
The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control

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Abstract

This article conducts a comparative analysis of the American and European Conventions on Human Rights to review the relationship between conventionality control and constitutionality control assumed by domestic courts. First, the analysis negates the monist pyramid model by pointing out the limits of the supremacy of international law and constitution. Given the integration of conventionality control into constitutionality control in practice, this study instead presents the normative framework of the trapezium model, crowning the common values recognized by both national constitutions and international law. This research also contributes to clarifying the pro homine principle, a fitting concept to the trapezium schema, focusing on the most favourable treatment for individuals. Specifically, it proves the principle's double function to offensively pierce or defensively safeguard the boundary between international and domestic legal orders. Finally, it argues that in cases of conflicting rights between different individuals, the pro homine principle relativizes an absolute protection of certain rights to strike balance between them. In essence, conventionality control and constitutionality control should be coordinated by the open-minded, substance-oriented, pro homine principle within the pluralist trapezium, in lieu of the principle of the closed, formal supremacy of international law or constitution within the monist pyramid.

1 Introduction

As predicted by Georges Scelle's *dédoublement fonctionnel* theory, the institutional deficiencies for global governance still require domestic courts to promote international

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goals.¹ Actually, international law increasingly designates domestic judges as ‘natural judges’ of international law to ensure the opportunity for the state to comply with its international obligations.² Specifically, domestic courts assume an important role ‘to review the legality of national acts in the light of international obligations and to ensure rule-conformity’.³ In the context of European integration, the *Simmenthal* judgment mandated all national judges as the ordinary judge of Community law to set aside national law conflicting European Union (EU) law.⁴ The *Simmenthal* doctrine may be applied to characterize domestic courts as the ordinary judge of international law.⁵ The Inter-American Court of Human Rights (IACtHR) has indeed developed the *control de convencionalidad* doctrine to convert domestic judges as the ‘primary and authentic guardians’ of the American Convention on Human Rights (ACHR):⁶

When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the *effet utile* 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’ *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations.⁷

It should not be overlooked that the IACtHR formulates conventionality control not only as an obligation under the ACHR but also as a mandate under ‘international treaty’ in general. Put differently, the conventionality control doctrine can be generalized beyond Latin American to other universal and regional human rights treaties. In practice, under the strong influence of the European Court of Human Rights (ECtHR), states parties to the European Convention on Human Rights (ECHR) have engaged in the conventionality control of domestic law.⁸ In Belgium and France, for instance,

¹ Shany, ‘*Dédoublement fonctionnel* and the Mixed Loyalties of National and International Judges’, in F. Fontanelli, G. Martinico and P. Carrozza (eds), *Shaping Rule of Law through Dialogue* (2010) 29, at 36.

² Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’, 34 *Loyola of Los Angeles International and Comparative Law Review* (2011) 133, at 152.

³ A. Nollkaemper, *National Courts and the International Rule of Law* (2012), at 10.

⁴ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629, at paras 21–22. See also M. Claes, *The National Courts’ Mandate in the European Constitution* (2006), at 102.

⁵ El Boudouhi, ‘The National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts’, 28 *Leiden Journal of International Law (LJIL)* (2015) 283, at 283–286.

⁶ IACtHR, *Case of Cabrera Garcia and Montiel Flores v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 November 2010, para. 24, Concurring Opinion of Judge *ad hoc* E. Ferrer MacGregor. In regard to the relationship between the *Simmenthal* doctrine and the *control de convencionalidad* doctrine, see Lopes Saldanha and Pacheco Vieira, ‘Controle jurisdiccional de convencionalidade e reenvio prejudicial interamericano: Um diálogo de ferramentas processuais em favor da efetivação do direito internacional dos direitos humanos’, 19 *Anuario de derecho constitucional latinoamericano* (2013) 435, at 438–440. American Convention on Human Rights (ACHR) 1969, 1144 UNTS 123.

⁷ IACtHR, *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 November 2006, para. 128 (emphasis added).

⁸ Garlicki, ‘Contrôle de constitutionnalité et contrôle de conventionnalité: sur le dialogue des juges’, in Patrick Titun (ed.), *La conscience des droits: Mélanges en l’honneur de Jean-Paul Costa* (2011) 271, at 278–280.

there exist two norm-control systems: the *contrôle de constitutionnalité* is entrusted to the Belgium Cour constitutionnelle and the French Conseil constitutionnel, whereas the *contrôle de conventionnalité* is achieved by ordinary and administrative judges.⁹

As this example shows, states parties – especially domestic courts independent from the political section – face the challenge of reconciling conventionality control and constitutionality control within their domestic legal orders. Admittedly, the problem of whether international law is a part of national law and whether it is applicable before national courts is constitutional in nature.¹⁰ Therefore, the supremacy of international law over domestic law, which has been recognized as one of the fundamental principles at the international sphere,¹¹ cannot duly answer the question of whether domestic courts can utilize human rights conventions in judicial review.

Meanwhile, since human rights conventions and national constitutions share analogous catalogues of rights and freedoms for the most part,¹² the judicial review involving fundamental rights would indicate the coexistence of conventionality control and constitutionality control. Quoting the IACtHR's expression, 'the constitutionality control necessarily implies the conventionality control, exercised in complementary manner'.¹³ A complex problem thus arises when domestic courts find certain domestic provisions incompatible with a treaty and abstain from enforcing them. In this condition, no practical necessity would remain to re-evaluate these norms against the yardstick of the analogous catalogue of constitutional rights. Eventually, conventionality control would replace constitutionality control, and the latter's ultimate aim to ensure the supremacy of constitution would also be undermined.

Against these backgrounds, national judges have tried to integrate human rights treaties into national constitutions to converge the parallel judicial control mechanisms. By means of this integration, domestic judges are empowered to exercise constitutionality control by applying both national and international criteria.¹⁴ This practice no longer appears to rest with the closed relationship between international and domestic law supported by the notion of formal supremacy. Rather, emphasis should be put on the substantive content, recognized through the open interaction between international and domestic sources, which are truly favourable to human beings (*pro homine*).

⁹ Bossuyt and Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment', 7 *LJIL* (2011) 355, at 366–375.

¹⁰ J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 55–59.

¹¹ Fitzmaurice, 'The General Principles of International Law: Considered from the Standpoint of the Rule of Law', 92 *Recueil des cours* (1957) 1, at 85.

¹² Wagnerova, 'The Direct Applicability of Human Rights Treaties', in Council of Europe (ed.), *The Status of International Treaties on Human Rights* (2006) 111, at 113 (drawing an empirical conclusion that 'human rights treaties have significant influence on the catalogue of human rights contained in national constitutions, and, on the contrary, it follows from the very nature of human rights treaties that they are the result of reflected experience').

¹³ IACtHR, *Case of Gelman v. Uruguay*, Order (Monitoring Compliance with Judgment), 20 March 2013, para. 88.

¹⁴ C. Ayala Corao, *Del diálogo jurisprudencial al Control de Convencionalidad* (2012), at 90.

To comprehend such an open-minded, substance-oriented and human-centric relationship between conventionality control and constitutionality control, this study has conducted a comparative analysis on the ACHR and the ECHR. The following section points out the limits of the traditional monist pyramid model anchored by the supremacy of international law or constitution. The next part then pursues as an alternative the new trapezium model, the upper base of which is composed of both international and constitutional law. As a fitting concept to the trapezium schema, the fourth part surveys the *pro homine* principle embedded in ‘most favourable’ provisions of human rights treaties. The fifth part further analyses the dual function of the *pro homine* principle, namely offensively piercing and defensively shielding the boundary between international and constitutional legal orders. Finally, the sixth part considers the *pro homine* principle’s role in the conflict between the conventions’ rights and constitutional rights.

2 Rethinking the Monistic Pyramid Based on the Supremacy of International Law or Constitution

The pyramidal concept of the relationship between international and domestic law has been developed by monism theories. Based on the *rechtlicher Stufenbau* (hierarchically structured legal pyramid) developed by Adolf Merkl, Hans Kelsen advocated in his *Reine Rechtslehre* that ‘[t]he legal order is not of legal norms of equal rank but a pyramid structure of different layers of legal norms’.¹⁵ According to his theory, there are two theoretically equal possibilities: monism with the supremacy of international law and monism with the supremacy of the constitution.¹⁶ However, the contemporary state of affairs poses huge challenges to the supremacy of international law and constitution, respectively.

A Limits of the Supremacy of International Law

On the one hand, sovereign states have resolutely reserved the ultimate power to limit the performance of international obligations conflicting with national fundamental principles and values.¹⁷ The European integration process has abundant experience in this point. The Italian Constitutional Court devised the *controlimiti* doctrine in *Frontini* to restrict the absolute primacy of EU law in terms of national fundamental values.¹⁸ Likewise, the German Constitutional Court elaborated the *Solange* doctrine to evaluate the European Community acts against the yardstick of domestic basic rights.¹⁹ In

¹⁵ H. Kelsen, *Reine Rechtslehre* (2nd edn, 1960), at 228ff.

¹⁶ *Ibid.*, at 321ff.

¹⁷ Nollkaemper, ‘Rethinking the Supremacy of International Law’, 65 *Zeitschrift für öffentliches Recht* (2010) 65, at 67–71.

¹⁸ Corte costituzionale Italiana, Sentenza no. 183, *Frontini v. Ministero delle Finanze*, 27 December 1973.

¹⁹ Deutsche Bundesverfassungsgericht (BVerfG), *Solange I*, 2 BvL 52/71, 29 May 1974; BVerfG, *Solange II*, 2 BvR 197/83, 22 October 1986.

a series of decisions regarding the Treaty of Lisbon, the national identities concept, incorporated in Article 4(2) of the Treaty on the European Union, was employed by national constitutional courts 'as a synonym for constitutional core principles protected against the primacy of EU law'.²⁰

Given that these constitutional limits have been invoked even in the consolidated regional integration, it is unsurprising that similar practices are found in the more pluralistic context of international law.²¹ In the *Medellin* decision, for example, the Supreme Court of the United States relied on the constitutional principles, particularly federalism and the separation of powers, in order to avoid compliance with the 2004 *Avena* judgment of the International Court of Justice (ICJ).²² Similarly, confronting the implementation of the ICJ decision in *Jurisdictional Immunities of the State*, the Italian *Corte costituzionale* rejected in Sentenza 238/2014 the unqualified supremacy of international law over domestic law by reaffirming its own *controlimiti* doctrine.²³ As the most recent example, the German Bundesverfassungsgericht employed the constitutional principle of democracy to permit the legislature to revoke legal acts of previous legislatures and claimed that the principle of *Völkerrechtsfreundlichkeit* (openness to international law) does not include the constitutional obligation of unconditional compliance with international law.²⁴

Resistances against the absolute supremacy of international law have also occurred in the implementation of regional human rights conventions. In Sentenza 49/2015, the *Consulta* in Rome exhibited the 'functional disobedience' against the ECtHR by requiring ordinary judges to follow only the *diritto consolidato* under the Strasbourg jurisprudence.²⁵ The Italian practice is reminiscent of the United Kingdom's precedent in *Horncastle*, in which Lord Phillips sent a thoughtful message to Strasbourg, raising an objection against the interpretation made by the ECtHR Chamber.²⁶ As a more manifest example, the Russian Constitutional Court held that the 'practical implementation [of the ECHR and the ECtHR jurisprudence] in the

²⁰ Wendel, 'Lisbon before the Courts: Comparative Perspectives', 7 *European Constitutional Law Review* (2011) 96, at 131–136. Treaty on the European Union, OJ 2010 C 83/13; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C 306.

²¹ Palombino, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles', 75 *Heidelberg Journal of International Law* (2015) 1, at 4–20.

²² *Medellin v. Texas*, 552 US 491 (2008), at 10; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports (2004) 12, at para. 153. Peters, 'Let Not Triepel Triumph – How to Make the Best Out of Sentenza no. 238 of the Italian Constitutional Court for a Global Legal Order', *EJIL: Talk!* (22 December 2014), available at www.ejiltalk.org/let-not-triipel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/ (last visited 5 April 2016).

²³ Corte costituzionale Italiana, Case 238/2014, 22 October 2014, *considerato in diritto* para. 3.2. See also Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court', 78 *Modern Law Review* (2015) 1028, at 1031–1040.

²⁴ BVerfG, 2 BvL 1/12, 15 December 2015, paras 53–54, 67.

²⁵ Corte costituzionale Italiana, Sentenza 49/2015, 1 May 2015, *considerato in diritto* para. 7.

²⁶ *R v. Horncastle and others*, [2009] UKSC 14, on appeal from [2009] EWCA Crim 964, para. 11.

Russian legal system is only possible through recognition of the supremacy of the Constitution's legal force'.²⁷

In Latin America, in the *Rafael Chavero Gazdik* case, which involved the report published by the Inter-American Commission on Human Rights, the Supreme Court of Venezuela contended that international court decisions should not be executed in the state if they contradict the national constitution.²⁸ Another backlash came from the Constitutional Tribunal of the Dominican Republic, which recently declared unconstitutional the document accepting the IACtHR's contentious competence for the *control concentrado de convencionalidad* on the ultimate basis of the supremacy of constitution.²⁹

B Limits of the Supremacy of Constitution

On the other hand, sovereign states have faced heavy pressure from the international community, and, consequently, the absolute supremacy of constitution has been relativized through the phenomenon of 'internationalization of constitution'.³⁰ There indeed exists the 'progressive *rapprochement* between the European domestic orders with regard to the "position" of the ECHR in the national hierarchy of sources'.³¹ In like manner, 'the constitutionalization of human rights treaties from below' has actually occurred in Latin America, in which these instruments are incorporated into domestic legal orders with the constitutional rank.³² As a result, the incorporated international standards function as the parameter or block for the constitutional review of national acts.³³

The integration of conventionality and constitutionality controls is facilitated particularly through the clauses of consistent or conformity interpretation. A typical example is Article 93 of the 1991 Constitution of Colombia, which provides the Colombian Constitutional Court with the legal foundation for dynamically including

²⁷ Russian Constitutional Court, Decision 21-П/2015, 14 July 2015. For an English translation, see Smirnova, 'Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions', EJIL: Talk! (15 July 2015), available at www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/ (last visited 5 April 2016).

²⁸ Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, Sentencia no. 1942/2013, Constitutionality action raised by Rafael Chavero Gazdik, 13 November 2003, at consideraciones para decidir I.

²⁹ Tribunal Constitucional de República Dominicana, Case TC-01-2005-0013, Sentencia TC/0256/14, *Voto disidente de la Magistrada Katia Miguélina Jiménez Martínez*, 4 November 2014, para. 3.2.

³⁰ Chang and Yeh, 'Internationalization of Constitutional Law', in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1165, at 1167–1169.

³¹ Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts', 23 *European Journal of International Law (EJIL)* (2012) 401, at 404 (emphasis in original).

³² M.E. Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (2011), at ch. 2.

³³ In regard to the block of constitutionality, see Góngora Mera, 'La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del *ius constitutionale commune latinoamericano*', in A. von Bogdandy, H. Fix-Fierro and M. Morales Antoniazzi (eds), *Ius constitutionale commune en América Latina: rasgos, potencialidades y desafíos* (2014) 301, at 302–313.

the ACHR standards within the constitutionality block.³⁴ Likewise, Article 256(2) of the 2009 Constitution of Bolivia becomes the legal basis for the Bolivian Constitutional Court to confirm its own labours of both conventionality control and constitutionality control.³⁵ Moreover, the Peruvian Constitutional Court acknowledges that human rights treaties constitute the block of constitutionality in accordance with the fourth of the final and transitory provisions of the Constitution.³⁶ The last example is Article 1(2) of the Mexican Constitution, a newly introduced provision through the 2011 Human Rights Amendment, upon which the Mexican Supreme Court merged constitutional and international parameters for judicial review in the 2011 *Radilla-Pacheco* ruling.³⁷

Along with Latin American practices, 'consistent interpretation' clauses promote the constitutionalization of the ECHR. For example, Article 10(2) of the Spanish Constitution makes the constitutional provisions of fundamental rights incomplete, which are specified or restructured according to the convention's contents.³⁸ Within the 1998 Human Rights Act of the United Kingdom, which is gradually becoming a kind of constitutional statute,³⁹ the interpretive obligation required by section 3 serves as the 'prime remedial measure' for rectifying the unconventionality of national acts.⁴⁰

Even when formal provisions of consistent interpretation do not exist, the judiciary in practice interprets domestic law in conformity with human rights treaties and thereby contributes to promoting their hierarchy within the constitutional orders. For example, the German Constitutional Court expressed in the 2004 *Görgülü* decision that the ECHR and the ECtHR jurisprudence function as the *Auslegungshilfen* (interpretive aid) for the Basic Law, even though it is not recognized as the direct parameter for the constitutional review because of its domestic status as a federal statute.⁴¹ Subsequently, the

³⁴ Corte Constitucional de Colombia, Exp. T-357702, Sentencia T-1319-01, *Jaime Rodríguez v. Iván Mejía Álvarez*, 7 December 2001, *consideraciones y fundamentos (solución)*. See also Sierra Porto, 'La Corte Constitucional colombiana frente al control de convencionalidad', in E. Corzo Sosa, J.U. Carmona Tinoco and P. Saavedra Alessandri (eds), *Impacto de las sentencias de la Corte Interamericana de Derechos Humanos* (2013) 427, at 440–446.

³⁵ Tribunal Constitucional de Bolivia, Exp. 2009-20768-42-AL, Sentencia 1907/2011-R, 7 November 2011, *fundamentos* III.4 (*de los crímenes de lesa humanidad y la CIDH; y, otras Cortes Control de convencionalidad*).

³⁶ Tribunal Constitucional de Perú, Exp. 0047-2004-AI/TC, Sentencia, *José Claver Nina-Quispe Hernández v. el Congreso de la República*, 24 April 2006, *fundamentos* para. 22. See, in general, N. Torres Zúñiga, *El control de convencionalidad: Deber complementario del juez constitucional peruano y el juez interamericano (similitudes, deferencias y convergencias)* (2013), at ch. 3.

³⁷ Suprema Corte de Justicia de la Nación de México (SCJN), Exp. Varios 912/2010, *Radilla-Pacheco v Estados Unidos Mexicanos*, 4, 5, 7, 11, 12, 14 July 2011, para. 31.

³⁸ Cuenca Gómez, 'La incidencia del derecho internacional de los derechos humanos en el derecho interno: la interpretación del Artículo 10.2 de la Constitución española', 12 *Revista de Estudios Jurídicos* (2012) 1, at 4.

³⁹ Besson, 'The Reception in Ireland and the United Kingdom', in H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 31, at 56.

⁴⁰ *Ghaidan v. Mendoza*, [2004] 3 WLR 113, paras 38–49 (*per* Lord Steyn). See also A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009), at ch. 2.

⁴¹ BVerfG, *Görgülü*, 2 BvR 1481/04, 14 October 2004, para. 32.

Bundesverfassungsgericht declared the unconstitutionality of the legislation regarding preventive detention based on the Strasbourg jurisprudence.⁴² In the 2007 *Sentenze 'gemelle'* 348 and 349, the Italian Constitutional Court expounded that the ECHR provisions have the rank as *norme interposte*, according to which the constitutionality of domestic law must be assessed.⁴³ Following the new formula, the *Corte costituzionale* determined the unconstitutionality of the legislation concerning the refund for unlawful expropriation and found that it was incompatible with the convention's yardstick.⁴⁴

3 Transforming the Monistic Pyramid into the Pluralistic Trapezium

With the parallel limits on the supremacy principle as backdrops, the monist pyramid model has been challenged by legal pluralists who presuppose the heterarchical interplay of various layers of law and politics according to the rules ultimately set by each layer for itself.⁴⁵ Armin von Bogdandy, one of the most prominent critics, argues that the pyramid model must be reconstructed in light of legal pluralism to promote 'the insight that there is an interaction among the different legal orders'.⁴⁶ Similar ideas such as constitutional pluralism,⁴⁷ *Verfassungsverbund*,⁴⁸ *constitución red*⁴⁹ and *modèle du réseau* have been advocated in the face of the pyramid's *bougés* in the European multilevel constitutional layers.⁵⁰

Inspired by the legal pluralist perspective, this article presents [Figure 1](#), which depicts the trapezium model as an alternative to the pyramid model. While the summit of the pyramid fixes either international law or the constitution as the supreme norm, the upper base of the trapezium model consists of both legal sources. The trapezium vision has already been devised by some commentators in relation to Article 75(22) of the Argentine Constitution, which places human rights treaties and the national constitution on the same rank.⁵¹ Inheriting traits from both constitutionalism and legal

⁴² BVerfG, 2 BvR 2365/09, 4 May 2011. See also Andenas and Bjorge, "'Preventive Detention.'" No. 2 BvR 2365/09', 105 *American Journal of International Law* (2011) 768.

⁴³ Corte Costituzionale italiana, *Sentenze* no. 348 and 349, 24 October 2007, *considerato in diritto* para. 4.7 (no. 348), para. 6.2 (no. 349). See also Dal Monte and Fontanelli, 'The Decisions no. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System', 9 *German Law Journal* (2008) 889, at 915–920.

⁴⁴ *Ibid.*

⁴⁵ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), at 69.

⁴⁶ Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6 *International Journal of Constitutional Law* (2008) 397, at 399–401.

⁴⁷ MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review* (1993) 1, at 10.

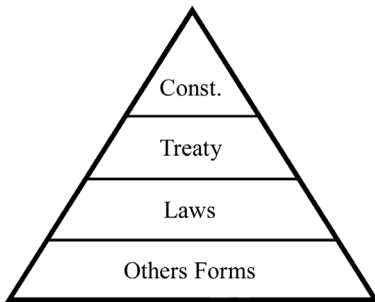
⁴⁸ Pernice, 'Theorie und Praxis des Europäischen Verfassungsverbundes', in C. Callies (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund* (2007) 61, at 78–84.

⁴⁹ Bustos Gisbert, 'Elementos constitucionales en la red global', 60 *Estudios de Deusto* (2012) 21, at 26.

⁵⁰ F. Ost and M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (2002), ch. 2.

⁵¹ Bazán, 'La interacción del derecho internacional de los derechos humanos y el derecho interno en Argentina', 5 *Estudios Constitucionales* (2007) 137, at 142; Pizzolo, 'Los mecanismos de protección en el sistema interamericano de derechos humanos y el derecho interno de los países miembros: El caso argentino', in R. Méndez Silva (ed.), *Derecho internacional de los derechos humanos. Memoria del VII Congreso Iberoamericano de Derecho Constitucional* (2002) 505, at 514.

The Pyramid Model Supported by
the Principle of Supremacy



The Trapezium Model Supported by
the *pro homine* Principle

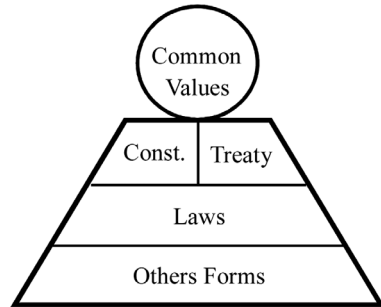


Figure 1: Transformation from the pyramid model to the trapezium model

pluralism, this article identifies three features of the novel trapezium in contrast with the traditional pyramid.

A Open-Mindedness

First, equating international standards with constitutional standards opens up the closed constitutions to international society. To borrow the words of Flávia Piovesan, it is a change from a 'hermetically-closed pyramid focusing on the *State approach*' to 'the permeable trapezium focusing on the *human rights approach*'.⁵² In common with the concept of *Offenheit* (openness) adopted in the Klaus Vogel's theory *offene Staatlichkeit*⁵³ and Peter Häberle's theory *kooperative Verfassungsstaat*,⁵⁴ the permeability here enables a legal order to incorporate the normative principles and contents emanating from other legal orders.⁵⁵

The notion of openness is espoused by legal pluralists 'not only because it gives contestation greater space but also because it reflects social indecision about which polity should govern transboundary issues'.⁵⁶ At the same time, constitutionalists also apprehend openness as the 'constitutionally established friendliness towards legal sources that are, from a formal point of view, external to those governed by the

⁵² Piovesan, 'Direitos humanos e diálogo entre jurisdições', 19 *Revista Brasileira de Direito Constitucional* (2012) 67, at 68–72 (emphasis in original)

⁵³ K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für die internationale Zusammenarbeit* (1964), at 42.

⁵⁴ P. Häberle, *Der kooperative Verfassungsstaat aus Kultur und als Kultur: Vorstudien zu einer universalen Verfassungslehre* (2013), at 96–116.

⁵⁵ For the relationship between these concepts, see M. Wendel, *Permeabilität im europäischen Verfassungsrecht: Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (2011), at 28–30. See also Morales Antoniazzi, 'El nuevo paradigma de la apertura de los órdenes constitucionales: una perspectiva sudamericana', in A. von Bogdandy and J.M. Serna de la Garza (eds), *Soberanía y Estado abierto en América Latina y Europa* (2014) 233, at 243–247.

⁵⁶ Krisch, *supra* note 45, at 26.

national system'.⁵⁷ In reality, the constitutional clauses of 'consistent interpretation' examined above build an important momentum to transform a state into the *estatalidad abierta* (open state).⁵⁸ The constitutional openness based on which plural constitutional orders interact necessarily endorses the *rehabilitación* of the state, converting it into the principal space for human rights protection.⁵⁹

B Substance Orientedness

Second, as premises for the same position between international and constitutional standards, the decisive element for governing their relations is shifted from formal hierarchy to substantive protection. In this regard, Anne Peters remarkably proposed the non-formalist, substance-oriented approach, integrating constitutionalist and pluralist standpoints. Having empirically analysed the interaction between international law and national constitutions, she suggested that '[t]he ranking of the norms at stake should be assessed in a more subtle manner, according to their *substantial weight and significance*'.⁶⁰

To introduce the anti-formalist approach into the trapezium model, this article envisages that the common values recognized in both international law and national constitutions are placed on its upper level. By crowning the common values as completely independent from the formal hierarchy, 'the domestically rather powerless notion of *supremacy of international law* would be replaced by a notion of *supremacy of universal values* that would be able to pierce the divide between the domestic and international sphere'.⁶¹ At the same time, 'a constitution is no longer supreme by the formalities in its approbation – *formal supremacy* – but rather by the contents which it regulates and proclaims – *supremacy of contents*'.⁶²

C Human-Centrism

Third, above all, the substantive values shaped by an open interaction between international and national legal sources are construed for the sake of persons, not for the sake of states. In the human-centric trapezium, the *pro homine* principle, as analysed in the next parts of this article, constitutes the core element in lieu of the supremacy of international law or constitutional law. To locate human beings at the centre of the

⁵⁷ Martinico, 'Constitutionalism, Resistance and Openness: Comparative Law Reflections on Constitutionalism in Global Governance', Sant'Anna Legal Studies STALS Research Paper 5/2015, available at www.stals.sssup.it/files/martinicoSTALS.pdf (last visited 5 April 2019).

⁵⁸ Morales Antoniazzi, *supra* note 55, at 250.

⁵⁹ Del Toro Huerta, 'La apertura constitucional al derecho internacional de los derechos humanos en la era de la Mundialización y sus consecuencias en la práctica judicial', 112 *Boletín Mexicano de Derecho Comparado* (2005) 325, at 331–343.

⁶⁰ Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law', 3 *Vienna Online Journal of International Constitutional Law* (2009) 170, at 195–198 (emphasis added).

⁶¹ Nijman and Nollkaemper, 'Beyond the Divide', in J.E. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (2007) 341, at 342–348 (emphasis added).

⁶² Arias López, 'Entre la Constitución y los tratados de derechos humanos', 38 *Derecho y Cambio Social* (2014) 1, at 11 (emphasis added).

legal system, we can gain implications from two relevant illustrations, which attempt to humanize the Kelsenian pyramid just like this article.

The first illustration is the structural inversion of the Kelsenian pyramid depicted by Norberto Garay Boza.⁶³ In his model, the conformity of domestic norms with international human rights criteria is controlled in light of the principle of progressiveness, which is an interchangeable concept with the *pro homine* principle.⁶⁴ In contrast with our trapezium schema, the inversed pyramid vision might be problematic from the legal pluralist perspective because it seems to place *a priori* priority of international human rights standards over constitutional ones.⁶⁵ Nevertheless, this article supports his argument that if the contents of *infra*-legal regulations are more ample than those of legislations in light of international human rights standards, the priority should be given to the former rather than to the latter. This humanity-oriented idea enlightens our trapezium to admit that even hierarchically inferior norms take precedence if they contain the most favourable protection to persons. It follows that the formal supremacy of international law would be powerless to counter against more protective legislations and other forms, without prejudice to the formal supremacy of a constitution in relation to other national norms.

The second illustration is the pyramid customized for contemporary global law by Rafael Domingo. The new pyramid model, according to his view, 'unlike Kelsen's, would not comprise superimposed normative layers, each dependent on another up through the fundamental norm (*Grundnorm*), but rather a wide base in which each point – that is, each *person* – would be projected in the apex'.⁶⁶ This humanized pyramid, beyond the context of human rights protection, 'integrates the local and the global across all existing and developing branches of law'.⁶⁷ Learning from his model, our human-centric trapezium has also the potential to be generalized, especially to the branches experiencing active interactions between international and national law in favour of individuals.⁶⁸ Despite the future possibility, the following debates are limited to the field of human rights protection for the present purpose.

4 Applying the *Pro Homine* Principle to the Pluralistic Trapezium

As a fitting concept to the trapezium schema, we can address the *pro homine* principle that also possesses a open-minded, substance-oriented and human-centric nature.

⁶³ Garay Boza, 'Gobernar desde abajo: Del control de convencionalidad a la instrumentalización de la inversión estructural de la pirámide kelseniana', 5 *Inter-American and European Human Rights Journal* (2012) 124, at 128–137.

⁶⁴ *Ibid.* As to the interchangeability between the principle of progressiveness and the *pro homine* principle, see A.R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (2009), at 59–61.

⁶⁵ *Ibid.*

⁶⁶ R. Domingo, *The New Global Law* (2010), at 149 (emphasis added).

⁶⁷ *Ibid.*

⁶⁸ In international investment law, e.g., see ICSID, *Tradex Hellas v. Albania*, Decision on Jurisdiction, 24 December 1996, ICSID Case no. ARB/94/2, at 194.

This part overviews the principle's characteristics reflected in 'more favourable' clauses of human rights treaties.

A 'More Favourable' Clauses of Human Rights Conventions

The so-called 'more favourable' clauses are provided in Article 29(b) of the ACHR and Article 53 of the ECHR. Their main function is to prohibit an interpretation restricting the existing human rights standards established by other international and national legal instruments. Since these provisions prohibit the restriction of external criteria by the conventions, Article 29(a) of the ACHR and Article 17 of the ECHR prevent the limitation of internal standards by other conventions' rights 'to a greater extent than is provided for' therein. A large portion of universal and regional human rights instruments include 'more favourable' clauses, such as Articles 5(2) of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 53 of the Charter of Fundamental Rights of the European Union (CFREU).⁶⁹ These 'more favourable' provisions are also found in other branches of international law,⁷⁰ including international environmental law,⁷¹ international humanitarian law,⁷² international labour law,⁷³ and international cultural heritage law.⁷⁴

⁶⁹ In general, see Dhommeaux, 'Hiérarchie et conflits en droit international des droits de l'homme', 4 *Annuaire international des droits de l'homme* (2009) 37, at 55–62. International Covenant on Civil and Political Rights 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3; Charter of Fundamental Rights of the European Union, Doc. 2012/C 326/02, 26 October 2012. Other examples are the International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195, Art. 1(3); Convention on the Elimination of All Forms of Discrimination against Women 1965, 660 UNTS 195, Art. 23; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984, 1465 UNTS 85, Art. 1(2); the Convention on Rights of the Child 1989, 1577 UNTS 3, Art. 41; International Convention for the Protection of All Persons from Enforced Disappearance, Doc. A/RES/61/177, 20 December 2006, Art. 37; Convention on the Rights of Persons with Disabilities, Doc. A/RES/61/106, 13 December 2006, Annex 1, Art. 4(4).

⁷⁰ S.-A. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (2004), at 163–168.

⁷¹ For example, Art. 11 of the Basel Convention on the Control of Transboundary Movements of Hazardous and Their Disposal 1989, 1673 UNTS 126; Art. 2(4) of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2000, 2226 UNTS 208.

⁷² E.g., Arts 6(2) of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention III relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Art. 7(2) of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287; Article 34(1), 45 (3), 75(7)(b), (8) of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3. See also Graf-Brugère, 'A *lex favorabilis*? Resolving Norm Conflicts between Human Rights and Humanitarian Law', in R. Kolb and G. Gaggioli (eds), *Research Handbook of Human Rights and Humanitarian Law* (2013) 251, at 258–260.

⁷³ Art. 19(8) of the Constitution of the International Labor Organization. See also N. Valticos and G.W. von Potobsky, *International Labour Law* (2nd edn, 1995), at 79.

⁷⁴ Convention on the Protection of the Architectural Heritage of Europe, ETS no. 121, 1 December 1987, Art. 21.

These 'more favourable' clauses are of particularly significance with regard to certain treaty mechanisms, such as derogation and reservation, by which states parties may escape from the full application of treaty provisions. Typically, Articles 5(2) of the ICCPR and the ICESCR provide the safeguard against the derogation measures that restrict the existing rights in states parties 'on the pretext that the present [treaty] does not recognize such rights or that it recognizes them to a lesser extent'. In *Habeas Corpus in Emergency Situations*, which concerned *habeas corpus* in emergency situations, the IACtHR interpreted the derogation clause (Article 27(2) of the ACHR) in light of 'the need to prevent a conclusion that could give rise to the suppression of "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 therein" (Article 29(a))'.⁷⁵ In the case law on the reservation on the death penalty, the San José Court also held that 'the application of Article 29(a) compels the conclusion that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself'.⁷⁶

The original function of 'more favourable' provisions to prohibit the restriction of pre-existing human rights does not require treaty and national standards to be unified as a single right answer.⁷⁷ Rather, the treaty criteria are essentially seen as a floor of protection giving states parties the freedom to set their own higher national standards than the treaty minimum standards.⁷⁸ As long as they rely on these 'more favourable' provisions, the conventionality control of domestic law is based on the pluralist diversifying approach.⁷⁹ In practice, however, 'more favourable' clauses are often utilized for aggregating regional and universal human rights criteria. This is evident when 'the Inter-American Court has interpreted Article 29 as the formal admittance by States of such references to other International Rules' and, consequently, 'as an authorization to enlarge the content of the rights protected by the Convention'.⁸⁰ In the 2014 *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* ruling, the Strasbourg Court likewise dictated that '[i]t would be inconsistent with this method for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which

⁷⁵ IACtHR, *Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) ACHR)*, Advisory Opinion, 30 January 1987, para. 18.

⁷⁶ IACtHR, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion, 8 September 1983, para. 66; IACtHR, *Constantine et al. v. Trinidad and Tobago*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 September 2001, para. 66.

⁷⁷ Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', 14 *Human Rights Law Review* (2014) 487, at 493.

⁷⁸ E. Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (2014), at 35–44.

⁷⁹ A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012), at 58, 112.

⁸⁰ Tigroudja, 'The Inter-American Court of Human Rights and International Humanitarian Law', in Kolb and Gaggioli, *supra* note 72, 466, at 471–472.

prevails in international law'.⁸¹ These practices represent the constitutionalist unifying approach that counters the fragmentation of international human rights law.⁸²

These pluralist (or fragmenting) and constitutionalist approaches are not mutually exclusive but, rather, complementary to each other. Mireille Delmas-Marty famously advocated *pluralisme ordonné* 'to move beyond the universal/relative dichotomy and explore the possibility of a law that would order complexity without eliminating it'.⁸³ Peters similarly claims constitutionalizing fragmentation, according to which 'constitutional principles and procedures are needed to constructively deal with pluralism (and with fragmentation)'.⁸⁴ As these ideas imply, 'a relatively consolidated form of global constitutionalism, rather than unregulated global legal pluralism, is the best way to ensure a healthy pluralism of human values'.⁸⁵

Blending diversifying and unifying approaches, 'more favourable' clauses perfectly share the features of the trapezium model depicted in the previous part of this article. First, such an interpretive clause '*opens the door* for the use of other instruments (international or national) as relevant tools and ... precludes restrictive interpretations' of the rights and freedoms recognized thereby.⁸⁶ In this sense, 'more favourable' provisions are analogous to 'consistent interpretation' provisions, both of which enable an open-minded interpretation in light of external legal sources.⁸⁷ Second, 'more favourable' clauses do 'not decide the precedence on the basis of the hierarchical position of the norm nor of a specific court, but instead on the basis of *substantive criteria*'.⁸⁸ Indeed, the IACtHR was 'not assuming a ranking [*jerarchización*] between normative orders' in accordance with Article 29(b) of the ACHR when it dynamically interpreted the Convention in light of other pertinent sources.⁸⁹ Third, 'more favourable' clauses,

⁸¹ ECtHR, *National Union of Rail, Maritime and Transport Workers (RMT) v. the United Kingdom*, Appl. no. 31045/10, Judgment of 8 April 2014, para. 76; see also para. 3, Concurring Opinion of Judge Wojtyczek.

⁸² However, see Rachovitsa, 'Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties', 16 *Human Rights Law Review* (2016), at 83–96 (pointing out that 'the divergent practices [between the ECtHR and IACtHR] deepen the difficulties related to the fragmentation of international law').

⁸³ M. Delmas-Marty, *Le pluralisme ordonné: Les forces imaginantes du droit (tome 2)* (2006), at 28. For an English translation, see M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2009), at 14.

⁸⁴ Peters, 'Constitutional Fragments: On the Interaction of Constitutionalization and Fragmentation in International Law', Centre for Global Constitutionalism at University of St Andrews, Working Paper no. 2, available at <http://cg.cwp.st-andrews.ac.uk/files/2015/04/CGC-Working-Paper-No-2-Constitutional-Fragments.pdf> (last visited 5 April 2016).

⁸⁵ Isiksel 'Global Legal Pluralism as Fact and Norm', 2 *Global Constitutionalism* 160 (2013), at 190.

⁸⁶ Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', 21 *EJIL* (2010) 585, at 597 (emphasis added).

⁸⁷ Burgorgue-Larsen, 'La Corte Interamericana de Derechos Humanos como tribunal constitucional,' in von Bogdandy, Fix-Fierro and Morales Antoniazzi, *supra* note 33, 421, at 443–452.

⁸⁸ Van de Heyning, 'No Place like Home: Discretionary Space for the Domestic Protection of Human Rights', in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and National Courts* (2011) 65, at 72 (emphasis added).

⁸⁹ IACtHR, *Case of The Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 25 November 2013, para. 143 (emphasis added).

compared to the traditional value-oriented doctrine of restrictive interpretation in favour of state sovereignty, typify the new trend where 'in case of doubt, the interpretation more favourable to the private party must be preferred'.⁹⁰

B *The Pro Homine Principle Reflected in 'More Favourable' Clauses*

Exploring the essence of 'more favourable' provisions, we find the so-called *pro homine* or *pro persona* principle that prioritizes the most beneficial interpretation and application of norms for individuals. The principle has already been developed in domestic legal systems, such as *in dubio pro reo*, *in dubio pro operario*, *favor debilis*, *favor libertatis* and *pro actionae*.⁹¹ At the international level, the IACtHR explicitly recognizes that Article 29 of the ACHR includes the *pro homine* principle serving not only for substantive rights but also for procedural regulations. For example, in *Certain Attributes of the Inter-American Commission on Human Rights*, the Court demonstrated that the decision of the Inter-American Commission on Human Rights Commission whether to submit the case to the Court in accordance with Article 51 of the ACHR 'is not discretionary, but rather must be based upon the alternative that would be *most favorable for the protection of the rights established in the Convention*'.⁹² Since the inter-American system permits any legally recognized non-governmental entity to lodge petitions with the Commission (Article 44 of the ACHR), such a procedural advancement based on the *pro homine* principle would operate in favour of juridical persons as well as natural persons.

With regard to the validity beyond Latin America, Helen Keller and Fabián Salvioli, the Human Rights Committee members, referred to the *pro homine* principle by noting that '[i]nternational bodies have a responsibility to make sure that they do not end up adopting a decision that weakens standards already established in other jurisdictions'.⁹³ It should also be recalled that 'more favourable' provisions, allegedly embodying the *pro homine* principle, are prescribed in almost universal and regional human rights treaties.⁹⁴ Taking these doctrinal and normative supports into account, it may be convincingly argued that the *pro homine* principle is enshrined as 'the backbone of the post-Second World War international law of human rights'.⁹⁵

Reflecting the pluralist diversifying approach of 'more favourable' clauses, the *pro homine* principle prohibits the restrictive interpretation to the detriment of existing

⁹⁰ Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)', 21 *EJIL* (2010) 681, at 690–691. Although Crema did not consider 'more favourable' clauses in this article, such as Art. 29(b) of the ACHR (at 688, n. 53), he evaluated the *pro homine* principle, embedded in this provision, as a new trend.

⁹¹ X. Medellín Urquiaga, *Principio pro persona* (2013), at 16–17.

⁹² IACtHR, *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, Advisory Opinion, 16 July 1993, para. 50 (emphasis added).

⁹³ Human Rights Committee, *Elgueta v. Chile*, Communication no. 1536/2006, CCPR/C/96/D/1593/2006, 28 July 2009, para. 11, Individual Opinion of Ms. Helen Keller and Mr. Fabián Salvioli.

⁹⁴ See text accompanying note 69 above.

⁹⁵ De Oliveira Mazzuoli and Ribeiro, 'The *Pro Homine* Principle as an Enshrined Feature of International Human Rights Law', 3 *Indonesian Journal of International and Comparative Law* (2016) 78.

human rights standards. In fact, in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, the IACtHR recognized the *pro homine* principle to forbid the external restriction on the rights in the ACHR:

Hence, if in the same situation both the American Convention and another international treaty are applicable, *the rule most favorable to the individual* must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.⁹⁶

Meanwhile, as the origin of the constitutionalist unifying approach of ‘more favourable’ provisions, the *pro homine* principle also functions to elevate the conventions’ criteria in terms of other international legal instruments. Performing the *pax de deus* with the ‘living instrument’ doctrine of evolutionary interpretation, the *pro homine* principle in fact dramatically escalates the ACHR standards.⁹⁷ As remarkable examples, their combination urged the IACtHR to include sexual orientation⁹⁸ and ethnic origin⁹⁹ as the categories of ‘any other social condition’ protected from discrimination under Article 1(1) of the ACHR. In *Rights and Guarantees of Children in the Context of Migration*, the most recent advisory opinion regarding children’s rights in the context of migration, the *pro homine* principle was also invoked to evince the ‘complementary protection constitut[ing] a normative development’ in regard to the principle of non-refoulement, integrating the particular sphere of application and specific correlative obligations.¹⁰⁰

Equipping both the constitutionalist and pluralist natures, the *pro homine* principle completely fits with the trapezium’s features. First, as often stipulated in conjunction with ‘consistent interpretation’ clauses,¹⁰¹ the *pro homine* principle promotes the open-minded dialogue between international and national legal actors with regard to human rights protection.¹⁰² Second, the *pro homine* principle demands that decision makers consider various international and national norms and select the most protective substance regardless of their hierarchy.¹⁰³ Third, the *pro homine* principle, as

⁹⁶ IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion, 13 November 1985, para. 52 (emphasis added).

⁹⁷ Medellín Urquiaga, *supra* note 91, at 25.

⁹⁸ IACtHR, *Case of Atala Riffo and Daughters v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 February 2012, paras 83–93.

⁹⁹ IACtHR, *Case of Norín Catrín et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 29 May 2014, paras 202–206.

¹⁰⁰ IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion, 19 August 2014, para. 234.

¹⁰¹ See text accompanying notes 34–37 above and text in Part 5(A).

¹⁰² Piovesan, ‘*Ius constitutionale commune latinoamericano en derechos humanos e impacto del Sistema Interamericano: Rasgos, potencialidades y desafíos*’, in von Bogdandy, Fix-Fierro and Morales Antoniazzi, *supra* note 33, 61, at 74.

¹⁰³ Henderson, ‘Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*’, 39 *Revista Instituto Interamericano de Derechos Humanos* (2004) 71, at 92.

graphically told by the Latin maxim itself, requires the norms in question to be interpreted and applied in the most favourable ways to persons.¹⁰⁴

5 The *Pro Homine* Principle as Sword and Shield

Apart from the *pro homine* principle's role in the horizontal relationship between the conventions and other international legal sources, this part of the article analyses the principle's concrete functions for the vertical relationship between the conventions and national constitutions. As a clue to comprehend the latter, the IACtHR made a valuable interpretation in *Juridical Condition and Rights of Undocumented Migrants*:

This Court notes that, since there are many legal instruments that regulate labor rights at the domestic and the international level, these regulations must be interpreted according to *the principle of the application of the norm that best protects the individual*, in this case, the worker. This is of great importance, because there is not always agreement either between the different norms or between the norms and their application, and this could prejudice the worker. Thus, *if a domestic practice or norm is more favorable to the worker than an international norm, domestic law should be applied*. To the contrary, *if an international instrument benefits the worker, granting him rights that are not guaranteed or recognized by the State, such rights should be respected and guaranteed to him*.¹⁰⁵

According to this view, the *pro homine* principle may have two aspects: the offensive function as a sword to penetrate the border between international and national legal orders and the defensive function as a shield to preserve constitutional principles and values.

A *Piercing Constitutional Boundaries with International Standards*

In Latin America, the *pro homine* principle often exerts the offensive function to pierce the boundary of domestic legal orders to complement constitutional fundamental rights with the ACHR's rights. In fact, recent constitutional reforms tend to include the *pro homine* provisions to aggregate national and international human rights – for example, the 2008 Constitution of Ecuador (Articles 424 and 426), the 2009 Constitution of Bolivia (Article 256), the 2010 Constitution of the Dominican Republic (Article 74(4)) and the 2011 Constitution of Mexico (Article 1). In addition to these formal clauses, a number of domestic courts in Latin America have materially relied on the *pro homine* principle to integrate international and constitutional human rights standards.¹⁰⁶ In this sense, as André Nollkaemper characterizes the doctrine of the direct effect of international law, the *pro homine* principle may serve as 'a powerful

¹⁰⁴ Pinto, 'El principio pro homine: criterios de la hermenéutica y pautas para la regulación de los derechos humano', in M. Abregú and C. Courtis (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (1997) 163, at 164–165.

¹⁰⁵ IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, 17 September 2003, para. 156 (emphasis added).

¹⁰⁶ In general, M. Castañeda, *El principio pro persona: experiencias y expectativas* (2014), at 110–129, 191–239.

sword that courts can use to pierce the boundary of the national legal order and protect individual rights where national law falls short'.¹⁰⁷

First, domestic courts rely on the *pro homine* principle to prioritize the ACHR's rights over national constitutions if the former offers more ample protection to persons than the latter does. For example, the Bolivian Constitutional Court clearly articulated that 'based on the principle of favorability and *pro persona*, the Fundamental Law itself foresees the possible supra-constitutionality of some instruments of the International Law of the Human Rights, when its norms are *more favorable to the human being*'.¹⁰⁸ In a similar way, the Constitutional Chamber of the Supreme Court of Costa Rica confirmed that 'to such an extent that if [the International Instruments of Human Rights] recognize a right or offer *greater protection of a freedom* than the norm foreseen in the Constitution, they give priority over this one'.¹⁰⁹

Second, the *pro homine* principle provides momentum to reconsider the overall relationship between national constitutions and the ACHR. For example, the Chilean Constitutional Court remarked that constitutional judges are required to apply the *pro homine* principle with the obligation of the state imposed by the Constitution to be the 'servant of the human being' and to limit the exercise of the sovereignty in function.¹¹⁰ Similarly, the Peruvian Constitutional Tribunal mentioned that the *pro homine* principle transforms 'the formal constitutional text' into 'the Constitution in the material sense' complemented by human rights treaties.¹¹¹ As a remarkable perspective, the Constitutional Chamber of the Supreme Court of El Salvador regarded the relationship between the Constitution and international human rights law not as *jerarquía* but, rather, as *compatibilidad* in terms of the *pro homine* principle.¹¹²

Third, the *pro homine* principle regulates the national acts of specific organs. In regard to the executive, the Colombian Constitutional Court emphasized that the administrative practice on internally forced displacement 'must be in accordance with the *pro homine* principle and in any case not restrict the previously established standard in the norms of legal character and in the recommendations of international character'.¹¹³ With respect to the judiciary, the Supreme Court of Argentina in *Cardozo* revoked the judgment of the Supreme Court of the Province of Buenos Aires, which

¹⁰⁷ Nollkaemper, 'The Duality of Direct Effect of International Law', 25 *EJIL* (2014) 105, at 112–115 (emphasis added).

¹⁰⁸ Sentencia 1907/2011-R, *supra* note 35, *fundamentos* III.4. (emphasis added).

¹⁰⁹ Sala de lo Constitucional de la Corte Suprema de Justicia de Costa Rica, Exp. 08-012101-0007-CO, Res. no. 2008018884, 19 December 2008, at *considerando* III (emphasis added).

¹¹⁰ Corte Suprema de Justicia de Chile, Sentencia 740-07-CDS, 18 April 2008, *considerando* V (*las normas nacionales sobre regulación de la fertilidad y la duda razonable de afectación del derecho a la vida*).

¹¹¹ Tribunal Constitucional de Perú, Exp. 1417-2005-AA/TC, *Manuel Anicama Hernández v. la Cuarta Sala Civil de la Corte Superior de Justicia de Lima*, 8 July 2005, *fundamentos* para. 9.

¹¹² Sala de lo Constitucional de la Corte Suprema de El Salvador, Sentencia 52-2003/56-2003/57-2003, *Los procesos de inconstitucionalidad por el ciudadano Aldonov Frankeko Álvarez y otros*, 1 April 2004, *considerando* V-3 (emphasis added).

¹¹³ Corte Constitucional de Colombia, Exp. D-7473, Sentencia C-372/09, *Demanda de inconstitucionalidad por José Fernando Valencia Grajales*, 27 May 2009, at 8 (Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Refugiados).

'avoided the pronouncement as to whether ... the judge had chosen "that interpretation which was more respectful with the *pro homine* principle" within the framework of the duty to guarantee the right to the access that assists every person accused of crime'.¹¹⁴

As a controversial practice, the *pro homine* principle comes to a crossroad in Venezuela. According to the constitutional *pro homine* clause (Article 23), the Supreme Court at the stage of Sentencia 87/2000 compared the judicial guarantees under Article 8 of the ACHR and Article 49(1) of the Constitution and concluded that the norm of the convention's provision is more favourable to the exercise of such a right than the constitutional one.¹¹⁵ Nevertheless, since the *Rafael Chavero Gazdik* ruling cited above, the Constitutional Chamber has fiercely defended its own position as 'the maximum and last interpreter' of human rights treaties incorporated to the constitutional hierarchy.¹¹⁶ The academic literature harshly criticizes the Tribunal's position on the grounds that '[b]y assuming the absolute monopoly of constitution interpretation, the Tribunal limited the general powers of all the other courts to resolve by means of judicial review on the matter and to directly apply and give prevalence to the American Convention regarding constitutional provisions'.¹¹⁷

The attitude of the Mexican Supreme Court also looks ambivalent. On the basis of the reformed constitutional *pro homine* provision (Article 1), the 2011 *Radilla Pacheco* judgment integrated the *parámetros de constitucionalidad y convencionalidad* and transformed the judicial review system from the traditional (semi-)centralized version to the diffused version exercised by *all public authorities*.¹¹⁸ In *Contradicción de Tesis 293/2011*, however, the Supreme Court assertively defended that the Constitution has the priority in cases where an express restriction is stipulated at the constitutional level.¹¹⁹ It remains unclear whether this decision 'clearly undermines the *pro persona* principle, re-establishing old hierarchies' or 'still leaves room for interpretation, and thus a non-hierarchical, value-oriented deliberation on a case-by-case basis'.¹²⁰

B *Protecting Constitutional Boundaries against International Standards*

Compared to the Latin American experiences, the *pro homine* principle has not been explicitly referred to in the jurisprudence of the Strasbourg Court and the European

¹¹⁴ Suprema Corte de Justicia de Argentina, Fallos 329:2265, *Cardozo, Gustavo Fabián s/recurso de casación*, 20 June 2006, *considerando* para. 8.

¹¹⁵ Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, Sentencia no. 87, *C.A. Electricidad del Centro (Elecentro) y otra vs. Superintendencia para la Promoción y Protección de la Libre Competencia (Procompetencia)*, 14 March 2000, reprinted in 81 *Revista de Derecho Público* (2000) 157.

¹¹⁶ Sentencia no. 1942, *supra* note 28, at *consideraciones para decidir* I.

¹¹⁷ Brewer-Carías, *supra* note 64, at 35–38.

¹¹⁸ *Radilla-Pacheco*, *supra* note 37, paras 23–36 (emphasis added).

¹¹⁹ SCJN, Sentencia 293/2011, *Contradicción de Tesis 293/2011*, 3 September 2013, at 64–65.

¹²⁰ Rodiles, 'The Law and Politics of the *Pro Persona* Principle in Latin America', in H.P. Aust and G. Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (2015) 170.

national courts.¹²¹ From their practices, however, we may extract some important functions of Article 53 of the ECHR – a similar ‘more favourable’ provision to Article 29(b) of the ACHR – and, albeit indirectly, induce those of the *pro homine* principle. The following points, as a whole, show that Article 53 of the ECHR, supposedly embracing the *pro homine* principle, plays a defensive role in preserving constitutional values from the judicial control based on the Strasbourg law. In this situation, the *pro homine* principle in turn works as shield to ‘justify the non-application of international law by the courts, and thereby protect domestic political organs and, more generally, domestic values, from review based on international law’.¹²²

First, as is the case with the 2005 *Okyay v. Turkey* judgment, national judges invoke Article 53 of the ECHR to emphasize its literal safeguarding function and to maintain exiting national standards against the Convention’s standards.¹²³ As a representative example, the German Constitutional Court conditioned in the *Görgülü* decision that the ECHR and the ECtHR jurisprudence serve as interpretive guidelines for the Basic Law, ‘provided that this does not lead to a restriction or reduction of protection of the individual’s fundamental rights under the Basic Law – and this the Convention itself does not desire’.¹²⁴ Similarly, the Italian Constitutional Court mentioned Article 53 of the ECHR to confirm that ‘the need to comply with international law obligations can never constitute grounds for a reduction in protection compared to that available under internal law’.¹²⁵ Moreover, the Spanish Constitutional Court referred to Article 53 of the ECHR in Declaración 1/2004, elaborating the Spanish version of the *controlimiti* doctrine. In this context, Article 53 of the ECHR and a similar provision – Article II(113) of the Treaty Establishing a Constitution for Europe (corresponding to Article 53 of the CFREU) – were invoked to emphasize that ‘the CFREU is conceived, in whatsoever case, as a guarantee of minimums on which the content of each right and freedom may be developed up to the density of content assured in each case by internal legislation’.¹²⁶

Second, in line with in the *E.B. v. France* judgment by the ECtHR,¹²⁷ national judicial authorities rely on Article 53 of the ECHR to progressively fix higher national

¹²¹ Art. 20(2) of the 1991 Constitution of Romania incorporates a ‘more favourable’ clause. See also Gonenc and Esen, ‘The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution’, 8 *EJIL* (2007) 485, at 492–497.

¹²² Nollkaemper, *supra* note 107, at 115–117.

¹²³ ECtHR, *Okyay and Others v. Turkey*, Appl. no. 36220/97, Judgment of 12 July 2005, paras 61–68 (finding the applicability of Art. 6 of the ECHR on the grounds that ‘the concept of a “civil right” under Article 6 § 1 cannot be construed as limiting an enforceable right in domestic law within the meaning of Article 53 of the Convention’).

¹²⁴ *Görgülü*, *supra* note 41, para. 32.

¹²⁵ Corte Costituzionale italiana, Sentenza no. 317, 3 November 2007, *considerato in diritto* para. 7.

¹²⁶ Tribunal Constitucional español, Declaración 1, 13 December 2004, *fundamentos jurídicos* para. 6. Treaty Establishing a Constitution for Europe, OJ 2004 C 310/01.

¹²⁷ ECtHR, *E.B. v. France*, Appl. no. 43546/02, Judgment of 22 January 2008, para. 49. In the judgment, the Court indicated the possibility under Art. 53 of the ECHR that ‘a State is free to be “generous”, that is, to do more than the Convention require it to do – but once it decided to take that step, the State should not discriminate’. See Lawson, ‘Beyond the Call of Duty? Domestic Courts and the Standards of the European Court of Human Rights’, in S. Vogenauer and H. Snijders (eds), *Content and Meaning of National Law in the Context of Transnational Law* (2009) 21, at 25.

standards than the convention standards.¹²⁸ For example, in Decision 159/2004, the Belgian Constitutional Court stated that it was free to go further than the Strasbourg Court regarding the right to same-sex marriage under Article 12 of the ECHR, referring to Article 53 of the ECHR and Article 5(2) of the ICCPR.¹²⁹ The Supreme Court of Norway took a similar approach with regard to the right to present evidence from child witnesses in court, which is found in both Norwegian due process guarantees and the ECHR. According to an explanation from Justice Øie, it is therefore not reasonable to see the right to the questioning of children as being anchored in the convention alone, as interpreted by the Strasbourg Court; rather, it has been established in the interplay between Norwegian law and international human rights.¹³⁰

As a problematic approach, the mirror principle has been adopted by some states parties to uncritically accept the Strasbourg jurisprudence. In the 2004 *Ullah* ruling, Lord Bingham famously formulated the mirror principle, which holds that the court must keep pace with evolving Strasbourg jurisprudence 'no more, but certainly no less'.¹³¹ In Decision NJ 2002/278, the Supreme Court of the Netherlands already elaborated the Dutch mirror principle under Article 53 of the ECHR by stating that the incompatibility between domestic law and the ECHR 'cannot be assumed solely on the basis of an interpretation by the national – Dutch – courts ... which leads to a more extensive protection than may be assumed on the grounds of the jurisdiction of the ECHR'.¹³² The mirror principle not only evinces respect for the ECtHR case law as the authoritative ECHR interpretation but also minimizes the risk of a decision of the national court being the subject of an application to the Strasbourg court.¹³³ Particularly due to this principle, domestic courts may 'leave important political and value choices to be made by the Legislature' by strictly mirroring the international jurisprudence.¹³⁴ Notwithstanding these advantages, the mirror principle may prevent national judges from developing their own native approach to ECHR interpretation.¹³⁵ This consequence would defeat the purpose of Article 53 of the ECHR (and

¹²⁸ Andenas and Bjorge, 'National Implementation of ECHR Rights', in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 181, at 205–206.

¹²⁹ Cour constitutionnelle belge, Arrêt no. 159, *M. Goossenaerts et autres*, 20 October 2004, paras 6.1–6.4.

¹³⁰ Norges Høyesterett, HR-2011-00182-A, *A. v. The Public Prosecutor*, 26 January 2011. For the English translation, see Andenas and Bjorge, 'The Norwegian Court Applies the ECHR by Building upon Its Underlying Principles', 19 *European Public Law* (2013) 241.

¹³¹ *R. (on the application of Ullah) v. Special Adjudicator*, [2004] UKHL 26, [2004] 2 AC 323, para. 20.

¹³² Hoge Raad der Nederlanden, NJ 2002/278, 10 August 2001, para. 3.9. For an English translation, see Efthymiou and de Wit, 'The Role of Dutch Courts in the Protection of Fundamental Rights', 9 *Utrecht Law Review* (2013) 75, at 78–79.

¹³³ Lady Justice Arden DBE, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe', 29 *Yearbook of European Law (YEL)* (2010) 3, at 14.

¹³⁴ Gerards and Fleuren, 'The Netherlands', in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis* (2014) 217, at 245–246.

¹³⁵ J. Jowell, *The Changing Constitution* (2015), at 88.

section 11 of the 1998 Human Rights Act) on the basis of which a more generous approach than the Strasbourg Court is permitted.¹³⁶ Since in numerous occasions national standards have proved themselves to be stronger in protecting human rights than the ECHR, such supplementary protection should not be lightly cast aside.¹³⁷

6 The *Pro Homine* Principle in Cases of Conflicting Rights

Despite its potential to revise the supremacy of international law and constitution, the *pro homine* principle would not be a perfect panacea for disciplining the relationship between conventionality control and constitutionality control. The thorniest issue arises in cases where different rights of several individuals contravene each other. A simple answer for the question of what is the most favourable to persons cannot be elicited from the principle. The final part of this article is therefore dedicated to reconsidering its *raison d'être* in situations of conflicting rights.

A Limits in Balancing Conflicting Rights

The *pro homine* principle prioritizing the most favourable protection to individuals embraces a paradoxical problem. As criticized by Alejandro Rodiles, the *pro homine* principle would be labelled as intuitive and tautological because 'it is the object and purpose of every human rights treaty to grant the broadest possible protection to each of the rights it contains, and that everything else would run counter to their very normative function'.¹³⁸ The expert contests that '[t]he limits of this principle become apparent when human rights of different individuals have to be balanced'.¹³⁹ The same problem is pointed out by Catherine van de Heyning when she states that 'it is not always clear what the best protection of fundamental rights is' and 'which court or which level, the national or [international], could decide what the best protection is'.¹⁴⁰

The utility of the *pro homine* principle was indeed suspected in the Strasbourg Court. A prime example is the 1992 *Open Door and Dublin Well Woman v. Ireland* case concerning the conflict between freedom of expression and right to life. In facing the conflict of rights, the ECtHR simply cut off the argument on Article 60 (the former version of Article 53) of the ECHR invoked by the respondent government.¹⁴¹ Instead, the Court

¹³⁶ Clayton, 'Should the English Courts under the HRA Mirror the Strasbourg Case Law?', in K.S. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (2015) 95, at 105. Human Rights Act 1998, c. 42.

¹³⁷ B. Dickson, *Human Rights and the United Kingdom Supreme Court* (2013), at 43

¹³⁸ Aust, Rodiles and Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation', 27 *LJIL* (2014) 75 at 97.

¹³⁹ *Ibid.*

¹⁴⁰ Van de Heyning, 'The Natural "Home" of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights', 31 *YEL* (2012) 128, at 152.

¹⁴¹ ECtHR, *Open Door and Dublin Well Woman v. Ireland*, Appl. nos 14234/88 and 14235/88, Judgment of 29 October 1992, at paras 78–79.

applied the margin of appreciation doctrine and concluded that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued.¹⁴² As this case suggests, the ECtHR does not regard Article 53 of the ECHR as the appropriate tool to deal with conflicting rights since this provision would be 'at odds with the concept of autonomous standards' and diminish 'the reach as well as the authority of the ECtHR case law'.¹⁴³ It might be therefore be better to say that, within the European system, the margin of appreciation doctrine, not the *pro homine* principle, transforms the concepts within the ECHR 'from an applicant's sword into a defendant's shield'.¹⁴⁴

B Relativizing Absolute Supremacy of Conflicting Rights

Such limits, however, do not render the *pro homine* principle completely meaningless in cases of conflicting rights. In the 2012 *in vitro Fertilization* judgment, the IACtHR relied on the *pro homine* principle to settle the collision between unborn children's rights and mothers' rights. In this context, the San José Court rejected the respondent's argument that 'its constitutional norms grant a greater protection to the right to life and, therefore, proceed to give this right *absolute* prevalence'.¹⁴⁵ This is because 'this approach denies the existence of rights that may be the object of disproportionate restrictions owing to the defense of the *absolute* protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty'.¹⁴⁶ To endorse its own position, the Court invoked the *pro homine* principle:

[I]n application of the principle of *the most favorable interpretation*, the alleged 'broadest protection' in the domestic sphere cannot allow or justify the suppression of the enjoyment and exercise of the rights and freedoms recognized in the Convention or limit them to a greater extent that the Convention establishes.¹⁴⁷

Following this statement, the IACtHR assessed the balance between these conflicting rights and concluded that there was 'an arbitrary and excessive interference in private and family life that makes this interference disproportionate'.¹⁴⁸ In this reasoning, the *pro homine* principle itself did not provide a direct answer for resolving the conflict of rights in question. The principle's role is rather found in the previous stage – it relativizes the absolute protection of conflicting rights supported by the supremacy of the national constitution and thereby creates an open circumstance

¹⁴² *Ibid.*, paras 67–77.

¹⁴³ Van de Heyning, *supra* note 88, at 78.

¹⁴⁴ H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996), at 193.

¹⁴⁵ IACtHR, *Case of Artavia Murillo et al. ('in vitro Fertilization') v. Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2012, para. 259.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* (emphasis added).

¹⁴⁸ *Ibid.*, paras 260–263.

for striking an appropriate balance most favourable to persons in terms of their substance.

Does the *pro homine* principle also relativize the absolute mandates based on the supremacy of international law in favour of national constitutions? In the 2013 *Melloni* ruling, concerning the collision between constitutional fundamental rights and EU law obligations, the Court of Justice of the European Union (CJEU) made controversial interpretation of a ‘more favourable’ clause (Article 53 of the CFREU): ‘[N]ational authorities and courts remain free to apply national standards of protection of fundamental rights, *provided that* the level of protection provided for by the Charter, as interpreted by the Court, and *the primacy, unity and effectiveness of EU law are not thereby compromised*.’¹⁴⁹ In short, the CJEU ‘forcefully asserted that article 53 of the EU Charter cannot threaten the supremacy of EU law in any event’.¹⁵⁰ As a response to the preliminary judgment, the Tribunal Constitucional admittedly lowered the national level of protection while reminding the Spanish *controlimiti* doctrine elaborated in Declaración 1/2004.¹⁵¹

As a severe criticism against these courts’ rulings, Aida Torres Pérez describes the *Melloni* saga as moving from dialogue to monologue because both the Luxembourg and Madrid Courts eventually ‘retreated to the safe havens of EU primacy and constitutional supremacy in a struggle for ultimate authority’.¹⁵² To facilitate robust dialogues between the CJEU and national courts, she normatively argues that ‘even if primacy, unity, and effectiveness [of EU law] were compromised, constitutional rights should not be automatically set aside, but rather the CJEU should examine whether a restriction on those principles might be justified in order to accommodate *more protective constitutional rights*’.¹⁵³ The pluralist position seems to vindicate the open-minded, substance-oriented interaction between European and domestic legal sources, which are truly favourable to human beings, rather than the absolute primacy of EU law or national constitutions. In line with the IACtHR jurisprudence, her opinion embraces a significant implication to the *pro homine* principle’s role in striking an appropriate balance between human rights conventions and constitutional rights.

7 Conclusion

This study explored the open-minded, substance-oriented and human-centric relationship between conventionality control and constitutionality control performed by domestic courts. In essence, given the limits of the supremacy of international and

¹⁴⁹ Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, [2013] ECR I-00000, para. 60 (emphasis added).

¹⁵⁰ Komárek, ‘National Constitutional Courts in the European Constitutional Democracy’, 12 *International Journal of Constitutional Law* (2014) 525, at 528 (emphasis added).

¹⁵¹ Tribunal Constitucional español, Sentencia 26/2014, 13 February 2014, *fundamentos jurídicos* para. 3. See also BVerfG, 2 BvR 2735/14, 15 December 2015, para. 78.

¹⁵² Torres Pérez, ‘Melloni in Three Acts: From Dialogue to Monologue’, 10 *European Constitutional Law Review* (2014) 308, at 329–331.

¹⁵³ *Ibid.*, at 328 (emphasis added).

constitutional within the monist pyramid model (in the second part of the article), it argued that conventionality control and constitutionality control should be coordinated within the pluralist trapezium model, surmounting common values recognized by both international and constitutional sources (third part), through the *pro homine* principle that espouses the most favourable protection to individuals (fourth part).

This normative view needs to be conditioned by the empirical comparative analysis between the ACHR and ECHR contexts. While the *pro homine* principle reflected in Article 29(b) of the ACHR has been widely accepted in Latin America, European national courts have not manifestly adopted the principle, and even when referring to the 'more favourable' provision (Article 53 of the ECHR), they limit its purpose only for preserving national discretions in human rights protection (fifth part of the article). In cases of conflicting rights, although the San José Court employs the *pro homine* principle, the Strasbourg Court instead prefers the margin of appreciation doctrine (sixth part). The reluctance of European judiciaries can provoke a convincing counter-argument that the *pro homine* principle does not work at all in the ECHR implementation.

The disparity, however, should not be superficially taken as a clear-cut contrast between the inter-American judges' *pro homine* attitude and the European judges' *contra hominem* attitude. By granting the margin of appreciation to states parties, the European approach 'allows the consideration of a role of the state' as an 'expression of the principle of good faith' in interpreting human rights.¹⁵⁴ In this sense, the *pro homine* principle and the margin of appreciation doctrine move in concert and aim at the ultimate purpose of human rights protection.¹⁵⁵ Put differently, the San José jurisprudence and the Strasbourg jurisprudence are two sides of the same coin, and, probably, their ambivalent approaches would let us get closer to the ideal model of regional *ius constitutionale commune*.

¹⁵⁴ Crema, *supra* note 90, at 699.

¹⁵⁵ Caballero Ochoa, 'La cláusula de interpretación conforme y el principio *pro persona* (artículo 1º, segundo párrafo, de la Constitución)', in M. Carbonell and P. Salazar (eds), *La reforma constitucional de derechos humanos: un nuevo paradigma* (2012) 103, at 119–121. See also *Gelman v. Uruguay*, *supra* note 13, para. 72, Separate Opinion of Judge E. Ferrer Mac-Gregor Poisot.