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El control de convencionalidad y su carácter vinculante en la Jurisdicción Contenciosa Administrativa Colombiana[1]

The control of conventionality and its binding nature in the Colombian Contentious Administrative Jurisdiction

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RESUMEN

Palabras clave:

Consejo de Estado, Control de convencionalidad, Corte Interamericana de Derechos Humanos, Jurisdicción Contenciosa Administrativa

El control de convencionalidad, es un término acogido recientemente y concebido como mecanismo de protección de los derechos humanos; por lo cual, la Corte Interamericana de Derechos Humanos lo ha ido conceptualizando, desarrollando y estableciendo parámetros de aplicación con sus decisiones partiendo de casos concretos. Por lo anterior, en esta investigación se realizará un análisis sobre el control de convencionalidad y su carácter vinculante en la Jurisdicción Contenciosa Administrativa Colombiana, teniendo en cuenta los pronunciamientos emitidos por la Corte Interamericana de Derechos Humanos, el Consejo de Estado y sus efectos en el ordenamiento jurídico de Colombia.

ABSTRACT

Keywords:

Council of State, Conventionality Control, Inter-American Court of Human Rights, Contentious-Administrative Jurisdiction

The control of conventionality is a term recently accepted and conceived as a mechanism for the protection of human rights; therefore, the Inter-American Court of Human Rights has been conceptualizing, developing and establishing application parameters with its decisions based on specific cases. Due to the above, in this investigation an analysis will be carried out on the control of conventionality and its binding nature in the Colombian Contentious Administrative Jurisdiction, taking into account the pronouncements issued by the Inter-American Court of Human Rights, the Council of State and its effects on the Colombian legal system.

1. Introduction

In the Americas, the notion of conventionality control is a guaranteeing term and instrument introduced and applied by the Inter-American Court of Human Rights and the American States. Since 2006, the pronouncements based on the application of the Control of Conventionality are much more reiterated in the jurisprudence issued by the Inter-American Court of Human Rights with the case of Almonacid Arellano et al. v. Chile; although for the first time, reference is made to such control in the case of Velásquez Rodríguez v. Honduras, judgment issued by the IACHR Court on July 29, 1988.

Its dogmatic development has been progressive within the States that are obliged to apply it, although it initially went unnoticed in the first years of the signing of the American Convention on Human Rights.

The control of conventionality and the control of constitutionality must be differentiated, based on the premise that the former is exercised against actions issued by judges and linked to the administration in search of respect for international treaties; in the latter, there must be internal concordance with the Constitution, as the supreme norm.

Through the enactment of Law 16 of 1972, Colombia approved the American Convention on Human Rights, obliging itself to respect the human rights of its inhabitants and being sanctioned by the Inter-American Court of Human Rights in case of violating them. The Political Constitution of 1991, in Article 93, establishes that the international instruments ratified by the Colombian State prevail in the internal order, called the Block of Constitutionality.

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Therefore, this investigation conducts a study on the application of the Principle of Conventionality specifically in the Contentious-Administrative Jurisdiction, based on jurisprudence and investigations on the subject.

This work is divided into three parts: The first part will review the pronouncements issued by the IACHR Court, against condemnations to States for specific cases in which the human rights of its inhabitants have been violated, leading to the development of the characteristics, principles, and implementation of the conventionality control. The application in some Member States will be reviewed, to finally examine the pronouncements and scope in the Contentious Administrative Jurisdiction, specifically those made by the Council of State.
Finally, it is intended to demonstrate that the Contentious Administrative Jurisdiction carries out a control of conventionality, a concept that has been introduced and developed in its decisions.

2. State of the Art

At the international level, multiple investigations have been developed to advance an important and significant mechanism. Mejía, J. et al (2016) in their book: "El Control de Convencionalidad en México, Centroamérica y Panamá" (Conventionality control in Mexico, Central America, and Panama), reveal the challenges from different spheres in its implementation in these countries. Starting from the practical reality of the theoretical contents enshrined both in the treaties and in international rulings.

Núñez Donald, C. (2015) in the book: "Control de convencionalidad: teoría y aplicación en Chile", defines the foundations of International Law, making a tour of the parameters in its application until reaching the effects produced in the Chilean internal environment.

This investigation reflects the pronouncements issued in the Courts of different orders based on certain criteria for the application, according to the principles that guide the interpretation. Thus, the materialization of conventionality control in Chile was concluded, finding erroneous interpretations that prevent compliance with the obligation of its application.
Cubides Cárdenas, J. et al (2016). In the book: "El Control de Convencionalidad (CCV): Fundamentación e implementación desde el Sistema Interamericano de Derechos Humanos", present the results of the investigation based on the first pronouncements of the Council of State on the principle of conventionality and its respective application. Thus, the exercise and development within this jurisdiction and the different problems in its implementation are made known.

At the regional level, Parada Figueroa, A. N. (2019) in his article: "Aplicación del control de Convencionalidad dentro del Estado Colombiano" starts with the concepts and theoretical background issued by the international bodies on this type of control, bringing to mention the different cases in which emphasis was placed on the obligation of the state's parties to comply with the commitments acquired in the protection of human rights.

3. Methodology

The results of this investigation are the product of a qualitative inductive methodology, in which the conclusions deduced are based on an analysis of the normative premises contained in the different pronouncements issued by international and national bodies such as the Inter-American Court of Human Rights and the Council of State.

The qualitative approach was based on the social reality of the country, under a critical analytical and documentary biographical investigation method, through induction as a form of reasoning and the possibility of building prepositions on a specific case, such as the reality of the application of conventionality control and the binding nature of international instruments in the Contentious-Administrative Jurisdiction.

To achieve the expected results, this document will be divided into three phases; in the first aim, the origin, basis, and background of the application of the principle of conventionality control in the Contentious Administrative Jurisdiction will be investigated, starting from the concept, following with the judgment issued by the Inter-American Court of Human Rights in which its application arises for the first time; The application of conventionality control in different countries will be compared, specifically in the Contentious Administrative Jurisdiction and finally, the jurisprudence issued by the Council of State about conventionality control and the cases in which it was applied will be analyzed.

3.1 Origin, basis, and background of the principle of conventionality control

3.1.1. Origin of conventionality control.

The control of conventionality is an international mechanism that obliges the State and all its public authorities to apply its norms if they are not contrary to the international obligations acquired; between national and international norms there must be a relationship of compatibility, allowing the protection of human rights recognized by the international community. In this way, there must be an articulation between internal decisions and treaties of the international community and the application of internal norms.

Some characteristics that represent it are a type of judicial control, abstract, concrete, concentrated, diffuse, hybrid, preventive, legal, international, subsequent, perimetral or framework, and definitive; according to the organ that executes it and the subject matter.

At the international level, this control is carried out by the IACHR Court, under the precepts of the signature by the American States of the American Convention on Human Rights, held on November 22, 1969, in San José, Costa Rica, the purpose of which is to:

"To consolidate on this continent, within the framework of democratic institutions, a system of personal freedom and

social justice based on respect for the essential rights of man". (Convención Americana sobre Derechos Humanos, 1976).

At the national level, it must be carried out within the framework of the competencies of all judges and justice administration bodies; in Colombia, the provisions of the Convention were approved through the enactment of Law 16 of 1972, making it mandatory in the Colombian legal system.

According to the above, the purpose of this control is to harmonize the domestic law of a country with the ratified treaties, allowing the citizens of the States Parties to turn to the international community to carry out an international process against violations or threats to the effective enjoyment of their rights when the State does not correctly protect them, resulting in an evident infringement of their rights.

In the Americas, the first pronouncement on conventionality control was made in the case of Velásquez Rodríguez v. Honduras, a judgment handed down by the Inter-American Court of Human Rights on July 29, 1988; in accordance with the provisions of Article 2, the duty to adopt provisions of domestic law, paragraph 169, reiterates the unlawfulness of the actions of the powers of the State aimed at violating human rights.

As can be seen, the IACHR Court established a precedent on the control of conventionality, recalling that the judgments of the internal organs of a State, and therefore the legislation on which they are based, must be compatible with the treaties.

The concept and the respective application of "conventionality control" was gradually emerging through the pronouncements of the international community; appreciating the need for the court to create a doctrine, very similar to what happens in national latitudes according to what is the Control of Constitutionality.

In this regard, the Inter-American Court of Human Rights has pronounced on the control of conventionality, as the Council of State has stated:

> Case of Suarez Rosero v. Ecuador, Judgment of November 12, 1997; Case of Castillo Petruzzi et al. v. Peru, Judgment of May 30, 1999; Case of Mirna Mack Chang v. Guatemala, Judgment of November 25, 2003 (Concurring reasoned opinion of Judge Sergio García Ramírez); Tibi v. Ecuador, Judgment of September 7, 2004; Case of The Last Temptation of Christ v. Chile, Judgment of February 5, 2005; Case of López Álvarez v. Honduras, Judgment of February 1, 2006. Ecuador, Judgment of September 7, 2004; Case of The Last Temptation of Christ v. Chile, Judgment of February 5, 2005; Case of López Álvarez v. Honduras, Judgment of February 1, 2006; Case of Almonacid Arellano et al. v. Chile, Judgment of September 26, 2006; Case of Dismissed Congressional Workers (Aguado Alfaro et al.) v. Peru, Judgment of November 24, 2006 (Reasoned opinion of Judge García Ramírez); Case of La Cantuta v. Peru, Judgment of November 29, 2006 (Reasoned opinion of Judge García Ramírez); Case of Boyce v. Barbados, Judgment of November 20, 2007; Case of Castañeda Gutman v. Mexico, Judgment of August 6, 2008; Case of Heliodoro Portugal v. Panama, Judgment of August 12, 2008. Barbados, Judgment of November 20, 2007; Case of Castañeda Gutman v. Mexico, Judgment of August 6, 2008; Case of Heliodoro Portugal v. Panama, Judgment of August 12, 2008; Case of Radilla Pacheco v. Mexico, Judgment of November 23, 2009; Case of Manuel Cepeda Vargas v. Colombia, Judgment of May 26, 2010; Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgment of August 24, 2010; Case of Fernández Ortega et al. v. Mexico, Judgment of August 30, 2010; Case of Rosendo Cantú et al. v. Mexico, Judgment of August 31, 2010; Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, Judgment of September 1, 2010; Case of Vélez Loor v. Panama, Judgment of November 23, 2010; Case of Gomes Lund et al. Panama, Judgment of November 23, 2010; Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil, Judgment of November 24, 2010; Case of Cabrera García and Montiel Flores v. Mexico, Judgment of November 26, 2010; Case of Gelman v. Uruguay, Judgment of February 24, 2011; Case of Chocrón Chocrón v. Venezuela, Judgment of July 1, 2011; Case of López Mendoza v. Venezuela, Judgment of September 1, 2011; Case of Fontevecchia and D'amico v. Argentina, Judgment of November 29, 2011; Case of Atala Riffo and girls v. Chile, Judgment of February 24, 2012 (Partially dissenting opinion of Judge Alberto Pérez Pérez Pérez); Case of Furlan and next of kin v. Argentina, Judgment of August 31, 2012; Case of the Rio Negro Massacre v. Guatemala, Judgment of September 4, 2012; Case of the El Mozote Massacre and nearby places v. El Salvador, Judgment of September 4, 2012. Argentina, Judgment of August 31, 2012; Case of the Rio Negro Massacre v. Guatemala, Judgment of September 4, 2012; Case of the Massacre of El Mozote and nearby places v. El Salvador, Judgment of October 25, 2012 (reasoned opinion of Judge Diego García Sayán); Case of Gudiel Álvarez (Diario Militar) v. Guatemala, Judgment of November 20, 2012; Case of the Santo Domingo Massacre v. Colombia, Judgment of November 30, 2012; Case of Mendoza et al. v. Argentina, Judgment of May 14, 2013; Case of García Cruz and Sánchez Silvestre v. Mexico, Judgment of November 26, 2013; Case of J v. Peru, Judgment of November 27, 2013; Case of Liakat Ali Alibux v. Suriname, Judgment of January 30, 2014; Case of Norín Catriman et al. v. Chile, Judgment of May 29, 2014. Suriname, the judgment of January 30, 2014; Case of Norín Catriman et al. v. Chile, the judgment of May 29, 2014; Case of the Dominican and Haitian Expelled Persons v. Dominican Republic, the judgment of August 28, 2014; Case of Rochac Hernández et al. v. El Salvador, the judgment of October 14, 2014. (Contentious-Administrative Chamber, Council of State, 2014, Judgment with file 73001-23-31-000-2003-01736-01 (35413)

3.2 Conventionality control and its application in different countries of the Americas.

The following is a brief review of the application of conventionality control in some countries of the Americas:

3.2.1 Chile.
The application of conventionality control by the Inter-American Court to Chile was used for the first time in 2006, explicitly in the case of Almonacid Arellano et al. v. Chile; this jurisprudence is a precedent in the region, clearly providing guidelines on which to carry out the control internally, and its decisions are enshrined as binding on the States.

In the case of "Atala Riffo and Girls vs. Chile, the State is examined and sanctioned for its responsibility for its failure to protect rights such as equality, and due process, among others, establishing that the judicial and administrative jurisdiction must intervene in the application of the control of conventionality.

In the Almonacid Arellano et al. v. Chile case, the Inter-American Court made approximations and specified its main elements, as can be seen in an exhaustive manner in numeral 124.

Initially, it is expressed specifically in terms of its application in the judicial jurisdiction, but it is progressively extended to other jurisdictions. This judgment, in paragraphs 123 to 125, insists that the violation of rights caused by the act or omission of a State generates international responsibility. Therefore, although national judges are obliged to base their decisions on the rule of law established in the domestic legal system, they must strive to comply with the provisions of international treaties. In this way, the obligations produced in the decisions issued must be fully complied with.

3.2.3 Costa Rica.
Article 48 of the 1949 Constitution, in accordance with Law 7128 of August 18, 1989, establishes the remedies of habeas corpus and amparo, providing that the purpose of the amparo remedy is "to preserve or repair the effective enjoyment of the human rights recognized in the Constitution and in international instruments".

This has had substantial consequences in administrative law, based on the premise that the pronouncements, declarations and conventions of the international community are part of the constitutional block of Costa Rica, which means that all jurisdictions within the framework of their functions must ensure respect for these and avoid an unavoidable annulment of the rules and acts and a respective sanction for the consequences resulting from the violation of human rights.

3.2.2 México.
The Inter-American Court of Human Rights condemned Mexico in several cases between 2004 and 2010, for violation of human rights; giving precedents to this country to take measures to protect and guarantee the effective enjoyment of the rights of its inhabitants.

Through the reform made to the Constitution in 2011, a turn was made regarding the recognition of human rights, giving powers to the Senate to ratify international treaties on this matter, calling the new constitutional era. In this order, the control of conventionality is considered in this State as an instrument that allows the creation of parameters for the promulgation and application of internal order norms, under the premise of union and concordance between both.

Article 1 of the Mexican Constitution recognizes the application of conventionality control; recognizing that all rights recognized in the Constitution and treaties must be protected.

3.2.4 Perú
The State of Peru has recognized that the Inter-American Court of Human Rights has contentious jurisdiction. It identifies the control of conventionality and relates it to the control of constitutionality applied in its system, considering that the contents of international treaties have the same level as the Constitution and that both the review of conventionality and constitutionality produce the same effects.

National judges are free to establish whether the norms are inconsistent with the instruments; in the Contentious Jurisdiction, on the other hand, they have the power to apply them. Article 205 of the 1993 Constitution establishes supranational jurisdiction and recognizes the power to resort to international jurisdiction once domestic jurisdiction has been exhausted.

The application of conventionality control has been gradually applied by the Constitutional Court and the Judiciary. Peru and La Cantuta vs. Peru (2006), among others, are precedents in compliance with sanctions imposed by the international community, Peru being sanctioned with the payment of direct reparations by action or omission is responsible for the crimes committed against it.

3.2.5 Colombia
The Colombian State has been sanctioned by the Inter-American Court of Human Rights in forty-two (42) cases with sentences. Considering the harshness of the armed conflict that has been going on for more than 50 years, the population has been affected, resulting in the constant violation of rights by different actors in the conflict, and therefore the State must assume the consequences.

The first Judgment was issued on January 21, 1994. Series C No. 17, Case of Caballero Delgado, and Santana v. Colombia (Preliminary Objections); which addresses the responsibility of the State for the violation of the rights recognized by the American Convention, enshrined in Article 1 (obligation to respect rights), Article 4 (right to life) and Article 7 (right to personal liberty) caused by the detention and subsequent disappearance of Isidro Caballero Delgado and María del Carmen Santana in 1989.

In this order, we can enunciate the cases with judgments issued by the Court against the Colombian State (Inter-American Court

of Human Rights, 2022):

1. IACHR Court. Case of Members and Militants of the Unión Patriótica v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455.
2. IACHR Court. Case of Movilla Galarcio et al. v. Colombia. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 452.
3. IACHR Court. Case of Bedoya Lima et al. v. Colombia. Merits, Reparations and Costs. Judgment of August 26, 2021. Series C No. 431.
4. IACHR Court. Case of Martínez Esquivia v. Colombia. Interpretation of the Judgment on Preliminary Objections, Merits and Reparations. Judgment of June 21, 2021. Series C No. 428.
5. IACHR Court. Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits and Reparations. Judgment of October 6, 2020. Series C No. 412.
6. IACHR Court. Case of Petro Urrego v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406.
7. IACHR Court. Case of Omeara Carrascal et al. Case of Omeara Carrascal et al. v. Colombia. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of October 14, 2019. Series C No. 389.
8. IACHR Court. Case of Omeara Carrascal et al. Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 21, 2018. Series C No. 368.
9. IACHR Court. Case of Vereda La Esperanza v. Colombia. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2018. Series C No. 367.
10. IACHR Court. Case of Carvajal Carvajal et al. v. Colombia. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of November 21, 2018. Series C No. 365.
11. IACHR Court. Case of Villamizar Durán et al. v. Colombia. Case of Villamizar Durán et al. v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2018. Series C No. 364.
12. IACHR Court. Case of Isaza Uribe et al. v. Colombia. Case of Isaza Uribe et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 20, 2018. Series C No. 363.
13. IACHR Court. Case of Carvajal Carvajal et al. v. Colombia. Case of Carvajal Carvajal et al. v. Colombia. Merits, Reparations and Costs. Judgment of March 13, 2018. Series C No. 352.
14. IACHR Court. Case of Yarce et al. v. Colombia. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2017. Series C No. 343.
15. IACHR Court. Case of Vereda La Esperanza v. Colombia. Case of Vereda La Esperanza v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341.
16. IACHR Court. Case of Yarce et al. Case of Yarce et al. v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2016. Series C No. 325.
17. IACHR Court. Case of Duque v. Colombia. Case of Duque v. Colombia. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2016. Series C No. 322
18. IACHR Court. Case of Duque v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310.
19. IACHR Court. Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 14, 2014. Series C No. 287.
20. IACHR Court. Case of the Displaced Afro-descendant Communities of the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270.
21. IACHR Court. Case of the Santo Domingo Massacre v. Colombia. Request for Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 19, 2013. Series C No. 263.
22. IACHR Court. Case of the Santo Domingo Massacre v. Colombia. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series C No. 259.
23. IACHR Court. Case of Vélez Restrepo and family members v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 3, 2012. Series C No. 248.
24. IACHR Court. Case of Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213.
25. IACHR Court. Case of Valle Jaramillo et al. v. Colombia. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of July 7, 2009. Series C No. 201.
26. IACHR Court. Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192.
27. IACHR Court. Case of Escué Zapata v. Colombia. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of May 5, 2008. Series C No. 178.
28. IACHR Court. Case of the La Rochela Massacre v. Colombia. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of January 28, 2008. Series C No. 175.
29. IACHR Court. Case of Escué Zapata v. Colombia. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165.
30. IACHR Court. Case of the La Rochela Massacre v. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163.
31. IACHR Court. Case of the Pueblo Bello Massacre v. Colombia. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 159.

32. IACHR Court. Case of the Ituango Massacres v. Colombia. Judgment of July 1, 2006. Series C No. 148.
33. IACHR Court. Case of the Pueblo Bello Massacre v. Colombia. Judgment of January 31, 2006. Series C No. 140.
34. IACHR Court. Case of the "Mapiripán Massacre" v. Colombia. Judgment of September 15, 2005. Series C No. 134.
35. IACHR Court. Case of Gutiérrez Soler v. Colombia. Judgment of September 12, 2005. Series C No. 132.
36. IACHR Court. Case of the "Mapiripán Massacre" v. Colombia. Preliminary Objections. Judgment of March 7, 2005. Series C No. 122.
37. IACHR Court. Case 19 Comerciantes v. Colombia. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109.
38. IACHR Court. Case of Las Palmeras v. Colombia. Reparations and Costs. Judgment of November 26, 2002. Series C No. 96.
39. IACHR Court. Case 19 Comerciantes v. Colombia. Preliminary Exception. Judgment of June 12, 2002. Series C No. 93.
40. IACHR Court. Case of Las Palmeras v. Colombia. Merits. Judgment of December 6, 2001. Series C No. 90.
41. IACHR Court. Case of Las Palmeras v. Colombia. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67.
42. IACHR Court. Case of Caballero Delgado and Santana v. Colombia. Reparations and Costs. Judgment of January 29, 1997. Series C No. 31.
43. IACHR Court. Case of Caballero Delgado and Santana v. Colombia. Merits. Judgment of December 8, 1995. Series C No. 22.
44. IACHR Court. Case of Caballero Delgado and Santana v. Colombia. Preliminary Objections. Judgment of January 21, 1994. Series C No. 17.

It should be noted that the following are currently in the process of being processed:

1. Arboleda Gómez v. Colombia Case
2. Guzmán Medina et al. v. Colombia Case
3. Tabares Toro v. Colombia
4. Case of U'wa Indigenous Peoples and their members v. Colombia
5. Case of Members of the José Alvear Restrepo Lawyers Collective Corporation (CAJAR) v. Colombia

3.3. Analysis of the jurisprudence issued by the Council of State with reference to the principle of conventionality.

The Council of State, through its decisions, has insisted on its role as a judge of conventionality, recalling that it must examine the possible existence of a miscarriage of justice in the rulings issued by all judicial bodies.

In the exercise of the application of the control of conventionality through jurisprudence and concepts, the Council of State has issued approximately one hundred (100) rulings, as evidenced in the judgments from 1992 to 2022.

In judgment NR: 2079986 08001-23-31-000-1992-08356-01 30620, the Council of State, for the first time decides based on the control of conventionality, for serious violations of human rights, expressing that the State must make reparations in compliance with the principle of integral reparation or restitution in integrum, as in the case of the practice of hysterectomy and death of an unborn baby in childbirth.

Regarding the liability of the State for non-pecuniary damages caused by violations or infringements of conventional rights, in a unification decision of September 27, 2013, file 19939 and August 28, 2014, file 05001-23-25-000-1999-00163-01 (32988), this body reiterated that the reparation measures must be correlative, timely, pertinent, and adequate to the damage generated. (Consejo de Estado, 2014)

In this order, in the judgment of April 28, (2021), C. P. Ramiro de Jesús Pazos Guerrero address 44001-23-31-000-2011-00080-01(55287), includes in the decision the fulfillment by the State of guarantees of non-repetition and satisfaction, as integral reparation.

The recognition of the "relevant affectation or violation of conventionally and constitutionally protected goods or rights" seeks the comprehensive reparation of the victim through the reestablishment of the exercise of his or her rights and the adoption of measures of guarantees of truth, justice, and reparation, as well as those recognized in international human rights law, related to: (i) restitution; (ii) compensation; (iii) rehabilitation; (iv) satisfaction; and, (v) adoption of guarantees of non-repetition, taking into account the relevance of the violated rights and the seriousness of their affectation in each particular factual situation" (Consejo de Estado, 2021)

Thus, whoever has been affected by the conviction by means of a final judgment will have the right to compensation for the damages caused, as established in Articles 10 and 63 of the American Convention on Human Rights (Pact of San José).

In an order dated May 6, 2021, with file number 11001-03-15-000-2021-01608-00, the decision resolves not to apply articles 23 and 45 of Law 2080 of 2021, which regulate the immediate control of legality of judgments with fiscal responsibility, considering them contrary to articles 8 and 25 of the American Convention on Human Rights and articles 29, 229 and 238 of the Political Constitution of Colombia. The foregoing, because of the violation of rights contrary to the postulates of guarantees and Judicial Protection, incorporated in the Colombian legal system by the due process in all kinds of judicial and administrative proceedings and access to justice, by preventing the effective challenge of the particular and concrete administrative act of fiscal responsibility.

The Council of State states that other instruments of international human rights law and even international humanitarian law must be applied.

2. Results

Initially, the pronouncements through the judgments of the IHL Court on the application of conventionality control appeared gradually, thus compiling parameters for its application.

In Colombia, this control has been extended to the pronouncements and decisions of the highest body of the Contentious Administrative Jurisdiction, the Council of State, explicitly in the review of judicial errors; the immediate control of legality has led to direct reparation for the action, omission, and administrative operations by the State and non-application of contrary norms and decisions. This is supported by the reiterated use of the control of conventionality as a legal tool in the judgments issued by this body from 1992 to 2022.

As it has been stated, the Control of Conventionality has been reflected in jurisprudence and doctrine, under the foundations established in the Political Constitution article 93, having the obligation to comply with the obligations acquired in the ratified International Treaties, specifically with the American Convention on Human Rights by the Pact of San José de Costa Rica the American Convention on Human Rights.

3. Conclusions

The control of conventionality is a mechanism of great importance within the States and all its organs must be committed and obliged to its application from their competencies and jurisdiction, although there is a tendency to think that it is only applicable to the Constitutional and Ordinary Jurisdiction.

The advantages of applying the control of conventionality in all jurisdictions of a State are that it allows the establishment of a legal order, and the guarantee of legal procedures embodied in decisions that lead to the achievement of the general interests of its inhabitants.

In this process of evolution, the scope of this control has been extended to the point that it is not only judges but all authorities who must apply it. When the Inter-American Court of Human Rights speaks of a Control of Conventionality, it is very careful to refer to the competencies of the authorities, in such a way that all of them must carry out a control of Conventionality, pretending to bind them all within the legal system.

In the Contentious Administrative Jurisdiction of our country, such application has been very recent and gradual, initially focusing only on cases related to violation of human rights in its different types of damages condemning the Colombian State by granting direct reparation to the victims; with its different pronouncements it has been more recurrent until applying it in all means of control of the administration, as evidenced in various pronouncements. It has committed itself to the application of the principle of conventionality, which reminds us that it is obliged to act as a judge of conventionality, seeking to guarantee the efficacy and effectiveness of international human rights and international humanitarian law in the internal sphere.

The control of conventionality in the pronouncements issued by the Council of State in articulation with the Inter-American Court of Human Rights has produced effects in the Colombian legal system, to the point of being used as a legal instrument of judicial activity against the manifestations of the administration, which forges the effective normative character of international treaties. The above, it is evident that when the rights recognized by the international community are violated, the State is condemned to compensate the victims, through direct relation, decisions that the Contentious Administrative Jurisdiction has implemented, in its different sentences and orders to compensate the victims or in applying contrary norms.

The Council of State, as the highest body of the Contentious-Administrative Jurisdiction, justifies its decisions regarding the declaration of liability of the Colombian State for damages caused to its inhabitants, based on compliance with the international community's call to act as a judge for the control of conventionality and at the same time to act as an inter-American judge internally.

In the Colombian context, this legal tool makes it possible to hold the State responsible for actions or omissions that result in crimes that violate human rights, in the face of actions by the authorities that are contrary to the domestic legal system closely related to international treaties, seeking truth, justice and reparation for the victims through administrative proceedings.

We can conclude that many pronouncements of the highest body of the Contentious Administrative Jurisdiction reiterate the application of conventionality control based on international instruments respecting the block of constitutionality, in search of a real protection of the rights of the Colombian population.

4. bibliography

Asamblea Nacional Constituyente. (1991). Constitución Política de Colombia de 1991. Gaceta Constitucional No. 116 de 20 de julio de 1991. http://www.secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991.html

Becerra Ramírez, J. et al. (2016). El control de convencionalidad en México, Centroamérica y Panamá. (1era. ed.). Casa San Ignacio. https://www.corteidh.or.cr/tablas/r34721.pdf

Cárdenas Poveda, Margarita, & Suárez Osma, Ingrid. (2020). EL CONSEJO DE ESTADO COLOMBIANO COMO JUEZ DE CONVENCIONALIDAD. Revista chilena de derecho, 47(2), 599-620. https://dx.doi.org/10.4067/S0718-34372020000200599

Congreso Constituyente. (1917). Constitución Política de los Estados Unidos Mexicanos de 1917. Diario Oficial de la Federación el 5 de febrero de 1917. https://docs.mexico.justia.com/federales/constitucion-politica-de-los-estados-unidos-mexicanos.pdf

Consejo de Estado. Sala de lo Contencioso Administrativo. (2014). Sentencia con expediente 73001-23-31-000-2003-01736-01 (35413) Consejero Ponente: Jaime Orlando Santofimio Gamboa. https://consejodeestado.gov.co/documentos/sentencias/73001233100020030173601.pdf

Consejo de Estado. Sala de lo Contencioso Administrativo

Sección Tercera (2014). Sentencia con expediente 76001233100019970325101 01 (20.507). Consejero ponente: Jaime Orlando Santofimio Gamboa. https://consejodeestado.gov.co/documentos/sentencias/76001233100019970325101.pdf

Consejo de Estado. Sala de lo Contencioso Administrativo Sección Tercera. (2016). Sentencia con expediente 52001-23-31-000-1998-00565-01 (34.791) Consejero Ponente: Jaime Orlando Santofimio Gamboa. https://consejodeestado.gov.co/documentos/sentencias/10-03-2016_52001233100019980056501.pdf

Consejo de Estado. Sala de lo Contencioso Administrativo Sección Tercera (2017). Sentencia con expediente 54001-23-31-000-2010-00370-01(53704)A. Consejero ponente: Jaime Orlando Santofimio Gamboa. https://www.consejodeestado.gov.co/documentos/boletines/PDF/54001-23-31-000-2010-00370-01(53704)A.pdf

Consejo de Estado. Sala de lo Contencioso Administrativo Sección Tercera. (2017). Sentencia con expediente 25000-23-41-000-2014-01449-01 (AG). Consejero ponente: Ramiro Pazos Guerrero. https://consejodeestado.gov.co/documentos/sentencias/07-04 2017_25000234100020140144901.pdf

Consejo de Estado. Sala de lo Contencioso Administrativo, Sección Tercera, Subsección B. (2021) sentencia con radicación 44001-23-31-000-2011- 00080-01(55287) Consejero ponente: Ramiro de Jesús Pazos Guerrero. https://www.consejodeestado.gov.co/documentos/boletines/243/44001-23-31-000-2011-00080-01.pdf

Corte Interamericana de Derechos Humanos. (2001) Caso "La Última Tentación de Cristo" (Olmedo Bustos y otros) Vs. Chile https://www.corteidh.or.cr/docs/casos/articulos/Seriec_73_esp.pdf

Corte Interamericana de Derechos Humanos. (2003) Caso Myrna Mack Chang Vs. Guatemala. https://www.corteidh.or.cr/docs/casos/articulos/seriec_101_esp.pdf

Corte Interamericana de Derechos Humanos. (2006) Caso Almonacid Arellano y otros Vs. Chile. https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_esp.pdf

Corte Interamericana de Derechos Humanos. (2010) Caso No. 220. Caso Cabrera García y Montiel Flores Vs. México https://www.corteidh.or.cr/docs/casos/articulos/seriec_220_esp.pdf

Corte Interamericana de Derechos Humanos. (2011) Serie C No. 221. Caso Gelman Vs. Uruguay. https://www.corteidh.or.cr/docs/casos/articulos/seriec_221_esp1.pdf

Corte Interamericana de Derechos Humanos. (2012) Serie C No. 239. Caso Atala Riffo y niñas Vs. Chile. https://corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf

Corte Interamericana de Derechos Humanos. (2017) Serie C No. 341. Caso Vereda La Esperanza Vs. Colombia. https://www.corteidh.or.cr/docs/casos/articulos/seriec_341_esp.pdf

Corte Interamericana de Derechos Humanos. (2022) https://www.corteidh.or.cr/casos_sentencias.cfm

Cubides Cárdenas, J. et al (2016). El Control de Convencionalidad (CCV): Fundamentación e implementación desde el Sistema Interamericano de Derechos Humanos (1era. ed.). Universidad Católica de Colombia. https://repository.ucatolica.edu.co/bitstream/10983/14400/4/control-de-convencionalidad.pdf

Jiménez Vanegas, J. S. (2015). El principio de convencionalidad de la corte interamericana de derechos humanos: un estudio sobre el carácter vinculante para la legislación nacional colombiana. Universidad Católica de Colombia. [Tesis de pregrado Universidad Católica de Colombia]. Repositorio Universidad Católica de Colombia. https://repository.ucatolica.edu.co/bitstream/10983/2860/4/EL%20PRINCIPIO%20DE%20CONVENCIONALIDAD%20%20DE%20LA%20CIDH.pdf

Hitters, J. C. (2015). Control de convencionalidad (adelantos y retrocesos). Estudios constitucionales, 13(1),123-162. https://dx.doi.org/10.4067/S0718-52002015000100005

Hitters, J. C. (2008) "¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos? control de constitucionalidad y convencionalidad". Revista Iberoamericana de Derecho Procesal Constitucional, (10), 131-156.

Hitters, J.C. (2013. Un avance en el control de convencionalidad. (El efecto "erga omnes" de las sentencias de la Corte Interamericana). Revista Estudios Constitucionales, 11 (2) 695 – 710 https://www.scielo.cl/pdf/estconst/v11n2/art18.pdf

Mac-Gregor, F.E. (2011). Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano, 9(2) 531 - 622. https://www.scielo.cl/pdf/estconst/v9n2/art14.pdf

Mejía, J. et al (2016). El control de convencionalidad en México, Centroamérica y Panamá (1era. ed.). Casa San Ignacio. http://www.corteidh.or.cr/tablas/r34721.pdf

Nash, C. (Ed.). (2015) Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N° 7: Control de Convencionalidad. Corte Interamericana de Derechos Humanos. https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7.pdf

Núñez Donald, C. (2015) Control de convencionalidad: teoría y aplicación en Chile. Cuadernos del tribunal constitucional (1era. ed.) Tribunal Constitucional. https://www2.tribunalconstitucional.cl/wp-content/uploads/2022/03/3072.pdf

Organización de los Estados Americanos. (1969) La Convención Americana sobre Derechos Humanos. https://www.oas.org/dil/esp/tratados_b32_convencion_americana_sobre_derechos_humanos.htm

Parada Figueroa, A. N. (2019). Aplicación del control de Convencionalidad dentro del Estado Colombiano. Universidad Libre de Colombia. [Tesis de pregrado Universidad Libre de Colombia]. Repositorio Institucional Universidad Libre de Colombia. https://repository.unilibre.edu.co/bitstream/handle/10901/17799/Aplicaci%C3%B3n%20del%20control%20de%20Convencionalidad%20dentro%20del%20Estado%20colombiano.pdf?sequence=2&isAllowed=y

Pérez, N. W & Zambrano S. L. (2016). El impacto del control

de convencionalidad en la jurisprudencia del Consejo de Estado colombiano en la reparación a víctimas de graves violaciones a derechos humanos. Eunomía. Revista en Cultura de la Legalidad (9), 161-177.

Quinche R. M. (2009). El control de convencionalidad y el sistema colombiano. Revista Iberoamericana de Derecho Procesal Constitucional (12), 163-190. http://www.corteidh.or.cr/tablas/r25586.pd