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Kim Scheppele's Vision for Restoring Democracy - And Why We Must Accept the Challenge

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DISCUSSANT COMMENTARY ON THE TWENTY-FIFTH ANNUAL GROTIUS LECTURE

KIM SCHEPPELE'S VISION FOR RESTORING DEMOCRACY – AND WHY WE MUST ACCEPT THE CHALLENGE*

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I am honored to discuss Professor Kim Lane Scheppele's Grotius Lecture. I convey my gratitude to Gregory Shaffer, President of the American Society of International Law, and Padideh Ala'i, Director of the International Legal Studies Program of American University's Washington College of Law, for inviting me to comment on the lecture of an intellectual that I have admired since I first met her at a seminar on the hardest issues coming to the chambers of constitutional judges.

In her superb lecture, Professor Scheppele raised an immense challenge to international law and to all of us lawyers.[1] I further argue that we must take up the challenge and prepare to endure frequent setbacks. As Winston Churchill reminded us, "success consists of going from failure to failure without loss of enthusiasm."[2]

Professor Scheppele is aware of the vicissitudes in any transformative endeavor worth the struggle,[3] as was Hugo Grotius.[4] Both decided to confront intolerant arbitrary power, a salient feature of authoritarian governments.[5] Grotius defied a prince in Holland who

1. *See generally* Kim Lane Scheppele, *25th Annual Grotius Lecture: Restoring Democracy Through International Law*, 39 AM. U. INT'L L. REV. 585 (2024) [hereinafter *Restoring Democracy*] (challenging lawyers to use international law to defend and strengthen democracy and the rule of law).

2. WINSTON CHURCHILL, CHURCHILL BY HIMSELF: IN HIS OWN WORDS app. I (Richard M. Langworth ed., 2013).

3. *See generally Restoring Democracy*, *supra* note 1 (referring to tone of the Grotius Lecture speech).

4. *See generally* HUGO GROTIUS, HUGO GROTIUS ON THE LAW OF WAR AND PEACE: STUDENT EDITION (Stephen C. Neff ed., 2012) (referencing the tone of Grotius' body of work).

5. WILLIAM STANLEY MACBEAN KNIGHT, THE LIFE AND WORKS OF HUGO GROTIUS 150–64 (1925); RESEARCHGATE, Kim Lane Scheppele's Research While Affiliated with Princeton University and Other Places, https://www.researchgate.net/scientific-contributions/Kim-Lane-Scheppele-20434090 [hereinafter Kim Scheppele's Research].

sided with the strict Calvinists, the so-called Gomarists.[6] Professor Scheppele has an impeccable record in defense of pluralism, tolerance, and liberal democracy, notably in Hungary and Poland.[7]

The parallel goes beyond opposing arbitrary power. Both Grotius and Professor Scheppele believe in the transformative power of innovative legal arguments that may become the law in the future, just as Grotius, though at the time unsuccessful, advocated for freedom of the seas against the English.[8]

Will history also favor Professor Scheppele? I hope it does. And soon. It depends partly on us lawyers. Who would have imagined that in Latin America, international law would play a democratization role? Yet, it has. I would like to share the broad lines of this story in support of her vision.

Professor Scheppele rightly highlights the use of innovative economic sanctions in Europe by introducing conditionalities that tie to the basic principles of the rule of law and democracy.[9] Hopefully, the economic sanctions are successful there. However, in Latin America, they have not worked.[10] The paradigmatic examples are Cuba and Venezuela, each in two very different historical contexts.[11] Two common factors help explain their failure: (i) the political manipulation of economic sanctions at the internal level to stoke nationalism; and (ii) the help of a great external power that eases the

6. KNIGHT, *supra* note 5, at 150–64.

7. *See generally* Kim Scheppele's Research, *supra* note 5 (detailing her decades of contributions to academia in defense of the rule of law and democracy, recently focusing on Hungary and Poland).

8. RENÉE JEFFERY, HUGO GROTIUS IN INTERNATIONAL THOUGHT 6 (2006). He had also advocated for the freedom of the seas in previous disputes and had published a pamphlet on *mare liberum*.

9. *Restoring Democracy*, *supra* note 1, at 616 (explaining that economic benefits have now been tied to reducing corruption and adhering to the rulings of legitimate judicial authorities).

10. Chase Harrison, *Explainer: U.S. Sanctions in Latin America*, AMS. SOC'Y/COUNCIL AMS. (Mar. 17, 2022); Louis A. Pérez, Jr., *More Than Six Decades of Sanctions on Cuba*, N. AM. CONG. ON LAT. AM. (Oct. 24, 2022).

11. Pérez, Jr., *supra* note 10; Diana Roy, *Do U.S. Sanctions on Venezuela Work?*, COUNCIL ON FOR. RELS. (Nov. 4, 2022) (describing the roots of Cuban and Venezuelan sanctions in cold-war era thinking and modern antidemocratic and terrorist fears, respectively).

impact of sanctions and offers political and military support in case of geopolitical conflict.[12] Two other factors that can be included are the selective use of corruption of internal actors to elicit their support to the anti-democratic regime and the expulsion or imprisonment of political opponents.[13]

Apart from economic sanctions, the experience of Latin America has a lot to contribute. Thus, I will focus on the work of judges, especially from the Inter-American Court of Human Rights,[14] and on international human rights law.

How can international law contribute to democracy? Professor Scheppele proposes three ways: "to prevent [their] domestic institutions from falling victim to anti-democratic forces . . . to free damaged domestic institutions from autocratic capture once autocrats have locked in their power by law," and to "help democrats within backsliding countries to replace autocratic and abusive law with democracy-honoring law as a way of signaling respect for the rule of law."[15]

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12. Dursun Peksen & A. Cooper Drury, *Coercive or Corrosive: The Negative Impact of Economic Sanctions on Democracy*, 36 INT'L INTERACTIONS 240, 242–48 (2010); Moises Rendon & Claudia Fernandez, *The Fabulous Five: How Foreign Actors Prop up the Maduro Regime in Venezuela*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 19, 2020), https://www.csis.org/analysis/fabulous-five-how-foreign-actors-prop-maduro-regime-venezuela.

13. *See generally* Ted Piccone, *Latin America's Struggle with Democratic Backsliding*, BROOKINGS INST. (Feb. 26, 2019), (illustrating the selective use of internal actors to support anti-democratic regimes and expulsion or imprisonment of political opponents).

14. Agreement Between the U.N. and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala ("CICIG") (Dec. 12, 2016); *Fact Sheet: the CICIG's Legacy in Fighting Corruption in Guatemala*, WASH. OFF. LAT. AM. (Aug. 27, 2019), https://www.wola.org/analysis/cicigs-legacy-fighting-corruption-guatemala/. Other international organs have had a deep impact in restoring democracy in Latin America. The United Nations promoted an investigative commission to fight impunity for corruption, a threat to democracy in the region. The International Commission against Impunity in Guatemala (CICIG) was created on December 12, 2006, and dissolved on September 3, 2019. It was created through the agreement signed between the United Nations and the government of Guatemala, following consultation of the Constitutional Court in May 2007. It was subsequently approved by the Congress of the Republic of Guatemala on August 1, 2007.

15. *Restoring Democracy*, *supra* note 1.

The Latin American experience offers interesting examples of these functions of international law. The region where I come from is not an admirable example of democracy and respect for the rule of law.[16] Latin America has been fertile ground for dictatorships, populisms, guerrilla movements, criminal organizations, terrorist actors, and all kinds of corruption.[17] Furthermore, it is marked by structural problems of social exclusion, extreme inequality, weak domestic institutions, as well as hyper presidentialism and attacks on judicial independence.[18]

There lies its appeal. It is a region with great experience in something bad: in threats and attacks on democracy. The threats and attacks have been ongoing since the first wave of democratization in the 1980s.[19]

International human rights law has played a constructive role in Latin America in resolving the most serious structural problems.[20] The

16. *The Global State of Democracy 2019*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 116, 116–49 (Nov. 9, 2019) [hereinafter IDEA Report] (noting that while democracies are common in Latin America, the region as a whole has seen an erosion of democratic norms in recent years).

17. *See* Erica Frantz & Barbara Geddes, *The Legacy of Dictatorship for Democratic Parties in Latin America*, 8 J. POL. LAT. AM. 3, 4–10 (2016) (noting, "All Latin American countries have had at least some experience with dictatorial government since World War II"); Stephen D. Morris & Charles H. Blake, *Introduction: Political and Analytical Challenges of Corruption in Latin America*, *in* CORRUPTION AND DEMOCRACY IN LATIN AMERICA 1, 1–22 (2009) (describing the depth and persistence of corruption in Latin America, noting, "corruption stubbornly thrives in Latin America").

18. MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 2–5 (2017); Armin von Bogdandy et al., *Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*, *in* MPIL RESEARCH PAPER SERIES, at 1, 4–5, 7–15 (Max Planck Inst. for Compar. Pub. L. & Int'l L. No. 2016-21, 2016); IDEA Report, *supra* note 16, at 116–49.

19. HOWARD J. WIARDA, THE DEMOCRATIC REVOLUTION IN LATIN AMERICA: HISTORY, POLITICS, AND U.S. POLICY 75–85 (1990). But populism has continued, and abuses have threatened democracy in the region. Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in the Andes*, 20 DEMOCRATIZATION 107, 107–10 (2013); *see, e.g.*, David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 200–07 (2013) (providing examples of threats and attacks since the first wave of democratization).

20. Landau, *supra* note 19, at 247–55 (illustrating the positive correlation between the inclusion of a "democracy clause" in the OAS charter and the decline

experience in each country has been different with both progress and setbacks.[21] However, an overview offers a surprising picture.

In this discussion, I will first outline the distinctive characteristics of the Inter-American Court's approach towards democratization in Latin American that has prompted the Court's unanticipated role in the region. Second, I will review four areas in which the decisions of the Court have contributed to democratic restauration in Latin America. Third, I will highlight factors that have enhanced the Court's impact. Finally, I will endorse Professor Scheppele's invitation to us lawyers.

I will not dwell on the details of the legal arguments, but on elements of the context and on the impact of international law beyond the specific case. In my experience, paradoxically, giving weight to these extra-legal elements is essential to enhance the role of law and its ability to constructively influence the restoration of democracy. I distance myself from those who look at the political context and conclude that the law must stay out of extremely complex problems. But I also distance myself from those who consider that taking the context into account implies sacrificing legal principles. The great difficulty lies in finding the balance so that reading the context leads to enhancing the role of law.

I. THE COURT'S APPROACH

As I know that we, Latin Americans, tend to fall into the naïve belief that the solution to a problem is to adopt a new legal rule, I quote the opinion of Armin von Bogdandy, Director of the Max Planck Institute for Comparative Public Law and International Law, in Heidelberg, Germany. He has developed several research projects on transformative constitutionalism in Latin America,[22] a phenomenon

in Latin American coups following its adoption).

21. Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 651–53 (2000) (describing how international human rights law supported stronger and more effective responses to threats to Guatemalan democracy than to Argentinian democracy as an example of the diverse outcomes of these trends).

22. *Prof. Dr. Armin Von Bogdandy - Biographical Note*, MAX PLANCK INST. FOR COMPAR. PUB. L. & INT'L L. (July 26, 2023), https://www.mpil.de/en/pub/institute/personnel/institute-management/directors/bogdandy.cfm (detailing his varied

that started several years before the well-known case of South Africa[23] but had not been conceptualized as such in the region.[24]

> "On 18 July 1978 the American Convention on Human Rights entered into force. Forty years later, it has become the cornerstone of Latin American transformative constitutionalism. Worldwide, the Convention is perhaps the most important international instrument of this nature, which begs the questions of how such an extraordinary development became possible."[25]

The Convention became an important international instrument of transformative constitutionalism due to a mix of very diverse factors.[26] One of the factors is that the judicial interventions of the Inter-American Court have distinctive characteristics.

First, the judges of the Inter-American Court take context very seriously. The individual facts of the case are considered an expression of that context.[27] Second, the context is analyzed as a reflection of

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publications on both Transformative Constitutionalism in Latin America as well as the development of "constitutional common law" in the region).

23. *See generally* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 146–88 (1998) (illustrating transformative constitutionalism in South Africa).

24. The Colombian Constitution of 1991 was adopted as a transformative instrument and the Constitutional Court was created with the mandate to ensure that the Constitution did "bite" and "generate change," unlike the previous 1886 Constitution, which kept Colombia as a "blocked society." Because it was promoted by two governments with this purpose, the political word used to refer to the message of the coming upheaval was "el revolcón," a less glamorous term than transformative constitutionalism. *See generally* MANUEL JOSÉ CEPEDA ESPINOSA, LA CONSTITUCIÓN DE 1991: VIVIENTE Y TRANSFORMADORA (2022). The Brazilian Constitution of 1988 had elements of transformative constitutionalism. Before, the Mexican Constitution of 1917, still in force, aimed at radical transformation since it was adopted at a revolutionary moment at Querétaro. Rainer Grote, *The Mexican Constitution of 1917: An Early Example of Radical Transformative Constitutionalism*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 615, 615–44 (Armin von Bogdandy et al. eds., 2017).

25. Armin von Bogdandy, *The Transformative Mandate of the Inter-American System: Legality and Legitimacy of an Extraordinary Jurisgenerative Process*, *in* 2019-16 MPIL RESEARCH PAPER SERIES 1, 1 (2019).

26. *Id.* at 1–2 (describing the regional emergence of democratic institutions, domestic adherence to treaty obligations, and the role of the Inter-American Court as factors in the Convention's central role in Latin American legal evolution).

27. JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-

systemic failures.[28] Third, the remedies adopted by the Court seek an impact beyond the specific case[29] and may require legal and constitutional reforms.[30] Fourth, the Court seeks, in the words of Professor Scheppele, to maintain democracy restored and discourage anyone from succumbing to authoritarian temptations again.[31] This fourth characteristic was eloquently synthesized in the Argentine expression "*Nunca Más*" ("never again"), which was the name of the final report of the truth commission chaired by the writer Ernesto Sábato.[32]

II. IMPORTANT PRO-DEMOCRATIC INTERVENTIONS OF THE COURT

I will briefly refer to four areas in which the Inter-American Court

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AMERICAN COURT OF HUMAN RIGHTS 224–25 (2012).

28. Victor Abramovich, *De Las Violaciones Masivas a Los Patrones Estructurales: Nuevos Enfoques y Clásicas Tensiones En El Sistema Interamericano de Derechos Humanos*, 6 SUR INT'L J. HUM. RTS. 7, 7–39, 17 (2009).

29. *E.g.*, Radilla-Pacheco v. Mexico, Merits, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 329–34 (Nov. 23, 2009) (orders aimed at changing the manner in which prosecutors conduct investigations); González v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 541–43 (Nov. 16, 2009) (orders aimed at changing the way in which police officers are trained); Barbera v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 253 (Aug. 5, 2008) (orders aimed at changing the way courts hire and fire judges). *See also* González, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 512 (orders including requiring the state to instruct officials regarding the human rights of women, creating a database of the women who have disappeared in Ciudad de Juarez, and restructuring the military jurisdiction).

30. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 2 [hereinafter ACHR]. Article 2 of the American Convention on Human Rights states: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

31. *Restoring Democracy*, *supra* note 1.

32. NAT'L COMM'N ON DISAPPEARANCE OF PERSONS (CONADEP), INFORME NUNCA MÁS [Never Again Report] (Sept. 1984) (Arg.), http://www.derechos humanos.net/lesahumanidad/informes/argentina/informe-de-la-CONADEP-Nunca -mas-Indice.htm#C1.

has intervened to restore democracy: impunity of agents of authoritarianism, assault on judicial independence, restrictions to media freedom and barriers to competitive elections. I will conclude with a few reflections on the impact of its judgments.

A. AGAINST THE IMPUNITY OF AUTHORITARIANISM

As is well known, most Latin American countries have been governed for prolonged periods by military dictatorships.[33] During the transitions to democracy in the mid-1980s, laws were adopted in different countries to prevent dictators or members of military juntas from being tried and condemned.[34] The Inter-American Court has consistently held that these types of laws are contrary to the American Convention of Human Rights.[35] In 2001, this belief was made clear in the *Barrios Altos* judgment by the Inter-American Court.[36] The judgment prevented President Alberto Fujimori's Administration from implementing a new self-amnesty law in Peru.

How seriously has the Inter-American Court taken the "Never Again" admonition? Very seriously. In 2011, in *Gelman v. Uruguay*,[37] the Court declared an amnesty law contrary to the American Convention. The peculiarity in this case resides not in its authoritarian origin but in the opposite: the law had been endorsed in a referendum (in 1989 that aimed but failed to derogate the law) and a plebiscite (in 2009 that aimed but failed to approve a constitutional amendment that

33. *See generally* Gordon Richards, *The Rise and Decline of Military Authoritarianism in Latin America: The Role of Stabilization Policy*, 5 SAIS REV. 155, 155 (1985) (outlining governance by military dictatorships in Latin America).

34. Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 50 VA. J. INT'L L. 915, 922–25 (2009).

35. Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. & CONTEMP. PROBS. 197, 211–12 (1996) (noting rulings finding El Salvador's complete amnesty law, Argentina's impunity laws, and Uruguay's criminal amnesty law all violative of the American Conventions for failing to ensure human rights under Article 1(1)).

36. Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 41–44 (Mar. 14, 2001); La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 162–89 (Nov. 29, 2006).

37. Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 195–97 (Feb. 24, 2011); Roberto Gargarella, *Democracy and Rights in* Gelman v. Uruguay, 109 AM. J. INT'L L. UNBOUND 115, 115–16 (2015).

would have deprived retroactively the law of any effect).[38] The amnesty law had been endorsed in two 1988 rulings of the Supreme Court of Uruguay as an amnesty law after the transition to democracy,[39] but it was then unapplied in three cases.[40] The democratic pedigree of the law was unquestionable.[41] However, for the Court, never again meant never again.

The staunch defense of the principle that human rights violations by authoritarian governments cannot be forgiven fulfills a democratic function: it not only prevents key actors of dictatorships from remaining unpunished, but also sends a clear message to those who in the future ponder falling into authoritarian temptations.[42]

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38. Gargarella, *supra* note 37, at 117.

39. *Gelman*, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 146 (citing to Suprema Corte de Justicia [SCJ] [Supreme Court of Justice] May 2, 1988, Judgment No. 112/87 (Uru.); Suprema Corte de Justicia [SCJ] [Supreme Court of Justice] June 15, 1988, No. 224/1988 (Uru.)); Martín Risso Ferrand et al., *Cumplimiento de la sentencia* Gelman vs. Uruguay *de la Corte Interamericana de Derechos Humanos* [*Compliance with the* Gelman v. Uruguary *Judgment of the Inter-American Court of Human Rights*], 27 REVISTA DE DERECHO 1, 5 (2023).

40. The three cases had *inter partes* effects and were decided in 2009, 2010, and 2011. After the decision of the Inter-American Court, a ruling of the Supreme Court declared articles of the Law 18.831 of 2011 unconstitutional, but struck down with *inter partes* effects precisely those articles that declared the crimes perpetrated during the dictatorship as crimes against humanity (article 3) and not subject to the ordinary statute of limitations (article 2). Then, in a decision of May 10, 2022, the Supreme Court changed its position and applied international human rights instruments to allow the continuation of criminal procedures that have ended in sentences condemning those responsible of crimes during the dictatorship, notably forced disappearances. Risso Ferrand et al., *supra* note 39, at 19.

41. Armin von Bogdandy & Rene Urueña, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT'L L. 403, 434 (2020) (stating that the Expiry Law was adopted by a democratically elected Congress, thrice reviewed by a relatively independent Supreme Court, and twice subject to a free national referendum).

42. Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 337–42 (Nov. 23, 2009); Garcia v. Mexico, Preliminary Objections, Merits, Reparations, and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶¶ 194–201 (Nov. 26, 2010); Cantú v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 156–67 (Aug. 31, 2010) (demonstrating that the court ordered changes in distribution of competences between martial and civilian courts so that military crimes against civilians fall into the jurisdiction of the

Inter-American jurisprudence in this matter has had an impact beyond democratic transitions. It has been decisive in establishing the minimums that must be respected in peace processes, that is, in transitions from armed conflicts to national reconciliation. In Colombia, establishing minimums was crucial, as was the Rome Statute and the International Criminal Court. In a peace agreement signed in 2016 with the Fuerzas Armadas Revolucionarias de Colombia ("Revolutionary Armed Forced of Colombia" or "FARC"), which for the last half a century was the largest and most powerful guerrilla group in Colombia,[43] the parties established that serious crimes involving violations of international law could not be granted amnesty.[44] The heads of the guerrilla group agreed to create a transitional justice system that would try and sentence them for crimes against humanity and war crimes.[45] Said agreement on transitional justice begins by citing the concurring opinion in the decision of the Inter-American Court on the Massacres of El Mozote, in El Salvador. [46] In this ruling, amnesty for the crimes committed during the massacres was declared contrary to the American Convention, many years after the armed conflict had ended through a peace agreement.

Let us pause to appreciate what this agreement reflects about the impact of international law within transitions to peace: guerrilla leaders accept that international rules must be respected as a prior step to be able to rejoin civilian life and consequently agree not to receive

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civilian courts).

43. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom.-FARC, Nov. 24, 2016 [hereinafter Colom.-FARC Peace Treaty]; Mapping Militant Project, *Revolutionary Armed Forces of Colombia (FARC)*, STAN. CTR. FOR INT'L SEC. & COOP. (July 2019), https://cisac.fsi.stanford.edu/mappingmilitants/profiles/revolutionary-armed-forces-colombia-farc#textblock17686.

44. Colom.-FARC Peace Treaty, *supra* note 43, arts. 40–41.

45. L. 01/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], noviembre 13, 2017, Sentencia C-674 (Colom.) A Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) was later created by a constitutional amendment (Acto Legislativo 1 de 2017). The Constitutional Court upheld the amendment quoting extensively international norms Decision C-674 of 2017.

46. Colom.-FARC Peace Treaty, *supra* note 43, § 5.1.2, ¶ 1 (citing the concurrence in the El Mozote Massacre judgment issued by the IACHR); Masacres del Mozote v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012).

amnesty for international crimes. It is also significant that the same transitional justice applies to the military who face judicial proceedings related to war crimes and crimes against humanity. I can attest that this was not an imposition of the civilian government.[47] It was a conclusion that was reached after long hours of analysis with the high military command on the importance of taking seriously the jurisprudence on "Nunca Más," even if it was not strictly applicable. In Colombia, the soldiers acted under democratically elected governments and have accepted to be subject to civilian power since the late 1950s.

All the rules of implementation and development of the peace agreement have been judged by the Constitutional Court.[48] The judgments of the Inter-American Court, like the pronouncements of the International Criminal Court, were widely cited by the Constitutional Court.[49] This gives greater strength to transitional justice in Colombia because it has passed through a denser and stricter filter.[50] It is pertinent to emphasize that in October 2021, the prosecutor of the International Criminal Court decided to close the cases against Colombia due to the proper functioning of the transitional justice system, which has already charged former guerrilla chiefs and some military commanders of committing crimes against humanity and war crimes. [51]

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47. *See generally* Julie Turkewitz & Sofía Villamil, *Colombian General and 10 Others Admit to Crimes Against Humanity*, N.Y. TIMES (Apr. 27, 2022) (stating that according to the Colombian court officials, this was the first time that perpetrators have admitted to committing war crimes).

48. Each decision can be accessed the Constitutional Court's website. *Acuerdo de Paz Cases*, CORTE CONSTITUCIONAL DE COLOMBIA [CONSTITUTIONAL COURT OF COLOMBIA], https://www.corteconstitucional.gov.co/relatoria (search in search bar for "Acuerdo de Paz"; then follow link to the list of cases).

49. Corte Constitucional [C.C.] [Constitutional Court], enero 27, 2022, Sentencia SU020/22 (p. 5.5.178, 8.2.157) (Colom.); C.C., diciembre 7, 2017, Sentencia T-713/17 (p. 7.1, 7.6) (Colom.); C.C., noviembre 3, 2020, Sentencia T-469/20 (p. 164, n. 175) (Colom.); C.C., septiembre 26, 2018, Sentencia T-399/18 (p. 9) (Colom.); C.C., diciembre 11, 2019, Sentencia SU599/19 (p. 2.6, 2.11 (Colom.).

50. *See* Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice*, BROOKINGS INST. 14–15 (July 2019) (noting that the ICC prosecutor issued a series of warnings reminding the Colombian government to prosecute war crimes and other grave violations).

51. Press Release, ICC, ICC Prosecutor, Mr. Karim A. A. Khan QC, Concludes

The United Nations ("U.N.") Security Council has played a key role with respect to the Peace Agreement: it gave unanimous support to the agreement soon after it was signed.[52] Then, the U.N. sent a verification mission and received periodical reports concerning the implementation of the agreement.[53] The Council also approved that the U.N. would assume the responsibility of verifying on the ground compliance with the sanctions imposed by the Special Jurisdiction for Peace.[54] International law is gradually cementing peace without impunity in Colombia.

Professor Scheppele stresses that in our times autocrats are more subtle and strategic.[55] Gradually, they are suppressing judicial independence and media freedom, closing the political process, and changing electoral rules to perpetuate themselves in power.[56] This gradual detriment to a country's democracy is happening without affecting the appearance of liberty, as citizens can continue walking down the street enjoying an ice cream.[57]

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the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice (Oct. 28, 2021); *Caso 01* [*Case 1*], JURISDICCIÓN ESPECIAL PARA LA PAZ [SPECIAL JURISDICTION FOR PEACE] (July 27, 2023), https://www.jep.gov.co/macrocasos/caso01.html#container; *Caso 03* [*Case 3*], JURISDICCIÓN ESPECIAL PARA LA PAZ [SPECIAL JURISDICTION FOR PEACE] (Aug. 30, 2023), https://www.jep.gov.co/macrocasos/caso03.html.

52. *See*, *e.g.*, Press Release, Security Council, Security Council Press Statement on Colombia, U.N. Press Release SC/15361 (July 20, 2023) (emphasizing the importance of comprehensive implementation of the Final Peace Agreement in Colombia).

53. U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the United Nations Mission in Colombia*, ¶ 1, U.N. Doc. S/2016/729 (Aug. 18, 2016).

54. S.C. Res. 2574, ¶ 1 (May 11, 2021) (supporting the comprehensive implementation of the Final Peace Agreement in Colombia).

55. *See* Kim Lane Scheppele, *How Viktor Orbán Wins*, 33(3) J. DEMOCRACY 45, 46 (2022) [hereinafter *How Orbán Wins*] (discussing how autocrats like Orbán can use their parliamentary majorities to change the law, neutralize the opposition's adopted strategy, and rig elections legally).

56. Kim Lane Scheppele, *The Treaties Without a Guardian: The European Commission and the Rule of Law*, 29 COLUM. J. EUR. L. 93, 99–103 (2023).

57. *How Orbán Wins*, *supra* note 55, at 46 (describing how Viktor Orbán's regime utilizes subsidies and legal changes that normalize and obfuscate the erosion of democratic norms).

B. GUARANTYING JUDICIAL INDEPENDENCE

In Latin America, we have witnessed numerous attacks on judicial independence, but the Inter-American Court has intervened to try to stop them.[58] Professor Scheppele has rightly referred to the cases of Peru and Ecuador.[59] I limit myself to adding that in Peru the intervention of the Inter-American Court in 2001 led to the return of the three justices of the Constitutional Court who had been illegally expelled from their position for having dared to take decisions contrary to President Fujimori's plan for a third re-election.[60]

When President Fujimori attempted a third re-election, the Constitutional Court prevented him from doing so.[61] At the request of the bar association, the Peruvian Court declared inapplicable the so-called law of "authentic interpretation" of the Constitution, through which Congress considered that Fujimori's first term, between 1990 and 1995, should not be counted to apply the rule according to which only one re-election was admissible.[62] The three magistrates responsible for the decision were dismissed in a kind of impeachment.[63] The other four members of the Court were not dismissed because they did not participate in the decision after they had recused themselves for having taken a public position on the validity of the law.[64] The Inter-American Commission ordered their reinstatement,[65] but the government did not comply.[66] The Inter-

58. Coello v. Ecuador, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶ 104 (Aug. 23, 2013); Const. Tribunal v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268, ¶¶ 165, 188, 208 (Aug. 28, 2013).

59. Const. Ct. v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 165–88, 6 (Jan. 31, 2001); *Coello*, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶ 104.

60. *Const. Ct. v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 2, 42, 120, 130 (stating that the Interpretation Law was declared unconstitutional, therefore rendering President Fujimori unable to run for a third term).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Const. Ct. v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 10, 13 (Jan. 31, 2001).

66. *Id.*

American Court protected the independence of the Peruvian Constitutional Court and ordered the payment of compensation to the expelled justices and their reinstatement to the Constitutional Court.[67]

In Ecuador, after enormous political controversies and partial compliance with the judgments of the Inter-American Court, the evolution of the democratic process led to the formation of a new National Court of Justice and a new Constitutional Court.[68] In a referendum, the Ecuadorian people decided that a special commission should appoint new magistrates for a new stage of democracy.[69] Both Courts have preserved their independence after the referendum.

In other countries, the interventions of the Inter-American Court have not been sufficient to protect judicial independence.[70] In Venezuela, provisionally appointed judges were arbitrarily removed from office.[71] In 2011, the Court ordered their reinstatement and developed important principles to protect judicial independence.[72] However, the general deterioration of the situation in Venezuela has swept away judicial independence and democratic liberties.[73] In the case of Venezuela, the Inter-American Court, as well as other powerful actors, were unable to stop the erosion of democracy.[74] By

67. *Id.* ¶ 119 (stating that the reparation of the damage included full restitution which consists of reestablishing the previous situation, repairing the consequences of the violation, and paying compensatory damages).

68. Coello v. Ecuador, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶¶ 54–60 (Aug. 23, 2013) (stating that the new Constitution adopted in 1998 had provisions to guarantee judicial independence).

69. Daniela Salazar Marín, *The Transitory Letter for Judicial Renovation*, YALE L. SCH. GLOB. CONST. SEMINAR 2022, at V23–24 (stating that a new court was designated in February 2019 through a merits process that included a partial renovation of three judges every three years).

70. Gonzolo Candia, *Regional Human Rights Institutions Struggling Against Populism: The Case of Venezuela*, 20 GERMAN L.J. 141, 141, 152–53 (2019) (stating that the Inter-American Court of Human Rights has been unsuccessful in preventing human rights abuses in Venezuela's populist Chavista regime).

71. *Id.* at 152–53 (discussing the Inter-American Court of Human Rights' condemnation of Venezuela for its arbitrary removal of five Supreme Court judges).

72. Chocrón v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 227, ¶ 205 (July 1, 2011).

73. Candia, *supra* note 70, at 160.

74. *Id.* at 141, 153 (discussing that the IACHR was unable to deter the Chavista

this point, Venezuela could not continue being part of the American Convention on Human Rights.[75] In 2012, Venezuela denounced the Convention and withdrew from the jurisdiction of the Court.[76] It could not even keep up appearances.

C. PROTECTING FREEDOM OF THE PRESS AND THE MEDIA

The other indispensable check on power in a democracy is the free media. It has been attacked in Latin America and continues to be.[77] But the Inter-American Court made it clear early on that it would defend this pillar of democracy.[78] In *Advisory Opinion OC-05/85*, the Court held that journalists could not be subjected to a prior licensing process in any form. The advisory opinion has been applied in several countries.[79]

On several occasions, the Inter-American Court has held that contempt laws ("*leyes de desacato*") are contrary to freedom of the press and expression.[80] These laws, inherited from authoritarian times,

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regime from human rights abuses because the Supreme Court of Venezuela found IACHR's decisions unconstitutional and the judicial process slow).

75. Gabriel Ortiz, *Overcoming the Westphalian Notion of "Absolute Sovereignty": The Venezuelan Case with the Inter-American Convention of Human Rights*, 26 HUM. RTS. BRIEF 39, 39 (2022).

76. *Id.* at 39 (stating that because then President Hugo Chávez withdrew from the ACHR, no one could petition before the Inter-American Commission or the Inter-American Court (IACHR) to hold Venezuela accountable for human rights violations).

77. Natalie Southwick & Carlos Martínez de la Serna, *A Press Freedom Crisis Unfolds in Latin America*, COMM. TO PROTECT JOURNALISTS (Dec. 8, 2021) (stating that the number of journalists killed in relation to their work in Latin America has surpassed the number of those in jail at the time of CPJ's 2021 prison census).

78. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶¶ 38, 85 (Nov. 13, 1985) (stating that Article 13(2) of the ACHR specifies that any preventative measure beyond the scope of subparagraph 4 inevitably amounts to an infringement of the freedom of press as guaranteed by the convention).

79. *Id.* ¶¶ 38, 85 (stating that compulsory licensing of journalists is incompatible with Article 13 of the ACHR).

80. The special report of the Inter American Commission of Human Rights on contempt laws was paramount. *See* INTER-AM. COMM. ON HUM. RTS., REPORT ON THE COMPATIBILITY OF "DESACATO" LAWS WITH THE AMERICAN CONVENTION ON HUMAN RIGHTS, 1, 6–7 (1994) [hereinafter Desacato Report] (assessing the

penalized disrespect for public officials.[81] They were extensively interpreted by national authorities to censor criticism of officials in different branches of government.[82] National courts, notably Brazil's Superior Tribunal of Justice, have applied the American Convention to strike down contempt laws that restricted freedom of expression.[83]

Then, the Inter-American Court went further. It ruled against the use of criminal law to intimidate journalists or hide facts that citizens have the right to know.[84] In two cases involving Presidents of the Republic, Menem in Argentina and Correa in Ecuador, the Court gave more weight to freedom of the press than to the right supposedly affected by the disclosure of uncomfortable information or by the use of harsh words in a newspaper.[85]

In the Ecuador case, some nongovernmental organizations ("NGOs") argued that criminal law cannot be weaponized by public officials to prevent the disclosure of information on matters of public interest or silence democratic debate on such issues.[86] The Court took a step in that direction but emphasized anti-slapp measures.[87] Last year, the Court analyzed not the use, but the very existence and scope of the crime of defamation.[88] In November 2022, in *Baranoa Bray v. Chile*, it considered that defamation can never be applied to information or opinions on matters of public interest.[89] The Court held that "states must establish alternative mechanisms to criminal law so

individual's free speech rights in relation to state censorship).

81. *See id.* at 2 (providing background on the purpose of contempt laws).

82. *See id.*

83. *See generally* S.T.J.J., Recurso Especial No. 1.640.084, Relator: Ministro Ribeiro Dantas, 13.04.2021, Diário da Justiça Eletrônico [D.J.e], 16.04.2021 (Braz.).

84. Urrutia v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 446, ¶¶ 1, 177, 210 (Nov. 24, 2021).

85. *Id.*; Fontevecchia v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶¶ 2, 16, 137 (Nov. 29, 2011); *see* Manuel José Cepeda Espinosa & Dario Milo, *The Beginning of the End for Criminal Defamation in the Americas? The El Universo Case*, JUST SEC. (May 3, 2022) (explaining the effects of the El Universo Case in relation to jurisprudence on media freedom in the Americas).

86. *Urrutia*, Inter-Am. Ct. H.R. (ser. C) No. 446, ¶¶ 12, 84.

87. *Id.* ¶¶ 95–96.

88. Bray v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 481, ¶ 109 (Nov. 24, 2022).

89. *Id.*

that public officials can obtain ratification . . . whenever their good name and honor has been affected."[90]

In the Ecuador case, the High-Level Panel of Legal Experts of the Media Freedom Coalition of States filed an amicus curiae and welcomed the decision.[91] The holding in the *Baranoa Bray* case embraces fully the argument made by the Panel.[92]

In addition to presenting amicus curiae, the Panel has begun to perform Venice Commission-style functions by rendering opinions on bills related to freedom of the press at the request of the respective state,[93] as was the case recently in Zimbabwe.[94] The Panel has advised states on international law,[95] both in relation to existing framework for protection and addressing material gaps.[96] The Panel has issued four reports which have started to have an impact.[97] For example, the Panel issued a report on the creation of an emergency visa for journalists at risk – a recommendation that has now been taken up by numerous states, including Czech Republic, Germany, Canada, Latvia, Lithuania, Estonia, and Kosovo.[98] Nearly 1,500 emergency visas have

90. *Id.* ¶ 115.

91. *High Level Panel of Legal Experts on Media Freedom - Who We Are*, INT'L BAR ASS'N, https://www.ibanet.org/HRI-Secretariat/Who-we-are#Members.

92. Special thanks to the work of the High-Level Panel, established in 2019, to which I have the honor to be a part of along with Catherine Amirfar, former President of ASIL, and Can Yeginsu, current member of ASIL's Executive Council. Both are deputy chairs of the Panel, chaired by Baron David Neuberger, former President of the Supreme Court of the United Kingdom. It is composed by lawyers from all continents, some of them well-known to the ASIL Community: Professor Sarah Cleveland, Baroness Helena Kennedy, Professor Irwin Cotler, Judge Chile Eboe-Osuji, and Mrs. Amal Clooney, former deputy chair.

93. *See High Level Panel of Legal Experts on Media Freedom - Opinions to States on Legislation*, INT'L BAR ASS'N, https://www.ibanet.org/HRI-Secretariat/Opinions-to-States-on-Legislation (describing the function of the High-Level Panel of Legal Experts on Media Freedom).

94. *See id.* (providing Zimbabwean legislation reviewed by the Panel).

95. *See High Level Panel of Legal Experts on Media Freedom - Our Reports*, INT'L BAR ASS'N, https://www.ibanet.org/HRI-Secretariat/Reports#Advisory (describing the Panel's research on international human rights standards).

96. *See id.* (identifying the Panel's practice for bolstering legislation which fails to meet fundamental human rights standards).

97. *See id.* (identifying the Panel's four advisory reports).

98. *See* Rhodri Davies, *"They Gave me Freedom": Journalists on the Importance of Safe Refuge from MFC Countries*, MEDIA FREEDOM COAL. (June 26,

been granted to journalists and human rights activists between 2022 and 2023.[99]

As such, the Panel, alongside the Inter-American Court, have protected the freedom of the press and media in tandem, and thus furthering democratization within Latin America. The Inter-American Court has also handed down rulings that keep the political process open and competitive. It is a fourth way of restoring democracy.

D. KEEPING THE ELECTORAL PROCESS OPEN AND COMPETITIVE

Professor Scheppele alluded to presidential re-election without term limits—the most sensitive issue. In a 2021 advisory opinion, the Inter-American Court stated that "enabling presidential reelection without term limits is contrary to the principles of representative democracy."[100]

In addition to the perpetuation in power of the same government, there are other consequences that can limit electoral competition.[101]

Can a candidate independent of the traditional dominant parties compete in the presidential elections? Can a leader who has exercised opposition to the political system be disqualified from being a candidate by the imposition of a non-judicial sanction? The first question was addressed in *Gutman v. Mexico*,[102] and the second was addressed in *Lopez Mendoza v. Venezuela*,[103] but in neither of the two

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2023) (detailing the countries that have provided refuge for journalists as members of the Media Freedom Coalition).

99. *See id.* (referencing the Media Freedom Coalition's 2022 Activity Report).

100. Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System (Interpretation and Scope of Arts. 1, 23, 24, and 32 and 29 American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter), Advisory Opinion OC-28/21, Inter-Am. Ct. H.R. (ser. A) No. 28, ¶ 144 (June 7, 2021).

101. *See id.* (detailing further the necessary and fundamental elements of representative democracy).

102. *See* Gutman v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶¶ 81–82, 251 (Aug. 6, 2008) (assessing Gutman's right to run for the United Mexican States' presidential office in accordance with the American Convention on Human Rights).

103. *See* Mendoza v. Venezuela, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 233, ¶ 249 (Sept. 1, 2011) (declaring that Venezuela

respective countries did the two judgments of the Inter-American Court produce as profound of an impact as they eventually did in Colombia.[104]

In Colombia, both sentences were decisive for the triumph of the current president, Gustavo Petro. Since the enactment of the current constitution in 1991,[105] adopted by a popularly elected and very pluralistic Constituent Assembly,[106] the political system has opened up to such an extent that the two traditional political parties lost a significant amount of power. The two parties went from controlling ninety-two percent of the seats in the senate in 1990, to merely twenty-five percent in 2018.[107] However, Petro generated intense controversies not only for having been a member of a guerrilla group that signed peace in 1990,[108] but also for his political positions.[109] When he was mayor of Bogotá, a disciplinary sanction disqualified him from being a candidate in future popular election for fifteen years. The Inter-American Commission, first through a precautionary measure and then later through a final judgment in the Inter-American Court,[110] intervened to protect his right to be elected, invoking, inter

violated Mendoza's right to run for office under the American Convention on Human Rights).

104. *See* Cepeda Espinosa, *supra* note 24 (assessing Gustavo Petro's cases before the Inter-American Court of Human Rights and their impact on Colombian society).

105. *See id.* (identifying enacted legislation in Colombia).

106. *See* Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RSRV. J. INT'L L. 139, 145 (1992) (describing the 1991 Colombian Constitutional Assembly framework and objectives).

107. Juan Jaramillo & Beatriz Franco-Cuervo, *Colombia*, *in* 2 ELECTIONS IN THE AMERICAS: A DATA HANDBOOK 295, 295, 311, 331, 333 (Dieter Nohlen ed., 2005); Election for Colombian Senate 2018 Results, INT'L FOUND. FOR ELECTORAL SYS. (Aug. 8, 2023) [hereinafter IFES].

108. *See* Oliver Stuenkel, *The Greatest Risk Facing Colombia and Its New Leftist President*, CARNEGIE ENDOW. FOR INT'L PEACE (Aug. 11, 2022) (commenting on Gustavo Petro Urrego's military history and political affiliation).

109. *See id.* (highlighting Gustavo Petro's political stance on military operations).

110. *See* Inter-Am. Ct. H.R., Res. 5/2014, *Matter Gustavo Petro Urrego concerning Colombia*, Precautionary Measures No. 374-13, at ¶¶ 3, 4D, 14, 20 (Mar. 18, 2014) (considering the risk to Gustavo Petro Urrego's political rights); Urrego v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 406, ¶¶ 95, 135 (July 8, 2020) (concluding that the Colombian government impaired Gustavo Petro Urrego's rights).

alia, the decision in the *Lopez* case against Venezuela. Colombian judges respected and applied the Inter-American decisions.[111] For this reason, Petro was able to run for election in 2018.[112] Although he lost, he made it to the second round of the presidential election.[113] But his party obtained very few votes in the congressional election, thus falling below the threshold required to stay in the political game and receive state funding.[114] However, in 2021 the Constitutional Court, invoking the principles established in the case of Castañeda against Mexico, restored the legal status of his party.[115] With this judicial intervention, Petro's party was able to compete in following elections, organize a coalition, receive state funding, and finally win the presidency of Colombia in August 2022.[116]

In sum, the current president of Colombia has benefited from two judgments of the Inter-American Court, one regarding Venezuela and the other regarding Mexico as Colombian judges have applied the doctrines established by the Inter-American Court by virtue of the constitutional block.

III. FACTORS THAT HAVE ENHANCED THE COURT'S IMPACT

A. THE ROLE OF INSTITUTIONAL DESIGN

The constitutional block is a national doctrine applied in several Latin American countries.[117] According to the doctrine, human rights

111. *See* Consejo de Estado [C.E.] [State Council], Sala Plena de lo Contencioso Administrativo, noviembre 15, 2017, César Palomino Cortés, rad. 11001032500020140036000, Gustavo Francisco Petro Urrego contra Procuraduría General de la Nación (1131-2014) (Colom.).

112. *See* June S. Beittel, *Colombia: Background and U.S. Relations*, CONG. RSCH. SERV. 7 (2021) (reviewing the results of the 2018 Colombian presidential elections).

113. *Id.*

114. *See* June S. Beittel & Edward Y. Garcia, *Colombia's 2018 Elections*, CONG. RES. SERV. (2018) (explaining the results of Colombia's 2018 elections).

115. *See* Corte Constitucional [C.C.] [Constitutional Court], septiembre 16, 2021, Sentencia SU-316/21 (Colom.).

116. *See Gustavo Petro*, ENCYCLOPEDIA BRITANNICA (Sept. 11, 2023) (detailing Petro's political history).

117. *See* Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79 L. & CONTEMP. PROBS. 179, 184, 186–87 (2016)

treaties are incorporated in the national legal system at the same level as a state's constitution.[118] Therefore, statutes and administrative acts must respect not only the national constitution but also the treaties that belong to the constitutional block.[119] The doctrine has been adopted in several Latin American Constitutions: Colombia in 1991,[120] Argentina in 1994,[121] Mexico in 2011,[122] and many others.[123] In Brazil, the Constitution is open to the reception of international human rights treaties but has not a strict doctrine of constitutional block.[124]

(explaining Latin American neoconstitutionalism stemming from the Inter-American Court of Human Rights).

118. *See id.* at 186 (defining the elements of neoconstitutionalism with respect to interpreting constitutional rights).

119. *See id.* (explaining the international human rights declarations, norms, and treaties judicial bodies must interpret into the scope and meaning of a state's constitution under the "constitutional block" doctrine).

120. In Colombia, the use of human rights treaties to interpret constitutional fundamental rights was promoted by the Executive which in turn lead to the creation of the Constituent Assembly that adopted the 1991 Constitution. A book containing the relevant treaties was published and distributed to all the judges in the country. *Los derechos fundamentales: fuentes internacionales para su interpretación*. Consejeria Presidencial para el Desarrollo de la Constitución. Presidencia de la República, 1992. The leading decision of the Constitutional Court was C-225 of 1995 MP: Alejandro Martinez Caballero (upholding Protocol II to the Geneva Conventions of August 12, 1949 and stating that international humanitarian law was part of the constitutional block). *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [Constitution], art. 93 (Colom.).

121. In Argentina, the first step was taken by the Argentine Supreme Court. It declared in 1992 that human rights treaties were directly applicable domestically even though, at that time, the Argentine Constitution had no such provision (Ekmedjian v. Sofovich y Carranza Latrubesse, Corte Suprema de Justicia de la Nación, July 7, 1992). The leading case of the Supreme Court after the constitutional amendment of 1994, is the case Giroldi, Horacio David y Otro s/Recurso de casación, April 7, 1995). *See* Art. 75.22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

122. *See* Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

123. *See* Manuel Gongora Mera, *The Block of Constitutionality as the Doctrinal Pivot of a Ius Commune*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA, *supra* note 24 (explaining which Latin American countries adhere to the constitutional block doctrine).

124. In 2004, Amendment 45 added a third paragraph to article 5 of the Constitution regarding express receipt of international human rights treaties. Only

The constitutional block is the highway that allows international law to enter the domestic sphere at the same hierarchical level as a state's constitution.[125] The block includes numerous international human rights treaties that can be directly applied by national judges in concrete cases.[126] The American Convention on Human Rights belongs to the constitutional block of all the states that have adopted this doctrine.[127]

What happens with the judgments of the Inter-American Court in countries in which the doctrine of the constitutional block does not exist? The Inter-American Court considers that the American Convention is directly applicable regardless of whether the block doctrine exists in a country.[128] Since *Almonacid Arellano and Others v. Chile* in 2006,[129] the Court has held that all the judges of the States party to the Convention must review the conventionality of any act relevant to decide a specific case, that is, they can determine if the national legal act is compatible with the American Convention and refuse to apply it if it is incompatible.[130] Conventionality review or control ("*control de convencionalidad*") has been a powerful tool to open a new entry for international human rights law.[131] Since each

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those approved by the same 3/5 majority required by constitutional amendments in two rounds have constitutional hierarchy. The others have *infra* constitutional but *supra* legal status. *See* Rodrigo Uprimny, *Las Transformaciones Constitucionales Recientes en América Latina: Tendencias y Desafíos* [*Recent Constitutional Transformations in Latin America: Tendencies and Challenges*], *in* EL DERECHO EN AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI at 109, 114 (César Rodríguez Garavito ed., 2011) (detailing the transformation of Brazil's constitutional interpretation).

125. *See* Huneeus, *supra* note 117, at 186 (explaining the framework and effects of neoconstiutionalism adoption).

126. *Id.*

127. *Id.*

128. *See* Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 124–125 (Sept. 6, 2006) (providing the framework for interpreting laws in accordance with the Inter-American Court's interpretation).

129. *Id.*

130. *Id.*

131. *See generally* PABLO GONZALEZ-DOMINGUEZ, THE DOCTRINE OF CONVENTIONALITY CONTROL: BETWEEN UNIFORMITY AND LEGAL PLURALISM IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2018) (explaining how conventionality control is a recent effort to make different legal sources more

country has different systems of judicial review and distinctive judicial structures, the Court has acknowledged that conventionality review may be applied differently in each state.[132] In turn, each country has adopted different rules to apply it.[133] These have evolved in key aspects. For example, in Mexico the federal Supreme Court held in 1999 that only federal judges could review the constitutionality of norms and that the control of general norms by all judges was prohibited.[134] But, in 2011, the Mexican Supreme Court changed course and expressly opened the door to state judges in a diffuse system to apply conventionality control and judicial review of the constitutionality of general norms.[135] If the system of judicial review is concentrated in one court but ordinary judges have competence to

effective in Inter-America); s*ee also* Eduardo Ferrer Mac-Gregor, *Conventionality Control the New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93, 98–99 (explaining the main objectives of conventionality control, including to create an "integrated system" of human rights protection); Myriam Hernandez & Mariela Morales, *El Control de Convencionalidad: Un Balance Comparado a 10 años de Almonacid-Arellano v. Chile* [Conventionality Control: A Balance Comparing ten years of Almonacid-Arellano v. Chile] (2017) (explaining different perspectives from officials on conventionality control).

132. The court held that while judges must exercise the doctrine of conventionality review, they must do so only "in the context of their respective spheres of competence and the corresponding procedural regulations. Thus, the doctrine does not "imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of actions" (para. 128). The highest national courts have taken diverse paths to incorporate conventionality control to their respective systems, but they coincide in giving significant weight in the resolution of a case to the American Convention and its authoritative interpretation by the Inter-American Court. Aguado-Alfaro v. Peru, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 159, ¶ 128 (Nov. 24, 2006).

133. Laurence Burgorgue-Larsen, *Conventionality Control: Inter-American Court of Human Rights*, *in* OXFORD PUB. INT'L L. ¶¶ 31–32, 34–42 (Max Planck Encyclopedias Int'l L. ed., 2018) (explaining how conventionality control has evolved over time and has generally been inconsistent despite its evolution).

134. Xochitl Garmendia Cedillo, CONTROL DIFUSO Y CONTROL CONVENCIONAL DE CONSTITUCIONALIDAD [DECONCENTRATED CONTROL AND CONSTITUTIONAL CONVENTIONAL CONTROL], Tribunal Federal de Justicia Administrativa 1, 10–11.

135. The leading case applying conventionality control came after the decision of the Inter-American Court in the case of *Pacheco v. Mexico* which condemned Mexico for disappearances and limiting the jurisdiction of military courts. Suprema Corte de Justicia de la Nación (2011).

protect constitutional rights, the competence of both constitutional judges and ordinary judges as well as the procedures to apply it in concrete cases becomes a hard and structural issue,[136] as has happened in Chile.[137] In Colombia, where a mixed system of judicial review exists and the Constitutional Court applies the doctrine of the constitutional block,[138] there has been a creative dialogue of judges in the application of conventionality control;[139] although the Constitutional Court has said that conventionality control should be done simultaneously with the application of judicial review based on the constitutional block,[140] as has been accepted by the Inter-American Court.[141]

Monitoring compliance[142] with its own judgments (47 Judgments in

136. *See* Miriam Henriquez Vinas, *Control de Convencionalidad en Chile* (2017) (explaining a general approach to conventionality control).

137. Several Latin American countries have a concentrated system of judicial review, such as Bolivia, Uruguay, Paraguay and the states of Central America. Some authors argue that this should not be an obstacle to applying conventionality control by all the judges of the respective country. *Id.*

138. Uprimny, *supra* note 124, at 109, 114.

139. Enrique Gil Botero, *Control de Convencionalidad en Colombia: Una Experiencia de Diálogo Judicial* (Tirant lo Blanch ed., 2019) (explaining that law should be more jurisprudential than legislative and the many associated benefits of that approach); *see also* Jamie Orlando Santogimio, *El Concepto de Convencionalidad* (2017).

140. Corte Constitucional de Colombia [C.C.] [Constitutional Court], abril 3, 2002, Sentencia C-228/02 (Colom.).

141. Garcia v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C), No. 165, ¶ 26 (Nov. 26, 2006).

142. The Court considers that its mandate includes monitoring of the implementation of its orders. Although the American Convention provides that the OAS General Assembly should review cases of non-compliance with the Court judgments, it has failed to do so. The Court has adopted a system of supervision that includes requesting compliance reports from the parties to the case (which include not only the complainant and the defendant state, but also the Inter-American Commission), issuing its own compliance report, and holding closed compliance conferences in which judges work with the parties toward overcoming the causes for non-compliance. The Court secretariat has established a unit dedicated to supervision of compliance. The Court also holds public compliance hearings *in situ*, an innovation that allows stakeholders from civil society to take part in the process of implementing its judgments. Further, if a structural change is required, the Court may issue a specific report concerning the non-complying State. Compliance varies according to the right infringed, the type of remedy, and the obliged country. *See*

the 2022 Report) is another one of the powerful tools that the Inter-American system exercises every year by holding hearings and issuing resolutions on whether a state has complied with a specific decision.[143]

These aspects of the institutional design of the Inter-American system have been paramount to enhance the impact of international law in the region.

B. A CONTEXT OF DISSATISFACTION WITH HOW THE SYSTEM WORKS

I argue that alongside the pre-mentioned aspects of institutional design of the Inter-American system that have increased the effect of international law in the democratization of the Latin American region, we must add political and cultural context. The following are important considerations that affect the impact of international law within the region:

First, the idea that there are structural problems and systemic dysfunctions in each state has predominated in the region.[144]

Second, the distrust in politics and the discredit of politicians in the region has been a constant since the mid-twentieth century and has become more acute during the twenty-first century.[145] These two elements of the context combined have given the judiciary space to act.

Third, a substantive, not just procedural, vision of democracy has gained strength precisely because of skepticism regarding electoral

Learn More about the Monitoring Compliance with Judgement, INTER-AM. CT. H.R., https://www.corteidh.or.cr/conozcalasupervision.cfm?lang=en (Aug. 11, 2023) (explaining that monitoring is done in order to protect fundamental human rights).

143. In the *Gelman* case, the Inter-American Court carefully monitored and issued two resolutions (in 2013 and 2020) highlighting the lack of compliance until in 2022 the Supreme Court changed course. ANNUAL REPORT 2022, INTER-AM. CT. H.R. 35, 79 (2022) (explaining the lack of compliance happening in the inter-Americas).

144. *See* LATINOBARÓMETRO, INFORME 2021 38 (2021) (explaining that seventy percent of people in Latin America are not satisfied with how democracy is working).

145. *See id.* (explaining that only twenty-nine percent of people feel close to a political party in their respective country).

processes.[146]

Fourth, in several countries of the region there is a bicentennial legal tradition.[147] It should not be forgotten that Latin American states are much older than many European states. During decolonization, lawyers alongside generals played a leading role in the fight from independence,[148] with different incidence in the respective nascent state.[149] There is a community of jurists in the region dedicated to ensuring that democracy is consolidated, deepened, or protected through law, especially human rights law.[150]

IV. CONCLUDING REMARKS

Further research could explore which of these contextual elements help to explain the differences in the impact of international law between the European cases and the Latin America cases. Perhaps the Latin American examples deserved more weight in Professor Scheppele's brilliant lecture.

Ultimately, the challenge she raised is not for international law, but for the role of lawyers in the restoration of democracy. It is synthesized in the following dilemma: Do we consider it legitimate that the law acquires a greater voice and role in the restoration of democracy? Or would that inevitably give too much power to the judges and, therefore, it is preferable to trust the political processes and give

146. *See generally* ROBERTO GARGARELLA. LATIN AMERICAN CONSTITUTIONALISM 1810 –2010: THE ENGINE ROOM OF THE CONSTITUTION (2013) (explaining the evolution of the relationship between constitutionalism and democracy in Latin America and how rights impacted a substantive conception of democracy).

147. Victor M. Uribe, *Kill All the Lawyers!: Lawyers and the Independence Movement in New Granada, 1809–1820*, 52(2) AMERICAS 175, 177–81 (1995) (noting that New Granada had an active legal community and tradition as early as the early 1810s).

148. *Id.* (explaining that lawyers and other members of the social elite were extensively involved in the struggle for independence).

149. *Id.*

150. For an analysis of the crucial role of this community of legal practitioners in the expansion of a *ius constitutionale commune* concerning constitutional law and human rights in Latin America. *See generally* Armin von Bogdandy & Rene Urueña, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT'L. L. 403 (2020).

political actors the time they require? But is this not a false dilemma? The experience of Latin America shows that there can be judicial interventions that are legally rigorous and, at the same time, energizing pro-democratic political processes instead of demobilizing political actors.[151]

Shakespeare once said: "Let's kill all the lawyers" without nuances.[152] Professor Scheppele tells us today: "Let's call all the lawyers," mainly those engaged in the defense of liberal democracy.[153] I join in her invitation, with the enthusiasm needed to keep going from failure to failure.

151. Alexandra Huneeus argues that the Court is limited by the disposition of national actors to implement its judgments: "the Court's institutional constraints ensure that, despite the Court's innovative construction of self-aggrandizing judicial doctrines, it remains dependent on the support of state actors exactly on the terms many of its critics would prefer." *See* Alexandra Huneeus, *The Institutional Limits of Inter-American Constitutionalism*, *in* COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 303 (Rosalind Dixon & Tom Ginsburg, eds., 2017).

152. WILLIAM SHAKESPEARE, HENRY VI act 4, sc. 2, l. 2379.

153. American Society of International Law, *25th Annual Grotius Lecture on International Law,* YOUTUBE (Mar. 23, 2023), https://www.youtube.com/watch?v=kD-ne1MTqOw (explaining that lawyers will play a key role in maintaining democracy).