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The Dominican withdrawal from the jurisdiction of the Inter-American Court of Human Rights

A legal and a contextual analysis

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Preface

During its more than three decades of history, the Inter-American Court of Human Rights has been consolidated as a fundamental instance for the protection of human rights in the continent. It has been an instance for the relief of hundreds of victims of human rights, and a promoter of important changes within Latin-America. Indubitable, the Inter-American Court has become a regional and international referent for the protection of human rights. However, in spite of all the developments, the Court and in general the Inter-American system of human rights still face the strong resistance and opposition from several States. Until now, the region still has 10 countries which have never ratified the ACHR, whereas from the 25 countries that have adopted the ACHR, 2 have already denounced it, 3 have never recognized the contentious jurisdiction of the Court, and 1 more attempted to withdraw that recognition. Now, it seems that we can add the Dominican Republic to the list. Its Constitutional Tribunal, through the judgment TC/0256/14 of November 2014, ruled that the Instrument through which the Dominican State recognized the jurisdiction of the Inter-American Court breaches provisions of its National Constitution. This situation has been interpreted as the withdrawal of the Dominican Republic from the jurisdiction of the Inter-American Court.

The purpose of the present thesis is to analyze the possible Dominican withdrawal from the jurisdiction of the Inter-American Court. Firstly, I will analyze the context under which the Constitutional judgment was decided in order to know the reasons that motivated the decision. Next, I will analyze whether the Dominican withdrawal, based on the Constitutional judgment, would comply with international law, Inter-American law, and Dominican law. Finally, I will analyze the possible implications of the Dominican withdrawal for the protection of human rights, for the Inter-American human rights system, and for the government of the Dominican Republic, if any.

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Abbreviations

Institutions

CERD	Committee on the Elimination of Racial Discrimination
Commission	Inter-American Commission on Human Rights
Court / IACtHR	Inter-American Court of Human Rights
ECLAC	United Nations Economic Commission for Latin America and the Caribbean
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ILC	International Law Commission
OAS	Organization of American States
UNDP	United Nations Development Programme
WB	World Bank

Treaties/Declarations/Statutes

ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ Statute	Statute of the International Court of Justice

OAS Charter

Charter of the Organization of American States

PACHPR

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

VCLT

Vienna Convention on the Law of the Treaties

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1 Introduction

1.1 Presentation of the problem

1.1.1 The coming encounter of the Inter-American Court of Human Rights and the Dominican Republic

On 28 August 2014, the Inter-American Court of Human Rights (Court or IACtHR) rendered its judgment in the *Case of Expelled Dominicans and Haitians v. Dominican Republic*.¹ This case is perhaps the Inter-American case against the Dominican Republic with the most important internal implications for the Dominican State during the approximately 16 years it has been under the jurisdiction of the Court.

According to the judgment, after one year from the notification thereof, that is on 22 October 2015,² the Dominican Republic will have to “provide the Court with a report on the measures taken to comply with [the judgment].”³ Nevertheless, on that date the Dominican Republic may become the newest State which withdraws (or attempts to) from the jurisdiction of the Court. This may occur if the Dominican Government follows the route marked by its Constitutional Tribunal through the judgment TC/0256/14 of 4 November 2014, in which that high Dominican judicial organ declared the Instrument of Recognition, which binds the Dominican Republic to the jurisdiction of the Court, in contravention of the Dominican National Constitution.

1.1.2 The judgment TC/0256/14

The Constitutional Tribunal’s judgment TC/0256/14 is the outcome of the nine years Constitutional Review Procedure TC-01-2005-0013 (*Acción directa de Inconstitucionalidad*), lodged in November 2005, against the Instrument of Recognition of the Court’s contentious jurisdiction⁴ signed in 1999 by the President of the Dominican Republic in office at the time, Leonel Fernández.

¹ IACtHR, *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary objections, Merits, Reparations, and Costs (2014)

² IACtHR (2014) Press release

³ IACtHR, *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary objections, Merits, Reparations, and Costs (2014), para. 512(22)

⁴ Concept of contentious jurisdiction *infra* Chapter 1.7

The core argument against the Instrument of Recognition is that it was signed only by the President of the Republic and without the approval of the Dominican Congress. Allegedly, this was in contravention of, *inter alia*, the powers of the National Congress to approve or disapprove international treaties, the National Sovereignty, and the division of powers established in Articles 3, 4, 37(14), 46, 55(6), and 99 of the 2002 Dominican Constitution (in force in 2005). However, due to the promulgation of a new National Constitution in 2010, the Constitutional Tribunal studied the Constitutional Review based on the equivalent provisions in the 2010 Constitution (currently in force). That is, based on Articles 3, 4, 6, 26(2), 73 *ab initio*, 93(1), and 128(d).⁵

After nine years of proceedings, the Constitutional Tribunal rendered its judgment TC/0256/14, in which it concluded that i) the Recognition of Jurisdiction of the Court's jurisdiction to be binding for the Dominican Republic must have complied with the requirements of the Dominican Constitution, and ii) that the sole compliance of the provisions of the American Convention on Human Rights (ACHR) regulating the recognition of the Court's jurisdiction are insufficient to bind the Dominican Republic to the jurisdiction of the Court.⁶ For those reasons, the Constitutional Tribunal declared “[t]he unconstitutionality of the Instrument of Recognition of the [IACtHR]’s jurisdiction signed by the President of the Dominican Republic on 19 February 1999.”⁷

1.1.3 The Dominican withdrawal unfolds?

The Constitutional judgment does not expressly mention the withdrawal of the Dominican Republic from the IACtHR's contentious jurisdiction. Neither did it declare the nullity of the Instrument of Recognition nor what the legal consequences of its decision will be. On the contrary, the Tribunal just limited to declare the unconstitutionality of the Instrument of Recognition after a rather general analysis of domestic and international law principles and provisions.

Seemingly, the clearest provision with regard to the effects of the Constitutional judgment can be found in paragraph 9.9. There, the Constitutional Tribunal stated that

⁵ Text available in the Annex

⁶ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, para. 9.16

⁷ *Idem*, First Resolutive Point (**My translation**)

[T]he recognition of the Court's jurisdiction by the Supreme Court of Justice [of the Dominican Republic], as well as the recognition of the binding force of the Court's decisions by the Constitutional Tribunal [of the Dominican Republic], are based on the presumption of legality of the Instrument of Recognition [of the IACtHR's jurisdiction]. However, it is necessary to point out that the contestation of the Instrument, through the present Constitutional Review, introduced a new factor that may entirely change that situation, in the event this [Tribunal] declares the unconstitutionality of that Instrument of Recognition.⁸

In those lines, the Constitutional Tribunal anticipated that the binding force of the Court's jurisdiction and of its decisions have been recognized by the Dominican Supreme Court and the Constitutional Tribunal (only) because they have presumed the legality of the Instrument of Recognition, what changed when the Constitutional Tribunal declared the act unconstitutional. Hence, it seems that the Constitutional Tribunal suggested that now, the Court's jurisdiction and the obligation of the Dominican Republic to comply with its judgments lack a formal legal basis.

Additionally, the use of Article 46 of the Vienna Convention on the Law of the Treaties (VCLT) regarding the invalidity of treaties as one of the arguments of the judgment used by the Constitutional Tribunal,⁹ also suggests that one of the legal consequences of the judgment would be the eventual invalidity of the Instrument of Recognition of the Court's jurisdiction.

However, does this constitute the withdrawal of the Dominican Republic from the Court's jurisdiction? In order to answer that question, we should focus our attention on how the Dominican Government will interpret and implement the judgment.

In October 2014, before the Constitutional judgment, the Dominican Foreign Minister, Andrés Navarro, stated that the Dominican Republic had not considered the withdrawal from an international organization.¹⁰ Whereas in November, a few days after the Constitutional Tribunal released its judgment, the Minister stated that the Dominican Government would comply with the Constitutional judgment,¹¹ and that the Foreign Ministry was working on the different scenarios that the Dominican State could

⁸ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, para. 9.9 (**My translation**)

⁹ *Idem*, paras. 9.4-9.6

¹⁰ Hoy Digital (2014)

¹¹ Agramonte (2014)

adopt after the Constitutional judgment.¹² Among these scenarios was “whether it is worth or not [for the Dominican Republic] to recognize the Court.”¹³ Similarly, the Minister referred that “it was not only the Government, but also the Constitutional Tribunal, who made a statement [...] with regard to the permanence [of the Dominican Republic] under the Court’s jurisdiction, what demonstrates that this was a decision from the whole State, not only of the Government.”¹⁴

Certainly, even when there is no official decision from the Dominican Government on whether the Dominican Republic will withdraw from the Court or not, the Government statements suggest that at least it is a real possibility. Under these circumstances, I believe that the most likely scenario is that the Dominican Government is just trying to make it clear that if necessary, it would not hesitate to take that route.

In any event, I consider that the lack of a final decision from the Dominican Government on the question should not be underestimated. The judgment TC/0256/14 clearly challenges the authority of the Court and binding force of its decisions, and the Dominican Government has shown an unprecedented opposition against the Court after the judgment in the *Case of Expelled Dominicans and Haitians*. All these factors suggest that there is a potential risk for the Constitutional judgment to become the first step towards the withdrawal of the Dominican Republic from the Court’s jurisdiction. This would lead to serious implications on the protection of human rights in that country, and for the consolidation of the regional system as a whole.

1.1.4 Human rights research

Although the particular Dominican withdrawal from an international court is closely related to other areas of law, like international law and constitutional law, my thesis is fundamentally a human rights research. Independent of whether the Constitutional judgment is strictly a legal issue regarding the constitutionality of the Instrument of Recognition, or what it seems, a legal artifice to avoid the compliance with the Court’s judgments, the consequences directly affect the effectiveness of the Court’s relief. For that reason, the study of the situation is enormously important for the consolidation of

¹² Listín Diario (2014)

¹³ Jiménez (2014)

¹⁴ Caminero (2014)

the regional system, since the Court represents the highest instance for the protection of fundamental rights and freedoms available in Latin America.

Therefore, due to the relation between the Constitutional judgment and its potential repercussions for the human rights protection, and my particular interest in the Inter-American court system that began with my internship at the IACtHR in 2014, I have decided to write my thesis on the ongoing Dominican situation. I believe that if we want to build a strong regional human rights system, the Dominican opposition to the Court's jurisdiction should be closely followed, studied, and prevented.

1.2 Research questions

The Constitutional Tribunal relied on principles of international law like the rules of invalidity of treaties in order to support its decision,¹⁵ whereas at the same time, the Tribunal dismissed the applicability or omitted the analysis of other principles that could have challenged its final decisions. For instance, estoppel, and *forum prorogatum*.¹⁶ In any event, the outcome was the declaration of unconstitutionality of the Instrument of Recognition of the Court's jurisdiction by the Constitutional Tribunal, which is apparently leading to the Dominican withdrawal from the Court.

However, I have doubts on whether the Dominican withdrawal would comply with international and Inter-American law, as the Constitutional Tribunal seems to suggest. As asserted by the Inter-American Commission on Human Rights (Commission), the “[Constitutional] judgment has no legal basis in international law, for that reason it cannot produce legal effects.”¹⁷ Therefore, the main purpose of the present research is to assess the compliance of the Dominican withdrawal with the aforementioned and other principles of international and Inter-American law, and when applicable with Dominican law.

In the light of the above, the research question I have formulated for the present thesis is:

¹⁵ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, para. 9.9

¹⁶ *Idem*, para. 9.7

¹⁷ Commission (2014) Press release 2014-130 (**My translation**)

Would the withdrawal of the Dominican Republic from the contentious jurisdiction of the Inter-American Court of Human Rights comply with international law, Inter-American law, and Dominican law?

Additionally, I consider that the sole legal assessment of the Dominican withdrawal without taking into account its context and consequences distorts the value and importance of the analysis for the human rights protection within the Inter-American human rights system.

For this reason, I have also formulated two sub-research questions:

1. *What is the Dominican and regional context under which the Constitutional judgment was decided (underlying causes)?*
2. *What are the possible implications if the withdrawal is consummated (potential consequences)?*

1.3 Hypothesis

My hypothesis for the main research question is: the withdrawal of the Dominican Republic from the IACtHR's contentious jurisdiction would breach international law, Inter-American law, and domestic legal provisions, based on three assumptions.

Firstly, neither the ACHR nor domestic law establish the requirement of ratification for the recognition of the Court's contentious jurisdiction to be valid and produce legal effects. The ACHR does not lay down any specific requirement, besides the act of notification of accession at any moment by the Parties to the ACHR. Thus, I argue that the sole signature of the Dominican President at the time, and the notification to the Organization of American States (OAS) are sufficient for the Recognition of the Court's jurisdiction to bind the Dominican State under the ACHR.

Secondly, international law, Inter-American law, and Dominican law recognize the special hierarchy of international obligations, particularly fundamental international human rights obligations such as those arising from the ACHR. For that reason, the obligations derived from the Instrument of Recognition of the Court's jurisdiction, an act regulated by international law and the ACHR, must prevail over domestic law, even in case of conflict with the Dominican Constitution.

Thirdly, the eventual withdrawal of the Dominican Republic from the Court's contentious jurisdiction would contravene a series of principles and rules of public international law and of the Inter-American human rights system. Among these principles, I will address the power of the IACtHR to decide on its own jurisdiction (*compétence de la compétence/Kompetenz-Kompetenz*); the principles of *pacta sunt servanda* and good faith, and the rules for the invalidity of treaties; and principles related to State's conduct, consent and acquiescence.

1.4 Methodology

The present research focuses primarily on the assessment of the compliance of the Dominican withdrawal from the Court's jurisdiction with international law, Inter-American law, and Dominican law. This requires taking into account the international obligations of the Dominican Republic, principles and rules of international and Inter-American legal frameworks, and the interaction thereof with legal provisions of Dominican law. For that reason, I consider that a positivist method based on the notion of voluntarism is the approach which best allows me to analyze the interaction between those bodies of law. The voluntarism approach lies in the assumption that the States' acts and consent create international norms and obligations, which at the same time prevent States from unilaterally withdrawing from those obligations.¹⁸ Therefore, given that the present thesis is concerned with the withdrawal from international undertakings, namely the Dominican withdrawal from its obligations under the Inter-American human rights court system, I consider that voluntarism provides an appropriate approach for addressing this problem. Then, I believe that by analyzing the international commitments and domestic legal provisions of the Dominican Republic, I will be able to answer whether the withdrawal complies with those bodies of norms.

Additionally, the present thesis also deals with a series of sub-issues that go beyond the sole legal assessment of the Dominican withdrawal from the Court. For instance, I already cited some political statements from the Dominican Foreign Minister in order to understand how the Dominican Government is planning to implement the Constitutional Tribunal's judgment. Similarly, I will also deal with the context of the

¹⁸ Simma and Paulus in Ratner (2006) p. 25

judgment within and outside the Dominican Republic, and its potential implications for the protection of human rights and for the Dominican Government itself. Therefore, I consider that my thesis employs a non-doctrinal approach that includes other disciplines as aids to the legal research.¹⁹ It implies that in order to understand the possible real motivation behind the Constitutional judgment, I will have to address the political behavior²⁰ of the Dominican State vis-à-vis the judgments from the IACtHR and the Haitian immigration in the Dominican territory that seems connected to Dominican withdrawal. Whereas in order to anticipate the possible consequences if the Dominican Republic unilaterally withdraws from the Court's jurisdiction, I will have to address the precedents of withdrawals and the regional response in those cases.

In sum, the present research requires a legal methodology in order to assess the Dominican withdrawal, complemented with a contextual analysis of its causes and possible consequences.

1.5 Sources

Due to the nature of the research goals, the present thesis will rely almost entirely on qualitative sources, except for some references to quantitative data regarding the situation of the Haitian immigration in the Dominican Republic in Chapter 2.

With regard to the legal sources (qualitative). I will give priority to those so-called formal sources of law²¹ binding on the Dominican Republic. For the international sources, I will follow the criteria laid down by Article 38 of the Statute of the International Court of Justice (ICJ Statute) as the most accepted exhaustive list of sources of international law.²² Therefore, I will refer to treaty-law, principles of international law, and subsidiary sources under the ICJ Statute, such as judicial decisions from the International Court of Justice (ICJ) and the IACtHR, and scholarly literature. Additionally, I will also rely on non-binding documents (soft-law sources)²³ to the extent that they could complement the understanding of particular legal issues.²⁴ For instance, I will

¹⁹ McConville (2007) p. 5

²⁰ Abbott in Ratner (2006) p. 129

²¹ Thirlway in Evans (2014) p. 92-93

²² Thirlway (2014) p. 6

²³ Hoffman (2008) p. 7

²⁴ McConville (2007) p. 3

refer to constitutive elements in the formation of customary international law (United Nations General Assembly declarations, or proposals of the International Law Commission (ILC)) in Chapter 3 for the analysis of the binding force of unilateral acts as sources of international obligations.

With respect to domestic legal sources (Dominican and other Latin-American countries), considering that the parties to the ACHR are of civil legal tradition, including the Dominican Republic, I will prioritize as domestic primary sources the national constitutions and laws, and as secondary sources I will take into account judgments from high tribunals (Supreme Courts or Constitutional Courts).²⁵

With respect to the contextual analysis of the Constitutional judgment and the possible implications of the Dominican withdrawal, I will also rely on qualitative non-legal sources. For instance, I will refer to official press releases of Inter-American organs, declarations of NGOs, statements from Dominican authorities formulated through official sites, and press.

1.6 Structure

After the current introductory Chapter in which I present the background of the Dominican withdrawal, the methodological framework, and the thesis' structure, I will move to Chapter 2 concerning the context of the Constitutional judgment TC/0256/14. I will address this from three angles. First, the participation of the Dominican Republic in contentious cases before the Court; second the context of the Haitian immigration; and third the precedents of withdrawals from the ACHR and from the Court's jurisdiction.

Following the presentation of the context, Chapter 3 provides the legal analysis of the compliance of the Dominican withdrawal with international law, Inter-American law, and applicable Dominican law. Then, in Chapter 4, I will address the possible implications if the Dominican Government decides to carry out the withdrawal. This will cover the implications for individuals, for the Inter-American system of protection of human rights, the possible sanctions for the Dominican Republic at the OAS level, and the remaining alternatives of human rights scrutiny within the OAS system and at the international level. Finally, I will present my conclusions.

²⁵ Hoffman (2008) p. 30

1.7 Definitions

Contentious jurisdiction of the IACtHR.- Alongside the advisory jurisdiction,²⁶ the IACtHR exercises the contentious jurisdiction. The contentious jurisdiction constitutes the ordinary form of jurisdiction of the IACtHR,²⁷ under which it decides on whether a State has violated the human rights of individuals in a particular case.²⁸

²⁶ ACHR Article 64

²⁷ IACtHR, *Matter of Viviana Gallardo et al.*, Order of the President (1981) Separate Opinion Judge Piza Escalante para. 4

²⁸ Pasqualucci (2013) p. 10

2 The Dominican withdrawal in context (causes)

2.1 The Dominican Republic before the Inter-American Court of Human Rights

The Dominican Republic is party to the ACHR since 19 April 1978, and accepted the Court's contentious jurisdiction on 25 March 1999, when its Permanent Representative at the OAS deposited the Instrument of Recognition signed by the Dominican President Leonel Fernández on 19 February 1999.

Thus, with the necessary requirements fulfilled, the Commission, since 2003 until now, has referred four cases against the Dominican State. The first application was the *Case of the Girls Yean and Bosico* lodged in July 2003. The case concerned, among other violations, the breach of the Right to Nationality protected under Article 20 ACHR in detrimental to children with Haitian origin, because the Dominican Government “refused to issue birth certificates [...] even though [the victims] were born within the [Dominican] territory and that the Constitution of the Dominican Republic [...] establishes the principle of *ius soli*.”²⁹ The second contentious case was *González Medina and Family* referred by the Commission in May 2010. This case concerned the forced disappearance of a university professor and opposition leader.³⁰ The third application was the *Case of Nadege Dorzema et al.* submitted by the Commission in February 2011. This case related to the alleged breach of the right to life, humane treatment and judicial guarantees of Haitians nationals who were victims of an excessive use of force by the Dominican military.³¹ The Court found the Dominican Republic responsible for human rights violations in all the three above-mentioned cases.

The fourth contentious application was the *Case of Expelled Dominicans and Haitians*. The Commission submitted the application of the case in July 2012. The case

²⁹ IACtHR, *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (2005) para. 3

³⁰ IACtHR, *Case of González Medina and Family v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (2012) para. 2

³¹ IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations and Costs (2012) para. 1

involves the “‘arbitrary detention and summary expulsion from the territory of the Dominican Republic’ of [...] Haitians and Dominicans of Haitian descent [...] without following the expulsion procedure set out in domestic law.”³² Additionally, the case also relates to the deprivation of the generation of identity documents and from obtaining Dominican nationality for persons, including children, with Haitian origin and born in Dominican territory.³³

Through its judgment of 28 August 2014, the Court found several judgments (from the Constitutional Tribunal itself), and different pieces of legislation (including the National Constitution) in contravention with the ACHR. As a result, the Court ordered the Dominican Republic to, *inter alia*, adopt measures for the registration and generation of identity documents for the victims, to allow one of the victims with Haitian origin to reside in Dominican territory, and to adopt legislative measures (constitutional if necessary) to ensure to every newborn in the territory of the Dominican Republic (*jus soli*) an accessible and simple birth registration.³⁴

In the light of the unprecedented broad scope of reparations ordered by the Court, it can be stated that this case is indubitably the most relevant contentious case against the Dominican Republic until now. If implemented, it would certainly have deep implications on the Dominican migratory policies.

Before moving to the next section, I would like to highlight that three out of the four contentious cases against the Dominican Republic relate to violations committed against Haitians or Dominicans with a Haitian background. Moreover, two of the cases were particularly related to issues concerning the Right to Nationality of children with Haitian background. Thus, it is clear that the inadequate treatment of the Haitian immigration by the Dominican Government has been the main cause why the Court has tried the Dominican Republic. For this reason, I will explore in the next section whether the Inter-American scrutiny of the Dominican migratory policies motivated the Constitutional ruling that declared unconstitutional the adherence of the Dominican Republic to the Court’s jurisdiction.

³² IACtHR, *Case of Expelled Dominicans and Haitians*, Preliminary objections, Merits, Reparations, and Costs (2014) para. 1

³³ *Ibidem*

³⁴ *Idem*, para. 512

2.2 The real motivation of the Dominican Republic?

On 4 November 2014, after nine years of proceedings, the Dominican Constitutional Tribunal released its judgment TC/0256/14 which declared the unconstitutionality of the Instrument of Recognition of the Court's jurisdiction. It was decided in a very peculiar moment, just after less than two weeks from the date the Court notified its judgment of the *Case of Expelled Dominicans and Haitians*. Perhaps, as mentioned before, this Inter-American judgment against the Dominican Republic has the strongest legal implications in its sixteen years of history under the Court's jurisdiction. Therefore, I consider that the obligated question is whether there is a relation of causality between the two decisions.

In that respect, the dissenting opinion of Judge Jiménez Martínez, member of Constitutional Tribunal, provides some interesting insights on that possibility. The Dominican Judge stated that

We must indicate that the present judgment has been decided under a historical context, in which our country [the Dominican Republic] has been condemned by the Inter-American Court of Human Rights and that, in our opinion, responds more to an act of reaction than legal reasoning; situations like those which have constituted the shameful way-out that in other countries it has been given under similar circumstances, with the clear difference that where this has occurred, it has never been promoted by a Constitutional Justice organ, as it has happened in the Dominican case, what deeply concerns us.³⁵

Clearly, what the Judge Jiménez Martínez was referring to was the historical context of the *Case of Expelled Dominicans and Haitians*.

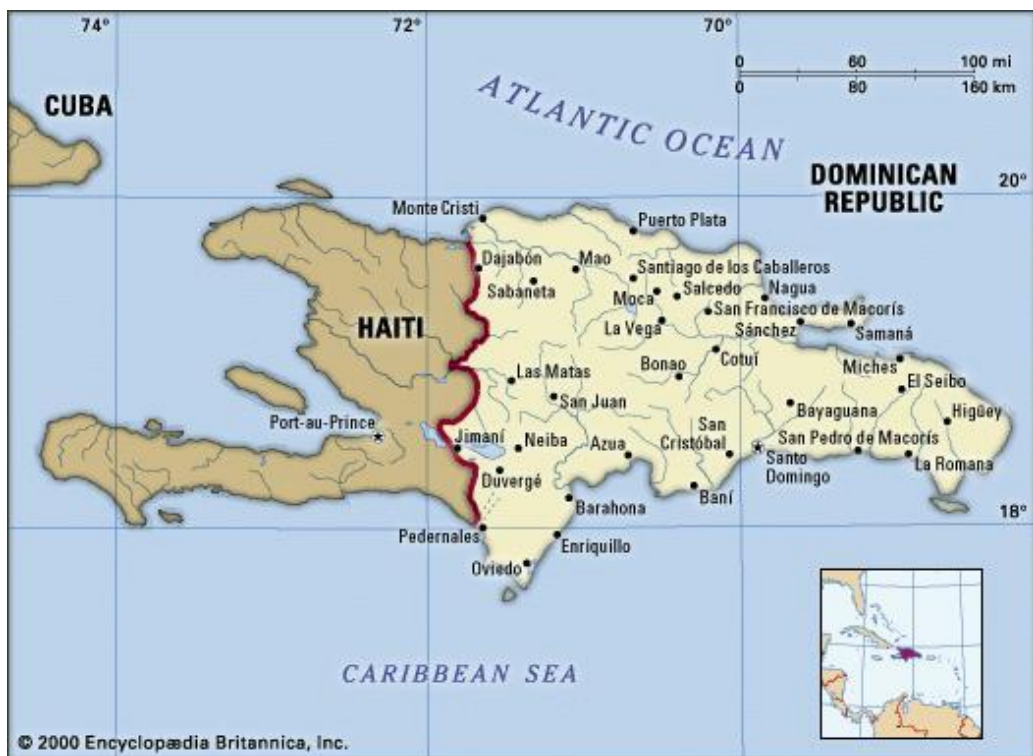
This seems to coincide with the strong opposition of the Dominican Authorities against that ruling by the IACtHR. The Dominican Foreign Minister declared after the notification of the Court's judgment that the Dominican Republic "every country has the right to define the mechanism to grant citizenship, [...] and that sovereign decision cannot be interpreted under any circumstances as a denial of the respect of human rights."³⁶ The Minister added that the Dominican Republic "cannot accept the terms of

³⁵ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, Dissenting Opinion Judge Katia Miguelina Jiménez Martínez, para. 4.2.12 (**My translation**)

³⁶ Cited in MIREX (2014) (**My translation**)

the ruling.”³⁷ Similarly, the former Dominican President Leonel Fernández, who actually signed the Instrument of Recognition, stated before the OAS in November 2014, that the judgment from the Court against the Dominican Republic “constitutes a clear infringement of the sovereignty of the Dominican Republic” and “that the Dominican State is impeded to comply with the decision.”³⁸

To understand this opposition, we need necessarily to take into account the delicate history of migration between Haiti and the Dominican Republic.



Island of Hispaniola³⁹

Haiti and the Dominican Republic apart from sharing the Caribbean island of Hispaniola, they also share a long history of immigration primarily motivated by economic reasons.⁴⁰ This is understandable due to the enormous social and economic differences between the two countries. According to the 2014 statistics from the United Nations Development Programme (UNDP), the Dominican Republic was ranked in the

³⁷ Cited in Hoy Digital (2014) (My translation)

³⁸ Speech available in Diario Libre (2014) (My translation)

³⁹ Encyclopædia Britannica (2015)

⁴⁰ ECLAC (2010) p. 9

102nd position among the nations evaluated in the Human Development Index, this places the Dominican Republic in the category of countries with a High Human Development, whereas Haiti was ranked 168, among the countries with Low human development.⁴¹ Moreover, according to the World Bank (WB) statistics, the Poverty headcount ratio of the Dominican Republic represented in 2012 the 40.9% of population,⁴² whereas in Haiti it represented the 58.5% in the same year.⁴³ Similarly, in 2013, the Gross National Income per capita in the Dominican Republic was \$5,770.00 USD,⁴⁴ whereas the Haitian was only \$810 USD.⁴⁵

Now, according to the last Dominican national census of 2010, the number of people born in Haiti and living in the Dominican Republic was 311,969 out of the 9,445,281 people who represented the total population in the Dominican Republic.⁴⁶ Moreover, if we consider that the total number of people born abroad and living in the Dominican Republic in 2010 was 395,791 people,⁴⁷ then the Haitian minority represents approximately the 78% percent of the total foreigners living in the Dominican Republic. Nevertheless, the scenario is even more complex. The Economic Commission for Latin America and the Caribbean (ECLAC) recognizes that there is no final consensus on the real number of people with Haitian background living in Dominican territory. The studies quoted by the ECLAC go from 200 thousand up to 2 million people.⁴⁸ This outlook shows the complexity of the Haitian immigration in the Dominican Republic.

Moreover, although there are positive actions of solidarity from the Dominican Republic to the difficult situation of Haiti particularly after the devastating earthquake of 2010,⁴⁹ the massive immigration has also led to unfortunate attitudes and policies from the Dominican Government against Haitian population in many occasions. In that respect, the Office of the UNDP in the Dominican Republic has referred that the “most of [the Haitians in the Dominican Republic] are undocumented and must face a

⁴¹ UNDP Table 1: Human Development Index and its components available at: <http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components>

⁴² WB statistics available at: <http://data.worldbank.org/country/dominican-republic>

⁴³ WB statistics available at: <http://data.worldbank.org/country/haiti>

⁴⁴ WB statistics available at: <http://data.worldbank.org/country/dominican-republic>

⁴⁵ WB statistics available at: <http://data.worldbank.org/country/haiti>

⁴⁶ Ministerio de Economía, Planificación y Desarrollo (2010) pp. 16 and 99

⁴⁷ Idem, p. 98

⁴⁸ ECLAC (2010) p. 10

⁴⁹ CERD: Concluding observations (2013) para. 5

generally hostile political and social situation.”⁵⁰ For its part, the Court has recognized the existence of “a situation [...] in the Dominican Republic in which Haitians and persons born in Dominican territory of Haitian descent, who were usually undocumented and living in poverty, frequently suffered abuse or discrimination, including from the authorities, which exacerbated their situation of vulnerability.”⁵¹ Whereas the Committee on the Elimination of Racial Discrimination (CERD) has referred to the “recurring reports of mass, indiscriminate and arbitrary deportations of citizens of Haitian origin,”⁵² and to certain measures which “lead to a situation of statelessness [for Dominicans of Haitian background].”⁵³

In my opinion, the historical context appears to show that the Constitutional decision may constitute a response to the recent Court’s judgment in the *Case of Expelled Dominicans and Haitians*. If so, it makes the Constitutional Ruling a legal justification for an anticipated non-compliance of the Dominican Republic with the Inter-American judgments, and a confirmation of the historical context of violations committed against the persons with Haitian origin.

2.3 Latin-American precedents of denunciations and withdrawals

In words of Úbeda De Torres, “[t]he main reason for the difference between th[e Inter-American] system and the European one, however, lies in the fact that the American states are not ready to make court control fully operational. For them, State sovereignty clearly prevails and this highlights the weaknesses of the Court, which is obliged to recognize it.”⁵⁴ Certainly, no regional system of human rights has experienced such a number of withdrawal or attempted withdrawals as the Inter-American system. The African system established its court less than ten years ago and has had no withdrawals. The European system has only experienced the withdrawal of Greece in 1969 during its Military Junta, however Greece rejoined the European system just after 5 years in

⁵⁰ Cited in IACtHR, *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (2005) para. 109(3)

⁵¹ IACtHR, *Case of Expelled Dominicans and Haitians*, Preliminary objections, Merits, Reparations, and Costs (2014) para. 171

⁵² CERD: Concluding observations (2013) para. 21

⁵³ *Idem*, para. 19

⁵⁴ Burgorgue-Larsen (2011) p. 8

1974.⁵⁵ In contrast, the Inter-American system has been subject of two denunciation of the ACHR, one attempted withdrawal from the Court's jurisdiction, and several threats of withdrawals.⁵⁶ To that history of denunciations and withdrawals within the Inter-American system, we must now add what seems to be the new attempt of withdrawal of the Dominican Republic, which beyond its technical peculiarities, appears to emulate the route that other governments of the region. In the present Section, I will briefly address those regional precedents.

i) Trinidad and Tobago

Similar to the current context of political opposition against the Court's decisions in the Dominican Republic, Trinidad and Tobago frustrated by the resolutions from the Commission thwarting death sentences in violation of the right to due process, decided to denounce the ACHR in May 1998.⁵⁷ This became effective after a one-year period (May 1999) as established by Article 78(1) ACHR. The justification put forward by Trinidad and Tobago was that it was denouncing the ACHR in order to avoid the cruel, inhuman, and degrading treatment resulting from the death row for all those persons sentenced to death penalty, since the proceedings before the Inter-American organs would have taken too long, what was contrary to its Constitution.⁵⁸

Therefore, Trinidad and Tobago became the first country in the region that made use of the denunciation clause established in Art. 78 ACHR, which specifically allows States to denounce the ACHR.

Despite that, Trinidad and Tobago could not avoid the ruling of the Court. Pursuant to Art. 78(2) ACHR, the denunciation of the ACHR did not release Trinidad and Tobago from its obligations therein in relation to all those acts prior the effective date of denunciation, as confirmed by the Court in the *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*.⁵⁹

ii) Peru

⁵⁵ Tyagi (2009) pp. 159-160

⁵⁶ *Ámbito Jurídico* (2013)

⁵⁷ Cassel (1999) p. 168

⁵⁸ Burgorgue-Larsen (2011) p. 14

⁵⁹ IACtHR, *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Merits, Reparation, and Costs (2002) para. 13

Perhaps, the Fujimori regime encouraged by the example of Trinidad and Tobago, became the second experience of withdrawals from the Court's contentious jurisdiction. Notwithstanding the absence of a denunciation clause for the Court's contentious jurisdiction, Peru, during the course of the cases *Ivcher Bronstein* and *Constitutional Court*, notified to the Secretary General of the OAS, its decision to withdraw its recognition of the Court's jurisdiction. The withdrawal was backed by its National Congress, and was adopted with "[immediate effects] to all cases in which Peru has not answered the application filed with the Court."⁶⁰

The Court relying on its authority to determine the scope of its own competence⁶¹ established that the only denunciation permissible in the ACHR is of the ACHR itself as a whole, not of the jurisdiction solely.⁶² Moreover, the Court also noted the absence of any provision in the specific Instrument of Acceptance of Peru allowing for the future withdrawal of the Court's jurisdiction.⁶³ Additionally, the Court emphasized, that the duty to comply with the provisions of a treaty is not limited to substantive provisions but also procedural.⁶⁴ Thus, Article 62(1) ACHR shall be interpreted and applied in a way that the judicial mechanism for the protection of human rights therein is truly practical and effective.⁶⁵

For the abovementioned reasons, the Court found the withdrawal attempted by Peru inadmissible.⁶⁶ Fortunately, the Peruvian rebellion was temporal. When the Fujimori regime ended, the interim Government of President Paniagua declared the withdrawal without effects. Thus, the Peruvian attempted withdrawal turned out to become a false retreat.⁶⁷

iii) Venezuela

In August 2008, the Court released its judgment in the *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* related to the removal from

⁶⁰ IACtHR, *Case of the Constitutional Court v. Peru*, Competence (1999) para. 27

⁶¹ *Idem*, para. 31

⁶² *Idem*, para. 50

⁶³ *Idem*, para. 38

⁶⁴ *Idem*, para. 36

⁶⁵ *Idem*, para. 36

⁶⁶ *Idem*, para. 53

⁶⁷ Burgorgue-Larsen (2011) p. 16

office of former judges of the First Court of Administrative Disputes. The Court declared that the procedure before their removal violated their rights to a hearing before an impartial tribunal,⁶⁸ to due guarantees,⁶⁹ and ordered the Venezuelan State to reinstate the victims in a position in the Judiciary with same salaries, benefits, and equivalent rank.⁷⁰ The judgment was strongly opposed by the Venezuelan Government and as response, it filed a constitutional procedure against the concerning Inter-American judgment before its Supreme Court, in order to declare the judgment contrary to its Constitution and consequently of impossible implementation.⁷¹ The Constitutional Chamber of the Supreme Court found the judgment in contravention to the Venezuelan Constitution, and concluded that the judgments from the Court are not legally binding and inapplicable when they violate the Venezuelan Constitution.⁷² As if it was not enough, the Constitutional Chamber requested the Executive Power of Venezuela to denounce the ACHR, what was made official in 2012, and became effective in 2013. In that form, Venezuela is the last withdrawal from the ACHR and the Court's jurisdiction in the Inter-American system of human rights, unless the Dominican Republic opts for the same route.

2.4 Final remarks on the context of the Dominican withdrawal

It might be that the Dominican Constitutional Tribunal followed the unfortunate developments of the abovementioned Latin-American States. We still do not know what steps the Dominican Government will take in the near future with respect to their continuation under the Court's jurisdiction. From the previous experiences, the Dominican situation may be just a false retreat like Peru, or perhaps, the Constitutional judgment is the precursor of a future denunciation like Venezuela. What it is important to note here is that despite the Dominican arguments on Constitutional Supremacy, Division of Powers, and Legality put forward in its Constitutional judgment, the historical context of the Haitian question and the judgments from the Court in that respect cannot be simply concealed. The Latin-American precedents demonstrate that decisions like that

⁶⁸ IACtHR, *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary objection, Merits, Reparations and Costs (2008) paras. 67 and 148

⁶⁹ *Idem*, para. 91

⁷⁰ *Idem*, para. 267(17)

⁷¹ Salgado Ledesma (2012) p. 243

⁷² *Ibidem*

of the Dominican Republic, generally follow inconvenient judgments and decisions from the Inter-American human rights organs. And, the declarations of the Dominican Foreign Minister and the dissenting opinion of Judge Jiménez Martínez seem to place the Dominican situation in a similar rhetoric. Regardless whether the Dominican State opts to remain under the Court's jurisdiction or to withdraw, the harm is done. From the thirty-five members of the OAS,⁷³ ten have never ratified the ACHR; three of those, which have ratified the ACHR, have not accepted the jurisdiction of the Court yet; two, which ratified ACHR and recognized the Court's jurisdiction, have already withdrawn with no clear signals of a soon return; and other governments threaten with withdrawing from the system. Thus, I believe that the current Dominican situation constitutes a new setback for the consolidation of the Inter-American human rights system and the universality of human rights. In response to that, I will proceed to the legal evaluation of the Constitutional judgment in Chapter 3.

⁷³ Including Cuba whose suspension from the OAS was revoked through the OASGA resolution AG/RES. 2438 (XXXIX-O/09)

3 Analysis of the compliance of the Dominican withdrawal with international, Inter-American, and Dominican law

3.1 The requirements of the recognition of the contentious jurisdiction of the Inter-American Court of Human Rights

I will address in the present Sub-Chapter the first assumption of my hypothesis:

Neither the ACHR nor domestic law establish the requirement of ratification for the recognition of the Court's contentious jurisdiction to be valid and produce legal effects. The ACHR does not lay down any specific requirement, besides the act of notification of accession at any moment by the Parties to the ACHR. Thus, I argue that the sole signature of the Dominican President at the time, and the notification to the OAS are sufficient for the Recognition of the Court's jurisdiction to bind the Dominican State under the ACHR.

3.1.1 The recognition of the contentious jurisdiction under the American Convention on Human Rights

Similar to other international tribunals,⁷⁴ the Court lacks contentious jurisdiction *ipso iure* as it is endowed for its advisory jurisdiction.⁷⁵ There is no obligation upon states to accept the Court's jurisdiction. As Article 62(1) ACHR clearly lays down, “[a] State Party may, upon depositing its instrument of ratification or adherence to th[e ACHR], or at any subsequent time, declare it recognizes [...] the jurisdiction of the Court.” Consequently, it is not considered that the sole ratification of the ACHR implies simultaneously the acceptance of the Court's contentious jurisdiction.⁷⁶ Therefore, the acceptance of the Court's contentious jurisdiction constitutes a *sine qua non* prerequisite for the exercise thereof. As the Court has expressly stated, “[i]t would make no sense [...] to examine the merits of the case without first establishing whether the parties involved have accepted the Court's jurisdiction.”⁷⁷

Now the question is how the recognition of the Court's contentious jurisdiction shall be made by States in order to produce the intended legal effects. To that end, I will first look at the ACHR and then at the domestic law of the Dominican Republic.

⁷⁴ See ICJ Statute Article 36(2), and PACHPR Article 34(6)

⁷⁵ Faúndez Ledesma (1996) p. 294

⁷⁶ *Ibidem*

⁷⁷ IACtHR, *Advisory Opinion OC-3/83, Restrictions to the Death Penalty* (1983) para. 21

Article 62 is the only provision of the ACHR that regulates the recognition of the contentious jurisdiction. Its first paragraph establishes that States may make a declaration recognizing the Court's jurisdiction i) at the moment of the ratification or adherence to the ACHR, ii) at any subsequent time, or iii) simply not accept the Court's contentious jurisdiction. Moreover, the same provision stipulates that the recognition of jurisdiction may be unconditional, *ipso facto*, and without requiring special agreement, or conditional.⁷⁸ Under the conditional form, States are allowed to limit the Court's jurisdiction for specific cases (*ratione materiae*), for a specified period (*ratione temporis*), or simply recognize it on the basis of reciprocity (in the case of inter-states applications).⁷⁹

Furthermore, Article 62(3) ACHR establishes that the Court's contentious jurisdiction may be recognized whether by special declaration or by special agreement. The former is the declaration referred in the previous paragraphs, which although can be subject to certain limitations, in general terms all persons and all sort of violations of rights protected by the ACHR (and other regional human rights treaties ratified by the respondent State) may be referred to the Court. Whereas the latter constitutes a specific case in which a State, that has not accepted the Court's jurisdiction yet, may accept it for that specific case, without obligating that State to accept the Court's jurisdiction for any other case.

Besides Article 62 ACHR, there are no more provisions on the form in which the recognition the Court's jurisdiction should be done in order to produce legal effects. Therefore, there is no specific mention on whether the act of recognition requires parliamentary ratification.

Turning to the Dominican case, the recognition of Court's jurisdiction was made through a declaration formulated by its President on 19 February 1999, approximately after 20 years from the Dominican ratification of the ACHR. The Declaration does not contain any reference to the permissible limitations to the Court's jurisdiction referred above, neither does it estipulate any other restriction.

⁷⁸ ACHR Article 62

⁷⁹ ACHR Article 62(2)

As I have referred previously, the Constitutional Tribunal found that the Instrument of Acceptance of the Court's jurisdiction is unconstitutional because it was not approved by the National Congress. Thus, the question is whether that approval is necessary according to the ACHR.

First, an act of recognition in the form of a declaration formulated by a State recognizing the contentious jurisdiction of the Court falls under the classification of unilateral acts. That has been recognized by the IACtHR,⁸⁰ and the Dominican Constitutional Tribunal itself.⁸¹ Similarly, the ICJ has also established it with regard to the declarations formulated by States pursuant to the equivalent Article 36 ICJ Statute.⁸²

Second, it is important to establish that there is a general understanding that unilateral acts constitute a source of international obligations for States.⁸³ As Cassese refers, although unilateral acts are not provided for in Article 38 ICJ Statute, it is envisaged that they have the same rank as those provided for custom and treaties.⁸⁴ The ICJ established in the landmark *Nuclear Tests cases* that

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration [...].⁸⁵

Third, the Constitutional Tribunal went even further in its definition of the Instrument of Recognition and explained that it constitutes a *non-autonomous* unilateral act, and added, that given its (dependent) nature, the analysis of the concerning Instrument of Recognition must be done *only* within the framework of the ACHR.⁸⁶ This view coincides with the established by the Court in the *Case of the Constitutional*

⁸⁰ IACtHR, *Case of the Constitutional Court v. Peru*, Competence (1999) para. 48

⁸¹ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14 para. 9.16

⁸² ICJ, *Nicaragua v. United States of America*, Jurisdiction of the Court and Admissibility of the Application (1984), para. 61

⁸³ Shaw (2008) p. 122 and Thirlway (2014) p. 44

⁸⁴ Cassese (2005) p. 184

⁸⁵ ICJ, *Nuclear tests case (New Zealand v. France)*, (1974), Judgment, para. 46, and *Nuclear tests case (Australia v. France)*, Judgment (1974), para. 43

⁸⁶ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14 para. 9.16

Court, in which it distinguished the acceptance of jurisdiction, a unilateral act carried out within the framework of treaty law, from other unilateral acts carried out purely in the context of interstate relations, such as recognition, promise, protest, or renunciation.⁸⁷

Thus, if the Recognition of Jurisdiction is a non-autonomous unilateral act dependent on and regulated by the ACHR, it should fall within the law of treaties⁸⁸ and the provisions of the ACHR itself. Similarly, the Court has established that the “acceptance [of jurisdiction] is determined and shaped by the [ACHR] itself and, in particular, through fulfillment of its object and purpose.”⁸⁹

Therefore, by looking at the ACHR, it is clear that Article 62 does not impose upon States any formality such as legislative approval/ratification for the recognition of its jurisdiction to produce legal effects, besides the formulation of a declaration. However, that requirement cannot be constructed from the omission of Article 62 ACHR, because if States wanted to establish that formality, they would have established it. For instance, Article 74(1) ACHR lays down that the “[ACHR] shall be open for signature *and ratification* by or adherence [Emphasis added].” Hence, the absence of a ratification requirement for the Instrument of Recognition was consensual, otherwise it would have been included in Article 62 ACHR.

Additionally, when the Legislature of the Dominican Republic ratified the ACHR in 1978, it did so without reservations or interpretative declarations, including for Article 62 ACHR. Similarly, the Dominican delegation did not make an observation or commentary, during the *travaux préparatoires* for the adoption of the ACHR, with regard to the necessity of more formalities for the recognition of jurisdiction to produce legal effects.⁹⁰ For those reasons, I consider that if the Dominican Republic wanted to have the Recognition of the Court’s Jurisdiction adopted through a different procedure from that established in the ACHR, it had several opportunities for expressing such a position, but it chose not to do so.

⁸⁷ IACtHR, *Case of the Constitutional Court v. Peru*, Competence (1999) para. 48

⁸⁸ Eckart (2012) p. 55

⁸⁹ IACtHR, *Case of the Constitutional Court v. Peru*, Competence (1999) para. 48

⁹⁰ *Travaux préparatoires* ACHR (1969) p. 83

In sum, the Recognition of the Court's Jurisdiction is a unilateral act regulated primarily by the ACHR. The ACHR does not require the Recognition of the Court's Jurisdiction to be ratified or approved by States' legislatures in order to produce legal effects. Consequently, the Instrument of Acceptance effectively binds the Dominican Republic to the Court's contentious jurisdiction in spite of the lack of legislative approval.

3.1.2 The recognition of the contentious jurisdiction under Dominican Law

While the validity of the Recognition of Jurisdiction is regulated by the ACHR and treaty law, not domestic law, I consider that an analysis of the Constitutional provisions in which the Dominican Constitutional based its decision cannot be evaded. As the former Inter-American Judge, Sergio García Ramírez, stated when he was discussing the Recognition of the Court's jurisdiction made by Mexico, "the intention was formalized through the proposal submitted by the Executive to the Senate, [...] in an act that might be legally indispensable, or might not."⁹¹ I will explore in this section the first possibility referred by Judge García Ramírez, whether an act of ratification was necessary under domestic law.

In the last two decades, the Dominican Republic has adopted three National Constitutions,⁹² one in 1994, one in 2002, and the one currently in force in 2010. The Constitutional Tribunal based its analysis on the 2002 Constitution, the one in force when the Constitutional Review procedure was lodged, and on the 2010 Constitution, the one in force when the Constitutional Tribunal released its judgment. An interesting question which was not raised by the Constitutional Tribunal is why it did not consider in its judgment the 1994 Dominican Constitution, which was the one in force in 1999 when the Instrument of Recognition of the Court's jurisdiction was signed and notified to the OAS. In the light of the above, I will base my search not only on the 2002 and 2010 Constitutions as the Constitutional Tribunal did, but also on the 1994 Constitution, which is the one that governed the powers of the President and the Legislature at the time the act was done.

⁹¹ García Ramírez (2009) para. 29 (**My translation**)

⁹² The list of the Dominican constitutions is available at: <http://www.consultoria.gov.do/coleconstitucion.php>

There is no provision on the 1994 Constitution, the 2002 Constitution, or the 2010 Constitution, that establishes the obligation of the President of the Republic, or the faculty of the National Congress, to have unilateral acts carried out by the former approved by the latter. Indeed, the only two provisions that specifically refer to the adoption of international obligations are Articles 55(6) and 37(14) of the 1994 Constitution, Articles 55(6) and 37(14) of the 2002 Constitution, and Articles 128(1)(d) and 93(1)(l) of the 2010 Constitution. The provisions of the three constitutions set forth in almost identical terms the attribution of the President to “[c]elebrate and sign treaties or international conventions and submit them to the approval of the National Congress”⁹³ and the attribution of the National Congress to “approve or disapprove the international treaties and conventions subscribed by the Executive Power.”⁹⁴ Clearly, there is no reference to other sources of international obligations besides treaties or conventions, thus in *stricto sensu* there is no obligation for the Executive or attribution of the Legislative to have the Instrument of Recognition (a unilateral act) approved by the Congress.

Based on the analysis of the provisions of the three Dominican constitutions that have existed since 1999, I consider that it is not possible to deduce the requirement of legislative approval for unilateral acts. As the dissenter Judge Bonilla Hernández in the Constitutional judgment referred, the recognition is not a treaty or convention that requires ratification.⁹⁵ Therefore, I conclude that neither under the ACHR nor under Dominican Law, the Dominican Instrument of Recognition fails to comply with the formal requirements necessary to produce legal effects and bind the Dominican Republic to the Court’s authority.

3.2 The special hierarchy of the obligations under the American Convention on Human Rights

In the present Sub-Chapter I will address the second assumption of my hypothesis:

International law, Inter-American law, and Dominican law recognize the special hierarchy of international obligations, particularly fundamental international human rights obligations such as those arising from the ACHR. For that reason, the obligations derived from the Instrument of

⁹³ 2010 Constitution Article 128(1)(d)

⁹⁴ 2010 Constitution Article 93(1)(l)

⁹⁵ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, Dissenting Opinion Judge Ana Isabel Bonilla Hernández, para. 2.7 (**My translation**)

Recognition of the Court's jurisdiction, an act regulated by international law and the ACHR, must prevail over domestic law, even in case of conflict with the Dominican Constitution.

3.2.1 The relationship between international law and domestic law

The relationship between international obligations adopted by States and their domestic legal provisions may give rise to conflict of norms. When it happens, the principle *pacta sunt servanda* may prevent States from “invok[ing] provisions of its internal law as justification for its failure to perform a treaty.”⁹⁶ In the same way, although *pacta sunt servanda* is concerned with treaty obligations, it has been recognized that a similar rule applies for other sources of international obligations.⁹⁷ Similarly, the ICJ has been conclusive on the question by recognizing “the fundamental principle of international law that international law prevails over domestic law.”⁹⁸

Additionally, the 2001 Articles on Responsibility of States for International Wrongful Acts, which have acquired increasingly authority as customary law,⁹⁹ set out in Article 12 that “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.” Particularly, it is important to pay special attention to the phrase *regardless of its origin or character* since it extends the responsibility of States to other sources of international law, including unilateral acts. Therefore, even in the event that domestic tribunal decides to invalidate an international treaty (or any other source of international obligations) because it conflicts with its domestic law, the failure to perform the obligation would nevertheless constitute a breach of international law.¹⁰⁰

On its part, the IACtHR has held that “all obligations imposed by [international law] must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment[, what] may be deemed to be general principles of law.”¹⁰¹ Similarly, it has

⁹⁶ VCLT Article 27

⁹⁷ See Draft Declaration on Rights and Duties of States Article 13

⁹⁸ ICJ, *Advisory Opinion Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, (1988), p. 57

⁹⁹ Crawford (2012) p. 540

¹⁰⁰ Buergenthal (2007) p. 7

¹⁰¹ IACtHR, *Advisory Opinion OC-14/94, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (1994) para. 35

stated that “a customary law prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken.”¹⁰²

Therefore, it can be affirmed that international obligations should be given primacy in case of conflict with domestic laws. This would be even more applicable for international human rights obligations given their prominent role over other norms of international law.¹⁰³ That is particularly true for those *jus cogens* norms, *erga omnes* obligations,¹⁰⁴ and non-derogable rights.¹⁰⁵

Back to the particular Dominican withdrawal, it is clear that the first consequence of it would be the non-recognition of the IACtHR’s judgments by the Dominican State. By doing so the Dominican Republic would fail to comply not only with the judgments, but also with its human rights obligations set forth by the ACHR forming the subject matter of those cases. Additionally, the Dominican Republic would fail to comply with its undertakings under the unilateral act of recognition of the jurisdiction of the Court. Thus, regardless whether the Instrument of Recognition failed to comply with domestic legal provisions as ruled by the Constitutional Tribunal, the principles referred in previous paragraphs should prevent the Dominican Republic from eluding its human rights obligations and its compromise to participate in the court system it has consented to back in 1999. The opposite, even legitimate under domestic law, would constitute a breach of international law.

3.2.2 The hierarchy of the American Convention on Human Rights

Brewer-Carías argues that currently the process of protection of human rights is in its third stage, what he defines as the “Constitutionalization of the Internationalization of Human Rights.”¹⁰⁶ During this stage international human rights are constitutionalized through the incorporation of the international and regional systems of protection of human rights within the domestic regulations of States.¹⁰⁷ In Latin-America, normally this

¹⁰² IACtHR, *Case of Garrido and Baigorria v. Argentina*, Reparations and Costs (1998) para. 68

¹⁰³ Shelton (2006) p. 294

¹⁰⁴ Shaw (2008) p. 124

¹⁰⁵ Tahvanainen (2006) p. 194

¹⁰⁶ Brewer-Carías (2008) p. 31

¹⁰⁷ Ibidem

incorporation of international human rights norms into the domestic legal systems is addressed directly in their national constitutions.¹⁰⁸ In this form, it is possible to affirm that in Latin-American the monist¹⁰⁹ and dualist¹¹⁰ debate has been solved in the region in favor of the former theory. Thus, when a Latin-American State adopts an international treaty, it produces immediate legal effects in its national law. Consequently, once a State ratifies or adheres to the ACHR, it is automatically incorporated into its domestic law.¹¹¹ The question is, in which rank is the ACHR incorporated with respect to national constitutions and secondary norms?

In general, it is possible to affirm that there are four historical groups in which Latin-American constitutions can be classified with respect to the status they recognize to international human rights treaties.¹¹² The first group of constitutions recognizes that human rights conventions have a higher status than domestic law (including national constitutions). We can find in this group the Constitution of Guatemala.¹¹³ In the second category, we find constitutions that recognize human rights treaties the same status of that of constitutional provisions. For example, the Constitution of Argentina expressly recognizes constitutional status to a list of human rights treaties, the ACHR included.¹¹⁴ The third group of constitutions gives international treaties a higher hierarchy than laws, but lower than the national constitution. In this third group we can find the Constitution of Costa Rica.¹¹⁵ Finally, the last group of constitutions places human rights treaties at the same level of national laws. Arguably, this fourth group is now empty, since the Constitution of Mexico, which used to be the last constitution in this group, after its

¹⁰⁸ Pásara (2008) p. 32

¹⁰⁹ “The monist theory supposes that international law and national law are simply two components of a single body of knowledge called ‘law’” in Dixon (2013) p. 91

¹¹⁰ “Dualism denies that international law and national law operate in the same sphere, although it does accept that they deal with the same subject matter” in Dixon (2013) p. 92

¹¹¹ Pasqualucci (2013) p. 300

¹¹² Henderson (2004) p. 76

¹¹³ Political Constitution of the Republic of Guatemala: Article 46.- Preeminence of International Law. It is established the general principle that in that in the field of human rights, treaties and conventions accepted and ratified by Guatemala, have preeminence over domestic law. **(My translation)**

¹¹⁴ Constitution of the Argentine Nation: Article 75.22.- [...] the American Convention on Human Rights [...] [has] constitutional hierarchy [...].

¹¹⁵ Political Constitution of the Republic of Costa Rica: Article 7.- Public treaties, international conventions and concordats duly approved by the Legislative Assembly shall have, from the date of their enactment or from the date set forth, a higher authority than the laws [...]. **(My translation)**

constitutional reform of 2011 grants human rights treaties constitutional status,¹¹⁶ placing Mexico among the second group referred above.

However, the jurisprudence of the IACtHR shows that in its view, the ACHR is seen as having a higher position with respect to domestic law, including national constitutions. An example of that is the development of the principle of Conventionality Control introduced for the first time by the Court in the judgment in the *Case of Almonacid-Arellano et al v. Chile* of 2006. According to the Court, this principle implies that “when a State has ratified [the ACHR], 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 [ACHR] are not adversely affected by the enforcement of laws which are contrary to its purpose.”¹¹⁷ Therefore, the supervision of the compliance with the ACHR is no longer only the duty of the Court (known as the concentrated conventionality control), but it is also duty of national judges to ensure its national implementation (known as diffuse conventionality control).¹¹⁸ To perform this diffuse conventionality control, the national “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 [ACHR].”¹¹⁹ Thus, the principle of Conventionality Control entails that the provisions of the ACHR should be given priority over provisions of domestic law, imposing on States the obligation to adapt its domestic law to conform with the Inter-American human rights framework. Actually, this obligation to adopt domestic law it not new at all in the Inter-American system, since it has always existed under Article 2 ACHR regarding domestic implementation.

Similarly, we can quote relevant opinions of Inter-American judges in support of the special rank of the ACHR over domestic legislation. Judge Ferrer Mac-Gregor Poisot has stated that if constitutional guarantees fail to protect fundamental rights, these judicial guarantees are transferred to the ACHR, what “gives rise to a ‘conven-

¹¹⁶ Fix-Zamudio (2011) p. 426

¹¹⁷ IACtHR, *Case of Almonacid-Arellano et al v. Chile*, Preliminary Objection, Merits, Reparations and Costs (2006) para. 124

¹¹⁸ IACtHR, *Case of Cabrera García and Montiel Flores v. Mexico*, Preliminary Objection, Merits, Reparations and Costs (2010) Concurring Opinion Judge Ferrer Mac-Gregor Poisot para. 22

¹¹⁹ IACtHR, *Case of Almonacid-Arellano et al v. Chile*, Preliminary Objection, Merits, Reparations and Costs (2006) para. 124

tional supremacy’.”¹²⁰ The former Inter-American and current ICJ Judge Cançado Trindade has said that the “[ACHR], besides other human rights treaties, were conceived and adopted on the basis of the assumption that the domestic legal orders ought to be harmonized with the conventional provisions, and not vice versa.”¹²¹ In fact, the Court in its recent judgment in the *Case of Expelled Dominicans and Haitians* has confirmed these opinions. In this case, the Court ordered the Dominican Republic to “adopt, within a reasonable time, the necessary measures to annul any type of norm, whether administrative, regulatory, legal or *constitutional* [...] contrary to the [ACHR] [Emphasis added].”¹²² The above, confirms the position of the Court that in the event domestic law (including constitutional provisions) conflicts with provisions of the ACHR, the latter prevails and the former must be adapted in accordance to the ACHR.

Moreover, apart from the countries referred in the previous Chapter, and probably now the Dominican Republic, there are examples at the domestic sphere that confirms the special hierarchy of the ACHR over domestic law, and the binding force of the Court’s judgments. For example, the Mexican Supreme Court has recognized that it cannot evaluate the proceedings of the IACtHR, but just comply to the extent and in the terms of its judgments, and that the IACtHR’s decisions are binding for all organs of the State.¹²³ By the same token, the Constitutional Court of Colombia has established that the constitutional rights and duties must be interpreted according to the international human rights treaties ratified by Colombia, and that the jurisprudence of those international organs responsible for their interpretation constitutes a relevant criterion for the interpretation of constitutional provisions on fundamental rights.¹²⁴ For its part, the Constitutional Tribunal of Peru has also stated that the rights and freedoms in the Peruvian Constitution must be interpreted in accordance to international human rights trea-

¹²⁰ IACtHR, *Case of Cabrera García and Montiel Flores v. Mexico*, Preliminary Objection, Merits, Reparations and Costs (2010) Concurring Opinion Judge Ferrer Mac-Gregor Poisot para. 21

¹²¹ IACtHR, *Case of El Amparo v. Venezuela*, Interpretation of the Judgment of Reparations and Costs (1997) Dissenting Opinion para. 13

¹²² IACtHR, *Case of Expelled Dominican and Haitian*, Preliminary Objection, Merits, Reparations and Costs (2014) para. 469

¹²³ Cossío (2012) p. 34

¹²⁴ Constitutional Court of Colombia (2000) Judgment C-010/00, para. III.7

ties ratified by Peru, and has added that it implicitly entails that the interpretation should follow that, in particular, of the IACtHR, the ultimate guardian of rights in the region.¹²⁵

I consider that based on the numbers of the national constitutions recognizing the special hierarchy of the ACHR, and the support found in the jurisprudence at the regional and national level, it is possible to affirm that in Latin-America the elevated status of the ACHR over domestic law (including national constitutions) is well-established. Thus, we cannot expect the ACHR's provisions to be adapted and subordinated to domestic provisions, which vary from country to country, but only the opposite way.¹²⁶

3.2.3 The status of the American Convention on Human Rights in the Dominican Republic

According to its new National Constitution enacted on 26 January 2010, the Government of the Dominican Republic is divided into three independent powers: Legislative, Executive, and Judiciary.¹²⁷ The Legislature resides in the National Congress, which consists in two bodies, the Senate and the Chamber of Deputies. The National Congress has the power, among others, to adopt national laws and approve the international treaties signed by the President.¹²⁸ The President is the Head of the Executive Power and the Head of the State and has the power, among others, to conduct the international and domestic policy, to appoint the members of the Cabinet of Ministers, and to enter into international treaties.¹²⁹ The Judiciary is formed by the Supreme Court of Justice and the tribunals adopted by the Constitution and laws.¹³⁰ Perhaps, the most fundamental structural change of the 2010 Constitution is the creation of the Constitutional Tribunal. It is defined by the Act 137-11 as the supreme organ for the interpretation and control of the constitutionality, and it was endowed with independence from the other powers of the Dominican State.¹³¹ The Constitutional Tribunal has competence to decide on the constitutionality of laws, decrees, and resolutions (international treaties are not

¹²⁵ Constitutional Tribunal of Peru (2002) Judgment 218-02-HC/TC, para. 2

¹²⁶ Salgado Ledesma (2012) p. 231-232

¹²⁷ 2010 Constitution Article 4

¹²⁸ 2010 Constitution Article 93

¹²⁹ 2010 Constitution Article 128

¹³⁰ 2010 Constitution Article 149

¹³¹ Act 137-11 after amendment through Act 145-11: Article 1

listed),¹³² and to exercise the preventive control of international treaties *before* their ratification by the Legislative.¹³³ Notably, according to the Constitution in force, the Constitutional Tribunal is not expressly authorized to review the constitutionality of International Treaties after ratification, but only before ratification.

With regard to the hierarchy of international obligations, Article 26 of the 2010 Constitution recognizes that the Dominican State is observant of the norms of international law. Consequently, the Dominican Republic recognizes and applies the norms of international law,¹³⁴ and that the ratified international conventions will govern within the domestic sphere.¹³⁵ In particular, the 2010 Constitution recognizes specifically that human rights treaties have constitutional rank.

Article 74(3).- The treaties, pacts and conventions concerning human rights, subscribed and ratified by the Dominican State, have constitutional hierarchy and are of direct and immediate application by the tribunals and other organs of the State.

Moreover, the Supreme Court of Justice of the Dominican Republic has recognized the binding character, not only of the ACHR but also of the interpretation thereof done by the Court, for all the Dominican State, including its Judiciary.¹³⁶

In the light of the above, it seems clear that the Dominican Republic incorporates international law automatically into its legal system. Moreover, although the 2010 Constitution does not recognize the supremacy of all branches of international law over constitutional provisions, it does recognize constitutional rank to human rights treaties. Consequently, the ACHR and other regional and universal human rights conventions should be regarded as having the same hierarchy of the National Constitution. This implies that human rights treaties have been recognized by 2010 Constitution as part of the Block of Constitutionality. Thus, when the Constitutional Tribunal and other organs of the Dominican Judiciary review the compliance of acts with the Dominican Constitution, the international human rights treaties shall be regarded as part of a single body of norms together with the Constitution. Thus, a violation of an international human rights

¹³² 2010 Constitution Article 185(1)

¹³³ 2010 Constitution Article 185(2)

¹³⁴ 2010 Constitution Article 26(1)

¹³⁵ 2010 Constitution Article 26(2)

¹³⁶ Supreme Court of Justice of the Dominican Republic (2003) Decision No. 1920-03

obligation in force in the Dominican Republic amounts to a violation of its own Constitution. This is expressly confirmed by Articles 6¹³⁷ and 7(10)¹³⁸ of the Act 137-11 which regulates the Constitutional Procedures and the Constitutional Tribunal.

This constitutional hierarchy of human rights treaties is particularly relevant because it raises serious questions with respect to the Constitutional judgment. On the one hand, it is questionable whether the provisions of the National Constitution can invalidate the Instrument of Recognition of the Court's jurisdiction because it is primarily regulated by the ACHR, a norm (from the domestic legal perspective) of the same rank. On the other hand, since the ACHR and the Dominican Constitution are norms of the same rank, the ACHR would be the *lex specialis* with regard to the Recognition of Jurisdiction of the Court's contentious jurisdiction, given that there is no specific provision regulating unilateral acts in the Constitution, whereas the ACHR does regulate the act of recognition of the Court's jurisdiction. Indeed, the Constitutional Tribunal itself recognized that the analysis of the Instrument of Recognition, as a non-autonomous unilateral act, should be done *only* based on the provisions of the ACHR.¹³⁹ Hence, it seems to me that the Constitutional Tribunal fell in a contraction when it recognized the *lex specialis* status of the ACHR with respect to the recognition of the Court's jurisdiction, but assessed its legality under the provisions of the Constitution.

Based on the analysis above, we can make four related claims with respect to the Dominican legal framework and the unconstitutionality of the Instrument of Recognition declared by the Constitutional Tribunal. First, that it is beyond doubt that the Dominican Constitution recognizes constitutional rank to the ACHR. Second, that the Dominican constitution does not establish any requirement whatsoever for unilateral acts to be valid, on the contrary, it only sets forth formal requirements for international treaties and conventions. Third, that the only mechanism for the Constitutional Control of international obligations of the Dominican State recognized for the Constitutional Tri-

¹³⁷ Act 137-11: Article 6.- Constitutional infractions: The Constitution is infringed when the text, effects, interpretation and application of a norm, act or omission, contradicts the values, principles and rules set forth in the Constitution and international treaties on human rights [...]. **(My translation)**

¹³⁸ Act 137-11: Article 7(10).- Guiding principles: [...] Interdependence. The values, principles and rules set forth by the Constitution and international treaties on human rights adopted by the powers of the Dominican Republic [...] form the block of constitutionality, which establishes the parameters for the constitutional control [...]. **(My translation)**

¹³⁹ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14 para. 9.16

bunal by the Constitution is the so-called preventive control of international treaties prior to ratification (not after). And four, that the Constitutional Review as delimited by Article 185(1) of the 2010 Constitution, does not authorize the Constitutional Tribunal to review the constitutionality of international obligations of the Dominican State after their adoption. For these reasons, I consider that the judgment of the Constitutional Tribunal declaring the unconstitutionality of the Instrument of Recognition of the Court's contentious jurisdiction contradicts, or at least, goes beyond the existing Constitutional framework of the Dominican Republic.

3.3 The Dominican withdrawal under provisions and principles of international and Inter-American law

I will address in the present Sub-Chapter the third assumption of my hypothesis:

The eventual withdrawal of the Dominican Republic from the Court's contentious jurisdiction would contravene a series of principles and rules of public international law and of the Inter-American human rights system. Among these principles, I will address the power of the IACtHR to decide on its own jurisdiction (*compétence de la compétence/Kompetenz-Kompetenz*); the principles of *pacta sunt servanda* and good faith, and the rules for the invalidity of treaties; and principles related to State's conduct, consent and acquiescence.

3.3.1 The power of the Inter-American Court of Human Rights to decide on its own jurisdiction

Neither the ACHR nor the Statute of the IACtHR have a specific provision establishing the competence of the Court to decide questions regarding its own jurisdiction,¹⁴⁰ as the ICJ Statute and the European Convention on Human Rights do.¹⁴¹ However, it is implicit in Article 62(3) ACHR which lays down that “[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention”. As Úbeda de Torres affirms, the power to decide on its jurisdiction “is inherent to all Courts and they cannot refuse to exercise it.”¹⁴² For this power to be effective it should extend to the interpretation of the instruments of recognition of their jurisdiction. As the ICJ has established, “the right [of an international tribunal] to decide

¹⁴⁰ Pasqualucci (2014) p. 118

¹⁴¹ See ICJ Statute Article 36(6), and ECHR Article 32(2)

¹⁴² Burgogue-Larsen (2011) p. 16

as to its own jurisdiction and [...] the power to interpret for this purpose the instruments which govern that jurisdiction [is] a rule consistently accepted by general international law.”¹⁴³

For its part, the IACtHR has expressly stated “it is master of its own jurisdiction”,¹⁴⁴ and that “as any organ with jurisdictional functions, it has the power inherent in its attributes to determine the scope of its own competence (*compétence de la compétence/Kompetenz-Kompetenz*).”¹⁴⁵ Furthermore, it has also stated that “[t]he instruments accepting the optional clause on the binding jurisdiction (Article 62(1) of the Convention) presuppose the acceptance by the States presenting them of the Court’s right to decide any dispute relating to its jurisdiction.”¹⁴⁶ Then, following the same reasoning of the ICJ, the IACtHR has also confirmed its power to decide on its own jurisdiction and on the evaluation of the declarations regulated by Article 62 ACHR.

Back to the Dominican case, even when the Constitutional Tribunal was not judging *per se* the jurisdiction of the Court, but the constitutionality of the Instrument of Recognition, the ruling has a direct impact on the exercise of jurisdiction of the Court. This is because it would *de facto* deprive the Court from the opportunity to decide on its own jurisdiction. Thus, the Constitutional Tribunal is (indirectly) judging the jurisdiction of the Court to try the Dominican Republic, in a clear invasion of the Court’s authority under the principle *compétence de la compétence*.

In fact, from the perspective of the Inter-American legal framework, the constitutionality or not of the Instrument of Recognition is an external aspect that shall not interfere with the jurisdiction of the Court. In the words of the Court, “the jurisdiction of the [Court] cannot be contingent upon events extraneous to its own actions.”¹⁴⁷ Allowing the opposite, would be contrary to the purpose and object of the ACHR of establishing a mechanism for the protection of human rights. As Judge Cançado Trindade has stated, “the Court, and not the State, has the last say on its jurisdiction, the opposite

¹⁴³ ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary objections (1953), p. 12

¹⁴⁴ IACtHR, *Ivcher Bronstein v. Peru*, Competence (1999) para. 34

¹⁴⁵ IACtHR, *Case of J. v. Peru*, Preliminary Objection, Merits, Reparations and Costs (2013) para. 18

¹⁴⁶ *Ibidem*

¹⁴⁷ IACtHR, *Case of the Constitutional Court v. Peru*, Competence (1999) para. 33

would lead to the subversion of the international legal order and to the destruction of all legal certainty in international dispute resolution.”¹⁴⁸

Therefore, the Dominican withdrawal from the Court based on the judgment of its Constitutional Tribunal would deprive the Court from its power to decide on every question regarding its own jurisdiction under the well-established principle *compétence de la compétence* and Article 62(3) ACHR.

3.3.2 Provisions of the Vienna Convention on the Law of the Treaties: *Pacta sunt servanda*, invalidity of treaties, and good faith¹⁴⁹

Despite the fact that the act subject to the Constitutional Review is the Instrument of Recognition of the contentious jurisdiction of the Court, a unilateral act, the Constitutional Tribunal applied principles of the law of the treaties for the analysis of the Instrument of Recognition. In its analysis, the Tribunal referred to the principle *pacta sunt servanda* and the rules for the invalidity of treaties established in Articles 26, 27, and 46 VCLT. The conclusion of the Constitutional Tribunal was that “the prohibition to invoke Domestic Law in order to fail to comply with State obligations under international conventions has an exemption.”¹⁵⁰ This exemption arises when “the consent of a State to participate in a treaty has not been given [in accordance to the law] or is void of legal effects due to its conflict with a norm of domestic law of fundamental importance.”¹⁵¹ Therefore, “the rule *Pacta sunt servanda* [is ineffective] when the consent of the State to participate in a treaty has not been produced [in accordance with the law] or is null.”¹⁵² What in the opinion of the Constitutional Tribunal applies (analogically) with respect to the Instrument of Recognition signed by the President of the Dominican Republic without legislative approval, “because the Dominican consent to the contentious jurisdiction of the IACtHR [was] given under a manifest breach of a fundamental norm of the domestic law of the Dominican State.”¹⁵³

¹⁴⁸ Cançado Trindade (2003) p. 41 (**My translation**)

¹⁴⁹ The Dominican Republic is party to the VCLT since 01 April 2010

¹⁵⁰ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, para. 9.5 (**My translation**)

¹⁵¹ *Ibidem* (**My translation**)

¹⁵² *Idem*, para. 9.6 (**My translation**)

¹⁵³ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, para. 9.6 (**My translation**)

In response, the Commission through a press release of November 2014 stated that “the reference to Article 46 VCLT [on the invalidity of treaties] by the Constitutional Tribunal is openly incompatible with the law of the treaties.”¹⁵⁴

I will consider first whether it is correct to apply principles of the law of treaties to unilateral acts like the recognition of the Court’s contentious jurisdiction. On that subject, the ICJ has established that “[i]t appears from the requirements of good faith that [declarations] should be treated, by analogy, according to the law of treaties.”¹⁵⁵ Therefore, I will proceed to the analysis of the compliance of those principles in the judgment of the Constitutional Tribunal.

The Preamble of the VCLT lays down that the principles of *pacta sunt servanda* and good faith are universally recognized. Pursuant to Article 26 VCLT, the principle *pacta sunt servanda* entails that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁵⁶ The same principle imposes that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,”¹⁵⁷ except when the “consent [of the State] to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties.”¹⁵⁸ However, that violation of domestic law must be “manifest” and must concern a rule of “fundamental importance.”¹⁵⁹ In addition, “[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”¹⁶⁰

Therefore, we can deduce from Article 46 VCLT two pre-requisites: i) the provision breached must be of fundamental importance regarding the competence to conclude treaties, and ii) that the violation must be manifest (objectively evident) under normal practices and good faith.

i) A provision of fundamental importance

¹⁵⁴ Commission (2014) Press release 2014-130

¹⁵⁵ ICJ, *Nicaragua v. United States of America*, Jurisdiction of the Court and Admissibility of the Application (1984), para. 63

¹⁵⁶ VCLT Article 26

¹⁵⁷ VCLT Article 27

¹⁵⁸ VCLT Article 46(1)

¹⁵⁹ VCLT Article 46(1)

¹⁶⁰ VCLT Article 46(2)

As the Constitutional Tribunal concluded, the power of the organs of the Dominican Republic to adopt treaties is a norm of fundamental character. This has been recognized by the ICJ which has stated that “[t]he rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance.”¹⁶¹ In fact, the legislative approval of international treaties is an increasingly common precondition for the internal applicability thereof among States.¹⁶² However, we must bear in mind that the Recognition of Jurisdiction is not a treaty but a unilateral act. Thus, the requisite of legislative approval cannot be automatically imposed for the Instrument of Recognition just because it is required for treaties. Moreover, as analyzed before, none of the Dominican constitutions that have been in force during the period the Dominican Republic has been under the contentious jurisdiction of the Court (1999-2014?) sets forth the requisite of legislative approval for unilateral acts.

Under this legal framework, it seems highly doubtful whether the controverted Instrument of Recognition has breached a norm of fundamental character of the Dominican Law or International Law. Therefore, it is questionable whether the first requisite established in Article 46(1) VCLT was fulfilled in the Dominican case.

ii) The breach must be manifest or objectively evident under normal practices and good faith

For a State to legitimately fail to comply with its international obligations based on its domestic law, the breach must have been “ascertainable and a matter of common knowledge.”¹⁶³ In the Dominican case, it can hardly be considered that the breach of the Dominican Constitution by the Instrument of Recognition is or was noticeable by all the parties that have relied on the Dominican recognition. On the one hand, because as I have said, no provision of domestic law establishes the requirement of legislative approval for unilateral acts. On the other hand, because it is presumed that a unilateral declaration done by a Head of State, as the Dominican President, is sufficient to bind a State and produce legal effects. This is supported by Paragraph 4 of the ILC’s Guiding Principles applicable to unilateral declarations of States capable of creating legal obliga-

¹⁶¹ ICJ, *Case Concerning the land and maritime boundary between Cameroon and Nigeria*, Judgment (2002), para. 265

¹⁶² Shelton (2011) p. 8

¹⁶³ Villiger (2009) p. 590

tions, which lays down that “[a] unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations”, what resembles Article 7 VCLT regarding the representatives of States with the power to adopt a treaty on their behalf. In that respect, the ICJ has stated that

[A] limitation of a Head of State’s capacity [with respect to the authority to sign treaties] is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons [listed in] Article 7, paragraph 2 [VCLT].¹⁶⁴

Therefore, the alleged requisite of legislative approval for the Instrument of Recognition signed by the Head of State of the Dominican Republic cannot be considered to be objectively evident for all other parties.

Additionally, I consider that even if the Instrument of Recognition was in conflict with fundamental norms of Dominican law, the Dominican Republic waived its right to be legally exempt from its duty to comply with the obligations derived from it, because a treaty given in violation of Article 46 VCLT is not void *ab initio* but voidable.¹⁶⁵ It means that a State that discovers constitutional difficulties, instead of resorting to a claim of invalidity, it should promptly notify the other parties and seek to obtain a revision of its own internal legislation, or even an amendment to the treaty.¹⁶⁶ However, the Dominican Republic has never notified those constitutional difficulties to neither the OAS nor the Inter-American human rights organs. On the contrary, the Dominican Republic participated and consented the Court’s jurisdiction. Particularly, since 2003 when the Dominican Republic appeared for the first time before the Court in a contentious case.

Moreover, even in the case that the requirements under Articles 27 and 46 VCLT were fulfilled for the invalidity of the act of recognition of the Court’s jurisdiction, that is, that the Instrument of Recognition manifestly violated a fundamental norm

¹⁶⁴ ICJ, *Case Concerning the land and maritime boundary between Cameroon and Nigeria*, Judgment (2002), para. 265

¹⁶⁵ Villiger (2009) p. 590

¹⁶⁶ *Ibidem*

of Dominican law, it would not invalidate all the acts performed in good faith based on that recognition. In that respect, Article 69(2) VCLT (omitted by the Constitutional Tribunal) clearly sets out that the “acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.” This means that when a treaty is invalid, that does not make the acts performed in good faith null or unlawful. Thus, *mutatis mutandi*, the invalidity of the Instrument of Recognition does not render invalid the proceedings done in reliance of the Dominican recognition of jurisdiction.

Therefore, I consider that the possible invalidity of the Instrument of Recognition would not exclude the Dominican Republic from its obligation to comply with the judgments from the Court concluded in good faith, at least those released before the declaration of invalidity (the Constitutional judgment). Otherwise, it would be detrimental for all those who relied in good faith on the validity of the Instrument of Recognition. For instance, not recognizing the binding force of the judgments from the Court, valid or not, would directly affect the victims in those cases who acted in good faith before an international instance in order to find relief for violations of human rights. In fact, I consider that the non-recognition of the cases would also affect all the other actors in those cases: the Commission, the representatives of the victims, among others. In other words, I consider that the alleged invalidity of the Instrument of Recognition does not exempt the Dominican Republic from complying with the judgment in the *Case of Expelled Dominicans and Haitians*.

For all the above, I consider that the lack of legislative approval in the Dominican Instrument of Recognition of the IACtHR’s contentious jurisdiction cannot violate a nonexistent fundamental norm of Dominican law. Even if there was such a norm, it would be difficult to hold that the breach was manifest for all parties. For that reason, I agree with the Commission on its statement that the application of the rules of invalidity of treaties by the Dominican Constitutional Tribunal seems to be incompatible with the law of the treaties. Moreover, even if the Instrument of Recognition were truly in violation of fundamental norms of the Dominican law, at this moment, the failure to comply with the Court’s judgments would be contrary to the principle of good faith, because it would unfairly affect all the parties in those cases who have relied in the State’s behavior until now.

3.3.3 State's conduct, consent and acquiescence

Judge Acosta de los Santos, from the Constitutional Tribunal, stated in its dissenting opinion that “besides that the instrument of recognition of the Court’s jurisdiction was done regularly, the behavior of the powers of the [Dominican] State [...] leave no room for doubts on the acceptance thereof.”¹⁶⁷ In connection to that, the NGO COLACID, which intervened in the Constitutional Review as *Amicus Curiae*, referred that the principles of estoppel and *forum prorogatum* demonstrate that the Dominican Republic has recognized as valid and constitutional the Court’s jurisdiction.¹⁶⁸ However, the Constitutional Tribunal abstained from pronouncing on both principles because it considered they were related to acts out of the scope of the Constitutional Review.¹⁶⁹ This position notwithstanding, I consider that the approximately 16 years of State’s acquiescence of the Court’s jurisdiction may represent an important element to take into account in the present Dominican situation. Hence, I will address in the present section the possible conflict of the Dominican withdrawal with the principles of estoppel and *forum prorogatum*.

i) Acts and conduct of the Dominican Republic consenting to the jurisdiction of the Inter-American Court of Human Rights

In the present section, I will list the main acts and conduct done by the Dominican Republic through which it has consented to the Court’s jurisdiction since the date the Instrument of Recognition was presented to the OAS in 1999.

a) Instrument of Recognition

Indubitably, the first and most important manifestation of the Dominican Republic recognizing its intention to be bound to the Court’s jurisdiction is the Instrument of Recognition signed in 1999 by its President at that time. The act was duly notified to the General Assembly of the OAS in compliance of Article 62 ACHR.

b) Participation in all the previous proceedings before the Court

¹⁶⁷ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, Dissenting Opinion Judge Hermógenes Acosta de los Santos, para. 22 (**My translation**)

¹⁶⁸ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, p. 24-28

¹⁶⁹ *Idem*, p. 38 (footnote 20)

The second form of recognition is the repeated consent of the Court's contentious jurisdiction by the Dominican State in all the cases in which it has been party before the Court. In fact, this form of manifestation is twofold. On the one hand, as a tacit manifestation, given that the State has never raised the question of the invalidity of the Instrument of Acceptance in any case before the Court so far. On the other hand, as an explicit manifestation, because the Dominican Republic has expressly recognized the Court's jurisdiction during the course of contentious cases against it. For instance, even in the tense *Case of Expelled Dominican and Haitian People*, the agents of the State said that the Dominican Republic accepted the contentious jurisdiction of the Court on 25 March 1999.¹⁷⁰

c) Compliance with the Court's judgments

By the same token, the Dominican Republic has recognized the jurisdiction of the Court by complying with its judgments and participating in the monitoring of the compliance conducted by the Court.¹⁷¹ Indeed, in my view, the compliance with the Court's judgments is perhaps the conclusive manifestation of the recognition of the binding character of the Court's jurisdiction; otherwise, the State would simply not comply.

d) Recognition by the Dominican Judiciary

Another important manifestation of recognition of the Court's jurisdiction are the judgments from the Supreme Court¹⁷² and the Constitutional Tribunal¹⁷³ of the Dominican Republic in which they have expressly acknowledged the recognition of the Court's jurisdiction.

e) Recognition in national laws

Finally, the National Congress itself acknowledged the jurisdiction of the Court through the adoption of the Act No. 137-11 of 15 June 2011 regarding the organization of the Constitutional Tribunal and its proceedings (now amended). According to the

¹⁷⁰ IACtHR, *Case of Expelled Dominican and Haitian*, Preliminary Objection, Merits, Reparations and Costs (2014) para. 35

¹⁷¹ See, IACtHR, *Case of the Yean and Bosico Girls v. The Dominican Republic*, Monitoring of Compliance with Judgment (2011) paras. 2-4

¹⁷² Supreme Court of Justice of the Dominican Republic (2003) Decision No. 1920-03

¹⁷³ Constitutional Tribunal of the Dominican Republic (2013) Judgment TC/0136/13, para. 10.11

Preamble of that Act, the execution of the judgments from the IACtHR was one of the constitutional proceedings under the jurisdiction of the Constitutional Tribunal. And, despite the fact that the referred Act was suspiciously modified after less than one month by a subsequent Act, it does not diminish the fact that the National Congress has acknowledged the Court's binding force through a legislative act.

Now that I have listed the most relevant acts and conducts of consent of the jurisdiction of the Court done by the Dominican Republic, I will move to the analysis of the principles of estoppel and *forum prorogatum*.

ii) Estoppel:

Estoppel was imported into international law from civil law and common law systems.¹⁷⁴ Nevertheless, it has had an independent development from its domestic law predecessors.¹⁷⁵ Today, estoppel is recognized as a principle of international law,¹⁷⁶ and its practical purpose is the promotion of the consistency of the acts of States and international relations.¹⁷⁷ Furthermore, international tribunals have extensively used estoppel.¹⁷⁸ For instance in inter-state cases before the ICJ,¹⁷⁹ but also by human rights tribunals as the ECHR¹⁸⁰ and the IACtHR. The IACtHR has stated that “once a State has adopted a position producing certain legal effects, may not, under the principle of estoppel, later assume a position in contradiction to the former one and changing the state of affairs upon which the other party relied.”¹⁸¹

Thus, estoppel in practice constitutes a fundamental procedural rule which gives certainty to the course of cases by preventing the parties from changing their position and arguments indiscriminately. The IACtHR frequently relies in its jurisprudence on estoppel to prevent a State from invoking objections before it, when the objections were not previously raised in the proceeding before the Commission, or to prevent a State

¹⁷⁴ Crawford (2012) p. 421

¹⁷⁵ Wagner (1986) p. 1778

¹⁷⁶ Crawford (2012) p. 422

¹⁷⁷ Wagner (1986) pp. 1778-1779

¹⁷⁸ Martin (2004) p. 462

¹⁷⁹ ICJ, *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment (1969), para. 30

¹⁸⁰ See ECtHR, *Case of Mizzi v. Malta*, Judgment (2006) para. 48

¹⁸¹ IACtHR, *Case of Acevedo-Jaramillo et al. v. Peru*, Preliminary Objection, Merits, Reparations and Costs (2006) para. 176

from objecting the effects of a recognition of responsibility of human rights violations it has done before.¹⁸²

Although it is difficult to predict the precise actions of the Dominican Republic in future proceedings before the Court, it seems likely that the Dominican Government will withdraw from the Court's jurisdiction. Despite that, the Dominican Republic will have to face the authority of the Court at least in a few more situations, because the Court will call upon the Dominican State for the monitoring of compliance of the *Case of Expelled Dominicans and Haitians* which will take place in late October 2015. In case that the Dominican Government opts for not recognizing the jurisdiction of the Court, or simply does not attend the monitoring, this would constitute a breach of the principle of estoppel. The Dominican Republic under the principle of estoppel would be legally prevented from ignoring the binding force of the Court's authority when it has recognized its jurisdiction during the course of all the stages related to that case. Therefore, under estoppel, the Dominican State cannot simply contradict itself in detriment of the victims in those cases, who have carried out in good faith all the stages of the Inter-American human rights complaint procedure in order to find relief to their violations.

Finally, I find illustrative to refer the ICJ *Case of Nicaragua v. United States of America*, in which the United States challenged the validity of Nicaragua's recognition of the ICJ's contentious jurisdiction due to formal defects. In that case, the ICJ concluded that the acquiescence of Nicaragua and the United States over a period of 38 years "unequivocally constitute[ed] consent to be bound by the compulsory jurisdiction of the [ICJ]", and "[a]s a consequence it was recognized by both Parties that any formal defect in Nicaragua's ratification [...] did not in any way affect the essential validity of Nicaragua's consent to the compulsory jurisdiction."¹⁸³ Thus, without explicitly referring to estoppel, the *Nicaragua case* constitutes a good example of the applicability of estoppel as basis for the jurisdiction of an international tribunal.¹⁸⁴ This precedent could potentially be applied by the IACtHR in the present situation of the Dominican Republic. In

¹⁸² IACtHR, *Case of Acevedo-Jaramillo et al. v. Peru*, Preliminary Objection, Merits, Reparations and Costs (2006) para. 176

¹⁸³ See ICJ, *Nicaragua v. United States of America*, Jurisdiction of the Court and Admissibility of the Application (1984), para. 43

¹⁸⁴ Wagner (1986) p. 1792

the Dominican withdrawal, similarly to the *Nicaragua case*, the legal defects of the Instrument of Recognition could be deemed as compensated by the 16 years of Dominican consent.

On this basis, I consider that the consistent Dominican recognition of the Court's jurisdiction, and from the ICJ case-law, support the argument that the withdrawal of the Dominican Republic based on the alleged unconstitutionality of the Instrument of Recognition would contravene the well-established principle of estoppel. Particularly, after approximately 16 years during which all the powers of the Dominican State have consistently acknowledged the jurisdiction of the Court to try the Dominican Republic.

iii) Forum prorogatum:

As for estoppel, the Constitutional Tribunal also abstained from analyzing the principle of *forum prorogatum* on the basis that it relates to acts that fall out of the scope of the Constitutional Review procedure.¹⁸⁵

To understand *forum prorogatum* it is necessary to look at the jurisprudence of the ICJ, which has developed the principle since the *Corfu Channel Case*.¹⁸⁶ The ICJ held that it has competence to entertain a case under this principle when a State, which has not recognized the jurisdiction thereof at the time when an application is filed, accepts such jurisdiction subsequently.¹⁸⁷ This opportunity for the State to accept the jurisdiction has to be product of a "voluntary and indisputable consent."¹⁸⁸ Such consent can be either expressed by an explicit agreement of the parties in the case, through the respondent's conduct before the ICJ, or through the respondent's conduct in relation to the applicant, in such a manner as to have consented the ICJ's jurisdiction.¹⁸⁹ Therefore, in its very essence *forum prorogatum* consists in giving an applicant an opportunity to

¹⁸⁵ Constitutional Tribunal of the Dominican Republic (2014) Judgment TC/0256/14, footnote 20, p. 38

¹⁸⁶ ICJ, *The Corfu Channel Case*, Preliminary objection (1948), pp. 27-29

¹⁸⁷ See Basis of the ICJ's Jurisdiction at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2>

¹⁸⁸ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary objections (1996), para. 40

¹⁸⁹ Yee (2003) p. 704

confront a respondent State before a tribunal when otherwise it would not be possible due to the lack of a prior express recognition of jurisdiction by the State.¹⁹⁰

Turning to the Inter-American system, until now the Court has only exercised jurisdiction over States that have recognized its jurisdiction, either at the moment of ratification or in a subsequent moment through a declaration, but always through a prior, clear, and express manifestation in that respect. Despite that, it seems possible for the Court to apply the principle *forum prorogatum* as basis of its jurisdiction.¹⁹¹ Pursuant to Article 62(3) ACHR the Court has jurisdiction “provided that the States Parties to the case *recognize or have recognized* such jurisdiction [Emphasis added]”. Thus, it can be inferred that the recognition of jurisdiction can be given either before the submission of the case, or once the case is already at the Court. It is also important to mention that the wording of Article 36 ICJ and 62 ACHR are very similar with regard to the timing, form, and permissible limitations to the recognition of the jurisdiction. Therefore, I consider it is possible to apply analogically the position of the ICJ in the case of the IACtHR. That is, taking a more flexible interpretation of the requirements for the Recognition of Jurisdiction to be valid, as in the opinion of the ICJ, where the consent of jurisdiction by the States does not require to be given in any particular form.¹⁹²

Back to the Dominican case, it is unquestionable that from 1999 until the *Case of Expelled Dominicans and Haitians* exist many manifestations of express and tacit consent to the Court’s jurisdiction. Thus, even if the Instrument of Recognition of the Court’s jurisdiction failed to comply with formalities under domestic law, the principle *forum prorogatum* could still be the basis of the Court’s jurisdiction, regardless the nullity/invalidity of the Instrument of Recognition. Because, the purpose of *forum prorogatum* is (precisely) that when a tribunal lacks jurisdiction over the subject matter of the application when it receives the complaint, it might still entertain the case if the respondent State realizes actions that consent such jurisdiction.¹⁹³ Consequently, even if the Dominican Republic opts for declaring that the Court has no (or never had) jurisdic-

¹⁹⁰ Jalloh (2010) p. 627

¹⁹¹ Quintana (1995) p. 130

¹⁹² ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti V. France)*, Judgment (2008), para. 60

¹⁹³ Yee (2003) p. 704

tion in the absence of a valid Instrument of Recognition, the Court could still exercise jurisdiction, given that the Dominican Republic has consented the jurisdiction through several manifestations of consent until now. In other words, under the principle *forum prorogatum*, the jurisdiction of the Court over the Dominican Republic is no longer based exclusively on the existence of a valid Instrument of Recognition, but also in all the acts of recognition it has done over the past 16 years. Therefore, the Act of Recognition being one of the many forms of consent given by the Dominican State, its nullity would not affect the jurisdiction of the Court. This is the reason why the unilateral withdrawal of the Dominican Republic solely based on the judgment from the Constitutional Tribunal (even if valid) would not deprive the IACtHR from its power to entertain a case against the Dominican Republic on the basis of the principle *forum prorogatum*. Each act of consent is independent, and the nullity of one of them (Instrument of Recognition), does not affect the others.

Unfortunately, I consider important to bear in mind that, although *forum prorogatum* has been used in the inter-state cases of the ICJ, it has not been developed in the case-law of the regional human rights courts yet. Hence, we still have to see whether the IACtHR will introduce *forum prorogatum* in its jurisprudence.

In sum, I share the opinion that the IACtHR may rely on *forum prorogatum* as basis for its jurisdiction, and that in principle the decision of the Constitutional Tribunal of the Dominican Republic if applied by the Dominican Government to evade the Court's jurisdiction would contravene the principle of *forum prorogatum*. However, at the present state of affairs, I doubt whether this principle is recognized in the Inter-American system, and consequently whether it has the potential to be applied for the Dominican situation.

4 Implications of the Dominican withdrawal (legal and political consequences)

I established in the previous Chapter that the withdrawal from the jurisdiction of the Court by the Dominican State based on the judgment from its Constitutional Tribunal would breach a series of principles and rules of international, Inter-American, and Dominican law. Moreover, that the Constitutional judgment does not legitimately free the Dominican Republic from its obligation to comply with proceedings and rulings from the Court in the cases in which it has been party or is yet to be.

For that reason, in the present Chapter I will analyze the implications the Dominican withdrawal would have for the protection for human rights in the Dominican Republic and the Inter-American system, and its political consequences for the Dominican Republic.

4.1 Implications for the protection of human rights

4.1.1 Deprivation of an international instance

In November 2014, a group of more than fifty organizations belonging to the International Coalition of Organizations for Human Rights in the Americas made a joint statement in response to the Constitutional judgment. The Coalition that includes Amnesty International and the Center for Justice and International expressed their rejection to the decision and warned that its application would hinder the access to the Court for all victims of human rights violations in the Dominican Republic, what would close their last door for accessing justice.¹⁹⁴

As expressed by the NGOs, the most obvious consequence of the eventual Dominican withdrawal from the Court's jurisdiction would constitute the abrupt deprivation of all persons under the jurisdiction of the Dominican Republic from the opportunity to find relief at the highest organ for the protection of human rights in the continent. In the short term, the Dominican withdrawal could lead to the non-recognition of the

¹⁹⁴ CEJIL (2014)

binding character of the Court's decision in the *Case of Expelled Dominican and Haitian*, what would perpetuate the violations committed against the victims in this case.

4.1.2 Implications for the Inter-American Court system

In a broader perspective, independently from whether the Dominican Republic finally decides to elude the ruling of the Court based on the Constitutional judgment or not, I consider that the sole decision has a negative impact on the consolidation of the Inter-American human rights system. Unfortunately, the Dominican example reminds us that, close to the fourth decade from the creation of the Court, it still faces the strong opposition of several members of the OAS, including those who have already adopted the ACHR and recognized its jurisdiction. Regrettably, the Dominican example seems to demonstrate that the regional human rights system still has to overcome the difficulties it has faced in the past.

Additionally, the Dominican case is far from being the first attempt of withdrawal or consummated withdrawal from the jurisdiction of the Court. Under this unfortunate context, we cannot ignore the possibility that other States decide to follow the route used by the Dominican Republic through its Constitutional Tribunal. Particularly, if taking into account that some countries, which are currently part of the court system, have expressed the possibility of withdrawing.

4.1.3 Implications for the Inter-American Commission system

When the Venezuelan denunciation of the ACHR entered into force in 2013, the Commission through a press release made it clear for Venezuela that the denunciation of the Convention did not imply the withdrawal from the competence of the Commission.¹⁹⁵ It is important to remember that the Commission is an organ created since the Charter of the Organization of American States (OAS Charter) in order to “promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.”¹⁹⁶ Therefore, whereas the Court has only competence over those States parties to the ACHR and which have made a declaration recognizing its jurisdiction, the Commission has competence to entertain

¹⁹⁵ Commission (2013) Press release 2013-064

¹⁹⁶ OAS Charter Article 106

communications concerning any State member of the OAS.¹⁹⁷ That is the reason why countries that have not ratified the ACHR, like the United States, and countries that have denounced it, like Trinidad and Tobago, are under the competence of the Commission. Therefore, the only form to withdraw from the Commission's competence would be through the withdrawal from the whole OAS system.

Consequently, even if the Dominican Republic insists in eluding the Court's jurisdiction based on its Constitutional ruling, and even if opts for the denunciation of the ACHR, it would remain bound to the proceedings of the Commission. In this unfortunate scenario, the Commission would become in the last resort within the Inter-American system for the protection of alleged violation of human rights committed by the Dominican State. The Commission would continue with the release of its views on the cases brought by individuals under the jurisdiction of the Dominican Republic, though without the possibility of a further submission to the Court.

4.2 Implications for the Dominican Government

4.2.1 Sanctions?

It has been approximately six months since the Constitutional Tribunal released the judgment TC/0256/14, and within approximately five months, the Dominican Republic shall inform the Court about its compliance with the ruling in the *Case of Expelled Dominicans and Haitians*. During this period, several organizations have pronounced against the decision from the Dominican Constitutional Tribunal. The Office of the High Commissioner for Human Rights has expressed its "deep concern about [the] ruling",¹⁹⁸ and a number of NGOs in the Latin-American region have condemned the Constitutional ruling.¹⁹⁹ However, among the organs of the OAS, only the Commission has openly expressed itself against the Constitutional ruling of the Dominican Republic through a press release.²⁰⁰ Under this scenario, what are the possibilities for any effective response against the Dominican Republic at the Inter-American level?

¹⁹⁷ Medina in Steiner (2008) p. 1025

¹⁹⁸ United Nations News Centre (2014)

¹⁹⁹ CEJIL (2014)

²⁰⁰ Commission (2014) Press release 2014-130

One of the biggest differences between the Inter-American system and the European system resides in the fact that the latter is endowed with a political machinery for the supervision of State compliance with the ECtHR's judgments, through the Committee of Ministers.²⁰¹ In contrast, the Inter-American legal framework only allows the Court to submit an annual report to the General Assembly of the OAS in which it can express "pertinent recommendations."²⁰² Lacking a strong political mechanism of supervision, the IACtHR has attributed to itself the power to monitor its own judgments.²⁰³ Unfortunately, the reality is that the IACtHR is alone in its judicial monitoring since it is not accompanied by any political measure by the other organs of the OAS. Thus, in the absence of a powerful mechanism for the supervision of the Court's judgment, as Pasqualucci mentions, if the States do not implement the ordered measures, the Court's decisions become "merely illusory and more akin to declaratory judgments."²⁰⁴

The lack of political response by the OAS in the previous purported withdrawals from the Court's jurisdiction, like in the Peruvian case of 1999,²⁰⁵ demonstrates that the OAS is not willing to take any political role in those situations. Perhaps, this is even understandable, because if the Inter-American States are pressured too much, they could simply opt for the complete denunciation of the ACHR, and in that way end with all their obligations under the regional human rights treaty altogether, as Venezuela did in 2013, something (unfortunately) possible because the fact of being Party to the ACHR is not a membership requisite of the OAS, as it has become for the Council of Europe.²⁰⁶ The rather weak legal framework for the enforceability of human rights judgments, may be part of reasons why the Latin-American States find it easier to challenge the authority of the Court.

In fact, by looking to the situations in which the OAS has implemented strong political measures, we find that they are reserved only for very exceptional situations. Examples include the suspension of Cuba as member of the Organization after the

²⁰¹ Harris in Steiner (2008) p. 1027

²⁰² ACHR Article 65

²⁰³ Burgorgue-Larsen (2011) p. 177

²⁰⁴ Pasqualucci (2013) p. 303

²⁰⁵ Cassel (1999) pp.168-169

²⁰⁶ Leuprecht in Shelton (2013) p. 26

Missile Crisis in 1962,²⁰⁷ and the more recent suspension of Honduras after the coup of 2009.²⁰⁸ However, the current Dominican case is far from a comparable situation to the previously mentioned, and consequently the possibilities for any similar measure are almost non-existent.

In light of the above, political or diplomatic sanctions from the OAS against the Dominican Republic seem unlikely. Therefore, probably the Court will have to maintain the judgments on its docket,²⁰⁹ until the Dominican Republic decides to return, as Peru did at the end of the Fujimori regime. Regrettably, that seems to be the only hope.

Finally, it is important to use the Dominican example as a reminder of the need for the strengthening of the Inter-American human rights system towards a better compliance with the ACHR obligations and the decisions from the Commission and the Court.

4.2.2 Scrutiny under other judicial and quasi-judicial mechanisms

In virtue of the deprivation of an international instance for the protection of human rights for the individuals in the Dominican Republic product of that situation, I consider important to stand out that that the Dominican State will remind under the scrutiny of other international instances. In particular, the Dominican Republic has recognized the competence of the Human Rights Committee,²¹⁰ the Committee on Elimination of Discrimination Against Women,²¹¹ and the Committee on the Rights of Persons with Disabilities,²¹² to consider individual complaints alleging the violations of the concerned conventions.

In addition, there is a legal possibility for Haiti to bring the Dominican Republic before the ICJ for breaches to international human rights treaties. For example, both States are parties to the International Convention on the Elimination of All Forms of

²⁰⁷ Cited in OASGA Resolution AG/RES. 2438 (XXXIX-O/09) (2009)

²⁰⁸ OASGA Resolution AG/RES. 2 (XXXVII-E/09) (2009)

²⁰⁹ Pasqualucci (2013) p. 303

²¹⁰ Status of ratification of Optional Protocol ICCPR available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

²¹¹ Status of ratification of Optional Protocol CEDAW available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

²¹² Status of ratification of Optional Protocol CRPD available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en

Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Both treaties establish a clause allowing States parties to refer disputes related to the interpretation and application thereof to the ICJ,²¹³ and neither the Dominican Republic nor Haiti made a reservation on those clauses. Thus, both States have consented to the possible referral to the ICJ.

Therefore, even after the Dominican withdrawal from the Court, there will be other international instances available, alongside the Commission, in monitoring of the realization of human rights in the Dominican Republic.

4.3 Final remarks on the implications of the Dominican withdrawal

I consider that as in the Peruvian purported withdrawal of 1999, the Court will likely defend its jurisdiction by reference to some of the principles of international law I have addressed in Chapter 3. However, based on the previous experiences in the Inter-American system, I can anticipate that there will be no political or diplomatic actions by the General Assembly of the OAS in support of the difficult task of the Court to prevent the Dominican Republic from leaving the regional court system and avoiding its obligations under the ADHR. Hence, the Dominican withdrawal, clearly contrary to principles and rules of international and Inter-American law, could potentially happen without major legal or political international repercussions for the Dominican State.

Regrettably, as usual the most affected by this sort of decisions are the individuals. The people under the jurisdiction of the Dominican Republic will be deprived of the most important international instance available in Latin-America for the protection of their fundamental rights. Nevertheless, even after its unilateral withdrawal from the Court's jurisdiction and giving no recognition to its judgments, the Dominican State will not totally elude the possibility to be brought again before other international judicial or quasi-judicial bodies for its human rights violations. Therefore, I consider that the Dominican Government should take into account that regardless its withdrawal from the IACtHR, it will remain bound to regional and international scrutiny of its human rights record. Instead of avoiding its international obligations under international and regional human rights law and the Dominican Constitution, the Dominican government

²¹³ ICERD Article 22, and CEDAW Article 29

should engage in an open dialogue with national, regional and international actors so as to find a suitable solution regarding respecting the rights of the population of Haitian origin living in the Dominican Republic.

Conclusions

i) Concluding remarks

With about five months to go for the Dominican Republic to submit to the Court the information of its compliance with the judgment in the *Case of Expelled Dominicans and Haitians* there is no express statement from the Dominican Government on whether it will (or has already) withdraw from the Court's jurisdiction based on its Constitutional Tribunal's ruling TC/0256/14 of November 2014. Nevertheless, from the analysis of the Constitutional judgment in conjunction with the statements from the Dominican Foreign Minister, I consider that it seems highly probable to conclude that the Dominican Government will opt for the withdrawal from the Court's jurisdiction (Chapter 1).

Additionally, the particular time in which the Constitutional judgment was rendered; the context under which it was decided; the manifest opposition of the Dominican Government against the recent judgment from the IACtHR; and the express mention by one of the judges from the Constitutional Tribunal, suggest that the judgment TC/0256/14 was more an act of reaction against the ruling from the IACtHR than a legal reasoning. In fact, the regional context demonstrates that although it is the first time a country *invalidates* the Instrument of Recognition of the IACtHR's jurisdiction through a Constitutional Review, it would not be the first time a country in the region opts for similar alternatives to elude the compliance with the Court's judgments (Chapter 2).

Therefore, the particular circumstances of the Dominican situation calls for a proper legal evaluation of its compliance with international, Inter-American, and Dominican law. This evaluation was the core research question of my thesis, which I addressed in Chapter 3 in three main sections.

Firstly, I analyzed whether the requisite of ratification or legislative approval was necessary for the Instrument of Recognition to be valid and bind the Dominican Republic to the Court's jurisdiction. After looking at the ACHR and the last three National Constitutions of the Dominican Republic, I concluded that the act of recognition of the Court's jurisdiction (a non-autonomous unilateral act) does not require such formality neither under the ACHR, nor under Dominican law to be valid.

In fact, the only requisite established by Article 62(2) ACHR is the notification to the Secretary General of the OAS which was duly complied with. Therefore, the Instrument of Recognition cannot be legitimately invalidated due to the lack of a requirement not established under any body of norms (Chapter 3.1).

Secondly, I also analyzed whether given the specific hierarchy of international undertakings, particularly human rights, the obligations derived from the ACHR and the unilateral act of recognition should prevail over domestic/Dominican law in case of conflict. In my analysis, I referred to a series of provisions and judgments that confirmed that international obligations should prevail. I also found that the developments of the IACtHR, and increasingly the case-law of the Latin-American States, recognize the higher hierarchy of the ACHR over domestic law. Moreover, it was particularly relevant to find that the Dominican Constitution itself recognizes constitutional rank to international human rights obligations. Additionally, the Dominican Constitution does not authorize the Constitutional Tribunal to review the constitutionality of international treaties *after* ratification, but only *before* ratification. Therefore, the conclusion was that the invalidation of the Instrument of Recognition would be contrary to the Dominican Constitution. Even if in accordance with the Constitution, this would not excuse the Dominican Republic from its international human rights obligations. Thus, the country shall remain bound to the Court's jurisdiction (Chapter 3.2).

Thirdly, I also analyzed whether the withdrawal from the jurisdiction of the Court would breach other principles and provisions of international and Inter-American law, namely *compétence de la compétence*, the rules of invalidity of treaties, good faith, *pacta sunt servanda*, estoppel and *forum prorogatum*.

My findings confirm that under the principle *compétence de la compétence*, it is within the power of the Court to decide on any issue concerning its own jurisdiction. Clearly, the validity of the Instrument of Recognition is an issue related to its jurisdiction, and it should be the Court itself, which decides on that issue. Otherwise, the Court would be subject to the whims of States. For that reason, the invalidation by the Constitutional Tribunal would deprive the Court from its power to decide on its jurisdiction, in a clear breach of the principle of *compétence de la compétence* (Chapter 3.3.1).

Additionally, my analysis of the analogical application of the rules of invalidity of treaties for the unilateral act of Recognition of the Court's competence suggests that the alleged invalidity thereof does not reach the strict requisites set forth by the VCLT. On the one hand, there was no breach of a domestic legal provision of fundamental importance as required by Article 46(1) VCLT because there is no provision whatsoever in any of the three analyzed constitutions requiring the legislative approval for unilateral acts. On the other hand, even if there is such a requisite under domestic law, it cannot be affirmed that it was objectively evident as required by Article 46(2) VCLT because, at the international level, unilateral acts are not required to follow such formality. Additionally, given that many actors (victims, Commission, Court, etc.) have relied in good faith on the declaration contained in the Instrument of Recognition, the Dominican Republic cannot simply ignore the authority and rulings of the Court. On the contrary, it would (anyhow) be obliged to comply with all acts done in good faith in reliance of the Instrument of Recognition pursuant to Article 62(2) VCLT. In sum, it can hardly be affirmed that the Dominican situation reaches the requirements under the VCLT for the invalidity of treaties, thus the exemption for the principle *pacta sunt servanda* pursuant to Articles 27 and 46 VCLT is not fulfilled (Chapter 3.3.2).

Additionally, I also concluded that after 16 years of consent and acquiescence of the jurisdiction of the Court by the Dominican Republic, the principle of estoppel would prohibit the State from unilaterally withdrawing its consent in detriment of the other parties to the contentious cases. Whereas, with regard to the principle *forum prorogatum*, I found that the Court may rely on it to entertain cases against the Dominican Republic even if the Instrument of Recognition is void (Chapter 3.3.3).

In sum, the Constitutional judgment and the eventual Dominican withdrawal from the jurisdiction of the Court would contravene provisions and principles of international, Inter-American, and Dominican law. Furthermore, the withdrawal has significant deleterious consequences for the protection of human rights in the Dominican Republic and potentially in the region. The most significant negative consequence, namely the abrupt deprivation of access to the Inter-American court system is detrimental to all persons under the jurisdiction of the Dominican Republic, and would constitute an unfortunate setback for the consolidation of the regional human rights system (Chapter 4).

ii) Further research

One of the conclusions of Chapter 4 is that based on the previous experiences of withdrawals in the region, the Dominican Republic will very likely receive no political pressure from the political organs of the OAS. Therefore, again the Court will have to face alone the Dominican attack on its jurisdiction, probably just with the support of the Commission. For that reason, I consider that the present Dominican withdrawal is a good reminder that the Inter-American system for the protection of human rights needs to be endowed with more political tools to really ensure the compliance with the decisions from the Court and the implementation of the reports from the Commission. Thus, I consider that once we get to know the outcome of the ongoing Dominican situation, a deeper legal and political study on the necessary changes to strengthen the Inter-American system will indubitably constitute a very useful research for the protection of human rights in the region.

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ICJ Statute	Statute of the International Court of Justice, San Francisco, 24 October 1945
Optional Protocol CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999
Optional Protocol CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities, New York, 13 December 2006
Optional Protocol ICCPR	Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966
VCLT	Vienna Convention on the Law of Treaties, Vienna, 23 May 1969

Inter-American system

ACHR	American Convention on Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San José, 22 November 1969)
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OAS Charter Charter of the Organization of American States (Adopted at the Ninth International Conference Of American States, Bogotá, 30 April 1948)

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Artículo 3.- Inviolabilidad de la soberanía y principio de no intervención. La soberanía de la Nación dominicana, Estado libre e independiente de todo poder extranjero, es inviolable. Ninguno de los poderes públicos organizados por la presente Constitución puede realizar o permitir la realización de actos que constituyan una intervención directa o indirecta en los asuntos internos o externos de la República Dominicana o una injerencia que atente contra la personalidad e integridad del Estado y de los atributos que se le reconocen y consagran en esta Constitución. El principio de la no intervención constituye una norma invariable de la política internacional dominicana.

Article 3.- Inviolability of sovereignty and the principle of no intervention. The sovereignty of the Dominican Nation, a State free and independent of any foreign power, is inviolable. None of the public powers organized by this Constitution may realize or permit the realization of acts that constitute a direct or indirect intervention in the internal or external affairs of the Dominican Republic or an interference that infringes the personality and integrity of the State and of the attributes that are recognized and consecrated in this Constitution. The principle of non-intervention constitutes an invariable norm of Dominican international policy.

Artículo 4.- Gobierno de la Nación y separación de poderes. El gobierno de la Nación es esencialmente civil, republicano, democrático y representativo. Se divide en Poder Legislativo, Poder Ejecutivo y Poder Judicial. Estos tres poderes son independientes en el ejercicio de sus respectivas funciones. Sus encargados son responsables y no pueden delegar sus atribuciones, las cuales son únicamente las determinadas por esta Constitución y las leyes.

Article 4.- Government of the Nation and separation of Powers. The government of the Nation is essentially civil, republican, democratic and representative. It is divided into the Legislative Power, the Executive Power and the Judicial Power. These three powers are independent in the

²¹⁴ English translation by William S. Hein & Co. (2012) Available at: https://www.constituteproject.org/constitution/Dominican_Republic_2010?lang=en

exercise of their respective functions. Their office holders are responsible and cannot delegate their attributions, which are uniquely determined by this Constitution and laws.

Artículo 6.- Supremacía de la Constitución. Todas las personas y los órganos que ejercen potestades públicas están sujetos a la Constitución, norma suprema y fundamento del ordenamiento jurídico del Estado. Son nulos de pleno derecho toda ley, decreto, resolución, reglamento o acto contrarios a esta Constitución.

Article 6.- Supremacy of the Constitution. All the persons and the organs exercising public powers are subject to the Constitution, which is the supreme norm and foundation of the juridical order of the State. Any law, decree, resolution, regulation or act that is contrary to this Constitution is null of plain right.

Artículo 26.- Relaciones internacionales y derecho internacional. La República Dominicana es un Estado miembro de la comunidad internacional, abierto a la cooperación y apegado a las normas del derecho internacional, en consecuencia: 1) Reconoce y aplica las normas del derecho internacional, general y americano, en la medida en que sus poderes públicos las hayan adoptado; 2) Las normas vigentes de convenios internacionales ratificados regirán en el ámbito interno, una vez publicados de manera oficial; 3) Las relaciones internacionales de la República Dominicana se fundamentan y rigen por la afirmación y promoción de sus valores e intereses nacionales, el respeto a los derechos humanos y al derecho internacional; 4) En igualdad de condiciones con otros Estados, la República Dominicana acepta un ordenamiento jurídico internacional que garantice el respeto de los derechos fundamentales, la paz, la justicia, y el desarrollo político, social, económico y cultural de las naciones. Se compromete a actuar en el plano internacional, regional y nacional de modo compatible con los intereses nacionales, la convivencia pacífica entre los pueblos y los deberes de solidaridad con todas las naciones [...].

Article 26.- International relations and international law. The Dominican Republic is a member State of the international community, open to cooperation and attached to the norms of international law, in consequence: 1. It recognizes and applies the norms of international, general and American law, in the manner in which its public powers have adopted it; 2. The norms in force of ratified international agreements will govern within the domestic sphere, once they have been published in official manner; 3. The international relations of the Dominican Republic are founded and governed by the affirmation and promotion of its national values and interests, the respect for human rights and for international law; 4. In equal conditions with other States, the Dominican Republic accepts an international juridical order that guarantees the respect for fundamental rights,

peace, justice, and the political, social, economic and cultural development of the nations. It undertakes to act in the international, regional and national levels in a manner compatible with the national interests, a peaceful coexistence among peoples and the duties of solidarity with all nations [...].

Artículo 73.- Nulidad de los actos que subviertan el orden constitucional. Son nulos de pleno derecho los actos emanados de autoridad usurpada, las acciones o decisiones de los poderes públicos, instituciones o personas que alteren o subviertan el orden constitucional y toda decisión acordada por requisición de fuerza armada.

Article 73.- Nullity of the acts that subvert the constitutional order. The acts issued by usurped authority, and the actions or decisions of the public powers, institutions or persons that alter or subvert the constitutional order and any decision reached by requisition of armed force, are null of plain right.

Artículo 74.- Principios de reglamentación e interpretación. La interpretación y reglamentación de los derechos y garantías fundamentales, reconocidos en la presente Constitución, se rigen por los principios siguientes: [...] 3. Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por el Estado dominicano, tienen jerarquía constitucional y son de aplicación directa e inmediata por los tribunales y demás órganos del Estado [...].

Article 74.- Principles of regulation and interpretation. The interpretation and regulation of the fundamental rights and guarantees, recognized in this Constitution, shall be governed by the following principles: [...] 3. The treaties, pacts and conventions concerning human rights, subscribed and ratified by the Dominican State, have constitutional hierarchy and are of direct and immediate application by the tribunals and other organs of the State [...].

Artículo 93.- Atribuciones. El Congreso Nacional legisla y fiscaliza en representación del pueblo, le corresponden en consecuencia: 1) Atribuciones generales en materia legislativa: [...] 1) Aprobar o desaprobar los tratados y convenciones internacionales que suscriba el Poder Ejecutivo; [...].

Article 93.- Attributions. The National Congress legislates and supervises in representation of the people, and as a consequence it corresponds to it: 1. General attributions in legislative matters: [...] 1. To approve or to disapprove the international treaties and conventions subscribed by the Executive Power [...].

Artículo 128.- Atribuciones del Presidente de la República. La o el Presidente de la República dirige la política interior y exterior, la administración civil y militar, y es la

autoridad suprema de las Fuerzas Armadas, la Policía Nacional y los demás cuerpos de seguridad del Estado. 1) En su condición de Jefe de Estado le corresponde: [...] d) Celebrar y firmar tratados o convenciones internacionales y someterlos a la aprobación del Congreso Nacional, sin la cual no tendrán validez ni obligarán a la República; [...].

Article 128.- Attributions of the President of the Republic. The [feminine or masculine] President of the Republic directs the internal and foreign policy, the civil and military administration, and is the supreme authority of the Armed Forces, of the National Police and the other security bodies of the State. 1. In the condition of Head of State it corresponds to him to: [...] d. Celebrate and sign treaties or international conventions and submit them to the approval of the National Congress, without which they would not be valid or obligate the Republic [...].