

## Contestation and deference in the Inter-American human rights system

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# CONTESTATION AND DEFERENCE IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

JORGE CONTESSE\*

## I

### INTRODUCTION

The Inter-American human rights system (the IAHRs), in place for over fifty years, is composed of the Inter-American Commission on Human Rights, a quasi-judicial body that issues recommendations for member states of the Organization of American States and submits cases before the Court, and the Inter-American Court of Human Rights, an international tribunal with compulsory jurisdiction over member states<sup>1</sup> that have ratified the American Convention on Human Rights (the American Convention).<sup>2</sup> Established amid the pressures of the Cold War, the system, contributing to the restoration of democracy and the promotion of justice in the region, has dealt for decades with the consequences of massive and gross human rights violations. Today, the system faces significant legal and institutional challenges. Along with cases related to political persecution, torture, and other egregious human rights violations stemming from authoritarian regimes, the IAHRs must deal with petitions against functioning democracies, as most of the states today in the region have left behind authoritarian and dictatorial regimes.<sup>3</sup>

This article explores the system's adjudication model in light of some of the conjectures on subsidiarity as a principle for international governance—that is, the degree of deference it grants to the assessment of a situation by the member

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1. For the purposes of this article, both Organization of American States member states and states that have ratified the American Convention on Human Rights are referred to as member states.

2. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 [hereinafter American Convention].

3. See Katherine Isbester, *Democracy in Latin America: A Political History*, in THE PARADOX OF DEMOCRACY IN LATIN AMERICA 35, 55 (K. Isbester ed., 2010); see also Mark P. Jones, *The Diversity of Latin American Democracy*, WORLD POLITICS REVIEW (Mar. 20, 2012), <http://www.worldpoliticsreview.com/articles/11751/the-diversity-of-latin-american-democracy> (observing that by the end of the 1970s, sixteen out of nineteen Latin American countries were governed by military or civilian dictatorships, and that in 2012, only Cuba remained as a nondemocratic country).

state concerned—that Jachtenfuchs and Krisch propose.<sup>4</sup> To that end, the article inquires about the system’s role as arbitrator of human rights cases within its jurisdiction. It examines the dynamics of subsidiarity in the context of the IAHRs and finds that the Inter-American Court embraces a maximalist model of adjudication—one that leaves very little, if any, room for states to reach their own decisions. The Court’s current approach to supranational adjudication is explained as largely resting upon its historical context.

From a normative perspective, this article examines how the Inter-American Court *ought to* decide its cases. Should the Court act as a tribunal with expansive fact-finding powers, or should it instead limit its reach to legal questions of interpretation? If the latter, what model of adjudication should the Inter-American Court embrace? More generally, can there be an understanding of subsidiarity that is particular to the IAHRs? If so, this raises questions about the import of the political context in which the Court operates to its attitude toward state parties, petitioners, and in general, the cases under its consideration.

This article enriches Jachtenfuchs’s and Krisch’s typology,<sup>5</sup> as the matter under consideration both questions and confirms some of their conjectures. In particular, because some states deem the system’s decisions too intrusive, it may be necessary to draw some form of subsidiarity for the Court. At the same time, however, the calls for higher subsidiarity play out in the context of an international court that has “significant and stable institutional and political autonomy.”<sup>6</sup> The challenge, then, is to reconcile both claims: on the one hand, states’ demands for higher deference, and on the other hand, the importance of a powerful and independent regional tribunal.

## II

### SUBSIDIARITY IN INTERNATIONAL LAW

Who should decide—or alternatively, who has—the final word to say what the law is? This is arguably one of the most relevant questions for any legal and political regime, and a coherent answer will both explain and allow scrutiny of the allocation of authority in any given regime.<sup>7</sup> In the United States, at least since *Marbury v. Madison*,<sup>8</sup> scholars have debated whether the judiciary’s

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4. See Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1, 14–19 (offering nine conjectures on the—stronger or weaker—demand for subsidiarity as a ruling principle for global governance).

5. See *id.*

6. *Id.* at 17.

7. For inquiries into the foundations and scope of the subsidiarity principle, see generally Andreas Føllesdal, *Subsidiarity* 6 J. POL. PHIL. 190 (1998); Jonathan Chaplin, *Subsidiarity: The Concept and the Connections*, 4 ETHICAL PERSP. 117 (1997); In the context of international human rights law, see Gerald Neuman, *Subsidiarity*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 360 (D. Shelton ed., 2013); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38 (2003).

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

authority should extend as far as encompassing the ability to strike down legislation. In the European context, the creation of constitutional courts at the beginning of the twentieth century also raised key questions about who should be “the guardian of the Constitution.”<sup>9</sup> In the area of international law, particularly international human rights law, these questions continue to receive significant attention, especially in Europe, where member states, petitioners and even the European Court of Human Rights unceasingly debate the European Court’s scope of authority.<sup>10</sup>

The doctrine of subsidiarity provides one framework for the allocation of power in global governance. Subsidiarity comes into play as a mechanism that helps address some of the problems that the rise of international authority creates, particularly the increased perception that international authority has a democratic deficit.<sup>11</sup> Such perception is especially problematic when the issue at stake is the protection of human rights by regional courts. If international authority must respect principles of democratic self-determination, how should international courts address situations in which domestic decisions may indeed affect the rights of individuals? Subsidiarity, and its different notions, may help address such questions.

Andreas Føllesdal has articulated the notion of subsidiarity in international law as a “rebuttable presumption for the local,”<sup>12</sup> that is, the idea that states should have “prima facie prioritization” when deciding issues of international law.<sup>13</sup> This normative theory of subsidiarity presupposes that local units should have first right to decide matters of law.<sup>14</sup> Notably, most of the scholarly work

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9. See generally LARS VINX, *THE GUARDIAN OF THE CONSTITUTION: HANS Kelsen AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW* (2015) (featuring debate over constitutional review in Weimar, Germany).

10. Perhaps the most recent and salient example of a state’s unease with the European Court’s decisions is the hostile position that the United Kingdom has adopted since the Court decided *Hirst v. United Kingdom* in October 2005. See *Hirst v. United Kingdom* (No. 2) [GC], 2005-IX Eur. Ct. H.R. 187. In *Hirst*, the Court found that the United Kingdom’s blanket ban on convicted prisoners voting in elections violated European human rights law and ordered the state to amend its legislation. After more than ten years, the United Kingdom has failed to comply with the decision. See Ed Bates, *Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg*, 14 HUM. RTS. L. REV. 503, 503–04 (2014); Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487, 488 (2014). On the question of the European Court’s legitimacy, see generally KANSTANTSIN DZEHTSIAROU, *EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2015), and on the question of international courts’ political legitimacy, see generally THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES (Andreas Føllesdal, Johan Karlsson Schaffer & Geir Ulfstein eds., 2013).

11. Jachtenfuchs & Krisch, *supra* note 4, at 3.

12. Andreas Føllesdal, *Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—Or Neither?*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 147, 148.

13. Mattias Kumm, *Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 239 (observing that subsidiarity “amounts to the proposition that the more local unit should have jurisdiction to regulate an issue, unless there are good reasons for the overarching, more central level to step in”).

14. Føllesdal offers four different normative justifications for the principle of subsidiarity:

on the subject, particularly in Europe, endorses this normative theory of subsidiarity.<sup>15</sup>

Others have proposed a merely descriptive theory of subsidiarity.<sup>16</sup> Gerald Neuman has observed that subsidiarity “describes a relationship between two institutions or norms, by which one supplements the other in appropriate circumstances.”<sup>17</sup> Here, subsidiarity does not import any preference—for the local, the peripheral, or the central. It merely describes the relationship that exists between two (or more) institutions with the power to adjudicate. Endorsing this theory of subsidiarity gives parties room to articulate a defense of center-controlled decisionmaking, whereas endorsing the normative view presupposes that individual states have the first word. Because most accounts of subsidiarity in international law give preference to subunits (“the rebuttable presumption *for the local*”),<sup>18</sup> the descriptive theory of subsidiarity has the burden of articulating arguments against giving such preference. In other words, the descriptive theory of subsidiarity leaves room for the argument that the center decides in lieu, and not just *in subsidio*, of the local units.

The importance of choosing a theory of subsidiarity is highlighted in the arena of international human rights law, where differing facts and circumstances may require either of the two approaches.<sup>19</sup> Subsidiarity in international human rights law is a “paradoxical” principle.<sup>20</sup> Human rights courts deal with flexible, subjective norms subject to great contestation and with politically sensitive issues ranging from the validity of self-amnesty laws to the rights of cultural or religious minorities or other disadvantaged groups. Therefore, it is not surprising that international human rights organs, whether full-scale tribunals or human rights treaty bodies, must confront the subsidiarity principle in form and scope.

The following parts examine the specific example of the IAHRs with an emphasis on the Inter-American Court and illustrate how this regional system addresses the normative and practical challenges raised by the concept of subsidiarity.

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arguments from liberty, arguments from efficiency, a Catholic argument based on personalism, and liberal contractualism. Føllesdal orders the different arguments decreasingly in terms of the autonomy granted to subunits. See Føllesdal, *supra* note 7, at 190.

15. Jachtenfuchs and Krisch observe that there can be at least two versions of subsidiarity: on the one hand, a “weak” version, characterized by “a presumption for the local that provides a low threshold and can be overcome by any reason that makes action on a higher level appear advantageous,” and on the other hand, a “strong” version of subsidiarity that “is characterized by a high threshold—a presumption in favor of local governance that can be rebutted only by strong reasons in exceptional cases.” Jachtenfuchs & Krisch, *supra* note 4, at 8.

16. Some commentators label these two versions of the principle of subsidiarity as “positive” and “negative” subsidiarity. See Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jack Delors* 44:6 HOKKAIDO L. REV. 553, 641–42 (1994).

17. Neuman, *supra* note 7, at 361.

18. Føllesdal, *supra* note 12 (emphasis added).

19. *Id.* at 161 (observing that “subsidiarity may support either centralization or decentralization”).

20. See Carozza, *supra* note 7, at 49 (“[T]he canon of international human rights, like the idea of subsidiarity, combines intervention with noninterference.”).

## III

## RELUCTANCE TOWARD SUBSIDIARITY

A considerable amount of literature has been written about the history of the IAHRs. Scholars have reflected on the history of the IAHRs as well as its accomplishments and the challenges it faces, such as the proper response to state parties that fail to comply with the Inter-American Commission's recommendations and the Inter-American Court's decisions.<sup>21</sup> Others have studied the influence of the IAHRs on domestic courts and whether such influence actually enhances the protection of fundamental rights in the Americas.<sup>22</sup> The existing accounts of the IAHRs, however, do not fully describe the Court's attitude regarding its own authority and the authority of member states in cases brought before it. That the Inter-American Court renders decisions *against* states is somehow taken for granted: because states violate human rights and there is a regional mechanism for redress, individuals and groups should have a way to seek remedies.

This extremely simplified version of the IAHRs rests upon the assumption that Latin American states have historically harbored regimes that violate human rights more or less pervasively. Of course, this was true in the early years of the Inter-American Court, when, throughout Latin America, military dictatorships persecuted political dissidents through massive, large-scale, human rights violations.<sup>23</sup> Today, the situation is different. Several recent cases, discussed below, demonstrate a shift in the region's political and social landscape and in the nature of rights being violated. The current IAHRs often addresses claims of human rights infringement by democratic—rather than authoritarian—governments, with the violations alleged therein of a less extreme and less obvious nature.<sup>24</sup> When faced with such cases, the IAHRs

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21. See generally, e.g., Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOBAL STUD. L. REV. 639 (2009); 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 (2009).

22. See, e.g., Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 518–30 (2011); Ariel Dulitzky, *The Inter-American Human Rights System Fifty Years Later: Time for Changes*, 2011 QUE. J. INT'L L. 127, 138 (2011) (“Almost 60% of the [Inter-American Commission on Human Rights] recommendations . . . are never carried out. Just under 40% are partially complied with . . .”); Fernando Basch et al., *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions*, 12 SUR—INT'L. J. HUM. RTS. 9, 20–29 (2010); see generally HUMAN RIGHTS CLINIC, U. TEX. SCH. LAW, MAXIMIZING JUSTICE, MINIMIZING DELAY: STREAMLINING PROCEDURES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2011), <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2012-HRC-IAC-HR-Maximizing-Justice-Report.pdf> (analyzing the struggles facing the Commission and the Court and making recommendations for improving their functioning and efficiency).

23. See generally SONIA CARDENAS, *HUMAN RIGHTS IN LATIN AMERICA: A POLITICS OF TERROR AND HOPE* (2011) (examining the actions of several of the military dictatorships in Latin America).

24. See, e.g., Const. Tribunal (Camba Campos et al.) v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268 (Aug. 28, 2013) (ruling on a challenge to lack of procedural protections for dismissed members of Ecuador's Constitutional

commonly uses the Inter-American Court's articulation of the "conventionality control" doctrine.<sup>25</sup>

The IAHRs was initially conceived as a collection of tools designed to promote, investigate, and repair violations of the rights recognized by the 1948 American Declaration of the Rights and Duties of Man and the American Convention.<sup>26</sup> It has generated substantial case law concerning fundamental rights, and it is widely cited and regarded as the main source of authority for human rights in the Americas.<sup>27</sup> Both the Inter-American Commission and the Inter-American Court have established legal doctrine relating to rights that are commonly labeled "first generation rights," that is, freedom of expression, due process, the right to be free from inhuman treatment, and the right to protection against arbitrary discrimination, among others.<sup>28</sup> The Inter-American Commission and the Inter-American Court have issued reports, precautionary measures, and advisory opinions to protect persons whose rights have not been recognized by the state parties.<sup>29</sup> Today the system addresses many different human rights issues. It tends to do so, however, without granting deference to domestic states, a policy that creates both practical and normative problems.

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Tribunal).

25. According to the conventionality-control doctrine, all judges from countries that have ratified the American Convention on Human Rights have an obligation to contrast domestic legislation not only with the national constitutions, but also with the American Convention and the Court's interpretation of the Convention. This article argues that the doctrine is poorly founded and that it inadequately expands the Court's authority upon states. *See infra* Part III.B.2.

26. Organization of American States, *supra* note 2. *See also* Goldman, *supra* note 21, at 862 (discussing the historical origins of the inter-American human rights system).

27. *See* Claudio Grossman, *The Inter-American System of Human Rights: Challenges for the Future*, 83 IND. L.J. 1267, 1268 (2008) ("The Commission and Court's case law has been significant in advancing the protection of fundamental rights and contributing to such protections throughout the different phases of the system's development."). *See generally* LAURENCE BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE-LAW AND COMMENTARY* (2011).

28. For a comprehensive list of cases, see BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 27, at xxxv–xlvi.

29. With respect to the so-called "second-generation rights" or social rights, the Inter-American system has been less prone to protect them. The Inter-American Court has stated,

[T]he issue [of economic, social, and cultural rights] is not reduced to the mere existence of a State duty that should orient its tasks as established by this obligation, considering individuals as mere witnesses waiting for the State to comply with its obligation under the Convention. The Convention is a body of rules on human rights precisely, and not just on general State obligations. The existence of an individual dimension to the rights supports the so-called "justiciable nature" of the latter, which has advanced at the national level and has a broad horizon at the international level.

"Five Pensioners" v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 98, ¶ 3 (Feb. 28, 2003) (García Ramírez, J., concurring). More than a decade ago, Inter-American Court Judge Cançado Trindade noted with purpose that, in the future of the inter-American system, "[O]ne must ... move on to address economic, social, and cultural rights as the true rights that they are." Antonio Cançado Trindade, *Reflexiones sobre el Futuro del Sistema Interamericano de Protección de los Derechos Humanos*, in *EL FUTURO DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS* 573, 578 (Juan Méndez & Francisco Cox eds, 1998). In circumstances of scarce and poorly distributed fiscal resources, the system's main bodies—the Commission and the Court—will have to face the critical necessities of social and economic rights.

### A. The *Velásquez Rodríguez* Ethos

Scholars have identified three distinct periods in the development of the IAHRs.<sup>30</sup> The first began in 1978, with the entry into force of the American Convention, and ended around 1990, as the authoritarian regimes of member states lost power. This period is defined by the IAHRs's responses to authoritarian regimes in the region executing massive and systematic human rights violations in the form of state policy. The period largely determined the system's original ethos, in which the Inter-American Court was not merely a "higher" legal tribunal, but ultimately a moral superior with the power to prescribe the actions of state parties and with the function of a last-resort remedy to massive human rights violation.<sup>31</sup> Addressing nondemocratic member states, the Inter-American Court established itself as a locus for rights protection and political integrity.

In 1988, the Inter-American Court handed down its very first decision in *Velásquez Rodríguez v. Honduras*.<sup>32</sup> The Court found that Honduras had violated several provisions of the American Convention in relation to the forced disappearance of Ángel Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras, at the hands of the state's security forces.<sup>33</sup> The Court found that the state had violated the right to life, the right to humane treatment, and the right to personal liberty; it ordered monetary compensation to the victim's family and continued investigation into the disappearance.<sup>34</sup>

The state objected to the Inter-American Court hearing the case on the ground that the victims had not exhausted domestic remedies—a requirement in any case brought before a supplementary supranational system like the IAHRs. The Court rejected this argument (although it agreed with Honduras that normally a state should first address a human rights claim) with the following understanding of subsidiarity: "The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding."<sup>35</sup>

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30. See Grossman, *supra* note 27, at 1268; see also Felipe González, *La OEA y los Derechos Humanos Después del Advenimiento de los Gobiernos Civiles: Expectativas (In)Satisfechas*, in *DERECHOS HUMANOS E INTERÉS PÚBLICO* 147 (Felipe González ed., 2001); Víctor Abramovich, *From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System*, 11 SUR—INT'L J. HUM. RTS. 6, 9 (2009).

31. See Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 202 (2001).

32. *Velásquez Rodríguez v. Hond.*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

33. Around the same time, the Inter-American Court decided other cases against Honduras dealing with the same issue of forced disappearance. See *Godínez Cruz v. Hond.*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5 (Jan. 20, 1989); *Fairén Garbí and Solís Corrales v. Hond.*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 6 (Mar. 15, 1989).

34. *Velásquez Rodríguez* (ser. C) No. 4 § XIV ¶¶ 2–5.

35. *Id.* ¶ 61.



[T]he Government stressed that the requirement of prior exhaustion of domestic remedies is justified because the international system for the protection of human rights guaranteed in the Convention is ancillary to its domestic law.

The observation of the Government is correct. However, it must also be borne in mind that the international protection of human rights is founded on the need to protect the victim from arbitrary exercise of governmental authority. . . . Thus, whenever a petitioner alleges that such remedies do not exist or are illusory, the granting of such protection may be not only justified, but urgent.<sup>36</sup>

In carving out an exception to the exhaustion of the domestic-remedies rule, the Court embraced a more aggressive approach for intervention in domestic affairs. Further, by acknowledging the preference for local rule but quickly rebutting that preference in favor of its own authority, the Court established itself as a moral superior—a task made easier by its employment of human rights language<sup>37</sup> and the fact that the Court was addressing Honduras, a country with serious institutional problems. Together these assertions marked the early governing ethos of the Inter-American Court.

The weak form of subsidiarity articulated by the Inter-American Court is confirmed by its judgment on reparations. As previously explained, the *Velásquez* Court ordered monetary compensation to the victim's family—a form of reparation that would become the standard in inter-American human rights law.<sup>38</sup> However, the judges disagreed on *how* such remedy should be implemented. While the Court ordered that the Inter-American Commission should play the primary role in determining “the form and amount” of the victims' compensation,<sup>39</sup> the minority opinion argued that the victims' families should be able to participate in the damages process.<sup>40</sup> The dissent declared that the Commission should act only as a type of “public prosecutor in the inter-American system”<sup>41</sup> that participates in the case, but that leaves it to the victims and the state “with the intervention of the Commission” to determine the form and amount of compensation.<sup>42</sup> In this view, the Court's decisions concerning damages ruled against the local and retained for the IAHRs the authority to determine the details of reparations.

In the second phase of the IAHRs development, the system acclimated itself to a changing political environment in which member states were transitioning from authoritarianism to democracy. It faced a new breed of cases addressing human rights questions much subtler—freedom of expression, access to information, and transparency—than those raised by the atrocities of the

36. *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶¶ 92–93 (June 26, 1987).

37. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 53 (2003) (noting that human rights has become “the lingua franca of global moral thought, as English has become the lingua franca of the global economy”).

38. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: the Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 365 (2008).

39. *Velásquez Rodríguez*, (ser. C) No. 4 § XIV, ¶ 6.

40. *Id.* ¶ 1 (Piza-Escalante, J., dissenting).

41. *Id.* ¶ 3.

42. *Id.* ¶ 1.

earlier period. The IAHRs responded with a broader, more political approach to human rights issues, with diplomacy and flexible standards taking center stage, as the increased use of the friendly settlement mechanism shows.<sup>43</sup> Still, most of the Inter-American Court's work continued to address the mass atrocities committed in earlier years.<sup>44</sup>

Besides “protecting” human rights in the Americas, the Organization of American States reinforced its mission to “promote” them, a function which by its nature allows for greater deference to states. *Aylwin Azócar v. Chile*<sup>45</sup> provides one example. In that case, a group of individuals challenged Chile's electoral system as infringing several provisions of the American Convention.<sup>46</sup> The Commission found that Chile had in fact violated the rights of several individuals and ordered the country to

adopt the measures necessary to bring its domestic legal order into line with the provisions of the American Convention, so as to guarantee fully, for all Chilean citizens, including the victims in this case, the exercise of the right to vote and to be elected in general conditions of equality, as set forth in Articles 23 and 24 of the American Convention, in respect of the composition of the Chilean Senate, as a bicameral legislative organ of popular representation of the Chilean Congress.<sup>47</sup>

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43. Goldman explains that the Commission's work focused on certain countries, like Colombia and Perú, and observes how the Commission commenced using the mechanism of friendly settlement with states. Goldman, *supra* note 21, at 874–82.

44. The Court decided cases related to the right to life, the right to humane treatment, personal liberty, and the right to judicial protection. *See, e.g.*, *El Amparo v. Venezuela*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 19 (Jan. 18, 1995); *Gangaram Panday v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 16 (Jan. 21, 1994); *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

45. Andrés Aylwin Azócar v. Chile, Case 11.863, Inter-Am. Comm'n H.R., Report No. 137/99, OEA/Ser.L/V/II.106 doc. 6 rev. (1999).

46. *Id.* ¶ 2 (“[T]he designation of senators in the manner provided for under the new constitutional order in Chile constitutes an institution that violates the right to equality in voting, is inimical to popular sovereignty, and represents an obstacle making it practically impossible to change the non-democratic institutions established in the Chilean Constitution.”). In the original text of the Chilean Constitution, enacted by General Augusto Pinochet, there were reserved seats for appointed senators and former presidents—like Pinochet himself, who, after retiring from the Army, became a senator-for-life. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] Oct. 21, 1980, art. 45, *translated in* Constitution of the Republic of Chile, Constitution Finder, <http://confinder.richmond.edu/admin/docs/Chile.pdf>.

47. *Id.* ¶ 161. Article 23 of the American Convention establishes the right to participate in government:

1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Article 24 states that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

In a dissenting opinion, Commissioner Robert Goldman criticized the Commission's position. Goldman embraced a deferential approach based on the Commission's duty to *promote* human rights. Goldman observed,

Even though Article 23 assumes the existence of a government structure that is democratic and representative in nature, it does not stipulate a definitive model concerning how the state should be organized to institutionalize representative democracy in an ideal fashion, much less how the seats in the legislative branch should be distributed. Therefore, claims alleging the incompatibility of a particular institutional model with the principles underlying Article 23 should be analyzed with special deference to the state parties, and the Commission must carefully consider whether it is appropriate to take a position regarding the advisability of a particular model. I believe that unless the institutional structure established by the state impedes the effective expression of the will of the citizens in a manifestly arbitrary manner, the Commission should in principle refrain from passing judgment on that structure's proximity to an ideal model, at least in the context of examining an individual case. In this regard, issues concerning the advisability of particular models of political participation more appropriately *fall within the mandate of the Commission to promote human rights*.<sup>48</sup>

Goldman, however, was alone in this position. As explained, the Commission did find that, by enacting a particular electoral system, Chile had violated the American Convention.<sup>49</sup>

The third period of the IAHRs began around 1996 with the system's response to pressure from the transnational civil society to shift focus from the "promotion" of human rights and the establishment of the rule of law in emerging democracies to the "protection" of the rights of individuals and groups within these newly established democracies.<sup>50</sup> Human rights advocates demanded that supranational bodies take steps to protect the rights of specific vulnerable groups, such as women, LGBTI individuals, and indigenous peoples. As a result, in 2001, new procedural rules eased the process of bringing a claim before the system, a shift that successfully increased the number of cases submitted before both the Inter-American Commission and the Inter-American Court.<sup>51</sup> At the same time, the OAS allowed nongovernmental organizations to formally participate in its assemblies, thereby fostering dialogue regarding the protection of human rights and the rule of law in the Americas.<sup>52</sup> The language

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48. *Id.* ¶ 4 (Goldman, Comm'r, dissenting) (emphasis added).

49. *Id.* ¶ 159.

50. It is understood that education through conferences, lectures, and other activities to spread the word corresponds to the scope of promotion, whereas monitoring State compliance with international human rights standards belongs to the field of protection. Almost two decades ago, in fact, human rights lawyers convened experts to debate the future of the inter-American system, which, according to them, was experiencing "an identity crisis" due to "the fundamental lack of agreement among the key players about the legal and political character of the system and its future direction." JUAN MÉNDEZ & FRANCISCO COX, *EL FUTURO DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS* 9 (1998).

51. Goldman observed that "[t]he annual average number of petitions received between 1997 and 2001 was 609. The Commission received 1,456 new complaints in 2007, an approximate seventy-percent increase in a ten-year period." Goldman, *supra* note 21, at 883.

52. In 1999, the OAS adopted new Guidelines to grant civil-society organizations legal status with the Organization. See Organization of American States, Permanent Council Res. 759, *Guidelines for the Participation of Civil Society Organizations in OAS Activities* (Dec. 15, 1999).

of rights would no longer be the sole province of the Court. Human rights advocates and state officials could now interact through channels provided by the IAHRs.

Since the early 2000s, largely due to the newly established procedural rules, the IAHRs has received more cases per year and in an array of subject matters more diverse than in prior decades. There is now a new phase in the historical development of the system—one in which the Inter-American Court has explicitly established itself as a final interpreter of the American Convention and asserts that domestic judges have an obligation to directly enforce the American Convention.<sup>53</sup> These are not trivial developments. In a context of more democratic regimes and more diverse areas of human rights issues, the IAHRs—particularly through the Inter-American Court’s case law—has become markedly less deferential toward member states.

It is unsurprising that the system today faces resistance from states that see it as an unwelcome intrusion into their domestic affairs.<sup>54</sup> When the system started handing down decisions, many states had no democratic credentials. Consequently, they had little credibility to push back against the Court. The Court embraced a standard and an almost-mechanical form of deference by citing to the rules of prior exhaustion of remedies and the general complementary character of international authority.<sup>55</sup> The newly established democracies, in contrast, *want* to participate and actually do take part in the regional governance. The Court is now within their reach.

Furthermore, the *Velásquez* ethos is still very much present, at least in some of the leading voices of the IAHRs. One such leading voice is that of former President of the Inter-American Court and current judge at the International Court of Justice, Antonio Cançado Trindade. Cançado Trindade recently reiterated his strong opposition to the potential adoption by the IAHRs of the “margin of appreciation” doctrine, a well-established doctrine in European human rights law.<sup>56</sup> The margin-of-appreciation doctrine prescribes that a

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53. See Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 14 INT’L J. CONST. L. (forthcoming 2016).

54. In 2013, Venezuela denounced the American Convention, and the Dominican Republic is considering doing the same. See *infra* Part III.C.

55. It is a common part of any decision that the Court confirms that petitioners have in fact exhausted domestic judicial remedies. The Court’s understanding of this rule has traditionally been less strict than that of other international tribunals. Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT’L L. & POL’Y 333, 344 (1994).

56. See generally ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* (2012); YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (2002) (discussing the development of the doctrine and its effect in ECHR cases granting member states discretion in implementing human rights standards); Marisa Iglesias Vila, *Una Doctrina del Margen de Apreciación Estatal para el CEDH: En Busca de un Equilibrio entre Democracia y Derechos en la Esfera Internacional*, in *DERECHOS HUMANOS: POSIBILIDADES TEÓRICAS Y DESAFÍOS PRÁCTICOS* 14–39 (R. Saba ed., 2014); Ronald St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (Ronald St. J. Macdonald et al. eds., 1993). For a broader discussion of the margin-of-

regional human rights court should grant member states relatively wide berth in the regulation of human rights affairs given that they are closer to the case at hand, in time and geography, than are international bodies. The traditional understanding is that the margin of appreciation refers to cases where fundamental rights may conflict with public morals, typically defended by the state. Thus the doctrine often arises in the case of highly contested moral issues, such as freedom of expression, freedom of religion, or sexuality rights. In the landmark 1976 case of *Handyside v. United Kingdom*<sup>57</sup> the European Court of Human Rights accorded for the first time a margin of appreciation to the European States. In this decision, the Court found that that the censoring restrictions imposed on a book publisher were both prescribed by law and in pursuit of a legitimate aim, pursuant to the norms of the European Convention on Human Rights.<sup>58</sup> Therefore, the Court denied the publisher's petition and ruled in favor of the State, upholding the United Kingdom's prohibition of a publication. The margin-of-appreciation doctrine was born and, with it, the idea that the doctrine served states' purpose to limit fundamental liberties.

As recently as 2008, Cançado Trindade has rejected the adoption of the margin of appreciation as inappropriate in the sociopolitical context of the IAHR's jurisdiction:

Fortunately, such doctrine has not been developed within the inter-American human rights system. . . . How could we apply [the margin-of-appreciation doctrine] in the context of a regional human rights system where many countries' judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity? . . . We have no alternative but to strengthen the international mechanisms for protection . . . .<sup>59</sup>

One could understand such a statement from an Inter-American Court's judge in the late 1980s, but after two decades of case law and significant political and legal developments in the region, one might expect a more nuanced approach to the relationship between the Court and state parties.

## B. Current Manifestations: The Maximalist Court

In recent years, the IAHR's reluctance toward subsidiarity has taken new shape. The Inter-American Court's articulation of the doctrine of conventionality control and the maximalist approach found in certain decisions illustrate this shift. This part considers a specific decision—*Gelman v.*

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appreciation doctrine, see generally Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?* 16 EUR. J. INT'L L. 907 (2005) (citing International Court of Justice cases as well as European Court of Justice and WTO Dispute Settlement Body cases as examples of tribunals giving more or less consideration to the margin-of-appreciation doctrine).

57. *Handyside v. U.K.*, 24 Eur. Ct. H.R. (ser. A) (1976).

58. *Id.* ¶¶ 44–46.

59. See ANTONIO CANÇADO TRINDADE, *EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS EN EL SIGLO XXI* 389–90 (2008).

*Uruguay*<sup>60</sup>—that sheds light on the Court’s attitude toward states’ authority to rule on human rights issues from the past. This part also examines the Court’s adoption of the conventionality control, a doctrine whereby domestic courts have an obligation to enforce the American Convention as interpreted by the Inter-American Court. *Gelman*, along with the articulation of conventionality control, shows the Inter-American Court’s current limited understanding of subsidiarity as a governing principle of international law.

### 1. The *Gelman* Decision

Between 1973 and 1985 a military dictatorship ruled in Uruguay.<sup>61</sup> Like other South American countries, Uruguay enacted the Uruguayan Expiry Law, which prevented state authorities from investigating crimes committed by state agents during the dictatorship years.<sup>62</sup> The law granted amnesty to military and police officers for human rights violations committed during the dictatorship.<sup>63</sup> Like other Latin American countries that also passed amnesty laws—for example, Chile or Peru—Uruguay sought to ensure social peace after a difficult period of dictatorship and serious social unrest.<sup>64</sup> Unlike some of the named countries, however, it was not a military junta (as in the case of Chile) or an elected president who had previously dissolved the Congress (as in the case of Peru) that adopted the self-amnesty laws. In Uruguay, the enactment of the Expiry Law was the decision of a fully democratic Congress.

Furthermore, the law was twice upheld by popular vote. In 1989, a proposal to partially repeal the law was ultimately defeated by fifty-eight percent of the votes.<sup>65</sup> Two decades later, a progressive political party collected hundreds of thousands of signatures to challenge the law through popular vote. Again, the vote for upholding the legislation prevailed—albeit with a close margin of fifty-

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60. *Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).*

61. As in other regimes in the Southern Cone of Latin America, in Uruguay the civilian–military regime executed mass human rights violations, such as torture, extrajudicial executions, and mass imprisonment of political opponents. According to international reports, by 1976 “Uruguay had more prisoners per capita than any other country in the world. With a total population of three million people, roughly ten percent went into exile (300,000 to 350,000 people); over twenty percent of all citizens were imprisoned at some point during this period (600,000 to 650,000 Uruguayans); and almost 25,000 people received long prison sentences for alleged political offenses.” See JAVIER A. GALVÁN, *LATIN AMERICAN DICTATORS OF THE 20TH CENTURY: THE LIVES AND REGIMES OF 15 RULERS* 135 (2013).

62. *Ley de Caducidad de la Pretensión Punitiva del Estado, Ley No. 15.848 [Expiry Law], Dec. 22, 1986, D.O. 22295 (Uru.) [hereinafter Expiry Law].*

63. *Id.* art. 1.

64. Amnesty laws like those of Chile can be found also in other countries, including Argentina, which in 1986 and 1987 produced the so-called “impunity laws,” Law No. 23492, Dec. 24, 1986, B.O. 21864 and Law No. 23521, June 8, 1987, B.O. 21746 (or Full Stop and Due Obedience Acts); Uruguay, which adopted the “Expiry Law” in 1986, *supra* note 62; or Brazil, which did the same in 1979, Lei No. 6683, de 28 De Agosto De 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.8.1979.

65. *Gelman*, (ser. C) No. 221 ¶ 146.

two percent.<sup>66</sup> The Expiry Law was well in effect, “despite its safe harbor for human rights violations.”<sup>67</sup>

In 2011, the Inter-American Court found that, by adopting an amnesty law for the crimes committed by security forces during the military dictatorship, Uruguay had violated the American Convention and the Inter-American Convention on Forced Disappearance of Persons.<sup>68</sup> *Gelman* is a fine example of the Inter-American Court’s expansive approach toward the protection of human rights and generally of “the human rights movement’s attachment to the fight against impunity and its uses of criminal law in the process.”<sup>69</sup> The Court reasoned that the Uruguayan law in question, despite popular support domestically, lacked any validity because it prevented authorities from investigating and punishing those responsible for gross and massive human rights violations.<sup>70</sup>

In reaching this decision, the Court expanded its well-established case law on the incompatibility of self-amnesty legislation.<sup>71</sup> The fundamental difference here from earlier cases was, as explained, that Uruguay had decided through democratic decision-making processes to both enact and uphold this legislation. It was against such democratic background that the Inter-American Court rendered its decision. *Gelman* therefore raises a fundamental question in the confrontation between international human rights law and democratic legitimacy: May a regional human rights court overrule the will of the people manifested in a formal vote?<sup>72</sup>

The Court should have articulated a theory to justify its ruling *against* the will of the Uruguayan people. It failed, however, to do so. The Court stated,

The fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, using methods of direct exercise of democracy, -referendum (paragraph 2 of Article 79 of the Constitution of Uruguay) - in 1989 and “plebiscite [sic] (letter A of Article 331 of the Constitution of Uruguay) regarding a referendum that declared as null Articles 1 and 4 of the Law – therefore,

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66. *Id.* ¶ 148.

67. Daniel Soltman, *Applauding Uruguay’s Quest for Justice: Dictatorship, Amnesty, and Repeal of Uruguay Law No. 15.848*, 12 WASH. U. GLOBAL STUD. L. REV. 829, 832 (2013).

68. *See Gelman*, (ser. C) No. 221 ¶ 246 (relating to the forced disappearance of an Argentinean national at the hands of the Uruguayan security forces).

69. Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1127 (2015).

70. *See Gelman*, (ser. C) No. 221 ¶ 232.

71. *See, e.g.*, *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); *Almonacid Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006); *Goiburú v. Para.*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006); *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001); *Blake v. Guat.*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998).

72. Roberto Gargarella, *La Democracia Frente a los Crímenes Masivos: Una Reflexión a la Luz del Caso Gelman*, 2 REV. LAT. DER. INT’L 1, 2 (2015).

October 25, 2009, should be considered, as an act attributable to the State that give rise to its international responsibility. . . .

The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable [sic] limit to the rule of majority . . . .<sup>73</sup>

The Inter-American Court has long established that amnesty laws are invalid under the American Convention on Human Rights.<sup>74</sup> But the Court should have made an effort to better justify its ruling in *Gelman*, because the Uruguayan Expiry Law has more legitimacy than other amnesty laws enacted in Latin America. In other words, even if the Court had decided that it must uphold its established case law on impunity and amnesty legislation, good reasons existed for the Court to take a more deferential approach in this particular case. Such an approach required, at least, a greater effort at finding Uruguay internationally responsible for passing the Expiry Law and upholding the law's validity twice through popular vote.

## 2. The Conventionality Control Doctrine

The Inter-American Court of Human Rights has articulated a doctrine under which judges and other national authorities are obligated to disregard domestic regulations that fail to conform to the clauses of the American Convention on Human Rights, as well as the Court's authoritative interpretation of the Convention.<sup>75</sup> By charging judges and national authorities with this responsibility, conventionality control seeks to strengthen human rights protection in the region. However, its implementation has not been without difficulties and has generated criticism.<sup>76</sup> It is, in fact, another example

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73. *Gelman*, (ser. C) No. 221 ¶¶ 238–39.

74. *Id.* ¶ 225.

75. The first holding in which the Inter-American Court in its entirety—that is, not just one of the judges, in separate opinions, as had happened before—upheld this doctrine was *Almonacid Arellano*, (ser. C) No. 154, issued in September 2006. Soon after, the Inter-American Court restated this notion of “conventional control,” albeit with some nuanced changes and other larger differences, in the following holdings: *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009); *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); *Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186 (Aug. 12, 2008); *Boyce v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169 (Nov. 20, 2007); *La Cantuta*, (ser. C) No. 162; *Dismissed Cong. Emp. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006).

76. See generally Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L. L.J. 45 (2015) (describing the Court's creation of itself as a constitutional court and offering suggested improvements) and Roberto Niembro Ortega, *Sobre la legitimidad democrática del diálogo entre jueces nacionales e internacionales tratándose de derechos fundamentales*, in ESTUDIOS AVANÇADOS DE DIREITOS HUMANOS 112 (Armin von Bogdandy, Flavia Piovesan & Mariela Morales Antoniazzi eds., 2013) (examining the challenges of the democratic legitimacy of international judges ruling on fundamental



of the IAHRs's current reluctance to embrace subsidiarity—confirming what commentators view as the Court's excessive interference with domestic powers.<sup>77</sup>

A former judge of the Inter-American Court, Sergio García Ramírez, in a number of separate opinions, first mentioned the idea of reviewing domestic statutes to ensure their conformity with the provisions of the American Convention.<sup>78</sup> The Court did not decide to adopt García's doctrine until September of 2006. In a case against Chile that concerned the existence of an amnesty law impeding the investigation and prosecution of gross and massive human rights violations committed during Augusto Pinochet's dictatorship, the Court declared that

domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when 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.<sup>79</sup>

Because the American Convention itself does not contain any rule *requiring* national judges to carry out this type of review, the first concern raised by the doctrine is it may lack an actual basis in law.<sup>80</sup> With the Inter-American Court deciding cases since the late 1980s, it is hard to explain why it took it twenty years to "discover" that domestic judges have an obligation to override laws that conflict with the Convention. The basis for this obligation, the Court maintains in *Almonacid*, lies in states' duty to enforce international treaties "in good faith," pursuant to Article 26 of the Vienna Convention on the Law of

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rights).

77. See Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT'L CRIM. L. REV. 665, 685–94 (2012).

78. See *López Álvarez v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 4 (Feb. 1, 2006) (García-Ramírez, J., concurring); *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 6 (Sept. 7, 2004) (García-Ramírez, J., concurring); *Myrna Mack Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 26 (Nov. 25, 2003) (García-Ramírez, J., concurring); see also Juan Carlos Hitters, *Control de Constitucionalidad y Control de Convencionalidad. Comparación (Criterios Fijados por la Corte Interamericana de Derechos Humanos)*, 7 ESTUDIOS CONSTITUCIONALES, no. 2, 2009, at 109, 113–14 (2009).

79. *Almonacid Arellano*, (ser. C) No. 154 ¶ 124.

80. See Ximena Fuentes, *International and Domestic Law: Definitely an Odd Couple*, 77 REV. JUR. U.P.R. 483, 487–88 (2008); see also Karlos Castilla Juárez, *Control Interno o Difuso de Convencionalidad? Una Mejor Idea: la Garantía de los Tratados*, 13 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 51, 81 (2013).

Treaties.<sup>81</sup> There the Court also cites Article 27 of the Vienna Convention,<sup>82</sup> which establishes that a state “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>83</sup> As such, the Court seems to assert domestic judges’ obligation to give direct effect to the Convention in domestic law.

For some, the doctrine introduced in 2006 represents a significant advance in regional human rights protection. As Castilla Juárez points out, most authors have praised the adoption of the conventionality-control doctrine.<sup>84</sup> Others, however, have warned that it creates problems of judicial interpretation and have criticized the Inter-American Court’s haste in introducing a notion that, at the very least, affects states’ grants of jurisdiction at the local level.<sup>85</sup>

Following the holding in *Almonacid*, the Court has reiterated the notion of conventionality control in a number of rulings.<sup>86</sup> For example, although the Court initially believed that judges were required to carry out “a sort of conventionality control” (without indicating what sort of control that might entail), it would later invoke an unqualified notion of control without describing how this review differs from the earlier “sort” of review.<sup>87</sup> The Court added that judges were required to exercise conventionality control not just if the involved parties requested it, but by obligation.<sup>88</sup> Finally, the Court suggested that national judges are obligated to ensure the fulfillment of the “practical effects”

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81. *Almonacid Arellano*, (ser. C) No. 154 ¶ 125 (quoting Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331).

82. *Almonacid Arellano*, (ser. C) No. 154 ¶ 125 (citing Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331).

83. *Almonacid Arellano*, (ser. C) No. 154 ¶ 125; see also Juana María Ibáñez Rivas, *Control de Convencionalidad: Precisiones Para su Aplicación Desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*, ANUARIO DE DERECHOS HUMANOS 103, 106–07 (2012); Néstor Pedro Sagües, *Obligaciones Internacionales y Control de Convencionalidad*, 8 ESTUDIOS CONSTITUCIONALES 117, 120 (2010).

84. A brief bibliographical list can be found in Castilla Juárez, *supra* note 80.

85. Offering varying degrees of criticism, see generally Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT’L. L.J. 45 (2015); Fuentes, *supra* note 80; Castilla Juárez, *supra* note 80; Oswaldo Ruiz-Chiriboga, *The Conventionality Control: Examples of (Un)Successful Experiences in Latin America*, 3 INTER-AM. & EUR. HUM. RTS. J. 200 (2010).

86. See *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009); *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); *Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186 (Aug. 12, 2008); *Boyce v. Barb.*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169 (Nov. 20, 2007); *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); *Dismissed Cong. Emp. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006).

87. *Almonacid Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 ¶ 124 (Sept. 26, 2006) (emphasis added).

88. Ibáñez Rivas, *supra* note 83, at 112.

of international treaties, a concept that would add another element to conventionality control.<sup>89</sup>

Nevertheless, it is unclear how, out of a prohibition on using domestic norms to justify noncompliance with international obligations—which can, of course, trigger international responsibility on the state’s part—arises a specific requirement to reassign court jurisdiction at the domestic level, thus endowing judges with powers that the domestic legal system may not grant them.<sup>90</sup> This problem becomes evident when considering the diverse models of constitutional review found in Latin America.<sup>91</sup>

The Inter-American Court did not acknowledge these problems until after *Almonacid*. In the case *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*,<sup>92</sup> for example, the Court added a modification to conventionality control, determining that the “organs of the Judiciary” must carry it out “obviously, within the framework of their respective competences and of the corresponding procedural regulations.”<sup>93</sup> In a sense, this elaboration of the doctrine improved it somewhat because it now abides by the specifics of diverse domestic regulations, even though inconsistencies remain. For example, due to the Court’s insistence that conventionality control must be carried out *ex officio*, there is a question about what happens when the discrepancy between legal provisions and the constitution can only be resolved by formal request. According to the Inter-American Court this would be a problem, but in certain countries, constitutional review of the law can be exercised only by certain courts, as opposed to all judges, suggesting that the Court is still confronted

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89. *Id.*

90. See María Carmelina Londoño Lázaro, *El Principio de Legalidad y el Control de Convencionalidad de las Leyes: Confluencias y Perspectivas en el Pensamiento de la Corte Interamericana de Derechos Humanos*, 128 BOLETÍN MEXICANO DE DERECHO COMPARADO 761, 810 (2010).

91. Taking Argentina, Chile, and Colombia as examples, it is possible to illustrate the aforementioned problem: whereas in Argentina the power of constitutional review is “diffuse,” that is, held by all judges, Chile and Colombia have “concentrated” constitutional review, in which only a single specialized court possesses the power to invalidate laws that contravene the constitution. In articulating the notion of conventionality control, the Inter-American Court ignored the distinction between diffuse and concentrated models of constitutional control. Thus, as a matter of logic, the obligation introduced by the Court is fulfilled differently depending on whether national laws grant all or only some judges the power to invalidate laws counter to the constitution. This means that if, in Chile, a court of first instance determines that a domestic law contradicts any clause of the American Convention or its interpretation by the Inter-American Court, under the conventionality-control doctrine, the court would have to refuse to apply that law. Yet in so doing, the court would violate those laws stipulating that only the constitutional court has the power to declare legal precepts unconstitutional—specifically, C.P. Oct. 21, 1980 art. 93, No. 6. In Argentina, meanwhile, that same court of first instance could discharge the duty imposed upon it by the Inter-American Court without imperiling internal laws regarding the assignment of court jurisdiction.

92. *Dismissed Cong. Emp. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006).

93. *Id.* ¶ 128. This formula would later be reiterated in *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 339 (Nov. 23, 2009), and in *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 282 (Feb. 24, 2012).

with the prospect of overthrowing the domestic organic standards of the states that give it power.

The Court's adoption of the conventionality control raises both theoretical and practical problems. It also raises questions about the Court's understanding of its relationship with states and reinforces the IAHRs's reluctance toward forms of deference. As explained below, the current political and legal landscape calls for a revision of the system's notion of subsidiarity. The Court's authority and the strengthening of the system are good reasons to consider the adoption of mechanisms for judicial deference.

#### IV

#### DEFERENCE: A NEW APPROACH?

It is possible to articulate a principle of subsidiarity for use in the IAHRs. To do so, however, scenarios must be considered in which the system has embraced normative subsidiarity (in some form) as a strong basis for a more deferential approach in international human rights adjudication.

##### A. Margin of Appreciation in the IAHRs

As previously explained, most scholars believe that the margin-of-appreciation doctrine is almost entirely foreign to the IAHRs.<sup>94</sup> This is not entirely accurate. Both the Inter-American Commission and the Inter-American Court have made reference to and employed the margin-of-appreciation doctrine in several decisions—albeit inconsistently.

First, the IAHRs has made use of the margin-of-appreciation doctrine in discussions concerning political participation, particularly the kind described in Article 23 of the American Convention.<sup>95</sup> For example, in a case against Guatemala, the Inter-American Commission found that

the context of Guatemalan and international constitutional law in which this condition of ineligibility is placed is the appropriate dimension for analysis of the applicability of the Convention in general, and of the applicability of its Arts. 23 and 32 [of the American Convention] to the instant case,<sup>96</sup> and *from which the margin of appreciation allowed by international law can emerge.*

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94. See, e.g., CANÇADO TRINDADE, *supra* note 59; see also Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 NW. J. INT'L HUM. RTS. 28, 61–66 (2012) (discussing opposing views on the reception of the margin-of-appreciation doctrine in the Americas).

95. See Andrés Aylwin Azócar v. Chile, Case 11.863, Inter-Am. Comm'n H.R., Report No. 137/99, OEA/Ser.L/V/II.106 doc. 6 rev. ¶ 161 (1999).

96. Montt v. Guatemala, Case 10.804, Inter-Am. Comm'n H.R., Report No. 30/93, OEA/Ser.L/V.85 doc. 9 rev. ¶ 24 (1993) (emphasis added). American Convention, *supra* note 2, Article 32 states that “[e]very person has responsibilities to his family, his community, and mankind.” It also has a general rule of interpretation wherein “[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.” *Id.*

In other decisions and reports, both the Inter-American Commission and the Inter-American Court have interpreted Article 23 in line with the margin-of-appreciation doctrine.<sup>97</sup> Both bodies, however, have failed to explain why and how the doctrine should be used. Reconstructing these decisions, one may note that the subject matter at hand allowed for an even more deferential approach from the Inter-American Commission and the Inter-American Court.

Notably, in these cases, the system was dealing with procedural human rights issues, as opposed to substantive matters such as sexuality rights. The Court could have articulated a version of the margin-of-appreciation doctrine that distinguishes “structural” or “procedural” issues (for instance, cases on political participation) on the one hand, and “substantive” issues (such as cases related to the recognition of equal-protection rights) on the other.<sup>98</sup>

## B. The Court as Fact-Finder

Lengthy decisions are a trademark of the Inter-American Court, with rulings often spanning several hundred pages. Although it may be important for a court to provide factual and legal contexts, the length of the Court’s rulings is also symptomatic of the Inter-American Court’s decision to fact-find—a task better left to individual states.

The role of the Inter-American Court is to examine whether or not the state has violated a right protected by the American Convention. In several instances the Court has explicitly adhered to the “fourth instance” doctrine, which states

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97. See *Statehood Solidarity Comm. v. U.S.*, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.118 doc. 5 rev. 2 ¶ 88 (2003) (“[T]he Commission has recognized that a degree of autonomy must be afforded to states in organizing their political institutions so as to give effect to these rights, as the right to political participation leaves room for a wide variety of forms of government. As the Commission has appreciated, its role or objective is not to create a uniform model of representative democracy for all states, but rather is to determine whether a state’s laws infringe fundamental human rights. The Commission has similarly recognized that not all differences in treatment are prohibited under international human rights law, and this applies equally to the right to participate in government.”); *Aylwin Azócar*, Report No. 137/99, OEA/Ser.L/V/II.106 doc. 6 rev. ¶ 4 (Goldman, Comm’r, dissenting); see also *Castañeda Gutman v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 184, ¶ 155 (Aug. 6, 2008) (“Article 23(2) of the American Convention establishes that the law may regulate the exercise and opportunities of such rights only on the basis of ‘age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.’ The provision that limits the reasons for which it is possible to restrict the use of the rights of paragraph 1 has only one purpose—in light of the Convention as a whole and of its essential principles—to avoid the possibility of discrimination against individuals in the exercise of their political rights. It is evident that the inclusion of these reasons refers to the enabling conditions that the law can impose to exercise political rights. Restrictions based on these criteria are common in national electoral laws, which provide for the establishment of the minimum age to vote and to be elected, and some connection to the electoral district where the right is exercised, among other regulations. Provided that they are not disproportionate or unreasonable, these are limits that the States may legitimately establish to regulate the exercise and enjoyment of political rights and that, it should be repeated, they refer to certain requirements that the titleholders of political rights must comply with so as to be able to exercise them.”).

98. On the distinction between structural and procedural margin of appreciation, see generally George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEG. STUD. 705 (2006).

that international courts should not act as fact-finders, but rather are limited to a determination of questions of law.<sup>99</sup> When a court ignores this doctrine and reviews witness testimonies, expert testimonies, and other evidence, it trespasses on the territory of domestic courts, which are better positioned in time and geography to assess evidence. If a state's authorities, say, the judiciary or the prosecutor's office, fail to conduct investigations and adjudicate, there are better reasons for a regional court to intervene. Even then, in the case of due process violations, the regional court could still remand the case to domestic courts for additional fact-finding.

In relation to the expansive investigative function that the Inter-American Court sometimes plays, it has also been very aggressive in providing remedies.<sup>100</sup> The Inter-American Court not only orders monetary compensation, but it orders legal (or even constitutional) reforms,<sup>101</sup> judicial training,<sup>102</sup> the erection of monuments or memorials for the victims,<sup>103</sup> and the publication of the decisions it hands down,<sup>104</sup> among other remedies. Moreover, the Court usually establishes timeframes for compliance and issues periodic reports that monitor whether or not states enforce the Court's decisions (thus creating a new problem, namely, lack of enforcement). Through these reports, the Court exposes states' lack of compliance—a matter that has received significant scholarly attention.<sup>105</sup> Commentators usually praise the Court's "creative" approach to remedies, which contrasts with the European Court's more restrained approach.<sup>106</sup> The Court's willingness to craft expansive remedies itself, however, rather than defer to domestic law and domestic courts, is yet another example of its rejection of normative subsidiarity.

For this reason, the Court could adopt a less aggressive approach to remedies. It could declare that there has been a violation and that compensation is in order, but then leave it to the state to offer a path for repair. The Court could retain the authority to review state compliance, albeit in a less aggressive manner, giving an enhanced role to the state that violated the American Convention. Additionally, this could improve enforcement, as it

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99. On the "fourth instance" formula, see *Marzioni v. Argentina*, Case 11.673, Inter-Am. Comm'n H.R., Report No. 39/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 48 (1996); JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 92–95 (2013).

100. See generally Antkowiak, *supra* note 38 (providing examples of the varied equitable remedies employed by the Inter-American Court along with damages).

101. *Id.* at 382–83.

102. *Id.* at 384.

103. *Id.* at 381–82.

104. *Id.* at 380.

105. See David C. Baluarte, *Strategizing For Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative For Victims' Representatives*, 27 AM. U. INT'L L. REV. 263, 265–66 (2012) ("In the inter-American human rights system, a particularly notable development is the evolution of a compliance phase of litigation before the Inter-American Court of Human Rights.").

106. See Nino Tsereteli, *The Relevance of the Principle of Subsidiarity for the Evolvement of Remedial Regimes of Regional Human Rights Courts (ECtHR and IACtHR)* 5 (June 2014) (on file with author).

would be the state, not the Court, defining the reparations the state must provide.

### C. Authority and Context

In recent years, the IAHRs has fallen under scrutiny and criticism. Countries as politically distinct as Venezuela, Colombia, and Brazil have found themselves working together to denounce the system's expansive and, as they argue, illegitimate powers.<sup>107</sup> In 2013, some states successfully pushed for a so-called "strengthening process" of the IAHRs, what some advocates and scholars described as a deliberate strategy to undermine some of the Inter-American Commission's powers.<sup>108</sup> The Inter-American Court cannot function effectively when barraged with politically motivated attacks or when operating in a politically hostile environment. The solution is for the Court to garner greater political legitimacy, such that it may speak with authority on the matters before it.

In sum, the Inter-American Court, as any international tribunal, needs the continuous support of its member states.<sup>109</sup> By embracing normative subsidiarity, the Inter-American Court—and the Inter-American Commission—can foster, as a less aggressive and interventionist approach, a more collaborationist model for the enforcement of international human rights law. It is important that member states see the IAHRs as an opportunity, rather than as a threat. It would thus be wise for the Court to abandon its maximalist approach and embrace instead a theory of subsidiarity. Such a novel approach should grant member states some say regarding the protection of human rights, as the Court has timidly done recently.<sup>110</sup>

## V

### CONCLUSION

It is traditionally held that international human rights regimes are supplementary to the law of individual states. International bodies act whenever domestic authorities fail to provide adequate remedies to victims of human rights violations. The principle of subsidiarity provides both a theoretical and practical foundation to determine how much authority a state should be granted

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107. See Victoria Amato, *Taking Stock of the Reflection on the Workings of the Inter-American Commission on Human Rights*, 16 APORTES DPLF 4, 5, 8 (2012) and Daniel Cerqueira, *Brazil, Ecuador, and the Inter-American Human Rights System*, AMERICAS QUARTERLY, (Mar. 6, 2015), <http://www.americasquarterly.org/content/brazil-ecuador-and-inter-american-human-rights-system>.

108. See generally, e.g., Santiago A. Cantón, *To Strengthen Human Rights, Change the OAS (Not the Commission)*, 20 HUM. RTS. BRIEF 5 (2013).

109. See Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 3 (observing that states' delegation of jurisdiction upon international courts is not sufficient for international courts' legal authority).

110. For instance, in the *Atala Riffo* decision, the Court cites domestic case law and thus bolsters its own ruling on sexual orientation. *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

in the regulation of human rights affairs. In the specific context of the IAHR, subsidiarity is not a salient feature. The system established a strong moral and legal voice through its early decisions on gross and massive human rights violations committed by authoritarian regimes. In such a context, deference is not a pressing need for regional courts. The Court embraces a weak version of subsidiarity.<sup>111</sup>

Today, however, the situation is more complex. States are mostly well-functioning democracies, with cases moving away from claims of mass atrocity to current issues such as the right to same-sex marriage. This landscape coexists, however, with some massive and gross human rights violations, as is the case, for instance, in Mexico.<sup>112</sup> In such a changing and complex legal and political landscape, it may be time to reconsider the system's reluctance toward subsidiarity as a principle for international adjudication. Since subsidiarity considerations must take into account the context where decisions are made,<sup>113</sup> the IAHR should articulate its own notions of deference toward states. Just as some commentators have argued for a more egalitarian conception of judicial authority at the domestic level, international courts should also be aware of the risks that international judicial supremacy may entail.<sup>114</sup> Reviewing instances in which both the Inter-American Commission and the Inter-American Court have used notions of subsidiarity reveals that consistent adoption of this principle is superior. Indeed, subsidiarity could enhance the system's authority and acknowledge states' positions as fundamental actors for the enforcement of international human rights norms.

Furthermore, the system should distinguish more clearly instances where reasons for centralization can be found—as in cases where the right to life is at stake—from cases where there could be decentralization. Such an approach would not just enhance the system's legitimacy but would also vindicate principles of democratic decisionmaking that are necessary to ensure that international governance rises in accordance to the domestic units that create and sustain it.

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111. *See supra* note 15.

112. A 2014 United Nations report on the human rights situation in Mexico found that “[t]orture and ill-treatment are generalized in Mexico.” Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mission to Mex., U.N. DOC. A/HRC/28/68/ADD.3, Dec. 29, 2014. Along with torture, there is a severe crisis of enforced disappearances. *See* NIK STEINBERG, HUMAN RIGHTS WATCH, MEXICO'S DISAPPEARED: THE ENDURING COST OF A CRISIS IGNORED (2013), <https://www.hrw.org/report/2013/02/20/mexicos-disappeared/enduring-cost-crisis-ignored>.

113. *See* Føllesdal, *supra* note 12.

114. *See generally* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992) (criticizing notions of judicial supremacy and arguing for an egalitarian conception of judicial authority).