

Research Article

Conventionality control: an ineffective model for regional enforcement of human rights

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Abstract

Observing the practice of the Inter-American Court, this article will criticise the doctrinal effectiveness of conventionality control as a mode of regional enforcement of human rights. The article firstly criticises the theoretical argument that conventionality control is a more effective way to regionally enforce state human rights compliance. Firstly, there is no actual legal basis both explicitly in the American Convention on Human Rights, and implicitly through precedent from the decision of *Almonacid* or by invocation of the principle of effectiveness. Without authority there is no normative reason for States to subject their own domestic law to the Inter-American Court to enforce human rights. Secondly, the article criticises the systematic illegitimacy in unjustifiably restraining the actions of democratically legitimate states. Finally, this article proves these normative issues in practice through an empirical analysis of the low compliance rates in conventionality control judgements. The article then engages with the highly complied alternative friendly settlement process which by comparison proves that conventionality control is ineffective due to its lack of dialogue with the states. If the states have no normative reasons to subject their domestic laws or comply with enforcement orders, and in practice conventionality control does not cause high compliance in contrast to non-maximalist dialogic mechanisms, then conventionality control is an ineffective mode of regional enforcement of human rights.

⁵⁰⁸ Jack Dias-Harrison is an alumni who graduated the Law LLB degree in 2025. He became interested in the practices of the Inter-American System after taking the class 'Innovations from Global South Actors' taught Dr Kathryn Nash. He produced this essay with the guidance and encouragement of Dr Nash to which he is very grateful.

I. Introduction

This article will argue that the Inter-American Court of Human Rights' (IACtHR) model for regional enforcement of human rights, 'conventionality control', is ineffective both in theory and practice. This article will attempt to examine and find fault with the theoretical basis that the doctrine provides an effective means of enforcement. This is due to several factors, including a lack of a formal legal basis, which gives no normative reasons for states to consent to this model of enforcement. Additionally, the system of enforcement through conventionality control is illegitimate, giving no normative reasons for states to enforce human rights through conventionality control. The article will then examine, through these theoretical reasons, the practical considerations of low rates of compliance in comparison to the success of the non-legal dialogic friendly settlement mechanism, demonstrating a lack of dialogue between states as a root cause for ineffectiveness of the doctrine. As there is no theoretical reasoning or practical evidence to show the doctrine as effective, conventional control is an ineffective model, and a more dialogic, non-hierarchical method of regional enforcement ought to be preferred.

II. Context

The Inter-American Court of Human Rights is the regional court of Latin America that interprets the American Convention on Human Rights (ACHR).⁵⁰⁹ The IACtHR exists within a wider framework of the Organisation of American States (OAS) and the Inter-American System (IAS). Twenty-three of the OAS member states accept the Court's jurisdiction at the time of writing.⁵¹⁰ The IACtHR has the authority to enforce human rights by initiating contentious proceedings against states and subsequently monitor the orders issued by the Court.⁵¹¹ Conventionality control is a model of human rights enforcement from the IACtHR. The theoretical justification was to increase the

⁵⁰⁹ American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969.

⁵¹⁰ "Frequently asked questions", Inter-American Commission on Human Rights. Accessed February 10, 2025. <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/usersupport/faq.asp#:~:text=The%20States%20that%20have%20recognized,Trinidad%20and%20Tobago%2C%20Uruguay%20and.>

⁵¹¹ 'What is the I/A Court H.R.?' Inter-American Court of Human Rights, Accessed 23/11/2024 https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en.

effectiveness of enforcing human rights regionally by obliging all states to interpret and apply their domestic law consistently with the jurisprudence of the IACtHR.⁵¹² This model is maximalist, as it provides less room for domestic law discretion to offer varied protection of human rights; all interpretation of human rights and their scope is decided hierarchically by the IACtHR. The doctrine has been expanded over time to override the constitutional provisions of the state by the IACtHR's own body of law.⁵¹³ The current model evolved from what was originally intended to be a minimum threshold protection of human rights subsidiary to the domestic states' own system and safeguards.⁵¹⁴ This progression has been defended theoretically as necessary to ensure "harmonious application of international law at the state level".⁵¹⁵ The benefit is the consistency of protecting and meaningful enforcement where mass human rights violations occur without effective recourse or remedy from the State.⁵¹⁶ No other regional system offers such a degree of a direct enforcement comparable to this. However, there are reasons to doubt whether conventionality control can be perceived to improve the effectiveness of human rights enforcement.

What defines enforcement of human rights as effective stems from state consent and the recognition of the IACtHR's legitimacy to enforce human rights through conventionality control.⁵¹⁷ Even where a member state may disagree with the decision, they reluctantly enforce the international court's ruling as they consented to the body having final say and recognise their legitimacy to do this. Legitimacy gives normative reasons for states to cooperate, which consequently means reparation orders are fully

⁵¹² Pablo Gonzalez-Dominguez, *The doctrine of conventionality control: between uniformity and legal pluralism in the inter-American human rights system* (Cambridge University Press, 2018) 1-2.

⁵¹³ Claudina Orunesu, 'Conventionality Control and International Judicial Supremacy: Some Reflections on the Inter-American System of Human Rights' *Revus J Const. Theory & Phil, Law* 40 (2020), 45, 48-49.

⁵¹⁴ See American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Article 29(b).

⁵¹⁵ Paolo G Carozza and Pablo Gonzalez, 'The Final Word? Constitutional dialogue and the Inter-American Court of Human Rights: A reply to Jorge Contesse I-CON: Debate!' *International journal of constitutional law* 15, no. 2 (2017), 436, 441 citing Garcia Ramirez, 'The relationship between Inter-American jurisdiction and states (national systems: some pertinent questions' (2014) 1(1) *Notre Dame J. Int'l & Comp.L.* 141.

⁵¹⁶ Ariel E. Dulitzky, 'An Inter-American Constitutional Court? The Intervention of the Conventionality Control by the Inter-American Court of Human Rights' *Texas International Law Journal* 50 (2015), 45, 54-55.

⁵¹⁷ Claudina Orunesu (n 5), 49-50.

executed and complied with.⁵¹⁸ Therefore, to assess the effectiveness of conventionality control, it depends on the compliance of states in response to the judgments of the IACtHR.⁵¹⁹ The former two sections refute the theoretical idea that states, through conventional control, would feel compelled to comply with IACtHR's orders; the latter proves that states generally do not comply with IACtHR orders, denying the idea that conventional control can be effective.

III. Lack of a normative basis for conventionality control

IIIA. Lack of ACHR basis

Conventionality control lacks a legal basis through the ACHR and precedent to enforce human rights. Without this, there is no normative justification for the states to consent and comply with the IACtHR, which makes conventionality control theoretically ineffective to enforce human rights. The doctrine was formally established in *Almonacid* in 2006.⁵²⁰ The Court invoked Article 2 ACHR,⁵²¹ which requires the state to undertake "legislative or other measures" to ensure ACHR rights are given effect.⁵²² They combined this with the art.1.1⁵²³ requirement to "ensure" the rights can be exercised.⁵²⁴ The argument was that by ratifying the ACHR, the states' judiciary was bound to exercise control over their domestic law to be compliant with the convention; Article 27 of the Vienna Convention (VC)⁵²⁵ was referenced to support this.⁵²⁶ However, the ACHR does not support this kind of enforcement under conventional control; the preamble refers to the convention as complementary.⁵²⁷ No explicit

⁵¹⁸ Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", in *International judicial lawmaking on public authority and democratic legitimation in global governance*, ed. Armin von Bogdandy and Ingo Venzke (Springer, 2012) 297.

⁵¹⁹ Henk Addink, *Good governance: concept and context* (Oxford University Press, 2019) 147-150.

⁵²⁰ *Almonacid Arellano et al. v Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.154 (26 September 2006).

⁵²¹ American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Article 2.

⁵²² *Almonacid* (n 12) 115-119.

⁵²³ American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Article 1.1.

⁵²⁴ *Almonacid* (n 12) 123.

⁵²⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331, Article 27 VC.

⁵²⁶ *Almonacid* (n 12) 125.

⁵²⁷ American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Preamble.

direction is given on the application that the states should take to “ensure” the protection of rights.⁵²⁸ Art. 68.1 gives a duty of compliance only when states are parties to the dispute.⁵²⁹ Gonzalez-Dominguez examined the preparatory materials and original context of the ACHR and concluded art.2 was intended to give deference to states in implementation as opposed to accepting direct effect of the IACtHR.⁵³⁰ Furthermore, scholars have argued that, by its nature, art.27 VC does not support an interpretation consistent with direct effect and supremacy of international law.⁵³¹ It cannot be said that there is evidence to suggest there is legitimacy for such a maximalist form of enforcement under the ACHR and VC alone.

III.B. Lack of precedential basis

There is a lack of precedential basis to give justification for conventionality control. Precedent justifies an expansive interpretation of the ACHR by principles including effectiveness.⁵³² In *Dismissed Employees*, the Court held that conventional control should be carried out “*ex officio*”.⁵³³ This meant domestic judges were approved to give abstract rulings on the conventionality of domestic law within their respective competences,⁵³⁴ yet states with centralised constitutional control would not give competence for domestic judges to do this and their constitutional structure was subsequently undermined. The Court justified an interpretation of the ACHR supporting this on the effectiveness of enforcing human rights domestically without needing to petition the IAS.⁵³⁵ Similarly, it can be argued that the Almonacid reasoning was to give effectiveness to the ACHR in applying an amnesty law where domestic law could not. This is a different assessment of effectiveness on whether conventional control gives the best application to the ACHR over domestic mechanisms. The

⁵²⁸ *ibid* Article 1.1, 2, 13, 17, 18, 25, 43.

⁵²⁹ *ibid* Article 68.1.

⁵³⁰ Pablo Gonzalez-Dominguez (n 4) 121.

⁵³¹ Claudina Orunesu (n 5) 48-9, Pablo Gonzalez-Dominguez (n 4) 139.

⁵³² Eduardo Ferrer Mac-Gregor, ‘Symposium: The constitutionalisation of international law in Latin America conventionality control the new doctrine of the inter-American court of human rights.’ *AJIL Unbound* 2019 (2015), 93, 96.

⁵³³ *Dismissed Congressional Employees (Aguado-Alfaro et al.) v Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.158 (24 November 2006), 128.

⁵³⁴ *ibid* 128.

⁵³⁵ *ibid* 131.

precedential basis can be rejected on two grounds. Firstly, the argument that the precedent can bind states to exercise conventional control is circular. Secondly, even if we accept a precedential basis, it cannot be justified by the principle of effectiveness in the current regional context.

There is no precedential basis to justify conventional control since the argument is circular. Gonzalez-Dominguez highlights the circularity of the justification from *Almonacid*. Conventionality control is justified because *Almonacid* confirmed that States ought to do so and consider IACtHR precedent binding. Yet why *Almonacid* said this is less clear. As aforementioned, it cannot be found by an explicit legal basis or formal mutual agreement. Rather, the basis for this is that the doctrine of conventional control itself exists, which is a non-justification.⁵³⁶ One might argue that custom forms the basis, and the States acquiesced to its binding precedent, but there has been no source that identifies this. Although the IACtHR is seen as the ultimate interpreter of the ACHR, this does not save this reasoning either, as it does not necessarily imply an acceptance of conventionality control. Other international courts assume the role of ultimate interpreter but still play subsidiary roles in actual enforcement within the states.⁵³⁷ Consequently, precedent does not provide a convincing justification for conventionality control either.

Even if we were to accept there was a precedential basis for conventionality control, the expansionist interpretation of the ACHR on the principle of effectiveness to justify it is inapplicable in the modern regional context. For the principle of effectiveness to justify a directly enforcing relationship to interpret the ACHR, state consent must be continuous, and the factual situation needs to explain why it is effective for the ACHR to be interpreted in such a way.⁵³⁸ Latin America's previous era of authoritarian regimes and dictatorships meant that human rights could not be enforced domestically.⁵³⁹ In the transition to democracies, many states bought into the IACtHR and ACHR to guarantee human rights whilst the states were fragile and still developing

⁵³⁶ Pablo Gonzalez-Dominguez (n 4) 143-144.

⁵³⁷ *ibid* 144.

⁵³⁸ Henk Addink (n 11) 150-151.

⁵³⁹ Jorge Contesse, 'Contestation and deference in the Inter-American Human Rights System' *Law and Contemporary Problems* 79, no. 2 (2016), 123, 133-134.

democratic practices.⁵⁴⁰ After the 1990s, states established democratic mechanisms to enforce human rights tailored to their local contexts.⁵⁴¹ Petitions in the modern context are increasingly for more politically sensitive and non-lethal rights violations.⁵⁴² Crema argues that the IACtHR in *Almonacid* adapted a politically specific judgment into a blanket normative precedent for intervention in the state's enforcement of human rights.⁵⁴³ The factual demand for conventionality control in *Almonacid* relied heavily on the political consent and cooperation of the new democratic government which wanted to remove the amnesty granted during Pinochet's regime.⁵⁴⁴ The decision was only effective because Chile chose to cooperate due to their lack of domestic procedure in place, not because they felt a normative obligation to do so.⁵⁴⁵ Gonzalez-Dominguez expands this reasoning to other cases regarding dealing with the aftermath of previous regimes like Fujimori's regime in Peru.⁵⁴⁶ Since *Almonacid* and related circumstances are politically specific instances, and the current regional context shows that democratic states have their own politically decided mechanisms to enforce rights, it cannot be said that the factual demand proves conventionality control is the most effective way to give application to the ACHR. This allows the IACtHR to empower judges to disapply laws with which the IACtHR may politically disagree. For example, in *Esposito*, Argentina disagreed with the IACtHR but felt obliged to comply to avoid international responsibility.⁵⁴⁷ There cannot be continuous normative support from states in the current context where conventionality control is perceived as politically undermining and subsequently not required for best application in the current regional context. In the absence of both an explicit or precedential legal basis for conventionality control, there is no normative reason for the states to consent and enforce human rights. The doctrine is a theoretically ineffective model to enforce human rights.

⁵⁴⁰ Ariel E. Dulitzky (n 8) 55-56.

⁵⁴¹ Ximena Soley and Silvia Steininger, 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' *International Journal of the Law in Context* 14, no. 2 (2018), 237, 242.

⁵⁴² Jorge Contesse (n 32) 128.

⁵⁴³ Luigi Crema, 'Are Amnesties Still an Option ? A Non-Policy Based Critique of the Inter-American Approach', *The Center for Civil & Human Rights Working Paper Series* 6 (2013), 1, 50-51.

⁵⁴⁴ Pablo Gonzalez-Dominguez (n 4) 145-146.

⁵⁴⁵ *ibid* 145.

⁵⁴⁶ *ibid*.

⁵⁴⁷ Claudina Orunesu (n 5), 53-54.

IV. Systematic legitimacy

IV.A. Defining Systematic legitimacy

Conventionality control is not an effective model of the enforcement of human rights, also because it lacks systematic legitimacy. The effectiveness of an international institution depends on the continued support of the states, while the international institutions determine the validity of domestic law.⁵⁴⁸ As aforementioned, the effectiveness of enforcement is dependent on legitimacy as legitimacy provides a normative reason for the states to buy-in to conventionality control making it effective.⁵⁴⁹ An international institution does not necessarily need to be democratically legitimate; systematic legitimacy is achieved by dividing the labour of the international institution and democratically legitimate states appropriately. The states only have their autonomy infringed by the institution when proportionate to the benefits of the Court intervening through conventionality control.⁵⁵⁰ Iglesias-Vila endorses systematic legitimacy as a goal for the IACtHR.⁵⁵¹ It is beyond the scope of this essay to consider the democratic legitimacy of the IACtHR. It is enough to assume that democratic legitimacy can be contested on the basis of similar issues to other international courts and the fact there is no explicit basis for state consent to conventionality control.⁵⁵² Therefore, conventionality control needs to be systematically legitimate to be theoretically effective for enforcement.

Deference to the states in certain circumstances would be a systematically legitimate way of dividing labour. The eleventh IACtHR President argued against deference as judges would be subject to intimidation and pressure to not enforce human rights.⁵⁵³ But as proven in the previous section, this is no longer the general case. Each state

⁵⁴⁸ Henk Addink (n 11) 151.

⁵⁴⁹ Allen Buchanan, *The Heart of Human Rights* (Oxford University Press, 2013), 180.

⁵⁵⁰ *ibid* 193-194.

⁵⁵¹ Marisa Iglesias-Vila, 'The conventionality control and the Fontevecchia case: Is the margin of appreciation the pancea?' *Journal for Constitutional Theory and Philosophy of Law* 46 (2022), 1, 9-10.

⁵⁵² Cohen Harlan Grant, Follesdal Andreas, Grossman Nienke, Ulfstein Geir, "Legitimacy and International Courts – A Framework" in *Legitimacy and International Courts. Studies on International Courts and Tribunals*, eds. Grossman Nienke, Cohen Harlan Grant, Follesdal Andreas, Ulfstein Geir (Cambridge University Press; 2018), 7-8.

⁵⁵³ Jorge Contesse (n 32)133-134.

has their political sensitivities and contexts which place the domestic court in a better position to adjudicate.⁵⁵⁴ Without a fair division of labour, conventionality control undermines the legal and sovereign autonomy of each state and risks the judicial overreach of the IACtHR to decide issues which overlook the realities of the political context and priorities of each nation. The next sections will illustrate through the cases of *Gelman* and *Fontevecchia* that conventionality control through its infringement of state autonomy with no deference to democratic procedures is systematically illegitimate.

IV.B. Lack of deference in *Gelman*

The illegitimacy of conventionality control is exemplified through the case of *Gelman* which gave no sort of legitimate deference to Uruguay's domestic context and law in handling the situation. The case concerned an amnesty law regarding the Uruguayan dictatorship.⁵⁵⁵ The IACtHR remained consistent with their amnesty law jurisprudence deciding against Uruguay.⁵⁵⁶ The public generally supported nullity of amnesty laws, but the democratic credentials in *Gelman* differentiated this case.⁵⁵⁷ It was passed by a democratic government and legislature, then upheld twice by popular vote.⁵⁵⁸ The state demonstrated they preferred the amnesty law to prevent social unrest and allow the democratic government to progress their objectives.⁵⁵⁹ The IACtHR held that the ACHR and protection of human rights are non-derogable and therefore take priority over the will of the public.⁵⁶⁰ The decision has been criticised for its lack of deference.⁵⁶¹ The IACtHR or Commission could have ordered Uruguay to ensure a remedy is sought for the victims or facilitate a dialogue with the victims whilst monitoring compliance, as opposed to dismissing the democratic context and requiring the law to be applied. The Court by utilising conventionality control was systematically illegitimate in not dividing the labour to allow Uruguay to ensure remedy without

⁵⁵⁴ Ariel E. Dulitzky (n 8) 53.

⁵⁵⁵ *Gelman v Uruguay*, Merits and Reparations, Inter-American Court of Human Rights Series C No.221 (24 February 2011) 2.

⁵⁵⁶ *ibid* 228-229.

⁵⁵⁷ Christina Binder (n 10) 325-326.

⁵⁵⁸ Jorge Contesse (n 32) 134-136.

⁵⁵⁹ *ibid* 134-136.

⁵⁶⁰ *Gelman* (n 48) 238-239.

⁵⁶¹ Jorge Contesse (n 32) 137.

disenfranchising their democratic will. The fallout of this systematic illegitimacy was shown when the Supreme Court struck down criminal code provisions compliant with *Gelman* under conventionality control because it was unconstitutional.⁵⁶² Uruguay felt the infringement to their democratic autonomy was not proportionately restricted, and consequently felt no normative reason to comply with the court. *Gelman* illustrates that the non-deferential model of conventionality control is systematically illegitimate and ineffective as a means of enforcement.

IV.C. Lack of deference in *Fontevecchia*

Fontevecchia provides further evidence that conventionality control is systematically illegitimate therefore giving no normative reason for compliance making the doctrine ineffective. Before 2017, Argentina was one of the most amenable states to conventionality control.⁵⁶³ Though this may be due to convenience. Argentina operates a diffuse system of constitutional control and afforded the ACHR constitutional status in the 1994 reforms meaning the exercise of conventionality control was relatively uncontroversial as opposed to true state buy-in.⁵⁶⁴ *Fontevecchia* concerned the violation of freedom of expression in Argentina.⁵⁶⁵ The IACtHR explicitly ordered Argentina to “revoke the decision in its entirety”.⁵⁶⁶ Argentina refused on the basis it violates a constitutional principle of *res judicata*.⁵⁶⁷ The Supreme Court of Justice of Argentina (SCJAN) argued the Court ought not to act as a fourth instance but merely be subsidiary to alert non-compliance.⁵⁶⁸ Therefore, the IACtHR was acting outside of its competences and could not order a violation of Argentina’s constitution.⁵⁶⁹ Argentina did not oppose the binding nature of the IACtHR within its competences.⁵⁷⁰

⁵⁶² Burt J.M, “Recent Sentence by Uruguayan Supreme Court Obstructs Search for Truth and Justice”. Accessed December 1, 2024. <https://www.wola.org/analysis/recent-sentence-by-uruguayan-supreme-court-obstructs-search-for-truth-and-justice/>

⁵⁶³ Laurence Burgorgue-Larsen, ‘Conventionality Control: Inter-American Court of Human Rights (IACtHR)’ *Oxford Public International Law* 1 (2018), 42.

⁵⁶⁴ Jorge Contesse (n 32) 140, Lucia Bellochio, ‘Conventionality control in Argentina case law’ *Revista de Direito Economico e Socioambiental* 12 (2021), 60, 61.

⁵⁶⁵ Anon, “Fontevecchia Case” *International Law Reports* 186 (2020) 430, 433.

⁵⁶⁶ *Fontevecchia and D ’ Amico v Argentina*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No. 238 (29 November 2011) 105.

⁵⁶⁷ Anon (n 58) 436-438.

⁵⁶⁸ *ibid* 434-435.

⁵⁶⁹ *ibid* 435-437.

⁵⁷⁰ *ibid* 438.

The reasoning of Argentina can be criticised as unsound, considering it implies the IACtHR's ability to enforce is subject to Argentina's interpretation of what is in its competencies.⁵⁷¹ Regardless, this was an instance of the court refusing to comply with conventionality control for its undue restriction on state autonomy. Argentina was criticising the overstep of the IACtHR into becoming a fourth instance court which gives specific remedial orders as opposed to ordering the result that needs to be achieved.⁵⁷² The IACtHR is the "ultimate interpreter" of the convention but this does not necessarily imply that they then get to determine the appropriate remedy for the state.⁵⁷³ The issue in *Fontevecchia* was a matter of enforcement, not substantive right.

By ordering a specific order rather than requesting the disapplication, the Court's infringement on Argentina's autonomy outweighed the benefit of the IACtHR's interpretation of the ACHR on freedom of expression. The Court subsequently conceded that Argentina did not necessarily have to revoke the judgment but could find other outcomes to ensure the judgment had no effect.⁵⁷⁴ The order was satisfied through a label attached to the publication of the original case notifying non-compliance with the ACHR.⁵⁷⁵

Multiple scholars suggest an inter-court dialogue between the IACtHR and states would be systematically legitimate.⁵⁷⁶ The IACtHR criticised Argentina for not asking alternatives before refusing to enforce their ruling, however if there had been some dialogue for an alternative prior to the ruling there would not be illegitimate sentiments towards the IACtHR.⁵⁷⁷ The missed opportunity for the Court to both give deference and engage in dialogue with the SCJAN represents another instance where the court was systematically illegitimate. Argentina's executive, which originally supported the

⁵⁷¹ Lucia Bellochio (n 53) 68-69.

⁵⁷² Jorge Contesse (n 32) 143.

⁵⁷³ Pablo Gonzalez-Dominguez (n 4) 143-144.

⁵⁷⁴ *Fontevecchia and D ' Amico v Argentina*, Monitoring Compliance with Judgement, Inter-American Court of Human Rights (18 October 2017) 16 (Translated Spanish to English by Microsoft Word Translate).

⁵⁷⁵ Claudina Orunesu (n 5), 56.

⁵⁷⁶ Lucia Bellochio (n 53) 70, Claudina Orunesu (n 5) 60, Marisa Iglesias-Vila (n 40) 31-35.

⁵⁷⁷ Marisa Iglesias-Vila (n 40) 35-35 and 'Judicial Backlash in Inter-American Human Rights Law?', Contesse Jorge, "Judicial Backlash in Inter-American Human Rights Law?". Accessed October 23, 2024. <https://www.iconnectblog.com/judicial-backlash-interamerican/>.

IACtHR's order,⁵⁷⁸ subsequently joined with four other states in a 2019 Joint-Declaration calling for more respect for state autonomy and deference.⁵⁷⁹ Argentina no longer had a normative drive to comply with the current mode of enforcement, viewed as illegitimately restricting their autonomy. *Fontevecchia* shows another instance where the Court by not providing deference acted systematically illegitimate causing enforcement in Argentina to become more strained and consequently ineffective theoretically.

Overall, the instances in *Gelman* and *Fontevecchia* highlight the systematic illegitimacy of conventionality control. As the doctrine is illegitimate, it becomes theoretically ineffective as a model of enforcement of human rights.

V. Compliance and Friendly Settlements

The practical impact of the doctrine shows low compliance rates in enforcement orders. This paired with the success of a non-legal dialogic friendly settlement mechanism further emphasises that conventionality control is ineffective in enforcing human rights. Abbott argues that assessing effectiveness should have regard to the practical outcome otherwise the theoretical underpinning of conventionality control can be deceiving.⁵⁸⁰ Having rebutted the theoretical underpinnings in the last two sections, the lack of practical effectiveness of conventionality control conclusively proves that it is ineffective.

V.A. Low Compliance

Conventionality controls' low compliance rate render it ineffective at enforcement. The former OAS Secretary-General noted how non-compliance "gravely damages" effectiveness⁵⁸¹ and the fact that IACtHR cannot practically adjudicate over thousands

⁵⁷⁸ Pablo Gonzalez-Dominguez (n 4) 149.

⁵⁷⁹ 'The Joint Declaration to the Inter-American System of Human Rights: Backlash or Contestation?' Girardi Fachin Melina and Nowak Bruna, "The Joint Declaration to the Inter-American System of Human Rights: Backlash or Contestation?". Accessed December 2, 2024. <https://www.iconnectblog.com/the-joint-declaration-to-the-inter-american-system-of-human-rights-backlash-or-contestation/>.

⁵⁸⁰ Max Silva Abbot, "Is the control of conventionality really viable?" *Journal of Applied Business and Economics* 23, no. 2 (2021), 144, 153.

⁵⁸¹ Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's struggle to Enforce Human Rights', *Cornell International Law Journal* 44 (2011), 493, 504.

of domestic matters – despite its doctrine intended to have the IACtHR adjudicate on a few rulings each year creating a body of law which is multiplied through the enforcement of local judges – emphasises its likely ineffectiveness. Therefore, the compliance of states with the IACtHR is necessary.⁵⁸²

Prior to conventionality control the IACtHR faced low compliance. Between 2001 to 2006, 50% of Court cases had no compliance, 36% had total compliance.⁵⁸³ After the establishment of conventionality control, increased democratisation of states and reformed procedural rules, the number of cases drastically increased. Yet the rate of compliance failed to increase in proportion.⁵⁸⁴ Between 1989 to 2018 only a third of measures by the Court have met full compliance.⁵⁸⁵ In 2023, approximately 50% of decisions were either pending or not complied with.⁵⁸⁶ The most relevant data comes from Abbott's study specifically on all judgements asserting conventionality control prior to 2018.⁵⁸⁷ It found that only 7.3% of cases showed full compliance, 47.3% partial compliance and 25% non-compliance.⁵⁸⁸ Thus, conventionality control has not improved the poor rates of compliance. Excluding monetary remedies, states are unwilling to comply with orders that involve investigation, denying impunities and forwarding human rights accountability.⁵⁸⁹ Although this is not always the case, Argentina in *Bulacio* and *Esposito* being an instance where Argentina complied despite their Supreme Court dissenting the order due to their acknowledgement of international responsibility.⁵⁹⁰ Regardless, there are still high rates of non-compliance. This is contributed to the idea of political disjunction or "lack of political will" to compel the domestic state to comply.⁵⁹¹ This is only worsened by the challenges to legal basis

⁵⁸² Max Silva Abbott (n 73) 154.

⁵⁸³ Fernando Basch, Leonardo Filippini, Ana Laya and Mariona Nino, "The effectiveness of the Inter-American System of Human Rights Protection: A quantitative approach to its functioning and compliance with its decision" *SUR International Journal on Human Rights* 7 (2010), 9, 18.

⁵⁸⁴ Anibal Perez-Linan, 'Compliance with the Inter-America Court of Human Rights: Methodological proposal and preliminary findings' *Kellog Institute for International Studies* (2019), 1, 1.

⁵⁸⁵ *ibid* 2.

⁵⁸⁶ *Annual Report of the Inter-American Commission on Human Rights* (2023) Chapter 2, Section D, Paragraph 157.

⁵⁸⁷ Max Silva Abbott (n 73) 148.

⁵⁸⁸ *ibid* 151.

⁵⁸⁹ James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' *The American journal of international law* 102, no. 4 (2008), 768, 774.

⁵⁹⁰ *ibid*.

⁵⁹¹ *ibid*.

and legitimacy of conventionality control aforementioned since political states may feel no obligation to comply. Cavallaro and Brewer suggest direct court orders are ineffective, and any meaningful progress in Latin American human rights has depending on social movements and pressure. Currently, the Court does not aid the state in any form of dialogue or political mediation in achieving compliance but merely monitors to ensure the order is met,⁵⁹² yet this is counterintuitive. Legal orders compared to political orders have the lowest rates of compliance, predominantly because such actions require the consensus of more than one political entity.⁵⁹³ Monetary remedies are easier to implement and subsequently have the highest rates of compliance.⁵⁹⁴ If the Court or Commission were to coordinate with domestic human rights activists, campaigns, media and public support and form a dialogue with them and the domestic state there is greater chance of political pressure to comply and increase human rights enforcement. Cavallaro and Brewer note multiple cases where human rights were successfully enforced and orders complied with because of the legal order paired with domestic public pressure.⁵⁹⁵

Multiple authors argue that the lack of compliance with conventionality control enforcement orders could be resolved by establishing some form of dialogue similar to that in friendly settlement mechanisms.⁵⁹⁶ Former President Cancado Trindade argued that giving dialogical deference allows non-compliance.⁵⁹⁷ This, however, is less likely to occur when the IACtHR is part of the dialogue and still holds the function to monitor compliance. *Atala* shows the benefit of dialogue on compliance.⁵⁹⁸ The case concerned the violation of the right to equality and protection of family in private family

⁵⁹² Cecilia M. Baillet, 'Measuring compliance with the Inter-American Court of Human Rights: The ongoing challenge of judicial independence in Latin America', 34(4) *Nordic Journal of Human Rights* 477, 484.

⁵⁹³ *ibid* 483-4.

⁵⁹⁴ *ibid* 488.

⁵⁹⁵ Cavallaro and Brewer (n 82) 775.

⁵⁹⁶ Max Silva Abbott (n 73) 152, Alexandra Huneus (n 71) 526, David C. Baluarte David C., "Strategizing for compliance: The evolution of a compliance phase of Inter-American Court litigation and the strategic imperative for victims representatives" *American University International Law Review* 27, no. 2, 263, 284, Jorge Contesse, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights', *International Journal of Constitutional Law* 15, no. 2 (2017) 414, 426.

⁵⁹⁷ Claudina Orunesu (n 5), 60.

⁵⁹⁸ *Atala Rizzo and Daughters v Chile*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.239 (24 February 2012).

life when the Supreme Court granted custody to the father on the basis that the fact that the mother was living with her same-sex partner would not be in the interests of the children.⁵⁹⁹ The IACtHR were cautious as this was a novel case on sexual orientation as a protected category and the status of children's rights in guardianship. The Court held there was a violation but in their judgement notably referred explicitly to the socio-political landscape of Latin America and various cases from other states.⁶⁰⁰ In doing so they justified the decision on the consideration of how the other states have handled the issue in relation to the specific political factors of the region. This shows a cautious attempt to establish a dialogue with the states in their judgment. By acknowledging the political reasons of similar states, the order gains more legitimacy and becomes more convincing to be enforced by the domestic state.

Contesse notes that in the case of *Gelman* the IACtHR could have still legitimately ruled against Uruguay, but failed to give proper justification and consideration of political factors for this.⁶⁰¹ *Gelman* came just before the decision in *Atala* so the use of dialogue in conventionality control seemed to be more exceptionally done in relation to a very sensitive and novel circumstance. It can be derived that the benefits of dialogue from the Court would include effective and more feasible enforcement orders that take into account the structural complexities of the state and also give more justification for states to comply with the decision. Conventionality control creates a one-sided dialogue where the IACtHR can determine orders for the states without knowledge of political difficulties or ability to help them. The state then may not be able to fully comply which subsequently damages the effectiveness of conventionality control.

V.B. Friendly settlement process

The friendly settlement mechanism's success in dialogic enforcement further emphasises that the legal maximalist form of enforcement conventionality control is ineffective. The friendly settlement mechanism is described as "an opportunity for

⁵⁹⁹ Jorge Contesse (n 89) 427.

⁶⁰⁰ *ibid* 427.

⁶⁰¹ Jorge Contesse (n 32) 136-7.

dialogue” between the petitioners and state.⁶⁰² The Commission, prior to the merits stage of a petition, will give an opportunity for the parties to express if they want to initiate the mechanism.⁶⁰³ If requested, the Commission will act as an impartial third party to facilitate the communication and follow-up on compliance.⁶⁰⁴ It appeals to the victims as it is procedurally quicker and cheaper than the Commission or Court.⁶⁰⁵ It also has a higher degree of compliance due to the fact that the dialogue allows the petitioner and state to be mutually satisfied with the decision.⁶⁰⁶ In the 2022 Annual Report the Commission commended the mechanisms for its effectiveness and promotes its expansion to tackle procedural backlog to the Commission and Court.⁶⁰⁷ In 2023, 112% of measures reached total compliance.⁶⁰⁸ Therefore, total compliance exceeded the base amount from the previous year. This can be partially attributed to the fact it is a voluntary procedure but the dialogic aspect of the mechanism that allows negotiation with consideration of political factors significantly lends to the success of the system and exacerbates why the lack of consideration through conventionality control makes it ineffective.⁶⁰⁹ States prefer the mechanism for the consideration of political factors.⁶¹⁰ The 2023 Annual Report commended Argentina for fostering communication with the victims and achieving the highest number of formally approved friendly settlement agreements despite having rejected the application of conventionality control in *Fontevecchia*.⁶¹¹ The friendly settlement mechanism emphasises that the lack of dialogue towards democratic states as a consequences

⁶⁰² ‘Friendly Settlements’, Inter-American Commission on Human Rights, Accessed December 4, 2024. https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/friendly_settlements/default.asp#:~:text=petitioners%20and%20states-.The%20friendly%20settlement%20mechanism%20provides%20an%20opportunity%20for%20dialogue%20between,violation%20and%20society%20at%20large.

⁶⁰³ Rules of Procedure of the Inter-American Court of Human Rights, Article 37.4.

⁶⁰⁴ *ibid* Article 40.1.

⁶⁰⁵ Ziccardi Natalia Saltalamachia, et al. “Friendly Settlements in the Inter-American Human Rights System: Efficiency, Effectiveness and Scope”, in *The Inter-American Human Rights System* (Springer International Publishing, 2018), 62.

⁶⁰⁶ *ibid*.

⁶⁰⁷ *Annual Report of the Inter-American Commission on Human Rights* (2022) Chapter 2, Section C, Paragraph 68.

⁶⁰⁸ *Annual Report of the Inter-American Commission on Human Rights* (2023) Chapter 2, Section C, Paragraph 107.

⁶⁰⁹ Natalia Saltalamachia Ziccardi, et al (n 97) 66.

⁶¹⁰ *ibid*.

⁶¹¹ *Annual Report of the Inter-American Commission on Human Rights* (2023) Chapter 2, Section C, Paragraph 131.

of utilising conventionality control only contributes to its ineffectiveness.

The low compliance rates of the states through conventionality control and the effectiveness in enforcement of the friendly settlement mechanism which provides a more dialogic outcome with consideration of political factors as opposed to conventionality control which does the opposite shows that the doctrine is ineffective in enforcing human rights regionally.

VI. Conclusion

Conventionality control cannot be considered an effective model of regional enforcement of human rights in the current context. There is no valid legal basis for conventionality control through the ACHR or precedent in the current regional context, and thus, this provides no normative reasons for states to consent with the IACtHR through conventionality control, rendering the doctrine theoretically ineffective. This is further proven because the doctrine is systematically illegitimate through its lack of deference to the domestic states. *Gelman* and *Fontevicchia* illustrate that there is no normative reason for states to comply with enforcement orders and restrict their own autonomy for the sake of uniformity. Finally, the theoretical shortcomings of the doctrine have translated in practice to low compliance rates. This failure in compliance can be attributed to the dialogic gap between the IACtHR and the state in legal enforcement. Friendly settlements show the success of engaging in a form of mutual dialogue and having regard to the contextual political factors of the state. Conventionality control failing to engage in this further emphasises its ineffectiveness. As there is no theoretical justification for the doctrine to be effective, and the practical application consolidates that in practice the doctrine does not work, conventionality control cannot be regarded as an effective mode of enforcement for human rights in its current form. Building on the discussion from the previous section, a more dialogic and horizontal relationship between the member states and the IACtHR would be more effective.

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