
490 High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration 19 February 2010, Action Plan 4(c).
491 High Level Conference on the Future of the European Court of Human Rights Brighton Declaration 19–20 April 2012, 9(c)(iv).
492 Marten Breuer, 'Principled Resistance' to ECtHR Judgments: An Appraisal' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments: A New Paradigm?* (Springer 2019) 323–350, 338 [emphasis added].
493 Oddný Mjöll Arnardóttir, '*Res Interpretata*, *Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 *European Journal of International Law* 819–843.

B. Supremacy of National Constitutions over Regional Conventions

(i) Consubstantial Constitutional Contestations against Regional Conventions

While accepting the increasing mandates from outside, sovereign states have resolutely reserved the ultimate power to limit the performance of international obligations that conflict with national fundamental principles and values.[494] The institutions involved in regional integration processes have abundant experience regarding this point. The Italian Constitutional Court devised the *controlimiti* doctrine in *Frontini* to restrict the absolute primacy of EU law in terms of national fundamental values.[495] Likewise, the German Constitutional Court elaborated the *Solange* doctrine to evaluate European Community acts against the yardstick of domestic basic rights.[496] In a series of *Lisbon* decisions, the *national identities* concept, incorporated into Article 4(2) of the Treaty on European Union, was employed by national constitutional courts 'as a synonym for constitutional core principles protected against the primacy of EU law'.[497]

Given that these constitutional limits have been invoked even in consolidated regional integration, it is unsurprising that similar practices are found in the more pluralistic context of international law.[498] According to the *Final Report of the ILA Study Group on Principles on the Engagement of Domestic Courts with International Law*, a constitutional contestation against international law may be positively evaluated as *consubstantial contestation* because it is based on 'norms which happen to exist both at the international and the domestic level, and provide for the same

494 André Nollkaemper, 'Rethinking the Supremacy of International Law' (2010) 65 *Zeitschrift für öffentliches Recht* 65–85, 67–71.

495 Corte costituzionale italiana, *Frontini v. Ministerio delle Finanze*, Sentenza № 183 del 27 dicembre 1973. See also, Vittoria Barsotti, Paolo G Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press 2016), Chap 7.

496 BVerfG, *Solange I*, 2 BvL 52/71, Entscheidung vom 29. Mai 1974; BVerfG, *Solange II*, 2 BvR 197/83, Entscheidung vom 22. Oktober 1986.

497 Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 *European Constitutional Law Review* 96–137, 131–136.

498 Fulvio M Palombino, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles' (2015) 75 *Heidelberg Journal of International Law* (2015) 503–529.

substantive regulation'.[499] Samantha Besson proposes, as a prominent theoretical approach, the *coordination-based* theory of legal authority, according to which the justification of legitimate authority is mostly found in the 'coordinating ability' of international law in circumstances of 'reasonable disagreement'.[500] Besson argues that the role of state consent is best understood and justified by reference to the circumstances of reasonable disagreement about and in international law, and hence to state democracy and equality.[501] In such reasonable disagreement cases, 'democratic state consent should work as an exception to the *prima facie* legitimate authority of international law'.[502]

As regards human rights norms that are *consubstantial* between international and constitutional law, the *Jurisdictional Immunities of the State (Germany v Italy)* case exposed the tension between international and constitutional adjudication. From the normative viewpoint of human rights protection, the ICJ ruling, which prioritised state immunity over individual victims, may be criticised on the grounds that it 'did not speak fairly for the whole society of the forum state, nor did the legal actions of the foreign state comply with the requirement of being fairly addressed to all those affected'.[503] In *Sentenza* 238/2014, the Italian Constitutional Court indeed declared the legislation for implementing the ICJ decision unconstitutional because it entailed the risk of sacrificing the judicial protection stipulated in Article 24 of the Italian constitution. Keeping in mind its *controlimiti* doctrine, the *Corte costituzionale* emphasised that the right is not only 'one of the supreme principles of our [Italian] constitutional order, intrinsically connected to the principle of democracy itself' but also 'one of the greatest principles of legal culture in democratic systems

499 The Final Report of the ILA Study Group on Principles on the Engagement of Domestic Courts with International Law, the 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7–11 August 2016, para 30.

500 Samantha Bessson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 *Sydney Law Review* 343–380, 352–355.

501 Samantha Bessson, 'State Consent and Disagreement in International Law-making: Dissolving the Paradox' (2016) 29 *Leiden Journal of International Law* 289–316, 300-302.

502 Ibid 307.

503 Benedict Kingsbury, 'International Law as Inter-Public Law', in Henry S Richardson and Melissa Williams (eds), *Nomos XLIX: Moral Universalism and Pluralism* (New York University Press 2009) 167–204, 182.

of our times'.[504] This critical message from Rome to the Hague enjoyed great acclaim because the *Consulta* fulfilled 'the creeping "educational" function that the Court felt entitled to perform vis-à-vis the international and UN legal orders (including the ICJ), by indicating a path that those orders should follow if they want to embrace a meaningful process of *democratization*'.[505]

As a comparable precedent to the Italian contestation, the US Supreme Court also engaged in a contestation to avoid compliance with the World Court ruling. Relying on the 'self-executing' (or direct effect) doctrine, the Supreme Court defended in *Medellín* that '[t]he *Avena* judgment creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources [...] creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted'.[506] The ILA report categorised the American reaction against the World Court as a *local contestation* because the invocation of the 'self-executing' issue superficially seems to defend the peculiarly national 'procedural default' rule without a corresponding rule (in substance) in international law.[507] As Fulvio Palombino[508] and Anne Peters[509] determined, the Supreme Court more fundamentally vindicated constitutional principles, particularly federalism and the separation of powers, and therefore, implicitly engaged with international law by consubstantial contestation.

Consubstantial constitutional contestation against the absolute supremacy of international law has also occurred in the implementation of regional human rights conventions in various settings. In Europe, the ECHR's supremacy over national law has faced 'principled resistance' especially when the ECtHR lacks legitimacy over national authorities.[510] The German Constitutional Court in the *Görgülü* decision implied a momentum

504 Corte costituzionale italiana, Sentenza № 238 del 22 ottobre 2014 Considerato in diritto para 3.4.

505 Riccardo Pavoni, '*Simoncioni v. Germany*' (2015) 109 *American Journal of International Law* 400–406, 404 (emphasis added).

506 Medellín v Texas, 552 US 491 (2008).

507 The ILA Final Report (n 500) paras 25–26.

508 Palombino (n 499) 510.

509 Anne Peters, *Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order*, EJIL: *talk!*, 22 December 2014, available at http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/ (last visited 28 February 2020).

510 See the articles included in Breuer (n 493).

of functional contestation. While admitting that the binding effect of statute and law under Article 20(d) of the Basic Law includes a duty to take into account ECHR standards, the *Bundesverfassungsgericht* made a caveat that '[b]oth a failure to consider [*fehlende Auseinandersetzung*] a decision of the ECHR and the "enforcement" of such a decision *in a schematic way*, in violation of prior-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law'.[511]

The claim that the *Völkerrechtsfreundlichkeit* (openness to international law) principle does not include the constitutional obligation of unconditional compliance with international law was militant in the 2015 judgement, where the German *Bundesverfassungsgericht* employed the constitutional principle of democracy to permit the legislature to revoke legal acts of previous legislatures.[512] This opaque idea was furthermore revitalised in the 2018 judgement concerning the constitutional right to strike that possibly conflicted with Article 11 of the ECHR.[513] Invoking the *Görgülü* formula, the Federal Constitutional Court maintained that '[i]t is therefore not contrary to the objective of openness to international law if the legislature does not observe international treaty law in exceptional cases, provided this is the only way to avert a violation of fundamental constitutional principles'.[514]

In the Americas, the situation in the *Fontevecchia and D'Amico* case is a more constitutionally nuanced example than those that are sovereignty oriented. This case is related to the civil sentence of the Supreme Court of Argentina imposing compensation for journalists who published articles on political scandals. The main cause of the conflict between national and international judges here was the possibility of revoking the Supreme Court's decision, issued 25 September 2001, with the *res judicata* effect. In the judgement on merits issued on 29 November 2011, the IACtHR, having determined the violation of the victims' freedom of expression, ordered as a reparation measure that 'the State must *dejar sin efecto* ['revoke' in the official English translation] the decision'.[515] This sensitive reparation order provoked a critical reaction from the Supreme Court in the judgement handed down on 14 February 2017. According to the Argentine

511 *Görgülü* (n 445) (emphasis added).
512 BVerfG, 2 BvL 1/12, Entscheidung vom 15. Dezember 2015, paras 53–54, 67.
513 Heiko Sauer, 'Principled Resistance to and Principled Compliance with ECtHR Judgments' in Breuer (n 493) 55–88, 63–64.
514 BVerfG, 2 BvR 1738/12 et al, Entscheidung vom vom 12. Juni 2018, para 133.
515 *Fontevecchia and D'Amico v Argentina*, IACtHR, Series C No 238, Judgment on Merits, Reparations and Costs of 29 November 2011, para. 105.

Supreme Court, the *dejar sin efecto* order suggested the substitution of its authority by the Inter-American Court, which was a clear transgression of constitutional principles. This position was reinforced with sovereignty-driven constitutional reasoning: 'The constituent has enshrined in Article 27 a sphere of sovereign reserve, delimited by the principles of public law established in the National Constitution, to which international treaties must be adjusted and with which must keep compliance'.[516]

The question raised in Buenos Aires was answered negatively in San José with an order on compliance issued on 18 October 2017. First, the Inter-American Court clarified that the meaning of its own wording *dejar sin efecto* is not synonymous with revoking as interpreted by the Argentine Supreme Court, but rather that 'the State should adopt "the judicial, administrative and other measures that may be necessary" to "render ineffective" such sentences'.[517] Next, the IACtHR mentioned the existence of other types of legal acts, different from such revocation, to comply with the ordered reparation measure, including some type of annotation that indicated the judgement in question was declared in violation of the American Convention by the Inter-American Court.[518] The Argentine judges sincerely welcomed this reflective clarification by the Inter-American judges in the decision issued on 5 December 2017. The Supreme Court admitted that the interpretation formulated by the Inter-American Court in October was completely consistent with its decision in February.[519] Therefore, the Buenos Aires judges resolved the issue by ordering the annotation, in line with the order by the San José judges, that 'the sentence [of 25 September 2001] was declared incompatible with the ACHR by the Inter-American Court'.[520] At the same time, however, *la Corte Suprema* rigidly maintained its position that the annotation sought by *la Corte Interamericana* does not violate the principles of public law established by Article 27 of the National Constitution.[521] This response from Argentina was positively evaluated

516 Corte Suprema de Justicia de la Nación de Argentina, Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso 'Fontevecchia y D'Amico v Argentina' por la Corte Interamericana de Derechos Humanos, Sentencia de 14 de febrero de 2017, Considerando 16.

517 *Fontevecchia and D'Amico v Argentina*, IACtHR, Monitoring Compliance with Judgment, Order of 18 October 2017, para. 16.

518 Ibid paras 20–21.

519 Corte Suprema de Justicia de la Nación de Argentina, Resolución 4015/17 de 5 diciembre de 2017, Considerando para 2.

520 Ibid para 3.

521 Ibid para 4.

by the IACtHR in the order on compliance handed down on 11 March 2020, as 'a change in the position previously held by the Supreme Court of Justice of the Nation in this case, regarding the role that, within the scope of its powers, has to assume the internal court in the compliance or implementation of the Judgment of this case'.[522] Although the repeated dialogues seem a successful story in favour of compliance with the Inter-American judgement, it cannot be overlooked that the Supreme Court firmly maintained constitutional supremacy over international law in the domestic sphere.

(ii) Sovereigntist Constitutional Contestations against Regional Conventions

Constitutional contestations may take forms that are rather 'rebellious' against international law, mainly in the name of sovereignty. The notion of national or constitutional identity has the risk of being abuse in favour of sovereignty, which was allegedly realised within the European integration process. The Hungarian Constitutional Court in its ruling 22/2016 defended its competences to review EU legal acts if 'the sovereignty of Hungary' and 'its self-identity based on its historical constitution' as well as human dignity and another fundamental right can be presumed to be violated.[523] This sovereigntist constitutional identity claim is harshly criticised as 'national constitutional parochialism, an attempt to abandon the common European constitutional whole'.[524] The White Paper on the Reform of the Polish Judiciary took an interpretation that '[t]he European legal system is founded on the recognition of constitutional pluralism enshrined in Article 4 of the Treaty on European Union which also guarantees that each member state may shape its own judicial system in a sovereign manner'.[525] This mixture between sovereignty and national identity is another abusive example of constitutional pluralism by autocrats

522 *Fontevecchia and D'Amico v Argentina*, IACtHR, Monitoring Compliance with Judgment, Order of 11 March 2020, para 8.

523 Hungarian Constitutional Court, Decision 22/2016. (XII. 5.) AB of 30 November 2016, para 69.

524 Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law' (2018) 43 *Review of Central and East European Law* 23–42, 42.

525 Poland, the Chancellery of the Prime Minister, the White Paper on the Reform of the Polish Judiciary, 7 March 2018, para 206.

and their captive courts.[526] In the context of Brexit, the Miller judgement opined that the withdrawal process under Article 50 of the TEU 'can and should be determined by Parliament not by the courts' under 'the fundamental principle of Parliamentary sovereignty'.[527] The ultimate fashion of exit triggered by the United Kingdom implies an atavism from a future-oriented post-sovereign arrangement predicated on constitutional pluralism to a classic dualist or Westphalian understanding of sovereignty.[528]

So-called nationalist/populist backlashes against international law and courts may likewise be observed worldwide.[529] In recent years several developing and emerging States expressed their distrust in the Investor-State Dispute Settlement, such as Bolivia, Ecuador, Nicaragua, Venezuela, South Africa, India and Indonesia.[530] The ICC currently faces resistance from Burundi, Gambia, Kenya, South Africa and the Philippines.[531] In Latin America, Venezuela under the administration of Hugo Chavez withdrew from the Andean Community, and Ecuador under the leadership of Rafael Correa launched mega-politics against the ATJ.[532] In Africa, the sub-regional courts such as the ECOWAS, the East African Court of Justice and

526 R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59–74.

527 *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 274.

528 Cormac Mac Amhlaigh, 'Back to a Sovereign Future?: Constitutional Pluralism after Brexit' (2019) 21 *Cambridge Yearbook of European Legal Studies* 41–58 (arguing that 'constitutional pluralism can and will remain relevant to EU/UK relations as well as within the EU, well into the future.').

529 Erik Voeten, 'Populism and Backlashes against International Courts' (2020) 18 Perspectives on Politics 407–422.

530 United Nations Conference on Trade and Development (UNCTAD), 'Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims' (2010) 2 *IIA Issues Note* 1–10.

531 Henry Lovat, 'International Criminal Tribunal Backlash' in Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 601-625.

532 Karen J Alter and Laurence R Helfer, *Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice* (Oxford University Press 2017), 187; Salvatore Caserta, *International Courts in Latin America and the Caribbean: Foundations and Authority* (Oxford University Press 2020) 230–235.

the SADC Tribunal have encountered political contestation.[533] Rwanda, Tanzania, Benin and Côte d'Ivoire decided to withdraw the right of individuals and NGOs to submit complaints directly to the African Court on Human and Peoples' Rights under Article 34(6) of the Ouagadougou Protocol.[534]

Amongst various forms of contestation by European national authorities, Russia has posed the most serious challenge against the Strasbourg law.[535] In *Decision No. 21-П/2015*, setting aside the constitutionality issues of Federal Laws regarding ECHR ratification and international treaties, the Russian Constitutional Court generally reasoned that under Article 15(4) of the Constitution, the 'practical implementation [of the ECHR and the ECtHR jurisprudence] in the Russian legal system is only possible through recognition of the supremacy of the Constitution's legal force'.[536] To support this conclusion, the Constitutional Court clarified its attitude towards the Law of Treaties. First, by virtue of Articles 26 (*pacta sunt servanda*) and 31 (General Rule of Interpretation) of the VCLT, if the ECtHR interprets an ECHR provision in a way other than its normal meaning or contrary to the object and purpose of the Convention, the State Party has the right to refuse to follow the interpretation as exceeding the obligations voluntarily assumed by itself.[537] What the Russian Court particularly emphasised in this context is that Strasbourg Court judgements cannot be considered binding when they diverge from *jus cogens*, including the principle of sovereign equality and respect for the rights inherent in sovereignty as well

533 Karen J Alter, James T Gathii and Laurence R Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 European Journal of International Law 293–328.

534 Amnesty International, *The State of African Regional Human Rights Bodies and Mechanisms 2019–2020*, 41–42.

535 Jeffrey Kahn, 'The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg' (2019) 30 *European Journal of International Law* 933–959; Lauri Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015' (2016) 12 *European Constitutional Law Review* 377–395.

536 The Russian Constitutional Court, Decision No. 21-П/2015 of 14 July 2015. For English translation, see Smirnova, Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions, EJIL: *Talk!*, 15 July 2015, available at http://www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/ (last visited 5 April 2016).

537 Ibid para 3.

as the principle of non-interference in the internal affairs of States.[538] Second, according to Article 46(1) of the VCLT, the state retains to invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent if that violation was manifest and concerned a rule of its internal law of fundamental importance.[539] Subsequently, legislation enacted on 14 December 2015 clearly granted the Russian Constitutional Court the power to declare 'impossible to implement' the decisions of a human rights body when they are inconsistent with the Constitution of the Russian Federation.

The *Конституционный Суд*'s new authority to justify non-compliance with international adjudication has in practice been exercised in three important instances. The first case is *Decision No. 12-П/2016* concerning the restriction of electoral rights of individuals sentenced to deprivation of liberty under Article 32(3) of the Constitution, which was identified as a violation of Article 3 of Protocol No. 1 to the ECHR (Right to Free Elections) by an ECtHR Chamber in *Anchugov and Gladkov*. The St Petersburg Court criticised the evolutionary interpretation of the Convention right by the Strasbourg Court, as regards which consensus has not yet emerged among States Parties.[540] The Russian court also paid attention to possible deviations from the principle of subsidiarity by the ECtHR itself, which can lead to 'a conflict with a constitutional legislator, whose powers are based on the principles of *State sovereignty*, supremacy and supreme legal force of the Constitution of the Russian Federation in the legal system of Russia'.[541] Recognising its primary role of reconciling a conflict between international and constitutional law, the Constitutional Court declared impossible the execution of the ECtHR *Anchugov and Gladkov* judgement, which in its view conflicted with Article 32(3) of the Constitution.[542]

The second occasion is *Decision No. 1-П/2017*, which is pertinent to the *Yukos* case where an ECtHR Chamber found the tax evasion criminal proceedings against a corporation to cause pecuniary damages in violation of Article 1 of ECHR Protocol No. 1 (Right to Property), which allegedly contradicted Article 57 of the Constitution that obliged everyone to

538 Ibid.
539 Ibid.
540 The Russian Constitutional Court, Decision No. 12-П/2016 of 19 April 2016, para 4.3.
541 Ibid para. 4.4 (emphasis added).
542 Ibid operative part para 1.

pay legally established taxes and dues. The Russian court reiterated that the tax offences committed by the OAO Neftyanaya Kompaniya Yukos would mean in essence not only suspension of the effect of Article 57 of the Constitution of the Russian Federation but also the violation of the principles of equality and justice embedded in the entire system of the Constitution.[543] Facing a normative conflict between international and constitutional norms, the St Petersburg Court once again rejected to execute the Strasbourg Court decision in light of the constitutional principles of equality and justice.[544]

The third instance is the opinion issued by the Constitutional Court on 16 March 2020 with respect to the draft constitutional amendments proposed by the president of the Russian Federation in January 2020. The proposed draft amendment to Article 79 of the Constitution added that 'Decisions of inter-state bodies adopted on the basis of provisions of international treaties of the Russian Federation, where construed in a manner *contrary to the Constitution* of the Russian Federation, shall not be subject to enforcement in the Russian Federation'. The proposed constitutional amendment, in asserting Russia's right to refuse to obey the decisions of international institutions if these were found not to comply with its constitution,[545] would in fact formalise several previous rulings which had also run counter to Article 15.[546] Notwithstanding this risk, the St Petersburg judges found that the draft amendment 'provisions, as follows directly from their wording, do not prescribe a repudiation by the Russian Federation of compliance with the international treaties themselves and of the honouring of its international obligations and, accordingly, are not contrary to Article 15(4) of the Russian Federation Constitution'.[547] The

543 The Russian Constitutional Court, Decision No 1-П/2017 of 19 January 2017, para 4.5.

544 Ibid operative part para 1.

545 In relation to this draft provision, the proposed draft amendment to Article 125 § 5 b) provides that the Constitutional Court of the Russian Federation 'shall, in accordance with the procedure stipulated by the federal constitutional law, resolve matters concerning the possibility of enforcing decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation, where construed in a manner contrary to the Constitution of the Russian Federation'.

546 Elizabeth Teagu, 'Russia's Constitutional Reforms of 2020' (2020) 5 *Russian Politics* 301–328, 308–310.

547 The Russian Constitutional Court, Decision No 1-Z of 16 March 2020, para 3.3. See also, Venice Commission's unofficial translation, CDL-REF(2020)022, 30 April 2020.

Venice Commission showed its concern that the proposed amendments might enlarge the possibility that the Russian Constitutional Court could declare the non-execution of inter-state bodies' decisions, and risk 'the use of the notion "contrary to the Constitution", which is too broad a formula, broader than that of current Article 79'.[548]

In Latin America, ACHR and IACtHR decisions have been seriously assaulted by States Parties.[549] The ultimate form of backlash, the denunciation of the Convention, was triggered by Trinidad and Tobago in 1999 concerning individual petitions regarding the death penalty, and Venezuela in 2013 regarding complex political cases. Reflecting resistance from the executive branch, Peru under the Fujimori regime attempted to withdraw from IACtHR jurisdiction, which was however rejected by the Court. More recently, the Joint Declaration by Argentina, Brazil, Chile, Colombia and Paraguay represents another contestation that puts emphasis on the subsidiarity principle and the margin of appreciation before the inter-American system of human rights.[550]

Latin American contestations against the inter-American system may take judicial forms. Article 23 of the 1999 constitution of Venezuela also expressly stipulates that '[t]he treaties, pacts and conventions relating to human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favourable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power'. In the *Rafael Chavero Gazdik* case involving a report published by the IACHR, the Supreme Court of Venezuela contended that the decisions of international courts

548 Opinion on the Draft Amendments to the Constitution (as Signed by the President of the Russian Federation on 14 March 2020) Related to the Execution in the Russian Federation of Decisions by the European Court of Human Rights, CDL-AD(2020)009, 18 June 2020.

549 Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 *International Journal of Law in Context* 237–257; Jorge Contesse, 'Resisting the Inter-American Human Rights System' (2018) 44 Yale Journal of International Law 179–237.

550 Melina Girardi Fachin & Bruna Nowak, *The Joint Declaration to the Inter-American System of Human Rights: Backlash or Contestation?* Int'l J. Const. L. Blog, Dec. 12, 2019, at: http://www.iconnectblog.com/2019/12/the-joint-declaration-to-the-inter-american-system-of-human-rights-backlash-or-contestation/.

should not be executed in a state if they contradict the national constitution.[551]

The Constitutional Tribunal of the Dominican Republic has also resisted the Inter-American judges, especially in cases of expelled Dominicans and Haitians.[552] In Judgement No. TC/0256/14, the *Tribunal Constitucional* declared that the 1999 presidential instrument without national congressional approval, by which the Dominican Republic accepted IACtHR jurisdiction, was unconstitutional.[553] To reach this conclusion, the constitutional judges relied on Article 46(1) of the VCLT to justify the invocation of 'the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent' as the instrument was 'in violation of our Constitution, supreme norm and foundation of the judicial order of the Dominican State'.[554] In particular, the instrument was alleged to 'harm national sovereignty, the principle of separation of powers, and the principle of non-intervention in the country's internal affairs'.[555] This sovereignty oriented logic is highly questionable, however, because the Tribunal did not deeply engage in discussion on the VCLT requirement under Article 46(2).[556]

2. *Pro Homine Principle's Domestic Functions for Conventionality Control*

The previous section showed that national judges have tried to integrate human rights treaties into national constitutions to converge the parallel judicial control mechanisms. This practice no longer appears to rest with the *closed* relationship between international and domestic law supported by the notion of *formal* supremacy. Rather, emphasis should be put on

551 Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, Sentencia Nº 1942 de 13 noviembre 2003, at consideraciones para decidir I.

552 *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, Series C No 282, Judgment on Preliminary Objections, Merits, Reparations and Costs of 28 August 2014.

553 Tribunal Constitucional de República Dominicana, Exp TC-01–2005–0013, Sentencia TC/0256/14 de 4 de noviembre de 2014.

554 Ibid, para 9.5 – 6.

555 Ibid, para 9.19.

556 Dinah Shelton and Alexandra Huneeus, '*In re* Direct Action of Unconstitutionality Initiated Against the Declaration of Acceptance of the Jurisdiction of the Inter-American Court of Human Rights' (2017) 109 *American Journal of International Law* 866–872, 869.

the *substantive* content, recognized through the *open* interaction between international and domestic sources, which are truly favorable to human beings (*pro homine*).

This section then analyses the *pro homine* principle's function of regulating the relationship between regional conventions and national constitutions. Apart from the role played by the *pro homine* principle in the relationship between regional conventions and other international legal sources (see Part I – Chapter 1), the present Part analyses the principle's concrete functions regarding the relationship between regional conventions and national constitutions. As a clue to comprehending the latter, the IACtHR made a valuable interpretation in *Advisory Opinion OC-18/03*:

> This Court notes that, since there are many legal instruments that regulate labor rights at the domestic and the international level, these regulations must be interpreted according to *the principle of the application of the norm that best protects the individual*, in this case, the worker. This is of great importance, because there is not always agreement either between the different norms or between the norms and their application, and this could prejudice the worker. Thus, *if a domestic practice or norm is more favorable to the worker than an international norm, domestic law should be applied*. To the contrary, *if an international instrument benefits the worker, granting him rights that are not guaranteed or recognized by the State, such rights should be respected and guaranteed to him*.[557]

According to this view, the *pro homine* principle may have two aspects: the *offensive* function as a *sword* to penetrate the border between international and national legal orders, and the *defensive* function as a *shield* to preserve constitutional principles and values.

A. Unified Application of Conventionality Control Parameters

(i) Sword Function for Regional Conventions against National Constitutions

In Latin America, the *pro homine* principle often engages in the offensive function of piercing the boundary of domestic legal orders to complement

557 *Juridical Condition and Human Rights of the Child*, IACtHR (n 151) para 156 (emphasis added).

constitutional fundamental rights with ACHR rights. In fact, recent constitutional reforms have tended to include *pro homine* provisions to combine national and international human rights: for example, the 2008 Constitution of Ecuador (Articles 424 and 426), the 2009 Constitution of Bolivia (Article 256), the 2010 Constitution of the Dominican Republic (Article 74(4)), and the 2011 Constitution of Mexico (Article 1). In addition to these formal clauses, a number of domestic courts in Latin America have materially relied on the *pro homine* principle to integrate international and constitutional human rights standards.[558] In this sense, just as Nollkaemper characterises the direct effect doctrine of international law, the *pro homine* principle may serve as a powerful *sword* piercing the boundary between the international and the constitutional legal order.[559]

First, domestic courts rely on the *pro homine* principle to prioritise ACHR rights over national constitutions if the former offers more ample protection to persons than the latter does. For example, the Bolivian Constitutional Court clearly articulated that 'based on the principle of favourability and *pro persona*, the Fundamental Law itself foresees the possible supra-constitutionality of some instruments of the International Law of the Human Rights, when its norms are *more favourable to the human being*'.[560] In a similar way, the Constitutional Chamber of the Supreme Court of Costa Rica confirmed that 'to such an extent that if [the International Instruments of Human Rights] recognise a right or offer *greater protection of a freedom* than the norm foreseen in the Constitution, they give priority over this one'.[561]

Second, the *pro homine* principle provides momentum to reconsider the overall relationship between the ACHR and national constitutions. For example, the Chilean Constitutional Court remarked that constitutional judges are required to apply the *pro homine* principle with the obligation of the state imposed by the constitution to be the 'servant of the human

558 In general, Mireya Castañeda, *El principio pro persona: experiencias y expectativas* (Comisión Nacional de los Derechos Humanos 2014)110–129, 191–239.

559 Nollkaemper (n 418) 112–115.

560 Tribunal Constitucional de Bolivia, Sentencia 1907/2011-R (n 465) Fundamentos III.4 (emphasis added).

561 Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Exp 08–012101–0007-CO, Res № 2008018884 de 19 deciembre 2008, Considerando III (emphasis added).

being' and to limit the exercise of the sovereignty in function.[562] Similarly, the Peruvian Constitutional Tribunal mentioned that the *pro homine* principle transforms 'the formal constitutional text' into 'the Constitution in the material sense' complemented by human rights treaties.[563] Notably, the Constitutional Chamber of the Supreme Court of El Salvador regards the relationship between the constitution and international human rights law not as *jerarquía* but as *compatibilidad* in terms of the *pro homine* principle.[564]

Third, the *pro homine* principle regulates the national acts of specific organs. As regards the executive, the Colombian Constitutional Court emphasised that the administrative practice on internally forced displacement 'must be in accordance with the *pro homine* principle and in any case not restrict the previously established standard in the norms of legal character and in the recommendations of international character'.[565] With respect to the judiciary, the Supreme Court of Argentina in *Cardozo* revoked the judgement of the Supreme Court of the Province of Buenos Aires, which 'avoided the pronouncement as to whether […] the judge had chosen "that interpretation which was more respectful with the *pro homine* principle" within the framework of the duty to guarantee the right to the access that assists every person accused of crime'.[566]

As a controversial practice, the *pro homine* principle faces a challenge in Venezuela. According to the constitutional *pro homine* clause (Article 23), the Supreme Court at the stage of *Sentencia Nº 87/2000* compared the judicial guarantees under Article 8 ACHR and Article 49(1) of the Constitution, and concluded that the norm of the convention provision is more favourable to the exercise of such a right than the constitutional

562 Corte Suprema de Justicia de Chile, Sentencia 740–07-CDS de 18 abril 2008, at Considerando V (Las normas nacionales sobre regulación de la fertilidad y la duda razonable de afectación del derecho a la vida).

563 Tribunal Constitucional de Perú, Exp. 1417–2005-AA/TC, Sentencia de 8 julio 2005 Fundamentos para 9.

564 Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Sentencia 52–2003/56–2003/57–2003 de 1 abril 2004, Considerando V-3 (emphasis added).

565 Corte Constitucional de Colombia, Exp D-7473, Sentencia C-372/09 de 27 mayo 2009, 8 (Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Refugiados – ACNUR).

566 Suprema Corte de Justicia de la Nación de Argentina, Fallos 329:2265, Sentencia de 20 junio 2006, at Considerando para. 8.

one.[567] Nevertheless, since the *Rafael Chavero Gazdik* ruling cited above, the Constitutional Chamber has fiercely defended its own position as 'the maximum and last interpreter' of human rights treaties incorporated into the constitutional hierarchy.[568] The academic literature has harshly criticised the Tribunal's position on the grounds that '[b]y assuming the absolute monopoly of constitution interpretation, the Tribunal limited the general powers of all the other courts to resolve by means of judicial review on the matter and to directly apply and give prevalence to the American Convention regarding constitutional provisions'.[569]

The attitude of the Mexican Supreme Court also appears ambivalent. On the basis of the reformed constitutional *pro homine* provision (Article 1), the 2011 *Radilla Pacheco* judgement integrated the *parámetros de constitucionalidad y convencionalidad*, and transformed the judicial review system from a traditional (semi-)centralised version to a diffused version exercised by *all public authorities*.[570] In the *Contradicción de Tesis 293/2011*, however, the Supreme Court assertively defended that the Constitution has priority in cases where an express restriction is stipulated at the constitutional level.[571] It remains unclear whether this decision 'clearly undermines the *pro persona* principle, re-establishing old hierarchies' or 'still leaves room for interpretation, and thus a non-hierarchical, value-oriented deliberation on a case-by-case basis'.[572]

(ii) Relativising Absolute Protections of Constitutional Rights by Regional Conventions

Despite its potential to revise the supremacy of international law and constitution, the *pro homine* principle is not be a perfect panacea for govern-

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567 Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, Sentencia Nº 87 de 14 de marzo de 2000. See 81 *Revista de Derecho Público* (2000) 157.

568 Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, Sentencia Nº 1942, *supra* note 28, at consideraciones para decidir I.

569 Brewer-Carías (n 449) 35–38.

570 *Radilla-Pacheco v Estados Unidos Mexicanos* (n 469) paras 23–36 (emphasis added).

571 *Contradicción de Tesis 293/2011*, SCJN de México, Sentencia de 3 septiembre de 2013, paras 64–65.

572 Alejandro Rodiles, 'The Law and Politics of the *Pro Persona* Principle in Latin America' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2015) 153–174, 170 (both quotations).

ing the relationship between conventionality control and constitutionality control. The thorniest issue arises in cases where different rights of several individuals contravene each other. A simple answer to the question of what is the most favourable to persons cannot be elicited from the principle. The final Part of this paper is therefore dedicated to reconsidering the principle's *raison d'être* in situations of conflicting rights.

The *pro homine* principle, which prioritises the most favourable protection to individuals, embraces a paradoxical problem. Alejandro Rodiles has criticised it, suggesting the *pro homine* principle may be labelled *intuitive* and *tautological* because 'it is the object and purpose of every human rights treaty to grant the broadest possible protection to each of the rights it contains, and that everything else would run counter to their very normative function'.[573] Experts contend that '[t]he limits of this principle become apparent when human rights of different individuals have to be balanced'.[574] The same problem is pointed out by Catherine Van de Heyning in her statement that 'it is not always clear what the best protection of fundamental rights is' and 'which court or which level, the national or [international], could decide what the best protection is'.[575]

Such limits, however, do not render the *pro homine* principle completely meaningless in cases of conflicting rights. This is corroborated by the *Artavia Murillo* case pertaining to alleged human rights violations resulting from the presumed general prohibition of the practice of *in vitro* fertilisation (IVF). Although IVF was authorised by the 1995 Executive Decree 24029-S in Costa Rica, it was declared unconstitutional by the Constitutional Chamber of the Supreme Court of Justice in Judgement No. 2000–02306 of 15 March 2000. The Chamber's decision allegedly constituted arbitrary interference in the right to private life and family in the name of the absolute protection of the right to life. As a response in the 2012 *in vitro Fertilisation* judgement, the IACtHR in fact relied on the *pro homine* principle to settle the conflict between the unborn child's rights and the mother's rights. In this context, the Inter-American judges rejected the Respondent's argument that 'its constitutional norms grant a greater protection to the right to life and, therefore, proceed to give this right

573 Helmut Philipp Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation', 27 *Leiden Journal of International Law* (2014) 75–112, 97.

574 Ibid.

575 Catherine Van de Heyning, 'The Natural "Home" of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights' (2012) 31 *Yearbook of European Law* 128–161, 152.

absolute prevalence'.[576] This is because 'this approach denies the existence of rights that may be the object of disproportionate restrictions owing to the defence of the *absolute* protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty'.[577] To support its own position, the Court invoked the *pro homine* principle:

> [I]n application of the principle of *the most favourable interpretation*, the alleged 'broadest protection' in the domestic sphere cannot allow or justify the suppression of the enjoyment and exercise of the rights and freedoms recognized in the Convention or limit them to a greater extent than the Convention establishes.[578]

Following this statement, the IACtHR assessed the balance between these conflicting rights and concluded that there was 'an arbitrary and excessive interference in private and family life that makes this interference disproportionate'.[579] In this reasoning, the *pro homine* principle itself did not provide a direct answer for resolving the conflict of rights in question. The principle's role is rather found in the previous stage: it *relativises* the *absolute* protection of conflicting rights supported by the supremacy of the national constitution, and thereby creates an *open* circumstance for striking an appropriate balance *most favourable to persons* in terms of their *substance*.

The Costa Rican constitutional judges were again in favour of the right to life, in opposition to the Inter-American judges. To implement the reparation measure indicated by the IACtHR, the executive issued again Decree 39210-MP-S authorising IVF. It was however declared unconstitutional by the Constitutional Chamber judgement on 3 February 2016 for violating constitutional principles of *reserva de ley* and democracy. More concretely, the following constitutional reason was given:

> Compliance with the judgment of the IACHR [...] implies a reconfiguration of the level and scope of the right to life, as well as the definition of a new embryo protection status, in order to perform a new weighting of the protection of the other rights involved, [...], which, by virtue of the principle of *reserva de ley*, which governs in the

576
577 Ibid.
578 Ibid. (emphasis added).
579 Ibid paras 260–263.

> matter of fundamental rights, can only be done by means of a formal law promulgated by the Legislative Assembly.[580]

This case represented a confrontation between constitutional and Inter-American judges. In an order on compliance issued on 26 February 2016, the IACtHR valued positively the efforts made by the executive to annul the IVF prohibition, while it considered the negative attitude of the Constitutional Chamber just two weeks earlier as an obstacle to implementing the judgement.[581] It is remarkable in this context that the dissenting opinion of Judge Vio Grossi clearly mentions 'el margen de apreciación del Estado', which is recognised for implementing the obligations under international law.[582] As the last message from the Inter-American Court, its Order was issued in 2019, which verified that the state had complied fully with the judgement because Executive Decree No. 39210-MP-S of 11 September 2015 for authorising the assisted reproduction technique of *in vitro* fertilisation and embryo transfer remained in force.[583] It was also positively evaluated that Costa Rica had introduced in 2016 two decrees to ensure the proper implementation of the practice of the IVF in the country.[584] The Inter-American Court found that, with these three decrees, the state had not only regulated those aspects it considered necessary for the implementation of IVF in both public and private health establishments, but had also established a system of inspection and control by the Ministry of Health to periodically monitor all the public and private health clinics that carry out this assisted reproduction technique, as ordered by this Court.[585]

580 Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Exp 15–013929–0007, Sentencia № 01692/2016 de 3 febrero 2016, Considerando IV.

581 *Artavia Murillo and Others (In Vitro Fertilization) v Costa Rica*, IACtHR, Monitoring Compliance with Judgments, Order of 26 February 2016, paras 17–19.

582 Individual Dissenting Opinion of Judge Eduardo Vio Grossi, ibid para 25.

583 *Artavia Murillo and Others (In Vitro Fertilization) and Case of Gómez Murillo and Others v Costa Rica*, Monitoring Compliance with Judgments. Order of the Inter-American Court of Human Rights of 22 November 2019, para 17.

584 Ibid para 18.

585 Ibid para 22.

B. Diversified Application of Conventionality Control Parameters

(i) Shield Function for National Constitutions against Regional Conventions

In comparison to the Latin American experiences, the *pro homine* principle has not been explicitly referred to in the Strasbourg Court jurisprudence and by European national courts.[586] From their practices, however, we may extract some important functions of Article 53 of the ECHR, a similar 'more favourable' provision to Article 29(b) of the ACHR, and albeit indirectly, induce those of the *pro homine* principle. The following points, taken as a whole, show that Article 53 of the ECHR, which supposedly embraces the *pro homine* principle, plays a defensive role in safeguarding constitutional values from judicial control based on the Strasbourg law. In this situation, the *pro homine* principle in turn works as a *shield* to prioritise national legal sources over international ones and thereby protects constitutional principles and values.

First, as is the case with the 2005 *Okyay v. Turkey* judgement, national judges invoke Article 53 of the ECHR to emphasise its literal safeguarding function and to maintain existing national standards against the Convention standards.[587] As a representative example, the German Constitutional Court asserted the condition in the *Görgülü* decision that ECHR and ECtHR jurisprudence serve as interpretative guidelines for the Basic Law 'provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law – and this the Convention itself does not desire'.[588] Similarly, the Italian Constitutional Court mentioned Article 53 of the ECHR to confirm that 'the need to comply with international law obligations can never constitute grounds for a reduction in protection compared to that available under internal

586 Article 20(2) of the 1991 Constitution of Romania incorporate a 'more favorable' clause. See also, Levent Gonenc and Selin Esen, 'The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution' (2007) 8 *European Journal of Law Reform* 485–500, 492–497.

587 *Okyay and Others v. Turkey*, ECtHR, App No. 36220/97, Judgment on Merits and Just Satisfaction of 12 July 2005, paras 61–68 (finding the applicability of Article 6 ECHR on the grounds that 'the concept of a "civil right" under Article 6 § 1 cannot be construed as limiting an enforceable right in domestic law within the meaning of Article 53 of the Convention').

588 *Görgülü* (n 445) para 32.

law'.[589] Moreover, the Spanish Constitutional Court referred to Article 53 of the ECHR in *Declaración 1/2004*, elaborating the Spanish version of the *controlimiti* doctrine. In this context, Article 53 of the ECHR and a similar provision, Article II-113 of the Treaty establishing a Constitution for Europe (corresponding to Article 53 of the CFREU), were invoked to emphasise that 'the CFREU is conceived, in whatsoever case, as a guarantee of minimums on which the content of each right and freedom may be developed up to the density of content assured in each case by internal legislation'.[590]

Second, in line with the *E.B. v. France* judgement by the ECtHR,[591] national judicial authorities rely on Article 53 of the ECHR to progressively fix higher national standards than the Convention standards.[592] For example, in the *159/2004* decision, the Belgian Constitutional Court stated that it was free to go further than the Strasbourg Court regarding the right to same-sex marriage under Article 12 of the ECHR, referring to Article 53 of the ECHR and Article 5(2) of the ICCPR.[593] The Supreme Court of Norway took a similar approach with regard to the right to present evidence from child witnesses in court, which is found in both Norwegian due process guarantees and the ECHR. According to an explanation from Justice Øie, 'it is therefore not reasonable to consider the right to the questioning of children as anchored in the Convention, as interpreted by the Strasbourg Court, alone; it has rather been established in the interplay between Norwegian law and international human rights'.[594]

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589 Corte constituzionale italilana, Sentenza № 317 del 3 novembre 2007 Considerato in diritto para 7.

590 Tribunal Constitucional español, Declaración 1 de 13 diciembre 2004 Fundamentos jurídicos para. 6.

591 *E B v France*, ECtHR, App no 43546/02, Judgment on Merits and Just Satisfaction of 22 January 2008, para 49. In the judgment, the Court indicated the possibility under Article 53 ECHR that 'a State is free to be "generous", that is, to do more than the Convention require it to do – but once it decided to take that step, the State should not discriminate.' See Rick Lawson, 'Beyond the Call of Duty? Domestic Courts and the Standards of the European Court of Human Rights', in Henk Snijders and Stefan Vogenauer (eds), *Content and Meaning of National Law in the Context of Transnational Law* (Sellier European Law Publishers 2010) 21–38, 25.

592 Mads Andenas and Eirik Bjorge, 'National Implementation of ECHR Rights' in Føllesdal and Others (n 149) 181–262, 205–206.

593 Cour constitutionnelle belge, Arrêt n° 159/2004 du 20 octobre 2004, paras 6.1 – 6.4.

594 Norges Høyesterett, HR-2011–00182-A, 26. januar 2011. For the English translation, Mads Andenas and Eirik Bjorge, 'The Norwegian Court Applies the ECHR

A problematic approach is that some States Parties have adopted the *mirror* principle to uncritically accept Strasbourg jurisprudence. In the 2004 *Ullah* ruling, Lord Bingham famously formulated the mirror principle, according to which the court must keep pace with evolving Strasbourg jurisprudence 'no more, but certainly no less'.[595] In the *NJ 2002/278* judgement, the Supreme Court of the Netherlands already elaborated the Dutch mirror principle under Article 53 of the ECHR by stating that the incompatibility between domestic law and the ECHR 'cannot be assumed solely on the basis of an interpretation by the national – Dutch – courts […] which leads to a more extensive protection than may be assumed on the grounds of the jurisdiction of the ECHR'.[596] The mirror principle not only evinces respect for ECtHR case law as the authoritative ECHR interpretation but also minimises the risk of a decision of the national court being the subject of an application to the Strasbourg Court.[597] Particularly, due to this principle, domestic courts may 'leave important political and value choices to be made by the Legislature' by strictly mirroring international jurisprudence.[598] Notwithstanding these advantages, the mirror principle may prevent national judges from developing their own native approach to ECHR interpretation.[599] This consequence would defeat the purpose of Article 53 of the ECHR (and Section 11 of the 1998 Human Rights Act) on the basis of which a more generous approach than the Strasbourg Court is permitted.[600] Because on numerous occasions national standards

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by Building upon Its Underlying Principles' (2013) 19 *European Public Law* 241–248.

595 *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20.

596 Hoge Raad der Nederlanden, NJ 2002/278, 10 augustus 2001, para 3.9. For the English translation, Nick S Efthymiou and Joke C de Wit, 'The Role of Dutch Courts in the Protection of Fundamental Rights', (2013) 9 *Utrecht Law Review* 75–88, 78–79.

597 Rt Hon Lady Justice Arden DBE, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29 *Yearbook of European Law* 3–20, 14.

598 Janneke Gerards and Joseph Fleuren, 'The Netherlands' in Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis* (Intersentia 2014) 217–260, 245–246.

599 Jeffery Jowell, *The Changing Constitution* (Oxford University Press 2015) 88.

600 Richard Clayton, 'Should the English Courts under the HRA Mirror the Strasbourg Case Law?', in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 95–114, 105.

have proved stronger in protecting human rights than the ECHR, such supplementary protection should not be lightly cast aside.[601]

(ii) Relativising Absolute Protections of Conventional Rights by National Constitutions

The utility of the *pro homine* principle was indeed limited in the Strasbourg Court. A prime example is the 1992 *Open Door and Dublin Well Woman v Ireland* case concerning the conflict between freedom of expression and the right to life. In confronting this conflict of rights, the ECtHR simply cut off the argument on Article 60 (the former version of Article 53) of the ECHR invoked by the Respondent Government.[602] Instead, the Court applied the margin of appreciation doctrine and concluded that the restraint imposed on the applicants against receiving or imparting information was disproportionate to the aims pursued.[603] As this case suggests, the ECtHR does not regard Article 53 of the ECHR as an appropriate tool for dealing with conflicting rights as this provision would be 'at odds with the concept of autonomous standards' and diminish 'the reach as well as the authority of the ECtHR case law'.[604] It might be therefore better to say that, within the European system, the margin of appreciation doctrine, not the *pro homine* principle, transforms ECHR concepts 'from an applicant's sword into a defendant's shield'.[605]

Does the *pro homine* principle also relativise the absolute mandates based on the supremacy of international law in favour of national constitutions? An answer can be drawn from the *Melloni* case which represented such a collision between constitutional protection of fundamental rights and EU law systems. On the one hand, the Spanish *Tribunal Constitucional* has

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601 Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 43.

602 *Open Door and Dublin Well Woman v Ireland*, ECtHR, App Nos 14234/88 and 14235/88, Judgment on Merits and Just Satisfaction of 29 October 1992, paras 78–79.

603 Ibid paras 67–77.

604 Catherine van de Heyning, 'No Place like Home: Discretionary Space for the Domestic Protection of Human Rights' in Patricia Popelier, Catherine Van de Heyning and Piet Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and National Courts* (Intersentia 2011) 65–96, 78.

605 Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill 1996) 193.

established that the right to participate in an oral trial and to one's own defence constitutes the 'absolute content' of the right to a fair trial.[606] On the other hand, Article 4(a)(1) of the amended European Arrest Warrant Framework Decision 2009/299 specified the conditions under which conviction in a trial *in absentia* cannot constitute a reason for non-surrender of the convicted person. Against the background of this conflict, the *Tribunal Constitucional* decided to refer questions, including the following issue of Article 53 of the CFREU, to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union: 'does Article 53 of the Charter […] allow a Member State to make surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union Law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognized by the constitution of the first-mentioned Member State?'

Although the Madrid Court knocked on the Luxembourg Court's door suggesting a possible interpretation of Article 53 of the CFREU, the CJEU simply dismissed it, contending that it 'would undermine *the principle of the primacy of EU law* inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's Constitution'.[607] Subsequently, the CJEU presented a new formula for regulating the relationship between EU law and national standards under Article 53 of the CFREU as follows:

> It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and *the primacy, unity and effectiveness of EU law are not thereby compromised*.[608]

In conclusion, the CJEU responded that 'Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being

606 Tribunal Constitucional español, Sentencia 91/2000 de 4 de mayo de 2000 para 13.

607 Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, Judgment of 26 February 2013, para 56 (emphasis added).

608 Ibid para 60 (emphasis added).

open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution'.[609] In essence, the *Melloni* ruling clearly asserts that EU law can work not only as a *floor* (minimum standard) but also as a *ceiling* (maximum standard) to limit more protective provisions of national constitutions.[610] Put differently, the CJEU 'forcefully asserted that Article 53 of the EU Charter cannot threaten the supremacy of EU law in any event'.[611]

As a response to the preliminary judgement, the *Tribunal Constitucional* conceded to complete the preliminary ruling of the CJEU by lowering the national level of protection while reminding the Spanish *controlimiti* doctrine elaborated in the *Declaración 1/2004.*[612] In the Declaration, the Madrid Court opened the possibility of 'ultimately rul[ing] in favor of the sovereignty of the Spanish people and the supremacy of the Constitution, through the relevant constitutional procedure'.[613] The Spanish constitutional judges' attitude seems to suggest that the Constitutional Court retains the last word in the event of a clash between the Spanish Constitution and EU law.[614] Aida Torres Pérez offered severe criticism by describing the *Melloni* case as one that moved *from dialogue to monologue* because both the Luxembourg and the Madrid Court eventually 'retreated to the safe havens of EU primacy and constitutional supremacy in a struggle for ultimate authority'.[615] She normatively argues that, to facilitate robust dialogue between the CJEU and national courts, 'even if primacy, unity, and effectiveness [of EU law] were compromised, constitutional rights should not be automatically set aside, but rather the CJEU should examine whether a restriction on those principles might be justified in order

609 Ibid para 64.
610 Fabbrini (n 211) 35–44.
611 Jan Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12 *International Journal of Constitutional Law* 525–544, 528 (emphasis added).
612 Tribunal Constitucional español, Sentencia 26/2014 de 13 febrero 2014, Fundamentos jurídicos para 3. See also, BVerfG, 2 BvR 2735/14, Entscheidung vom 15. Dezember 2015, para 78.
613 Tribunal Constitucional español, Decración 1/2004 para 3. See also ibid, Voto particular concurrente que formula la Magistrada doña Encarnación Roca Trías, para 4.
614 Aida Torres Pérez, 'Melloni in Three Acts: from Dialogue to Monologue' (2014) 10 *European Constitutional Law Review* (2014) 308–331, 320.
615 Ibid 329–331.

to accommodate *more protective* constitutional rights'.[616] The pluralist position seems to vindicate the open-minded, substance-oriented interaction between European and domestic legal sources, which are truly favourable to human beings, rather than the absolute primacy of EU law or national constitutions.

To realise such a pluralist idea, the absolutist jurisprudence of the CJEU has been to some extent attenuated in subsequent cases. In *Åkerberg Fransson*, the question arose as to 'whether the charges brought against Mr. Åkerberg Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by […] Article 50 of the Charter would be infringed'.[617] It was the legal circumstance where the Swedish *Haparada tingsrätt* asked the CJEU whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same act of providing false information.[618] Although the main issue of the *Åkerberg Fransson* case was the scope of application of the CFREU as prescribed by Article 51, the CJEU expressly cited the *Melloni* decision in paragraph 29 and explained the relationship between EU law and national standards as follows: '[W]here a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, *in a situation where action of the Member States is not entirely determined by European Union law*, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised'.[619] Following this statement, the Court concluded that 'the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT [value added tax], a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the

616 Ibid 328 (emphasis added).
617 Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, Judgment of 26 February 2013, para 14.
618 Ibid para 32.
619 Ibid para 29 (emphasis added).

national court to determine'.[620] *Åkerberg Fransson* implies that where EU law does not completely determine Member States' actions, national authorities may entertain a higher level of protection of fundamental rights than those required by the CFREU.[621]

Later, the CJEU issued *Opinion 2/13* and held that the agreement on the accession of the EU to the ECHR is not compatible with EU law. In ascertaining whether the agreement is liable adversely to affect the specific characteristics of EU law, the Court examined the relationship between Articles 53 of the CFREU and ECHR. In this context, the CJEU noted their relations, citing the *Melloni* judgement, as follows: 'In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that *the power granted to Member States by Article 53 of the ECHR is limited* […] *to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised*'.[622] Despite the potential danger of undermining the primacy of EU law, according to the Court, there is no provision in the draft agreement envisaged to ensure such coordination.[623] Therefore, the CJEU concluded that the EU accession to the ECHR is liable adversely to affect the specific characteristics of EU law and its autonomy.[624] The Opinion seems to express the Court's 'worry that the Member States might now use Article 53 of the Convention to resurrect fundamental rights standards in defiance of *Melloni*'.[625]

Finally, the *Taricco* case narrated by the judges in both Luxembourg and Rome tells us the relativist potential of the *pro homine* principle in the European context. The story started when the *Tribunale di Cuneo* launched a preliminary reference to the CJEU with regard to the compatibility

620 Ibid para 37.

621 Bas van Bockel and Peter Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åkerberg Fransson*' (2013) 38 *European Law Review* 866–883, 878–879.

622 CJEU, Opinion 2/13 of 18 December 2014, para 189 (emphasis added).

623 Ibid para 190.

624 Ibid para 200.

625 Daniel Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR and a Way Forward' (2015) Public Law and Legal Theory Research Paper Series (University of Michigan), 19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567591> accessed 30 March 2015.

of Italian provisions regulating limitation periods applicable to tax and financial offences with Article 325 of the TFEU. In the so-called *Taricco I* ruling in 2015, the Court of Justice vindicated the primacy of EU law by requiring domestic courts to disapply national provisions at issue that do not satisfy the requirement of EU law that measures to counter VAT evasion be effective and dissuasive.[626] Because the *Taricco I* provoked turmoil, the Court of Cassation sent references to the Italian Constitutional Court questioning the compatibility of the case law between the Italian Constitutional Court and the CJEU. In a response from Rome, *la Corte costituzionale* indicated the possibility of invoking its own doctrine of *controlimiti* that reflected the notion of respect for national constitutional identity and was constructed on the basis of Article 4(2) of the TEU.[627] Moreover, the constitutional judges paved the way for dialogue with the community judges by asking them to reconsider the interpretation of Article 325 of the TFEU on the basis of its compatibility with Article 49 of the CFREU and the principle of legality.[628] In the Opinion of Yves Bot, advocate general of the CJEU, the application of the Italian constitutional standard of protection 'compromises the primacy of EU law in that it allows an obstacle to be placed in the way of an obligation identified by the Court which is not only consistent with the [CFREU] but also in keeping with the [ECtHR] case law'.[629] In the *Taricco II* judgement, however, the CJEU remarkably cited the *Åkerberg Fransson* judgement's paragraph 29, which in turn invoked the rule affirmed in *Melloni*, although it did not refer to Article 53 of the Charter.[630] It follows from this reasoning that the Community Court made implicit and indirect reference to Article 53 of the CFREU which allows national actors to apply national fundamental rights standards.[631] The *Taricco* case, as Giuseppe Martinico and Giorgio Repetto viewed it, was 'a cumulative approach by which the various catalogues of rights arrive on the scene simultaneously and a different logic

626 Case C-105/14, *Taricco and Others* CJEU, Judgment of 8 September 2015, para 49.
627 Corte costituzionale italiana, Sentenza № 24/2017 del 23 novembre 2016 Considerato in diritto paras 6–8.
628 Ibid para 9.
629 Opinion of Advocate General Bot in Case C-42/17 M A S, M B, para 166.
630 Case C-42/17 M A S, M B, CJEU, Judgment of 5 December 2017, para 47.
631 Matteo Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union CJEU' (2018) 25 *Maastricht Journal of European and Comparative Law* 357–373, 364–365.

seems to be emerging vis-à-vis the functioning of the Charter'.[632] The CJEU's attitude in *Taricco II* has an affinity with the diversified application of regional conventions and national constitutions. In line with IACtHR jurisprudence, this attitude embraces a significant implication for the role of the *pro homine* principle in striking an appropriate balance between constitutional and conventional rights.

632 Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' (2019) 15 *European Constitutional Law Review* 731–751, 751.