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The transformation of the Inter-American system for the protection
of Human Rights: the structural impact of the Inter-American Court's
case law on amnesties
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THE TRANSFORMATION OF THE INTER-AMERICAN
SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS.
THE STRUCTURAL IMPACT OF THE INTER-AMERICAN
COURT'S CASE LAW ON AMNESTIES

ACHR	American Convention on Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
OAS	Organisation of American States
OP	Operative Paragraph
VCLT	Vienna Convention on the Law of Treaties (1969)
Cfr.	compare
ff.	following
p.	page
para.	paragraph
paras.	paragraphs
pp.	pages
supra.	See indicated note above

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INTRODUCTION

The Inter-American Court of Human Rights (IACtHR) is generally considered to be a very creative and innovative jurisdictional organ. These qualities arguably reached their heyday in the case of *Barrios Altos*¹. In this case the Court, besides establishing the three pillars of transitional justice (truth, justice and reparations), made the following pronouncement:

Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated².

This pronouncement has been reiterated in three other cases concerning three different states which also had amnesty laws in force. The most recent of those judgements was handed down in February 2011. The Court seems, therefore, to have established its jurisprudence with respect to amnesty laws. This jurisprudence has been enthusiastically welcomed, especially in Latin America. During the course of this research, only two critical stances were found. This is, however, hardly surprising, given the fact that, in general, little efforts have been dedicated to analyse this case law in depth. The vast majority of the authors we have consulted for this study either mention the Court's judgements in passing or merely describe them, or make a shallow analysis. Such lack of attention is, in contrast, much more intriguing,

¹ *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75.

² *Ibidem*, para. 44.

because the Court's judgements are not self-explanatory. While the incompatibility of the amnesty laws with certain rights appears beyond doubt, the grounds for drawing their ineffectiveness as a consequence are not easily traceable. Against this background, a more inquisitive scrutiny by commentators could have been expected. An additional reason to expect it is the novelty of such a pronouncement both in general international law and in international human rights law. On the face of it, an international human rights court deciding on whether a domestic piece of legislation should or not deploy legal effects was something unheard of until *Barrios Altos*. Tentatively we could venture that the IACtHR is making through these cases structural innovations in the Inter-American system, concerning especially the legal nature of the American Convention on Human Rights (ACHR) and its own powers.

The combination of these two factors, novelty and insufficient study, has prompted this research, the aims of which are, firstly, to establish whether the Court has acted within its competences and secondly, to determine to what extent this doctrine is new in international law. Accordingly, the central questions will be: has the IACtHR exceeded its powers in declaring domestic legislation without legal effects? Can any theory in international law sustain such a development? In order to tackle these questions, the research is divided into two parts.

In the first chapter, we will try to establish what the Court means when it declares a domestic law «without legal effects,» and what the consequences for the respondent states are. We will also try to determine whether this jurisprudence can continue to be applied in the future. Furthermore, the research revealed that declaring laws ineffective is part of a broader process through which the Court is transforming the Inter-American system. Hence, this process will be analysed as well. Acquiring an understanding of these aspects is indispensable in order to enable us to answer our central questions. It has been necessary to study this at some length, owing to the lack of consensus among scholars and to some inconsistencies within the case law itself. The methodology followed in this first part consisted mainly in case law analysis techniques. Apart from the cases that constitute the principal object of our study, many other judgements, opinions and orders of the Court have been analysed. By extracting the *rationes decidendi* of these decisions (in the respects relevant to our investigation), relating them to the facts and comparing them, we have been able to put the judgements on amnesties into an evolutive perspective and to answer some questions concerning their «what» and «how.»

In the second chapter we will answer our two central questions

departing from the conclusions of the first chapter. In order to analyse whether the Court has exceeded its powers, we chose to examine the interpretation that the Court makes of the ACHR in the relevant judgements. Thereby we aim at establishing whether the Court has just attributed to certain articles of the Convention one of their possible meanings or if, to the contrary, the Court has created new law and has, thereby, exceeded its competence. The methodology followed this time was to examine the interpretative methods the Court apparently uses and to test whether the Court's conclusions fit into the possible results those methods would lead to. Next, with a view to establishing the novelty of the Court's case law, we selected some especially pertinent theories of international law and checked whether they could provide a justification for the Court's theoretical framework about amnesty laws, or whether this could be somehow contemplated by those theories. After arriving at our conclusions, we will speculate on why the Court chose this solution after all, in order to finish with a final balance and some concluding remarks on legitimacy.

This study does not intend to call into question the incompatibility of amnesties with the American Convention: we will not be examining the material arguments here. It is also necessary to state at this point that a *ius cogens* argument may be read into the judgements. However, we will not delve into it, for it would exceed this work's possibilities, and for reasons we will explain opportunely.

CHAPTER 1

UNDERSTANDING THE TRANSFORMATION

In this first chapter we will try to elucidate what the Court means when it declares that an amnesty law lacks legal effect, with a view to establishing later whether making this declaration is or not within the Court's powers and whether this is new for international law.

1.1. THE CASES

Our study starts with a brief description of those aspects of the cases relevant to our purposes. To the four cases mentioned in the introduction we add a fifth one which is closely related to Barrios Altos and useful to understand some aspects of the case law.

1.1.A. Brief Description of the Cases

The case of Barrios Altos concerned the extra-judicial killing of several persons by a special unit of the Peruvian Army as part of an anti-terrorist operation against Sendero Luminoso. Shortly after a judicial investigation was initiated, the Congress enacted the self-amnesty law. The investigating judge continued with the proceedings, as she deemed the law unconstitutional. In view of this, the Congress enacted a second law prohibiting judges from revising amnesties under the first law and granting amnesty to persons not yet charged. Before the IACtHR, the state acknowledged its international responsibility. The judgement on the merits declared that Peru's self-amnesty laws violated the rights of the victims' next of kin under the ACHR to be heard by a court (Article 8(1)) and their right to judicial protection (Article 25) in relation to the state's duty to investigate the facts and prosecute and punish the perpetrators under Article 1(1), and to its duty to adapt its internal legislation to the obligations arising from the Convention (Article 2). Owing to

their incompatibility with the Convention, the laws lacked legal effect. The interpretation judgement³ bases the violation of the Convention committed by Peru on the breach of its duties under Article 2 and establishes that the laws' ineffectiveness is *ab initio* and general in character.

The case of La Cantuta⁴ was also about extra-judicial killings and other grave human rights violations by the Peruvian Army's anti-terrorist operations. The perpetrators were sentenced by military courts, but later benefited from the self-amnesty laws. However, in 2003, as a result of the IACtHR's judgement in Barrios Altos, the ordinary jurisdiction reopened proceedings. Nevertheless, these were ineffective and the Court found violations of Articles 8(1), 25 and 1(1). However, these violations were attributable to the self-amnesty laws only until Barrios Altos was incorporated into Peru's legal order in 2001 and the self-amnesty laws ceased to be applied. Therefore, the Court found that Article 2 had been violated until that moment, but not from then onwards.

The case of Almonacid-Arellano⁵ handled the summary and extra-judicial execution of Mr. Almonacid-Arellano, a communist activist, in the first days after Pinochet's *coup d'état*. Judicial proceedings initiated by his wife were dismissed because of the application of the 1978 Chilean amnesty law. The Court concluded that Mr. Almonacid's execution had been a crime against humanity, for which no amnesty was possible under Article 2 of the Convention. For its incompatibility with the Convention, the Court declared the lack of legal effects of the law (para. 119). It also stated that national courts had the obligation to conduct a «conventionality control» on domestic legislation.

In Gomes Lund⁶ the Court confronted the enforced disappearance and killing of members of a resistance group by the Brazilian Army during the dictatorship. The application and interpretation of the 1979 amnesty law made by the Brazilian Federal Supreme Court in 2010 impeded the investigation of the facts and the prosecution and punishment of the perpetrators. Therefore the Court found violations of Articles 8(1), 25 and 1(1). After establishing a violation of Article 2, the Court declared the lack of legal effects of the amnesty law as it was incompatible with the Convention (para. 174).

Finally, in the case of Gelman⁷ the Court tackled the «Operation

³*Barrios Altos v. Peru*, Interpretation of judgement on the merits, Judgement of 3 September 2001, Series C No. 83.

⁴*La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162.

⁵*Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154.

⁶*Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219.

⁷*Gelman v. Uruguay*, Judgement of 24 February 2011, Series C No. 221.

Condor.» A pregnant Argentinean woman had been arrested by members of the Argentinean and Uruguayan Armies and taken to Uruguay. When she gave birth, her daughter was taken away and given to a Uruguayan family. The fate of the woman was never clarified, but she most probably was executed in Uruguay or Argentina. The girl's grandparents (the Argentinean writer Juan Gelman and his wife) started a quest and finally found her. The proceedings initiated by Gelman and his granddaughter in respect to the latter's mother were discontinued on two occasions because of the application of the 1986 Law on the Expiry of the State's Criminal Action⁸, which the IACtHR considered to be an amnesty. A third attempt was not discontinued, but bore no fruits. Two *referenda* had upheld the operation of the law. The state acknowledged partially its international responsibility. The Court declared that the law was incompatible with the Convention, lacked legal effects (para. 232) and that the interpretation and application made thereof by the state had violated its obligations under Article 2 in connection with Articles 8(1), 25 and 1(1).

1.1.B. *Common Features and Some Clarifications about the Cases*

We will now try to find the common ground to these cases and to discard the irrelevant issues.

In the five cases, there is direct involvement of the state in the crimes and in the impairment of any investigation on them. In this second circumstance, the involvement consists in the enactment and application of an amnesty law. All the cases concern grave human rights violations, such as enforced disappearance and extra-judicial executions.

Whether the laws at stake were amnesties or self-amnesties seemed to bear some relevance at the beginning⁹. However, in the cases of Gelman and Gomes Lund the Court underscored the irrelevance of the distinction between amnesties and self-amnesties as regards their incompatibility with the Convention¹⁰. Finally, the fact that the crimes covered by the amnesty were or not crimes against humanity has also proven irrelevant, as Cassel¹¹

⁸ My own translation of the Spanish «Ley de Caducidad de la Pretensión Punitiva del Estado.»

⁹ See for example the case of *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75, paras. 42-44. The separate opinions attached also refer mainly to self-amnesties. On the difference between amnesties and self-amnesties, see Judge García Ramírez's concurring opinion in the case of *Castillo-Páez v. Peru*, Judgement on reparations and costs of 27 November 1998, Series C No. 43.

¹⁰ See *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 175, and *Gelman v. Uruguay*, Judgement of 24 February 2011, Series C No. 221, para. 229.

¹¹ Cassel, 2007, p. 208.

and Lisa Laplante¹² show. In *Barrios Altos*, *Gomes Lund* and *Gelman*, the Court did not use the category of «crimes against humanity» and referred to the crimes as «grave human rights violations.»

1.2. THE MEANING OF THE DECLARATION THAT THE LAWS «LACK LEGAL EFFECTS»

After having given brief account of the relevant features of the five cases that motivate this study, and after having clarified some points about their scope, we will try to establish the meaning of the Court's expression «lack legal effects.» Thereby we seek to establish what consequences the IACtHR is attaching to the incompatibility of amnesties with the Convention. We will do this through three different questions:

1. What constitutes an incompatibility with the Convention such as to motivate this pronouncement?
2. What consequences does the Court intend to attach to it?
3. What does the Court expect states to do?

1.2.A. What Constitutes the Incompatibility with the Convention Capable of Motivating the Court's Pronouncement?

a. Incompatibility with Article 2 of the American Convention

The cause for the lack of legal effects is the incompatibility of the amnesty laws with the ACHR. First, they are incompatible with the rights enshrined in Articles 8(1) and 25, and hence with Article 1(1), which enshrines a general obligation to respect the rights. Second, they are incompatible with the obligation of the states under Article 2 «to adopt [...] such legislative or other measures as may be necessary to give effect to those rights or freedoms.» The violation of a right implies often the violation of Article 2¹³. The obligations under Article 2 are added to the specific obligations of each of the protected rights, as the Court has established¹⁴. Judge Ventura Robles has indicated that Article 2 cannot be violated independently¹⁵. It is precisely the incompatibility with this article that is decisive for declaring the lack of legal effects of the laws. If the state is not found in non-compliance of its obligation to adapt its

¹²Laplante, 2009, p. 973.

¹³García Ramírez, 2010, pp. 367-368.

¹⁴*Cantoral-Benavides v. Peru*, Judgement on the merits of 18 August 2000, Series C No. 69, para. 175.

¹⁵Judge Ventura Robles' separate opinion to *Cantoral-Huamani and García-Santa Cruz v. Peru*, Judgement of 10 July 2007, Series C No. 167.

internal order to the Convention, there is no need for the Court to take steps in that direction. In the cases, the Court uses different formulations, but it always appears that Article 2 is the one leading to the declaration of ineffectiveness¹⁶.

b. State Action Giving Rise to Incompatibility

i. Two Possibilities

The next step is to identify the state action which causes this incompatibility with the Convention: is it the mere enactment and maintenance, or the interpretation and application of the law? To determine this, we will depart from that state action the Court finds incompatible with Article 2.

When using the terms «incompatibility» or «incompatible,» we are not referring to the mere inconformity of domestic laws with the text of the Convention or the Court's case law. The immediate reason for the Court to declare the lack of legal effects of national pieces of legislation in the four mentioned cases is their incompatibility with the Convention. But, as we shall see, the Court had found national laws to be contrary to the Convention in several occasions before *Barrios Altos*, and has continued to do so afterwards, without judging on the effects of those laws. For this reason, when we examine here the origin of the said incompatibility, we are referring to that incompatibility capable of motivating a pronouncement on the part of the Court that declares the lack of legal effects of domestic laws.

According to Advisory Opinion OC-14/94, «the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of the treaty¹⁷.» The mere adoption of a law can constitute a violation of Article 2 of the Convention. An example from the Court's contentious jurisdiction is the case where it considered that the mere existence of a law imposing automatically the death penalty to those convicted of murder constituted a violation of Article 2 of the Convention¹⁸.

From this departure point, the possibilities are:

The promulgation and existence of the laws causes the incompatibility

¹⁶ See supra the description of the cases.

¹⁷ Advisory Opinion OC-14/94 of 9 December 1994, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Series A No. 14, para. 50.

¹⁸ *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, Judgement of 21 June 2002, Series C No. 94, paras. 113-117.

with the Convention (Article 2), and therefore motivates the declaration of ineffectiveness. The language of the judgements suggests this at some points, for example in operative paragraph (OP) 3 of Barrios Altos (merits): «the state failed to comply with Articles 1(1) and 2 [...] as a result of the *promulgation* and application» of the amnesty laws. Other remarks the Court makes also indicate this possibility. In La Cantuta, the Court takes the view that the state's duties under Article 2 are breached while the rule or practice running counter to the Convention remains part of the legal system (para. 172), and in Almonacid-Arellano it had noted that keeping Chile's amnesty law in force for 16 years after ratifying the Convention was a violation thereof (para. 121).

On some occasions, the Court has affirmed that laws contrary to the Convention lack legal effect since their inception¹⁹. Judges García Ramírez and Cançado Trindade also express this view in their separate opinions to La Cantuta²⁰. This indicates that such laws are incompatible to the Convention since their promulgation. If it were the application of the laws that causes the incompatibility with the Convention, there would be no reason to say that they lack legal effects since their inception: it would be their application that would originate the relevant incompatibility with Article 2. In the same vein, the Court affirmed in the judgement on interpretation of Barrios Altos that the enactment of a law manifestly incompatible with the obligations of the state party is *per se* a violation, and concluded that the effects of the decision on the merits were general²¹.

Finally, various authors have interpreted that the violations of the Convention were owed to the promulgation or existence of the amnesty laws²².

The promulgation and existence of the laws alone does not suffice to cause incompatibility with the Convention: the interpretation and application of the laws are necessary. This hypothesis is clearly pointed to in some of the judgements: in both Gomes Lund²³ and Gelman²⁴, the

¹⁹ *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 124; *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162, para. 189; *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 176.

²⁰ See *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162, paras. 5 and 27 respectively.

²¹ See *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75, para. 18.

²² See Binder, 2010, p. 169; Salado Osuna, 2003, p. 151; Duhaime & Dulitzky, 2006, p. 353; Nogueira Alcalá, 2006, pp. 369-371.

²³ *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 180.

²⁴ *Gelman v. Uruguay*, Judgement of 24 February 2011, Series C No. 221, para. 230.

Court declared that the way in which the respective amnesty laws had been interpreted and applied had affected the state's obligations under the Convention and particularly under Article 2. In *Almonacid-Arellano*, the Court had already held that Chile had violated its obligation to modify its internal legislation in order to guarantee the rights embodied in the Convention because it had *enforced* and still kept in force its amnesty law²⁵. The ambivalent operative paragraph 3 of *Barrios Altos* (merits) refers to the promulgation and *application* of the amnesty laws. In *La Cantuta*, the Court concluded that the fact that the amnesty laws were not applied anymore prevented a breach by the state of Article 2: the state was not found in violation of Article 2 although the laws continued to be formally in force. It was found in violation of that article for the period during which the amnesty laws were given effect²⁶. In the literature, Tittmore puts forward this argument²⁷.

As we can see, there are arguments for both points of view. The amnesty laws had been applied in our five cases. But, given that the mere enactment and existence of a law contrary to the Convention suffices to violate Article 2, we seek to elucidate how decisive this application was for the declaration of ineffectiveness. In order to answer this question, we will examine what the Court has decided in other cases in which national laws were deemed in conflict with provisions of the American Convention.

ii. The Court's Case Law

When trying to find the origin of that incompatibility capable of motivating a declaration of ineffectiveness, we need to observe the case law's evolution in those cases in which the Court declared laws contrary to the Convention. Thereby we can identify those situations in which the Court *reacts* and seeks to cause an impact on domestic legislation. In this way we will be able to establish whether the existence of laws contrary to the Convention is enough to make the Court react, or if, on the contrary, the application of those laws to the case at stake is a prerequisite for the Court to take steps concerning the domestic legal order.

The Court declined in its first cases to give a judgement on the compatibility of laws with the Convention in abstract situations. This was stated in its Advisory Opinion OC-14/94. Owing to the subsidiarity

²⁵ *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 129.

²⁶ *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162, OP 7.

²⁷ Tittmore, 2006, pp. 448-449.

requirement, the Court affirmed that the Inter-American Commission on Human Rights (IACHR) could not request it for a ruling on the compatibility of national laws that had not been applied to the concrete case. The possibility for the Court to make such findings was restricted to its advisory jurisdiction and did not pertain to its contentious jurisdiction²⁸. Consequentially, in the contentious cases of *El Amparo* (reparations)²⁹ and *Genie-Lacayo*³⁰ the Court declared that it could not give its judgement on national laws that had not been applied to the case. Judge Cançado Trindade expressed his disagreement. However, a few months afterwards, the Court was ready to examine a national law in an abstract situation in the *Suárez-Rosero* case³¹. From then, the Court has never again refused to do so for reasons of principle.

So what is the Court's reaction when faced with abstract situations as opposed to those cases in which the laws contrary to the Convention have been applied by national authorities? Douglas Cassel³² notes that the Court has only ordered legislative reform when the legislation contrary to the Convention has been applied to the particular case. A review of the case law before and after *Barrios Altos* confirms this and allows us to see how *Barrios Altos* appears as the last step in an evolution. We can differentiate two stages.

Between *Suárez-Rosero* (merits, November 1997) and *Loayza-Tamayo* (reparations, November 1998), the Court was ready to declare domestic laws contrary to the Convention, even in those cases where said laws had not been applied. But it would not give states any orders as to what they had to do with that legislation. The Court only reminded states of their obligation to ensure that new violations would not occur again³³, or of their obligation to investigate the facts³⁴. There were no explicit orders to states to amend their legislation. Still in 1999, in the reparations judgement to *Suárez-Rosero*, the Court again refrained from ordering the state to amend its internal legislation contrary to the Convention: it just reminded it of its obligation to recognise the

²⁸ See Advisory Opinion OC-14/94 of 9 December 1994, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Series A No. 14, paras. 40-49.

²⁹ *El Amparo v. Venezuela*, Judgement on reparations and costs of 14 September 1996, Series C No. 28, paras. 59 and 60.

³⁰ *Genie-Lacayo v. Nicaragua*, Judgement of 29 January 1997, Series C No. 30, para. 84.

³¹ *Suárez-Rosero v. Ecuador*, Judgement on the merits of 12 November 1997, Series C No. 35, para. 98.

³² Cassel, 2010, p. 235.

³³ *Suárez-Rosero v. Ecuador*, Judgement on the merits of 12 November 1997, Series C No. 35, para. 106.

³⁴ *Castillo-Páez v. Peru*, Judgement on reparations and costs of 27 November 1998, Series C No. 43, para. 103.

rights set forth in the Convention to all persons without exception³⁵. This type of formula seemed to leave states a relatively wide margin of appreciation to decide on the way to conform to the Court's findings.

In November 1998 the second phase was inaugurated with the judgement on reparations in the case of *Loayza-Tamayo*, in which the Court ordered legislative reform³⁶. However, in the same session the reparations for the case of *Castillo-Páez* were decided upon, and there the Court omitted any order to Peru as regards its internal legislation³⁷. In *Castillo Petruzzi* the Court declared certain Peruvian laws that had been applied to the case to be contrary to Articles 7(5), 7(6) and 25 of the Convention. The enforcement of such laws had deprived the victims of some of their rights under the Convention and constituted a violation of Article 2, because the state had failed to take the measures to ensure the free and full exercise of the rights and to ensure the non-repetition of the violations³⁸. Finally, in OP 14, the Court ordered the state to adopt the appropriate measures to amend the laws that it had found to be in violation of the Convention.

Since that judgement, the Court has continued to order states to amend their internal legislation in different circumstances, although not with absolute consistency³⁹; in the cases of *Durand and Ugarte* and *Cantoral-Benavides*, the Court found certain Peruvian laws to be contrary to the Convention and to constitute a violation of Article 2 thereof. However, it did not request the state to amend them⁴⁰. In the case of *Cantoral-Benavides*, the laws in question were the same as those declared incompatible with the Convention in *Castillo Petruzzi*. However, the judgement on reparations explains this: the relevant legislation had been amended in the meantime. The Court held that neither the old nor the new version of the decrees had affected the juridical situation of the victim, presumably because he had been pardoned

³⁵ *Suárez-Rosero v. Ecuador*, Judgement on reparations and costs of 20 January 1999, Series C No. 44, para. 87.

³⁶ *Loayza-Tamayo v. Peru*, Judgement on reparations and costs of 27 November 1998, Series C No. 42, OP 5.

³⁷ Cfr. *Castillo-Páez v. Peru*, Judgement on reparations and costs of 27 November 1998, Series C No. 43, para. 103, and *Loayza-Tamayo v. Peru*, Judgement on reparations and costs of 27 November 1998, Series C No. 42, OP 5.

³⁸ *Castillo Petruzzi v. Peru*, Judgement of 30 May 1999, Series C No. 52, paras. 110-112, 188 and 207.

³⁹ Antkowiak notes that «the Court's approach in this area is uneven.» Antkowiak, 2008, p. 383.

⁴⁰ *Durand and Ugarte v. Peru*, Judgement on the merits of 16 August 2000, Series C No. 68, para. 138 and OP 6; *Durand and Ugarte v. Peru*, Judgement on reparations and costs of 3 December 2001, Series C. No. 89; *Cantoral-Benavides v. Peru*, Judgement on the merits of 18 August 2000, Series C No. 69, para. 178; *Cantoral-Benavides v. Peru*, Judgement on reparations and costs of 3 December 2001, Series C No. 88, paras 76-81.

before. Therefore, the Court saw no need to examine the conformity of the decrees with the Convention⁴¹. Eventually, this case reinforces the argument that the Court does not order states to amend laws that were not applied to the particular case. In *Baena-Ricardo*, the Court continued this trend. It found a Panamanian law contrary to the Convention and declared a violation of Article 2, but it did not order the state to amend it although it had been applied⁴². In this case the explanation may be that the Panamanian Supreme Court had partially annulled that law⁴³.

In February 2001, just one month before *Barrios Altos*, the Court rendered its famous judgement in the case of *Olmedo-Bustos*, where it ordered Chile to amend its Constitution and other norms applied to the case⁴⁴. It must be noted that, in contrast to the previous cases, the issue did not concern procedural and personal guarantees, but freedom of expression.

After *Barrios Altos*, the Court has continued to direct states to adapt their domestic legislation to the Convention only when the conflicting laws had been applied to the particular case. In *Hilaire, Constantine and Benjamin*, the Court ordered the state to amend an act providing for automatic death penalty for murder. This law had been applied to the case, as 32 persons had been sentenced to death for murder. It also declared the inconformity with the Convention of one article of the national Constitution that precluded challenge to that law⁴⁵. However, from OP 8 it is not possible to conclude whether the state was also directed to amend its Constitution. This case motivated Trinidad and Tobago's withdrawal from the American Convention.

In *Bulacio*, the Court's order to Argentina to adapt its national legislation on the conditions of detention of minors to the Convention was softened by the fact that the state had previously agreed to do this in a friendly settlement⁴⁶. The case of *Benavides-Cevallos* concerned statutes of limitations. In the 1998 judgement, the state had pledged to investigate the facts⁴⁷. However, when the Court supervised compliance, such investigation had not been conducted. The state alleged that the

⁴¹ *Cantoral-Benavides v. Peru*, Judgement on reparations and costs of 3 December 2001, Series C No. 88, paras. 76-81.

⁴² *Baena-Ricardo v. Panama*, Judgement of 2 February 2001, Series C No. 72, para 183.

⁴³ *Ibidem*, para. 114.

⁴⁴ *Olmedo-Bustos v. Chile*, Judgement of 5 February 2001, Series C No. 73, paras. 85-90 and OP 4.

⁴⁵ See *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, Judgement of 21 June 2002, Series C No. 94, paras. 112-117 and 152 c).

⁴⁶ *Bulacio v. Argentina*, Judgement of 18 September 2003, Series C No. 100, paras. 139-144 and OP 5.

⁴⁷ *Benavides-Cevallos v. Ecuador*, Judgement of 19 June 1998, Series C No. 38, para. 48.4.

criminal action had become statute-barred by the passage of time and the application of statutes of limitations. In its compliance order of November 2003, the Court only implicitly gave a judgement on the conformance of those statutes of limitations to the Convention and did not order the state to amend its law⁴⁸. This could seem contradictory to the jurisprudential line we have been describing. However, we need to take into account that, in its compliance orders, the Court supervises whether the state has complied with a previous judgement on the merits and reparations; therefore, the Court is not supposed to impose new obligations on states through compliance orders.

The case of *Palamara-Iribarne* concerned freedom of expression and procedural guarantees. The Court found that considering contempt as a crime was contrary to «the international standards on freedom of expression.» Although the pertinent provisions applied to the case had been amended, they still kept some of their problematic aspects and the Court ordered the state to annul and amend them⁴⁹. The Court found that other provisions applied to the case were contrary to the Convention and their interpretation and application had caused diverse violations of the claimant's procedural rights. Therefore, the state was required to implement the necessary changes in its legislation⁵⁰.

In two cases against Mexico, the Court declared that one provision of the Military Criminal Code applied on both occasions was contrary to the Convention, and the state was directed to amend it in the two judgements⁵¹. In the first of these cases, the Court also found one constitutional provision to be problematic, but it only ordered the state to adjust the «interpretation» of such provision to the Convention and expressly said that constitutional reform was not necessary⁵². In the second case, the Court did not mention the Mexican Constitution. Perhaps the experience with Trinidad and Tobago made the Court act more cautiously.

We have reviewed so far some of the cases in which the Court, faced with national pieces of legislation that had been applied to the case and which it found contrary to the Convention, directed the state to amend

⁴⁸ *Benavides-Cevallos v. Peru*, Order of 27 November 2003, Compliance with judgement, paras. 11-12.

⁴⁹ *Palamara-Iribarne v. Chile*, Judgement of 22 November 2005, Series C No. 135, OP 13.

⁵⁰ *Ibidem*, OP 14.

⁵¹ *Radilla-Pacheco v. Mexico*, Judgement of 23 November 2009, Series C No. 209, OP 10 and 11; *Cabrera García y Montiel Flores v. Mexico*, Judgement of 26 November 2010, Series C. No. 220, OP 15.

⁵² *Radilla-Pacheco v. Mexico*, Judgement of 23 November 2009, Series C No. 209, paras. 340-341.

or annul such provisions. Now we will prove the contrary: the Court does not order the state to modify its domestic order when the conflicting laws have not been applied to the case. We will focus our attention on cases concerning amnesty laws.

In the reparations judgement to the Loayza-Tamayo case, the state argued that it could not comply with an order to prosecute and punish those responsible for the violation of Ms. Loayza-Tamayo's human rights owing to the amnesty law. This norm had not been applied to the case yet, as no proceedings had been started. The Court ordered legislative reform of the laws on terrorism (which had been applied), but not of the amnesty laws. It only directed the state to adopt all necessary domestic legal measures to ensure that this obligation to investigate and punish was discharged⁵³. This very broad formula arguably did not necessarily entail reform of the amnesty laws. If we compare the language of the Court in this case to that used to order states to amend their legislation, we come to the conclusion that, in this case, the Court was not intending to give the state an order to change those laws. This duty, however, was asserted by Judges Cançado Trindade and Abreu Burelli in their concurring opinion⁵⁴.

The case of Castillo-Páez was similar. In the judgement on the merits the Court had stated that the right of the victim's next of kin to learn about his fate and whereabouts prevailed over any obstacles that the Peruvian internal order might pose⁵⁵. In the reparations phase in 1998, the IACHR and the victim's next of kin requested a pronouncement of the Court on the incompatibility of the amnesty laws with the Convention. However, they did not argue that the laws had been applied to any particular judicial proceedings. In the case, they had not caused any effects as to that moment. The Court accepted that the amnesty laws were an obstacle to the investigation of the facts and the access to justice of the victim's next of kin and reiterated the state's obligation to investigate in the same terms as in the judgement on the merits⁵⁶. However, it did not give the requested pronouncement on the compatibility of amnesty laws with the Convention expressly, and it did not order the state to amend or annul the amnesty laws. Judges Cançado Trindade

⁵³ See *Loayza-Tamayo v. Peru*, Judgement on reparations and costs of 27 November 1998, Series C No. 42, OP 6.

⁵⁴ See *ibidem*, para. 4 of the opinion.

⁵⁵ *Castillo Páez v. Peru*, Judgement on the merits of 3 November 1997, Series C No. 34, para 90.

⁵⁶ *Castillo-Páez v. Peru*, Judgement on reparations and costs of 27 November 1998, Series C No. 43, para. 103.

and Abreu Burelli affirmed this duty in their separate opinion, but did not criticise the judgement for not ordering amendment or annulment of the amnesty laws⁵⁷.

After Barrios Altos, the next case involving amnesty laws was that of the Serrano-Cruz sisters. The case concerned the probable abduction of two children in the midst of the Salvadorian conflict. The case had not been properly investigated. The Court, in affirming the state's duty to investigate the facts, reminded El Salvador of its obligation to abstain from using figures such as amnesty designed to prevent criminal prosecution or to suppress the effects of a conviction. The Court noted that there was an amnesty law in force in El Salvador, but that said law had not been applied to the case (the crime of abduction fell outside its scope). The Court did not find a violation of Article 2 and did not order the state to amend or repeal its amnesty law⁵⁸.

The case of Moiwana Village concerned non-investigated massive killings in Suriname. The amnesty law in force excluded crimes against humanity according to international law. The IACHR admitted that this law had not been applied to the case⁵⁹. The Court agreed with this and consequentially did not declare a violation of Article 2⁶⁰ and did not order Suriname to amend or repeal its amnesty law: it just reminded the state of the inadmissibility of amnesty provisions as obstacles to the investigation of human rights violations⁶¹.

The case of Anzualdo Castro followed the same line as La Cantuta. The Court found that the state had breached its obligations under Article 2 for the time that the amnesty laws had been effective in Peru. After that, the evidence did not show unequivocally that the omissions and negligent acts during the proceedings had been caused by the amnesty laws. Nor did the evidence show that the state had ceased to adopt the measures necessary to eradicate the effects of such laws⁶². Therefore, as in La Cantuta, no violation of Article 2 was found after the incorporation of the Court's jurisprudence in Barrios Altos into the Peruvian legal order.

In the case of the «Las Dos Erres» massacre the IACtHR was faced

⁵⁷ See *ibidem*, para. 3 of the opinion.

⁵⁸ *The Serrano-Cruz sisters v. El Salvador*, Judgement of 1 March 2005, Series C No. 120, paras. 171-172.

⁵⁹ *Moiwana Village v. Suriname*, Judgement of 15 June 2005, Series C No. 124, para. 136 i).

⁶⁰ Although it could have, according to the Suárez-Rosero case law.

⁶¹ *Moiwana Village v. Suriname*, Judgement of 15 June 2005, Series C No. 124, paras. 206-207.

⁶² *Anzualdo Castro v. Peru*, Judgement of 22 September 2009, Series C No. 202, paras. 162-163.

with an amnesty law likely to be applied to a case of grave human rights violations following the decision of a national court. The IACtHR determined that «the eventual application of the amnesty provisions of the LRN in this case would violate the obligations derived from the American Convention. Thus the state has the duty to continue the criminal proceeding without major delays, and include the multiple crimes generated in the events of the massacre for their proper investigation, prosecution and eventual punishment of those responsible for those acts⁶³.» The Court did not declare the lack of legal effects of the amnesty law, not even its inconformity with the Convention. It confirmed thereby that it does not take action in potential and abstract cases.

In conclusion, when in a contentious case, the Court finds national legislation to be contrary to the Convention, but this legislation has neither produced any effects in the particular case, nor affected the juridical situation of the victims, the Court does not interfere with the state's internal order, even if a violation of Article 2 is declared. This leads us to the conclusion that the mere adoption, without application, of laws contrary to the Convention does result in incompatibility with the Convention, but not an incompatibility capable of motivating a declaration of ineffectiveness by the Court of that national legislation.

c. Conclusion

The enactment and existence of a law contrary to the Convention is not enough for the Court to declare its ineffectiveness: the application of that law to the case is necessary for this to happen.

The problem would finally consist in national authorities applying laws that are *per se* contrary to the Convention⁶⁴. This connects with the theory of the conventionality control, which we will examine later.

This conclusion explains the decision in La Cantuta. The Court decided that Peru had not violated Article 2 anymore since 2001, when the amnesty laws ceased to be applied to the case at stake. The laws were *per se* contrary to the Convention, as the Court had already established in Barrios Altos. But this had no consequences because the laws had ceased to be applied to the La Cantuta case since 2001. The result was the implicit declaration of incompatibility with the Convention of laws that had not been applied to the case: it was an abstract situation. Following the line indicated by Cassel, the Court did not find order

⁶³ «Las Dos Erres» massacre v. Guatemala, Judgement of 24 November 2009, Series C No. 211, para. 131.

⁶⁴ See Barrios Altos v. Peru, Interpretation of judgement on the merits, Judgement of 3 September 2001, Series C No. 83, and La Cantuta v. Peru, Judgement of 29 November 2006, Series C No. 162, para. 174.

Peru to amend its legislation. Moreover, it did not declare a violation of Article 2.

This last point seems to be contradictory to the interpretation of Article 2 according to which states have to abstain from adopting legislation contrary to the Convention, or with the pronouncement of the Court in the interpretation to Barrios Altos according to which the adoption of legislation incompatible with the Convention constitutes *per se* a violation. In La Cantuta and some other cases, the Court does not find a breach of Article 2, although the state had promulgated a law contrary to the Convention. It is not that the violation of Article 2 did not have consequences for the case, but rather that there was not a violation of Article 2. This could not be possible according to the described doctrine. However, this would be a contradiction within the Court's jurisprudence on violations of Article 2 in abstract situations. According to this jurisprudence, the mere enactment and existence of a law can violate *per se* Article 2, even if it had not been applied to the case. This jurisprudence could have been applied to some of the cases above, but the Court, to the contrary, did not declare a violation of Article 2 although the different amnesty laws had been enacted and continued to exist. But this does not contradict the proposition that the mere existence of laws is not sufficient to motivate a pronouncement of the Court on the effectiveness of internal legislation.

1.2.B. What Consequences Does the Court Intend to Attach to the «Incompatibility»?

Once we have understood how «incompatibility with the Convention» is caused, we will try to establish what the Court intends to achieve when it reacts to such incompatibility declaring the lack of legal effects of national laws. In this respect, we can also find different statements in the cases which may cause some confusion. We will try to establish the intended effect of the judgements onto the domestic order of the concerned states by scrutinising the Court's pronouncements in these cases, the opinions of some of its judges and the interpretation that some authors have made of them, and by taking into account the nature of the Court's judgements.

a. The Court's Intention

Materially, the purpose of the Court is clear: the consequence of the judgement shall be the investigation of the facts and the prosecution and punishment of the responsible persons in the particular case. Amnesty laws cannot constitute an obstacle to such proceedings and, as

the Court says with different formulations in each of the judgements, to others related to similar cases⁶⁵.

What does this mean for the laws? Taking into account different pronouncements of the Court in the five cases we are examining, we are confronted with two possibilities: either a declaration of nullity, or a declaration of ineffectiveness. The first would imply that the laws cease to exist, while the second would not eradicate them completely from the legal order of the concerned state, in which they could continue to exist and even deploy certain effects.

In their separate opinions, some judges seem to have understood a declaration of nullity. Judge García Ramírez, in his concurring opinion in *Barrios Altos*, said that the incompatibility of self-amnesty laws with the Convention «signifies that those laws are null and void [...]. The incompatibility determines the invalidity of the act» (para. 15). In his separate opinion to *La Cantuta*, he argued that amnesty laws are invalid and that any special decision holding it would be a mere, redundant declaration (para. 5). Judge Cançado Trindade, in his separate opinion to the same case, affirmed that amnesty laws «are flawed with nullity, *ex tunc*» (para. 27). Finally, he expressed the view that self-amnesties were not true laws, but «illegal aberrations» in his concurring opinion to *Almonacid-Arellano* (para. 7).

However, the language the Court uses in the operative paragraphs of the four relevant judgements (and in some other paragraphs thereof⁶⁶) reads «lack legal effects,» and not «the laws in the instant case are null and void.» The compliance orders subsequent to the *Barrios Altos* case also use this language⁶⁷. The consequence of the judgements is that the amnesty laws cannot continue to prevent investigations in the case at stake and others, which could imply that, theoretically, they may continue to exist and to produce their effects in other respects.

If we weigh these arguments, we find that judgements, operative paragraphs and compliance orders seem to indicate a declaration of ineffectiveness, while only in separate opinions is the idea of nullity launched. Therefore, it is insufficiently supported.

Turning to the literature, Sagüés⁶⁸ indicates that the Court does not have the competence to repeal domestic legislation. For Hitters⁶⁹, the

⁶⁵ See the operative paragraphs of *Barrios Altos*, *Almonacid-Arellano*, *Gomes Lund and Gelman*.

⁶⁶ For example in *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 124.

⁶⁷ See, for example, *Barrios Altos v. Peru*, Order of 22 September 2005, Compliance with judgement, p. 21, para. 9 b).

⁶⁸ Sagüés, 2010, p. 133.

⁶⁹ Hitters, 2009, p. 112.

Court's task is not to modify internal legislation or to deprive it of its effects. The pronouncements in these judgements are declarations of inapplicability with *erga omnes* effects, which is very similar to a declaration of nullity⁷⁰. In our opinion, this rather amounts to ineffectiveness.

According to Christina Binder, the Court intends to give direct effect to its judgements when it declares that domestic laws lack legal effects. The IACtHR takes the position of a constitutional court and aims at a maximum effect, avoiding need for national legislation to implement its decision. The Court does not consider an internal legal act to be necessary to make its decision effective⁷¹. Hers is a useful point of view to explore the Court's intention. Whether seeking to annul the law or not, the Court's intention to cause an effect in the internal legal order of the state concerned is clear.

We can reasonably assume that this impact should be stronger than when the Court simply states the incompatibility of domestic laws with the Convention and orders the states to amend them. The Court strives for more influence when it declares that the laws lack effects, since their inception and generally, maybe in order to retain a more powerful tool in case of non-compliance. This stronger interference seems to take place with the effectiveness or the validity of domestic legislation *in the domestic order*.

Brief e-mail exchange with Dinah Shelton, the current Chair of the IACHR, allowed us to have her opinion on this matter. When asked whether she thought the judges were seeking an impact on the domestic legal order stronger than when they only declared the obligation of states to conform their domestic legislation to the Convention, she answered: «Yes. I think the Court is looking forwards and backwards. It seeks to ensure non-repetition, but also adequate reparations (per Article 63) for victims of violations. Articles 8 and 25 would lose much of their meaningful guarantees for victims if a blanket amnesty remained in effect, since there would neither be criminal prosecutions nor civil remedies against perpetrators, and it would also raise questions about commitments to non-repetition⁷².»

At the same time, the Court seems to recognise that some kind of «positive» action on the part of the states is needed and expects it⁷³, because the Court monitors compliance regarding this issue. In its

⁷⁰ *Ibidem*, p. 122 and footnote 79.

⁷¹ Binder, 2010, p. 170.

⁷² E-mail from Dinah Shelton, First Vice-Chair (currently Chair), Inter-American Commission on Human Rights, 3 March 2011.

⁷³ This is also the interpretation of Almonacid-Arellano by Nogueira Alcalá, 2006, p. 364.

compliance orders in the case of *Barrios Altos*, the Court has examined Peru's measures to comply with «the application of the Court's decision in its judgement on the interpretation of the merits [...] in the present case "concerning the sense and reach of the declaration of ineffectiveness"» of the amnesty laws⁷⁴. Although mere oblivion of the laws may suffice in order to attain their general non-application to the investigation of human rights violations, it is reasonable to think that the Court expects some «positive» action from the states and that it does not believe that its judgement will completely eradicate those laws.

This appears to contradict Binder's opinion. However, we believe that both points of view are partially correct. The Court recognises the need for the state's intervention in the execution of the judgement. However, it seeks to reduce this need. The Court establishes the criteria for the effectiveness of the law, derived directly from the Convention, which consequentially are not anymore in the hands of the state. The law is ineffective. The state will only have to see how to implement this. Judge García Ramírez expresses in his separate opinion to *La Cantuta* that different means are possible⁷⁵.

We can conclude after this that the hypothesis of a declaration of nullity loses strength. If the Court considered its judgement to be a declaration of nullity, it would not need to expect and monitor subsequent action by national authorities. If we draw a parallel to national systems of constitutional justice, when a court empowered to do so annuls legislation contrary to the Constitution with *erga omnes* effects, no further action by the other the powers of the state is required: they just need to act, from that moment onwards, as if the law did not exist anymore. In contrast, the IACtHR monitors compliance to check whether the state has given compliance to its declaration of ineffectiveness.

b. The Nature of the Judgements

We will make now some considerations as to the nature of the judgements of the Inter-American Court which can be useful to understand the intention of the Court when making the pronouncements of ineffectiveness.

In the first place, as stated in Article 68(1) of the ACHR, states undertake to comply with the Court's judgements and it is widely

⁷⁴ See, for example, *Barrios Altos v. Peru*, Order of 22 September 2005, Compliance with judgement, p. 21, para. 9 b) (my own translation).

⁷⁵ See *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162, para. 4 of the opinion.

accepted that such compliance is obligatory for them⁷⁶. The Court's judgements are declaratory in nature⁷⁷.

In his work on the legal nature of international judgements, El Ouali⁷⁸ makes some useful remarks.

Firstly, El Ouali affirms that international judgements have an obligatory character independently of any formality or act of approval: «By virtue of the normative power of the international judge, international judgements do not need the reception formalities international treaties may need to become part of the internal legal order⁷⁹.» In order to deploy its legal effects, international judgements follow their own rules⁸⁰. When rendered in controversies originated in domestic law, international judgements aim naturally at deploying their effects in the states' domestic order⁸¹. Applying this to IACtHR judgements, such rules are laid down in the Convention and by the Court's case law, and controversies before it always originate within a state's domestic sphere, whether they concern legislation or not. However, international judgements are not self-executing: international judges do not have national enforcement mechanisms at their disposal⁸².

This construction would support our findings until now: those states that have accepted the contentious jurisdiction of the Court have the obligation to abide by the Court's judgements, but these are not self-executing: their execution in the internal order depends on the operation of national enforcement mechanisms.

Concerning declaratory judgements, El Ouali contends that these are authentic judgements that establish obligations and produce effects of *res judicata*⁸³. Declaratory judgements have a complete character in the sense that they determine the precise content of a norm⁸⁴. However, he recognises certain ambiguity concerning the fact that it is for the

⁷⁶ Hitters, 2008, p. 141.

⁷⁷ Davidson, 1997, p. 212.

⁷⁸ El Ouali, 1984. He does not refer specifically to judgements by international human rights courts, which are arguably different from judgements by other international courts in that the parties are not two states, but one state and the victims of human rights violations or, in the case of the IACtHR, one state and an organ in charge of the promotion and protection of human rights. However, these judgements are still international judgements rendered by courts the competence of which is based on international agreements and which decide according to international law. El Ouali's chapter on judgements on the legality of states parties' domestic legislation is especially pertinent, as the cases we are studying here are, in one sense, judgements on legality of states' domestic legislation.

⁷⁹ *Ibidem*, p. 223 (my own translation).

⁸⁰ *Ibidem*, p. 221.

⁸¹ *Ibidem*, p. 238.

⁸² *Ibidem*, p. 232.

⁸³ *Ibidem*, p. 259.

⁸⁴ *Ibidem*, p. 261.

states to draw by themselves the legal consequences that derive from those judgements in their internal order⁸⁵. Finally, he touches upon a special group of declaratory judgements: those deciding on the legality of internal legislation⁸⁶. According to him, judgements of this kind produce legal effects although they are not capable of annulling domestic legislation by themselves. El Ouali argues that the power to annul legislative acts is an additional and subsequent power not always attributed to the judge⁸⁷. Therefore, judgements on legality are complete judgements that cause legal effects. However, they are not self-sufficient to deploy their effects; it is up to the addressed states to determine the consequences in their internal order. In his opinion, the states' margin of appreciation is particularly broad in these cases⁸⁸.

We can conclude then that the judgements of the Inter-American Court that decide on the compatibility of internal laws with the Convention can be assimilated to the said international judgements on the legality of domestic legislation. They have full legal force and are complete in themselves, but lack executing force. Therefore, they cannot be presumed to completely eradicate domestic laws by themselves: some kind of action on the part of states is needed. Nevertheless, the IACtHR seems to be pushing the boundaries of this kind of judgements and trying to reduce the need for the states' intervention as much as possible.

c. Conclusion

Our conclusion is that we are before a declaration of ineffectiveness of the national legislation. The Court's intention is that this declaration thwarts the domestic effects of the law. However, it recognises that some kind of action on the part of the respondent states is still necessary and that its judgement will not make the laws disappear from the states' legal orders. Ineffectiveness appears as a nebulous «third way» between voiding the laws and simply ordering their reform.

Nevertheless, we have shown that the Court is striving for an enhanced influence on national legal orders, as compared to that exercised through other kind of pronouncements. The Court attaches far-reaching consequences for domestic legislation to its incompatibility with the Convention. Binder suggests this in her article⁸⁹. In his separate opinion to *La Cantuta*, Judge García Ramírez makes a distinction

⁸⁵ *Ibidem*, p. 261.

⁸⁶ *Ibidem*, pp. 278-282.

⁸⁷ *Ibidem*, p. 278.

⁸⁸ *Ibidem*, p. 279.

⁸⁹ Binder, 2010, p. 161.

between the international and the national spheres⁹⁰. The Court seems to overcome this distinction in its judgements. The Court is providing for measures of internal law: establishing the criteria for the effectiveness of laws in the domestic order and declaring them without effects are measures of internal law in the hands of national authorities, as the practice of the Court to order legislative reform shows.

We will now proceed to our third point. We have established that the Court, while intending to cause a notable impact onto national legal orders through its declarations of ineffectiveness, still expects states to do something, and that it intends to restrict the need for their intervention as much as possible. What does the Court expect from states?

1.2.C. What Are States Supposed to Do?

We will determine this according to what the Court orders states to do and to what the Court monitors in its compliance orders.

The Court did not order the states in any of our cases to formally repeal or amend the laws in the operative paragraphs. However, in *Almonacid-Arellano* it stated this obligation in the merits (paras. 121-122). The reasons were, firstly, that under Article 2 states are obliged to eliminate legislation contrary to the Convention. Secondly, the continuing formal existence of the laws implied the risk of judges returning to their application. Those seem to be cogent reasons. In spite of this, in the operative paragraphs, the state is not ordered to repeal the law formally. Moreover, in the compliance order of 2010, the Court did not check whether the Chilean law continued to exist or not. From the file submitted by Chile it could be understood that it continued to be in force and the Court did not use this as a reason to find non-compliance⁹¹. In *La Cantuta* the measures the state had adopted to prevent the application of the amnesty laws did not include formal repeal, but the Court considered them to be enough. This is because in the compliance order of *Barrios Altos* of 22 September 2005 the Court decided to stop supervising compliance on that point, as it satisfied itself that the measures taken by the state sufficed to comply⁹². Consequentially, the same conclusion was arrived at in *La Cantuta*. According to this, what states are supposed to do is to ensure that the laws do not hinder

⁹⁰ See *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162, para. 5 of the opinion.

⁹¹ See *Almonacid-Arellano et al. v. Chile*, Order of 18 November 2010, Compliance with judgement.

⁹² See *Barrios Altos v. Peru*, Order of 22 September 2005, Compliance with judgement, pp. 24-25.

the investigation of the individual case and of other possible cases by leaving them without effect in the internal order.

Moreover, in its compliance orders to the cited cases, the Court has never been interested in ascertaining whether the laws continued to exist formally or not, and it seems to be open to different possible solutions and appears to be driven by the action taken by states⁹³.

Judge García Ramírez says in paragraph 4 of his opinion to *La Cantuta* that the state has to find the manner to eliminate its laws in conflict with the Convention. The Court does not have to say how to do this. However, what is clear from the interpretation judgement to *Barrios Altos* is that the pronouncement has *erga omnes* effects: it binds all the authorities of the states in every case that may imply the application of those laws.

Some authors like Laplante⁹⁴ and Cassel⁹⁵ contend that the state has to formally repeal the laws. They have good reasons to do so, because in *Almonacid-Arellano* this obligation of the state is explicit in paragraphs 121 and 122, and Cançado's separate opinion to *Barrios Altos* also seems to suggest this⁹⁶. We object to this that the Court does not give such order in the operative paragraphs or monitors compliance on that point. Moreover, if states recognise the ineffectiveness of the laws, then in future cases they will not be applied: whether they cause a violation of the Convention will be rendered a purely abstract question (which it was not in any of the five cases, because in all of them the laws were applied at least until a certain moment in time). As we said before, when laws are not applied to the cases, the Court may declare their inconformity with the Convention, but it never requests states to change them. As in *La Cantuta*, if the state takes sufficient steps, the Court may even not find a violation of Article 2. For this reason, formal repeal is not indispensable to bring the state in line with the Convention for future cases. The fact that the Court did not insist upon repeal in *La Cantuta*, *Gomes Lund* and *Gelman* could mean that it realised that it did not bring additional benefits, as long as the laws remained unapplied. We conclude, therefore, that states are supposed to do anything that ends in the disregard of the amnesty laws, not necessarily formal repeal.

However, as we only have four judgements in which the Court has declared the ineffectiveness of domestic legislation, this conclusion can be considered provisional⁹⁷. The reasons given in paragraphs 121 and

⁹³ See same order and *Almonacid-Arellano et al. v. Chile*, Order of 18 November 2010, Compliance with judgement.

⁹⁴ Laplante, 2009, p. 970.

⁹⁵ Cassel, 2007, p. 210.

⁹⁶ See *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75, para. 11 of Cançado's separate opinion.

⁹⁷ In her e-mail Dinah Shelton attributed these differences to changes in the Court's membership.

122 of the Almonacid-Arellano judgement are good reasons to defend the obligation of states to formally repeal their laws, and some authors adhere to them. We cannot conclude with absolute clarity in this point. This discrepancy may be a symptom of lack of confidence of the Court in its pronouncements. Another reason may be that the ACHR does not foresee these situations in its text. In contrast to the statutes of constitutional courts, the Convention does not give any guidance as to how to interpret judgements of the Court on the compatibility of domestic legislation with the Convention or as to their effects on national legal orders. This may account for the inconclusiveness at which we have arrived in respect to this third point⁹⁸.

1.2.D. *Conclusions*

The incompatibility with the Convention capable of prompting a declaration of ineffectiveness by the Court consists of the existence and the application of a law contrary to the Convention. To this incompatibility, the Court attaches the general and immediate ineffectiveness of national legislation (and not nullity), and expects states to do whatever is effective for that purpose (not necessarily to abrogate the law).

In view of this characterisation, we can conclude that the Court is taking a step forward. There is a clear difference for an international court between ordering a state to adapt its internal order to a given Convention, and declaring by itself that such laws lack legal effect on the basis of their incompatibility with the said Convention. Although the Court still has to rely on action by the state, it tries to reduce this reliance to the minimum and to make its judgements deliver their own effects *on the states' domestic order*.

Once we have understood this development in the Court's case law, we will determine whether it will remain confined to our cases, or whether it can potentially expand.

1.3. IS THE ISSUE CLOSED?

This section tries to establish whether the jurisprudence we have analysed could be applied to other amnesty laws and to other laws which, similarly to amnesties, obstruct the investigation, prosecution

⁹⁸It may be useful to note as well that the Court is flexible *vis-à-vis* its own precedents. Cassel, 2010, p. 244.

and punishment of human rights violations. Thereby we will establish its possibilities for reiteration. We will approach this question investigating why the Court did not declare the lack of legal effects of other amnesties and of other laws that also precluded the investigation and punishment of human rights violations.

As regards amnesties, we have elucidated this in the previous section: the Court did not make any pronouncement on the compatibility of those laws with the Convention or on their effectiveness because they had not been applied to the cases and they had not been the reason for the lack of investigation or the shortcomings in the judicial proceedings. Although the Court could have given a judgement in abstract as to their inconformity with the Convention and could have declared a breach of Article 2 thereof, it would have not, according to its own practice, given a pronouncement on their effectiveness.

The material purpose of the Court with its judgements is to avoid impunity and to ensure that grave human rights violations are investigated and the responsible persons are prosecuted and punished. Therefore, other legal provisions the effect of which is to prevent this from happening could in principle be declared ineffective for the same reasons. The Court stated in *Barrios Altos* for the first time ever that

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations [...]⁹⁹

We will examine some cases concerning laws that impeded the full investigation of human rights violations focusing on the Court's reaction.

The case of *Bulacio* was about criminal proceedings stopped by the application of provisions on extinguishment. The IACHR asked the Court to order the state to «adopt such measures as may be necessary to give legal effect to the obligation to investigate and effectively punish the authors¹⁰⁰.» This requirement was appropriate to give the Court the chance to declare the ineffectiveness of the law. However, it must be also noted that the Commission did not ask for a ruling on the incompatibility of the law on extinguishment with the Convention, and this declaration always precedes the declaration of ineffectiveness¹⁰¹.

⁹⁹ *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75, para. 41.

¹⁰⁰ *Bulacio v. Argentina*, Judgement of 18 September 2003, Series C No. 100, para. 107 a).

¹⁰¹ See above description of the cases.

The Court affirmed that extinguishment provisions, or any other domestic legal obstacles to the investigation and punishment of human rights violations (notice that here the Court refers to «human rights violations» and not to «grave» or «serious» human rights violations), are inadmissible and cannot oppose compliance on the part of the state with its obligations under the Convention. However, the problem seemed to be less of a legislative nature: in paragraphs 113-115, the Court finds that the Argentinean judges did not direct the process correctly and allowed for extinguishment. The Court did not seem to see the problem so much in the extinguishment provisions in themselves as in the careless performance of the Argentinean judges. As a result, operative paragraph 4 only directs the state to continue the investigation of the facts, but does not order legislative reform of the extinguishment provisions. Therefore, if the Court did not declare the lack of legal effects of the Argentinean provisions on extinguishment, it does not seem to be owed to reasons of principle, but to reasons related to the circumstances of the case.

In the case of the «Las Dos Erres» massacre, the Court considered that a certain law, and its abusive use tolerated by the authorities, had been a factor for impunity for grave human rights violations (para. 120). The Court ordered amendment of the law in operative paragraph 10, but did not declare its ineffectiveness. This may be explained by the fact that, as the Court expresses in paragraphs 239-241, a reform of this law was already in process and the parties to the proceedings indicated that this new law would allow the Supreme Court of Justice «to decrease the abusive use of the appeal for legal protection.» The Court ordered the state to adopt this reform within a reasonable term. As we can see, once again there was not a reason of principle, and it is important to note that, according to the Court, this massacre was «part of a systematic context of massive human rights violations in Guatemala» (para. 152).

A third case is that of Benavides-Cevallos, of which we gave due account in the previous section. The Court did not declare the incompatibility with the Convention of national statutes of limitations which had stopped the investigation of the facts. We concluded that this was owed to the fact that such problem only appeared in the phase of compliance supervision, and not during the merits or the reparations phase. Therefore, once again, if the Court did not declare here the lack of legal effects of a provision that thwarted the possibilities for investigation and punishment of human rights violations, it was owed to the circumstances of the case and not to reasons of principle.

In the case of Trujillo-Oroza, the Bolivian statutes of limitations foreseen for unlawful deprivation of liberty were examined, and the

Court repeated that such provisions were inadmissible inasmuch as they prevented the investigation and punishment of human rights violations. However a decision of the Bolivian Constitutional Court had quashed the judgements that had applied that statute of limitations and stopped the investigations. Consequentially the investigation would have no more obstacles and the IACtHR had no need to give a judgement on the said provisions¹⁰².

In the case of the 19 Merchants, the IACHR contended that the criminal proceedings had extinguished. The Court did not devote its examination to the laws providing for extinguishment or their application to the case; it only reminded the state of the inadmissibility of such provisions and of its obligation to abstain from applying them. Therefore, the application of those provisions was hypothetical¹⁰³.

As we see, the absence of a reaction on the part of the Court regarding the effectiveness of these other laws, which also precluded investigation and punishment of human rights violations, could be reasonably owed to circumstances of the particular cases. Therefore, it cannot be excluded that the Court proceeds to extend its pronouncements on lack of legal effects to other laws that, having been applied to the case, have impeded the fulfilment of the states' duties to investigate and punish.

If the Court, at some point, directed a state to amend one law of this kind, instead of declaring its ineffectiveness, then the case could be made that amnesties are regarded by the Court as especially grave and as producing some kind of «qualified incompatibility» with the Convention that would justify extraordinary measures on the part of the Court. This «qualified incompatibility» would not necessarily be related to the gravity of the crimes covered by the amnesty provisions. Firstly, because in the Serrano-Cruz sisters case, the Court declared that «whenever there is a human rights violation, the state has the duty to investigate the facts and punish those responsible¹⁰⁴.» It appears therefore that obstruction of the investigation of any human rights violation causes a breach of the state's duties under the Convention. Secondly, because, as we had the chance to see in the case of the «Las Dos Erres» massacre, provisions other than amnesties can be used to cover grave and systematic human rights violations, but the Court would not

¹⁰² *Trujillo-Oroza v. Bolivia*, Judgement on reparations and costs of 27 February 2002 (reparations), Series C No. 92, paras. 102-111.

¹⁰³ *19 Merchants v. Colombia*, Judgement of 5 July 2004, Series C No. 109, paras. 254-263.

¹⁰⁴ *The Serrano-Cruz sisters v. El Salvador*, Judgement of 1 March 2005, Series C No. 120, para. 168.

declare them ineffective in the hypothesis we are making in this paragraph.

In conclusion, the jurisprudence we are studying could still be applied to other amnesty laws and also to other laws that thwart the rights under Articles 8(1) and 25 and the state's obligations under Article 1(1) ACHR. The probability that the Court will declare ineffective laws other than amnesties does not seem very high, as this could affect more sensitive issues for the states and authors are calling for proportionality¹⁰⁵. But, for the moment, it cannot be said that this is owed to the special gravity of amnesties as opposed to those other laws.

In order to comprehend completely the declaration of ineffectiveness, in the following section we will study the broader theoretical framework in which it is inserted.

1.4. THE THEORY OF THE CONVENTIONALITY CONTROL

The declaration of ineffectiveness is a technique to ensure consistency between national legal orders and the Convention, and it exists within a broader framework for which Court coined the term «conventionality control» in *Almonacid-Arellano*¹⁰⁶. It has found wide acceptance among Latin American scholars. This framework comprises two types of control: that exercised by the Court itself, and that exercised by national authorities. The Court only uses the expression «conventionality control» to refer to the latter; however, scholars have used it to refer to the control exercised by the Court as well¹⁰⁷. We will employ it with this meaning. This theory has been interpreted by scholars¹⁰⁸, former judges of the IACtHR¹⁰⁹ and by judges *ad-boc*¹¹⁰ as providing the basis to affirm that the Inter-American system for the protection of human rights has become, or is becoming, a constitutional system. In fact Judge García Ramírez, still as an incumbent judge, once pointed out that the IACtHR's task was similar to that of a consti-

¹⁰⁵ Antkowiak, 2008, p. 396. As regards laws affecting other rights, a declaration of ineffectiveness could happen as well, as the Court has not declared that this pronouncement is reserved to violations of Articles 8 and 25, but in our opinion this is even more unlikely.

¹⁰⁶ *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 124.

¹⁰⁷ See Sagüés, 2010, pp. 133 and ff.

¹⁰⁸ See for instance Piovesan, 2010, p. 441.

¹⁰⁹ See Salgado Pesantes, 2010, p. 471.

¹¹⁰ Separate opinion of *ad-boc* Judge de Figueiredo Caldas to *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219.

tutional court¹¹¹. Therefore it is necessary to understand that the declaration of laws without legal effect is part of a tendency (probably its epitome) leading to a transformation within the Inter-American system. We will study it in this section.

1.4.A. *The Conventionality Control Exercised by the Inter-American Court*

When talking about the conventionality control by the IACtHR, we are referring to the Court's supervision of national legislation in general, and not just to the declaration of ineffectiveness: the declaration of inconformity with the Convention of laws in abstract situations is also a manifestation of the conventionality control as exercised by the Court. We could say hence that the control is exercised with different intensity as regards its consequences. This is how Latin American scholars have understood and studied the concept¹¹² and we will adopt this view here, since it is coherent with the case law's evolutive perspective we have presented in previous sections.

In the previous sections, we have analysed the history and evolution of the conventionality control exercised by the Court through some of its judgements. Judges Nikken and Nieto Navia explained in their dissenting opinion to the Advisory Opinion OC-7/86 the need for this control and the procedure to carry it out in the context of the Court's advisory jurisdiction¹¹³. Some aspects of this conventionality control exercised by the Court have already been described and analysed in the previous sections, especially its results and consequences. We will only focus briefly on some other aspects now.

In the advisory jurisdiction, the competence of the Court to give its judgement on the compatibility of domestic laws with the Convention derives clearly from Article 64(2) of the American Convention, as the Court established in its Advisory Opinion OC-14/94¹¹⁴.

As regards the competence of the Court to carry out the conventionality control in contentious cases, Nogueira Alcalá understands that «states parties have conferred upon the IACtHR the competence to be

¹¹¹ Separate opinion of Judge García Ramírez in the case of *Tibi v. Ecuador*, Judgement of 7 September 2004, Series C No. 114, para. 3.

¹¹² See, for example, Hitters, 2009.

¹¹³ Dissenting opinion of Judges Nikken and Nieto Navia to Advisory Opinion OC-7/86 of 29 August 1986, *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*, Series A No. 7, paras. 2-5.

¹¹⁴ Advisory Opinion OC-14/94 of 9 December 1994, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Series A No. 14, para. 21.

the supreme interpreter of the Convention and to be the supreme judge on the conventionality of domestic acts concerning human rights¹¹⁵.» According to Salgado Pesantes, the competence to exercise the conventionality control derives from the competence of the Court to adjudicate on all those cases related to the application and interpretation of the Convention's norms¹¹⁶. The mission of the Court is to watch for states' compliance with the Convention: it is «the Convention's guardian¹¹⁷.». As we have seen in the previous section, Article 2 usually plays a crucial role in judgements on the compatibility of domestic legislation with the Convention. We will discuss the competence of the Court later, but this discussion will be restricted to the alleged competence of the Court to judge on the effectiveness of domestic laws. The competence to judge on the conformity of domestic law with the Convention does not seem problematic to us and therefore we accept these authors' arguments.

The standard against which the Court examines the conventionality of laws is, most of the times, the ACHR. However, the Court has extended it to other human rights-related treaties of the Inter-American system and even beyond. In *Palamara-Iribarne*, the Court refers to «the international standards regarding freedom of thought and expression» (OP 13). In *Radilla-Pacheco*, the Inter-American Convention on Forced Disappearance is used as standard for control (para. 324), and the Court refers as well to «the international standards in this subject» (OP 11).

As regards the limits the Court needs to respect in exercising this control, Judge García Ramírez gives some indications: «we could take as an example the mission of constitutionality courts [...]. The situation with the Inter-American Court is similar. The Court can only confront domestic rule laws, administrative acts, jurisdictional resolutions, without limitation to the provisions of the Convention and rule on their consistency in order to establish, if applicable, the State's international liability for failing to fulfil its obligations thereunder¹¹⁸.» The Court «does not develop a new stage-or instance-i.e. ordinary proceedings¹¹⁹.» Therefore, the control can be exercised over all kinds of domestic sources of law. But the Court has to be very careful not to become a fourth-instance court.

¹¹⁵ Nogueira Alcalá, 2006, p. 377 (my own translation).

¹¹⁶ Salgado Pesantes, 2010, p. 470.

¹¹⁷ *Ibidem*, p. 482.

¹¹⁸ García Ramírez's separate opinion in the case of *Vargas-Areco v. Paraguay*, Judgement of 26 September 2006, Series C No. 155, para 7. The consequences, as we have seen, may be different in different cases.

¹¹⁹ *Ibidem*.

1.4.B. *The Conventionality Control by National Authorities: The Diffuse Conventionality Control*

The theory of conventionality control has a second and more recent part which is useful to delve into and analyse here because it helps visualise the broader process of transformation of the Inter-American human rights jurisdiction. It also raises questions about the direct applicability of the Convention which will be addressed in the second chapter. It has been studied by various authors such as Hitters¹²⁰ or Sagüés¹²¹. *Ad-hoc* Judge Ferrer McGregor gives thorough and updated account of this second part of the conventionality control in his separate opinion to Cabrera García and Montiel Flores. He refers to it as «diffuse conventionality control¹²²» (the translation is my own), and this is the term we will use.

Before proceeding to a brief commentary on the conventionality control by national authorities, we wish to state that this is the control the IACtHR expects national authorities to conduct before a case reaches the Inter-American system (presumably to avoid recourse to international instances). The obligations the Court imposes on national authorities are not those subsequent to a concrete judgement of the IACtHR declaring the incompatibility with the Convention, or the ineffectiveness if it be the case, of a domestic piece of legislation. They are general obligations of national authorities.

According to the consulted authors, the IACtHR started to impose on national authorities the duty to carry out their own conventionality control in its judgement in the Almonacid-Arellano case. Briefly summarised, and following Ferrer McGregor, it consists of the obligation of national authorities to check whether the domestic legislation¹²³ they apply in a certain case is or not compatible with the American Convention and with the case law of the Court as the supreme interpreter thereof. According to some interpretations, the IACtHR adopts thereby the role of a *cour de cassation* whose jurisprudence will have a unifying effect throughout the continent¹²⁴. Should national authorities deem domestic legislation to be incompatible with the Convention, then they will act according to their competences and

¹²⁰ Hitters, 2009.

¹²¹ Sagüés, 2010.

¹²² See *Cabrera García y Montiel Flores v. Mexico*, Judgement of 26 November 2010, Series C. No. 220, p. 5 of the separate opinion.

¹²³ Comprising all norms, even constitutional provisions: Sagüés, 2010, p. 124.

¹²⁴ *Ibidem*, p. 126.

procedures in order to safeguard the *effet utile* of the conventional provisions and to avoid that domestic law undermines this effectiveness¹²⁵.

The doctrine of the diffuse conventionality control was originally addressed to all judicial authorities because the judiciary, as a part of the state, was also under the obligation to seek compliance with the state's international obligations. But later, in *Gomes Lund*¹²⁶, this obligation was extended to all state organs. National organs have to carry out the conventionality control of their own motion¹²⁷.

Some authors have identified a problem with respect to judicial authorities. The consequences attached to unconventionality are basically that domestic legislation has to be invalidated in some way. According to the Court, unconventional legislation lacks legal effects *ex tunc*¹²⁸. Therefore, national courts will have to consider that lack of legal effects retroactively¹²⁹ and disapply the norm, although they do not have to annul it necessarily: for the IACtHR it suffices that the law remains unapplied in the concrete case¹³⁰. To Binder this seems problematic in those states where the constitutionality control is concentrated in one single organ¹³¹. The constitutionality control is usually the only possibility for judges to disapply domestic legislation in force. In countries where this function is concentrated in one organ, the rest of the judges do not have the possibility to disapply laws. Introducing the duty of the conventionality control, which empowers judges and other organs to disapply laws on grounds of unconventionality, in fact causes a major constitutional problem. This is a question the Court itself has not resolved yet¹³².

The legal bases that the Court has invoked to underpin the diffuse conventionality control are the following¹³³:

– Articles 1.1 and 2 of the Convention. Article 2 facilitates the work of the judiciary, which will have a clear option in solving particular

¹²⁵ *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 176.

¹²⁶ *Ibidem*.

¹²⁷ *Ibidem*.

¹²⁸ *Ibidem*.

¹²⁹ Judge Ferrer McGregor's separate opinion to *Cabrera García y Montiel Flores v. Mexico*, Judgement of 26 November 2010, Series C. No. 220, para. 57.

¹³⁰ Sagüés, 2010, pp. 127-128.

¹³¹ Binder, 2010, pp. 173-174.

¹³² Judge Ferrer McGregor proposes a solution in *Cabrera García y Montiel Flores v. Mexico*, Judgement of 26 November 2010, Series C. No. 220, paras. 34-43 of his separate opinion.

¹³³ See *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, paras. 123-125, and *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, paras. 175-177.

cases. Article 1.1 binds courts to respect the rights and to refrain from enforcing laws contrary to the Convention.

– Article 27 of the Vienna Convention on the Law of Treaties (VCLT): domestic law cannot impair fulfilment of international obligations.

– Principles of good faith in complying with international obligations and *effet utile*: national judges have to make sure that national legislation does not impair the effectiveness of the Convention.

As to the competence of national organs to carry out this control (according to their powers), Sagüés, citing García Ramírez¹³⁴, affirms that they exercise it directly, without need for an express constitutional authorisation to compare domestic law with Inter-American law.

1.4.C. How Are These Two Types of Control Reconciled?

The fact that the Court imposes on national judiciaries the obligation to exercise the diffuse conventionality control, but then also exercises this control by itself, with the most far-reaching consequences, could awake some sense of contradiction. On the one hand, the Court leaves it to the states to set aside their laws incompatible with the Convention. But on the other hand, it seems to assume its own capacity to do this work instead of the states. As a constitutional system, this is an unusual construction, because it seems to be at the time a concentrated and a diffuse system. National courts, subordinated to the IACtHR, have the power to set aside or annul completely national legislation contrary to the Convention, as in a fully-fledged diffuse-control system. However, the IACtHR also has this capacity besides the prerogative of the binding interpretation of the Convention, as in a concentrated system. Can these two types of control be reconciled?

In *Gomes Lund* the Court seems to suggest an idea of subsidiarity when it affirms that the Brazilian authorities had not exercised the diffuse control¹³⁵. However:

– A principle of subsidiarity is not explicitly formulated in the judgement.

– In *Gelman*, decided only three months later, the IACtHR did not examine whether, in the particular case, the conventionality control had been exercised or not. Moreover, the Court noted that, in a different

¹³⁴ Sagüés, 2010, p. 123.

¹³⁵ *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 177.

case, the Uruguayan Supreme Court had exercised it correctly, although only with *inter partes* effects¹³⁶.

– In *Barrios Altos*, the Court would have exercised the conventionality control by itself without analysing whether this had been exercised or not by the national authorities (although obviously it had not), because the theory of the diffuse conventionality control did not exist yet.

– The Court had been exercising its control before creating the theory of the conventionality control by domestic authorities, as Hitters suggests, so subsidiarity never seemed to be a requirement. Until *Barrios Altos*, it had not gone further than finding inconformity of national law with the Convention and ordering the state to change it, so it had not exercised the control with the same intensity. However, in those cases there was no question of subsidiarity either.

The separate opinion of Ferrer McGregor to Cabrera García also seems to suggest the idea of subsidiarity when he says that the conventionality control conducted by national judges will be reviewed by the IACtHR¹³⁷. *Cabrera García* is the first case in which the conventionality control had been exercised by the national authorities, but apparently to no success. It appears that the IACtHR exercises its part of the conventionality control whether national authorities have exercised it or not, without contemplating the possibility to return the case when the control has not been exercised at the national level. As long as the requirement of subsidiarity is not clearly confirmed, a possible contradiction between entrusting national judges with the conventionality control and the practice of the Court to declare the lack of legal effect of domestic legislation will subsist.

The fact that the IACtHR can exercise this control in abstract situations gives rise to some doubts as well. If the norm in question was not applied in the case before the domestic judges, these did not have the chance to exercise the diffuse conventionality control. If afterwards the IACtHR exercises it in abstract, it is not respecting the subsidiarity rule. However, in such a case, the Court would not act on the effectiveness of the concerned domestic legislation.

Important is, nevertheless, to notice how the system is evolving and adopting the features of a fully-fledged system of judicial review in which the IACtHR and national courts seem to be parts of the same structure.

¹³⁶ *Gelman v. Uruguay*, Judgement of 24 February 2011, Series C No. 221, paras. 193 and 239.

¹³⁷ See *Cabrera García y Montiel Flores v. Mexico*, Judgement of 26 November 2010, Series C. No. 220, para. 8.

1.5. CONCLUSIONS

In this first chapter we have established that the declaration of ineffectiveness of national laws is a technique of the Court to enhance its influence on the states' legal orders. As the Court tries to bypass, as far as possible, the states' necessary intervention to adapt their law to the Convention, we can say that this case law blurs the boundary between national and international law. We have also established that there is potential for the continued application and expansion of this case law. Finally, we have given account of the broader process of transformation of the Inter-American system within which the declaration of ineffectiveness happens. According to our research plan, now it is time to analyse whether these developments are possible within the Court's competence and within general international law.

CHAPTER 2

ANALYSING THE TRANSFORMATION

2.1. INTRODUCTION

We have examined the most far-reaching steps that the Inter-American Court of Human Rights has taken in its history with respect to the fulfilment of the commitments made by the states parties to the Convention¹³⁸. What we can notice about the declaration of ineffectiveness of domestic legislation and the diffuse conventionality control is that, after an examination of the ACHR, the Statute of the Court¹³⁹ and its Rules of Procedure¹⁴⁰, they do not find any explicit or direct basis in these texts. Some authors have noted this¹⁴¹. Advisory Opinions OC-14/94 and OC-7/86 seem to oppose these developments. We can presume, therefore, that they are the product of interpretation.

In this chapter we will focus first on the activity of the Court. We will scrutinise the interpretative methods it has used to arrive at the declaration of ineffectiveness and to construct the diffuse conventionality control, in order to determine whether the Court has merely interpreted the Convention, or whether it has created law and exceeded its powers. After that, we will turn to some international law theories with a view to establishing whether they can justify the Court's findings. Finally, before concluding, we will try to elucidate the Court's reasons to adopt these doctrines.

The analysis we will conduct will be legal. We will limit it to the Court's discourse and delve only into those arguments the Court expressly or implicitly gives in our five judgements. When required, we will rely on reasonable assumptions, but we will avoid making suppos-

¹³⁸ Article 33 ACHR.

¹³⁹ Statute of the IACtHR, adopted in October 1979.

¹⁴⁰ Rules of Procedure of the IACtHR, as approved in November 2009.

¹⁴¹ See Binder, 2010, p. 173.

itions about what the judges' reasoning might have been. Only when exploring the international law theories will we detach our argumentation from the five cases. In this connection, we must justify now why the possible *ius cogens* argument will not be discussed. The IACtHR considers that the obligation to investigate human rights violations has *ius cogens* nature¹⁴². However, this does not seem to play any prominent role in the Court's reasoning towards the declaration of ineffectiveness, which the Court bases on the incompatibility of amnesties with the Convention. The Court does not mention a clash of amnesties with *ius cogens* as a reason to declare the lack of legal effects. It does not even say, to that purpose, that the Convention norms reflect such *ius cogens*. Therefore, we will not presume such reasoning. We believe, furthermore, that the relevant reasons are others.

2.2. THE DECLARATION OF INEFFECTIVENESS

Our analysis of the Court's interpretation leading to the declaration of ineffectiveness rests on the following propositions, derived from the conclusions from Chapter 1: the Court's declaration of ineffectiveness of amnesty laws derives, in our opinion, from an understanding of the ACHR according to which:

- The Convention produces the *ipso facto* effect of rendering incompatible domestic legislation ineffective in the domestic sphere and with general effects¹⁴³, irrespective of its rank within the different national legal orders.

- The Court has the power to declare that a certain piece of domestic legislation is automatically ineffective in the domestic sphere because of its incompatibility with the Convention.

2.2.A. *What Is the Court Interpreting?*

In order to analyse the interpretative activity of the Court, it is necessary to determine in the first place the object of that interpretation. This has proved challenging, as no consensus was to be found among scholars and various possibilities were thinkable. The Court

¹⁴²See, for example, *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 137.

¹⁴³This is clarified by the Court's interpretation judgement in the *Barrios Altos* case. We should remember the characterisation of such ineffectiveness made in Chapter 1, which still calls for the intervention of the states.

interprets several articles of the Convention in the judgements we are examining. In this section we will identify the one we believe serves the Court as basis for its pronouncements on the ineffectiveness of the amnesty laws.

The Court interprets in the first place Articles 8(1) and 25 ACHR, which respectively enshrine the rights to a fair trial and to judicial protection. These articles serve as basis to establish the inconformity of the amnesty laws with the substantive rights protected by the Convention. However, the inconformity with these articles is not, *per se*, what leads the Court to conclude that the amnesty laws lack legal effects. Rather, the contrariness of amnesty laws to these articles is the cause of a violation of the states' general obligations under Articles 1(1) and 2. In addition, when examining the Court's argumentation, we do not find the declaration of ineffectiveness of the amnesty laws as the corollary to the considerations on Articles 8(1) and 25. Thus, in spite of being the very material core of the question, we will not be examining the interpretation the Court makes of Articles 8(1) and 25, as we believe it is not by itself determinative.

The violation of Articles 8(1) and 25 by the amnesty laws leads the Court to conclude immediately related violations of Articles 1(1) and 2¹⁴⁴. Through Article 1(1) the states parties «undertake to respect the rights and freedoms recognised herein (in the Convention) and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination [...]» Article 2, as a specification to Article 1(1), establishes that «where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.» As García Ramírez points out¹⁴⁵, after the violation of a right, a breach of Article 1(1) ensues: if a right is violated, the state has failed to fulfil its general obligation to respect. In our cases, violating the rights of the victims' next of kin to a fair trial and to judicial protection derives from the state's failure to conduct adequate investigations of the facts capable of bringing the perpetrators to justice, as Article 1(1) requires in the Court's jurisprudence. We are studying the

¹⁴⁴ See *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75, paras. 39 and 42; *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 129; *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 172.

¹⁴⁵ García Ramírez, 2010, pp. 367-368.

IACtHR's power to directly impact on the states parties' legislation. Hence, Article 2 seems to be better suited for this, because it specifically refers to legislative duties of the states.

In *Barrios Altos*, the conclusion that the amnesty laws lack legal effects is arrived at as a consequence of their incompatibility with Articles 8(1), 25, 1(1) and 2. However, in *Almonacid-Arellano* this conclusion comes when examining specifically Article 2¹⁴⁶. In *Gomes Lund*, the reading of paragraphs 173 and 174 also suggests stronger reliance of the declaration of ineffectiveness of the amnesty law on Article 2. It must be noted that the Court's argumentation in the last two cases is more thorough and traceable than in the first.

For these reasons, we contend that Article 2 is the provision that the Court interprets when it declares the lack of effectiveness of the amnesty laws, although, as said, the inconformity of such laws with the Convention is the departure point of that declaration, and this refers also to Articles 8(1), 25 and 1(1).

Finally, Article 63(1) competes with Article 2 as the basis of the Court's interpretation to declare the amnesty laws without legal effects. It endows the Court with the competence to provide remedies in the following terms:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

The Court has interpreted this provision as including many different kinds of reparation measures, including «the positive measures a state must undertake to guarantee that injurious acts like the ones of the instant case do not occur again¹⁴⁷.»

The discussion on Article 63(1) as a possible basis for the declaration of ineffectiveness arises from the fact that many authors have considered it to be the basis for the Court's orders of legislative reform. This is the case of *Antkowiak*¹⁴⁸, *Jo Pasqualucci*¹⁴⁹ or *Dinah Shelton*¹⁵⁰.

¹⁴⁶ *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 119.

¹⁴⁷ *Ibidem*, para. 136.

¹⁴⁸ *Antkowiak*, 2008, pp. 382-384.

¹⁴⁹ *Pasqualucci*, 2003, pp. 245-248.

¹⁵⁰ *Shelton*, 2005 (a), p. 218.

In the light of several of the judgements in which the Court has ordered legislative reform, we agree with this position. In cases such as *Loayza-Tamayo*, *Castillo Petruzzi*, *Olmedo-Bustos*, *Hilaire*, *Constantie and Benjamin*, *Bulacio*, *Palamara-Iribarne* or *Radilla-Pacheco*, the Court found the inconformity of the laws at issue with the Convention and, in some cases, an infringement of Article 2, while examining the merits, but the order to amend national legislation was only given under the judgement's section on reparations, on the basis of Article 63(1).

We must note however that in the cases we are examining, after declaring the ineffectiveness of amnesty laws, the Court does not give the respondent states any order to amend their domestic legislation. We have established in the first part that the Court expects states to do something leading to the non-application of the laws and that it monitors compliance with the judgements, but it does not order states to amend their legislation as it does on other occasions¹⁵¹. The declaration of ineffectiveness is made while examining the merits of the case and specifically Article 2. This suggests a different understanding of this pronouncement's nature. While the order to amend legislation is conceived of as a reparation measure, the declaration of ineffectiveness appears to be linked to the state's primary obligations under Article 2. It is not related to the states' obligation to correct their wrongs, but to their primary duties under the Convention¹⁵². The Court has made this distinction explicit:

The obligation to guarantee and ensure effective exercise is independent of and different from the obligation to make reparation. The difference lies in the following: the reparation provided for in Article 63(1) is an attempt to erase the consequences that the unlawful act may have had for the affected person, his family or close friends. Since the measure is intended to make reparations for a personal situation, the affected party has the right to waive that right¹⁵³.

In our four cases, the declaration of ineffectiveness appears merely reiterated in the chapters on reparations, without further elaboration. It stands as a characteristic of the investigations that the respondent states are directed to conduct, or a condition under which such investigations have to be carried out: states may not apply the amnesty laws in those

¹⁵¹ See the operative paragraphs of *Barrios Altos* (merits), *Almonacid-Arellano*, *Gómez Lund and Gelman*.

¹⁵² According to H el ene Tigroudja, «it is evident that for the Court, they [the measures concerning legislation] constitute primary obligations and not new consequences arising from a wrong» (my own translation). Tigroudja, 2006, p. 640.

¹⁵³ *Garrido and Baigorria v. Argentina*, Judgement on reparations of 27 August 1998, Series C No. 39, para. 72.

investigations¹⁵⁴. Hence it does not seem to find an autonomous legal basis in Article 63(1). Conceptualising the declaration of ineffectiveness as a guarantee of non-repetition does not bring it under Article 63(1) either, if we examine the Court's practice: only in *Gomes Lund* and *Gelman* do we find a sub-section on guarantees of non-repetition, and the lack of legal effects of the amnesty law is not mentioned thereunder.

Yet, the distinction we have just made of orders to amend legislation as reparation measures and the declaration of ineffectiveness as part of a primary obligation is controversial. With respect to the first, *Laplane* has affirmed that orders to annul legislation owing to its incompatibility with the Convention are given under Article 63(1), but they merely reinforce Article 2¹⁵⁵. Judith Schönsteiner opines that non-repetition guarantees, which «frequently take the form of legislative measures,» stem exclusively from Article 2, but they can also be part of the reparations regime as a single order «may fulfil several purposes and [...] cannot clearly be subsumed under one category of measures¹⁵⁶.» *Tigroudja* contends similarly that satisfaction and guarantees of non-repetition (among them legislative reform) derive from Article 63(1), but predominantly from Articles 1 and 2¹⁵⁷ and Cassel is also more inclined to relate these orders to Article 2 than to Article 63(1)¹⁵⁸. *Vanneste* argues that it is probably better to consider orders to amend legislation as obligations of the state «standing next to the obligation to repair the victim¹⁵⁹.» As to the second, while *Binder* does not seem to link the declaration of ineffectiveness to reparations at all¹⁶⁰, *Pasqualucci* squarely classifies it as a reparation measure¹⁶¹. In the judgement on reparations of *Barrios Altos*, the state commits to abiding to the decision of the Court as a reparations measure¹⁶². However, we believe that those authors placing the orders to amend legislation under Article 2 serve as underpinning for our stance that declarations of ineffectiveness derive from that article: if both have the same nature (contrary to what the Court seems to indicate), then under Article 2, not under

¹⁵⁴ See *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 145; *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162, para. 226; *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 256 b); *Gelman v. Uruguay*, Judgement of 24 February 2011, Series C No. 221, para. 253.

¹⁵⁵ *Laplane*, 2004, p. 359.

¹⁵⁶ Schönsteiner, 2007-2008, pp. 147-148.

¹⁵⁷ *Tigroudja*, 2010, pp. 5-9.

¹⁵⁸ Cassel, 2010, p. 235.

¹⁵⁹ *Vanneste*, 2010, p. 523.

¹⁶⁰ *Binder*, 2010, pp. 164-176.

¹⁶¹ *Pasqualucci*, 2003, pp. 245-248.

¹⁶² *Barrios Altos v. Peru*, Judgement on reparations and costs of 30 November 2001, Series C No. 87, para. 44.

Article 63(1). Declaring the ineffectiveness of laws is also a modification of the states' legal order which would, by the same token, find its foundations in Article 2. Despite the fact that some authors catalogue it among the reparations measures, we are more convinced of its link to Article 2 for the reasons given. We admit nevertheless that Schönsteiner's view that measures can have a hybrid character is a realistic and accurate one¹⁶³.

Cassel¹⁶⁴ asserts that, although not explicitly, the Court applies the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁶⁵. These Principles include cessation in the notion of reparations, through the concept of satisfaction¹⁶⁶. It could be argued that the declaration of ineffectiveness is a form of cessation and that therefore it falls under reparations, with the result that the relevant interpretation is that of Article 63(1) of the Convention. We would oppose to this argument that the Court never refers to the term «cessation» in its judgements (although in fact the respondent states have to «cease» to apply their amnesty laws). If the Court draws inspiration from the Basic Principles, we can reasonably infer that it would have used this term if it had wished to frame the declaration of ineffectiveness within the reparation measures. Moreover, Shelton¹⁶⁷ contends that reparations do not constitute an adequate theoretical framework to analyse measures of cessation, so even if we took the declaration of ineffectiveness to be a cessation measure, we would have good reasons to analyse it from the point of view of Article 2, and not of Article 63(1).

In conclusion, the practice of the Court leads us to conclude that the declaration of ineffectiveness is not conceptualised as a reparation measure under Article 63(1)¹⁶⁸. Although in itself it serves a guarantee

¹⁶³ Cançado Trindade also supported this idea in his separate opinion to the reparations judgement in the case of Cantoral-Benavides: «There is an indissociability [*sic*] between the general duties of Articles 1(1) and 2 of the American Convention and the duty of reparation set forth in Article 63.1 of this latter» (para. 6).

¹⁶⁴ Cassel, 2010, p. 219.

¹⁶⁵ A/Res/60/147 of 21 March 2006.

¹⁶⁶ Vanneste, 2010, p. 509.

¹⁶⁷ Shelton, 2005 (b), pp. 11-22, as cited in Vanneste, 2010, p. 509.

¹⁶⁸ This does not mean that issuing, maintaining and applying amnesty laws is not, in the Court's view, an internationally wrongful act. It is one, as we have seen above, and it produces consequences that impose on the state the obligation to make reparations. However, the wrong consisting of the enactment and application of amnesty laws principally produces consequences that impose on states the obligation to act on the wrongful act itself, besides acting on the situation created by the international wrong (for this distinction, see Combacau & Alland, 2002).

of non-repetition, in the sense that it is aimed at preventing the future application of the amnesty laws, it is conceived of as part of the states' primary obligations. Therefore, the article from which the Court derives the ineffectiveness of the amnesty laws and its powers to declare it is Article 2. In addition, understanding this measure as an obligation standing next to that of providing reparations is methodologically more correct, as some of the cited authors suggest *a fortiori*.

2.2.B. *The Interpretation of Article 2*

a. Introduction

After having established the object of the Court's interpretation, we will analyse how this interpretation is developed. We will not be calling into question the existence of a breach of Article 2. We agree with the Court's conclusions that the amnesty laws were at the origin of violations of the rights to a fair trial and to judicial protection and that, hence, they constituted a breach of the states' obligation to adapt their domestic legislation to the ACHR's requirements. Article 2, as the Court has stated, prohibits the adoption of measures contrary to the Convention's rights¹⁶⁹. It is the consequence for the domestic legislation what we are studying.

According to our initial propositions, the questions that will guide our examination of the Court's interpretation of Article 2 are:

- Is it possible to derive, from the states' obligation to adapt their legal order, the ineffectiveness of internal legislation in the domestic sphere as a consequence of its incompatibility with the Convention?

- Is it possible to derive from the obligation of states to adapt their legal order the power of the Court to declare the ineffectiveness of internal legislation in the domestic sphere as a consequence of its incompatibility with the Convention?

By answering these questions, we will be able to determine whether the Court is just interpreting or is creating law, and ultimately whether it is overstressing its powers.

We need to state two caveats here. The first is that examining the Court's interpretation of Article 2 in our five judgements has been a difficult task, for the Court does not make its interpretative process explicit. It does not refer clearly to the interpretative methods applied. The Court does not openly acknowledge a situation in which it needs

¹⁶⁹ Advisory Opinion OC-14/94 of 9 December 1994, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Series A No. 14, para. 33.

to interpret. At first sight, it is as if the conclusions the Court draws from Article 2 followed immediately from the very text. For this reason, it has been necessary to resort to the theoretical foundations of interpretation and to studies on the interpretation of human rights treaties. Vanneste's work has been particularly useful in this respect, as he gives an account of the interpretative methods that the European and the Inter-American Court usually apply¹⁷⁰. His work served as a guide when establishing what indications we should be searching for in the judgements. Although Vanneste acknowledges some particularities in the interpretation of human rights treaties, he also states that, as the American Convention «does not clarify the distinction between creation and recognition» of rights, the IACtHR should respect the interpretative framework designed by the Vienna Convention on the Law of Treaties. He claims that the interpretation of human rights treaties has proved to be «less "specific" than often assumed¹⁷¹.». In this respect he coincides with Addo, who affirms that the American Convention does not contain prescriptions on how it should be interpreted and that the Court is «at pains» to follow the standards of the Vienna Convention¹⁷². For these reasons, the scheme that has guided our research also relies ultimately on the Vienna Convention.

The second caveat is that we have identified the interpretation methods globally in the five judgements. Some of them are used in some of the cases, and some of them in others. In no judgement do we find all of them together. However, we have chosen to examine them as an ensemble in order to obtain a complete picture of the interpretative process. Nevertheless we are aware that the employment of different methods in the different cases can produce disparities and reveal an evolution. We will indicate, for each method of interpretation identified, the judgements in which it was localised.

b. The Previous Interpretation of Article 2

An analysis of the text of Article 2 is not to be found in any of the five judgements. The Court does not try to establish what the ordinary meaning of the words employed in it would lead to, as the Court apparently does not believe to be before an interpretative dilemma. What the Court does refer to is the interpretation it has made previously of Article 2, which we can consider as the meaning that the Court has given to the words of this article. In *La Cantuta* (para. 172), the Court admits

¹⁷⁰ Vanneste, 2010, Part II, Chapter IV.

¹⁷¹ *Ibidem*, p. 214.

¹⁷² Addo, 2010, pp. 420-421.

that Article 2 does not specify what measures are appropriate to adjust domestic law to the Convention and that for that reason, on previous occasions, the Court has considered that it imposes the passing of laws contributing to achieve the effective observance of the Convention's guarantees, and the elimination of laws and practices that may imply the violation of the Convention rights. This second duty is satisfied by modifying, repealing, or otherwise annulling or amending such rules. This had been recalled in *Almonacid-Arellano* (para. 119). To this we could add that in Advisory Opinion OC-14/94 the Court had established that the promulgation of a law that violated a state's obligations under the Convention constituted a violation of the treaty. Therefore, Article 2 is interpreted also as prohibiting legislation contrary to the Convention¹⁷³.

We should not re-interpret the interpretation, but we can state that in this account the Court gives of the content of Article 2, we cannot envisage that this article would render domestic legislation ineffective in the domestic system, or that the Court would have the power to make such declaration with binding authority. The described interpretation of Article 2, on which the Court relies in two of the judgements, does not seem to provide sufficient basis to derive an «invalidating» effect of Article 2 or a power of the Court. The language of Article 2, and the interpretation the Court has offered of it (or at least the interpretation the Court has deemed relevant for our cases), refer to the states' obligations, but not to the Court's powers¹⁷⁴. Nor does the article contain words that suggest that the breach of the Convention may have automatic consequences for the states' internal legal order, although it does, as the Court has understood, suggest international responsibility in the event of a breach. Thus it does not lead to the results we have identified. It is opportune to recall that in interpretation theory, the text is considered to set the limits of interpretation¹⁷⁵.

c. *Object and Purpose*

The purpose is the aim or goals that the interpreted text seeks to further. Barak defines the purpose as the «*ratio juris* [...] the values, goals, interests, policies and aims the text is designed to actualize¹⁷⁶.»

¹⁷³ Advisory Opinion OC-14/94 of 9 December 1994, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Series A No. 14, para. 33.

¹⁷⁴ In this respect it is useful to remember Judge García Ramírez's opinion in the case of *Vargas-Areco v. Paraguay*, Judgement of 26 September 2006, Series C No. 155.

¹⁷⁵ See Barak, 2005, pp. 18, 22 and 92. For the interpretation of international human rights law, see Vanneste, 2010, p. 293.

¹⁷⁶ Barak, 2005, p. 89.

He identifies two foundations for the purpose of a legal text: the «authorial intent,» and the «objective purpose.» The latter is described as the hypothetical purpose of the reasonable author or, at a higher level of abstraction, the purpose typical for the kind of text being interpreted, or the purpose derived from the values of the system in which the text exists¹⁷⁷.

There is very little indication in our five judgements of the use of this method, so the assessment we can make is just approximate. We can say nevertheless quite confidently that the Court does not rely on authorial intent. In no moment does the Court appear to concern itself with the intentions of the drafters of the Convention. This is in itself a reason to criticise the Court's methodology, as the American Convention is an international treaty and the contracting states did have certain intentions when concluding it that may reflect on the treaty itself. But coming back to our point, we conclude that, if object and purpose are present, then in their objective form: what is the aim the Convention pursues? As said, there is little explicit indication that the Court considers this question when interpreting Article 2. In paragraph 43 of the Barrios Altos judgement, the Court says that amnesty laws are manifestly incompatible with the «aims and spirit» of the Convention. In Almonacid-Arellano (para. 119) the Court affirms that amnesty laws are overtly incompatible with the «wording and spirit» of the Convention. The Court does not explain what the «spirit» of the Convention is.

In its Advisory Opinion OC-2/82, the Court stated that the object and purpose of the Convention was «the protection of the basic rights of individual human beings irrespective of their nationality¹⁷⁸.» If we look at some relevant provisions of the ACHR revelatory of object and purpose, we can approximate them:

- The second recital of its Preamble refers to the international protection of the essential rights of man «in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.» To this we could add the subsidiarity principle in Article 46.

- Article 1(1) also reveals object and purpose when it refers to ensuring to all persons the free and full exercise of the Convention rights and freedoms.

Vanneste proposes that the object and purpose of the American

¹⁷⁷ *Ibidem*, pp. 150-153.

¹⁷⁸ Advisory Opinion OC-2/82 of 24 September 1982, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Series A No. 2, para. 27.

Convention is to transfer part of the states' sovereign powers to ensure that civil and political rights remain protected at the domestic level. The contracting states would thereby transfer part of their judicial powers to the IACtHR «in all matters concerning the interpretation and application» of the treaty, given that many of its provisions are open-ended. According to him, the states parties would also be delegating to the IACtHR their rule-making capacities with respect to the clarification of the Convention standards¹⁷⁹.

Even accepting Vanneste's proposal, it does not seem that the purpose to «complement» and «reinforce» the protection of human rights afforded by domestic legal systems is capable of justifying an interpretation that allows for direct interference with those national systems to the point of automatically rendering unconventional laws ineffective. In our opinion, Vanneste refers to the fact that states will not be free to interpret the Convention rights as they will, and that they agree that the binding interpretation of those open-ended rules will be made by an international court. This does not mean that the object of the Convention is the transfer of the mechanisms of judicial review of laws to an international instance.

Moreover, it is necessary to take into account what the reach of object and purpose in interpretation is. According to Gardiner¹⁸⁰, object and purpose are in the Vienna system «a means for shedding light on the ordinary meaning rather than an indicator of a general approach to treaty interpretation.» He also affirms that object and purpose may not override text, and cites the International Court of Justice (ICJ), which has held that a treaty's object and purpose is not an «independent source of meaning» that can contradict a text¹⁸¹. Therefore we conclude that the object and purpose of the Convention are not capable of justifying the Court's conclusions regarding Article 2. This conclusion may be owed to the vague reference that the Court seems to make to this method and its failure to explain its application to Article 2. However, object and purpose serve to introduce an additional criterion that deserves attention: the principle of effectiveness.

d. The Principle of Effectiveness

According to Addo, the principle of effectiveness has been a fundamental tenet of the Court's case law «as a key to making the

¹⁷⁹ Vanneste, 2010, pp. 257-258.

¹⁸⁰ Gardiner, 2008, p. 190.

¹⁸¹ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgement of 11 September 1992, as cited by Gardiner, 2008, p. 198.

Convention guarantees tangible and worthwhile¹⁸².» In our cases, the Court refers to the principle of *effet utile* in La Cantuta (para. 171), Almonacid-Arellano (para. 124), Gomes Lund (para. 176), and Gelman (para. 193). In the first case, the Court states that the measures that states adopt in their domestic order according to Article 2 must be effective, so as to ensure the Convention rights properly in the domestic sphere. In the others, the Court warns that the provisions embodied in the Convention shall not be adversely affected by the enforcement of laws contrary to its purpose. The principle of effectiveness means that both the Convention rights and the states' obligation to adapt their domestic legislation need to be allowed to deploy their effects fully. The principle of effectiveness is applied here to a provision that enshrines the states' obligation to adapt their legal order to the Convention. Thus the first question to ask is whether this obligation would be «theoretical or illusory» if Article 2 could not render by itself ineffective in the domestic order those pieces of legislation contrary to the Convention, and if the Court did not have the power to declare this. The facts that the Court's judgements are binding and obligatory for the states subject to its jurisdiction and that the Court can monitor compliance with them without closing the case until it is satisfied that full compliance has been given to its orders seem to suggest the contrary¹⁸³.

Orakhelashvili, an international law scholar, clarifies the meaning and scope of the principle of effectiveness. He explains that it is a vital principle for ensuring treaty obligations and for realising a treaty's object and purpose, and that it is part of the rules of interpretation laid down in the Vienna Convention. However, he warns: while effectiveness requires ensuring certain purposes, this should not go beyond the plain meaning of the treaty provisions¹⁸⁴. Effectiveness is not an independent principle: it relates to the object and purpose of the treaty and to its text. Effectiveness relates to the agreements between the parties, but not to hypothetical additional elements that would make it more effective¹⁸⁵. Hence, we add, if text, object and purpose cannot justify a certain interpretation, the principle of effectiveness does not make it possible either. Orakhelashvili also notes that the principle of effectiveness «cannot justify inroads into state sovereignty that do not relate to that object¹⁸⁶» (the object of the treaty). If we apply this briefly

¹⁸² Addo, 2010, p. 421.

¹⁸³ See *Baena-Ricardo v. Panama*, Judgement on competence of 28 November 2003, Series C No. 104, para. 72.

¹⁸⁴ Orakhelashvili, 2008, p. 407.

¹⁸⁵ *Ibidem*, p. 397.

¹⁸⁶ *Ibidem*, p. 394.

presented theory to our cases, we quickly identify those «inroads into state sovereignty» and domestic legal orders. However, we have seen how they are not necessarily related to the Convention's object. The interpretation we contend the Court makes of Article 2 would in fact be an excellent device for the uniform protection of human rights in the American states, but we have rejected the idea that an instrument meant to be complementary and subsidiary objectively contemplates that option.

Turning to the interpretation of human rights treaties, Vanneste also dismisses the possibility that merely referring to the principle of effectiveness is enough to deviate from general international law¹⁸⁷. Even if this principle has to be used to «unmask» mechanisms that would thwart the protection of human rights¹⁸⁸, it cannot be used to «circumvent the division of powers between international courts and states¹⁸⁹». By establishing the inadmissibility of amnesties under the ACHR, the Court has «unmasked» a device whereby states had eluded some of their obligations. But the division of powers between the states and the Court does not seem to indicate that the Court would be able to declare the ineffectiveness, in the internal order, of states parties' domestic legislation, even if we accept Vanneste's point on the relinquishment of a certain portion of state's sovereignty to the Court, or the Court's authority to give the binding interpretation of the Convention and «to be the supreme judge on the conventionality of domestic acts¹⁹⁰».

Judge García Ramírez makes a concrete application of the principle of effectiveness in his separate opinion in the case of *La Cantuta*, where he says: «There would be no point in holding that the law is “in conflict with the Convention” in a specific case, just to leave the source of the violation standing for future cases. Far from providing a guarantee of non-repetition [...] this would leave the door open to a repeat violation¹⁹¹». This is perfectly logical and true. But is it enough to justify the interpretation of Article 2 that we are examining? The rationale expressed by Judge García Ramírez requires the disappearance of the amnesty laws as a result, but it does not require the concrete means of recognising Article 2 invalidating force and giving the Court the power to declare the ineffectiveness of domestic legislation in the internal order.

¹⁸⁷ Vanneste, 2010, p. 316.

¹⁸⁸ *Ibidem*, p. 314.

¹⁸⁹ *Ibidem*, p. 343.

¹⁹⁰ Nogueira Alcalá, 2006, p. 377 (my own translation).

¹⁹¹ Separate opinion of Judge García Ramírez to *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C No. 162, para. 7.

From the division of powers made by the Convention we cannot derive a power of the Court to interfere directly and by itself with the states' domestic order. What the Court can do is order states to amend their legislation by means of an obligatory judgement and monitor compliance as it usually does (and has not yet tried with amnesties, as we saw in Chapter 1). These elements preclude the principle of effectiveness from allowing, by itself, an interpretation of Article 2 such as the one Court seems to have made, as it would go beyond text, object and purpose.

In sum, the principle of effectiveness cannot justify an interpretation according to which Article 2 of the Convention can render domestic legislation ineffective in the internal order and the Court has the power to declare this. Neither the protection of the Convention rights, nor the obligations of the states under the Convention, are «theoretical or illusory» without this interpretation. Moreover, the text and the object and purpose of the Convention and the division of powers between the states parties and the IACtHR (reflected on the complementary character and the subsidiarity referred to before) do not authorise this, even where, admittedly, it would provide a higher level of protection for the Convention rights.

e. Evolutive Interpretation

An evolutive interpretation of Article 2 is even less apparent from the judgements than the three previous methods we have analysed. However, in the first chapter we situated this case law on amnesties on a *continuum* with other previous and later cases and we described it as another step, the last so far, in an evolutive line. Hence it is justified to try an analysis of this method as well, especially one related to an international consensus or trend the Court identifies¹⁹².

Evolutive or «dynamic» interpretation is very characteristic of human rights courts¹⁹³. It consists in interpreting human rights treaties in the light of present conditions, without being bound by the original context or conceptions under which the treaty was initially concluded¹⁹⁴. The IACtHR is well acquainted to evolutive interpretation and has made use of it. In the case of the «Mapiripán Massacre,» the Court stated that

human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. In this regard,

¹⁹² *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 159.

¹⁹³ Nowak, 2003, p. 66.

¹⁹⁴ Vanneste, 2010, p. 245.

when interpreting the Convention it is always necessary to choose the alternative that is most favourable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favourable to the human being¹⁹⁵.

In this paragraph evolutive interpretation and *effet utile* appear mixed, but the core concept of evolutive interpretation is sufficiently expressed. Both concepts are nevertheless related, because human rights treaties need to remain effective through the times and not be impaired by social evolutions¹⁹⁶. Vanneste argues that evolutive interpretation can give rise to the recognition or the creation of new treaty obligations, which would shift the distribution of functions between international legislators and international courts, and admits the consequentially controversial character of evolutive interpretation¹⁹⁷. Therefore, we are before a method of interpretation that has the potentiality to operate significant changes in international human rights treaties. In an evolutive interpretation, all elements, text, context and consensus, «should bend in the same direction» in order to conclude an evolution in an international treaty¹⁹⁸.

i. Text and Context

There is one precedent of evolutive interpretation in the Inter-American system that can be especially illustrative for our purposes. Advisory Opinion OC-10/89¹⁹⁹ resolved the question whether the Court is entitled to interpret the American Declaration on the Rights and Duties of Man under Article 64 ACHR. In answering Colombia's query, the Court passed on the legal status of the Declaration²⁰⁰. This Opinion is thus relevant because we are delving into the legal status of the Convention when we try to find out whether it can render by itself domestic legislation ineffective. For this reason, this Advisory Opinion can help us identify the kind of text and context that would allow for an evolutive interpretation of the Convention in our cases.

The Court took the view that the status of the American Declaration had to be assessed within the current Inter-American framework, which had undergone an evolution since the Declaration was adopted in

¹⁹⁵ «*Mapiripán Massacre*» v. Colombia, Judgement of 15 September 2005, Series C No. 134, para. 106.

¹⁹⁶ Vanneste, 2010, p. 244.

¹⁹⁷ *Ibidem*, p. 247.

¹⁹⁸ *Ibidem*, p. 262.

¹⁹⁹ Advisory Opinion OC-10/89 of 14 July 1989, *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Series A No. 10.

²⁰⁰ *Ibidem*, para. 25.

1948²⁰¹. The Court quoted two *Consideranda* of the Declaration as evidence of its evolutionary possibilities²⁰². The Third Considerandum states that «[t]he international protection of the rights of man should be the principal guide of an evolving American law,» and the Fourth Considerandum adds that «the initial system of protection [was] considered by the American states as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favourable.» Quite clearly, evolution was incorporated in the text and in the object and purpose of the Declaration, which seemed bound to undergo reinforcing shifts in its legal status. Moreover, the Court had evidence of the states' opinion that the status of the Declaration had changed by 1989: the Advisory Opinion refers to Resolutions of the General Assembly of the Organisation of American States (OAS) recognising the Declaration as a source of international obligations. The Statute of the IACHR, which gives it the competence with respect to the rights enunciated in the Declaration, is taken to be further evidence in this sense²⁰³.

We noted in the first chapter that the declaration of ineffectiveness was the last step in a progression, which can arguably reflect an evolution of the status of the ACHR. However, we do not have any evidence that the Convention allows for such evolution, or that the states parties have prompted it. That point is not made in any of our judgements. There is not an argumentation similar to that followed in Advisory Opinion OC-10/89. The Convention does not contain text indicating so clearly the possibility of an evolution in its legal nature as the Declaration does. The Resolutions the OAS has issued in the last ten years on strengthening the Inter-American Human Rights system do not refer to the Convention's legal nature²⁰⁴. Therefore, there is no evidence of textual or contextual support for an evolution in the sense we are indicating.

ii. International Consensus

When interpreting the Convention and its object and purpose, the Court considers that account should be taken of the system to which the treaty pertains²⁰⁵. The Court does not restrict this system to the Inter-American system: it is more inclined to look at the developments

²⁰¹ *Ibidem*, para. 37.

²⁰² *Ibidem*, paras. 34, 37 and 38.

²⁰³ *Ibidem*, paras. 42 and 41 respectively.

²⁰⁴ See, for example, AG/RES. 2675 (XLI-O/11) of 7 June 2011.

²⁰⁵ Vanneste, 2010, p. 295.

of the international legal system. The Court values international consensus as a «general belief» that indicates the appropriate interpretation of the ACHR²⁰⁶, although «it has never explained why a certain evolution in international law could trigger an evolutive interpretation of the ACHR²⁰⁷.» In any case, the Court pays much attention to the development of international law²⁰⁸ and to the existence of an international consensus on certain matters that comes under its consideration through the American Convention.

This is very visible in the *Gomes Lund* and *Gelman* judgements. Before declaring the ineffectiveness of the Brazilian amnesty law under Article 2, the Court thoroughly reviews the international context, referring to the United Nations various human rights mechanisms and documents, and to the other regional human rights systems²⁰⁹. However, we need to make two remarks about this list. Firstly, it reflects an international consensus on the inadmissibility of amnesties because they violate the states' duty to investigate human rights violations, but not a consensus on their automatic lack of effects when compared to international human rights treaties. Only a 1997 report by the Special Rapporteur on the question of impunity refers to the lack of legal effects of amnesties²¹⁰, as well as some political agreements on the establishment of special international criminal courts. Therefore it does not seem possible to derive from this consensus a belief affecting the legal status of the Convention. Secondly, the majority of the documents and decisions listed date from after *Barrios Altos*, and hence, when making this first decision, the Court cannot have relied on such international consensus. Probably for this reason, the judgement fails to refer to the theory of evolutive interpretation as well as to the developments in the international system²¹¹. In *Almonacid-Arellano* only a few references are made to the international context. If we were to accept that an international consensus exists, this would only be valid from *Gomes Lund*, but not for the first time that the Court took the decision to declare ineffective a piece of domestic legislation.

iii. *The European Court of Human Rights*

Although the IACtHR has not invoked the European Court of

²⁰⁶ *Ibidem*, p. 302.

²⁰⁷ *Ibidem*, p. 300.

²⁰⁸ *Ibidem*, p. 296.

²⁰⁹ *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, paras. 147-162; *Gelman v. Uruguay*, Judgement of 24 February 2011, Series C No. 221, paras. 195-214.

²¹⁰ E/CN.4/Sub.2/1997/20 Rev 1, 2 October 1997, para. 32.

²¹¹ *Vanneste*, 2010, p. 297, footnotes 1.102 and 1.104.

Human Rights (ECtHR) in our cases, it is undoubtedly a great source of inspiration for the Inter-American judges and the cross-fertilisation between both courts has been widely celebrated²¹². In establishing an international consensus, the opinion of the ECtHR would be a weighty consideration. Therefore we will look superficially into the practice of ECtHR as regards laws that prove to be incompatible with the European Convention on Human Rights (ECHR).

The ECtHR has never been close to giving a judgement on the validity or effectiveness of domestic legislation, as it has always been characterised by self-restraint and consciousness of its limitations²¹³ and it lacks «the authority to declare null and void regulations of internal law²¹⁴.» The foregoing does not mean, however, that the judgements of the European Court have not had any influence on the domestic legal orders of the contracting parties to the European Convention. As Bates argues²¹⁵, in the late Seventies the Court started to show an increased willingness to use the Convention «as a standard-setting instrument to stimulate legal change.» The Court has exercised its influence on national legal systems and has concerned itself with the compatibility of domestic legislation with the ECHR. The authors consulted for this work talk about the «constitutional» or «quasi-constitutional²¹⁶» role of the ECtHR. The Court itself has referred to the constitutional character of the Convention in the case of *Loizidou*²¹⁷.

As far as remedies are concerned, the Court has «steered a conservative course that shows only little enthusiasm for a creative interpretation of Article 41²¹⁸.» The Court has considered that on the basis of this article, it cannot make prescriptive directions to the states, because national authorities are primarily responsible for protecting rights²¹⁹.

Nevertheless, there has been a remarkable evolution as the Court started to pay attention to the fact that certain domestic laws caused systemic problems. In the *Broniowski* case²²⁰, the Court created the procedure known as «pilot-judgement.» The Court identified a structural problem in the Polish legislation liable to cause a violation of

²¹² See in this respect *Cançado Trindade*, 2004, pp. 309-312.

²¹³ *Carrillo Salcedo*, 2009, p. 663.

²¹⁴ *Ibidem*, p. 659.

²¹⁵ *Bates*, 2010, p. 319.

²¹⁶ See *ibidem*, p. 436; *Carrillo Salcedo*, 2009, p. 663; *Colandrea*, 2007, p. 406; *Tomuschat*, 2008, p. 254.

²¹⁷ *Loizidou v. Turkey* (preliminary objections), Judgement of 23 March 1995, Series C No. 310, para. 75.

²¹⁸ *Addo*, 2010, p. 309.

²¹⁹ *Ibidem*, p. 312.

²²⁰ *Broniowski v. Poland*, Judgement of 22 June 2004, Reports 2002-X.

the right to property to many persons and ordered Poland to take general measures to solve such structural problem. The Court did not specify any concrete measures and only suggested what type of action could be necessary. Paragraph 194 of the judgement refers to «appropriate legal and administrative measures to secure the effective and expeditious realisation of the entitlement in question in respect of the rest of the claimants.» In the judgement we find full explanation of the rationale and the legal basis the Court relied on.

Firstly, the Court finds in Article 46 ECHR the basis for the states' duty to take this kind of general measures. In paragraph 192, the Court states that such article imposes on the state the duty to select the measures it has to adopt to put an end to the violation found.

Secondly, the Court derives its authority to give this order from the Resolution of the Committee of Ministers on judgements revealing and underlying systemic problem²²¹. In that resolution, the Committee invites the Court to identify underlying systemic problems that may affect large numbers of persons in order to assist the state in finding the appropriate solution, and the Committee of Ministers in supervising compliance with the Court's judgements. This is expressed in paragraph 190.

Finally, the rationale of the «pilot-judgement» is to try to dampen the immense flux of cases arriving at the Court. In paragraph 193, the Court makes explicit that the high number of applications received from persons in the same situation as Broniowski is a menace to the future effectiveness of the Convention machinery, and paragraph 192 takes the Court's case-load as the occasion to examine the state's obligation under Article 46 ECHR.

Thanks to this procedure, legislative reform took place in Poland and following it, the Court supervised a friendly settlement that ensured the rights of the claimant and potentially of the rest of the persons in his situation. Eventually, it was able to strike out of its list other applications lodged on the same grounds arguing that the systemic problems did not exist anymore²²².

This solution has been adopted mainly as a measure to try to alleviate the Court's unmanageable case-load, and not so much for reasons of principle. The correct functioning of the system, which undoubtedly impacts the effective protection of the rights, has been the main prompter. The role of the Committee of Ministers in this jurisprudential

²²¹ Committee of Ministers, *Resolution Res(2004)3 of the Committee of Ministers on Judgements Revealing an Underlying Systemic Problem*, adopted on 12 May 2004, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=743257&Lang=fr> (consulted on 1 July 2011).

²²² Bates, 2010, p. 490. See also case of *Broniowski v. Poland* (friendly settlement), Judgement of 28 September 2005.

development is undeniable. Although questionable from the point of view of the independence of the Court, this involvement legitimises the Court's orders, as they rest on the initiative of the states subject to the Court's jurisdiction. We believe that this constitutes a major difference to the path that the IACtHR is following.

In conclusion, the European Court does not seem to be prepared to follow the steps of its American counterpart so far. The European doctrine of the margin of appreciation, the generally good level of compliance with the ECtHR's judgements, the differences in the democratic development of the states subject to the jurisdiction of both courts²²³ and the different constructions of Articles 41 ECHR and 63 ACHR that have resulted from each context could account for this. The ECtHR's case law cannot be taken as an indicative of an international consensus.

iv. The Regional Consensus

Vanneste notes that the Court relies much more on the international than on the regional consensus²²⁴. However, sometimes it has invoked a regional consensus. This was the case in *Baena-Ricardo*, in which the Court used the *opinio juris* of the states subject to its jurisdiction to justify its competence to supervise compliance with its judgements, as these had consistently accepted such practice²²⁵. The subsequent practice of the parties is considered as a factor in the interpretation of treaties by Article 31.3.b) VCLT.

In *Gomes Lund and Gelman*, the Court also summarises the regional consensus²²⁶. It refers to decisions of several regional Supreme and Constitutional Courts that set national amnesty laws aside in one way or another. These decisions reflect the acceptance of the Inter-American case law on amnesties, and could hence be considered to accept the interpretation of Article 2 and the powers the IACtHR attributes to itself through it. But again some remarks are pertinent. Firstly, all of them date from after *Barrios Altos*. Secondly, from the reproduced excerpts it appears that the highest national courts continue to set aside or to strike down these laws primarily by reference

²²³ For a comparison, see Cavallaro & Brewer, 2008.

²²⁴ Vanneste, 2010, p. 296.

²²⁵ *Baena-Ricardo v. Panama*, Judgement on competence of 28 November 2003, Series C No. 104, para. 137.

²²⁶ *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, paras. 163-169; *Gelman v. Uruguay*, Judgement of 24 February 2011, Series C No. 221, paras. 215-224.

to domestic law²²⁷. Thirdly, the Brazilian Federal Supreme Court had not accepted the IACtHR's case law, so there was not a complete regional consensus, even at the time when Gomes Lund was delivered.

We cannot deny, nevertheless, that the IACtHR's case law on amnesties, including its interpretation of Article 2, enjoys wide acceptance in the Inter-American context. The judgements by the national courts cited in Gomes Lund bear testimony of this acceptance on the legal plane. If states have shirked from implementing the Court's judgements, it does not appear to have been in reaction to the Court's lack of legitimacy²²⁸. Among the academic community, only occasional criticism is found. Many authors do not call the Court's competence to declare domestic law ineffective into question, and some others are enthusiastic about this jurisprudential development. We admit therefore that the *opinio juris* in this respect is changing, or may be changing, in the sense the Court wanted it to change²²⁹. In our opinion there is an emerging consensus that has developed from Barrios Altos. This means that such consensus was not there the first time that the Court declared ineffective an amnesty law, so the origin of this emerging consensus does not rest with the opinion of the states, but with the action of the Court, to which the subsequent development has been favourable. We contend nevertheless that, in the absence of the rest of the elements allowing for an acceptable evolutive interpretation, this emerging consensus is not enough in itself to conclude that such method of interpretation was capable, in these cases, to lead to the Court's conclusions on Article 2.

f. Conclusion

The foregoing examination leads us to the conclusion that the Court has not merely attributed a meaning to Article 2 through an exercise of interpretation. The methods that the Court apparently has followed would not produce such an interpretation. We have to conclude that the Court has engaged in law-making in these cases. The Court has attributed to the Convention a legal status that it does not have and that cannot be derived from its provisions through interpretation, and it has also attributed to itself, and exercised, certain powers that equally do

²²⁷ This is very clearly the case in Peru and Uruguay.

²²⁸ For Barrios Altos and Almonacid-Arellano, see compliance orders cited above; for Gelman, see Center for Justice and International Law, *Votación del Parlamento Uruguayo sobre la Ley de Caducidad representa nueva dilación para acceso a la verdad y la justicia*, 20 May 2011, available at <http://cejil.org/comunicados/votacion-del-parlamento-uruguayo-sobre-ley-de-caducidad-representa-nueva-dilacion-para-a> (consulted on 1 July 2011).

²²⁹ See in this respect Judge Cançado Trindade's separate opinion to *Olmedo-Bustos v. Chile*, Judgement of 5 February 2001, Series C No. 73, concluding paras. 9 and 10.

not flow from the Convention: it has thus exceeded its attributions.

We will discuss the legitimacy of law-making by international human rights courts later. For the moment we will adhere to Tigroudja's suggestions that the Court sometimes needs to be more rigorous²³⁰. This additional rigour is especially needed when the Court is diverging from its own precedents²³¹. Advisory Opinion OC-14/94 established that the Court could not rule on the internal effects of domestic legislation contrary to the Convention, and that the consequences of such legislation were limited to international responsibility as far as the Court was concerned²³². The Court seems to have changed its opinion about this, but it does not explain why, or how. The commentaries of international law scholars contradict the Court's position. Brownlie²³³ opines that international tribunals cannot declare the invalidity of rules of national law, since the domain of domestic jurisdiction has to be respected. Eileen Denza²³⁴ explains that international law does not invalidate domestic law or intrude into national legal systems. Citing the IACtHR's Advisory Opinion OC-14/94, she goes on to say that international courts will only declare that national laws, or their application, were inconsistent with international law, but not their invalidity. Meanwhile, the IACtHR's advocates fail to produce satisfactory explanations. Pasqualucci, for example, merely states that «the Court is also empowered to declare that a domestic law in violation of the American Convention lacks legal effect²³⁵.» A step that a judge of the Court has called «of historical importance²³⁶» deserves a much more detailed and solid foundation.

²³⁰ Tigroudja, 2006, pp. 621-622, footnote 7, and Vanneste, 2010, p. 312.

²³¹ The Court has declared that it is not bound by its precedents, but from an intellectual point of view, it is desirable to know why a Court changes its mind. The Court cites its own precedents frequently when they serve to underpin its arguments. It should also pay attention to them when it wishes to diverge.

²³² See Advisory Opinion OC-14/94 of 9 December 1994, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Series A No. 14, paras. 34, 35 and 50.

²³³ Brownlie, 1998, p. 39.

²³⁴ Denza, 2006, pp. 425-426.

²³⁵ Pasqualucci, 2003, p. 248.

²³⁶ See Judge Cançado Trindade's concurring opinion to *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75, para. 1.

2.3. THE DIFFUSE CONVENTIONALITY CONTROL

2.3.A. *Introduction*

The diffuse conventionality control has been described as a «Copernican» innovation, which is the result of a «mutative» and «accumulative» interpretation of the Convention²³⁷. It has been generally welcomed in the Latin American context²³⁸.

We have characterised the conventionality control as the general theoretical framework within which the Court has started to understand differently the legal nature of the Inter-American system. As we said, this framework has two parts. The conventionality control exercised by the Court reveals this new understanding *from the point of view of the IACtHR*. According to this understanding, the Convention would have the capacity to impact directly onto national law rendering its provisions ineffective, and the IACtHR would have the power to declare this. The conventionality control exercised by national authorities, and particularly national courts, completes the framework with the new understanding of the Convention *from the point of view of national authorities*. This part of the theory tells national authorities how they should understand the legal status of the ACHR and how to act consequentially. It seems to reveal a shift in the conception of the Convention's legal status that the Court elaborated in its Advisory Opinion OC-7/86. We will examine it in the following sections, with a view to establishing whether it is a product of interpretation or of law-making. This will lead us to confront the question of the direct applicability of the Convention.

2.3.B. *A Brief Consideration on the Creation of the Theory*

The diffuse conventionality control was formulated for the first time in the case of *Almonacid-Arellano*. The Court enunciated it when establishing Chile's international responsibility for the application of an unconventional law which, according to the judgement, lacked legal effects. However, the inception of the theory appears redundant to the said end. In the paragraph just before the enunciation of the theory, the Court says that if state agents or institutions enforce an unconventional law, the state incurs into international liability²³⁹. The mere fact of that

²³⁷ Sagüés, 2010, p. 132 (my own translation).

²³⁸ See the authors cited in Chapter 1.

²³⁹ *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 123.

application is enough to find an international wrong attributable to the state. However, the Court adds to it the obligation to exercise the conventionality control, as an additional ground to establish international liability. If the relevant fact to establish the international responsibility of the state is the application of laws contrary to the Convention, why should the IACtHR bother to see if the national authority conducted a comparison between the Convention and national law, and set aside or not the latter? Our hypothesis is that the IACtHR, here again, is striving to reinforce the legal status of the Convention. If a national court conducts the conventionality control and finally decides to apply national legislation, the state will not be absolved of its international responsibility if the IACtHR has a different opinion on the compatibility of that national legislation with the Convention. Therefore we believe that the Court has created the theory of the diffuse conventionality control with a view to reinforcing the status of the Convention *already from its application at the national level*.

2.3.C. *The Question of the Direct Applicability of the Convention*

As Ximena Fuentes Torrijo points out, the diffuse conventionality control seems to indicate a change of attitude of the Court in relation to the direct applicability of the Convention²⁴⁰. The obligatory exercise of the conventionality control by national courts indicates that these courts need to be enabled to apply the Convention directly: this has to be part of their domestic law, and need no further measures in order to be applied. However, Advisory Opinion OC-7/86 does not appear to indicate that the Convention has such a character. On that occasion, the Court declared that a question concerning the application of Article 14 of the Convention in the internal legal order of the requesting state fell outside its jurisdiction²⁴¹. Moreover, in operative paragraph B, the Court admitted the possibility that a Convention right is not enforceable under the domestic law of a state party. Thus the Court seemed to accept that the Convention would not always have direct applicability in the states parties' legal orders.

However, this same paragraph B prompts another question that may be more useful for our analysis. It states: «When the right is not enforceable under the domestic law of the state party, that state has the

²⁴⁰ Fuentes Torrijo, 2008, pp. 487-491.

²⁴¹ Advisory Opinion OC-7/86 of 29 August 1986, *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*, Series A No. 7, para. 14.

obligation, under Article 2, to adopt [...] the legislative or other measures that may be necessary to give effect to this right.» Therefore, the question is: does Article 2 impose on the states the obligation to give the Convention direct applicability in their legal order? Some answers have been given so far and arguments for and against seem plausible. For this reason, we will contemplate both scenarios, without intending to find a definitive solution²⁴², and consider whether they would lead to an obligation to exercise the diffuse conventionality control.

a. No Obligation to Render the Convention Directly Applicable

The former President of the IACtHR Thomas Buergenthal affirms that the direct applicability of treaties, and specifically of the ACHR, is a question for national law to decide²⁴³. In their dissenting opinion to Advisory Opinion OC-7/86, Judges Nikken and Nieto Navia express the same opinion. For them, the direct applicability of a treaty is «a problem of domestic law [...] since it is a matter of whether such treaty acquires the nature of a domestic norm²⁴⁴.» Therefore, if this is a question that domestic law must decide, there cannot be an international obligation to give the provisions of the Convention direct applicability in the internal order of the states parties. Fuentes asserts that such an obligation is nowhere to be found in the Convention or in general international law²⁴⁵. Claudia Sciotti-Lam, who is very favourable to the direct applicability of human rights treaties, admits that the examination of the said treaties reveals no provisions indicating an intention to recognise them direct applicability. Such treaties do not envisage it expressly²⁴⁶. Moreover, if we look at the interpretation that the Court has made of Article 2, we do not find an obligation to make the Convention directly applicable in the states' internal legal order. The Court refers to an obligation to eliminate those laws and practices that impair the effects of the rights recognised by the Convention, but not to recognising direct applicability to the Convention. Finally, Advisory Opinion OC-7/86 refers to «whatever legislative or other steps as may be necessary to enable it [the state] to comply with its treaty

²⁴² The notion of direct applicability is controversial. We will use here a minimal understanding according to which the relevant criterion is the possibility for the international norm to be applied by national judges without complementary measures being needed for the purpose (Sciotti-Lam, 2004, p. 336).

²⁴³ Buergenthal & Shelton, 1995, p. 450.

²⁴⁴ Dissenting opinion of Judges Nikken and Nieto Navia to Advisory Opinion OC-7/86 of 29 August 1986, *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*, Series A No. 7, para. 14.

²⁴⁵ Fuentes Torrijo, 2008, pp. 487-488.

²⁴⁶ Sciotti-Lam, 2004, pp. 359 and 363.

obligations²⁴⁷.» From this language, it appears that the state would have a range of measures at its disposal and the possibility to choose among them as long as they lead to the expected result. Therefore, an obligation to make the Convention directly applicable does not seem to result.

If we accept that the Convention does not contain an obligation to recognise direct applicability to its provisions in internal law, then we come to the conclusion that an obligation to exercise the conventionality control cannot be imposed onto national courts, as it is a question of their internal law to decide on the status of the Convention and to decide on how to render the conventional rights effective. A failure to do this will result in international liability that the Court will establish in each case, but without judging on the legal status of the Convention in the national legal orders. In conclusion, under this hypothesis, the Court would have created an obligation to recognise direct applicability to the Convention and additionally to exercise the diffuse conventionality control.

b. Obligation to Render the Convention Directly Applicable

We need to examine those arguments that have been advanced in favour of an obligation to recognise the Convention direct applicability in the states' internal order, as they are equally plausible arguments and will help us get a balanced view. Then we will explore whether the existence of this obligation leads necessarily to the conventionality control and its consequences.

The arguments in support of such obligation are sometimes closely linked to the arguments against it. Sciotti-Lam, while admitting that human rights treaties do not usually contain provisions on their direct applicability, also points out that provisions excluding such direct applicability are equally rare, which could be interpreted as a refusal to preclude that possibility²⁴⁸. Recalling Advisory Opinion OC-7/86 and the operative paragraph B thereof, we note that states are under the obligation to adopt «the legislative or other measures that may be necessary to give effect to this right.» Under this obligation enshrined in Article 2 we could understand two things:

– Firstly, as Sciotti-Lam proposes, that those «other measures» include judicial decisions²⁴⁹. She contends that the judiciary may also have a role

²⁴⁷ Advisory Opinion OC-7/86 of 29 August 1986, *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*, Series A No. 7, para. 30.

²⁴⁸ Sciotti-Lam, 2004, p. 361.

²⁴⁹ *Ibidem*, p. 397.

to play in the fulfilment of the state's obligations under Article 2 (as the Court in fact believes). Judicial decisions applying the Convention directly are therefore required by Article 2 under this point of view.

– Secondly, it is arguable that if Convention rights are to be effective within the domestic legal order, as Article 2 commands, it is necessary that they are recognised direct applicability and courts can apply them without need for other measures. When formulating the diffuse conventionality control, the Court expressly says that national courts have the obligation to ensure that the conventional provisions are not adversely affected or jeopardised by the enforcement of laws contrary to the purpose of the state's obligations²⁵⁰. This idea is supported by the states' general duty to protect and respect the rights under Article 1(1) of the Convention. Sciotti-Lam advocates the existence of the above-mentioned obligation and proposes an interpretation of international treaties based on objective rather than subjective (the intention of the parties) criteria to infer it. While recognising that states have the choice of the means to introduce international human rights law into their legal orders, she also says that, *de facto*, only some of those means do in reality lead to the full effectiveness of the rights²⁵¹ and that recognising direct applicability to human rights treaties allows for greater effectiveness of the rights they contain²⁵². She even contends the existence of a presumption of direct applicability²⁵³.

Accordingly, an obligation of the states parties to the ACHR to recognise direct applicability to the provisions of the Convention would rest on an interpretation of Article 2 within its wording and based on the object and purpose of the Convention and the principle of effectiveness. However, would it imply all the consequences the Court attaches to the diffuse conventionality control? The fact that national courts need to have the ability to apply directly the Convention does not mean that this has to enjoy a superior position in the national legal orders. The ability of the judges to apply directly the Convention does not mean, by itself, that they can disapply unconventional laws. As Sagüés points out, this would rest on the *assumption* of a supra-constitutional, or at least supra-legal, position of the Convention²⁵⁴. Such assumption reflects the above-

²⁵⁰ See, for example, *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 124, and *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 176.

²⁵¹ Sciotti-Lam, 2004, p. 619.

²⁵² *Ibidem*, p. 416.

²⁵³ *Ibidem*, p. 413.

²⁵⁴ Sagüés, 2010, p. 124.

mentioned intention to enhance the Convention's force. The Court never explores the national legal order of the respondent state when it expects its judiciary to exercise the conventionality control. This is not the Court's task. Apparently, the Court just assumes that the Convention is endowed with superior legal force or supremacy and that national courts will be able to apply it preferentially. We contend that this does not necessarily derive from an obligation to recognise the direct applicability of the Convention. Advocates of direct applicability and utmost effect of human rights treaties like Sciotti-Lam admit to this²⁵⁵.

In conclusion, admitting the obligation of the states to confer direct applicability on the provisions of the Convention does not lead to the superiority of the Convention within national legal orders. It will be for the Inter-American Court to establish the international responsibility of the state in case it violates any right by applying certain legislation, but if the Court assumes that the Convention has a certain superior rank into a given domestic order, and derives any obligation for the states therefrom, it is creating law in respect to the legal nature of the Convention.

2.3.D. *Article 27 of the Vienna Convention on the Law of Treaties*

On some occasions the Court has relied on Article 27 of the Vienna Convention to underpin the diffuse conventionality control²⁵⁶. However, the common understanding of this article does not seem to support such obligation. According to a recent commentary²⁵⁷, Article 27 VCLT means the supremacy of international law *on the international level* and that domestic law cannot absolve a state of its international responsibility. But it does not concern the rank international law should be recognised within the domestic legal order. It does not relate to the way in which national courts and authorities should treat international law: it just states that domestic law will not serve as an excuse to avoid international responsibility. Therefore, Article 27 VCLT could not serve as a legal basis for the obligation to exercise the diffuse conventionality control. In the same vein, Fuentes Torrijo contends that the said article does not determine how national legal systems should incorporate international law²⁵⁸.

²⁵⁵ Sciotti-Lam, 2004, pp. 442-443: «If a conventional provision is confronted to a contrary domestic norm of a higher rank, it will be necessary to await the derogation thereof» (my own translation).

²⁵⁶ See, for example, *Almonacid-Arellano et al. v. Chile*, Judgement of 26 September 2006, Series C No. 154, para. 125, and *Gomes Lund y otros v. Brasil*, Judgement of 24 November 2010, Series C No. 219, para. 177.

²⁵⁷ Villiger, 2009, pp. 369-378.

²⁵⁸ Fuentes Torrijo, 2008, p. 489.

2.3.E. *Conclusion*

The theory of diffuse conventionality control constitutes creation of law by the IACtHR, as this theory does not derive from the Convention. We share Binder's concerns that the IACtHR is interpreting its jurisdiction too broadly and that a firm legal basis does not exist in the Convention²⁵⁹. An interpretation of Article 2 according to its object and purpose and to the principle of effectiveness can support an obligation to recognise direct applicability to the Convention, but the obligation to conduct the diffuse conventionality control with all its consequences reveals a new understanding of the legal status of the ACHR which does not derive from such an interpretation: it is, again, creation of law by the IACtHR.

After having established that the declaration of ineffectiveness and the diffuse conventionality control (which are manifestations of the transformation in the Inter-American system we mentioned above) are products of law-making and overstretching of powers, we will now test them against two theories in international law to see whether these can provide for a justification or whether, to the contrary, we need to conclude that the said transformation is a novelty in international law.

2.4. INTERNATIONAL RESPONSIBILITY

2.4.A. *Introduction*

We wish to analyse first whether the rules of international responsibility require, or allow for, a reading such as the one the Court makes of Article 2. The analysis from this point of view is pertinent because the Court states quite clearly that the issuing, maintenance and application of laws contrary to the Convention gives rise to the state's international responsibility.

2.4.B. *International Wrong and Its Consequences*

The first questions we ask in this respect are: what kind of international wrongful act is the issuance, existence or application of a law contrary to an international treaty? What kind of obligation does it

²⁵⁹ Binder, 2010, p. 176.

give rise to? Article 2 ACHR enshrines a primary obligation. The states' obligation to bring their internal order into compliance with the Convention does not arise from the breach of that obligation, but directly from the Convention. When this obligation is breached, the state needs, in the first place, to bring its internal order into compliance with the Convention again. But this duty is a part of the primary obligation, because it is subsumed in it as a condition of the lawfulness of the states' acts in international law²⁶⁰.

Let us turn to the consequences. According to Combacau and Alland's classification, the breach of this kind of obligations gives rise to consequences affecting the wrongful act itself. The consequence involves rendering the internationally illegal act «inoperative» or null and void²⁶¹. As we can clearly see in our judgements, a breach also gives rise to other consequences that, in Combacau and Alland's words, affect the harmful situation originated by the wrongful act, most prominently to the obligation to make reparations in its various manifestations. But we are focusing now on the consequences that the Court draws for unconventional laws.

Nullity or invalidity has already been recognised as the consequence of an international wrong by some international courts on different occasions, as Mann relates²⁶². However, the examples he gives reveal that such nullity or inopposability of state acts refers to the international sphere. In the Barcelona Traction case, the ICJ held that «the whole bankruptcy proceedings where, for excess of jurisdiction, internationally null and void *ab initio* and without effect in the international plane²⁶³.» In the Fisheries Jurisdiction case, again the ICJ held certain Icelandic legislative acts to be not opposable to the government of the United Kingdom²⁶⁴. Mann quotes Lauterpacht and states that «the absence of more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere²⁶⁵.» Therefore, the consequence of rendering domestic legislation ineffective on the domestic plane is not known in international law as a possible consequence of an international wrong.

²⁶⁰ Combacau & Alland, 2002, p. 90.

²⁶¹ *Ibidem*, p. 87.

²⁶² Mann, 2002, pp. 279-281.

²⁶³ Barcelona Traction, Light and Power Company, Limited (*Belgium v. Spain*), Judgement of 5 February 1970, as cited by Mann, 2002, p. 281.

²⁶⁴ Fisheries Jurisdiction (*United Kingdom v. Iceland*), Judgement of 25 July 1974, as cited by Mann, 2002, p. 281.

²⁶⁵ Mann, 2002, p. 280.

2.4.C. *Different Regimes of International Responsibility*

The general regime of international responsibility is considered to be codified in the International Law Commission's Draft Articles on Responsibility of States²⁶⁶. However, as James Crawford, who carried through the second reading of the Draft Articles, points out, this regime is not applicable to our case. The second part of the Draft Articles, entitled «Content of the International Responsibility of a State,» «does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a state²⁶⁷.» Therefore we shall not pay further attention to the Draft Articles.

Moving on to the specific field of human rights²⁶⁸, the United Nations General Assembly adopted in 2006 the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law²⁶⁹. The authoritative commentary that Bassiouni, one of the fathers of these Principles, makes, does not suggest the possibility that the regime of international responsibility for human rights violations contemplates the ineffectiveness of domestic laws in the domestic sphere, or the empowerment of international courts to declare this²⁷⁰. The Basic Principles just contemplate, as a guarantee of non-repetition, the revision and reform of laws allowing or contributing to gross violations of human rights²⁷¹. This is something that states should do, but not something that should happen *ipso facto* through a declaration by an international court.

2.4.D. *Conclusion*

The regime of international responsibility does not support the findings of the Inter-American Court on Article 2, which would represent a complete novelty if they were understood to fall within such regime.

²⁶⁶ United Nations General Assembly Resolution A/Res/56/83 of 28 January 2002.

²⁶⁷ Crawford, 2002, p. 193.

²⁶⁸ Vanneste, 2010, p. 508.

²⁶⁹ A/Res/60/147 of 21 March 2006.

²⁷⁰ Bassiouni, 2006.

²⁷¹ See General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/Res/60/147 of 21 March 2006, available at <http://www.un.org/Depts/dhl/resguide/r60.htm> (consulted on 1 July 2011), principle 23 h).

2.5. THE THEORY OF INHERENT POWERS

2.5.A. *Introduction*

The theory of the inherent powers of international courts offers a valuable point of view from which to examine our subject. As we have stated, the theory of the conventionality control reflects the Court's new understanding of the legal nature of the Convention and of its own powers and functions. An examination of the question from the point of view of inherent powers will provide a useful insight into the latter aspect.

2.5.B. *Precedents*

The Court invoked the theory of inherent powers when its competence to monitor compliance with its judgements was challenged by Panama in the case of *Baena-Ricardo*²⁷². Panama argued that the said function did not fall within the judicial competence of the Court, but within the political mandate of the OAS General Assembly. The Court had to justify a practice that had been part and parcel of its activities since the first contentious cases, in spite of not being foreseen in the ACHR. The Court could have invoked similar arguments when deciding the *Barrios Altos* case, or the others we have studied. However, it did not, thus repeating the pattern of the compliance orders: the Court acts and awaits a reaction. If someone requests an explanation, it gives an explanation. If not, it just continues with its practice without providing for the reasoning behind.

We do not have space to delve into the Court's arguments in *Baena-Ricardo* and will just give brief account of those based on the theory of inherent powers. The Court argued that the competence to monitor compliance with judgements and to impart orders and instructions in that respect was a power inherent to the jurisdiction of any judicial organ. The Court practically departed from this and contended that, given its «compétence de la compétence,» it could decide on whether it had the power to monitor compliance or not²⁷³. The Court did not explain much why this power is «inherent» to the judicial function, but

²⁷² See *Baena-Ricardo v. Panama*, Judgement on competence of 28 November 2003, Series C No. 104, paras. 59-83 and Conclusions.

²⁷³ In our opinion this is a wrong understanding of the «compétence de la compétence,» which is about deciding whether a Court's given powers can be exercised on a certain occasion, but not about what powers the Court has. See Shelton, 2009, pp. 546-548.

its argumentation leans on the principle of effectiveness. It understood its jurisdiction as including the power «to administer justice,» which goes beyond the declaration of the law, because the Court's judgements need to be effectively implemented by the respondent states. Without the possibility to monitor compliance, the Court argued, its judgements would be merely declaratory.

2.5.C. Possible Application of the Theory to the Conventionality Control

Could the theory of inherent powers justify the prerogatives the IACtHR has attributed to itself through the conventionality control? We will quickly examine this possibility with the help of some literature.

There is little theorisation of the inherent powers by scholars or international courts²⁷⁴. Therefore, a definition of such powers depends very much on what international courts rule about them. However, there seems to be an agreement that inherent powers are those that, in spite of not existing in the courts' constitutive instruments, derive from the judicial character of international courts. According to the ICJ, inherent powers are those necessary to ensure that the exercise of a court's jurisdiction on the merits is not frustrated, to provide for the settlement of all matters in dispute, and to preserve the judicial character of the Court²⁷⁵. The existence of these powers is justified by the gaps constitutive instruments and statutes usually leave when regulating international courts and their procedure²⁷⁶. Consequentially, inherent powers are limited to the fulfilment of a Court's particular functions²⁷⁷. Paola Gaeta contends that «any power not expressly provided for may only be exercised if it does not encroach on the freedom and sovereign rights of states²⁷⁸.» Finally, all the three authors consulted agree on one point: the inherent powers of international courts are not uniform and depend on the specific functions assigned to the different courts²⁷⁹. In this respect, Shelton classifies the IACtHR as a «compliance court,» focused more «on the public, even constitutional aim of the regime in which they operate» than on dispute

²⁷⁴ Brown, 2005, p. 197.

²⁷⁵ Nuclear Tests (*Australia v. France*), Judgement of 20 December 1974, as cited by Brown, 2005, p. 211. See also Gaeta, 2003, p. 363.

²⁷⁶ Brown, 2005, p. 202; Gaeta, 2003, p. 366.

²⁷⁷ Brown, 2005, p. 238.

²⁷⁸ Gaeta, 2003, p. 368.

²⁷⁹ Brown, 2005, p. 236; Gaeta, 2003, p. 370; Shelton, 2009, p. 571.

settlement. Some special inherent powers derive from this character according to her²⁸⁰.

After this quick description of the general theory, we are in the position to ask whether it can account for the competence the Court attributes to itself when it declares the ineffectiveness of domestic legislation. We need to note that, again, the Court itself has not resorted to this theory in any of our cases, so we are compelled to speculate in this respect. Our inevitably quick answer is no. We find it difficult to argue that a power to invalidate domestic laws in the domestic order of the respondent state is a power inherent to the judicial function and necessary to preserve its integrity. Many national courts do not have a similar power, and no international court does²⁸¹. The other existing human rights court that has so far produced jurisprudence has never made use of such a power or felt it was necessary for the full exercise of its jurisdiction. Moreover, the IACtHR had never invoked such a power before *Barrios Altos*, and has only used it on the counted occasions we have examined here. We have argued for alternatives above. In addition to this, following Gaeta, it is undeniable that such a power encroaches upon state sovereignty and therefore it needs express recognition in a legal instrument.

However, we acknowledge that this may be an open question. There is a possibility that the Court, at some point, will provide a thorough explanation, as happened in *Baena-Ricardo*. A similar argumentation based on the nature of the IACtHR as a human rights court and on the principle of effectiveness²⁸² would then be thinkable, following the precedent. An important difference must be highlighted nevertheless: in *Baena-Ricardo* the Court found an express legal basis in Article 65 ACHR, which it complemented. In our case, once Article 2 and Article 63(1) have been discarded, a possible legal basis is not apparent. In *Baena-Ricardo* the Court also cited Articles 33, 62(1) and 62(3) ACHR. But these are in our opinion general jurisdictional clauses which, by themselves, do not suffice to uphold such a power.

In conclusion, the theory of inherent powers could serve as a basis for the Court to provide an explanation for the powers it has exercised in our cases and consolidate its jurisdiction. But this would mean a new development within such theory.

²⁸⁰ Shelton, 2009, pp. 564-565.

²⁸¹ Except for the Court of Justice of the European Union. We do not have space for it; however, in our opinion, the uniqueness of European law situates it in a different category.

²⁸² We need to remember nevertheless the limitations of this principle.

2.6. WHY DID THE COURT CHOOSE THIS SOLUTION?

This last section tries to analyse the reasons why the Court decided to start declaring the ineffectiveness of amnesty laws and the circumstances that may have led the Court to do so. Our conclusions here will enable us to conduct a more balanced assessment of the transformations in the Inter-American system.

2.6.A. *Internal Factors*

We will briefly consider some factors internal to the Court that may have influenced its pronouncement in *Barrios Altos*.

Firstly, as we pointed out before, the declaration of ineffectiveness appears, from a chronological perspective, as the next step in the evolution of the Inter-American system for the protection of human rights towards an enhanced effectiveness and impact of the Convention and its monitoring bodies on national legal orders, to which Hitters refers²⁸³.

Secondly, Antkowiak²⁸⁴ points to the fact that the Court is used to receiving «emblematic cases» that give it a unique chance to resolve certain questions. The Court tries hence to give solutions as definitive as possible.

Finally, the presence and influence of certain judges can be considered fundamental. Judge Cançado Trindade's leverage is traceable throughout the Court's case law. His opinions have anticipated the Court's position on several occasions²⁸⁵. His separate opinion to *Olmedo-Bustos* contains very radical statements claiming the direct applicability of human rights treaties in the domestic law of the states parties thereto, and the inexistence of real obstacles to such direct effect²⁸⁶. This shows his readiness in the first months of 2001 to adopt drastic solutions to drastic problems. This predisposition, together with his influence, gives account of an immediate background conducive to the step taken in *Barrios Altos*. His contribution has been recognised by authors such as Tigroudja, who speaks of a «Cançado Trindade era» in the Court's history characterised by the «humanisation» of international law²⁸⁷.

²⁸³ Hitters, 2008, p. 131.

²⁸⁴ Antkowiak, 2008, pp. 395-396. He refers to an «overreaction» of the Court in other kind of cases, but we believe the argument is applicable.

²⁸⁵ See section 1.2.A.b.ii on the Court's case law.

²⁸⁶ See Cançado Trindade's separate opinion to *Olmedo-Bustos v. Chile*, Judgement of 5 February 2001, Series C No. 73, concluding paras. 9 and 10.

²⁸⁷ Tigroudja, 2006, p. 640.

2.6.B. *External Factors*

Some authors have underlined certain external factors that can have favoured the Court's step in Barrios Altos.

The first factor would be the favourable political context. Cavallaro and Brewer argue that the Peruvian political climate in 2001 was much more receptive than the one the IACHR found when confronting amnesties in Argentina and Uruguay²⁸⁸, which would have also deterred the IACHR from referring those two cases to the Court²⁸⁹. In general, the political context in Latin America seems to have become prone during the Nineties to the rejection of amnesties²⁹⁰, although some have continued to be in force as the experience of the Court shows. Secondly, from an academic point of view, we could point to the little opposition that the doctrines on fight against impunity find and to the emergence of an alleged victims' right for the perpetrator to be punished²⁹¹.

2.6.C. *Barrios Altos and Its Inertia*

Turning now to the circumstances around the seminal case Barrios Altos, Antkowiak²⁹² suggests that some of the broad orders to amend legislation given by the Court had resulted in under-enforcement. For example, in the case of Loayza-Tamayo, the Peruvian Supreme Court considered the IACtHR's judgement «unenforceable²⁹³.» It must be recalled that, during those years, Peru took a very defiant attitude towards the Inter-American Court, which had to reject its attempted withdrawal from its jurisdiction²⁹⁴. Laplante also attributes the increased boldness of the Court in awarding reparations²⁹⁵ to the «persistent failure to prevent human rights violations by states²⁹⁶.» The Court might, therefore, have felt the need to adopt this more far-reaching step. As we said in Chapter 1, we believe that the Court is trying to exercise bigger influence onto the domestic legal order.

The IACHR's attitude may have been relevant as well. According to

²⁸⁸ Cavallaro & Brewer, 2008, p. 820.

²⁸⁹ *Ibidem*, p. 819.

²⁹⁰ Binder, 2010, p. 186.

²⁹¹ See in this respect Silva Sánchez, 2008, pp. 876 and 879-880.

²⁹² Antkowiak, 2008, p. 394.

²⁹³ *Loayza-Tamayo v. Peru*, Order of 17 November 1999, Compliance with judgement, «considering» no. 1.

²⁹⁴ *Ivcher-Bronstein v. Peru*, Judgement on competence of 24 September 1999, Series C No. 54.

²⁹⁵ We have not considered the declaration of ineffectiveness as a reparations measure, but Laplante's point is nonetheless useful to characterise the Court's attitude.

²⁹⁶ Laplante, 2004, p. 358.

Laplante, the Commission presented the Barrios Altos case «a truly historic opportunity, to advance international human rights law, based on measures under domestic law that contribute to combat impunity²⁹⁷.» By 2001, Peru's regime had changed and the new government was much more cooperative with the Court. It had accepted its international responsibility for the facts; however, it had presented its amnesty law as an obstacle in its new human rights strategy and had suggested advancing with friendly settlements²⁹⁸. The IACHR persisted and made the case that the circumstances were «ripe» for a judgement that would provide Peru with an instrument «to destroy and remove the remaining obstacles in order to combat impunity in Peru.» Moreover, the Commission would have been longing to see its own jurisprudence against amnesties backed by the Court²⁹⁹. According to this version, Barrios Altos would have been a way to help Peru in its transitional justice process³⁰⁰.

In the previous paragraph, we suggested that Peru's defiant attitude and its disregard for the Court's judgements could have led the Court to a stronger pronouncement. Now we have just noted that Peru had a cooperative attitude and that the Court and the Commission would have been trying to act constructively. These two explanations can be reconciled if we think that, in fact, the Commission and the Court appreciated Peru's cooperative attitude and tried to help its new institutions with its transitional justice project. At the same time, the Court would have wanted to try an instrument stronger than the ones previously used that would allow no excuses on the part of Peru.

As for the other three cases in which the Court has declared the ineffectiveness of amnesty laws, we can briefly note that they were cases in which the amnesty laws in question were applied and the victims' next of kin were deprived of effective judicial remedies, so it was a matter of coherence (and possibly of authority) for the Court to find in the same way as in Barrios Altos. The judgement in La Cantuta bears testimony to Barrios Altos' success in Peru; therefore, the Court had good reasons to follow the same line.

In conclusion, the context was favourable and the need to fight impunity is a «strong practical reason» as Binder phrases it³⁰¹ to make a breakthrough such as the one we have been analysing along this study.

²⁹⁷ Laplante, 2009, p. 961.

²⁹⁸ See *Barrios Altos v. Peru*, Judgement on the merits of 14 March 2001, Series C No. 75, para. 35.

²⁹⁹ Laplante, 2009, p. 962.

³⁰⁰ It is noteworthy that the IACHR did not request, in any of our five cases, a pronouncement on the validity of amnesty laws in the state's domestic order.

³⁰¹ Binder, 2010, p. 176 (my own translation).

CONCLUDING REMARKS AND FINAL BALANCE

The main conclusion of our legal analysis has been that the theory of conventionality control is a product of law-making by the IACtHR. Surely it is not the first time that an international court creates law and some argue that such a prerogative is inevitable³⁰². For this reason, it is necessary to discuss the issue of legitimacy.

Before that, we will recall some shortcomings in the IACtHR's case law which will help us make a final evaluation. Firstly, we have affirmed and demonstrated that the Court does not provide an explanation for these new developments. Apart from the material arguments concerning Articles 1(1), 8(1) and 25 ACHR, the Court does not explain the source of the powers it attributes to itself, or why the incompatibility of a law with the Convention produces its ineffectiveness in a state's internal order. The most thorough reasoning is found in some judges' separate opinions, which are not part of the judgements. In addition, certain basic points of the theory of conventionality control, which have important implications, need to be settled. The question of subsidiarity is not resolved. Clarifying the duties of national courts in respect to the conventionality control is also important, as the Court should not be implying that only a certain system of judicial review is acceptable for the protection of human rights. Finally, the Court seems to be acting «as it goes,» as it did in the case of its compliance orders. It launched the theory of conventionality control without providing for detailed explanation and, as no one has challenged it so far, such an explanation has never been given. In our opinion, this way to proceed deserves criticism.

We have argued that the Court is transforming the nature of the

³⁰² Shelton, 2009, p. 553.

Inter-American system through sheer jurisprudential creation. The legitimacy of non-interpretive doctrines depends on the tradition and the legal system in which a judge operates³⁰³. Is the Inter-American system allowing for this?

More than ten years after *Barrios Altos*, it seems that the Court's «as it goes» fashion has succeeded. States have accepted it. The Court has only been requested for interpretation once, and that request contained no challenge. As reflected in the *Gomes Lund* and *Gelman* judgements, even in those states that have never responded an amnesty case, national courts have adopted the Inter-American case law. States seem to perceive the IACtHR to have the authority to make these findings. Hence, while this legitimacy can hardly be said to have existed at the time of *Barrios Altos*, it arguably exists nowadays. The material arguments on the inadmissibility of amnesties, which become *ius-naturalist* arguments in *Cançado Trindade's* opinions, have cogency. The humanisation of international law and the fight against impunity are, beyond doubt, legitimate objectives. The circumstances described in our last section seem to contribute to the legitimacy and reasonableness of the Court's developments.

On the other hand, we have examined the question from diverse legal points of view and no one has led to an unreservedly favourable conclusion. The Court has exceeded its powers by judging on the effects of domestic legislation in the domestic order, and by attributing to itself the power to do so. We need to note that, despite the fact that this is not the first time that an international court creates law, on this occasion such creation has a greater significance. The IACtHR, as we have argued, is transforming the nature of its system and is building one outside the standards of what is understood under «international courts.» Thereby it has encroached upon the sovereignty of the states parties and invaded the competences of an Inter-American conference, which would have normally been the organ to decide on the nature of the system. In addition, the case law's deficits we have outlined above detract legitimacy, especially according to paradigms such as *Tobin's*, for whom the ability to persuade a relevant audience through principles, clarity and coherence is the most important asset of interpretation³⁰⁴.

The question for the human rights community now is whether to accept or not these developments. This question needs to be faced.

³⁰³ Barak, 2005, p. 62.

³⁰⁴ Tobin, 2010.

These developments should not be contemplated as isolated cases. They represent a very big step: they imply overcoming the boundary between national and international law. They imply a transformation in the nature of the Inter-American system which the mainstream Latin American literature has welcomed and called a «constitutionalisation.» The question needs to be addressed by the rest of the human rights community. Are we ready to understand the Inter-American system as a genuine constitutional system with full judicial review of laws, and to start teaching it accordingly? If we say yes, then we might have to be prepared to extrapolate it to other international courts and branches of international law: do we accept that international courts, without a basis in their constitutive instruments, decide on the effects of domestic legislation in the internal order? As Koopmans notes, constitutional courts have created new institutional balances in national political systems³⁰⁵. The question is hence not completely new, but the structure of international law adds certain complications that would require, if this questions were tackled, in-depth thinking.

³⁰⁵ Koopmans, 2003, p. 76.

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