

## La inaplicación del fin constitucional de peligro para la comunidad en la medida de aseguramiento a la luz del Sistema Interamericano

*The Non-application of the Constitutional Purpose of Danger to the Community in Preventive Detention Measures in Light of the Inter-American System*

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### RESUMEN:

El control difuso ha sido establecido como una herramienta que permite a los Estados miembros de la Convención Americana sobre Derechos Humanos, concretar en todos los ámbitos, especialmente en el jurisdiccional, las obligaciones de respeto y garantía de los derechos humanos, mediante la verificación de la conformidad de las normas internas y las prácticas nacionales con esta (CADH) y la jurisprudencia de la Corte Interamericana; además como una contribución en el desarrollo de la dogmática, la concreción de las garantías hermenéuticas de estos derechos consagrados internacionalmente e integrados normativamente en el ámbito interno, para que los Estados partes cumplan efectivamente con las obligaciones adquiridas en esta materia. Finalmente, se precisa que el control de convencionalidad es una institución jurídica del derecho internacional de aplicación en nuestro ámbito interno, y a través de la teoría del apartamiento, los jueces pueden cumplir con los requisitos jurídicos para inaplicar el precedente que establece como fundamento de la medida de aseguramiento el peligro para la seguridad de la comunidad; y así hacer un análisis de esta teoría desde el punto de vista formal y práctico en el ejercicio jurisdiccional.

### Palabras clave:

Convencionalidad, Control, Detención, Peligro, Seguridad, Precedente, Apartamiento.

### ABSTRACT:

Diffuse control has been established as a tool that allows the member states of the American Convention on Human Rights to specify in all areas, especially in the jurisdictional area, the obligations to respect and guarantee human rights, through the verification of the conformity of internal regulations and national practices with this (CADH) and the jurisprudence of the Inter-American Court; also as a contribution to the development of dogmatics, the concretization of the hermeneutical guarantees of these rights consecrated internationally and normatively integrated into the domestic sphere, so that the States parties effectively comply with the obligations acquired in this matter. Finally, it is specified that conventionality control is a legal institution of international law applicable in our domestic sphere, and through the theory of separation, judges can comply with the legal requirements to disapply the precedent established as the basis of the measure. to ensure the danger to the safety of the community; and thus make an analysis of this theory from the formal and practical point of view in the jurisdictional exercise.

### Keywords:

Conventionality, control, detention, danger, security, previous, separation.

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## Introduction

The topic addressed in this article is closely connected to the obligations undertaken by the Colombian State as a State Party to the American Convention on Human Rights in addition to the resulting obligations entail the imperative to respect the rights and guarantees enshrined in the Convention and to ensure their effective exercise, in accordance with its provisions and the interpretation provided by the Inter-American Court of Human Rights, as its authorized body. This interpretation has been developed through the Court's jurisprudence and advisory opinions, particularly regarding the purposes deemed conventional for imposing preventive detention measures within the framework of criminal proceedings, which have also recognized the principle of conventionality control, as reflected in the ruling of Colombia's Supreme Court of Justice, Civil Chamber of Constitutional Review, in Judgment 6550 of 2018.

In this sense, this work establishes the position that, within the internal jurisdiction of our State, conventionality control is mandatory, and therefore, all judges, when resolving specific cases involving the potential limitation of a conventional right—such as personal freedom—must, as a first step, assess whether the domestic norms applicable to the case sub-judice are consistent with the rights and guarantees established in the Convention. Subsequently, they must ensure alignment with the interpretation rendered by the Inter-American Court of Human Rights regarding the right in question, as articulated in its jurisprudence.

In this regard, the objective of this research is to identify the criteria that judicial operators must consider and to design an applicable rule that serves as a tool to facilitate the analysis of each specific case. This is particularly relevant for supervisory judges who may find themselves involved in such normative conflicts.

## Methodology

This research is qualitative, documentary, and descriptive, focused on examining the potential integration of two institutions, shaped by the social and economic evolution of the country, into the Colombian legal system based on a proposition of a formula that preserves their intrinsic nature and the unity of the legal framework through critical analysis of sources and legal hermeneutics (Deobold, Van Dalen, and Meyers, 2006).

As part of the study, a comprehensive review was conducted of constitutional block parameters, constitutional provisions, laws, and regulations, especially, on jurisprudential sources from the Inter-American Court of Human Rights, Colombia's Constitutional Court, and the Criminal Procedure Code, among others. This enabled the identification of how such cases or similar situations have been addressed by the judicial system.

This resource involved a review of the background of existing norms, theories, and approaches to the application and departure from precedent, among other aspects. The primary interpretative method employed was grounded on exegetical and systematic techniques. The former was used to understand the validity and scope of the rules and their modifications, while the latter was applied to interconnect the conceptual categories

under discussion without producing inconsistencies or conflicts.

Additionally, sociological techniques were employed, enhancing the analysis by considering the historical context that has driven changes in interpretation and judicial decisions, which make up the standard to be followed by judicial operators.

Ultimately, national and international doctrine was examined to discern specific elements that would facilitate the creation of instruments to assist judicial operators in the non-application of the constitutional purpose of danger to the community in preventive detention measures.

## **Conventionality Control**

### **3.1. Nature and Characteristics of Conventionality Control**

The jurisprudence of the Inter-American Court of Human Rights, in its concept of “conventionality control,” represents a significant contribution to the development of human rights doctrine, ensuring that State Parties effectively fulfill the obligations acquired in the field of human rights. In many individual cases submitted to its jurisdiction, the Court found that these cases came under its competence because the internal justice systems of the States had failed and concluded that conventionality control is a tool that enables the realization of the hermeneutic guarantee of human rights, as internationally enshrined and normatively integrated within the domestic legal system.

In addition, it can be stated that today, conventionality control is a legal institution of international law that, first, is enabled when judges interpret international corpus juris norms integrated into the domestic order, and second, acts complementarily when the States fail to uphold the rights, freedoms, and guarantees established in international treaties and/or the interpretation provided by the Court through its jurisprudence or advisory opinions in nature. This mechanism is grounded in the integrated reading of Articles 1.1, 2, 29, and 33(b) of the American Convention on Human Rights (ACHR), when required.

Yet, the concept of conventionality control first emerged in the jurisprudence of the Inter-American Court of Human Rights in the case *Almonacid Arellano v. Chile* (Supreme Court, 2006), in which the Court addressed the claims of the family members of Mr. Almonacid Arellano, who requested the Court to rule on whether the Chilean State, by maintaining in force a decree that granted amnesty to individuals involved in criminal acts between 1973 and 1978—issued after Chile ratified the Convention—failed to adequately investigate the death of Mr. Almonacid Arellano, which occurred on September 17, 1973. The family argued that this situation constituted a violation of the obligations to respect and guarantee human rights under Articles 1(1) and 2 of ACHR and, in terms of its applicability, a breach of Articles 8 and 25 of the same Convention.

Thus, conventionality control imposes on the officials of the State Parties to the Convention, particularly judges, a set of conditions that must be verified by all internal authorities when applying or interpreting rights and guarantees integrated into the

domestic legal system. The purpose is to ensure that their interpretation and application are not contrary to the Convention or the human rights norms that are incorporated and complemented or even those stemming from the enactment of norms contrary to the ACHR or their interpretation, depending on the powers vested in each public authority.

### 3.2 The Binding Force of Conventionality Control in Treaty Law

The mandatory nature of States to carry out conventionality control stems from the principles of public international law. Consequently, the binding force of conventionality control derives directly from the Law of Treaties, as enshrined in the 1969 Vienna Convention, in which Article 26 establishes the principle of *Pacta Sunt Servanda*, which stipulates that “[e]very treaty in force is binding upon the parties to it and must be observed by them in good faith.” Moreover, regarding domestic law and treaty compliance, Article 27 further specifies that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

As for the ACHR explicitly imposes on State Parties the commitment to respect the rights and freedoms recognized therein and the obligation to guarantee the full exercise of these rights to every person “subject to their jurisdiction” (Article 1).

Along these lines, the binding power of conventionality control emerges from both treaty law and the obligations of respect and assurance assumed by the States that are signatories to the American Convention. Therefore, States are obligated to adhere to these commitments in both the international arena and their internal legal frameworks.

### 3.3 Dualism of Perspectives on Conventionality Control in Colombia

This control, as previously indicated, is not subject to discretionary application but is fully enforceable and mandatory for all state officials, who are required to perform conventionality control but more so, given that ACHR is part of the constitutional block in Colombia and consequently, its application and exercise cannot be left to the discretion of authorities. Moreover, this mechanism not only enables domestic authorities to acknowledge the international obligations undertaken by the State but also ensures that citizens are informed about the protection of their rights (Supreme Court of Justice, Civil Chamber of Constitutional Review, 2019).

There is a clear position expressed by the Colombian Supreme Court of Justice, which does not seem to be fully endorsed by the Constitutional Court. From its perspective:

[...] The decisions of the IACHR are of significant relevance, as they “bear direct implications for the interpretation of the meaning of a right enshrined in the American Convention.” Nevertheless, the application of the standards set forth by the IACHR in its jurisprudence demands “a systematic interpretation that is consistent with the reading derived from the Political Constitution [and from] [...] other treaties that similarly impose binding obligations on the State.” In conclusion, “the determination of the meaning of a right under the Convention, particularly when Colombia has accepted the contentious jurisdiction of this body, requires taking into account the pronouncements of its authorized interpreter; [however], this does not entail uncritically adopting such interpretations” (Constitutional Court, 2021, p.3).

It is worth recalling that in the case of *Petro Urrego v. Colombia* (IACHR, 2020), the Inter-American Court emphasized the interpretation made by the Colombian Council of State regarding conventionality control.

In conclusion, following the reasoning of the Inter-American Court, it can be affirmed that human rights must be observed and safeguarded through conventionality control, which extends to both national judicial operators and public policymakers, as they must ensure that international instruments are effective, applicable, and practical rather than be undermined or devalued “by the application of domestic norms or practices contrary to the object and purpose of the international instrument or the international standard for the protection of human rights” (IACHR, 2010).

The Constitutional purpose of danger to community safety as a foundation for preventive detention: legal rule in the Colombian domestic legal system

In the Colombian legal system, freedom is a constitutional right that is not absolute, as it may be limited or restricted [...] by a written order from a competent judicial authority, with the necessary legal formalities and for a clearly defined reason established by law (Political Constitution, Art. 28). Among the legal grounds for such restrictions, the punitive framework provides for the possibility of preventive deprivation of liberty during a criminal process through the imposition of a preventive detention measure, which can be carried out either in a detention facility or under house arrest, provided that one of the constitutional purposes or conditions outlined in Article 308 of Law 906 of 2004 (the Criminal Procedure Code, CPP) is met. These purposes include ensuring that the individual does not obstruct the due course of justice, evade appearance in the process, or fail to comply with a judgment. Notably, Article 308(2) specifically establishes that a precautionary measure may also be imposed when the accused poses a danger to the safety of society or the victim.

The aforementioned normative statement is rooted in a constitutional provision established in Article 250.1 of the Colombian Political Constitution, which mandates that the prosecuting body, in the course of its duties, must request the Supervisory Judge to adopt the necessary measures to ensure “the protection of the community, particularly the victims.”

In turn, this sub-rule is further reiterated in the Criminal Procedure Code through various provisions that affirm the right to freedom. Article 114.8 outlines the powers of the Public Prosecutor’s Office within the criminal process, explicitly reaffirming its authority to request the judge to adopt necessary measures to protect the community and victims. Article 296 establishes the objectives of restricting liberty, while Article 300.3 governs the exceptional detention by written and reasoned order of the Attorney General’s Office, under which the “danger to the safety of the community or victim” is a ground for detention, particularly if the accused, were not detained, could engage in further criminal conduct against them. Articles 310 and 311 further delineate the factors that the judge must evaluate to determine whether the accused poses “a future danger to the safety of the community” or the victim.

#### 4.1 The Requirement of Danger to Community Safety in the Context of Conventional

## Legal Development

The right to personal freedom and security is set forth in Article 7.1 of the ACHR as a general right. According to the IACHR, its subsequent paragraphs outline the guarantees that must be applied when this right is restricted.

Therefore, for preventive detention to comply with the provisions of the Convention, the IACHR has established a set of requirements that must be analyzed when imposing such a restriction on liberty. These include its “precautionary nature, exceptional character, limited duration, necessity, legality, adequacy, and proportionality, sufficient evidentiary basis, periodic review, and legitimate purpose” (Inter-American Court, 2014).

Nonetheless, the established requirements under the ACHR do not explicitly recognize the protection of community security and/or the victim as a valid foundation for preventive detention. Despite this, the IACHR has addressed the conventionality of such a justification for temporarily depriving an accused individual of their freedom on a preventive basis.

In examining the jurisprudence of the Colombian Constitutional Court from 2016, which remains applicable, it was observed that this legal standard was intended to “prevent the accused from continuing their criminal conduct.” However, the IACHR has consistently reaffirmed that “the detention of an accused individual cannot be justified by objectives of general or specific prevention inherent to punitive sanctions; rather, it must be strictly limited to legitimate purposes, such as ensuring that the accused does not obstruct the proceedings or evade justice.”

(Palacios, 2018); in other words, the objectives inherent to precautionary measures focus on ensuring the proper progression of the criminal process, rather than addressing the individual being subjected to it.

As previously noted, the justification of danger to the security of the community and the victim as a basis for preventive deprivation of freedom is, under the standards established by the IAHRs and the jurisprudence of the Inter-American Commission on Human Rights, inconsistent with the ACHR. This conclusion is drawn from a series of premises that are uncontested within the IAHRs and can be summarized as follows (Palacios, 2018): preventive detention may only be used to ensure the proper conduct of the criminal process. Accordingly, its “sole legitimate purposes are to prevent the accused from fleeing and to avoid obstruction of the investigation” (Palacios, 2018).

In opposition to the stance taken by the Colombian Constitutional Court, the IACHR has unequivocally and consistently articulated that the justification of “danger to the community” undermines “the precautionary and exceptional nature of preventive detention, consequently infringing upon the presumption of innocence and the freedom of the accused” (Cuervo, 2022). In this context, “danger to the community” is neither a legitimate nor a supplementary ground to secure an individual’s court appearance or prevent the obstruction of justice as these legitimate purposes are fundamentally “precautionary” regarding the procedural setting, rather than the enforcement of punishment. Asserting that “danger to the community” serves as a complementary

justification which effectively implies that, from the inception of the criminal process, a message is being conveyed to society that preventive detention is intended to prevent the commission of future crimes, which triggers the consequence of a violation of the right to be presumed innocent.

As observed, this requirement distorts the ultimate purpose of pretrial detention in alignment with the American Convention on Human Rights (ACHR), as it deviates from its primary objective of safeguarding the judicial process. By focusing on the accused and classifying an individual condition as dangerous, it not only disregards the presumption of innocence but also renders pretrial detention punitive in nature, thereby undermining the judicial guarantees enshrined in the ACHR.

Now, considering that the risk to the safety of the community and the victim is a purpose enshrined both in the Colombian Constitution and the Criminal Procedure Code, and has been declared constitutional through judicial review, how can there be true harmony in its interpretation and application when, according to the IACHR, such a purpose is inconsistent with the Convention? More importantly, how supervisory judges should make decisions on these cases, on one hand, the Political Constitution, the Criminal Procedure Code, and constitutional jurisprudence indicate and mandate that the danger to the community must be considered as one of the grounds for imposing preventive detention. On the other hand, the American Convention on Human Rights, its interpreter—the Inter-American Court of Human Rights—and the Inter-American Commission on Human Rights established that the risk to community safety diverges from the Convention and is not a legitimate purpose for imposing preventive detention.

To address this dilemmatic situation, it is essential to analyze the theory of divergence, given that this paper aims to offer practical guidance to judges and other parties involved in the criminal justice process, by equipping them to conduct a diffuse control of conventionality over norms deemed constitutional and therefore, fulfilling their obligation to ensure that our domestic legal framework complies with the standards established in the ACHR and the jurisprudence of the IACHR. Such compliance not only ensures the protection of rights and guarantees under the IACHR, but also upholds the international commitments that, as a State, we have undertaken. In addition, the ultimate aim is to direct our focus on the human being, who is the subject of the criminal process, whose rights are directly impacted by these limitations.

## **Theory of Deviation**

### **5.1. Nature of the Deviation Theory**

As a general rule, it has been established that Colombian constitutional jurisprudence is of imperative and mandatory compliance for judges (Constitutional Court, 2011), as the decisions of this ultimate authority ensure, among other things, respect for the principle of legal certainty. Consequently, its rulings are recognized as a “source of law” for authorities and private citizens, given that they provide binding interpretations of the provisions of the Constitution.

In this context, it has been determined which parts of the judgments are subject to

mandatory compliance. It has been clarified that not only the dispositive part is binding but also the reasoning that is decisive in reaching the decision or constitutes the ratio decidendi of the ruling. Under such circumstances, the ratio decidendi of constitutional jurisprudence serves as a source of law (Constitutional Court, 2015).

Consistent with the aforementioned, the Constitutional Court itself has recognized that not only its decisions but also those of the other high courts within the judicial branch hold the normative force of doctrine, which arises from the obligation of all judges to apply the law equally and to provide equitable treatment in the cases under their consideration.

Furthermore, the high courts of these jurisdictions bear the constitutional responsibility of ensuring jurisprudential unification. They operate under the principle of good faith, which should be understood as the trust placed in the conduct of authorities. Lastly, these decisions are understood, as previously noted, within the framework of the necessity to establish legal certainty for all citizens seeking the protection of their rights. In this context, individuals must have a reasonable expectation that judicial decisions will be issued in accordance with the principles of equality before the law and legitimate confidence in the authority rendering them (Constitutional Court, 2015). Additionally, such decisions must adhere to the principles of legality, *res judicata*, as well as the rationality and reasonableness that measures must embody (Constitutional Court, 2011).

Assuming the preceding is accurate, how can a trial judge implement diffuse conventionality control over the norm and sub-rule that form a constitutional precedent, in the context of fulfilling the objective of safeguarding the community and the victim, without their ruling being classified as malfeasance or, at the very least, a breach of the obligation to adhere to the Constitution and the law as stipulated by Article 230 of the Political Constitution?

To settle this, it is essential to recourse to the figure of deviation from judicial precedent by not applying the norm due to its incompatibility with international standards. This instrument effectively safeguards the right to liberty and protects the rights of the individual involved in criminal procedures.

On these matters, the highest constitutional jurisdiction body has also indicated that a judicial authority may depart from the applicable jurisprudence in a given case through a process of counter-argumentation. This approach does not undermine the principle of judicial independence but must meet one of the following criteria: (i) the lack of factual identity in the case, (ii) dissent on the interpretations of the norm as determined in the decision, or (iii) deviation from the legal rule constituting the jurisprudential line. The counter-argumentation procedure acknowledges the existence and binding nature of the precedent, offering a reasoned explanation for its inapplicability to the individual issue under examination. Constitutional Court, 2015.

## 5.2. Requirements for Departing from Vertical Precedent

Pursuant to the guarantee established in Article 228 of the Political Constitution, judges must adhere to two essential duties to legitimately depart from vertical precedent:

(i) to expressly reference the prior precedent, thereby satisfying the requirement of transparency, and (ii) to present a sufficiently reasoned justification for its abandonment or modification, enabling a departure in cases involving analogous factual circumstances. (Constitutional Court, 2022).

**This is explained by César Javier Valencia Caballero, who states:**

Accordingly, it is incumbent upon the judge departing from precedent to fulfill both general and specific requirements on the matter. The general requirements pertain to the principle of transparency, which entails identifying and explicitly recognizing the existence of the ratio decidendi established by the jurisprudence. The specific requirements, on the other hand, reflect the mandate of optimizing sufficiency, obligating the judge to present serious, compelling, and reasonable arguments that better explain why jurisprudential reasoning is not the most appropriate. It is emphasized that this does not involve proposing an alternative thesis, but rather justifying why the reasoning underlying the precedent is unreasonable or has become obsolete. (Valencia, 2020, p. 247)

**When applying the aforementioned sub-rules to the case at hand, the following was found:**

First, there is Article 250.1 of the Political Constitution, which imposes a duty on the Office of the Attorney General to request the judge responsible for procedural safeguards to adopt the necessary measures to ensure, among other things, the protection of the community, particularly the victims. This is not the only provision based on that premise, namely, utilizing community protection to enforce preventative detention as in the Criminal Procedure Code, articles 2, 114.8, 296, 300.3, 310, and 311 establish this as a legal rule applicable to the preventive restriction of the defendant's liberty.

Moreover, as previously noted, the Constitutional Court's ruling C-469 of 2016 declared constitutional the provisions set forth in numerals 2 through 7 and a phrase in numeral 1 of Article 310 of the Criminal Procedure Code. This provision is particularly relevant, as the Constitutional Court analyzed it and established as a sub-rule that the concept of danger to society is consistent with the Constitution and unquestionably aligned with the constitutional block. The Court determined, as the ratio decidendi of its decision, that this purpose is not incompatible with the ACHR.

It is important to note that a key point of the Court in this decision was the invocation of the principle of legislative autonomy in shaping the criminal legal framework. The Court underscored that essential methods in combating criminality are permissible, noting that legal and judicial reservations may affect individual liberty in some instances. This is due to the necessity of preventing court operators from arbitrarily imposing significant restrictions on personal preventative measures.

While the Court acknowledges that the legislator may impose exceptional restrictions on the personal liberty of the accused, it also emphasizes that, upon reviewing the challenged provisions, these are consistent not only with the Constitution but also with the bloc of constitutionality. This is due to the "merger of provisions on human rights that the bloc of constitutionality entails" requiring an interpretation that is both conciliatory and

harmonious. This approach expands the scope of rights protection and thus “preserves the idea of unity underlying this normative standard” (Constitutional Court, 2016).

Consequently, it is concluded that the contested regulations envision a range of circumstances; however, they erroneously align with perilous situations, thereby constraining the judicial officer’s discretion and imposing significant limitations as a means of restricting the application of the preventive measure.

Ultimately, the justification for asserting the constitutionality of the danger to the community as a rationale for the measure indicates that the interpretation of the right to liberty has varied among international bodies, culminating in the determination that this precautionary measure is the sole means to avert the obstruction of justice and guarantee the accused’s appearance; it reiterates that such premises are not a closed and exclusive criterion for the admission of other types of justifications, as the purpose under examination does not contradict the doctrine of the IACHR, since it cannot be read as intending to impose itself over other norms of equal normative hierarchy, nor can it be understood as inhibiting criminal policies that are aligned with local needs and conditions, as well as fundamental rights, particularly those formulated by the constituent assembly. (Constitutional Court, 2016)

Thus, in rulings that require interpretation and diffuse control, it has been stated that: “Although since 2016 the Constitutional Court has also set forth the reasons why the constitutional purpose of item 2 of Article 308 of the Code of Criminal Procedure, developed in Article 310 Ib., with respect to which the constitutionality analysis was carried out [ruling C 469] remains one of those that motivates the superior purpose of the preventive measure, it must be supported by other legitimate purposes for the admissibility of the preventive measure because, in dissenting from the Inter-American jurisprudence regarding the analysis of the imposition of the measure in specific cases, none of them should rely solely on danger, recidivism, the gravity of the offense, its social impact, and other personal circumstances of the conduct as the only guiding criterion for its application.” (Superior Council of the Judiciary, 2022, p.43)

Thus far, we can ascertain the presence of a constitutional and procedural norm that governs, within our internal legislation, the danger to community safety, alongside a constitutional sub-rule that has reviewed it, affirming its compliance with the Constitution and the constitutional framework.

## **Legitimate techniques for the “disobedience” of constitutional precedent in light of the danger posed by its application within the legal system.**

It is essential to first acknowledge that various methods and techniques are available for the application of constitutional precedent. While precedent is generally regarded as an auxiliary source of law within our traditional legal system, the Constitutional Court has established its binding nature in cases exhibiting factual and legal similarities (SU 354 of 2017). Furthermore, the Court has affirmed that a judge may deviate from precedent, provided that they offer a sufficient justification explaining why “the prior precedent

is not valid, correct, or sufficient to resolve a new case brought before the court,” and therefore, the judicial officer is not bound to its application (Ruling C-179 of 2016).

Thus, the power to depart from or “disobey” precedent constitutes a legitimate option in the decision-making process, particularly within a system that allows for case-by-case analysis, where even the smallest differential circumstance may require the case to be adjudicated *ex novo*.

As explicitly stated in Article 230 of the Constitution: “Judges, in their rulings, are solely subject to the authority of the law,” which is understood as the application of the legal norm, encompassing the rulings of the Inter-American Court at the same level as the Political Constitution.

Therefore, it becomes necessary to explain why this objective should be inapplicable within the domestic legal framework and why judges may employ this tool as an argumentative technique to deviate from precedent.

The jurisprudential line of the Constitutional Court, as outlined in Judgment T-446 of 2013, has established specific modalities for departing from judicial precedent (Valencia Caballero, 2022), which are as follows:

1) The previous ruling is inapplicable to the specific case due to the existence of new elements that necessitate a distinction; 2) The superior court, at the time, did not consider relevant normative elements that alter the admissibility of the precedent for the new case; 3) Subsequent doctrinal developments justify a different position; 4) The Constitutional Court or the Inter-American Court of Human Rights has issued a ruling contrary to the interpretation of the superior court; or 5) Subsequent normative changes make the precedent incompatible with the new legal framework. (Constitutional Court, 2013, pp. 29-30)

In this case, it is evident that the hypothesis underlying the departure from precedent in Judgment C-469 of 2016, and the provisions justifying the preventive measure based on the argument that the accused poses a danger to the safety of society or the victim, is that these are contrary to the ACHR and the rulings of the IACHR.

Thus, as grounded criteria for departing from precedent, the following have been identified:

- (i) The regulation of the right to personal freedom establishes that, although this right may be suspended during states of constitutional exception, it is nonetheless an integral part of the strict constitutional block. As such, it is safeguarded against undue interference by public authorities. Consequently, it is comprehensively regulated, and its limitation is explicitly confined to specific conditions, rendering it impervious to arbitrary restriction.
- (ii) There is no harmonious interpretation between the jurisprudential line established by the IACHR and the decision of the Colombian Constitutional Court. The latter deviated, without sufficient justification, from the conventional precedent by

equating the purposes of the measure involving deprivation of liberty with the broader set of measures that the Attorney General's Office may request from the supervisory judge, including non-custodial measures. In this regard, the interpretation is contradictory.

- (iii) In the constitutional review conducted by the Court, the pro homine principle was not applied to resolve the contradiction between the principles of the Inter-American System for the Protection of Human Rights and the domestic legal framework, particularly regarding the restriction of personal liberty.
- (iv) Recognizing the danger to community security as a purpose of preventive detention constitutes an expansion of the conventional parameters that limit the deprivation of personal liberty. Consequently, its acknowledgment within the framework of criminal proceedings amounts to an arbitrary measure that disregards the ACHR (Belalcázar Revelo, 2021).
- (v) The interpretation adopted by the Constitutional Court, rather than safeguarding the right to liberty, prematurely restricts its exercise by incorporating a purpose characteristic of the sentence imposed on a convicted individual.

## Conclusions

By adhering to the IAHRs, states subject themselves to a process of oversight and verification designed to fulfill the obligations set forth in the ACHR. This encompasses the notion of conventionality control, which constitutes part of the obligations assumed by members of the international community, which not only protects global norms but also limits any excessive interpretation of domestic legal requirements.

The binding force of the American Convention on Human Rights derives from treaty law, as established under the 1969 Vienna Convention, through the principle of *pacta sunt servanda*. Consequently, Colombia, as a State Party, is bound to comply with the ACHR, aligning both its domestic legal framework and decisions that restrict human rights with the conventional norm and the rulings issued by its authoritative interpreter.

Conventionality control, *inter alia*, is activated, first, when judges interpret the norms of the corpus juris of international human rights law that have been integrated into the domestic legal system; and second, complementarily, when states fail to recognize the rights, freedoms, and guarantees established by the Convention and/or the interpretation provided by its authoritative interpreter, whether through its jurisprudence or advisory opinions issued in the exercise of its consultative function.

The requirement of “danger to the community,” as enshrined in Colombian criminal procedural law and the Constitution, as a grounding for preventive detention, contradicts not only the ACHR but also the interpretation provided by its authoritative interpreter, the IACHR. This requirement relies on the personal characteristics of the alleged offender, thereby distorting the preventive purpose of the measure and transforming it into a punitive mechanism by setting judicial guarantees and rights aside, including the

presumption of innocence and the pro homine principle.

In adherence to the constitutional block, the judicial authority must, in analyzing its decisions, consider the principles, values, and rules of human rights, along with the interpretations established within the IAHRs. Therefore, it must adopt the conventional provisions that are most favorable to individuals.

Justifying a preventative detention action due to the potential threat the accused poses to the community or the victim effectively amounts to preemptively imposing a penalty, as this objective is intrinsic to criminal sanctions. This practice significantly compromises the presumption of innocence and diminishes the right to personal liberty, which is, as noted, subject to highly regulated constraints.

The inclusion of the potential threat the accused poses to the community, under a purportedly “harmonious” interpretation, as a rationale for preventative detention triggers a trend that promotes heightened incarceration as a solution to public insecurity.

The expansion of grounds for the application of preventive detention departs from its precautionary logic and instead it promotes considerations such as the seriousness of the act, the danger posed by the accused, and the anticipated penalty in the event of a conviction. These factors represent dangerous and punitive criteria.

The theory of deviation finds its feasibility through the diffuse control of conventionality, provided it is accompanied by sufficient or transparent reasoning concerning the norm deemed to be inconsistent with the Convention. It is, therefore, the responsibility of the criminal judge, when applying such control, to safeguard the rights of the accused by upholding the presumption of innocence, the principle of impartiality, due process, and other judicial guarantees.

## References

Castaño Lopez, Oscar Alejandro y Ríos Agudelo Jhon Fredy. Un análisis en torno a la aplicación del fin del peligro de la comunidad y el alcance de la presunción de inocencia en la sentencia C-469 de 2016. Nuevo Foro Penal. 2019

Código de procedimiento Penal Colombiano. Ley 906 de 2004. Agosto 31 de 2004.

Consejo Superior de la Judicatura. Juzgado Primero Penal del Circuito de Pasto. Juez: Oscar Fernando Vivas Bravo. Radicado 520016100000202000008. Sentencia de 22 de marzo de 2022.

Convención Americana sobre Derechos Humanos (Pacto de San José), en: <https://www.corteidh.or.cr/tablas/17229a.pdf>

Convención de Viena sobre el derecho de los tratados U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force January 27, 1980. Viena, 23 de mayo de 1969, en: [https://www.oas.org/36ag/espanol/doc\\_referencia/convencion\\_viena.pdf](https://www.oas.org/36ag/espanol/doc_referencia/convencion_viena.pdf)

- Corte Constitucional de Colombia. Sentencia C- 539 de 2011. M.P Luis Ernesto Vargas Silva . 06 de julio de 2011
- Corte Constitucional de Colombia. Sentencia T-446 de 2013. M.P Luis Ernesto Vargas Silva. 11 de julio de 2013
- Corte Constitucional de Colombia. Sentencia C- 269 de 2014. M.P. Mauricio González Cuervo. 2 de mayo de 2014.
- Corte Constitucional de Colombia. Sentencia C- 621 de 2015. M.P Jorge Ignacio Pretelt Chaljub. 30 de septiembre de 2015
- Corte Constitucional de Colombia. Sentencia C-179 de 2016. M.P. Luis Guillermo Guerrero Pérez. 13 de abril de 2016
- Corte Constitucional de Colombia. Sentencia C 181 -2016. M.P Gloria Stella Ortiz Delgado. 13 de abril de 2016
- Corte Constitucional de Colombia. Sentencia C 469 -2016. M.P Luis Ernesto Vargas Silva. 31 de agosto de 2016
- Corte Constitucional de Colombia. Sentencia SU 354 de 2017. M.P. Iván Humberto Escruce Mayolo. 25 de mayo de 2017
- Corte Constitucional de Colombia. Sentencia C-567 de 2019. M.P Alberto Rojas Ríos de 27 de noviembre de 2019
- Corte Constitucional de Colombia, sentencia C-142/21, M.P Alejandro Linares Cantillo. 25 de marzo de 2021
- Corte Constitucional de Colombia. Sentencia C-146 de 2021. M.P. Cristina Pardo Schlesinger. 20 de mayo de 2021.
- Corte Constitucional de Colombia. Sentencia T -017 de 2022. M.P. Cristina Pardo Schlesinger. 26 de enero de 2022.
- Corte Interamericana de Derechos Humanos, Análisis de la Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Integridad Personal y Privación de Libertad (Artículos 7 y 5 de la Convención Americana sobre Derechos Humanos), Corte Interamericana de Derechos Humanos. San José, C.R.: Corte IDH, 2010
- Corte Interamericana de Derechos Humanos, Caso Petro Urrego Vs Colombia, Excepciones Preliminares, Fondo Reparaciones y Costas, 8 de julio de 2020.
- Corte Interamericana de Derechos Humanos, Excepciones Preliminares, Fondo Reparaciones y Costas, 8 de julio de 2020

- Corte Interamericana de Derechos Humanos, Cuadernillo de jurisprudencia No. 7, control de convencionalidad. 2021, en [https://corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7\\_2021.pdf](https://corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7_2021.pdf)
- Corte IDH. Caso Yvon Neptune Vs. Haití. Fondo, Reparaciones y Costas. Sentencia de 6 de mayo de 2008. Serie C No. 180
- Corte IDH. Caso Torres Millacura y otros Vs. Argentina. Fondo, Reparaciones y Costas. Sentencia de 26 de agosto de 2011. Serie C No 229.
- Corte IDH, Caso Bulacio Vs. Argentina. Fondo, Reparaciones y Costas. Sentencia de 18 de septiembre de 2003
- Corte IDH. Caso Norín Catrimán y otros (Dirigentes, Miembros y Activista del Pueblo Indígena Mapuche) Vs. Chile. Fondo, Reparaciones y Costas. Sentencia de 29 de mayo de 2014. Serie C No. 27953
- Corte Suprema de Justicia. Sentencia STC 16102-2019. M.P Luis Armando Toloza. 28 de noviembre de 2019.
- Corte Suprema de Justicia, Sentencia STC 6550-2018 que cita la sentencia de la Corte IDH. Caso “Gudiél Álvarez y otros (“Diario Militar”) vs Guatemala”. Serie C No. 253. M.P. Luis Armando Tolosa Villabona. 20 de septiembre de 2018.
- Cuervo Cortés, Laura Fernanda. Peligro para la comunidad como requisito para la imposición de medidas de aseguramiento: conflicto entre la prelación de la normativa internacional con el orden jurídico interno. Universidad de Caldas. 2022
- Palacios Mosquera, Luis Bladimir. “Detención Preventiva y Control de Convencionalidad. El “peligro para la comunidad” desde la perspectiva del Sistema Interamericano de Derechos Humanos.”. Editorial Ibañez. 2018.
- Rojas Duque, John Alexander. El ejercicio de control de convencionalidad en materia detención preventiva basada en peligro para la comunidad. Universidad Militar Nueva Granada. 2016
- Trujillo Vallejo, Diana Marcela y Silva Arroyave Sergio Orlando. La detención preventiva en Colombia: Tensiones entre fines constitucionales y derechos fundamentales - Preventive Detention in Colombia: Tensions between Constitutional Purposes and Fundamental Rights, 2021. Estudios constitucionales vol.19 no.2 Santiago, versión en línea, 2021, en: [https://www.scielo.cl/scielo.php?pid=S0718-2002021000200325&script=sci\\_arttext](https://www.scielo.cl/scielo.php?pid=S0718-2002021000200325&script=sci_arttext)
- Valencia Caballero, Cesar Javier. El Control Judicial de los Hechos de la Acusación - Fundamento Convencional ¿Cómo Apartarse del Precedente Judicial que Impide el Control de la Acusación? Editorial Leyer. 2020.

Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 33: Excepciones Preliminares / Corte Interamericana de Derechos Humanos y Cooperación Internacional (GIZ). -- San José, C.R.: Corte IDH, 2021. <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo33.pdf>