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The Internationalization of Judicial Review in the Colombian High Courts

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Abstract

The internationalization of adjudication in the Colombian high court refers to the growing importance that the American Convention on Human Rights has gained among the judicial forums of this country, but especially to the phenomenon that occurs when national judiciaries implement and appropriate the doctrine of the control of conventionality. The Convention has claimed a high ground in the Colombian constitutional system due to the appropriation of international law by national courts decisions, and to the process of the internationalization of the law. By consistently applying the control of conventionality doctrine, courts like the State Council have reaffirmed the binding nature and the effectiveness of the decisions of the Inter-American Court of Human Rights for the Colombian legal system. In contrast to a much more regressive posture assumed by the Constitutional Court in recent decisions, the State Council, drawing on the legal contents of international law, has broadened the range of legal sources for rights interpretation in Colombia. By this action, as it will be further stated in this article, the State Council has contributed to a move away from a paradigm of a legalism based solely on the state sovereignty and national constitutionalism, towards one that endorses the pluralist structure of post-national law. Against this background, this article aims to discuss how the relationship of national judiciaries with international law is best understood as reflecting the development of a pluralist legal dynamic, sometimes referred to as jurisprudential dialogue, that involves the broadening of the normative horizon and the internationalization of the sources available for national judges in their reasoning; particularly in the cases that involve human rights violations.

Keywords: American Convention on Human Rights, Control of Conventionality, *Ius Commune Constitutionale*, Block of Constitutionality, Internationalization of the Law.

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I. INTRODUCTION

The strengthening of human rights law that came along with the establishment of the United Nations and the foundation of the multiple regional human rights systems have profoundly affected the scope of judicial protection provided to victims of human rights violations. The institutionalization of actors that, as Bogdandy states, "speak in the name of the peoples and citizens whose freedom they ultimately shape"[1] has changed the way in which judicial review is done in the high courts of several countries. Importantly, it marks a strengthened process of internationalization of Constitutional law.

This phenomenon, conceptualized by Vogel as openness of the state[2], is especially evident in the reasoning of the high courts in charge of the interpretation of the Constitution. Many Constitutional Tribunals and Supreme Courts of the region of Latin America deal with the question of the reception of international human rights treaties and international courts decisions, and each of them has chosen one or several methods to do this. It seems that the task of defining the role of international human rights law in the domestic level partially relies on the high courts of the State members of the American Convention on Human Rights (hereinafter – the ACHR).

Due to the receptiveness of judicial actors to international law,[3] and to the open structure of constitutional law, doctrines such as the block of constitutionality[4] and the control of conventionality[5] have made judicial review,

1 Armin Von Bogdandy and Ingo Venzke, *Whose Name: A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014), 5.

2 Jo Eric Khushal Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford: Oxford University Press, 2013), 117.

3 On the question of whether domestic courts can be cast as the natural judges of international law, see: A. Tzanakopoulos, "Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy" in *Select Proceedings of the European Society of International Law,* ed. J.R. Crawford, S. Nouwen (Oxford: Hart Publishing, 2012).

4 On the aplications of the Block of Constitutionality in Colombia, see: Vanessa Suelt-Cock, "El Bloque de Constitucionalidad como mecanismo de interpretación constitucional: Aproximación a los contenidos del bloque en Colombia [The Block of Constitutionality as a mechanism of constitutional interpretation: Approximation to the contents of the Block in Colombia]," *Universitas Law Journal* (2016), doi: http://dx.doi.org/10.11144/Javeriana.vj133.bcmi. Available in http://revistas.javeriana.edu.co/index.php/vnijuri/article/view/17747; and Rodrigo Uprinmy, "El bloque de constitucionalidad en Colombia: Un analisis jurisprudencial y un ensayo de sistematización doctrinal [The Block of Constitutionality in Colombia: a jurisprudential analisis and trial of doctrinary sistematization]" in *Compilación de jurisprudencia y doctrina nacional e internacional* [Compilation of national and international jurisprudence and doctrine] (Bogotá: Oficina en Colombia del Alto Comisionado de Naciones Unidas para los Derechos Humanos, 2011), 98-154.

5 On the Control of Conventionality, see: Manuel Fernando Quinche Ramírez, *El Control de Convencionalidad* [The

and in general the exercise of administrating justice, an activity much more exposed to the contents of international law. The appropriation of the norms of international human rights law by national judicial authorities guarantees the enforceability of the international rule of law, while at the same time widens the set of actors involved in the implementation of these international agreements.

Because of the work of both international and domestic judges, there is now an almost uncontested recognition of the constitutional legal value that the ACHR has in the region, and many Constitutions and high courts in Latin America have enforced the Convention and granted its constitutional rank.[6] Thanks to the appropriation of international law by national courts, the ACHR has claimed a high ground in the Colombian constitutional system, in the latest stage of the widest process of the internationalization of the law. Nevertheless, it should be noted that the development of this process has not been free of controversy and that the matter is currently subject to a very intense judicial debate.

Despite the more or less universal acceptance of the constitutional role that the American Convention has in Colombia, the decisions of the high courts of this country can be classified as rejecting international law or as embracing the full extent of this legal system. This classification depends essentially on the level of recognition that the courts of the different states make to the decisions of the IACtHR.

In a regressive tendency, the Constitutional Court has started to demount its own jurisprudential constructions in favor of "new" interpretations that close constitutional law to the process of the internationalization. Through means of negating its own precedents, the Court, in decisions SU-712 of 2013[7] and

Control of Conventionality] (Bogotá: Temis, 2014), and *El Control de convencionalidad y las Cortes nacionales: La perspectiva de los jueces mexicanos* [The Control of Conventionality and the National Courts: The perspective of the Mexican judges], ed. Paula M. García Villegas (Mexico, Ed Porrua, 2014).

6 Luis-Miguel Gutiérrez Ramírez, "Control de constitucionalidad y control de convencionalidad: interacción, confusión y autonomía. Reflexiones desde la experiencia francesa [Control of Constitutionality and Control of Conventionality: Interaction, Confusion and Autonomy. Reflexions from the French experience]," *Revista IIDH*, no. 64 (January 2017): 254.

7 Decision SU-712 of 2013, T3005221, Legal consideration No 7.6.3 (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

C-327 of 2016,[8] has turned its back on some of its most important rulings on the matter of the binding power of the decisions of the IACtHR. On this, the Court has adopted a rather restrictive interpretation of the law, with severe consequences for human rights protection in Colombia. By adopting that position, the Court has restricted the possibilities for rights protection in this country and has further isolated the constitution from international law, as Quinche affirms, "the so-called rejection posture resists applying the standards of rights adopted by the decisions of this international tribunal to favor the principle of state sovereignty."[9]

In the opposite side, the acceptance of the binding nature of the precedents of the Inter-American Court acknowledges the role that the authorized interpreter of the international agreement has in the definition of these instruments of international law. The Colombian State Council has strengthened the process of the internationalization by consistently applying the Control of Conventionality, and has confirmed the binding nature of the decisions of the Inter-American Court of Human Rights for the Colombian legal order. With regard to the legal pluralism and the post-national character of modern constitutions,[10] domestic judges like the State Council (hereinafter – the SC) can contribute greatly to the enforceability of international human rights law in Colombia.

In contrast with the tendency of rejection to the precedents of international law that the Constitutional Court has assumed in later decisions, and based on the institutional and normative pluralism of human rights, the SC has managed to consistently interpret the law in a manner respectful to both the Constitution and the American Convention. The SC's rulings that have applied the control of conventionality bring a light to the way in which international law should

[8] Decision C-327 of 2016, D-11058, Legal consideration No.73 (Justice Gloria Stella Ortiz Delgado, Constitutional Court of Colombia).

[9] Manuel Fernando Quinche Ramírez, El Control de Convencionalidad [The Control of Conventionality] (Bogotá: Temis, 2014), 131.

[10] On the concept of the postnationalism in the constitutional law context see: Jürgen Habermas, "Europa: En defensa de una política exterior común" [Europe: In defense of a common foreign policy] in *El derecho internacional en la transición hacia un escenario posnacional* [The international law in the transition towards a postnational scene], (Buenos Aires: Katz, 2008), and Jürgen Habermas, "Does the Constitutionalization of International Law Still Have a Chance?" in *The Divided West* (Cambridge: Polity, 2006).

be viewed from the perspective of national tribunals, and to the virtues of a judicial interpretation that is not limited to the sources of domestic law.

The enforcement of international human rights law through domestic courts' decisions has amplified the possibilities of both international and constitutional law. The international conventions on human rights and the clauses of openness[11] have enabled the national judge to carry out the mission of integrating international law with constitutional law. This phenomenon is not limited to countries under the jurisdiction of one of the existent regional human rights courts: the Inter-American, the African and the European ones, but also to those countries that belong to the UN human rights system. Despite the lack of a regional court of human rights for the numerous Asian countries, many constitutional courts of this region, including the ones of the Republic of Indonesia[12] and the Republic of Korea,[13] have shown a growing interest in international law as a source of authoritative arguments for judicial decision-making.

International law contributes to the legal protection of human rights and supports the moral importance of the fundamental principle of human dignity; the appropriation of its contents by domestic high courts is a legitimate tool for judicial decision-making and involves domestic judges to a greater extent in the wider process of enforcing international law. This article intends to show that, despite of the sometimes problematic coexistence of both national and international tribunals, judicial dialogue promises to be an effective tool for extending the rule of law and the protection of fundamental rights.

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[11] Armin Von Bogdandy, "Ius constitutionale commune interamericanum: una aclaración conceptual" [Ius constitutionale commune interamericanum: a conceptual remark] in *Ius Constitutional Commune en América Laina: Rasgos, Potenciales y Desafios* [Ius Constitutional Commune in Latin-America, potential and challenges], (Mexico DF: Porrua, 2013), 19.

[12] About the relationship between the decisions of the Constitutional Court of the Republic of Indonesia and the International Law see: Bisariyadi Bisariyadi, "Referencing International Human Rights Law in Constitutional Adjudication," *Constitutional Review* 4, no. 2 (December 2018): 256; and Heribertus Jaka Triyana, "The Role of the Indonesian Constitutional Court for An Effective Economic, Social and Cultural Rights Adjudication," *Constitutional Review* 1, no. 1 (May 2015): 74.

[13] On the relationship between the Constitutional Court and international law, see Kang Il-Won, "Constitutional Globalization in Korea", in *Global Constitutionalism and Multi-layered Protection of Rights* (Seoul: SNU-Pacific Law Institute, Constitutional Court of Korea, 2016), 248.

II. THE JUDICIALIZATION OF INTERNATIONAL HUMAN RIGHTS LAW

Despite the importance of the movement towards the internationalization of the law that can be observed in the numerous treaties signed after 1945, the creation of international courts in charge of the protection of human rights was the shifting point that changed our understanding of the relationship between constitutional law and international law. As Ricoeur pointed out, we have found ourselves in the midst of "the blossoming of a multitude of centers of rights [composed] of new Postnational, if not suprastate, institutions, which themselves will give rise to rights."[14]

One of the consequences of this turn is that the protection of fundamental rights can no longer be solely understood from a local perspective, but should be considered as a field of permanent interaction with the international law of human rights.[15] Domestic courts often define the fundamental rights protected by their decisions using precedents of international law and in some cases even borrow from comparative law. As Eckes states, "International law becomes increasingly judicialized and domestic courts are increasingly and actively referring to each other's judicial decisions, as well as to international law."[16] For instance, in the United States of America, in the Filartiga case, the courts stated that the Alien Tort Statute should be construed as "opening the federal courts for adjudication of the rights already recognized by International law."[17]

Notwithstanding the vast diversity of cases involving human rights violations, most relevant threats posed to human rights are universal. There is some level of similarity between the human rights violations that arise across the globe,

[14] Paul Ricoeur, *The Just,* trans. D. Pellauer (Chicago: Chicago University Press 2000), 93.

[15] Manuel Fernando Quinche Ramírez and Rocio del Pilar Peña Huertas, "La dimensión normativa de la justicia transicional, el sistema Inter-Americano y la negociación con los grupos armados en Colombia [The normative dimension of the transitional justice, the Inter-American System and the negotiation with the Colombian rebel groups]," *ACDI – Anuario Colombiano de Derecho Internacional* 7 (2014): 118, doi: dx.doi.org/10.12804/acdi7.2014.04.

[16] Christina Eckes, "The Court of Justice's participation in judicial discourse: theory and practice. In *The European Court of Justice and external relations' law: constitutional challenges*, ed. M. Cremona & A. Thies (Oxford: Hart Publishing. 2014), 183- 210.

[17] Sung Teak Kim, "Adjudicating Violations of International law: Defining the Scope of Jurisdiction under the Alien Tort Statute – Trajano v. Marcos," *Cornell International law Journal* 27, no. 2, (1994): 393, Available at: http://scholarship.law.cornell.edu/cilj/vol27/iss2/5.

which permits judges to learn from foreign judicial experience. Due to this, many national courts refer to comparative law in the decision-making process as well as to decisions of international courts. After all, as Justice Breyer recognized, "American and foreign judges furthermore have the same desire – as well as the requisite experience – to advance the rule of law even as the world threatens to become more turbulent."[18]

This form of cross-judicial fertilization[19] is part of the wider process of internationalization of constitutional law that creates common ground for judicial action to remedy human rights violations; the parity between constitutional rights and the human rights defined by international law implies a connection between the decisions of the courts that interpret these rules. The dialogue, as a way of constructing judicial decisions is very important if we consider that human rights are more susceptible to discretionary judicial interpretation than other non-constitutional rights.[20] In a context where domestic judicial actors appropriate international law, the role of international judges and experts, interpreting the various international human rights treaties, gains a special relevance.

The so-called authorized interpreters of international law[21] have become a source that national judges increasingly cite in their arguments for cases related to human rights recognized by international law,[22] the institution of the *consistent interpretation* that demands the judges to interpret the human rights in the light of international agreements, reinforces this development.[23]

These factors have created an interaction known as the *jurisprudential dialogue,*[24] in which judicial decisions taken within the scope of the nation-state

[18] Stephen Breyer. *The Court and the World: American Law and the new global realities* (New York, Alfred A. Knopf, 2015), 683.

[19] On the concept of cross-judicial fertilization, see: Francis Jacobs, *"Judicial Dialogue and the Cross-Fertilization of Legal Systems: the European Court of Justice," Texas International law Journal* 38, no. 3 (2013), http://www.tilj.org/content/journal/38/num3/Jacobs547.pdf.

[20] Robert Alexy, *"Discourse Theory and Fundamental Rights"*, ed. Agustín José Menéndez and Erik Oddvar Eriksen (Dordrecht, Springer, 2006), 23.

[21] Decision C-370 of 2006, D-6032. Legal consideration No. 4.6 (Justice Manuel Jose Cepeda and others, Constitutional Court of Colombia).

[22] Margaret Hartka, "The Role of International law in Domestic Courts: Will the Legal Procrastination End?" *Maryland Journal of International law*, no. 7 (Spring 1990): 124, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.425.6956&rep=rep1&type=pdf.

[23] Paola Acosta Alvarado, *Diálogo judicial y constitucionalismo multinivel: El caso Interamericano* [Judicial dialogue and multilayered constitutionalism: The Inter-American case] (Bogotá, Universidad Externado de Colombia, 2015), 61.

[24] On the concepts of Judicial Dialogue and cross judicial fertilization, see: Francis Jacobs, "Judicial Dialogue and

draw on the decisions of international courts as "authoritative borrowings."[25] This practice relates the decisions of ordinary judges to centralized international institutions, and transforms the domestic judge into an enforcer of international treaties, that boosts the value of international law through judicial action.

International law has come closer to the national high courts of the various states subject to the jurisdiction of the ACHR in a process of internationalization that seeks to give constitutional value to international law. The two main institutions that resulted from this judicial innovation are the block of constitutionality and the control of conventionality; both are judicial constructions that reflect the increasing interaction between international and constitutional law, for they are intended to promote the legal value of international law in domestic institutional environments.

Owing to these jurisprudential constructions, the application of international law by domestic judges is shifting from a non-standardized judicial practice to a more structured interaction between the international order and domestic constitutional systems. This communication, constructs a legal dynamic that defies the old debate between monist and dualist theories, in favor of a post-national understanding of the process of internationalization.[26]

III. THE BLOCK OF CONSTITUTIONALITY

In Colombia and other countries of the Americas the doctrine of the block of constitutionality has become the instrument to determine the legal nature of

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the Cross-Fertilization of Legal Systems: the European Court of Justice," *Texas International law Journal* 38, no. 3 (2013), http://www.tilj.org/content/journal/38/num3/Jacobs547.pdf; Eduardo Ferrer-Mac-Gregor and Alfonso Herrera García (eds.), *Dialogo Jurisprudencial en Derechos Humanos: entre Tribunales Constitucionales y Cortes Internacionales* [Jurisprudential Dialog on Human Rights between Constitutional Tribunals and International Courts] (Valencia: Tirant lo Blanc, 2013); Rafael Bustos Gisbert, "XV Proposiciones para una teoría de los diálogos judiciales [XV Proposals for a theory of the judicial dialogue]," *Revista Española de Derecho Constitucional*, no. 95 (May-August 2012): 13-63; and Victor Bazan, "Control de convencionalidad, aperturas dialogicas, e influencias jurisdiccionales reciprocas [Control of Conventionality, open dialogue and mutual jurisprundential influences]" in *Revista Europea de Derechos Fundamentales*, no. 18 (Valencia 2012): 63-104.

[25] Manuel Fernando Quinche Ramírez and Rocio del Pilar Peña Huertas, "La dimensión normativa de la justicia transicional, el Sistema Interamericano y la negociación con los grupos armados en Colombia [The normative dimension of the transitional justice, the Inter-American System and the negotiation with the Colombian rebel groups]", *ACDI - Anuario Colombiano de Derecho Internacional* 118, no. 7 (April 2014): 113-159. Available in: https://revistas.urosario.edu.co/index.php/acdi/article/view/acdi7.2014.04.

[26] On the concept of post-nationality applied for the context of the constitution, see: Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

international human rights law, in relation to its normative integration with the national constitutional systems.[27] This jurisprudential construction is based on a distant precedent of French law denominated *le bloc de constitutionnalité,*[28] which was coined by the French Constitutional Council when it recognized that both the preamble of the Constitution of 1945 and the Declaration of the Rights of 1781 were an integral part of the binding constitutional regime.

This doctrine – an adaptation for the constitutional context of the concept of the block of legality, that recognized certain rules like the general principles of law as above the law[29] – widened the normative spectrum of the constitution of France, by giving constitutional hierarchy to legal contents that are not proscribed by the written fundamental text and, moreover, by using them as a normative reference for the exercise of the control of constitutionality.[30] The decision of the 16th of July 1971 of the Constitutional Council incorporated the Declaration of the Rights of the Man and of the Citizen of 1789 as a normative parameter for the study of the constitutionality of the laws in France, it provided a human rights charter to the French constitutional order[31] and enhanced constitutionalism in the Mediterranean country. Following the same parameter, latter decisions also recognized the Preamble of the Constitution of 1945 as an integral part of the French constitutional order, and by that incorporated into French constitutionalism a charter of social, economic and cultural rights with the same legal validity as the rights protected by the Declaration of the Rights of the Man and of the Citizen.[32]

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[27] The general mechanism for the implementation of international law established by the Constitution in the appendix 16 of the article 50 is the most traditional method for the normative integration between domestic law and international law in Colombia. However, for the specific purpose of integrating the rules of international humanitarian law and the international law of human rights into this normative order, article 93 of the Constitution allows the use of other methods of integration of international law, like the block of constitutionality and the control of conventionality.

[28] Marie-Pierre Granger, "The Preamble(s) of the French constitution: Content, status, uses and amendment", *Acta Juridica Hungarica* 52 (2011), 12. 10.1556/AJur.52.2011.1.1.

[29] Marcos Carpio, "Bloque de constitucionalidad y proceso de inconstitucionalidad de las leyes [Block of Constitutionality and the process of unconstitutionality of the law]," *Revista Iberoamericana de Derecho Procesal Constitucional* 4 (July 2005): 81.

[30] Graciela Rodríguez Manzo, Juan Carlos Arjona Estévez & Zamir Fajardo Morales, *Bloque de Constitucionalidad en Mexico* [Block of Constitutionality in Mexico] (Reforma DH, 2013), 26. http://www2.scjn.gob.mx/red/coordinacion/Bloque%20de%20constitucionalidad.pdf.

[31] Decision C- 067 of 2003, D-4111, Legal consideration No 3ª, (Justice Marco Gerardo Monroy, Constitutional Court of Colombia).

[32] Louis Favoreau, "El Bloque de Constitucionalidad [The Block of Constitutionality]," *Revista del Centro de Estudios*

In the case of Latin America, the block of constitutionality focuses on expanding the Constitution and the parameters of the control of constitutionality, not only to incorporate other rules present in the sphere of the domestic law, but also to bring into the constitutional context the rules of international human rights law[33]. The distinctive element of the Latin-American version of the block of constitutionality, which contrasts with the Spanish and the French version, is the degree of receptiveness towards international law found in the constitutions of countries like Colombia.[34] According to Gongora, "while in Europe the concept of the block of constitutionality refers mainly to a set of norms of domestic origin used as a parameter for the control of constitutionality, in Latin America, the block incorporates norms of international origin, essentially human rights instruments, as a parameter of constitutionality."[35]

The decision of the Supreme Court of Panama on 24 July 1990 was the first precedent in which a high court in Latin America applied this doctrine with the aim of reconciling the Constitution with the contents of international law. Based on the article 4th of the constitutional text, this decision granted constitutional hierarchy to international law. Unexpectedly, this ruling influenced the definition of the block in the region and soon other high courts would apply this particular understanding of the institution; these were the cases of the Constitutional Chamber of the Supreme Court of Costa Rica and the Colombian Constitutional Court.

This understanding of the block can be found in early decisions of the Colombian Constitutional Court. For instance, decision C-225 of the year 1995, that defined the normative value of the clause of supremacy of international law, stated that

Constitucionales, no. 5 (Madrid 1990): 46.

33 Manuel Fernando Quinche Ramírez, *El Control de Convencionalidad* [The control of conventionality], (Bogotá: Editorial Temis, 2014), 139.

34 Ann Peters, *Constitucionalismo compensatorio: Las funciones y el potencial de las normas y estructuras internacionales* [Constitutionalism of compensation: the functions and the potential of the norms and international structures] (Valencia: T. l. Blanch, 2010), 211.

35 Manuel Gongora Mera. *La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitucionale commune latinoamericano* [The difusion of the block of constitutionality in the Latin-American jurisprudence and its potential for the construction of the Latin-American *ius constitucionale commune*], Revista juridical de la Universidad Autónoma de Mexico (2014): 308 http://biblio.juridicas.unam.mx/libros/8/3655/16.pdf.

> beyond the formal constitutional text there is the block of constitutionality, consisting not only of the written formal constitution but of those norms and principles that, without appearing formally in the articles of the constitutional text, are to be utilized as parameter for the control of constitutionality of the laws, for they have been normatively integrated in the constitution through different means and by direct order of the constitution itself.[36]

Ever since, this doctrine has been frequently applied in the jurisprudence of the Colombian Constitutional Court as a tool to further legal and judicial protection of human rights. Given the context of impunity that prevailed in Latin America and the lack of legal protection afforded to victims of grave human rights violations in that region, the block of constitutionality proved to be a useful tool to expand the range of normative resources available for judges to give protection to rights; as well as a source of additional legitimacy for judicial actors in their decisions.[37] In order to be able to correlate with the ever-changing reality of rights, the theory of the block of constitutionality gives a prominent place to international human rights law and international humanitarian law in the Colombian domestic order. It coordinates international law with domestic law and prevents the constitution from becoming passive in front of the new social, political and legal dynamics.

IV. THE CONTROL OF CONVENTIONALITY

Although certain precedents of the Inter-American Court of Human Rights (hereinafter IACtHR) are cautious when framing its role in the definition and protection of fundamental rights in the region, and have stated that the jurisdictional function of the Court consists merely in declaring the violation of the Convention and therefore ordering the State to repair such transgression[38], the truth is that the legal capacities of this international court in defining the normative grounds of fundamental rights in Latin America are of a much greater importance. In reality, both the decisions of the Court and its advisory opinions have contributed greatly to the protection of fundamental rights in

[36] Decision C- 225 of 1995 , L.A.T.-040. Legal consideration No. 12, (Justice Alejandro Martínez, Constitutional Court of Colombia).

[37] Manuel Fernando Quinche Ramírez, *El Control de Convencionalidad* [The Control of Conventionality] (Bogotá: Temis, 2014): 130.

[38] IACtHR "Perozo v Venezuela" Decision of the 28th of January 2009, Series C No. 175, 65.

the region and, despite the obstacles and the adverse conditions, these two features of the IACtHR have been consolidating and have reaffirmed the judicial authority of the Court over the whole normative content of the countries under its jurisdiction.[39]

The IACtHR contributes to the progressive interpretation of the meaning and scope of the rights protected by the American Convention on Human Rights when it rules on cases and interprets the reach of the rights written in this international instrument. In that sense, despite that in principle the basic normative ground of the Inter-American System of Human Rights is the ACHR, the decisions of the Inter-American Court of Human Rights have become an integral part of the *Ius Commune Constitutionale Inter-Americanum* and, therefore, a central element of the Inter-American System of Human Rights.[40]

In the year 2006, the doctrine of the control of conventionality appeared in the legal field as a normative resource for the integration of the ACHR with domestic law, which gives a leading role to the domestic judges in the interpretation of international law of human rights. The basic concept of the control of conventionality establishes that both the judicial and administrative authorities of the States that subscribed the ACHR, should apply in their decisions a control based on this international instrument. The IACtHR, in precedents like Workers of the Congress v. Peru[41] or the case of Heliodoro Portugal v. Panama[42] has defined the Control of Conventionality as an obligation of the judges of the various member states, not only to exercise in their judicial decisions the control of legality or the control of constitutionality, but also to incorporate into their decision-making process a control based on the ACHR.[43]

[39] Kai Ambos, "Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿Tribunal tímido vs. Tribunal audaz*?* [European Court of Human Rights and Inter-American Court of Human Rights: Shy Tribunal v. Audacious Tribunal]," in *Diálogo jurisprudencial en derechos humanos: Entre Tribunales Constitucionales y Cortes* Internacionales [Jurisprudential dialogue on Human Rights: Between constitutional tribunals and international Courts], ed. Ferrer MacGregor (Mexico: DF, Tirant lo Blanch, 2013), 1058.

[40] On the Ius Commune Internationale Interamericanum, see: Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan (eds.). *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford: Oxford University Press, 2017).

[41] IACtHR "Trabajadores Cesados del Congreso v. Peru" Decision of the 24th of November 2006, Series C No. 158.

[42] IACtHR "Heliodoro Portugal vs. Panamá" Decision of the 12st of August, 2008, Series C No. 186.

[43] Antonio Moreira Maués, "Supra-legality of International Human Rights Treaties and Constitutional Interpretation," *International Journal on Human Rights* 10, no. 18 (June 2013) http://sur.conectas.org/en/supra-legality-international-

Despite the importance of the institution of the block of constitutionality, the consolidation of the doctrine of the control of conventionality in the jurisprudence of the Inter-American System of Human Rights and its diffusion throughout the different constitutional orders in the region, has proven to be crucial for the fulfillment of human rights and the advancing of the process of internationalization of the law in Latin America. The control of conventionality is one of the most important jurisprudential constructions when it comes to the judicial protection of human rights in Latin America and a key feature for the current functioning of the Inter-American System of Human Rights. This doctrine assesses the way in which the jurisdiction of the Court relates to the different constitutional systems under its authority, and it determines the role that national judicial authorities have in the context of the internationalization of the law.[44]

The very nature of the control of conventionality – that demands all judicial authorities to directly implement the ACHR – is an invitation for judicial actors at the domestic level to preventively apply this doctrine before the activation of the jurisdiction of the IACtHR, in fact, "International law increasingly designates domestic judges as 'natural judges' of International law to ensure the opportunity for the state to comply with its international obligations."[45]

The process of constitutionalization and internationalization of the law seems to indicate that the rules and standards applied by international tribunals of human rights are now valid and enforceable rules for the different States under the jurisdiction of these tribunals. This reasoning is supported by the fact that the primary nature of the human rights prescribed in the American Convention on Human Rights provides to the judicial interpreter of the Convention an important margin of interpretation. The fact that human rights are structured as principles, and considering their rooting at the constitutional level, has distanced the normative interpretation of human rights away from the classic and strict legalist approach, that leaves no room for judicial law-making. The

human-rights-treaties-constitutional-interpretation/.

44 André de Carvalho Ramos, "Control of Conventionality and the struggle to achieve a definitive interpretation of human rights: the Brazilian experience," *Revista IIDH*, no. 64 (2016): 11-32.

45 Yota Negishi, "The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control," *The European Journal of International Law* 28, no. 2 (2017): 458.

so-called dynamic interpretative approach has stated that the human rights charters should be viewed as flexible normative standards, that are to be adjusted by judicial decision to the changing social realities.[46] According to this interpretation, "tribunals exercise their supervisory authority by infusing assumed present-day perceptions of human rights tolerance into the treaty provision for the purpose of effective treaty protection."[47]

In this scenario, the degree of internationalization of the judicial control, in contrast with the tendency of rejecting international court precedents, depends on the degree of deference that the rulings of national judges show towards the decisions of international courts. In the case of Colombia, this tension is evident in the case of the interpretation of the political rights contained in article 23, where the authority of the Court and the binding nature of its decisions are subject to the most intense judicial discussion, creating the need of a final decision by the Inter-American Court of Human Rights.

It is clear that domestic courts have appropriated intensively the legal discourse of human rights, most judicial authorities in Latin America accept at least nominally the normative priority of these normative principles, and the block of constitutionality is a widely accepted rule of integration. However, the difficulty for drawing the limits of the full extent of the American Convention of Human Rights in Colombia appears to be the question of the binding nature of the precedents of the IACtHR, which is currently subject to the most intense judicial debate.

In the case of Colombia, the discussion over the binding nature of the decisions of the IACtHR can be observed in the opposite jurisprudential positions of the State Council and the Constitutional Court. On the one hand, and following the example of the Supreme Court of Justice of Mexico,[48] the

[46] See: William Eskridge Jr, "*Dynamic Statutory Interpretation*" (Paper, Faculty Scholarship Series, 1987), 1505, http://digitalcommons.law.yale.edu/fss_papers/1505.

[47] Research Group on Internationalization of Law, "International tribunals: legalization and constitutionalization – implications for national constitutional structures" (Norwegian Research Council, University of Oslo, March 06), https://www.jus.uio.no/english/research/areas/intrel/projects/international-tribunals/documents/ISPprojectdescription_rev.pdf.

[48] On the relationship between the Supreme Court of Mexico and the doctrine of the Control of Conventionality see: *El Control de convencionalidad y las Cortes nacionales: La perspectiva de los jueces mexicanos* [The Control of Conventionality and the National Courts: The perspective of the Mexican judges], ed. Paula M. García Villegas

State Council has adopted a *receptive position* towards international human rights law, in which this judicial authority fully acknowledges the binding nature of the precedents of the IACtHR.[49] On the other hand, adopting the *restrictive approach*, th`e Constitutional Court of Colombia, in an awkwardly similar position to that of the Supreme Court of Venezuela,[50] has resisted the binding power of the decisions of the IACtHR, and "cut the rope" that "tied" the Constitutional Court with the precedents of this international tribunal.

The legal discussion opened in Colombia around the implications of the right to be elected stipulated by article 23 of the Convention, in the context of domestic law, exposes the tensions that can arise between the positions of the courts in the context of internationalized rights. The legal debates opened around the destitution of the Mayor of Bogota, and the latter decisions taken around the reach of article 23, are prove of the tensions that challenge judicial stability, and call out for a jurisprudential solution that assesses how these cases should be resolved from the perspective of the internationalization of the law.

V. THE JUDGMENTS ON THE CONVENTIONALITY OF THE DISCIPLINARY FUNCTIONS OF THE GENERAL PROSECUTOR OFFICE IN COLOMBIA

The former Guerrilla member, Gustavo Petro Urrego, served as mayor of Colombia's capital city for over two years, before his political rights were restricted and was removed from the office by a disciplinary sanction initiated by Colombia's General Prosecutor, Alejandro Ordonez; in a decision that was later deemed unlawful and widely considered as an act of political persecution.[51]

(Mexico: Ed Porrua, 2014).

[49] Decision of November 2017, 1131-2014. 48, (Justice César Palomino Cortéz, State Council of Colombia).

[50] About the relationship of the Supreme Court of Justice of Venezuela with the decisions and precedents of the IACtHR, see: Decision No.1939, December 18, 2008, Constitutional Chamber of the Supreme Court of Justice of Venezuela; and Allan Brewer, *"La interrelacion entre los tribunales constitucionales de America Latina y la Corte Interamericana de Derechos Humanos, y la cuestion de la inejecutvabilidad de sus decisiones en Venezuela"* [The interdependence between the Constitutional Tribunals of Latin America and the Inter-American Court of Human Rights, and the question of the non-enforceability of its decisions in Venezuela] in Gaceta Constitucional. Análisis multidisciplanrio de la jurisprudencia del Tribunal Constitucional, Editorial Gaceta Juridica (Lima, 2009).

[51] The decision of the General Prosecutor against the mayor of Bogota was motivated on the basis that this disciplinary authority, understood that the plan of disposal of garbage proposed by Petro, had violated the principles of public contract law stipulated on article 48, and therefore had committed a grave fault to the disciplinary code. However, in later decision, the State Council declared the unlawfulness of such sanction,

Based on articles 227 and 228 of the Constitution and on the law 743 of 2002, the Office of the General Prosecutor sanctioned Petro with the so-called political death – a prohibition to hold public positions for a period of 15 years – and ordered his removal from the office. In consequence, the President of Colombia had to enforce this decision and remove the mayor, in order to designate a person to be in charge of the office while elections were held.

This controversial decision, that would be finally deemed as contrary to article 23 of the Inter-American Convention on Human Rights, opened a complex case that involved different lines of litigation and different jurisdictions (both national and international). This situation would ultimately lead to three different but not necessarily mutually exclusive judicial interpretations of the international law, that would show the degree of pluralization of the sources in national fundamental rights litigation; as well as the crucial role that the American Convention of Human Rights has in relation to the definition of constitutional rights in Colombia.

There are various coexistent jurisdictions in Colombia and just like the Inter-American Court of Human Rights, they are aimed to protect human rights and to give normative priority to the Convention. However, these institutions are independent and distinctive courts, that cohabit with the Inter-American Court within the legal spectrum of the *Ius Commune Constitutionale Inter-Americanum,* therefore, they behave independently and seek their own means for protecting and interpreting the rights proscribed in the Convention. The legal actions taken by the former mayor of Bogota activated various jurisdictions for he filed: i) an action of nullity and re-establishment of rights to be decided by the State Council as head of the Contentious Administrative Jurisdiction and; ii) an application to the Inter-American System of Human Rights to be decided by the Inter-American Court of Human Rights.

After Petro turned to the Inter-American Commission of Human Rights (hereinafter IACHR) to review his case, the Commission had to tackle the

restituted Petro to his position and, later, in the frame of an investigation for irregularities in his appointment, removed from the General Prosecutor Alejandro Ordoñez from the office.

question of the conventionality of the sanctions held against him. Considering the risk that the penalties against Petro posed to the rights proscribed in the Convention, the Inter-American Commission of Human Rights enacted resolution 5 of 2014, with the order to concede the precautionary measures requested by Petro, and therefore ordered president Santos to "suspend immediately the effects of the decisions of January 13, 2014 and therefore keep in office Mr. Petro". The precautionary measure N.374-13 found that the matter of this disciplinary sanction "*prima facie* meets the requirements of seriousness, urgency and irreparable harm contained in article 25 of its rules of procedure" and decided that, to ensure the exercise of political rights of Mr. Gustavo Francisco Petro Urrego, he shall remain in his position while there is a definitive answer from the Commission on the individual petition P-1742-13.

Despite the importance and validity of the decisions of the IACHR, president Juan Manuel Santos failed to observe the precautionary measure ordered by this international institution and suspended the mayor. The precautionary measure ordered in favor of Petro, would then have to be complied by Colombia through a decision of the State Council.[52] This decision arrived in November 2017, when the State Council finally solved the matter in favor of the mayor. Nevertheless, after ordering the precautionary measure, the IACHR continued with the matter that had now reached the Inter-American Court.

The case of Petro made evident the tension between the capacity to remove democratically elected officials stipulated in Articles 227 and 278 of the constitution and the Article 23.2 of the American Convention that stipulates that the "law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph, only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings." The different cases and court decisions involved in determining the reach of this right have created in Colombia a situation that can be described as a clash between three important courts. As we will see, the matter of the disciplinary sanctions that the General Prosecutor activated

[52] Decision of November 2017, 1131-2014, 23, (Justice César Palomino Cortéz, State Council of Colombia).

against the mayor of Bogota – consisting of a restriction of his political rights – sets an example of the degree of indetermination as to what is required by international human rights law. The diverging opinions of two high courts and the eventual decision of an international court concerning the scope of the right to participate in government, has led to a situation in which a more constructive dialogue between court decisions is urgently needed.

Before we move on to analyze the consequences of these opposing judicial views – that occur within the frame of the so-called jurisprudential dialogue – we should first examine the jurisprudence of the Constitutional Court, the State Council and the Inter-American Court of Human Rights, concerning the right to participate in government as established in Article 23 of the Convention, which became the subject of the clash between the Constitutional Court and the State Council.

5.1. Interpretation of Article 23 by the Inter-American Court of Human Rights

With respect to the meaning and scope of Article 23 of the ACHR, the IACtHR has maintained in the cases Castañeda Gutman v. The United States of Mexico,[53] Yatama v. Nicaragua[54] and Lopez Mendoza v. Venezuela,[55] that the States have limited and conditioned competences when it comes to restrict political rights, more specifically, the right to participate in government positions. On this matter, the IACtHR has stated that democratically elected officials can only be deprived of their positions by a judicial authority following a criminal procedure, for instance, in the case of Lopez Mendoza v. Venezuela, the Court was clear to affirm that no administrative authority is authorized by the Convention to remove from office democratically elected officials, moreover, it affirmed that the State could only do such thing through the means of a decision produced by the competent judicial authority, in the course of a criminal procedure.

According to the Court, the political rights prescribed in Article 23 constitute "an end in itself and, a fundamental mean that democratic societies have to

53 IACtHR "Castañeda Gutman v. The United States of Mexico", Decision of the 6th of August 2008. Series C, No. 184.
54 IACtHR "Yatama v. Nicaragua", Decision of the 23rd of June, 2005, Series C, No. 127.
55 IACtHR "Leopoldo Lopez v Venezuela", Decision of the 1st of September, 2011, Series C, No. 233, p. 49.

ensure that other human rights enshrined in the Convention are guaranteed."[56] In that sense, they occupy a privileged position amongst the normative principles of this international instrument. Furthermore, the Court has stated that the restrictions of these rights should be reduced to the minimum, and that any limitation to Article 23 must be subject to the most rigorous judicial control. On this, the Court affirmed clearly that in order to limit this political rights it is mandatory the participation of a judicial authority and the occurrence of a crime like corruption.

5.2. Interpretation of Article 23 by the Colombian State Council

The State Council, a key actor in the field of human rights adjudication in Colombia, has shifted its understanding of the relationship between constitutional and international law, in order to become a tribunal that is actively involved in the enforcement of the American Convention on Human Rights. This court, through the application of the control of conventionality, has granted the normative superiority of Article 23, and concluded that the sanctions against the Mayor of Bogotá are against this international instrument.

As indicated by Juliana Sanchez Vallejo, the State Council has repeatedly applied the doctrine according to which all state authorities are unconditionally bound by the American Convention and by the rulings of the Inter-American Court of Human Rights. Since 2012, this court has handed down more than 40 decisions that refer to precedents of the Inter-American Court of Human Rights, while at the same time exercising the diffuse control of conventionality.[57] The SC has voluntarily assumed its role as a judge of the Convention and in this sense it has become a fundamental tool for the enforceability of this international instrument in domestic law.[58]

In this context, the SC was faced with the question of the compatibility of the sanctions emitted by the General Prosecutor with the law, the Constitution

[56] *Ibid*. Legal consideration No. 108.

[57] Juliana Sanchez Vallejo, "Entre la recepcion y la omission de una obligacion internacional: el control de convencionalidad en el Consejo de Estado [Between the reception and the omission of an international obligation: the control of conventionality in the State Council]," *Revista Academia & Derecho*, no 11,: 183-226. ISSN 2215-8944.

[58] Decision of November 2017, 1131-2014, (Justice César Palomino Cortéz, State Council of Colombia).

and the American Convention on Human Rights. The SC had to decide whether the norms that conceded to the General Prosecutor the faculty to remove from office democratically elected officials, for charges that did not relate to corruption, are compatible to the Convention or, whether in the contrary, the function that assists the General Prosecutor to apply these kind of sanctions is unlimited and fully compatible with the Convention.

For this case, based on the precedents of the decisions C-028 of 2006 and C-500 of 2014 of the Constitutional Court, the State Council stated that article 23 of the Convention could only be restricted in order to grant a more systematical interpretation of international law. The SC ruled that the prerogative of the General Prosecutor to remove from office publicly elected officials is restricted by international law to those cases where charges of corruption had been demonstrated. At the end, since the case of Petro did not relate to charges of corruption, the SC decided that the disciplinary sanction was not only illegal, but also unconstitutional and contrary to the American Convention on Human Rights.[59]

The SC declared to be acting as judge of the Convention, and exercised the control of conventionality that granted it enough power and legitimacy to set a precedent capable of normatively integrating international and domestic law. By acting on behalf of the American Convention on Human Rights, while at the same time referring to the block of constitutionality[60], the Council managed to bridge two different interpretations of the law in order to solve a controversial case.

5.3. Interpretation of Article 23 of the Convention by the Colombian Constitutional Court

Before we move on to analyze the value that the Constitutional Court assigned to the political rights contained in article 23 of the Convention, and its position in relation with the disciplinary sanctions, it is important to consider the vision of international law provided by the Constitutional Court;

[59] Decision of November 2017, 1131-2014, 38, (Justice César Palomino Cortéz, State Council of Colombia).
[60] *Ibid.*, 34.

this is essential for a better understanding of the growing amount of restrictive decisions that this court has produced in ignorance of international law. Despite the fact that the greater advances of the process of internationalization have come from the heart of the decisions of this court, its most recent rulings are restricting the role that these international instruments have in the protection of rights in the region. Numerous decisions of the Constitutional Court refer to the role that the American Convention on Human Rights has in the domestic realm, however, these decisions do not represent a stable jurisprudential line capable of staking out the degree of influence that the international law has in Colombian law.

In addition to this, in recent years the Constitutional Court has decided to demount its own precedents (rich in references to international law) by simply not using the available instruments for furthering the internationalization of the law, like the control of conventionality. In recent decisions, the Constitutional Court has adopted a position of negation, falsely affirming that the jurisprudence of the court has never recognized the binding nature of the decisions of the IACtHR, and therefore further restricted the process of internationalization of the law. However, the reality seems to indicate that in many occasions, paradigmatic decisions of the Constitutional Court have referred to the decisions of the Inter-American System of Human Rights and have used its authoritative arguments to fix specific standards for the protection of rights.[61]

Unfortunately, in relation to the application of article 23 in Colombia, the Court has adopted the restrictive approach and opted to resist the precedents of the Inter-American Court of Human Rights. For instance, in an early decision of 2006 the Court was challenged with the question of the compatibility of the disciplinary sanctions with the American Convention. In this case, the Court considered that, even though the Block of constitutionality establishes that the Constitution should be interpreted through the lens of the Convention, in

[61] The Court have applied the standards of rights fixed in the precedents of the IACtHR, in decisions, such as: Decision T-025 of 2004, T-653010 (Justice Manuel José Cepeda, Constitutional Court of Colombia); Decision T-576 of 2008, T-1247553, (Justice Humberto Sierra Porto, Constitutional Court of Colombia); Decision C-659 of 2016, D-11354, (Justice Aquiles Arrieta Gómez, Constitutional Court of Colombia); and Decision C-936 of 2016, D-813, (Justice Luis Ernesto Vargas Silva, Constitutional Court of Colombia).

the case of article 23, this should be done in a systemic way with the Inter-American Convention Against Corruption of 1996.[62] According to this decision, the ACHR and the Colombian Constitution do not oppose the establishment of sanctions to remove from office democratically elected officials, as long as these sanctions apply "exclusively" for the cases in which a crime against the public patrimony has been proven. According to the Court, the Convention does not oppose the establishment of these kind of disciplinary sanctions, as long as these "are aimed at combating the phenomenon of corruption, that harms severely the fulfillment of the economic, social and cultural rights stipulated in the San Salvador protocol."[63]

Years after, despite the new precedent set in the case of Lopez Mendoza v. Venezuela, the Constitutional Court further resisted the binding powers of the precedents of the IACtHR. The Court, in the decision SU-712 of 2013 established that the case of Venezuela differed much of the institutional regime of the Colombian Constitution[64] and that such precedent did not apply for the interpretation of the article 23. By this, the Court has chosen to ignore that the IACtHR had again ruled that the States "in order to be able to restrict the political rights contained in article 23, by means of a sanction, must do so through the means of the decision of a judge, in the context of a criminal procedure."[65]

Contrary to the position adopted by the decision SU-712 of 2013, it is clear that the case of Lopez Mendoza is relevant and illustrative for the Colombian case, because the sanction subject of study was produced by an administrative official (General Controller), in the context of and administrative procedure, and for faults that did not constitute any crime. From my perspective, and following the line of the dissenting opinions of justices Vargas and Calle[66],

[62] Decision C-028 of 2006, D-5768, Legal consideration no. 6.5 (Justice Humberto Antonio Sierra Porto, Constitutional Court of Colombia)

[63] *Ibid.*, legal consideration no. 6.4.

[64] Decision SU-712 of 2013, T3005221. Legal consideration no. 4 (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

[65] IACtHR "Lopez Mendoza v. Venezuela" Decision of the 1th of September 2011, Series C No. 233, 65.

[66] Decision SU-712 of 2013, T3005221, Dissenting opinions of Maria Victoria Calle Correa and Luis Ernesto Vargas Silva (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

the natural consequence of this affirmation is that the case of Venezuela is homogenous to the case of Colombia: both the General Prosecutor and the General Controller are administrative authorities that own the faculty to affect and restrict political rights. Unfortunately, the Court explicitly decided that a new decision of the Inter-American Court of Human Rights is not a sufficient reason to change its own precedents.[67]

On opposition to this regressive decision – that severely harms the process of internationalization and the possibility for courts to strengthen the judicial protection of the rights prescribed in the Convention – the dissenting opinions of Maria Victoria Calle and Luis Ernesto Vargas Silva sustained that the case of Venezuela is indeed comparable to the case of Colombia. According to these judges, the Court should not ignore the precedent of Lopez Mendoza and should have declared the unconformity of the controverted functions of the General Prosecutor with the American Convention on Human Rights.[68]

According to this view, the Constitutional Court, in the decisions SU-712/13[69] and C-101/2018,[70] should have correctly applied the case of Lopez Mendoza and granted the supremacy of the article 23 of the Convention. However, despite the importance and relevance of this precedent, the Constitutional Court decided to consciously omit the application of the full standard of protection established by these rulings, and decided to refer to this decision of the Inter-American Court in a way that does not serve justice; for instance, the Constitutional Court opted to falsely state that the decisions of the IACtHR assimilated the administrative procedure to the judicial procedure, and stated that in consequence, the Convention didn't seem to contradict this kind of sanctions[71]; something that the decisions of the IACtHR have never affirmed.

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[67] Decision C-111 of 2019, D-12604/D-12605, legal consideration no. 30, (Justice Carlos Bernal Pulido, Constitutional Court of Colombia).

[68] Decision SU-712 of 2013, T3005221, Dissenting opinions of Maria Victoria Calle Correa and Luis Ernesto Vargas Silva (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

[69] *Ibid*., legal consideration No 7.6.3.

[70] Decision C-101 of 2018, 12306, Legal consideration No. 4.6, (Justice Gloria Stella Ortiz Delgado, Constitutional Court of Colombia).

[71] Decision SU-712 of 2013 T3005221, Legal consideration No, 7.6.3, (Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

Finally, in the decision C-111 of 2019, the Court was asked again to apply the control of conventionality against the Disciplinary Code. In this context, the Constitutional Court, acting preventively ahead of an eventual decision by the Inter-American Court of Human Rights, further restricted article 23 and declared that the disciplinary sanctions of the General Prosecutor should remain intact, for they are perfectly compatible with the Constitution and the American Convention. This late decision of the Constitutional Court has wrongly declared the compatibility of the ACHR with the function to remove from office democratically elected officials that assist the General Prosecutor,[72] and has further restricted international law in the domestic realm. The Court seems to have misunderstood that the Inter-American Court of Human Rights allows for non-judicial authorities, that fulfill certain requirements, to restrict the rights prescribed in article 23. However, there are no precedents of the IACtHR to back this interpretation of article 8 and 25, and the reality is that the rule that creates these sanctions is far from meeting the standards of the IACtHR.

The Constitutional Court has falsely stated that the IACtHR somehow allows for a margin of interpretation when it comes to restricting the political rights contained in the ACHR[73] and, in that sense, has sustained that the administrative procedure can be as good as the judicial one.[74] However, the precedents of the IACtHR have clearly exposed the risk that the political motivation of the administrative decision can pose for democratic choice when the function is abused in the service of a sector of power. In the case of Venezuela, it has become clear that the exercise of this important function and responsibility can diverge into severe violations of the political rights of citizens, in particular the right to be elected stipulated in the Article 23 of the ACHR.

Moreover, the decision of the State Council was clear to indicate that the procedure of the General Prosecutor Office in Colombia does not meet the standard needed by international law. The State Council declared that the

[72] Decision C-111 of 2019, D-12604/D-12605, Legal consideration No. 26.3, (Justice Carlos Bernal Pulido, Constitutional Court of Colombia).

[73] *Ibid.*, Legal consideration No. 28.

[74] Decision C-111 of , D-12604/D-12605, Legal consideration no. 26.2.4, 2019 (Justice Carlos Bernal Pulido, Constitutional Court of Colombia).

General Prosecutor had abused the faculty to remove from office democratically elected officials, and highlighted the risk that this disproportionate faculties pose to democracy.[75] Unfortunately, the Court ignored the decisions of the SC and the IACtHR, and considered that the disciplinary procedure of the General Prosecutor Office meets all the international standards of due process.

For all of these reasons, the decision C-111 of 2019 of the Constitutional Court of Colombia constitutes a severe regression of the process of the internationalization of the law and a clear restriction of the tools available for human rights protection in this country. The Court has negated and restricted the role that the international human rights law has for the protection of human dignity in this South American Country, and has limit the judicial dialogue in Colombia. This decision contradicts the current jurisprudence of both the State Council and the Inter-American Court of Human Rights, on the matter of article 23 of the Convention and, in my point of view, has forced the Inter-American Court to declare this interpretation as contrary to the ACHR.

Given the context, it seems that the case of Colombia will be the next precedent in which the Inter-American Court of Human Rights will have to insist on the necessity to respect the guarantee of the political rights contained in article 23. Unfortunately, the judicial choices of the Constitutional Court have placed this tribunal in a position of rejection against the fulfillment of the rights contained in the ACHR; a position very similar to the one adopted by the Supreme Court of Justice of Venezuela, when it declared that the decisions of the IACtHR where not enforceable.[76]

This unfortunate interpretation of the international law could have been avoided if the court had only exercised a real judicial dialogue, and had honestly consulted its own precedents and those of the IACtHR. The tool of the advisory opinion, as Roa suggests, would have been a reasonable point of departure for such dialogue.[77] On the contrary, the decisions adopted by the

[75] Decision of November 2017, 1131-2014, (Justice César Palomino Cortéz, State Council of Colombia).
[76] Decision No.1939, 08-1572 (Constitutional Chamber, Supreme Court of Venezuela, December 2008).
[77] Jorge Ernesto Roa Roa, "La Aplicación Nacional de la Jurisprudencia de la Corte Interamericana sobre Derechos Políticos [The application of the precedentes of the Inter-American Court of Human Rights regarding political

Constitutional Court have plainly ignored the *pro homine* principle stipulated in article 29 of the ACHR, and have favored an interpretation that restricts the political rights of the Colombians. Instead of giving priority to the arguments related to the rights protected by international law, the Constitutional Court has decided that the sovereignty of its jurisdiction is superior to the realization of the rights contained in these international instruments.

Given the fact that the Constitutional Court has so far opted to openly resist the precedents of international law, the Inter-American Court of Human Rights will have to settle the dispute around the matter of the interpretation of article 23. It will have to grant the efficacy of its own decisions and declare that the regulation that allows the General Prosecutor to remove from office democratically elected officials continues to be unable to meet the standard of protection of the Court, and therefore should be deemed as a clear violation of the Convention.

The Inter-American Court needs to insist on the binding nature of its precedents for all the judicial authorities under its jurisdiction, and reaffirm its authority as authorized interpreter of the Convention. Hopefully, the Court will settle the dispute around the interpretation of Article 23 of the Convention through a constructive dialogue with the courts of Colombia, and by looking carefully to the decisions that have been taken within the scope of the Colombian domestic judiciary. If that is the case, the Inter-American Court will find that the Courts in Colombia, particularly the State Council, are still institutions capable to further the internationalization of the law and to construct the much needed dialogue between tribunals.

VI. INTERNATIONALIZATION OF JUDICIAL CONTROL V. JURSPRUDENTIAL REJECTION OF INTERNATIONAL LAW

As we have seen in the decisions that interpret the scope of article 23, despite the maturity of the internationalization process in Colombia, the discussion on

rights]", (Documentos de Trabajo, Departamento de Derecho Constitucional, Universidad Externado de Colombia), serie 37, 7.

the way in which international human rights law should be integrated with domestic law is a question that challenges the administration of justice, and a matter of the highest interest for the realization of the rights prescribed in the Constitution and the Convention. The relationship between the rulings of the Inter-American Court of Human Rights and the judges of the States under the jurisdiction of the American Convention is still a subject of discussion. In contrast to the Inter-American Court of Human Rights, that has a clear position on the legal value that its decisions have in relation to the application of the Convention, domestic judges oscillate between the model described by Quinche as: "model of rejection,"[78] and the model that recognizes the Convention as a general obligation that forces all judges to apply the precedents of the Court.

The two main Colombian courts for adjudication of fundamental rights cases have diverse and shifting precedents that relate to the matter of the legal value that the jurisprudence of the IACtHR has in domestic law. These decisions move between two extremes that can be described as opened or closed to international courts decisions. On the one hand, the Constitutional Court of Colombia has adopted the position of resisting the role of the jurisprudence of Inter-American Court of Human Rights, while, on the other hand, courts like the State Council have unconditionally attributed great value to that jurisprudence. In essence, these decisions can be classified according to the level of receptiveness shown towards international human rights. As we have seen, the tendency of rejection displayed by the Constitutional Court implies a diminution not only of the level of compliance of courts in Colombia with international human rights obligations, but a clear decrease in the protection of basic rights.

6.1. Control of Conventionality: a Dialogue or a Discussion?

As we have seen, the degree of openness that the State Council has shown towards the law of the Inter-American Human Rights System, contrasts

[78] On the so-called "model of rejection of the rules and standards of international law of human rights", see: Manuel Fernando Quinche Ramírez, *El control de convencionalidad* [The control of Conventionality] (Bogotá: Temis, 2014), 130, and Manuel Fernando Quinche Ramírez, *El precedente judicial y sus reglas* [The judicial precedent and its rules] (Bogotá: Doctrina y Ley, 2014), 101.

significantly with the approach taken by the Constitutional Court, that felt its constitutional competences threatened by the harmonic dialogue between the SC and the IACtHR. This newly created clash of jurisdictions, that will only be solved once the Inter-American Court of Human Rights produces a final decision, adds a chapter in the long and complicated relationship between the different Colombian high courts. However, despite the contradictory positions of these courts towards the role that international human rights law has to play in adjudicating fundamental rights' cases, the fact that the Constitutional Court has stated at all times to be granting the Convention, demonstrates that judicial dialogue, despite many possible diverse outcomes, was the chosen method by both high courts to relate with the decisions of the IACtHR.

The risk of contradictory positions in the administration of justice is outweighed by the potential benefits of the judicial dialogue between courts and the appropriation of the rules of International law by domestic judges. This contributes greatly to the process of internationalization, and enriches the legal scope of human rights with new active actors that are the key for making international human rights law effective. Despite the tension created by these contradictory decisions, at least nominally, the rulings of both the State Council and the Constitutional Court refer to international human rights law and seek to carry out a consistent interpretation of the law, that is respectful and coherent with international human rights treaties ratified by Colombia.

Regarding the right to participate in government protected by article 23 of the Convention, the decisions of the State Council demonstrate the active role that judges have begun to play in the daily life of international law. The precautionary measures of the 13th of May of 2014 – that provisionally suspended the controverted disciplinary sanction for finding it disproportionate – perfectly represent the connection between international courts' decision-making and the relevant role that national high courts have to play in its implementation. This ruling took the first step to make enforceable the precautionary measure ordered by the Inter-American Commission of Human Rights, while at the same time strengthened the rule of international law in Colombia.

Later, the decision of 15th November of 2017 of the State Council would apply to its full extent the control of conventionality doctrine to solve this matter. This decision studied the compatibility of Articles 227 and 278 of the Colombian Constitution – that give the General Prosecutor the competence to remove from the office democratically elected officials – with article 23.2 of the Convention, that establishes that States can regulate political participation and therefore the eventual removal of a democratically elected public servant, only on the basis of incompliance with the prescribed requirements to age, nationality, residence, language, education, civil and mental capacity, or the sentencing of a competent court in the due criminal proceedings.[79]

These State Council's decisions are good examples of the different ways in which domestic judges can relate to international law; the enforceability of International law through domestic judicial scenarios is fundamental for supporting the intrinsic value of the ACHR and the binding nature of International law of Human Rights. These rulings have found a way to conceal the normative priority of the Constitution and the legal value of the international human rights instruments. They do so by appropriating not only the use of the block of constitutionality shaped by the Constitutional Court, but also by exercising the diffuse control of conventionality, ordered by the Inter-American Court of Human Rights. The decisions of the SC are the clear representation of the expansion of the normative tools available to judges in their decisions, and of the growing relevance that the international human rights law has in relation to the domestic realm.

If we take into account that the SC applied the control of conventionality to interpret the functions of the General Prosecutor in the light of the jurisprudence of the Constitutional Court and the jurisprudence of the Inter-American Court of Human Rights, we can conclude that the way in which decision-making is done in the context of the process of internationalization differs greatly from those systems that are strictly State-driven. Moreover, the interpretation made by the State Council in the case of the political rights stipulated in Article

[79] See Decision of November 2017, 1131-2014, (Justice César Palomino Cortéz, State Council of Colombia).

23 granted normative preference to the law of the Inter-American System of Human Rights over domestic legal practices and precedents. By ruling that the law should be interpreted under the scope not only of the Constitution but also of the ACHR[80], the courts that have established and adopted the Control of Conventionality have caused a major shift in Colombia's legal tradition.

It is important to acknowledge the transcendental role that the process of internationalization of the law has in the protection of human rights in Colombia. The International Law of Human Rights has been a key tool for judges to expand constitutionalism and the protection of rights in this country. In this context, the regressions of the Constitutional Court of Colombia, on the matter of the binding power of the decisions of the Inter-American Court of Human Rights, severely harm the efficacy and effectiveness of international human rights law.

VII. CONCLUSION

The jurisprudential evolution of the relationship between Colombian constitutionalism and international human rights law, more specifically with the Inter-American System of Human Rights, stands out for: i) the appropriation of the normative contents of the Convention and the jurisprudence of the Inter-American Court of Human Rights by national high courts; ii) the deference shown to International law by national judiciaries through the use of doctrines such as the block of constitutionality, and the subsequent adoption of the control of conventionality, by Courts like the State Council; and iii) the highly internationalized nature of human rights, that transit freely between international, national and comparative law.

These three features of the relationship between the Colombian legal tradition and international law introduce us to a very different institutional horizon from the one prior to the internationalization process in Europe and America. The increasingly strong dynamic of normative interdependence between distinctive legal orders forces us to rethink judicial adjudication of human rights cases not

[80] *Ibid.*, 38.

only from the perspective of Constitutionalism but also from the perspective of international law.

The concurrent judicial precautionary measure granted almost simultaneously by both the Inter-American Commission of Human Rights and the State Council, in favor of the former mayor of Bogota, shows that national and international courts are coming in closer contact when it comes to the judicial protection of human rights. The common structure and identity of the rights proscribed in the Constitution and the Convention, and the application of international law by domestic judges bring together all the contents of human rights, both national and international, into one single frame of litigation.

Against this background, the block of constitutionality and the control of conventionality provide jurisprudential criteria for the application of international law by the judges of the countries under the jurisdiction of the American Convention, for they have assigned a specific legal status to each component of the Inter-American System. These precedents seem to indicate that national judges are also called to apply international law when it comes to the protection of rights contemplated in international instruments. This reality, is changing the way in which some judiciaries see themselves, for now they can also be identified as actors belonging to the wider scenario of the postnational law[81] and as grantors of the international rule of law; a new cosmopolitan way of decision-making.

The pluralist character of the modern Constitutions and the postnational structure of human rights have created a new normative scenario in which national judges are meant to solve the legal disputes related to human rights from the new argumentative sources of the judicial dialogue. High courts have a great tool in International law for expanding the reach of human rights, in a context where national judicial organs can no longer be acknowledged only as the enforcers of the fundamental rights granted in the Constitution, but

[81] Jürgen Habermas, "La Constelación y el futuro de la democracia" [The postnational constellation and the future of democracy] in *La constelación posnacional* [The postnational constellation] (Barcelona, Paidos, 2000), 95.

also as crucial means for the application, interpretation and enforcement of International law.

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