Introduction

1. *Research Problems*

A. Systemic Human Rights Violations Caused by Unconventionality of Domestic Law

Patients are considered to have the ultimate say regarding their health condition. Although doctors may play a crucial role in providing medical treatment, their capacity is ultimately complementary to patients' right to self-determination. What if, however, patients fail to recover by themselves due to permanent problems stemming from physical dysfunctionality? Should doctors be limited to examining patients' conditions just by touching their skin and telling them the name of their disease, and providing ointment or a pill that is only superficially effective for the affected area? Or can medical experts identify the affected areas through intense scrutiny, prescribe drugs to eliminate the root cause of the problem, and if the situation requires it, open a surgical resection of their bodies to directly stimulate individual organs that may be the source of the identified causes? If the health of patients is restored through such medical interventions, should their autonomy continue to be restricted based on expert advice?

This analogy helps set out the research problems of this monograph, namely, the issue of systemic violations of international human rights law caused by the defections of domestic legal orders. Within the Westphalian system, nation States with sovereignty have primary powers and duties to implement international obligations, and international institutions remain in principle subsidiary for that purpose.[1] This idea of subsidiarity has been structurally embedded in international human rights law, in which the primary authorities and responsibilities of States Parties are complementarily supervised by treaty bodies.[2] What if, however, human rights violations occur not in single cases but rather in a systematic way due to the lack of ability and/or willingness of States Parties to align their domestic

1 Gerald L Neuman, 'Subsidiarity' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 360–378, 363–365.

2 Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) *American Journal of International Law* 38–79.

legal orders with treaty standards? Should the experts on human rights mandated under treaties refrain from exerting their authority beyond the original meaning of subsidiarity? Or should they reconfigure the meaning of subsidiarity to proactively enforce the primary responsibilities of States Parties? If States Parties follow the decisions of treaty bodies, should their autonomy remain bound to the supervision of human rights experts? These questions are not just figurative or hypothetical but rather exist in reality before the European and Inter-American human rights systems.

The original members of the Council of Europe, mostly western European countries, have retained their domestic legal orders for the effective protection of human rights in accordance with the established criteria, such as the rule of law and democracy. Due to their fidelity to a trinity of values (human rights and democracy and the rule of law), ECtHR jurisprudence deferred to States Parties, and only moderately exercised its remedial power for granting only monetary compensation or declaratory relief to victims.[3] The Strasbourg Court's cautious attitude seemed to reflect how effectively the States Parties have performed their primary duties for the protection of human rights. Despite its past effectiveness, the present European system faces a major challenge that has emerged due to the admission of new members from Central and Eastern Europe whose domestic systems do not necessarily conform to the criteria established by the original members.[4] Consequently, the unconventionality of their domestic laws has resulted in repetitive cases in which vast numbers of victims make similar claims like 'clones' on the same factual basis.[5]

On the other side of the Atlantic, the Inter-American human rights system experienced systemic human rights violations caused by unconventional domestic law even earlier. During the birth of the system, the historical background of Latin American states heavily weighed against the optimism for protecting human rights in this region. That is, these States were 'simply not ready for a system that vests individuals with basic rights under international law and provides judicial machinery for

3 Rudolf Bernhardt, 'Just Satisfaction under the European Convention on Human Rights' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 243–252, 246–249.

4 For the problems relating the admission of new members from Central and Eastern Europe, see in general Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012).

5 Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 485–486.

the vindication of those rights'.[6] It should be noted, additionally, that dictatorship had historically remained endemic in the political life of Latin American States, and violence continued to be the principal vehicle for the attainment of political power in too many states.[7] As a result, widespread and grave violations of human rights in these states, such as forced disappearances, torture and extrajudicial killings were conducted under authoritarian regimes and in internal wars. In addition to these circumstances, amnesty laws and military jurisdiction were abused within their domestic legal orders in favour of those responsible for these violations. As a result, a culture of impunity spread over this region and most of the victims were systemically denied access to remedies.[8]

Figuratively speaking, doctors cannot deal with patients' internal dysfunction by simply touching their skin and telling them the name of their disease or providing an ointment that only superficially treats affected areas. Likewise, regional courts originally tended to provide individual relief to injured persons.[9] However, such case-by-case decisions would lead to difficulty in addressing systemic human rights violations caused by dysfunction within domestic legal systems.[10] To fundamentally address such violations, regional courts 'should view individual cases that are emblematic of persistent or structural human rights problems as opportunities to stimulate broader change on relevant issues'.[11] When States Parties do not comply with conventions standards by engaging in systemic violations, the collective mechanism of human rights protection manifests as a feature of *international law as intervention*, which allows treaty-based institutions

6 José A Cabranes, 'Human Rights and Non-Intervention in the Inter-American System' (1967) 65 *Michigan Law Review* 1147–1182, 1175–1176.

7 Ibid.

8 Laurence Burgorgue-Larsen, 'Exhaustion of Domestic Remedies' in Laurence Burgorgue-Larsen and Amaya Úbeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) 129–145, 138.

9 *Velásquez-Rodríguez v Honduras*, IACtHR, Series C No 4, Judgment on Merits of 29 July 1988, paras 134; *Karner v Austria*, ECtHR, App no 40016/98, Judgment on Merits and Just Satisfaction of 24 July 2003, para 26.

10 With regard to the meaning of 'structural problem', see in general Mart Susi, 'The Definition of a "Structural Problem" in the Case-Law of the European Court of Human Rights Since 2010' (2012) 55 *German Yearbook of International Law* 1–51.

11 James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768–827, 770.

to 'intervene' in the domestic legal order to eradicate the root causes of systemic problems.[12]

Just as doctors must take a step further to solve organic dysfunctions of patients, regional courts have developed remedial jurisprudence not only for individual *reparation* but also collective *restoration*. Within the international legal order, if a State commits an internationally wrongful act against other subjects of international law, that State is obliged to discharge its international responsibility by making reparations to the injured parties, as dictated in the *Factory at Chorzów* case concerning 'reparation' under Article 36(d) of the Statute of the PCIJ.[13] According to Dionisio Anzilotti, who was influential in the PCIJ era, however, '[t]he violation of the international legal order committed by a State subject to that order thus gives rise to a duty of reparation in general consisting of the restoration [*rétablissement*] of the disrupted legal order'.[14] A remedy for an internationally wrongful act is therefore 'not confined solely to reparation of the material damage on a basis of *restitutio in integrum*' but '[m]ore broadly, it aims at *restoration* of the situation, both legal and material, that existed, before commission of the act giving rise to it'.[15] Such 'aspects of the restoration and repair of the legal relationship affected by the breach'[16] are significant particularly when international wrongful acts result due

12 Syuichi Furuya, 'The Image of International Legal Order in International Criminal Adjudicative System: The Exteriorisation of "International Law as Intervention" [Kokusai Keiji Sisutem no Kokusaiho Chitsujozo: "Kainyu no Kokusaiho" no Kenzaika]' (2013) 11 *Horitsu Jiho* 32–36 (in Japanese). For the concepts of *international law of coexistence and co-operation*, see Wolfgang Friedmann, The Changing Structure of International Law (Columbia University Press 1964).

13 *Factory at Chorzów (Germany vs Poland)*, PCIJ, Series A No 9, Judgment on Jurisdiction of 26 July 1927, 21.

14 Dionisio Anzilotti, 'La responsabilité internationale des États à raison des dommages soufferts par des étrangers' (1906) 13 *Revue générale de droit international public* 5–29 and 284–309, 13. In this respect, the Anzilotti's logic still possesses the 'contemporaneity' even for the present international legal order includes obligations *erga omnes* (*partes*). See, Separate Opinion of Judge Cançado Antonio Augusto Trindade, *Ahmadou Sadio Diallo (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea) (Republic of Guinea v. Democratic Republic of Congo),* Meirts, Judgment, ICJ Reports 2010, paras 22–24, 41–59.

15 Pierre-Marie Dupuy, 'Dionisio Anzilotti and the Law of International Law' (1992) 3 *European Journal of International Law* 139–148, 146 [emphasis added].

16 Commentary to Articles on the Responsibility of Sates for Internationally Wrongful Acts (hereinafter, Commentary to ARSIWA), *Report of the International Law Commission on the work of its fifty-third session*, A/56/10 (2001), Art 30, para 1.

to the incompatibility between the domestic legal order in question and international law.[17]

Regional human rights courts have, remarkably, started to exert their *remedial powers* for systemic violations of *general obligations* and *rights to domestic remedies* under the conventions, all of which reflect the subsidiarity principle. It follows, then, that these reparative and restorative measures have a *caractère hybride* because their legal bases are found in both primary rules (establishing an obligation under international law for a state) and secondary rules (on state responsibility).[18] More specifically, based on the different categories of primary rules (obligation to *respect and ensure* and obligation to *harmonise*), the different content of secondary obligations (the past-oriented, remedial *reparation* and the future-oriented, preventative *restoration*).[19] Such an essential connection between primary and secondary norms serves 'to coordinate and ensure some degree of convergence between two [international and domestic] legal systems'.[20]

B. Conventionality Control of Domestic Law

This monograph's main topic, the doctrine of *conventionality control of domestic law*, indeed emerged to restore the unconventional defections of domestic legal orders, which cause systemic human rights violations. The doctrine of conventionality control appeared for the first time in the leading case of *Almonacid-Arellano and Others v Chile*, in which the compatibility between the self-amnesty law in the Pinochet regime and the ACHR

17 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo vs Belgium)*, Judgment, ICJ Report 2002, paras 75–76; *LaGrand (Germany vs United States of America)*, Judgment, ICJ Report 2001, para 125; *Avena and Other Mexican Nationals (Mexico vs United States of America)*, Judgment, ICJ Report 2004, para 121.

18 Hélène Tigroudja, 'La satisfaction et les garanties de non-répétition de l'illicite dans le contentieux interaméricain des droit de l'homme' in Elisabeth Lambert Abdelgawad and Kathia Martin-Chenut (eds), *Réparer les violations graves et massives des droits de l'homme: la Cour interaméricaine, pionnière et modèle?* (Société de Législation Comparée 2010) 69–89, 77. As to the distinction between primary and secondary rules, Working Paper Prepared by Roberto Ago, Yearbook of International Law Commission, 1973 Vol. II, A/CN.4/SER.A/1973/Add.1, 253.

19 Letizia Seminara, *Les effets des arrêts de la Cour interaméricaine des droits de l'homme* (Bruylant/Nemesis 2009) 61–66.

20 André Nollkaemper, 'The Power of Secondary Rules to Connect the International and National Legal Order' in Tomer Broude and Yuval Shany (eds), Multi-Sourced Equivalent Norms in International Law (Hart 2011) 45–67, 59–64.

was challenged. In this decision, the IACtHR dictated that the amnesty law, which left victims defenceless and perpetuated impunity for crimes against humanity, was 'manifestly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention', and therefore, did 'not have any legal effects and cannot remain as an obstacle for the investigation of the facts inherent to the instant case, or for the identification and punishment of those responsible therefor' and '[n]either can it have a like or similar impact regarding other cases of violations of rights protected by the American Convention which occurred in Chile'.[21] According to this interpretation, the Court determined the violation of Article 2 ACHR (obligation to harmonise) by formally keeping the amnesty law within the *legislative corpus*, and that of Article 1(1) thereof (obligation to respect and ensure) by the *judicial* application of the amnesty law.[22] In this context, the San José Court took a monumental step towards the regional integration of international and domestic legal orders:

> [W]hen a State has ratified an *international treaty* such as the American Convention, *its judges*, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, *the Judiciary* must exercise a sort of '*conventionality control*' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is *the ultimate interpreter* of the American Convention.[23]

The conventionality control doctrine initiated in *Almonacid-Arellano* embraces at least two implications for rethinking the relationship between international and domestic law. The first implication is what the present author calls the *constitutionalisation of international adjudication*. Just as the San José Court characterises itself as 'the ultimate interpreter' of the

21 *Almonacid-Arellano and Others v Chile*, IACtHR, Series C No. 154, Judgment on Preliminary Objections, Merits, Reparations and Costs of 26 September 2006, para 119.
22 Ibid. para. 122.
23 Ibid. paras 123–125 (emphases added).

ACHR, a human rights court behaves as a regional constitutional court that makes authoritative interpretations and conducts judicial review of national acts within Convention orders.[24] Alternatively, human rights courts are expected to 'focus more on the public, even *constitutional* aim of the regime in which they operate than they do on dispute settlement'.[25] In this context, human rights courts 'exercise *constitutional* functions in the sense that they may interfere significantly with activities of national legislative, executive, and judicial national organs'.[26] There is, in fact, the *constitutionalisation* of the Inter-American law phenomenon, in which the IACtHR performs 'much like a constitutional court, to "invite itself" into the member States' legal systems in order to force them to conform to the Convention'.[27] Similarly, the ECtHR has increasingly engaged in *constitutional justice* beyond individual justice to the extent that '[s]tates are routinely required to reform their internal law and practices in response to findings of violations by the Court'.[28]

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24 Alec Stone Sweet, 'Sur la constitutionalisation de la Convention européenne des droits de l'homme : cinquante ans aprês son installation, la Cour européenne des droits de l'homme conçue comme une cour constitutionnelle' (2009) 77 *Revue trimestrielle des droits de l'homme* 923–944; Catherine Van de Heyning, 'Constitutional Courts as Guarantees of Fundamental Rights: The Constitutionalisation of the Convention through Domestic Constitutional Adjudication' in Patricia Popelier, Armen Mazmayan and Werner Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 21–48; Laurence Burgorgue-Larsen, 'La Corte Interamericana de Derechos Humanos como tribunal constitucional' in Armin von Bogdandy, Héctor Fix-Flerro and Mariela Morales Antoniazzi (eds), *Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafios* (Universidd Nacional Autótonoma de México 2014) 421–457; Ariel Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50 *Texas International Law Journal* 45–93.

25 Dinah Shelton, 'Form, Function, and the Powers of International Courts' Chin. J. Int'l L. 9 (2009), 537–571, 564 (emphasis added).

26 Geir Ulfstein, 'The International Judiciary' in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009) 126–152, 127 (emphasis added).

27 Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) *Quebec Journal of International l Law (Special Edition)* 57–97, 71–76 (emphasis added).

28 Keller, Helen and Stone Sweet, Alec, 'Assessing the Impact of the ECHR on National Legal Systems' 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) 677–710, 703 (emphasis added).

The second implication is, in contrast, what the present author terms the *internationalisation of constitutional adjudication*. As predicted based on Georges Scelle's *dédoublement fonctionnel* theory, the institutional deficiencies that affect global governance still require domestic courts to promote international goals.[29] In the context of European integration, the *Simmenthal* judgement mandated that all national judges as the ordinary judges of Community law set aside national law that conflicted with EU law.[30] The *Simmenthal* doctrine may be applied to characterise domestic courts as the ordinary judge of international law.[31] Indeed, international law increasingly designates domestic judges as 'natural judges' of international law to ensure the opportunity for the state to comply with its international obligations.[32] Domestic courts specifically assume an important role in 'review[ing] the legality of national acts in the light of international obligations and ensuring rule-conformity'.[33] According to this statement, domestic courts are required to reconcile the traditional domestic task of constitutionality control and the new international mission of conventionality control. Human rights conventions are in reality becoming integrated into national constitutions, and thereby, domestic courts are becoming empowered to exercise constitutionality control by applying both national and international criteria.[34] In line with the *Simmenthal* doctrine, the conventionality control doctrine purports to convert domestic judges into 'primary and authentic guardians' of the legal orders established by human rights treaties.[35]

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29 Yuval Shany, '*Dédoublement fonctionnel* and the Mixed Loyalties of National and International Judges' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law Through Dialogue* (Europa Law Publishing 2010) 27–44, 36.

30 Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, at paras 21–22. See also, Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 102.

31 El Boudouhi, 'The National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts' (2015) 28 *Leiden Journal of International Law* 283–301, 283–286.

32 Antonios Tzanakopoulos, '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, at 152.

33 André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2012) 10.

34 Carlos Ayala Corao, *Del diálogo jurisprudencial al Control de Convencionalidad* (Editorial Jurídica Venezolana 2012) 90.

35 Concurring Opinion of Judge *ad hoc* Eduardo Ferrer MacGregor, *Cabrera Garcia and Montiel Flores v Mexico*, IACtHR, Series C No 220, Judgment on Preliminary

Can existing theories sufficiently elucidate such a dynamic synergy between 'constitutionalised international adjudication' and 'internationalised constitutional adjudication' illuminated by the doctrine of conventionality control? As is well known, dualist and monist scholars have debated the *validity* of international and domestic law. *Dualism* presupposes the independent character of the international and domestic orders.[36] Nevertheless, complete and reciprocal independence between these two orders has also been challenged, particularly in relation to the field of State responsibility that necessitates appreciation of the conformity between international and domestic law.[37] *Monism* alternatively perceives a hierarchical unity between the international and domestic legal orders.[38] In reality, however, these two legal orders differ from each other in terms of validities because the legal effects of domestic law cannot be denied directly due to its incompatibility with international law.

To avoid such dogmatic confusion, scholars have suggested practice-oriented approaches that examine 'the relationship between international and domestic law'. Sir Gerald Fitzmaurice noted that what may occur between international and domestic law is not a conflict of 'systems' but a conflict of 'obligations', which are regulated by the rules of State responsibility.[39] From a practical viewpoint, Başak Çalı has recently advocated a *reflexive authority* of international law before domestic courts to overcome the limits of the traditional monism–dualism debate by categorising in greater

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Objection, Merits, Reparations and Legal Costs of 26 November 2010, para. 24. As regards the relationship between the *Simmenthal* doctrine and the *control de convencionalidad* doctrine, see Jânia Maria Lopes Saldanha and Lucas Pacheco Vieira, 'Controle jurisdictional de convencionalidade e reenvio prejudicial interamericano: Um diálogo de ferramentas processuais em favor da efetivação do direito internacional dos direitos humanos' (2013) 19 *Anuario de derecho constitucional latinoamericano* 435–460, 438–440.

36 Heinrich Triepel, 'Les rapports entre le droit interne et le droit international' (1923) 1 *Recueil des cours* 73–122, 82–87; Dionisio Anzilotti, (traduit par Gilbert Gidel), *Cours de droit international, Premier Volume: Introduction : Théorie génerales* (Sirey 1929) 51.

37 Paul Guggenheim, *Traité de droit international public*, 2e éd., (Tome I, Librairie de l'Université, Georg & Cie S. A. 1967) 53–54.

38 Hans Kelsen, *Principles of International Law*, 2nd ed. (Revised and Edited by Robert W Tucker) (Holt, Rinehart and Winston 1967) 562.

39 Gerald Fitzmaurice, 'The General Principles of international Law: Considered from the Standpoint of the Rule of Law' (1957-II) 92 *Recueil des cours* 1–228, 79–80. See also, Charles Rousseau, 'Principes de droit international public' (1958-I) 93 *Recueil des cours* 369–550, 473; James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford University Press 2012) 50, 110–111.

detail the scope and extent (strong, weak or rebuttable) of the authority claim of international law.[40] Domestic judges are under the duty to disregard domestic law manifestly incompatible with a strict international legal obligation.[41] Moreover, they are given a certain amount of discretion to implement international law when confronted with a weak obligation of international law, or even may set aside a rebuttable international legal mandate.[42]

However, the doctrine of conventionality control has an uncharted potential to resurrect theoretical debates beyond considering practical tasks. Indeed, conventionality control does not simply denote, as the 'coordination' doctrine explains, each practice of coordinating a specific conflict that arises between international and national law; it more fundamentally involves, as the 'validity' doctrine such as dualism and monism argued, the theoretical momentum to reconstruct the overall relationship between the international and national legal orders. To cite the famous *Barrios Altos* and *La Cantuta* judgements against Peru concerning the self-amnesty or blanket amnesty laws by which perpetrators or responsible regimes grant themselves or their members immunity from prosecution, the IACtHR declared that '[o]wing to the manifest incompatibility of self-amnesty laws and the ACHR, the said laws lack legal effect'.[43] Antonio Cassese insightfully put forward Alfred Verdross' *moderate monism* theory by considering the IACtHR's jurisprudence of conventionality control in these decisions invalidating domestic law that is inconsistent with international law.[44] However, former judge Sergio García-Ramírez retained the dualistic position in his separate opinion, stating, '[i]t is not the inter-American Court's but the State's place to answer this question [concerning the means through which the State should do away with any unconventional laws], *i.e.* to analyse and implement the decision that will lead to the intended end, which is the elimination of any potential effect of a legal

40 Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford University Press 2015) 146–157.
41 Ibid.
42 Ibid.
43 *Barrios Altos v Peru*, IACtHR, Series C No. 75, Judgment on Merits of 14 March 2001, para 44.
44 Antonio Cassese, 'Towards a Moderate Monism: Could International Eventually Acquire the Force to Invalidate Inconsistent National Law?' in in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 187–199, 198.

provision that is incompatible with the Convention'.[45] The doctrine of conventionality control, therefore, cannot be accurately grasped by either the *static validity* theory or the *practical coordination* theory but rather by the *dynamic process* theory.[46]

In essence, the present volume analyses the doctrine of conventionality control that exposes a parallel dynamism between 'constitutionalised international adjudication' and 'internationalised constitutional adjudication'. The adoption of normative settings of constitutionalism does not mean that the book conducts a purely value-oriented analysis that might lead to an unrealistic utopia. Rather, practical moments are evaluated to the maximum extent 'as an empirical point of departure for mapping specific normative claims as well as identifying the actorship involved in raising these claims'.[47] This book therefore takes an approach that integrates both empirical and normative viewpoints because its ultimate aim is to capture the dynamic process where observable judicial practices suggest the value-oriented convergence of different legal orders.[48] Put differently, this project aims at establishing one normative model of conventionality control that is based on the currently existing human rights adjudicatory practices at the international and domestic levels, and will be subject to further elaboration in view of future empirical developments.

45 Separate Opinion of Judge Sergio García-Ramírez, *La Cantuta v Peru*, IACtHR, Series C No 162, Judgment on Merits, Reparations and Costs 29 November 2006, para 4.

46 For the three types of theory, Teraya, Koji, 'Shijinkan Koryoku to "Kokusaiho" no Siko Yoshiki: Kenpogaku to Kokusaihogaku no Dosyoimu [Horizontal Application Theories and "International Law" Thinking: Strange Bedfellows in the Disciplines of Constitutional Law and International Law]' (2012) 23 *Kokusai Jinken* [*Human Rights International]* 9–15, 11 (in Japanese).

47 In the context of pouvoir constituant 'unbound' by the State, Antje Wiener and Stefan Oeter, 'Introduction: Who recognizes the emperor's clothes anymore?' (2016) 14 *International Journal of Constitutional Law* 608–621, 611–614.

48 For the necessity to integrate both empirical and normative analyses, see Anne Peters, 'Realizing Utopia as a Scholarly Endeavour' (2013) 24 *European Journal of International Law* 533–552, 551–552.