

GUIDELINES FOR APPLYING THE CONVENTIONALITY PRINCIPLE

(Presented by Dr. Ruth Stella Correa Palacio)

I. Background

At the 87th regular session of the Inter-American Juridical Committee, held in Rio de Janeiro in August 2015, pursuant to Article 12(c) of its Statutes, the Committee decided on its own initiative to undertake the preparation of guidelines for applying the conventionality principle inasmuch as it concerns the conventions and instruments that make up the international body of law on human rights.

At the 88th regular session of the Inter-American Juridical Committee, held in Washington, D.C., in April 2016, the rapporteur presented a preliminary report specifying the concepts of the principle of conventionality and conventionality control according to the scope ascribed to them by the organs of the inter-American human rights system (Inter-American Court of Human Rights and Inter-American Commission on Human Rights). In addition, the Committee decided to send the OAS Member States a questionnaire in order to identify the mechanisms used specifically for applying in their internal law the three most important international instruments from the point of view of human rights protection: the American Convention on Human Rights (Pact of San José, Costa Rica), the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on Forced Disappearance of Persons.

Subsequently, at the 89th regular session, held in Rio de Janeiro in October 2016, in light of the few responses received, it was decided to persist in a bid to garner a representative number of responses that would allow a better determination of the degree of acceptance of the conventionality principle in Member States.

At the 90th regular session held in Rio de Janeiro in March 2017, the rapporteur presented an analysis of the responses of 14 states¹ to the CJI's questionnaire for determining the mechanisms used by justice operators at the domestic level (judges as well as administrative authorities) to apply in their decisions the above-mentioned three international instruments that are part of the body of law on human rights.²

In keeping with the observations of the Committee's member, the Guidelines here presented are intended to assist States in implementing the conventionality principle and different mechanisms for exercising conventionality control within their systems of laws.

II. The concept of the conventionality principle

This principle refers to the preferential application in internal law of international standards that enshrine human rights guarantees.

¹ See Annex "Responses of States to the questionnaire on the application at the domestic level of inter-American human rights law."

² See document OEA/Ser.Q, CJI/doc.526/17, February 26, 2017.

In its judgments, the individual opinions of its members,³ and its advisory opinions the Inter-American Court of Human Rights has contextualized the conventionality principle as that which determines the application within states of inter-American human rights law, which comprises the international conventions and instruments that enshrine it. According to the Court, that application involves not only the normative content of the international instruments that recognize it but also, in particular, the Court's authorized interpretation of those instruments as an international adjudicatory body to which that function belongs.

Under the conventionality principles, any signatory state of a multilateral instrument that enshrines human rights undertakes to incorporate the necessary norms for the protection of those rights in their internal law, and to ensure that their internal judges and justice operators in general enforce treaty provisions.

This principle was developed from the content of Articles 26 and 27 of the Vienna Convention on the Law of Treaties and Articles 1, 2, 68(1), and 69 of the American Convention on Human Rights. Under the former, States that have agreed to be bound by a treaty by accepting, adopting, or acceding to it are required to perform it in good faith—*pacta sunt servanda* principle—and they may not invoke the provisions of their internal law as justification for their failure to perform a treaty.

The above-mentioned articles of the American Convention on Human Rights, for their part, establish the obligation for States Parties to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition (Article 1). The American Convention also establishes the duty for States Parties to adopt such legislative or other measures as may be necessary to give effect to the rights and freedoms to which Article 1 refers.

For the purposes of the application of the conventionality principle, the Inter-American Court of Human Rights has established that (i) as the authorized interpreter of treaty provisions enshrining human rights, the Court's interpretation of those provisions is binding based on Article 68(1), by which “[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties”; and (ii) that that interpretation is binding upon all States Parties to the Convention, pursuant to Article 69, which provides that “[t]he parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention,” regardless of whether or not they were party to the proceeding that gave rise to the decision containing the interpretation.

The conventionality principle is no outlier in the European context, where the European Court of Human Rights “by including in its decisions general statements on the development of the European Convention on Human Rights has occasionally—and at an early stage—gone further than declaring a violation of the Convention by a State, and has exercised control over that State's legal (and even constitutional) provisions,⁴ putting its interpretation of the European Convention above the interpretation of the respective Constitution confirmed by the relevant constitutional court⁵ and, furthermore, establishing on its own authority the consequences of its judgments.”⁶

³ Judgment in the case of the Dismissed Congressional Employees v. Peru.

⁴ Original footnotenote to the transcribed text: “Thus approximating the function of abstract control of constitutionality of norms: judgments, for example, of 28 November 1978, *Case of Luedicke, Belkacem and Koç v. Germany*, and *Klass and Others v. Germany*.”

⁵ Footnote to the original text “Judgments of 22 October 1992, *Case of Open Door and Dublin Well Woman v. Ireland*; 1 July 1997, *Case of Gytonas and others v. Greece*; January 30, 1998, *Case of United Communist Party of Turkey and Others v. Turkey*; and 28 October 1999, *Case of Zielinski and Pradal and Gonzalez and Others v. France*.”

⁶ Parejo, Alfonso Luciano, prologue to *Control de Convencionalidad y Responsabilidad del Estado* by Allan Bruever Carías and Jaime Orlando Santofimio Gamboa. Universidad Externado de Colombia, 2013, p. 20

III. The concept of conventionality control as a mechanism for effectively ensuring the conventionality principle

Conventionality control has to do with contrasting internal provisions of law with those that make up the body of law on human rights in order to ensure the effectiveness of the rights and guarantees recognized in the latter.

It must be exercised primarily by domestic judges and, more broadly, by justice operators who are called upon to ensure human rights.

On a subsidiary basis—that is, if the domestic judges fail to fulfill that obligation—the Inter-American Court is responsible for exercising that control through its decisions, in which it may order the removal or addition of provisions or the adoption of different measures necessary to safeguard the effectiveness of the rights and guarantees enshrined in international treaties.

IV. The purpose of the Guidelines

The main purpose of these guidelines is to facilitate for states the application of the body of law on human rights in their domestic systems of laws in line with the pronouncements of the Inter-American Court of Human Rights.

Thus, these guidelines seek to advance the introduction of mechanisms by which to unify the basic standards of protection of human rights and ensure the dignity of the human person, as well as to facilitate and, where possible, homogenize the means of application of the instruments that make up the inter-American body of law on human rights by internal justice operators, be they judges or administrative authorities.

The underlying spirit of this guide is to contribute to the strengthening of suitable mechanisms for achieving the overarching aim that all the states share of strengthening respect for human dignity, the safeguarding of which prompted the incorporation in different international instruments, especially multilateral ones, of the array of human rights, against which, as peremptory norms of general international law, any contradicting provision is void ipso facto.⁷

V. The Guidelines

One. The incorporation in the domestic system of laws of the instruments that constitute the body of law on human rights is generally achieved through the Constitution, where they become part of the constitutional corpus.

There is a widespread tendency among the States Parties to the American convention on Human Rights to enshrine them in the Constitution with the same rank as the latter by incorporating them in the constitutional corpus.

This approach allows human rights treaties to be integrated into the domestic system of laws and also involves lawmakers in the regulation of the subject, a function in which they are not only bound by the constitutional framework, but also, in particular, by the treaties' provisions.

Some internal systems recognize supraconstitutional rank to the human rights contained in international instruments as being more favored than those recognized in the Constitution, using language such as “the Constitution and international treaties on rights ratified by the State that recognize more favored rights than those contained in the Constitution shall prevail over any other legal norm or act of government”; or they may include a notice in the Constitution to the effect that the rights and guarantees enshrined in the Constitution should be considered a minimum and as not excluding other rights and guarantees that affect the fundamental rights and dignity of persons.

⁷ Vienna Convention, Article 53.

At the same time, it is common to find that their adherence and observance is reiterated in criminal codes, which admonish that the rights and guarantees contained in them are considered a minimum and as not excluding other rights and guarantees that might affect the fundamental rights of the person.

Two. The domestic lawmaker, as the first stage in the implementation of the instruments that make up the body of law on human rights, is responsible for reviewing the domestic law in order to make it consistent with the mandates contained in those instruments.

The legislative branches of states parties to human rights conventions have been in charge of expressly incorporating in internal systems of substantive and adjective law the treaty provisions that contain the array of rights and guarantees recognized in the body of human rights law, in order to ensure their effective application by:

- (i) Enshrining treaty human rights norms in the Constitution and according them constitutional rank.
- (ii) Repealing norms that are contrary to treaty provisions.
- (iii) Enacting provisions to harmonize domestic systems of laws with treaty norms.
- (iv) Repealing or enacting provisions, if necessary of constitutional rank, in accordance with judgments of responsibility rendered by the Inter-American Court of Human Rights against states parties.
- (v) Enacting provisions that prohibit the infringement of standards of international human rights law.
- (vi) Enacting adjective norms that provide clarity on the authority of internal judges to enforce the treaty provision, even if that infringes the internal norm that opposes it.
- (vii) The enactment of norms that recognized the duty of justice operators to interpret domestic law in a manner compatible with international treaties and instruments on human rights, which assumes that, when faced with several legally valid interpretations, judges must opt for the one that is consistent with the law that accords with the rights and guarantees recognized in international treaties.
- (viii) Enacting provisions that clearly set out the justice operator's authority when a contradiction arises between an internal norm and a treaty-based one.

Three. The scope of conventionality control involves comparing the internal system of laws with the treaty provisions that make up the body of human rights law together with the interpretation of those provisions by the Inter-American Court of Human Rights.

The conventionality control exercised by internal judges is not limited to a comparison of the domestic provision with the treaty-based human rights norms. In this area, a distinction has been drawn between the direct effect of the judgments of the Inter-American Court of Human Rights on the State that was a party in the proceeding in which the decision was adopted, and the effect of the binding jurisprudential precedent with respect to the countries that have accepted the American Convention on Human Rights.

The Court has said with respect to its decisions interpreting treaty-based human rights provisions that the scope of that interpretation covers states other than the one that was party to the dispute, a position it grounds in Article 69 of the Convention, which provides that in addition to the parties to the case being notified of the judgment, it shall also be transmitted to the States Parties to the Convention.

It is worth noting the difficulty that that position presents—in terms of the binding effects of the decisions of the Inter-American Court of human rights—for countries that have not accepted its jurisdiction.⁸

⁸ To date, only 15 states parties to the American Convention on Human Rights have accepted that Court's jurisdiction.

The mechanisms instituted for exercising conventionality control also include the interpretation of domestic law in the light of the contents of international treaties on human rights.

Four.- Internal conventionality control falls primarily to the judges of each State.

Judges are the ones naturally the ones to whom it falls in each state to exercise control over the application of treaty-based human rights norms, since “[w]hen 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. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of ‘conventionality’⁹ *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations. This function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action.”¹⁰

Thus, the incorporation in the domestic system of laws of treaty provisions and their application is very different from the mere intervention of the lawmaker in charge of repealing, amending, or creating constitutional or statutory provisions to ensure respect for international legal provisions. Without wanting to minimize the value of legislative involvement, it should be noted that as a consequence of the evolution of the principle of conventionality, it is to judges that the task really falls to see to it that human rights conventions are observed and implemented within the states that have ratified and acceded to them.

Hence the use of treaty-based human rights provisions is regarded as the subsidiary jurisdiction of the Inter-American Court, given that domestic judges have the obligation to apply them, as Judge A.A. Cançado Trindade recalled in his dissenting opinion interpreting the judgment in the case of the Dismissed Congressional Employees v. Peru: “The organs of the Judiciary of each State Party to the American Convention should have an in-depth knowledge of and duly apply not only constitutional law but also international human rights law; should exercise *ex officio* the control of compliance with the constitution (constitutionality) and with international treaties (conventionality), considered together, since the international and national legal systems are in constant interaction in the domain of the protection of the individual.”

In ensuring that the conventionality principle is applied, the internal judges of States adopt the following types of decisions:

- (i) They enforce the treaty provision directly, where a provision of the same kind is absent from the domestic law.
- (ii) They disregard the domestic law provision that contradicts the American Convention.
- (iii) They disregard the domestic law provision that contradicts the interpretation of the treaty provisions made by the Inter-American Court.
- (iv) They rely on the treaty provision as the basis for their argument or interpretation in enforcing internal human rights norms.
- (v) They apply the interpretation of treaty provisions made by the Inter-American Court in their decisions.
- (vi) They interpret the internal norm in accordance with international human rights standards—Consistent Interpretation.

⁹ In a similar sense, see *Case of Almonacid Arellano et al.*, *supra* note 3, par. 124.

¹⁰ Inter-American Court of Human Rights, *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, No. 128.

Five. *The system of constitutionality control adopted in each State determines the system of internal conventionality control. It may be concentrated, through the consistent interpretation mechanism or the examination of an incidental motion by the judicial body that performs that control. Alternatively, it may be diffuse or mixed, through diffuse conventionality control; that is, the responsibility of each judge.*

The following mechanisms of constitutional review exist, depending on the constitutionality control system adopted by each State: *Concentrated*, i.e., to be defined by a single organ, generally judicial, established for that purpose; *Diffuse*, whereby each judge is allowed in each case that they adjudicate, to disregard with *inter partes* effects the provision that contradicts the Constitution; and *Mixed*, in which both the concentrated and the diffuse system are used. In the mixed system, even though a judicial organ exists within the State structure that has authority to exercise concentrated constitutional control, with the authority to strike down a provision on grounds of unconstitutionality, at the same time each judge has the power to disregard the provision that runs counter to the Constitution in the specific case.

As a consequence of the incorporation of international human rights norms in the constitutional corpus, conventionality control follows the system in place for constitutionality control.

Six. *Under the diffuse system of constitutionality control, judges have the authority to exert internal control of conventionality in a particular case by disregarding the internal provision that contradicts the treaty provision and, consequently, to directly apply the international provision.*

The combination of diffuse constitutionality control with the incorporation of international human rights conventions in the constitutional corpus allows each judge, upon reviewing the constitutionality of the applicable provision in each specific case to act *ex officio* and thus exercise conventionality control in relation to the provision.

The existence of the system of diffuse constitutionality control facilitates diffuse conventionality control, whereby each judge has the authority directly to apply the treaty provision in the absence of a provision in the domestic system of laws that effectively guarantees protection of human rights, according to the minimum standard enshrined in international human rights law. Consequently each judge has the capacity to disregard an internal provision that contradicts a treaty provision.

Seven. *There are two mechanisms for exercising conventionality control in the concentrated system of constitutionality control: (i) the examination of incidental motions by the organ exercising concentrated constitutionality control; and (ii) consistent interpretation.*

(i) *Examination of incidental motions by the organ exercising concentrated constitutionality control*

In states that have opted for concentrated constitutionality control, conventionality control can be done through an incidental motion calling for a review of constitutionality, which entails the suspension of the proceeding challenging the provision because of its opposition to international human rights law.

The proceeding in which the treaty provision is to be applied or the internal provision disregarded because of its opposition to international human rights law is subordinated to the examination of the incidental motion by the body charged with reviewing the constitutionality of provisions.

(ii) *Consistent interpretation – Concept*

It is based on Article 29 of the American Convention on Human Rights, according to which:

"No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

The content of the above-transcribed provision combined with the absence of diffuse control as the system of constitutionality control within a state provides judges with a different mechanism for ensuring conventionality control.

In these systems the degree of conventionality control is less intense and, in response, the Inter-American Court of Human Rights has promoted the interpretation of the domestic provision in conformity with the American Convention on Human Rights, its protocols, and the case-law under the conventions in a bid to harmonize domestic law and the international human rights law. In the words of Judge Eduardo Ferrer Mac-Gregor:¹¹

“...the intensity of “diffuse conventionality control” will diminish in those systems that do not permit ‘diffuse constitutionality control’ and, therefore, not all judges have the authority to not apply a law to a specific case. In these cases it is obvious that judges who lack such jurisdiction will exercise ‘diffuse conventionality control’ with less intensity, without this implying that they cannot do so ‘within their respective jurisdictions.’ This means that they may not suspend application of the law (since they do not have that power), and will, in any case, make a ‘conventional interpretation’ of it, i.e. a ‘compliant interpretation,’ not only of the national Constitution, but also of the American Convention and conventional jurisprudence. This interpretation requires a creative effort in order to ensure compatibility between the national standard and the conventional parameter, thereby guaranteeing the effectiveness of the right or freedom in question, with the greatest possible scope in terms of the pro homine principle.”

Without prejudice to the existing system of constitutionality control, consistent interpretation has been expressly adopted by a number of states which, based on the Constitution, make it mandatory for the interpretation of human rights norms to be consistent with the international treaties and agreements on such matters ratified by the State.¹²

Eight. *The exercise of internal conventionality control is not the exclusive purview of judges; rather, other justice operators who are directly responsible for the application of international norms that enshrine respect for human rights are also competent to exercise that control.*

As the Inter-American Court of human rights has written, a human rights treaty is binding upon all officials of a state that has signed it. Thus, if other State authorities are called upon to ensure the effectiveness of human rights, they are required to interpret the law in accordance with the Constitution and human rights treaty.

It is important that, in enforcing domestic human rights provisions, the duty to interpret in accordance with international law is enshrined in the Constitution.

Training for legal officers other than judicial officials—including prosecutorial services, public defender services, and others—in international human rights instruments and their application in the states promotes effectiveness in guaranteeing human rights and human dignity.

¹¹ Reasoned opinion of ad hoc Judge EDUARDO FERRER MAC.GREGOR POISOT regarding the judgment of the Inter-American Court of Human Rights in the case of Cabrera García and Montiel Flórez v. Mexico, November 26, 2010.

¹² See, in that regard, the constitutions of Peru, Mexico, and Bolivia.

Nine. Training for justice operators—judicial and administrative officials responsible for ensuring human rights—in international human rights instruments and their application in the states allows effective conventionality control.

The correct application of the conventionality principle and of its most important instrument for ensuring the effectiveness of the rights and guarantees enshrined in human rights law—conventionality control—requires not only the recognition in domestic law of the authority of judges to exercise that control, but also adequate training in that international law for both judges and justice operators.

Ten. The authority of the Inter-American Court to exercise conventionality control is subsidiary to the nonexistence of such control by domestic judges

The Inter-American Court of Human Rights has asserted that its authority to exercise conventionality control is subsidiary; that is, it may only do so when judges in the domestic system have failed to.

The Court has established as much in any number of pronouncements in which it has accorded priority to respect for the autonomy of the states in the manner in which they incorporate human rights treaty provisions into their domestic law and recognized that its jurisdiction is only triggered when there has been a breach of the treaty provisions.¹³

Accordingly, clear domestic regulations on the authority of judges to apply the conventionality principle in their decisions, where applicable, coupled with adequate training for such judicial operators, ensure that conventionality control is exercised within states without engaging the jurisdiction of the Inter-American Court of Human Rights.

¹³ Advisory Opinion OC-18/03 of September 17, 2003.

