doi:10.1017/aju.2022.54

SYMPOSIUM ON LATIN AMERICAN INTERNATIONAL LAW

HUMAN RIGHTS AS TRANSNATIONAL LAW

*Jorge Contesse**

In 1916, at the first meeting of the then newly created American Institute of International Law, jurists from different countries adopted a declaration stipulating that "[i]nternational law is at one and the same time both national and international."[1] A century later, Latin American international human rights law clearly reflects that idea. Since the adoption of the American Declaration of the Rights and Duties of Man in 1948, and especially since the 1950s, with the creation of the Inter-American Commission on Human Rights, and later with the adoption of the American Convention on Human Rights in 1969, human rights in Latin America have been, are, and will continue to be an essentially regional phenomenon of international law. By examining the Inter-American Court of Human Rights' case law, this essay analyzes the way in which Latin America has articulated transnational human rights law, from the establishment of the inter-American system, to the distinctive forms of interaction and influence between international law and constitutional law. Drawing from recent jurisprudence on social rights, this essay shows that the idea of a Latin American common law of human rights—an idea that has become highly influential in the past decade—is an example of the outer limits of the potential integration. As such, the idea presents challenges that must be addressed in order for regional human rights to realize their full potential as transnational norms.

A Regional System for the Protection of Rights

Toward the end of the 1970s, when the Southern Cone of Latin America was governed by military dictatorships —and the American Convention on Human Rights was coming into force—the Inter-American Commission on Human Rights visited Argentina. The event is usually seen as key to the decline of the Argentinean dictatorship (the final straw would be the military defeat suffered in the Malvinas Islands War) and to the positioning of the inter-American system as a reference point for democratic legitimacy. Thus, in the early 1980s, the Commission realized that it could play an important role in serving as a beacon for civil society to push, from below, for the dismantling of regimes that systematically undermined human rights.[2]

In the decade that followed, the Inter-American Commission slowly consolidated its authority through increasing interaction with both civil society organizations and Latin American states. In parallel, the Inter-American Court began to issue advisory opinions on various issues that both states and the Inter-American Commission

* *Professor of Law & Director, Center for Transnational Law, Rutgers Law School, Newark, New Jersey, United States.*

[1] Elihu Root, *The Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law*, 10 AJIL 211, 213 (1916).

[2] Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q. 856, 873 (2009).

© Jorge Contesse 2022. Published by Cambridge University Press on behalf of The American Society of International Law. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.1017/aju.2022.54 Published online by Cambridge University Press

brought before it. In the absence of contentious cases submitted by the Inter-American Commission—as provided for in the Convention—the Court used advisory jurisdiction to increase its authority and influence.[3]

International Law as Constitutional Law

At the end of the 1980s, many Latin American countries began the transition to become constitutional democracies. Many adopted new constitutions, while some reformed existing constitutions. States that experienced a sort of "new constitutional beginning," and which did so through new legal regulations, made an explicit commitment to international human rights law. If one reviews the new constitutions adopted at that time—Brazil in 1988, Colombia in 1991, and Peru in 1993—or the important constitutional reforms that other countries carried out, such as Chile in 1989 or Argentina in 1994, all of them provided that international human rights law would now form an integral part of constitutional law.[4]

This step was key to what would become the use of international law by domestic courts, especially constitutional courts. With varying intensity, national courts started incorporating in their reasoning international human rights norms that subsequently gave rise to a common law in Latin America, the so-called *ius constitutionale commune*. This phenomenon would crystallize, as I show in the following section, with the Inter-American Court's adoption of the doctrine of conventionality control, thus cementing Latin America international human rights law as constitutional law.

In the mid-1990s, a Peruvian district court declared the country's amnesty law unconstitutional for violating due process and affecting the rights of the victims of a massacre that occurred in November 1991 under Alberto Fujimori's regime—"the Barrios Altos massacre."[5] Interestingly, in its ruling, the court determined that the unconstitutionality of the amnesty law stemmed not only from its incompatibility with the Peruvian Constitution, but also with the Universal Declaration of Human Rights and the American Convention on Human Rights. International law was unequivocally now part of Peru's domestic law.

At the same time, the Constitutional Court of Colombia, established by the 1991 Constitution, created one of its most important doctrines: the "block of constitutionality." Under this doctrine, the Colombian Court found that it should not only take into account the norms of the national Constitution, but also the norms and principles of international human rights law. According to the court, international human rights norms, "without appearing formally in the articles of the constitutional text, are used as parameters for the control of the constitutionality of laws," thus generating a single normative "block" to be used by the Constitutional Court.[6]

A few years later, the Chilean courts—known for their reticence toward the use of international law and especially their acquiescence to the military dictatorship of Augusto Pinochet[7]—did the same with the self-amnesty laws passed by the Pinochet regime. Resorting to the Geneva Conventions, the Chilean Supreme Court modified its prior interpretation of self-amnesty laws which had rejected all efforts to hold accountable those responsible for serious human rights violations. With the new interpretation, the Chilean Court determined that international law (in this case, international humanitarian law) took precedence over domestic law.[8]

[3] The Court issued opinions in areas such as freedom of expression, suspension of rights in emergency contexts, and specific aspects of interpretation of the new regime. *See* Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. Int'l L. & Pol. 259, 269–70 (2004–2005).

[4] *See* Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 Tex. L. Rev. 1587 (2011).

[5] Judgment Case Ley de Amnistía 26.479 (Disposición Cuarta Transitoria; Control Difuso) (June 16, 1995) (Per.).

[6] Constitutional Court of Colombia, Judgment C-225/95 (May 18, 1995) (Colom.).

[7] *See* Lisa Hilbink, Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile (2010).

[8] Supreme Court of Chile, Criminal Chamber, Judgment No. 469-98 (Sept. 9, 1998) (Chile).

https://doi.org/10.1017/aju.2022.54 Published online by Cambridge University Press

These developments in the constitutional jurisprudence of various countries strengthened the authoritative character of inter-American human rights law. One may also note an aspect that is sometimes obscured, but which was of vital importance in the way international law became a central part of domestic law in the region: the role of legal education. Legal education in Latin America, traditionally marked by the formalist legacy of European legal education, was also undergoing a process of change. This change was driven, among other factors, by the work and influence of foreign organizations—such as the Ford Foundation—that funded the revision of law school curricula and the creation of a network of human rights legal clinics, thus giving an important boost to a novel way of using the courts as actors of social change.[9] It thus became increasingly common to invoke international law before domestic courts, generating an impact not only on judges, but also on public opinion: international law was no longer simply a set of norms and rules produced "out there." In line with the judicial doctrines explained above, international law became an integral part of the curriculum of some law schools that innovated in teaching and sought to leave behind the formalism characteristic of legal systems created in the light of the French Civil Code.[10]

Constitutional Law as International Law

The process by which international (human rights) law became increasingly important in Latin America was a product of not only internalization by national courts, but also of the singular way in which international law acquired, at least discursively, a constitutional character. To put it differently, regional human rights bodies—in particular, the Inter-American Court of Human Rights—progressively took on the role of a type of regional constitutional court. This means that attention should be focused not only on the role of *national* courts, but also on the way in which the regional Court developed its own jurisprudence.

As explained above, the Barrios Altos massacre serves as the starting point of the Peruvian jurisprudence that places international law in a preferential position. But this event also gave rise to one of the most important decisions for the inter-American human rights system: *Barrios Altos v. Peru*.[11] In this judgment, the Inter-American Court determined that Peru was responsible for the lack of proper investigation and punishment of those responsible for the Barrios Altos massacre. One of the most important features of this judgment is the Court's declaration that self-amnesty laws "lack legal effect,"[12] pursuant to which the Court ordered the reopening of the investigations by the national courts.

However, the *Barrios Altos* judgment is relevant in other ways too. The judgment marks what would become a vital component of inter-American human rights law: because they prevent the investigation, prosecution, and punishment of serious human rights violations, self-amnesty laws are incompatible with the American Convention. But beyond this declaration, the claim that such incompatibility renders these laws "devoid of legal effect" is what, in my opinion, turned the Inter-American Court into a sort of regional constitutional court. Declaring a national law inapplicable—or null and void—is typically a decision that a *domestic* (that is, "constitutional") court may take, not one that is left to the decision of an *international* tribunal.[13]

[9] Daniel Bonilla, *Legal Clinics in the Global North and South: Between Equality and Subordination*, 16 Yale Hum. Rts. & Dev. L.J. 1 (2013); Arturo J. Carrillo & Nicolás Espejo Yaksic, *Re-imagining the Human Rights Law Clinic*, 26 Md. J. Int'l L. 80, 89 (2011).

[10] Legal Culture in the Age of Globalization: Latin America and Latin Europe (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003).

[11] Barrios Altos v. Peru, Judgment, Merits (Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001)).

[12] *Id.*, para. 44.

[13] On the reasons why the Inter-American Court articulated the doctrine, see Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 Int'l J. Hum. Rts. 1168 (2018).

https://doi.org/10.1017/aju.2022.54 Published online by Cambridge University Press

It was in this context, reiterating the doctrine on the invalidity of self-amnesties, that in 2006 the Inter-American Court issued another landmark judgment: *Almonacid-Arellano v. Chile*, in which the Court created its doctrine of "conventionality control." According to this doctrine, all national judges are directly bound to follow the norms of the Convention and the interpretations of the Inter-American Court.[14] Since then, as several commentators have noted, there has been a growing understanding of the Court as a true regional constitutional court.[15] Thus, the separation between international law and constitutional law progressively unravels, as the Court seems to understand national judges as genuine "inter-American judges."[16]

A Latin American Common Law?

The idea of national judges as international judges has found an intellectual home in the school of "*ius constitutionale commune*," which originated at the Max Planck Institute in Heidelberg. This way of understanding the system—which has Inter-American Court Judge Ferrer Mac-Gregor arguably as its most enthusiastic promoter—postulates that the Court and states participate together in a judicial dialogue that ultimately "transforms" Latin American law. The doctrine aims to tackle structural inequalities in Latin American countries and gives the Court a core mission to do so.[17]

From there, the work of the Court is analyzed and promoted as that of a regional constitutional court. As observed by the school's most prominent author, the functions of the *ius constitutionale commune* "resemble those of a series of concepts, such as, for example, the new *Ius Commune* in Europe, the European *Ius Publicum* . . . the so-called law of humanity, cosmopolitan law, global law, world law, internal world law, transnational law or transconstitutionalism."[18] The list is impressive, and suggests that the school is normatively located on almost all possible grounds of authority—a feature that, as some have observed, makes it hard to clearly characterize it.[19]

What I am interested in highlighting here, however, is the ways in which *ius constitutionale commune* seems to promote the Court's critical jurisprudential expansion. The Court's expansive case law not only breaks new ground but also generates problems in its interaction with states.[20] For example, in the case of conventionality control, as applied in separate opinions by Judge Ferrer Mac-Gregor, which at times seem more like law treatises than judicial opinions because they detail the way in which states should adhere to this judicial doctrine.[21] For critical legal theorists, such an approach to international adjudication risks undermining the overall authority of a regional human rights system.[22]

[14] Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

[15] Laurence Burgorgue-Larsen, *La Corte Interamericana de Derechos Humanos como Tribunal Constitucional*, *in* Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos 421 (Armin von Bogdandy, Héctor Fix-Fierro & Mariela Morales Antoniazzi coords., 2014); Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 Texas Int'l L.J. 45 (2015).

[16] Armin von Bogdandy & René Urueña, *International Transformative Constitutionalism in Latin America*, 114 AJIL 403, 416 (2020).

[17] Armin von Bogdandy, Ius Constitutionale Commune *en América Latina: Una Mirada a un Constitucionalismo Transformador*, 34 Rev. Derecho Estado 3 (2015).

[18] *Id.* at 15–16 (footnotes omitted).

[19] *See* Alberto Coddou McManus, *A Critical Account of* Ius Constitutionale Commune *in Latin America: An Intellectual Map of Contemporary Latin American Constitutionalism*, 11 Glob. Constitutionalism 110 (2022).

[20] *See* Jorge Contesse, *Judicial Interactions and Human Rights Contestations in Latin America*, 12 J. Int'l Dispute Settlement 271 (2021).

[21] Cabrera García and Montiel Flores v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (serr. C) (concur. op., Ferrer Mac-Gregor Poisot, J. ad hoc).

[22] *See* Natalia Torres Zúñiga, The Inter-American Court of Human Rights: The Legitimacy of International Courts and Tribunals (2023).

https://doi.org/10.1017/aju.2022.54 Published online by Cambridge University Press

More recently, this character of a Latin American common law—that to say, an interaction that seems to blur the difference between domestic and regional jurisdictions—can be seen in the Court's jurisprudence on social rights. In a series of cases starting in 2017, the Court has determined that Article 26 of the American Convention is directly justiciable, even though this norm does not give the Court this power.[23] On the one hand, the majority opinion—originally promoted by former judge Roberto Caldas and current Judge Ferrer Mac-Gregor—claims that despite the language of the Convention—based on the principle of *iura novit curia*—the Court may *ex officio* advance and expand the scope of social rights. On the other hand, other members of the Court systematically dissent from this interpretation, with opinions that question the authority of the Court and warn about the risks of this expansive reading of Article 26.

The disagreement on the justiciability of social rights among members of the Court is reiterated in judgment after judgment. It is based on in the idea of a "paradigm shift in jurisprudence," announced by Judge Ferrer Mac-Gregor himself, writing in his capacity as legal scholar.[24] This jurisprudential change, based mainly on the evolutionary interpretation of the American Convention, encounters resistance within the Court itself, with some members criticizing the doctrine as a departure from basic rules of treaty interpretation and as undermining the legitimacy of the inter-American system.[25]

In short, it seems that the impetus to integrate international law with national law—a goal that has been present for more than a century—risks weakening the authority of the Court itself. It is unclear that the Inter-American Court (or any international tribunal, for that matter) should correct social injustices in all cases—or at least not if such a move implies disregarding norms agreed upon by states themselves. As Judge Sierra Porto has said, in an oblique reference to the *ius constitutionale commune* school, "transformative law cannot be done against the law in force."[26]

Conclusion

The impressive development of international human rights law in Latin America has made regional bodies key players in the protection and promotion of a shared language of rights. States, advocates, and scholars understand how important it is to protect the authority of the inter-American human rights system as a project of Latin American transnational law. However, this project must ensure that the integration between national law and international law, while responding to common objectives—rule of law, democracy, social justice, and human rights—does not affect the norms and principles that make such integration possible. As Latin American countries have paid a high price when democracy has been at risk, it is imperative that Latin American international law can serve those values with full adherence to the norms and principles that make them possible in the first place.

[23] Article 26 of the American Convention: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 143.

[24] Inclusión, *Ius Commune* y justiciabilidad de los DESCA en la jurisprudencia interamericana: El caso *Lagos del Campo* y los nuevos desafíos 15 (Eduardo Ferrer Mac-Gregor Poisot, Mariela Morales Antoniazzi & Rogelio Ángel Flores Pantoja coords., 2018).

[25] Sierra Porto, for example, has said that the Court "uses the 'evolutive' interpretation to conceal a 'conventional mutation'." Caso Lagos del Campo v. Peru, Preliminary Objections, Merits, Reparations, Costs, Judgment, para. 42 (Inter-Am. Ct. H.R. (ser. C) No. 340 (Aug. 31, 2017)) (diss. op., Sierra Porto, J.).

[26] *Id.*, para. 48.

https://doi.org/10.1017/aju.2022.54 Published online by Cambridge University Press