2. Research Materials and Frameworks

A. International and Constitutional Adjudications in Europe and Latin America

Against the background of the above-mentioned research problems, the following section demarcates the limits of research materials based on which empirical analyses are conducted. It is notable for this purpose that the San José Court does not restrict the doctrine of conventionality control only mandated to *judges* under the *American Convention*; rather, it broadly formulates an obligation of *a contracting state as a whole* under *international treaty law in general*:

> When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the *effet util* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose.[49]

The general statement corresponds to the recommendations contained in the *Guidelines* of the ILA Committee on International Human Rights Law that '[c]onstitutional and supreme courts develop and practice *control of conventionality*'.[50] Although this book admits that the potential of conventionality control needs to be comprehensively studied, it consciously limits its scope to *judicial* practices in *regional* human rights systems, particularly in *Europe* and *Latin America*, for the following reasons.

Through gaining lessons from the doctrine of *constitutionality control*, the book deals principally with conventionality control achieved by judicial adjudicators. In most constitutional systems worldwide, judicial bodies are explicitly empowered to guarantee respect for their constitutional pro-

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49 *The Dismissed Congressional Employees (Aguado-Alfaro and Others) v Peru*, IACtHR, Series C No 158, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 2006, para 128.

50 Guidelines: The Obligations of a State and Its Domestic Courts with Respect to a Decision Issued by an International Judicial or Quasi-judicial Body Involving International Human Rights Law, annexed to *Johannesburg Conference Resolution No. 2/2016*, the Committee on International Human Rights Law, the 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7–11 August 2016, para 9(a).

visions and principles.[51] Generally speaking, the purposes of constitutional adjudication by national courts include ensuring that the legislature does not overstep constitutional boundaries; protecting the fundamental rights of individuals in specific cases; resolving institutional disputes; and ensuring the integrity of political office and related issues.[52] Therefore, it can be concluded that conventionality control aimed at protecting human rights and maintaining a treaty-based legal order is primarily entrusted to judges who assume the function of maintaining the law.

The author is fully aware that focusing on judicial conventionality control may be subject to the criticism of international adjudication-centrism. Yasuaki Onuma questions the *judiciary-centric culture* as a corollary of international legal studies based on the domestic model.[53] Despite there still being a significant gap between norms of adjudication and conduct at the international level in contrast to the domestic systems of developed countries, international legal scholars tend to unconsciously regard international law as a set of norms of adjudication.[54] Nevertheless, these criticisms do not necessarily discourage the approach taken in this monograph but rather promote its significance in analysing the parallel phenomena of international and constitutional adjudication. In fact, Onuma does not reject the increasing roles played by norms of adjudication against the backdrop of the recent pluralisation of international courts and tribunals.[55] His idea also has parallels with the present monograph in his warning that we should not overlook the important roles of international judicial bodies for various functions other than dispute settlement.[56]

In confining this discussion to judicial practices, the author does not intend to disregard the political competences for attaining conventionality control. Even at the national level, in accordance with the constitutional principle of separation of powers, the roles and responsibilities for constitutionality control are allocated to political organs as well as national

51 Tom Ginsburg, 'The Global Spread of Constitutional Review', in Gregory A Keleman, R Daniel Kelemen and Keith E Whittington (eds), *Oxford Handbook of Law and Politics* (Oxford University Press 2008) 81–98.

52 Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart 2014), Chapter 3.

53 ONUMA Yasuaki, *International Law in a Transcivilizational Worl*d (Cambridge University Press 2017) 22–25.

54 Ibid.

55 Ibid 579–587.

56 Ibid.

tribunals.[57] The same is equally true of conventionality control, as represented by the second category of general obligations to harmonise domestic law with human rights conventions that is directed at the political sector. Despite its significance, political conventionality control is ultimately characterised as supplementary to judicial conventionality control for the purpose of protecting human rights.

The book furthermore narrows its focus to the judicial control of national law within *regional* human rights systems, precisely, two human rights courts, the *European Court* and the *Inter-American Court of Human Rights*. These two regional courts have developed ample jurisprudence as regards conventionality control, which falls within the scope of analytical objects here. The limited range of the empirical analysis entails three exclusive implications. First, the book does not include the African Court on Human and People's Rights because, albeit theoretically and practically interesting, it has not necessarily accumulated sufficient case law with regard to the conventionality control of national acts of States Parties in comparison to the ECtHR and IACtHR.[58] Second, the author does not directly deal with courts and tribunals established in the context of regional integration, although they often behave as human rights courts to protect the fundamental rights of regional communities (e.g. the ATJ in the Andean Community,[59] the Caribbean Court of Justice of the Caribbean Community,[60] the Central American Court of Justice, the ECOWAS Com-

57 In Japan, for example, when the Diet introduces a statute, the Legislation Bureau of the Cabinet Office checks the bill's compatibility and consistency with the Constitution, existing law, and international obligations. See Hiromichi Matsuda, 'International Law in Japanese Courts' in Curtis Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019) 537–548, 541.

58 Amos O Enabulele 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights Have the Final Say' (2016) 16 *African Human Rights Law Journal* 1–28.

59 Karen J Alter and Laurence R Helfer (eds), *Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice* (Oxford University Press 2017).

60 Salvatore Caserta, *International Courts in Latin America and the Caribbean: Foundations and Authority* (Oxford University Press 2020).

munity Court of Justice,[61] the East African Court of Justice,[62] the SADC Tribunal[63]). Exceptionally, due to its close relationship with the ECtHR, the CJEU jurisprudence regarding fundamental rights protection is considered.[64] Third, the book does not refer to the practices of human rights committees established under UN-related treaties. Although those treaty bodies may exercise quasi-judicial powers through the procedure of individual complaints, the non-legal binding nature of their view should be examined from a theoretically different viewpoint from the jurisprudence of human rights courts.[65]

The crucial problem for the present aim of the book is the *comparability* or *commensurability* between regional human rights systems, which have created different epistemic communities.[66] In his seminal paper, Oscar Schachter wrote that 'the professional community of international lawyers […], though dispersed throughout the world and engaged in diverse occupations, constitutes a kind of invisible college dedicated to a common intellectual enterprise'.[67] Such an invisible college as the 'homeland of the people of international law' allows international lawyers to imagine themselves as the *conscience juridique* of everyone else.[68] In the process of

61 Obiora C Okafor and Okechukwu J Effoduh, 'The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Brainy Relays, and "Flipped Strategic Social Constructivism"' in James Thuo Gathii (eds), The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change (Oxford University Press 2020) 106–148; Olabisi Akinkugbe, 'Towards an Analysis of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice' ibid 149–177.

62 Andrew Heinrich, 'Sub-Regional Courts as Transitional Justice Mechanisms: The Case of the East African Court of Justice in Burundi' ibid 88–105.

63 Frederick Cowell, 'The Death of the Southern African Development Community Tribunals Human Rights Jurisdiction' (2013) 13 *Human Rights Law Review* 153–165.

64 Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 13 *Maastricht Journal of European and Comparative Law* 168–184.

65 General Comment No 33 on Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, HRC, UN Doc CCPR/C/GC/33 (2009), para 11.

66 On the notion of commensurability in comparative international law, see Jean d'Aspremont, 'Comparativism and Colonizing Thinking in International Law' (2019) 57 *Canadian Yearbook of International Law* 89–112.

67 Oscar Schachter, 'The Invisible College of International Lawyers' (1977–78) 72 Northwestern University Law Review 217–226.

68 Zoran Oklopčić, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018) 223–226.

co-constituting their home, however, international lawyers also have the transgressive experience of 'divisible college', as coined by Anthea Roberts in opposition to Schachter's 'invisible college'.[69] The relativist term describes the diversity of epistemic communities, 'whose members hail from different states and regions and often from separate, though sometimes overlapping, communities with their own understandings and approaches, as well as their own distinct influences and spheres of influence'.[70] Similarly, Lauri Mälksoo asks an interesting question: 'are international lawyers globally really all in the same college or temple? Perhaps instead there are a number of fragmented colleges, epistemic communities, speaking each a different language or at least dialect of the same language, and thinking they are "predominant" while being relatively ignorant about the others'.[71]

Maintaining a consciousness of distinctive epistemic communities, the monograph reflects an appreciation of the situationality of regional human rights systems. In the context of international law, as a result of the ultimate denial of solipsism, 'an international lawyer is faced with the entire situational interconnectedness—both in terms of other disciplines of scholarship and in terms of his own personal being'.[72] With such a situationality, as Martti Koskenniemi says, 'a serious comparative study of international law would contribute to […] seeing all players as both universal and particular at the same time, speaking a shared language, but doing that from their own, localizable standpoint'.[73] Put another way, in the determined words of Andrea Leiter, 'international law is a practice that cannot provide such comfort' but rather 'holding on to the uncertainty in decision-making and the multiple means of meaning-making available at any given moment, holding on to the situatedness of the practice without

69 On the notion of Divisible College, see Andrea Carcano, 'Uses and Possible Misuses of a Comparative International Law Approach' (2018) 54 *Questions of International Law* 21–38; Miriam Bak McKenna, 'Decentering the Universal: Comparative International Law and Decolonizing Critique' (2018) 12 *ESIL Conference Paper Series* 1–25.

70 Anthea Roberts, *Is International Law International?* (Oxford University Press 2017) 2.

71 Lauri Mälksoo, 'International Legal Theory in Russia: A Civilizational Perspective, or: Can Individuals Be Subjects of International Law?' in Florian Hoffmann and Anne Orford (eds), *The Oxford Handbook on the Theory of International Law* (Oxford University Press 2016) 257–275, 273.

72 Outi Korhonen, 'New International Law: Silence, Defence or Deliverance?' (1996) 7 *European Journal of International Law* 1–28, 14.

73 Martti Koskenniemi, The Case for Comparative International Law' (2009) 20 *Finnish Yearbook of International Law* 1–8.

resorting to nihilism, is the task of the international lawyer'.[74] Therefore, the dialect between universality and particularity denotes 'the role of international lawyers as a discursive bridge, passing back and forth to facilitate interaction and understanding between the national and transnational'.[75]

Significant disparities have existed between the European and Inter-American human rights systems. As the following explanation summarises, one of the most crucial differences is the political context within which the two mechanisms operate: 'Whereas the European system has during its forty year history generally regulated democracies with independent judiciaries and governments that observe the rule of law, the history of much of the Americas since 1960 has been radically different, with military dictators, the violent repression of political opposition and of terrorism and intimidate judiciaries for a while being the order of the day in a number of countries'.[76] Consequently, the European system has principally dealt with 'qualified' rights (Articles 8–11), the interference in which is justified through the balance between individual and community interests in relatively consolidated democratic countries.[77] The Inter-American system, in contrast, has had to address gross and systematic human rights violations, such as forced disappearances, arbitrary detentions, extrajudicial executions and torture in the context of dictatorship and internal armed conflicts.

Notwithstanding such a historical discrepancy, we should not overlook the recent convergence of political contexts. Christina Cerna detects the *Europeanisation of the Inter-American system*, in which 'petitions presented in recent years concern problems common to most democratic states, such as violations of due process, delays in judicial proceedings, disputes over property rights, and status questions (e.g. loss of employment, decrease in pension, and the like)'.[78] At the same time, Cerna rightly identifies the

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74 Andrea Leiter, 'Review Essay: Is International Law International? by Anthea Roberts' (2018) 19 *Melbourne Journal of International Law* 413–422, 421.

75 Gleider Hernández, '*E Pluribus Unum*? A Divisible College?: Reflections on the International Legal Profession' (2018) 29 *European Journal of International Law* 1003–1022, 1021–1022.

76 Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals : Text and Materials*, 3rd ed (Oxford University Press 2008) 1027.

77 Sarah Maringele, *European Human Rights Law: The Work of the European Court of Human Rights Illustrated by an Assortment of Selected Cases* (Anchor Academic Publishing 2014) 44.

78 Christina M Cerna, 'The Inter-American System for the Protection of Human Rights' (2004) 16 *Florida Journal of International Law* 195–212, 201–203.

Latin-Americanisation of the European system, which 'deal[s] with different violations due to the composition of the newly democratic governments of the new member states of the Council of Europe [...] such as the conflict in Russia with Chechen rebels, and the incidents of torture in Turkey'.[79] As a result of such a coming together, as will be demonstrated in the following chapters, the number of comparative analyses between the European and Inter-American human rights systems has actually been increasing in the academic literature.

Against the similar backgrounds of systemic human rights violations caused by unconventional domestic law, domestic and regional courts have engaged in conventionality control. As a fundamental similarity, both systems aim at the collective enforcement of human rights beyond the reciprocal exchange of rights for the mutual benefit of the Contracting States.[80] As Strasbourg judge Lech Garlicki highlights, there have been certain instances where the European Court faced the question of the conventionality of domestic legal norms, and therefore, had to establish whether a national norm conformed with the European Convention.[81] Because the existing literature on the national implementation of human rights treaties has centred on European practices, the concept has been only fragmentarily examined. Although Latin American scholars have been interested in this notion, their analyses are generally limited to the regional context and ignore any comparability beyond the Americas.[82] Only a few authors in the existing literature have attempted to compare the Inter-American doctrine of conventionality control with the European practice; therefore, the research remains embryonic.[83] This monograph, then, fills the gap in

79 Ibid.

80 *Ireland v the United Kingdom*, ECtHR (Plenary), App no 5310/71, Judgment on Merits of 18 January 1978, para 239; "*Other Treaties*" *Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, IACtHR, Series A No 1, OC-1/82, Advisory Opinion of 24 September 1982, para 29.

81 Lech Garlicki, 'Contrôle de constitutionnalité et contrôle de conventionnalité : sur le dialogue des juges' in *La conscience des droits : Mélanges en l'honneur de Jean-Paul Costa* (Dalloz 2011) 271–280, 278–280.

82 Pablo González-Domínguez, *The Doctrine of Conventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System* (Intersentia 2018).

83 Gonzalo Aguilar Cavallo, 'El control de convencionalidad; análisis en derecho comparado' (2013) 9 *Revista Direito GV* 721–754; Néstor Pedro Sagüés, 'El "control de convencionalidad" en el sistema interamericano, y sus anticipos en el ámbito de los derechos económico-sociales: concordancias y diferencias con el sistema europeo' in Armin von Bogdandy, Héctor Fix-Fierro, Mariela Morales

comparative law research on international and constitutional law by empirically analysing the regional and domestic practice of conventionality control and normatively envisions a model thereof.[84]

B. Conventionality Control Parameters and Powers

To elaborate the structure of conventionality control, the book returns once again to the jurisprudence of the San José Court as the principal advocate of this international legal obligation. In the *Dismissed Congressional Employees* case, the IACtHR further clarified the manner and scope of conventionality control as follows:

> [T]he organs of the Judiciary should exercise not only a control of constitutionality, but also of 'conventionality' *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations.[85]

This explanation is highly suggestive for establishing analytical frameworks as regards to conventionality control. Concretely speaking, the Court refers to the control of domestic law following both the constitutional and the conventional *parameters*, which is achieved through the *powers* of domestic courts and a human rights court. As **Chart 1** below indicates, the book accordingly establishes the frameworks of *parameters* (Chapter 1) and *powers* (Chapter 2) of conventionality control in relation to the 'constitutionalisation of international adjudication' (Part I) and the 'internationalisation of constitutional adjudication' (Part II). After empirically inspecting the judicial practices in question (Section 1), each chapter makes normative claims in terms of constitutionalism and legal pluralism (Section 2).

Antoniazzi and Eduardo Ferrer Mac-Gregor (eds), *Construcción y papel de los derechos sociales fundamentales: Hacia un ius constitucionale commune en América Latina* (Instituto de Investigaciones Jurídicas 2011) 993–1030.

84 Anja Seibert-Fohr, 'Judicial Engagement in International Human Rights Comparativism' in August Reinisch, Mary E Footer and Christina Binder (eds), *International Law and...: Select Proceedings of the European Society of International Law*, Vol 5, (Hart 2014) 7–24.

85 *The Dismissed Congressional Employees (Aguado-Alfaro and Others) v Peru* (n 49) para 128.

The first analytical framework concerns the relationship of norms: the *parameters* as the yardstick by which conventionality control of domestic law is achieved. To elucidate the criteria, it is useful to borrow the concept of *block* that the French *Conseil constitutionnel* has developed as the parameter for constitutionality control. The concept *bloque de constitutionalidad* has been subsequently used by several constitutional courts in Latin America.[86]

Part 1 – Chapter 1: The first aspect of the constitutionalisation of international adjudication is that human rights courts are authorised to interpret the parameters through which the compatibility between national legislation and the Conventions is assessed. Since they originated, human rights courts had been limited to the interpretation and application of the provisions of the Conventions (and relevant protocols). Notwithstanding these *formal* limits, the ECtHR and the IACtHR have broken away from the *closed* position of adhering to the regional framework. As guardians of conventions-based constitutional orders, human rights courts are responsible for interpreting the conventionality block that is generally applied to all States Parties beyond individual contentious cases. In the practice of human rights courts, it is remarkable that external international instruments are referred to, to expand the rights and freedoms of Conventions.

Part 2 – Chapter 1: The first aspect of the internationalisation of constitutional adjudication is that domestic judges are required to exercise control of domestic law in accordance with not only national constitutions but also regional conventions. At the domestic level, the supremacy of international law over domestic law cannot duly answer the question of whether domestic courts can utilise human rights conventions in judicial review. Moreover, human rights conventions and national constitutions share analogous catalogues of rights and freedoms for the most part. Therefore, a judicial review involving fundamental rights would indicate the inevitable coexistence of conventionality control and constitutionality control. When domestic courts find certain domestic provisions incompatible with a treaty and abstain from enforcing them, conventionality control may replace constitutionality control, and the latter's ultimate aim of

86 Manuel Eduardo Góngora Mera, 'La diffusion del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del *ius constitutionale commune* latinoamericano' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), *Ius constitututionale commune en América Latina: Rasgos, potencialidades y desafíos* (UNAM ─IIJ/Institut Max Planck de Derecho Público comparado y Derecho Internacional 2014) 301–324.

ensuring the *supremacy of constitution* may also be undermined. Against this background, national judges have attempted to integrate human rights treaties into national constitutions to converge the parallel judicial control mechanisms.

The second analytical framework deals with the relationship among organs: the *powers* allocated to each organ to achieve conventionality control. To explain the allocation of competence, we can gain inspiration from the categorisation of *centralised* and *decentralised* models of constitutional review.[87] The centralised system confers upon a special institution, mostly the constitutional court, the exclusive authority to settle constitutional matters, and therefore, the powers of ordinary judges are limited to applying and interpreting parliamentary legislations. Following the theoretical foundations provided by Hans Kelsen, the concentrated model of constitutionality review has spread widely in Europe and Latin America. The *decentralised* or *diffused* system grants all judges the power to declare legislation unconstitutional. As a typical example, Chief Justice John Marshall in the 1803 *Marbury v Madison* decision introduced the diffused model of judicial review in the United States.

Part 1 – Chapter 2: The second aspect of the constitutionalisation of international adjudication is that human rights courts perform judicial review of national acts against the yardstick of conventions' parameters. As the structural principle of international human rights law, subsidiarity presumes that the *primary* responsibilities are incumbent on States Parties and that treaty mechanisms are essentially *subsidiary* to domestic systems. As the primary guardians of human rights, States Parties are required to perform general obligations to respect and ensure treaty rights and to align their domestic law and practice in line with treaty criteria. As a literal meaning, the subsidiarity principle governing the allocation of public authority in systems of multilevel governance shows a preference for functions at the lowest level of governance. Inversely, however, subsidiarity reallocates authority to the higher level if, and to the extent that, the higher level is better placed to fulfil the task in question. Considering these *negative* and *positive* aspects, this study demonstrates the dual pattern of power allocation (*centralisation* and *diffusion*) for conventionality control through subsidiarity.

Part 2 – Chapter 2: The second aspect of the internationalisation of constitutional adjudication is that the distribution of powers between con-

87 In general, Mauro Cappelletti, 'Judicial Review in Comparative Perspective' (1970) 58 *California Law Review* 1017–1053.

stitutional and ordinary courts is reallocated in accordance with regional conventions as well as constitutional mandates. In the subsequent jurisprudence, the IACtHR elaborated that the judiciary, at all levels, must exercise *ex officio*, a sort of conventionality control between the domestic legal provisions and the American Convention, evidently within the framework of their respective competence and the corresponding procedural rules. This position embraces both *restrictive* and *permissive* aspects concerning the distribution of competences for conventionality control among domestic courts. As for the *restrictive* aspect, conventionality control must be performed by *all judges*, regardless of their formal membership in the judiciary branch, and regardless of their rank, grade, level or area of expertise. Regarding the *permissive* aspect, States Parties are granted certain discretions to exclusively entrust conventionality control to the *constitutional court* in line with its concentrated powers for constitutionality control.

	Chapter 1 Conventionality Control Parameters	**Chapter 2 Conventionality Control Powers**
Part I Constitutionalisation of International Adjudication	**Interpretation of conventionality control parameters**	**International distribution of conventionality control powers**
Part II Internationalisation of Constitutional Adjudication	**Application of conventionality control parameters**	**Domestic distribution of conventionality control powers**

Chart 1. Research Framework: Conventionality Control Parameters and Powers