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## Harmonizing national law with inter-American human rights law: Evidence from Mexico

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### ABSTRACT

Conventionality review is a recent Latin American doctrine seeking that states which had ratified the American Convention of Human Rights verify the conformity of their national laws to norms of the Convention. In Mexico, several changes have placed the country in a better position to follow this inter-American doctrine: 1) a 2011 human rights constitutional amendment; and 2) an interpretation handed down by the Mexican Supreme Court after its appraisal of the Rosendo Radilla-Pacheco case. These events allow all judges in the country (federal and local) to disregard national laws if they contravene norms established in the Convention or the Constitution. How then are these changes operating in practice? This article explores the extent to which conventionality review is being used by intermediate level court's judges and defenders in the states of Jalisco, Nuevo Leon, and Oaxaca.

### Introduction

During the past few decades, Mexico has signaled its commitment to human rights by ratifying several international instruments, including the American Convention of Human Rights (hereafter, Convention or ACHR). Furthermore, it has accepted the jurisdiction of the Inter-American Court of Human Rights (hereafter, the Court or IACHR). This implies that Mexico must comply with the Convention and with the Court's judicial rulings. There are different actors and actions that allow us to observe a country's compliance with international law or judicial rulings (see below). Here, I focus on conventionality review, a new Inter-American System judicial tool that requires domestic judges to verify the conformity of national laws with the Convention or, more specifically, to harmonize domestic law with inter-American human rights law.

Transformations brought by conventionality review have entailed several challenges for judiciaries in countries that have ratified the ACHR and have accepted the jurisdiction of the Court (Fuentes-Torrijo 2007; Sagüés 2010; Carnota 2012; Contesse 2012; Ferrer-McGregor 2013). In the case of Mexico, the Supreme Court has voiced its opinion regarding this new regional doctrine. The Court has recognized the jurisdiction of the IACHR and has

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accepted its decisions as *res iudicata* and thus binding for the country. Justices of the Mexican Supreme Court have created a new thesis to allow the use of decentralized constitutional control and conventionality review *ex officio* by Mexican local judges.<sup>1</sup> This ruling was a consequence of both the decision of the IACHR regarding conventionality review and the introduction of an important legislative reform that constitutionalized the promotion, respect, protection, and guarantee of human rights in 2011.

In this context, victims, defendants, and their lawyers have better instruments to request the protection of human rights, while in deciding a case, judges are legally forced to prefer the most favorable interpretation contained in the United States Mexican Political Constitution (CPEUM) or in international human rights treaties. How, then, are these changes operating in practice? To what extent are actors (judges, public defenders, or defense attorneys—hereafter, defenders) following inter-American human rights law in the form of conventionality review? The literature on Latin American law and judicial politics says barely anything about these issues. Most works concentrate their attention on the novelty of conventionality review, its strengths and weaknesses, and its effects on national legal systems (Huneecus 2010; Sagüés 2010; García-Ramírez 2011; Bernardes, 2011; Castilla-Juárez 2013) but not on how judges and other local actors are implementing or enforcing this new legal tool. Other works focus their attention on relevant decisions on conventionality review handed down by the Supreme or Constitutional Courts (Herrerías-Cuevas and Rosario-Rodríguez 2012). Little has been said, however, about the role played by intermediate or lower courts and their judges, as well as other local actors such as public defenders or defense attorneys, in advancing the use of conventionality review. In this article, I explore how domestic judges of intermediate-level courts (Collegiate Circuit Courts) make decisions. In the same vein, I also look for the voices and arguments of defenders in the decisions they appeal. Using evidence from three Mexican states, I develop an exploratory empirical assessment of the domestic enforcement of inter-American human rights law. Thus, I present a first approach that will show (1) to what extent conventionality review is being used at the domestic level, (2) who is using conventionality review, and (3) how conventionality review is being used. I frame this work in the burgeoning body of empirical research in the fields of international law and comparative judicial studies on enforcement and compliance with judicial rulings (Schulte 2004; Simmons 2009; Hillebrecht 2012; Kapiszewski and Taylor 2013). This will allow me to generate several inferences regarding the reasons why domestic actors in Mexico comply with inter-American human rights treaties and conventions. To be clear, I do not intend to explain Mexico's compliance with inter-American human rights law or with IACHR's rulings but only to observe to what extent conventionality review is being followed in practice.

This article proceeds as follows: The next part presents an overview of conventionality review in the Americas and Mexico. The second section provides a review of the literature on compliance and enforcement of judicial decisions. In the third section, I discuss how data were collected and analyzed. The fourth section discusses the extent to which subnational actors in Jalisco, Nuevo Leon, and Oaxaca enforce inter-American human rights law by the use of conventionality review. Finally, I close with a conclusion.

## **Conventionality review in the Americas and Mexico**

In order to enhance the protection of human rights in the Americas, in 1969, state members of the Organization of American States (OAS) signed the ACHR, also known as the San José

Pact. Up until this time, 35 Latin American countries had ratified the Convention (OAS 2013:1). By ratifying, countries are obliged by this international arrangement to respect basic human rights such as the rights to life, judicial protection, a fair trial, and freedoms of expression, religion, thought, and association, among others. To accomplish this goal, the Convention established the Inter-American Commission on Human Rights and the IACHR. The Court's main duties are to decide whether a state party has violated "a right or freedom protected by this Convention [as well as] provide States with opinions regarding the compatibility of any of its domestic law with international instruments" such as the Convention (OAS 1969; 19). During its first years of existence, the IACHR had a rather passive role: It mainly issued opinions regarding the interpretation of international and regional law (Fuentes-Torrijo 2007). Since 2006, however, the IACHR has taken a very active role in ensuring that domestic judges whose states have ratified the Convention verify the consistency of their national laws with the Pact of San José, as well as with the interpretations that the IACHR makes.

Conventionality review, or control of conformity with the Convention, is the mechanism through which national judges may accomplish such a task. This recent inter-American doctrine requires that when domestic judges (national and subnational) articulate their decisions on a case involving human rights, they must *ex officio* disregard domestic laws that fail to conform to the Convention. The exercise of conventionality review aims to expand the protection of human rights at the domestic level by inducing national judges to decide cases according to what is established in the Convention, particularly when a national law does not fully protect human rights. It also aims to be an effective mechanism that fosters compliance with the ACHR and the Court's rulings.

The emergence of conventionality review can be traced to 2003 in a concurring opinion of Judge Sergio Garcia Ramirez for the case *Myrna Mack Chang v. Guatemala* (IACHR 2003). There, García Ramírez posited that for the American Convention to work effectively, states cannot be partially liable because "responsibility is global, it concerns the State as a whole and cannot be subject to the division of authority established in domestic law" (IACHR 2003: 163); that is, all institutions of the state are responsible for the violation of human rights and should enforce their respect and protection as stated in the American Convention. According to Castilla-Juárez, this formulation is inspired by the decision of the European Union Court of Justice on case 106/77 *Amministrazione Delle Finanze Dello Stato v. Simmenthal SpA*, in which this Court stated that "national courts should discard a law contrary to community law" (Castilla-Juárez 2013: 78; [Court of Justice of the European Union 1978](#)). Conventionality review was further developed in the cases of *Almonacid Arellano et al. v. Chile* and the *Dismissed Congressional Employees v. Peru*, both adjudicated in 2006; in *Almonacid Arellano*, the IACHR argued:

[W]hen a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. (IACHR 2006a: 54–55)

The Court justified this decision by referring to Article 27n of the Vienna Convention on the Law of Treaties<sup>2</sup> and the IACHR's Advisory Opinion OC-14/94.<sup>3</sup> In the case of the *Dismissed Congressional Employees*, the IACHR added that conventionality review is to be carried out as an official duty by local judges since they have to safeguard the practical effectiveness of the Convention: “[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” (IACHR 2006b: 45).

*Almonacid Arellano* and *Dismissed Congressional Employees'* arguments had been replicated in 15 cases adjudicated by the IACHR between 2006 and 2011, among which are *Radi-lla Pacheco v. Mexico*, *Xakmok Kasek Indigenous Community v. Paraguay*, *Velez Loor v. Panama*, *Gomes Lund et al. v. Brazil*, *Lopez Mendoza v. Venezuela* (Carnota 2012; IACHR 2003, 2006a, 2006b, 2008, 2009a, 2009b, 2010a). In the case *Cabrera Garcia y Montiel Flores v. Mexico*, adjudicated in 2010, inter-American judges made further specifications regarding the use of conventionality review, positing that “when a State has ratified an international treaty such as the American Convention, all its bodies, including its judges, are also bound by such Convention” (IACHR 2010a: 86). In other words, all judges, no matter their position, must carry out conventionality review when necessary.

How has Mexico reacted to these changes? Mexico ratified the ACHR in 1982<sup>4</sup> but did not accept the jurisdiction of the IACHR until 1998. Since then, the government has cooperated with both the Commission and the IACHR several times. It has invited the Inter-American Commission on Human Rights to inspect the state of human rights in the country and has asked the opinion of the IACHR on issues related to human rights of undocumented migrants and consular assistance. The Mexican government has not been collaborative in all instances, however. Since accepting the jurisdiction of the IACHR and during the first decade of the twenty-first century, the country has appeared before the IACHR several times. In many of them, the state was found liable for human rights violations<sup>5</sup> and was reluctant to fully accept and enforce the IACHR's judgments: The Mexican government observed only marginal points of those judgments, such as publishing part of the decisions in the Federal Official Diary and paying compensation to victims, but substantive resolutions to include a gender perspective in its protocols and manuals for crime investigations related to disappearances, sexual violence, and assassinations of women (Case González et. al. “*Campo Algodonero*,” IACHR 2009a) are still pending.<sup>6</sup>

Notwithstanding, since 2011 the situation has partially changed. A constitutional reform in 2011 (dubbed the Human Rights Constitutional Amendment) enforced the respect, promotion, and protection of human rights. It changed several articles in the constitution to create a “new juridical system of human rights protection” (Colli-Ek 2012: 7). The most important step in this regard was to establish in the constitution that the protection of human rights must be carried out by all state authorities taking into account the constitution and international treaties to which Mexico is party. Additionally, authorities must always favor the rule most favorable to the person (*pro homine* principle; CPEUM 1917). The relevance of this amendment allows citizens and obliges authorities to adopt the most favorable rule for the person protected by the constitution or international treaties. The potential of this new legislation is promising given that it will allow vulnerable groups to demand the protection of their rights according to international standards, which many times are more progressive than domestic, particularly local, norms such as state constitutions in federalized polities.

A second step toward this change has been the interpretations issued by the Mexican Supreme Court in several theses.<sup>7</sup> As a consequence of the 2011 human rights constitutional amendment and, especially, of the IACHR's judgment on *Rosendo Radilla-Pacheco v. Mexico* in 2009 (IACHR 2009b)—which condemned the country to reparations for the violation of several rights<sup>8</sup> guaranteed in the American Convention and the Inter-American Convention on Forced Disappearance of Persons—the then-president of the Supreme Court ordered the study of the Radilla-Pacheco decision to define its obligations to the Mexican judiciary, that is, to know what actions the judicial power had to carry out to comply with the IACHR decision. This was done in the case known as *Varios 912/2010*, which became a landmark in Supreme Court jurisprudential history because it changed the way Mexican judges should adjudicate cases where human rights are involved and because it fully recognized its obligation to repair human rights violations according to what was decided by a supranational entity, in this case the IACHR. This is a huge step in a country that has traditionally established arguments of sovereignty to disregard international commitments.<sup>9</sup> The Supreme Court agreed by a majority of votes:

1. To recognize the judgments of the IACHR as *res iudicata* and obligatory for the judiciary both when Mexico is part of a controversy (SCJN 2011a) and when it is not (SCJN 2013).
2. To introduce conventionality control applied *ex officio* by all judges in the country and allow all judges to disregard norms that breach human rights and contravene international human rights treaties and the constitution (decentralized judicial review). Expelling an unconventional norm, however, continues to be an exclusive duty of the Supreme Court (SCJN 2011b).
3. To implement administrative actions to professionalize federal judges in the use of conventionality control (SCJN 2011c).

The Mexican Supreme Court dramatically changed the way in which justice can be adjudicated. It set new parameters for local judges to disregard national law when it contravenes international human rights treaties. Given the constitutional amendment on human rights and the Radilla-Pacheco decision, the SCJN changed its jurisprudence by means of a new interpretation of constitutional Article 133, allowing the use of conventionality review.<sup>11</sup> How are judges at the subnational level following these changes? How can we frame future compliance/noncompliance of judges with this Supreme Court ruling and with conventionality review? In the following section, I explore several explanations proposed by the literature.

## Human rights and compliance with international judicial rulings

What drives countries, and particularly their courts, to comply with international law or judicial decisions on human rights? The literature on international law and comparative judicial politics presents several theories that discuss why countries follow judicial rulings, when and under what conditions they do so, and the limits signatory states encounter in enforcing those rulings. But before reviewing the different theoretical proposals that explain why countries comply with international law in general and with judicial decisions in particular, let us first establish a basic definition of compliance.

The literature on compliance indicates that the concept can be studied from different levels—national or international—and among different actors, such as executives, legislatures,

courts, or citizens (Kapiszewski and Taylor 2013: 805). Here, I focus on compliance of state authorities with international judicial decisions. Drawing on the literature in judicial politics and international law (Spriggs 1997; Alter 2001; Paulson 2004; Trochev 2008; Hillebrecht 2012; Kapiszewski and Taylor 2013; Kingsbury 1998), in this article, I define compliance as the *actions* national authorities carry out to internalize judicial rulings from an international tribunal, convention, or treaty to which they belong. Most of the time, actions are carried by several actors. As Courtney Hillebrecht correctly points out, “[international judicial] rulings require changes in the country’s jurisprudence, legislation, and practice, involving actors from the executive branch, judiciary, and legislature” (2012: 965). Thus, actions can be observable as reparation measures such as the following: monetary compensations or human rights conversation sessions; legislative changes, for example, the reform of a law that breaches human rights; domestic judicial rulings or interpretations such as the overturning of a local law that is inconsistent with an international human rights treaty (conventionality review); or citizens’ demands by means of strategic litigation.

With this in mind, why do countries follow international law or judicial rulings? Abram Chayes and Antonia Chayes argue that compliance with an international convention or treaty is based on the signatory country’s own interest. They posit that a country will enforce international law to the extent that it reflects the “broad-based conceptions of the national interest” (Chayes and Chayes 1993: 182) that have intergovernmental agents involved in the debate and the negotiation of an international treaty. Thus, we can expect countries to comply with international law to the extent that those interests are satisfied during the treaty-negotiation process. This reasoning is consistent with realist theories on international law, particularly those related to compliance. Realists consider international law an epiphenomenon: “[I]f a legal commitment is inconsistent with a significant interest of a State and it has the power to act in a manner which better serves its interest, it will usually do so” (Kingsbury 1998: 351). Consequently, this theory anticipates that powerful countries will not comply with their international commitments when state interests are negatively affected by the implementation of an international ruling.

Credible commitments are also an explanation for states’ compliance with international treaties or rulings. Borrowing from contract theory, Robert Scott and Paul Stephan propose the establishment of “ex-post precautions to safeguard against the possibility that a counterparty defects from its cooperative obligations once a project is under way” (Scott and Stephan 2006: 42) and thus reduce the cost of cooperation. These ex-post precautions might be “formal enforcements,” which are established to constrain countries and to avoid noncompliance. A type of formal enforcement, these authors posit, is an independent domestic court (Scott and Stephan 2006: 74–75) able to adjudicate conflicts and to impose sanctions effectively. An observable implication of this theoretical proposal is that countries will comply if there is a strong and independent court that imposes credible sanctions before noncompliance behavior.

But not only states’ interest or their cooperative rational actions are used to explain compliance. Beth Simmons offers another explanation: domestic politics, particularly legal mobilization. She argues that compliance increases when domestic actors (executives, judiciaries, or citizens) are involved in the implementation of international treaties on human rights. Citizens, for instance, engage in the defense of their rights by litigating cases in domestic courts using international human rights treaties ratified by their country, and “[i]f treaties are cited in a legal case, judges have to think about how they are to be interpreted” (Simmons

2009: 131). Her theory is consistent with the works of Michael McCann and Charles Epp about the roles of strategic litigation and justice-sector groups in the protection of human rights. As this article shows, domestic actors—particularly the involvement of justice-sector groups (lawyers, activists, and legal scholars) in the defense and promotion of rights through the litigation of cases on human rights—might trigger a wider use of international human rights instruments. The activism of justice-sector groups in placing cases before courts has proven crucial to shaping and advancing the protection of rights (McCann 1994; Epp 1998; Alter 2008) through the use of international standards. Judges do not choose their cases; they wait for actors to demand their intervention. In this vein, the legal actions of groups whose rights have been violated promise to expand and induce a wider use of conventional-law review to protect human rights, as well as to close the gap between government authorities' legal and international commitments and their daily praxis.

In addition, Hillebrecht's findings on compliance with the inter-American human rights system strengthen Simmons' thesis by showing how coalitions among domestic political elites foster compliance with international human rights law. She concludes that compliance with international judicial rulings is grounded on the elite's political will and "is still subject to domestic political maneuvering and the domestic balance of power" (Hillebrecht 2012: 966).

By discussing noncompliance, another body of research helps to explain the limits countries face in complying with their international commitments and how they can be surmounted. Chayes and Chayes offer three "causes" that allow countries to not comply with international law: (1) ambiguity of the law; (2) limitation of capacity; and (3) temporal dimension. In their words, international law can be subverted because the language is not clear, because the state does not have the capacity to implement or enforce it, or because implementation of international law takes, in some cases, considerable time; this fact triggers a variation in our assessment of a state's compliance with a treaty or convention.<sup>12</sup> These authors assume that compliance will increase when treaties are clear in language, when technical and financial assistance is provided to signatory countries, and when enough time is given to harmonize their national legislation with international law.

In relation to this literature, some scholars discuss the extent to which international courts can enhance the domestic enforcement of their rulings. Even though some of them believe that an international court's role is not "to ensure compliance with its judgments" because the business of the international court ends when it delivers its final decision (Aji-bola 1996: 12), others consider that international courts do play a role in enhancing compliance with their decisions. Jonas Tallberg and Karen Alter point out that international tribunals might facilitate compliance with international law through direct work with national governments, such as intensive interaction between international and national courts, capacity building, the provision of technical knowledge, and financial assistance to educate and professionalize domestic authorities, as well as through effective sanctions (Alter 2001; Tallberg 2002). This theory anticipates that compliance occurs when international courts actively implement actions to promote the internalization of international law within countries that have ratified a treaty or convention.

A different set of theories proposes that ideas play an important role in the decision judges make when adjudicating a case (Hilbink 2007; Nunes 2010; Ingram 2012). Drawing from this literature, one can classify the ideas of judges along a progressive-conservative continuum and argue that, on the one hand, progressive judges will decide their cases by taking into account those norms stated in international treaties that better protect a human right;



on the other hand, conservative judges will prefer those norms established in the constitution and raise sovereignty arguments to support their decisions. The role of ideas might turn into a potential explanation for the variation regarding the use of conventionality review by domestic judges, especially in countries where new constitutionalism and positivism are forced to share the judicial decision-making arena.

As observed, domestic authorities' compliance with international judicial rulings might be explained by "multiple factors," and, as stated by Kapiszewski and Taylor, "a unified theory seeking to explain all such action [compliance] would necessarily be too abstract to be useful" (2013: 824). The theories discussed, however, help us to frame the exploratory results of this work and to understand how we should interpret the findings presented in the last section—in particular, the role played by judges and defenders in using, or requiring the use of, conventionality review to expand the protection of human rights. The scope of this section was to present part of the academic discussion to inform the case-selection process. In this vein, the selection of the cases presented in the next section responds to the variation in the use of conventionality review among different justice-sectors actors that might seek the implementation of international treaties of human rights.

## Data and methods

As stated in the previous section, one way to observe compliance is by means of the use of conventionality review. This judicial tool is available to judges of all categories in Mexico but is also reachable for defenders, who can litigate cases by asking the judge explicitly to use conventionality review. In Mexico, the *Amparo Directo* is a type of judicial decision that permits observing the extent to which conventionality review is used, because it allows citizens to appeal in a federal court (Collegiate Circuit Court) a concluded decision that, presumably, breaches their human rights.

To develop this work, I reviewed concluded decisions of federal judges in three Mexican states. Decisions were handed down in the year 2012. After considering the universe of decisions adjudicated by federal circuit courts in each state<sup>13</sup> that year, I selected a random sample<sup>14</sup> from the civil, administrative, and criminal areas<sup>15</sup> in the states of Jalisco, Nuevo Leon, and Oaxaca, that is, states from the north, center, and south of Mexico, respectively, which present different types of political, economic, and legal developments and are expected to have justice-sector actors with diverse technical capacities and ideological backgrounds and, thus, produce differences in the extent to which these actors use conventionality review. Federal circuit courts are formed by three career federal judges (*magistrados*) and are located in almost every Mexican state.

The total number of decisions was composed of 8,870 for the state of Jalisco, 4,180 for the state of Nuevo Leon, and 1,565 for the state of Oaxaca. Once the sample was selected, the number of decisions reviewed for each state was 369, 352, and 309, respectively. The total number of *Amparo Directo* decisions reviewed for this work was 1,030 (see Table 1).

I reviewed all decisions in the sample, searching for different keywords that helped me to determine the extent to which conventionality review was part of the argument in each decision. Since conventionality review is a new instrument, when I was reviewing the decisions I considered it necessary to include words such as "human rights," "international treaties," "pacts," and "conventions."

**Table 1.** Decisions by state.

Decisions	Jalisco	Nuevo Leon	Oaxaca	Total
Total	8,870	4,189	1,565	14,624
Sample	369	352	309	1,030

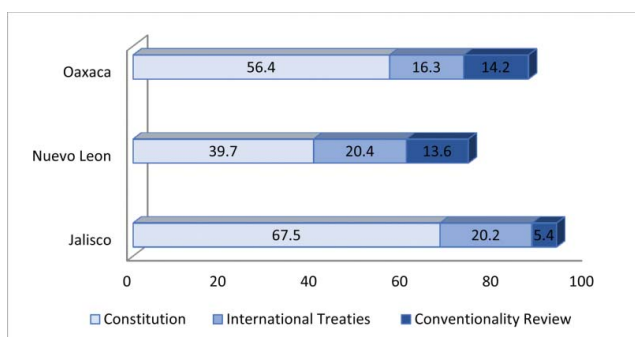
This comparative research follows a qualitative methodology. I collected the decisions,<sup>16</sup> reviewed and classified them to identify (1) whether conventionality review appeared as part of the argument in a decision, (2) who was claiming the use of conventionality review (local or federal judges or defenders), and (3) how conventionality review was used. To analyze the data, I used Nvivo software, which helped me to classify decisions in different nodes by (1) the type of legal instrument recalled in the decision to protect human rights, (2) the actor who made reference to that instrument, and (3) the number of mentions actors made of human rights legal instruments. After classifying and identifying the decisions that contained the keywords, I reviewed those decisions carefully, to determine whether or not conventionality review was exercised or simply quoted.

### Conventionality review in intermediate-level courts: The cases of Jalisco, Nuevo Leon, and Oaxaca

From the 369 decisions sampled and reviewed for the state of Jalisco, actors (federal judges, local judges, or victims' defenders) evoked arguments on conventionality review, human rights, international treaties, pacts, and conventions (the keywords) in 74 of them; that is, in 20% of the sample, actors used arguments on human rights, quoting either national law or international legal instruments. I reviewed 352 decisions for Nuevo Leon, and actors used the keywords in 88 cases; this represents 25% of the total sample selected. For the case of Oaxaca, I reviewed 309 decisions, and actors evoked arguments on human rights in 147, that is, 47.5% of the total sample. Oaxaca outperforms the other two states. One might infer that this is the case because judges and defenders have broader awareness or are more willing to adopt the changes introduced by legislators in 2011 and by justices in the thesis concerning the judiciary obligation to protect human rights, or because there are justice-sector groups (human rights activists, legal scholars) that advance cases in the judiciary.

Arguments on human rights raised by actors in *Amparo Directo* decisions, however, make reference to different legal instruments. I divided the arguments into three categories: (1) human rights in reference only to the constitution, that is, decisions in which actors sustain their arguments based only on what is stated in the constitution; (2) human rights in reference to international treaties (besides including references to the constitution, in these decisions actors also claim the protection of their rights according to international conventions); and (3) conventionality review, that is, decisions that, in addition to including arguments to protect rights based on the constitution and international treaties, refer explicitly to conventionality review. As shown in [Figure 1](#), actors in Jalisco evoked in 67.5% of the reviewed decisions "Human rights according to the Constitution"; in Nuevo Leon, actors referred exclusively to the constitution in 39.7% of the decisions reviewed, while in Oaxaca they did so in 56.4%.

References to the constitution are predominant in the three states, which might indicate, on the one hand, that actors find sufficient arguments to defend human rights breaches in



**Figure 1.** Percentage of references actors make to the constitution, international treaties, and conventionality review when defending human rights.

the national legislation and, on the other hand, that actors are not acquainted with, or are not willing to use, international human rights norms in their arguments.

Actors made fewer allusions to international human rights instruments in comparison to references to the constitution while defending human rights. In these decisions, judges and defenders did not only refer to the constitution, but, from their arguments in the case, one might infer that they consider it important to defend human rights according to what it is stated in those international treaties ratified by Mexico. In Jalisco and Nuevo Leon, the number of references made to international human rights treaties is very similar—20.4% and 20.2%, respectively, of the decisions reviewed for each state—while in Oaxaca the percentage is lower with 16.3% of the decisions reviewed. This is so because Oaxaca, as shown also in [Figure 1](#), has a higher percentage of decisions classified in the category “conventionality review,” which implies the use of arguments on international human rights treaties.

Lastly, actors referred to conventionality review in 14.2% of the decisions reviewed in the state of Oaxaca, in 13.6% of the decisions in the state of Nuevo Leon, and in only 5.4% of the decisions in the state of Jalisco. Oaxaca and Nuevo Leon appear as leading states where actors raise more conventionality review arguments in the decisions analyzed. With the data above, we can conclude that actors defend rights especially in reference to national legislation; that is, in the three states, the constitution seems to be the legal instrument par excellence to defend human rights, while the references that actors make to international treaties and, particularly, to conventionality review are lower in the three cases. It is worth noting, however, that actors in both Nuevo Leon and Oaxaca use conventionality review arguments more frequently in their decisions than actors in the state of Jalisco. The knowledge and capacities of judges and the involvement of human rights groups are plausible explanations for actors’ adoption of international law to defend or decide internal disputes.

But which actors are more likely to mention what type of legal instrument? In *Amparo Directo*, the voices of three different actors appear: the federal judge, the local judge,<sup>17</sup> and the lawyer or defender. Results for each state are shown in [Table 2](#). It is worth noting that several decisions that contained the term “human rights” did not make reference to any particular legal instrument; that is, actors just alleged that human rights were violated but did not reinforce their arguments by making reference to any particular legislation. I classified these decisions in a different category simply called “Human Rights” (at the top of [Table 2](#)).

**Table 2.** Legal instruments actors refer to in decisions when evoking human rights (%).

Category	Jalisco	Nuevo Leon	Oaxaca
Human rights	6.75	26.13	12.92
HR Constitution	67.56	39.77	56.46
Judge (federal)	14.86	5.68	2.04
Judge (local)	0	0	0.68
Defender	58.10	34.09	53.74
HR international treaties	20.27	20.45	16.32
Judge (federal)	8.11	6.81	3.40
Judge (local)	0	1.13	0
Defender	12.16	14.77	12.92
HR conventionality review	5.40	13.63	14.28
Judge (federal)	1.35	10.22	6.8
Judge (local)	0	0	0.68
Defender	4.05	4.54	10.20
TOTAL	100	100	100

*Note.* The percentage of references between the parent node (e.g., HR Constitution) and the child nodes (e.g., judge or defender) varies because in a few cases one decision (source) was classified in two child nodes, as the argument was developed by both the defender and the judges.

In the decisions reviewed, defenders invoked the constitution more often than other actors to protect human rights.<sup>18</sup> Federal judges placed second, while in the decisions reviewed the voice of the local judge appeared in only a few cases. The most-invoked articles in Direct *Amparo* decisions are Articles 14, 16, and 17 of the constitution, which protect due process and are also the basis for claiming the protection of federal justice by means of the *Amparo*. Other less-invoked articles are Articles 1, 8, 13, 19, 20, and 133 of the constitution.

International human rights treaties, such as the ACHR, International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, and United Nations Convention on the Rights of the Child, among others, are the legal instruments to which actors referred second most often (OAS 1969; UN 1948, 1966, 1990). Again, in the three states, defenders referred to international human rights instruments more times than federal judges. In the case of local judges, we have mostly the same scenario as before; that is, their voice does not appear in the decision. The article most referred to in the decisions reviewed was Number 25 from the ACHR, which guarantees the right to effective judicial protection; Article 8, which states the right to a fair trial, was also frequently referenced. Other invoked articles were 7 (right to personal liberty), 21 (right to property), 24 (right to equal protection), and 29 (restrictions regarding interpretation). The legal instrument that was referred to second most often was the International Covenant on Civil and Political Rights, of which Article 14 (equality before courts and tribunals) was quoted by actors to defend human rights (UN 1966).

Finally, the reviewed decisions evidenced that the pattern is consistent regarding the references actors make to conventionality review. In Jalisco and Oaxaca, defenders evoke this new doctrine more than federal or local judges; however, it is worth noting that, in Nuevo Leon, federal judges recall conventionality review doctrine more than the other actors. This evidences that federal judges are active agents (at least more active than the other actors are) in promoting and using the new legal tool to protect human rights in a way that their counterparts in the other states are not using. However, Table 2 also suggests that federal judges are quite active in the state of Oaxaca. In these states, judges seemed to keep in mind both constitutional changes and the Mexican Supreme Court decision on the file

*Varios 912/2010* (SCJN 2011c). Particularly in Nuevo Leon, arguments presented by judges in their decisions reflected a more detailed knowledge of international legal instruments and theory of human rights.

As shown in Table 2, defenders in Oaxaca referred more frequently to conventionality review than their counterparts in the states of Jalisco and Nuevo Leon. This finding is quite interesting because Oaxaca is the least politically and economically developed state among the cases selected, and, thus, one expects the use of conventionality review to be lower given that defenders might have fewer resources for legal education and training, as well as less exposure (technical and financial assistance) to new international human rights doctrines.

In the decisions reviewed for the three states, some actors referred extensively to conventionality review, while others simply mentioned the word without elaborating a revision or supporting their argument on the interpretations issued by the IACHR or the Mexican Supreme Court. Thus, to what extent were actors who referred to conventionality review applying (or requiring the application of) this new inter-American doctrine? That is, were actors verifying (or required to verify) the conformity of national laws to norms in the Convention, or were they just mentioning conventionality review? The evidence from Jalisco shows that in this state, actors (defenders and judges) used conventionality review only to reinforce and support their arguments in the decision. Furthermore, when defenders argued the unconventionality of a local norm, judges did not go further to revise the constitutionality of that norm. This is the case of decision 736/2012 (CJF 2012e). In this decision, the judges of the Collegiate Circuit Court pointed that “the plaintiff is limited to arguing that the responsible [state] court did not decide on the substance of the matter in question as stated by article 278 of the Code of Civil Procedure for the State of Jalisco, contravening article 1 of the Constitution, as well as articles 4 and 6 of the International Covenant on Civil and Political Rights” and that they as judges of the circuit court could not decide on the unconventionality of the norm because the argument of violation presented by the plaintiff was insufficient (Federal Judicial Council [CFJ] 2012e: 45–46).

Alternatively, in Nuevo Leon, actors exercised conventionality review in several decisions; that is, they disregarded (or were required to discard) national laws that contravene the Convention or any other international treaty on human rights:

Notwithstanding the violation which the fiscal court incurred in the present case, it is appropriate, according to article 1 of the Constitution, not to apply the norms of the Federal Law of Administrative Procedure, which precludes the fiscal court from studying the case put under its consideration by the plaintiff; this with the aim of granting the plaintiff access to justice as stated by articles 17 of the Constitution and 8 of the American Convention of Human Rights. [...] Thus, it is correct [for the fiscal court] to exert conventionality control without declaring the unconstitutionality of the norm. (CJF 2012a: 75–76)

In the decision below, in a particular vote, one of the judges in the Collegiate Circuit Court considered that his colleagues had the obligation to exercise conventionality review *ex officio*:

In my consideration it is necessary to add that the circuit court had the obligation to exert conventionality control *ex officio*, according to what was evoked in the plaintiff claim and in strict accordance to the [2011] constitutional amendment on human rights, and thus to protect the violated human rights (private property, judicial protection and social security), as stated by the Supreme Court in the case *Varios 912/2010*. (CJF 2012b: 31)

In other decisions in this state, actors only referred to conventionality review to be more persuasive in the presentation of their argument or to require a wider interpretation of the law and to grant greater protection to the plaintiff's human rights.

Arguments of conventionality review in Oaxaca were used, by both judges and defenders, mostly to strengthen their arguments and to be more persuasive. As in Nuevo Leon, they also used conventionality review to require a wider interpretation that considered the 2011 constitutional amendment on human rights as well as norms of the Convention or the International Covenant on Civil and Political Rights. Finally, in some decisions, conventionality review was cited explicitly to require that a local law that contravenes the constitution and the Convention not be applied:

The Circuit Court is obliged to exercise conventionality control *ex officio*, that is, it must verify the conformity of internal laws and acts with human rights established in the Constitution and international treaties; thus, conventionality control should be exercised against article 304, fraction IX of the Social Security Law. [...] The aim of requiring the application of conventionality control to that article is not that the judge expels it from the Law since it contravenes human rights contained in the Constitution and international treaties, but only that she does not apply that norm to my defendant, giving preference to those contained in the Constitution and international treaties. (CJF 2012c: 19–20)

[I claim the] violation of articles 50 of the Federal Law of Administrative Procedure; 1, 14, 16, 17 and 133 of the Constitution; as well as article 25 of the American Convention on Human Rights, since the judge did not decide the dispute I placed under her consideration; it proceeds then to concede the *Amparo* and require the judge to apply conventionality control *ex officio*, considering the *pro homine* principle. (CJF 2012d: 31)

After reviewing all decisions in the sample containing conventionality review, one can argue that actors use this inter-American doctrine to reinforce the argument presented in the decision and not to verify the conformity of national laws with the Convention. This especially occurred in the state of Jalisco, but also in Nuevo Leon and Oaxaca, where domestic actors quoted the conventionality review doctrine without applying it. It is worth noting, however, that a wider and refined use of conventionality review was made by federal judges in Nuevo Leon and defenders in Oaxaca; in particular, in these states, evidence shows that domestic actors required the application of international regulations to human rights when writing (the federal judge) or appealing (the defender) a decision.

## Final remarks

The introduction of conventionality review in Mexico goes along with other important institutional efforts to advance the quality of judicial institutions, as well as the mechanisms citizens must have in a democracy to protect their rights. In this vein, and as this article shows, conventionality review improves the channels justice-sector actors have to protect human rights but also enhances the rule of law by introducing new elements that seek to harmonize (1) national law with international human rights standards and (2) the performance of the judicial system with a democracy in which quality should to be improved.

Additionally, conventionality review favors Mexico's compliance with international human rights commitments, in particular with the Convention, by inducing national authorities—especially judges—to consider international judicial rulings and law in their decisions.

The exploratory results of this research show that justice-sector actors might potentially explain the extent to which a country complies with its international commitments on human rights. A first look at the use of conventionality review in the cases analyzed tells us that this new legal tool is more followed in Nuevo León and Oaxaca than in Jalisco, where judges (Nuevo León) and defenders (Oaxaca) seek to reinforce the protection of human rights by evoking international treaties and conventions ratified by Mexico. This evidence opens future lines for research, especially when and why we should expect conventionality review to be practiced. Besides the incompatibility of some local norms with human rights treaties ratified by a country, it is important to consider the role played by justice-sector actors, in particular, judges and defenders. As this work shows, defenders in Oaxaca and federal judges in Nuevo Leon and Oaxaca are the actors who most often use conventionality review in their arguments. What motivates defenders and judges to widen the protection of human rights using international human rights treaties? Legal mobilization and ideational factors are theories that might explain the protection of human rights demanding the use of international standards.

Furthermore, the work presented here also raises the question of to what extent the scenario regarding the use of conventionality review in Mexico can be generalized to other Latin American countries that have ratified the ACHR but have different constitutional models. Expanding the analysis to other countries will provide insights regarding the rationale of why actors protect human rights using international law, as well as what type of reactions domestic actors have before international judicial rulings.

## Notes

1. With the thesis P. LXVIII/2011 national and subnational judges are compelled to disregard secondary laws that contravene the constitution and international treaties on human rights (SCJN 2011d).
2. “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (UN 1969: 339).
3. In this advisory opinion, the IACHR stated that “the promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty” (IACHR 1994: para. 50).
4. In Mexico, once the Executive and the Senate agree to ratify a treaty, it becomes supreme law of the land and, as the Mexican Supreme Court recently instructed, international treaties are placed at the same level as the constitution; that is, both legal tools belong to the same “human right’s constitutional block” (SCJN 2013: 8), unless there is a constitutional limitation of rights; if that is the case, the constitution prevails (SCJN 2013).
5. See cases of *Castañeda-Gutman* in 2008, *González et. al.* (“*Campo Algodonero*”) in 2009, *Rosendo Radilla-Pacheco* in 2009, *Cabrera-Garcia* and *Montiel-Flores* in 2010, and *Fernandez-Ortega et al.* in 2011 (IACHR 2003, 2006a, 2006b, 2008, 2009a, 2009b, 2010a, 2010b).
6. Note, however, that in April 2014 the Federal Congress approved a reform to the military code. This was a long-standing request of the IACHR derived from sentences in *Radilla-Pacheco* and *Cabrera-Garcia* and *Montiel-Flores* cases against Mexico.
7. A thesis from the Plenary of the Mexican Supreme Court is an interpretation of the law that justices elaborate before a case to which the law does not contemplate a clear solution. It offers subnational judges guidelines to decide in the same manner futures cases.
8. Rights to personal liberty, humane treatment, fair trial, judicial protection, juridical personality, and life (OAS 1969).

9. As a matter of fact, those arguments still prevail in the Mexican Supreme Court as well. See, for instance, the opinion in this case of Justice Sergio Aguirre Anguiano (SCJN 2011c); see also the opinion of Justice Margarita Luna Ramos in “Contradiction of thesis” 293/2011 where she defends the supremacy of the Constitution over international human rights treaties ratified by Mexico (SCJN 2013).
10. In 2013, the plenary of the Supreme Court decided in case 293/2011 a “Contradiction of thesis” between two circuit tribunals regarding the prevalence of rights in the constitution or in international treaties when the former contravene the latter. Even if they recognized the constitutional character of international human rights, they agreed by 10 votes (out of 11) that “when there is a restriction in the Constitution, it must prevail what states the constitutional norm” (SCJN 2013).
11. This, however, was subjected to constitutional limitation. See Contradiction of Thesis 293/2011 (SCJN 2013) handed down in 2013.
12. This last fact is also shared by Schulte (2004: 29).
13. Each state has various federal circuit courts assigned by the federal judiciary depending on the state’s population. Jalisco (the most populated state among those selected) has five federal circuit courts for the civil area, four for the administrative area, and three for the criminal area; Nuevo Leon has three circuit courts for the civil area, three for the administrative area, and two for the penal area: Oaxaca has a circuit tribunal for the civil and administrative area and another for the criminal and administrative areas.
14. I used randomizer.org.
15. Selection of cases in the labor arena was avoided given that direct *Amparos* are issued against decisions of a special department called *Procuraduría Federal del Trabajo* and not a federal or local judge.
16. The concluded decisions are classified as “fundamental public information” according to the Federal Transparency and Access to Information Law and should be available in the judiciary webpage. This was the case for the most federal decisions (Supreme Court, circuit tribunals, unitary tribunals, and district courts).
17. I included local judges since, in most of the cases — in some decisions federal authorities such as the Fiscal and Administrative Federal Courts handed down the decision the plaintiff was appealing — they adjudicated the decision the plaintiff was appealing. However, we have to consider an important issue: Most of the local decisions against which the Direct *Amparo* was issued were adjudicated during or before the 2011 constitutional amendment and before the Supreme Court landmark decision on the case *Varios 912/2010*, and thus we can expect local judges not to use conventionality review or to use it sparingly. It is worth noting, however, that few local and federal judges’ decisions exercising conventionality review existed before those reforms were accomplished.
18. To decide what actor invoked human rights arguments, I read the selected decisions and the arguments presented; in many of them, both the defender and the federal judge recalled human rights, but I classified the reference in relation to the former given that the judge just repeated the lawyer’s argument without adding any other reasoning, articles, or protocols on human rights.

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