INTERNATIONAL LAW AND CONSTITUTION-MAKING IN CHILE: OPPORTUNITIES AND LIMITS

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International law impacts constitution-making processes: international agencies act as advisors or observers in constitutional replacement mechanisms, along with the global dialogue between international law and domestic law, whereby constitutions expressly incorporate international law (especially, on human rights), enact norms with international law in mind, or straightforwardly constitutionalize international human rights treaties. This Article explores the impact of international law on the constituent process in Chile, which took a different and untrodden path, by expressly establishing a duty to ensure that the future constitutional text "respect…the international treaties ratified by Chile and currently in force." Although such duty was political rather than legal in nature, international law—in particular, human rights law—played a key role in the work of the first Constitutional Convention. While the literature often depicts international human rights law as being "the floor not the roof," Chile's constituent process shows that international human rights law can also operate as a limit to constitutional innovations.

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INTRODUCTION: CHILE'S RELATIONSHIP WITH INTERNATIONAL LAW

Over the past forty years, international law in Chile has followed a dual path, as it has been used as legal tool to fight oppression as well as minimum legal denominator to reestablish democracy. On the one hand, international human rights law first served as a tool that, during the Pinochet's dictatorship, allowed the opposition to bring to public attention the massive human rights violations that the regime was committing.[1]

It was this fundamental role that international human rights law played during the dictatorship, the fact that it became a banner of struggle, a vehicle for the expression of outrage at the gross human rights violations, albeit with little impact on the courts of justice, that opened the door to its inclusion in the text of the constitutional project of the Pinochet regime. The original text of the Constitution, imposed in 1980, did not have any reference to international human rights law. Therefore, such inclusion came in with the package of constitutional amendments negotiated with the democratic opposition that paved the way for the transition to democracy.[2]

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[1] INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN (1991), https://bibliotecadigital.indh.cl/handle/123456789/170 (last visited May 13, 2023); INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA (VALECH I) (2005), https://bibliotecadigital.indh.cl/handle/123456789/455 (last visited May 13, 2023); ROBERT BARROS, LA JUNTA MILITAR: PINOCHET Y LA CONSTITUCIÓN DE 1980 (2005); LISA HILBINK, JUECES Y POLÍTICA EN DEMOCRACIA Y DICTADURA: LECCIONES DESDE CHILE (2014); HUGO ROJAS & MIRIAM SHAFTOE, DERECHOS HUMANOS Y JUSTICIA TRANSICIONAL EN CHILE (2022).

[2] CARLOS ANDRADE, REFORMA DE LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 199-202 (1991).

The first amendments to the Chilean Constitution, approved in 1989, included reforms to Article 5 of the constitutional text.[3] While the reform maintained the text's original statement that "sovereignty" resided in "the nation," it now stated that the limits that the exercise of sovereignty should respect (which previously only included "the essential rights that emanate from human nature") now included a further obligation, namely: it is the duty of the organs of the State to respect and promote such rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.[4]

One of the most intense debates that followed this recognition centered on the normative hierarchy of international human rights treaties.[5] During the first years of democracy and up to the present day, the State of Chile has continued, sometimes reluctantly, to approve and ratify various instruments of international human rights law.[6] As seen during

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[3] *Id.*

[4] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 5.2 (1980, rev. 2021) [hereinafter C.P.].

[5] *See generally* Claudio Troncoso Repetto & Tomás Vial Solar, *Sobre los Derechos Humanos Reconocidos en Tratados Internacionales y en la Constitución*, 20 REVISTA CHILENA DE DERECHO 695 (1993); Miriam Henríquez, *Jerarquía de los Tratados Internacionales de Derechos Humanos: Análisis Jurisprudencial desde el Método de Casos*, 6 ESTUDIOS CONSTITUCIONALES 73 (2008); HUMBERTO NOGUEIRA ALCALÁ, DERECHO CONSTITUCIONAL CHILENO 157 (2012); PABLO CONTRERAS & GONZALO GARCÍA, ESTUDIOS SOBRE CONTROL DE CONVENCIONALIDAD 67-108 (2020).

[6] The constitutionality of some treaties was challenged, such as the ILO Convention No. 169 and the Rome Statute of the International Criminal Court. Tribunal Constitucional [T.C.] [Constitutional Court], Apr. 4, 2000, Rol de la causa 309-00; Tribunal Constitucional [T.C.] [Constitutional Court], Apr. 8, 2002, Rol de la causa 346-02 (Chile). The latter treaty required a constitutional reform prior to its ratification. *See* C.P., *supra* note 4, at disposición vigesimocuarta transitoria.

the dictatorship, the inclusion of these treaties in the national legal order has allowed 'democratic iterations,' that is, the appropriation by national social actors of human rights language, which has allowed progress to be made in the recognition of their demands.[7] Perhaps the most obvious example, despite the difficulties in its implementation, is the ratification of ILO Convention 169 with respect to the duty to consult, but not only with respect to that duty.[8]

In contrast to these thorny debates, international economic law was welcomed with open arms, first by the dictatorship itself and then by the democratic governments that followed.[9] Having understood from the outset that the context of globalization and the need to attract investment to the ailing economy left by the dictatorship made it advisable to open up

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[7] *See* Jorge Contesse & Domingo Lovera, *Access to Medical Treatment for People Living with HIV/AIDS: Success without Victory in Chile*, 5 SUR, REV. INT. DIREITOS HUMAN. 142 (2008); Gloria Maira et al., *Abortion in Chile: The Long Road to Legalization and its Slow Implementation*, 21 HEALTH & HUM. RTS. 121 (2019); Lidia Casas & Judith Schönsteiner, *Violencia y Discriminación Estructural: Estallido Social y Pandemia desde un Enfoque de Derechos Humanos*, *in* INFORME ANNUAL SOBRE DERECHOS HUMANOS EN CHILE 2020 9-39 (Centro de Derechos Humanos UDP ed., 2020); EZIO COSTA, POR UNA CONSTITUCIÓN ECOLÓGICA (2021).

[8] EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO. MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN (Jorge Contesse ed., 2012); Javier Aguas & Héctor Nahuelpan, *Los límites del Reconocimiento Indígena en Chile Neoliberal. La implementación del Convenio 169 de la OIT desde la Perspectiva de Dirigentes Mapuche Williche*, 29 CULTURA-HOMBRE-SOCIEDAD 108 (2019); SEBASTIÁN DONOSO RODRÍGUEZ & MANUEL NÚÑEZ POBLETE, EL CONVENIO NO. 169 DE LA OIT SOBRE PUEBLOS INDÍGENAS Y TRIBALES: MANUAL PARA SU APLICACIÓN 45-113 (2022).

[9] David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement*, 19 AM. UNIV. INT'L L. REV. 679 (2003); Raimundo González Muñoz & Rodrigo Rojo, *Acuerdos Internacionales en Materia de Inversión: Las Implicancias para la Soberanía Nacional*, 1 NOMOS 107 (2008).

to international trade, Chile became the "best student" of the global economic consensus.[10]

Today, this "best student" boasts a network of international treaties on free trade, investment protection, and the granting of jurisdiction to international panels which, unlike what has happened with human rights treaties (as was the case with the "Rome Statute" that established the International Criminal Court),[11] have never been questioned for their constitutionality.[12]

It is not an exaggeration, then, to argue that this network of international treaties has allowed the economic model bequeathed by the dictatorship to be shielded internationally—for a there is a reason these treaties are called the new constitution—making it especially difficult to even scratch the surface of the neoliberal model. In the case of Chile, this model has even taken over the provision of social goods such as health, education, and most clearly, social security.[13] In fact, some of these tensions have become especially evident in the constituent moment Chile is currently experiencing. The work of Amaya Álvez *et al*. provides an account of some of these

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[10] *See Acuerdos Económicos Internacionales* [International Economic Treaties], SUBSECRETARÍA DE RELACIONES ECONÓMICAS INTERNACIONALES, https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes (last visited May 15, 2023).

[11] Tribunal Constitucional [T.C.] [Constitucional Court], Apr. 8, 2002, Rol de la causa 6662-19 (Chile).

[12] Except for the CPTPP, although the petition to declare its unconstitutionality was declared inadmissible ("no se acogió a trámite") by the Chilean Constitutional Tribunal. *See* Tribunal Constitucional [T.C.] [Constitutional Court], Apr. 8, 2002, Rol de la causa 6662-19 (Chile).

[13] FERNANDO MUÑOZ, HEGEMONÍA Y NUEVA CONSTITUCIÓN 107 (2015); FERNANDO ATRIA, DERECHOS SOCIALES Y EDUCACIÓN: UN NUEVO PARADIGMA DE LO PÚBLICO (2014); JAIME BASSA & CHRISTIAN VIERA, DERECHOS, PERO ASÍ NO (2018).

episodes,[14] in which some voices—we will see in a moment what reasons they have invoked—have argued that Chile's international economic regime (or the one to which Chile is subject) should remain untouched despite the constitutional redefinition.[15]

I. THE RULE AND THE DEBATES

The replacement of Chile's 1980 Constitution was mediated institutionally by rules negotiated in a reform to Chapter Fifteen of the Constitution, which regulates constitutional reforms. One of the peculiarities of these rules is the one to be found in the final paragraph of Article 135, which states; the text of the New Constitution to be submitted to plebiscite must respect … the international treaties ratified by Chile and which are in force.[16]

What is the meaning of this provision? To what extent does it constrain the exercise of constituent power? Those who have (more or less) distanced themselves from the process, have seen in this provision room to argue that international law would operate as a substantive constraint for the Constitutional Convention.[17] Such argument runs against the claims

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[14] Amaya Álvez et al., *Entre Dos Corrientes: Derecho al Agua e Inversiones como Influencias en Torno al Debate Constitucional en Chile*," *in* ANUARIO DE DERECHO PÚBLICO 2022, 181-99 (Domingo Lovera ed., 2023).

[15] Teodoro Ribera, *Proceso Constituyente y Compromisos Internacionales*, EL MERCURIO (Sept. 16, 2020), https://www.nuevopoder.cl/proceso-constituyente-y-compromisos-internacionales/.

[16] C.P., *supra* note 4, at art. 135.

[17] Arturo Fermandois, *Un proceso constituyente civilizado: Las limitaciones del artículo 135 inciso final de la Constitución a la Convención Constitucional*, *in* TRÁNSITO CONSTITUCIONAL: CAMINO HACIA UNA NUEVA CONSTITUCIÓN 709, 714-17 (2021).

expressed by citizens, the spirit of the reform, and, as we shall see, the proper understanding of the rules in force and the institutions involved.[18] The constituent body would not start, then—these voices argue—from a blank sheet of paper.[19] Instead of being "blank," it would be "full of colors," since "Chile is a State party to a good number of these international agreements, which establish obligations in the most diverse areas, non-compliance with which inevitably generates the international responsibility of the State that contracted them."[20] Others may argue that the substantial constraints that international law would impose the process, such as the absence of a blank sheet of paper.[21]

We believe these approaches to be mistaken. We contend that the provision in Article 135 has a double nature. A juridical or legal nature, in the sense that the Constitutional Convention was barred from both invading and exercising those powers related to international relations and treaty negotiations that are vested in constituted authorities, such as the President of the Republic and the National Congress.[22] But, also, a political

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[18] *See generally* Constanza Salgado et al., *¿Límites de Tratados Internacionales al Poder Constituyente? Análisis del Caso Chileno*, 19 INT'L J. CONST. L. 1351 (2021).

[19] Sebastián López, *Una Hoja Llena de Colores*, LA TERCERA (Oct. 28, 2020), https://www.latercera.com/opinion/noticia/una-hoja-llena-de-colores/JDTMNWV4QJEETIVCQJATNG4K7I/; Diego Pardo, *La Potestad de Reforma Constitucional*, *in* CONCEPTOS PARA UNA NUEVA CONSTITUCIÓN 709, 714-17(Fernando Muñoz & Viviana Ponce de León eds., 2020).

[20] *See* López, *supra* note 19; Pardo, *supra* note 19, at 714-17.

[21] Jean Pierre Matus, *La Revolución Imposible (O Por Qué el Nuevo Pacto Social Deberá Conservar el Libre Mercado en Chile)*, CIPER (Oct. 23, 2020), https://www.ciperchile.cl/2020/01/23/la-revolucion-imposible-o-por-que-el-nuevo-pacto-social-debera-conservar-el-libre-mercado-en-chile/.

[22] *See* Pardo, *supra* note 19; Diego Pardo, *Constitucionalismo Calificado: La Regla de la Mayoría Calificada del art. 133 Inc. 3 de la Constitución Política de Chile*, 88 REVISTA DE DERECHO (CONCEPCIÓN) 13 (2020) (on the constitutional powers of the President and Congress).

nature, meaning that the Convention should pay international law close attention, while having the flexibility, as a constituent body, to read, interpret and write its own version (however informed) of international human rights obligations. Thus, the Convention should have engaged in a nomogenetic dialogue that creates new state practice, relevant to the same interpretation of public international law. Rather than a top-down application of international law, this could be seen—if not as a bottom-up drawing of international human rights obligations—as a form of transnational dialogue. Although this path did not shield the state from incurring international liabilities, treaty bodies should reconsider their approach to state obligations when a constituent process is unfolding. Under such arguments, the final paragraph of Article 135 actually establishes the legal contours of the Constitutional Convention's work—no more, but no less.[23] The rule shapes the powers or jurisdiction of both the Constitutional Convention and other constitutional bodies: the former is in charge of creating a new constitutional text and the latter are commanded to exercise current powers—such as legislating on international affairs—and not interfere with the work of the Constitutional Convention. Therefore, the rule in question helps to shape the hybrid model of constitutional replacement that is under development in Chile, which is based on a dialogic interaction between constituted powers and the constituent body, without the one being confused with the other. In other words, it provides certainty about what the Constitutional

[23] *See* Salgado et al., *supra* note 18. The argument is presented fully therein.

Convention can and cannot do. It should not be lost sight of the fact that the constituent power to propose a full new constitutional text that replaces *in toto* the Constitution of 1980.

This is also consistent with international human rights law itself, in which it is not possible to identify any state obligation to incorporate international law at the constitutional level during constitution-building moments.[24] Neither general international treaties, nor human rights treaties establish direct obligations to constitutionalize certain contents in particular norms. A determination of incompatibility between a constitutional norm and a treaty obligation requires the activation of mechanisms of international responsibility. The mere abstract interpretation of international primary rules is not sufficient.[25] Considering the Articles on Responsibility of States for Internationally Wrongful Acts,[26] drawn up by the International Law Commission, state liability arises with a breach of an international obligation.[27] Such responsibility cannot be established solely on the basis of an apparent contradiction between a domestic primary rules and international primary rules.[28] Primary rules are the rules of conduct:[29] prohibitions, mandates and permissions, in this case in terms of international law obligations. Secondary rules

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[24] Luis María Díez-Picazo, *Límites Internacionales al Poder Constituyente*, 76 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 9, 12 (2006); Johan van der Vyver, *Sovereignty*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 385 (Dinah Shelton ed., 2013).
[25] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 13, 124 (2002).
[26] U.N. GAOR, 56th Sess., U.N Doc. A/56/49 (Dec. 12, 2001) [hereinafter *ARSIWA*].
[27] *See id.* at art. 2.
[28] H.L.A. HART, THE CONCEPT OF LAW 78-85 (1st ed. 1961).
[29] *Id*. at 78.

include "rules that specify the consequences of violations of the primary rules" and thus constitute a reaction to the violation of the latter.[30] State liability will always require the operation of international secondary rules.[31] This is particularly relevant in the case of the nomogenetic activity of the constituent power. But, from the fact that the international responsibility of a state is established in accordance with international enforcement mechanisms, it cannot be deduced that a vertical mandate exists to constitutionalize all or part of the obligatory content of international law.

The 2022 Chilean constituent process finalized with no judicial action claiming the violation of international human rights law being brought before any sort of international tribunal, commission, or panel.[32] Nor has the ad-hoc complaint procedure been used to complain to a tribunal composed of judges of the Supreme Court for violations of the rules of procedure regulated in Article 136.[33] The reason is simple: these are not judicially enforceable standards. Law is an

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[30] Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1089 (1992).

[31] *See* Salgado et al., *supra* note 18, at 1372-73.

[32] Of course, none of this is to say that future actions cannot be brought before international tribunals, and this is partly what we have held above, that they will be brought – we have no doubt of this – on the basis of the very international treaties that are claimed to have been violated, not under art. 5.

[33] Although this is a procedure through which only these types of violations can be challenged, some have pointed out that the violation of international treaties ratified by Chile, and which are in force, would be one such violation. It is worth noting, for the record, that some protective actions such as the *recurso de protección* –which is the equivalent of an *amparo*, some sort of a broad writ of *habeas corpus*–were lodged in the courts. Both Appeal Courts from different regions as well as the Supreme Court declared the writs inadmissible; *see* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Dec. 10, 2021, Rol de la causa: 90,884-2021, protección (Chile).

institutional and formal system. Its binding character requires formal manifestations (a statute, a judicial decision) that are institutionally mediated (by a congress, or a court).[34] Hence, it is not enough to claim the legally binding character of a set of norms simply because they are regularly observed or because of the simple concurrence of behaviors. Instead, it must be possible to appreciate institutions that can determine which norms are binding and therefore obligatory for agents—such as states, in the case of international law—that under certain circumstances are individualized as subjects compelled, ultimately by recourse to legitimate force, to adjust their behavior to pre-existing norms.

II. THE PROCESS: A PERVASIVE PRESENCE

The fact that Article 135 established non-enforceable standards regarding international human rights law does not mean that these obligations were unimportant. As some literature has shown, regardless of the actual legal contours that govern the exercise of constituent power, an analysis of the comparative social practice of these processes shows that international law nevertheless has an important impact on the design of new constitutions.[35] In other words, although the inclusion of international law in constitutions is not an obligation within the terms of international human rights law

[34] NEIL MACCORMICK, INSTITUIONS OF LAW. AN ESSAY IN LEGAL THEORY 21-22 (2007).

[35] Colin J. Beck et al., *World Influences on Human Rights Language in Constitutions: A Cross-National Study*, 27 INT'L SOCIO. 483 (2012); Colin J. Beck et al., *Constitutions in World Society: A Measure of Human Rights*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 85 (Gregory Shaffer et al. eds., 2019).

(nor, as we have argued above, in the light of the norms regulating the Chilean process), the social reality of these processes shows that it still ends up happening in one way or another.[36]

Constituent moments, therefore, serve not only the purpose in the Chilean case of looking inwards to identify the main challenges a community faces, but they also interact "with the broader environment of ideas and institutions outside a nation's borders."[37] From Thornhill's words, one can appreciate how constituent power today is far from being "a primary political source of constitutional norms," for it now "appears only as a secondary expression of norms already contained within the global legal system."[38]

Let's see what took place in the Chilean process. On the one hand, it was the Convention itself that embraced the responsibility to read its work in line with the obligations of international law.[39] Part of the discourse that affected the deliberation on the creation of constitutional norms, was based on warnings of the possible international liability that they

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[36] *See* Beck et al., *supra* note 35.

[37] CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 1, 3 (Tom Ginsburg et al. eds., 2019).

[38] Chris Thornhill, *The Global Legal System and the Procedural Construction of Constituent Power*, 5 GLOB. CONST. 405 (2016). Although this may be true descriptively, we believe that it overlooks the "valvular role" constituent power exercises – and, as can be claimed in the Chilean case, the more structural and far-reaching consequences of its intervention.

[39] This is salient feature of the Informe Final [*Final Report*], in terms of the guarantees of non-repetition. *See* CONVENCIÓN CONSTITUCIONAL, INFORME FINAL. VERDAD HISTÓRICA, REPARACIÓN INTEGRAL Y GARANTÍAS DE NO REPETICIÓN 26 (chapter 1), 26 (chapter 2), 20 (chapter 3), 29-37, 45-51, 67-70 (chapter 5), 34 (chapter 6), https://www.chileconvencion.cl/wp-content/uploads/2021/12/informe_audiencias_completar-RevMLA_editSIC.pdf (last visited May 13, 2023) [hereinafter CONVENCIÓN CONSTITUCIONAL, INFORME FINAL].

believed the approval of a particular article could entail for the state of Chile.[40] This shows that constituent power acts within a web of relationships between states, international organizations, cooperation agencies and citizens, and that there is a value in observing developments in international law in order to *deepen* understanding of one's own constitutional arrangements.[41]

This was possible by keeping the courts removed from the Convention, thus providing the constituent body with enough room to read and implement international human rights law standards for itself. Before conferring the leading role to the judicial organs or to the court that rules on constitutional matters, this version invites *every* branch of the government certainly the constituent body as well to observe international treaties.[42] This model not only ensures a multilevel dialogue (not only between states and treaty bodies, but eventually the citizenry and other actors), but also finds a correlation with the Inter-American human rights system.[43]

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[40] *See*, for instance, the document prepared by one right-wing think tank, Libertad y Desarrollo: ". . . it is inappropriate to recognize all the rights of indigenous peoples contained in 'various international instruments,' since it is the international treaties ratified and in force in Chile that properly generate obligations for the State, precisely because of the seriousness of compromising the responsibility of the State in international and domestic law." LIBERTAD Y DESARROLLO, *Informe sobre el Desarrollo de la Discusión en la Convención Constitucional* (Dec. 31, 2021), https://lyd.org/wp-content/uploads/2021/12/ACTUALYDAD-CONSTITUYENTE-26.pdf.

[41] Vicki Jackson, *Progressive Constitutionalism and Transnational Legal Discourse*, *in* THE CONSTITUTION IN 2020 285, 288-99 (Jack M. Balkin & Reva B. Siegel eds., 2009).

[42] Salgado et al., *supra* note 18, at 1382-84.

[43] CECILIA MEDINA, THE AMERICAN CONVENTION ON HUMAN RIGHTS 87 (2018).

In other words, the Convention performed a horizontal version of constitutional control that is more reflexive in nature and is placed in the hands of the Convention. By domestically interpreting human rights standards and obligations, the convention made them their own.[44] Instead of the tradition of imposition or vertical control (which the national doctrine has generally favored in Chile),[45] this model opens broad spaces for the mediation and appropriation[46] of international human rights law provisions by the Convention, which offers its own readings, generated from below, in the form of a genuine transnational dialogue.[47] This approach, we believe, allows the development of a virtuous practice that is respectful of the constituent character of the convention, on the one hand, while assigning special relevance to international human rights law, on the other.

On the other hand, international human rights law has been profoundly and profusely cited and resorted to by all sides of the Convention. We will show this by referring to two examples: the use that members of the Convention have made of international law and how this use translated into the Convention's first big decision.

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[44] On the "horizontal" approach from domestic courts, *see* Eduardo Ferrer Mac-Gregor, *Interpretación Conforme y Control Difuso de Convencionalidad. El Nuevo Paradigma para el Juez Mexicano,* 9 ESTUDIOS CONSTITUCIONALES 531, 596, 621 (2011). For a "bottom-up" perspective, *see* Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights,* 15 INT'L J. CONST. L. 414, 430-34 (2017).

[45] *See generally* Humberto Nogueira, *Consideraciones sobre Poder Constituyente y reforma de la Constitución en la teoría y práctica constitucional*, 15 REVISTA IUS ET PRAXIS 229, 251 (2009).

[46] SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 70-71 (2006).

[47] Contesse, *supra* note 44, at 426.

Regarding the former, representatives of Chile's indigenous peoples regularly resorted to both ILO Convention 169[48] and the Declaration on the Rights of Indigenous Peoples.[49] Left-wing members of the Convention went so far as to include respect for soft law and other international human rights resolutions as standards the Convention should observe.[50] More surprisingly (since they have always distanced themselves from international human rights law), right-wing Convention members and other representatives also played their international human rights law cards: for instance, they referred (no matter how misleadingly) to the Convention on the Rights of the Child to complain against the inclusion of sexual and reproductive rights in the constitution—which in their view would affect rights of the unborn that are included in the Convention on the Rights of the Child's preface as well as at the lack of recognition of the right of parents to educate their children.[51]

As mentioned above, these claims translated into the first big decision the Convention adopted: its procedural rules. A close reading of the Convention's procedural rules (*Reglamento General*),[52] reveals that the international human

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[48] *See generally* Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), June 27, 1989, 1650 U.N.T.S. 383.

[49] *See generally* G.A. Res. 61/295 (Sept. 13, 2007).

[50] Natividad Llanquileo, one of the representatives of the Mapuche people's reserved seats, put it well in one of her speeches to the Convention. *See* @NatividadLlanq3), TWITTER (Sept. 13, 2021, 9:49 AM), https://twitter.com/NatividadLlanq3/status/1437413243727892485.

[51] *Diputados UDI Recurrirán a Organismos Internacionales tras Rechazo de la CC a Indicación sobre Libertad de Enseñanza*, CNN CHILE (Sept. 28, 2021), https://www.cnnchile.com/pais/diputados-udi-recurriran-a-organismos-internacionales-tras-rechazo-cc_20210928/.

[52] CONVENCIÓN CONSTITUCIONAL DE CHILE, REGLAMENTO GENERAL DE LA CONVENCIÓN CONSTITUCIONAL, https://www.chileconvencion.cl/wp-

rights law verbiage is all in there, both expressly (usually by incorporating international human rights law into internal regulations) as well as implicitly. For example, its opening norms, which are termed *Principles and General Rules* of the constituent process, assert the preeminence of human rights, meaning the promotion, protection of, and unrestricted compliance with "the principles, rights, and standards recognized in the International Human Rights System."[53] This same trend can be identified in the debates. When discussing the principle of indigenous participation, it is affirmed that this must be implemented "through consultation and participation mechanisms, in accordance with the standards established in the United Nations Declaration on the Rights of Indigenous Peoples and other international instruments."[54]

Other internal Convention regulations also make explicit references to international human rights law. An example is the regulation on indigenous participation and consultation, according to which "[t]he jurisprudence of the Inter-American Court of Human Rights; the Observations and Recommendations of the United Nations Human Rights Treaty Committees and Special Rapporteurships on Human Rights; and the recommendations of the Inter-American Commission on Human Rights"[55] are mandatory standards the Convention must observe. The highly controversial ethical rules that members of the Convention had to observe in their work state that they should act according "to the rules, standards, and

content/uploads/2021/10/Reglamento-definitivo-versio%CC%81n-para-publicar.pdf (last visited May 13, 2023) [hereinafter REGLAMENTO GENERAL].

[53] *Id*. at art. 3(a).

[54] *Id*. at art. 3(j).

[55] *Id*. at art. 7(m).

principles of international human rights law."[56] Finally, the rules on popular participation are worthy of note. These rules regulate a procedure for citizens to present their own constituent initiatives.[57] Such proposals, if meeting certain requirements (most notably, gathering 15,000 signatures of support) were to be discussed by the Convention. However, Article 33 of the Rules of Popular Participation provided that, the Commission on Popular Participation may declare inadmissible those initiatives *whose content produces a breach of the obligations arising from the International Human Rights Treaties ratified by the State of Chile*…[58]

Besides these explicit references, the *Reglamento General* also contains other rules and been taken from international human rights law. It establishes the *pro homine* principle,[59] defined as the use of "the broadest standard or the most extensive or protective interpretation" of the rights of

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[56] CONVENCIÓN CONSTITUCIONAL DE CHILE, REGLAMENTO DE ÉTICA Y CONVIVENCIA; PREVENCIÓN Y SANCIÓN DE LA VIOLENCIA POLÍTICA Y DE GÉNERO, DISCURSOS DE ODIO, NEGACIONISMO Y DISTINTOS TIPOS DE DISCRIMINACIÓN; Y DE PROBIDAD TRANSPARENCIA EN EL EJERCICIO DEL CARGO art. 10, https://www.chileconvencion.cl/wp-content/uploads/2022/04/Reglamento-definitivo-version-para-publicar-5-mayo-2022-con-anexos.pdf (last visited May 13, 2023).

[57] CONVENCIÓN CONSTITUCIONAL DE CHILE, REGLAMENTO DE MECANISMOS, ORGÁNICA Y METODOLOGÍAS DE PARTICIPACIÓN Y EDUCACIÓN POPULAR CONSTITUYENTE art. 31, https://www.chileconvencion.cl/wp-content/uploads/2021/10/Reglamento-definitivo-Participacio%CC%81n-Popular-final-modificado-2.pdf (last visited May 13, 2023) [hereinafter RULES OF POPULAR PARTICIPATION].

[58] *Id*. at art. 33 (emphasis added).

[59] *See generally* Yota Negishi, *The* Pro Homine *Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control*, 28 EUR. J. INT'L L. 457 (2017); Valerio de Oliveira Mazzuoli & Dilton Ribeiro, *The* Pro Homine *Principle as an Enshrined Feature of International Human Rights Law*, 3 INDON. J. INT'L & COMPAR. L. 77 (2014).

individuals."[60] The *Reglamento General* also defined the core tasks that each of the (seven) different committees should address.[61] References to the terms of international human rights law are also numerous here.[62] For example, in the case of the committee on fundamental rights, it was stipulated that the committee must address the "[r]ight to truth, justice, comprehensive reparation for the victims, their families and society as a whole, with respect to crimes committed by agents of the State that constitute human rights violations."[63]

Finally, perhaps the most remarkable case concerns guarantees of non-repetition. Indeed, the Inter-American human rights system conceives these guarantees as obligations that, unlike general ones such as respect, protection, and promotion, arise from a violation of the norms of the American Convention on Human Rights.[64] In the initial work of the Convention, however, guarantees of non-repetition were addressed autonomously as a general international human rights law principle. The report of the Commission on Human Rights, Historical Truth and the Basis for Justice, Reparation and (most notably) Guarantees of Non-Repetition stated clearly as part of its mandate.[65] However, as is obvious, the

[60] REGLAMENTO GENERAL, *supra* note 52, at art. 3.
[61] *See* PABLO CONTRERAS ET AL., LA CONVENCIÓN CONSTITUCIONAL DE CHILE. ORIGEN, ORGÁNICA, ESTATUTOS Y PROCEDIMIENTOS 61-80 (2022).
[62] *See, e.g.*, REGLAMENTO GENERAL, *supra* note 52, at arts. 63(d) and (e); 65; 66(b), (d), and (m); 67(g) and (m); 68(c), (d), and (f).
[63] REGLAMENTO GENERAL, *supra* note 52, at art. 65(b).
[64] CECILIA MEDINA QUIROGA, LA CONVENCIÓN AMERICANA DE DERECHOS HUMANOS 81 (2018). In fact, these guarantees – in a certain way – need a victim although they "point[] to the future and to people other than the victim." *Id*. at 84.
[65] CONSTITUTIONAL CONVENTION, PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE 2022 (July 2022), https://www.chileconvencion.cl/wp-content/uploads/2022/08/Texto-CPR-

Constitutional Convention was far from being an adjudicatory body for such violations.[66]

III. THE LANGUAGE OF THE PROPOSED CONSTITUTION

One of the main features of the proposal for a new constitution is the pervasiveness of a human rights discourse within its legal framework. Indeed, the language of international human rights law was incorporated into provisions included in the draft of the proposal, which makes use of the formula "recognized in this Constitution and the international human rights treaties and instruments ratified by Chile and in force" (or similar language) more than nine times.[67] In fact, a more general provision clearly places international human rights law in a strategic place: the rights and obligations established in international human rights treaties ratified by Chile and which are in force, the general principles of international human rights law and customary international law on the same subject are an integral part of this constitution and enjoy constitutional rank.[68]

This rule is of particular importance. It has three components: treaties, general principles, and customary international law, and all three of them concern international

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2022-entregado-al-Pdte-y-publicado-en-la-web-el-4-de-julio.pdf [hereinafter PROPUESTA CONSTITUCIÓN].

[66] The guaranteed also appeared in the text of the proposed constitution. Thus, in the case of art. 24.5, it is stated that "The State guarantees the right to memory from an approach that considers its relationship with the guarantees of non-repetition and the rights to truth, justice and comprehensive reparation." PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 24.5.

[67] *Id*. at arts. 15, 26, 28, 29, 33, 98, 109, 111(f), 123, 126, 148.

[68] *Id*. at art. 15.1.

human rights.[69] Therefore, these three sources of international law should not be understood as generic terms (such as general public international law) but are confined to international human rights obligations. The rule's inspiration comes from Article 38 of the Statute of the International Court of Justice (with corrections such as the omission of the phrase "no civilized nations"),[70] but it does not incorporate the subsidiary means for the determination of rules of law, that is, the "*judicial decisions and the teachings of the most highly qualified publicists of the various nations*" as part of its core.[71]

What the rule establishes is the legal hierarchy of those three sources of international law within the Chilean domestic legal system. When it comes to "international human rights treaties ratified by Chile and which are in force, the general principles of international human rights law, and customary international law on the same subject," those sources are considered akin to constitutional rules in terms of legal hierarchy. The main goal was to reduce the uncertainty behind decades of litigation over the domestic legal status of human

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[69] *See generally* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992).

[70] Statute of the International Court of Justice art. 38, June 26, 1945, 145 U.N.T.S. 17 ("1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law; 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.").

[71] *Id.*

rights treaties.[72] The rule states clearly that international human rights law sources are deemed to enjoy the same legal hierarchy under the constitution.[73] It does, however, open up new challenges, two of which are worth noting here. First, it will require judges and practitioners to identify applicable general principles and customary international human rights law. In previous years, the big debate was over the hierarchy of treaties, not these two other sources of law.[74] Article 15 *constitutionalizes* sources of international human rights law other than treaties, but will require their identification in each judicial case.[75] Second, there is no recognition of the formal hierarchy of human rights soft law. It is true that other constitutional provisions mention "international instruments," as a way to recognize *soft law*, but they avoid any attribution of hierarchy.[76] We see this as a necessary counterpart to the role played by international human rights law in the drafting of the regulations, a point we will return to below.

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[72] Manuel Núñez Poblete, *La Función del Derecho Internacional de los Derechos de la Persona en la Argumentación de la Jurisprudencia Constitucional: Práctica y Principios Metodológicos*, 32 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 487 (2009).

[73] PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 15.1.

[74] Pablo Contreras Vásquez & Domingo Lovera Parmo, *Nueva Constitución y Derecho Internacional de los Derechos Humanos: Problemas y Desafíos*, *in* UNA NUEVA CONSTITUCIÓN PARA CHILE. LIBRO HOMENAJE AL PROFESOR LAUTARO RÍOS ÁLVAREZ (Asociación Chilena de Derecho Constitucional ed., 2018).

[75] PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 15.1.

[76] *Id.* at art. 29 (concerning human rights standards on neurodiversity and neurodivergent persons), art. 307 (on how courts must rule on the Constitution, laws, and international treaties or instruments), and art. 309 (which restricts the jurisdiction of indigenous peoples under the constitution and international human rights treaties and instruments).

The impact of international human rights law has allowed the recognition of new rights in the Chilean constitutional scheme. As Professor Young has pointed out, the globalization of international human rights law instruments puts the nation-state to the test, a pressure that is exacerbated in the context of regional human rights systems.[77] Such is the case of the right to adequate housing and the right to water, to name two examples. [78] In both cases, as in that of the regulations, the international human rights law language is present.

Article 51 of the Proposal for a New Constitution, for instance, recognizes the right to housing.[79] It then adds, no doubt drawing on the language of international human rights law,[80] that, "[e]veryone has the right to decent and adequate housing which permits the free development of a personal, family and community life." The Proposal for a New Constitution listed the following state duties involved:

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[77] KATHARINE YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 24-25 (2012). However, the impact is far from being obvious. Whereas it is true that there is a tendency to recognize more and more social rights in constitutions, this may well be due to a kind of "constitutional concurrence" rather than a proof of the undeniable impact that the international human rights law instruments have had on these recognition processes. Daniel M. Brinks et al., *Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular,* 11 ANN. REV. L. & SOC. SCI. 289, 293 (2015).

[78] Another clear set of examples are the rights and rules concerning gross violations of human rights, such as the right to truth, prohibitions on enforced disappearances, and torture, among others. Pietro Sferrazza Taibi & Francisco Bustos Bustos, *La Constitucionalización del Derecho de Toda Persona a no Ser Sometida a Desaparición Forzada*, 20 ESTUDIOS CONSTITUCIONALES 157 (2022).

[79] PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 51.

[80] As has been claimed, "[a]t its core, it is the right to live in dignity and security… ." Leilani Farha & Kaitlin Schwan, *The human right to housing in the age of financialization*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS & POVERTY 385, 386 (Martha F. Davis et al. eds., 2021).

> The State shall take all necessary measures to ensure the universal and timely enjoyment of this right, contemplating at least *habitability*, sufficient space and equipment, domestic and community, for the production and reproduction of life, *availability of services, affordability, accessibility, appropriate location, security of tenure and cultural relevance of housing*, in accordance with the law.[81]

These standards are clearly inspired by a reading of the Committee on Economic, Social and Cultural Rights, adopted under General Comment No. 4. The Committee on Economic, Social and Cultural Rights interpreted *adequate* housing in terms of seven factors: "legal security of tenure," "availability of services, materials, facilities, and infrastructure," "affordability," "habitability," "accessibility," "location," and "cultural adequacy."[82] It is not hard to find a similar, almost identical phrasing of the State's duties under the right to housing in the Proposal for a New Constitution.[83] The text not only reproduced, literally, the standards of the General Commentary but also added others of its own: "sufficient space and equipment, domestic and community, for the production and reproduction of life."[84] Therefore, the Convention constitutionalized *soft law* standards and also added others explicitly, thereby engaging in how the content of the right should be guaranteed by the State.

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[81] PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 51.2.
[82] U.N. Comm. on Econ., Soc., & Cultural Rts., *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, § 8, U.N. Doc. E/1992/23 (Dec. 13, 1991).
[83] PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 51.2.
[84] *Id.*

Most notably, in the second example, Article 57 of the Proposal for a New Constitution recognized the right to water and sanitation.[85] It stated:

> 1. [e]veryone has the human right to water and sufficient, healthy, acceptable, affordable and accessible sanitation. It is the duty of the State to guarantee it for current and future generations.
> 2. The State shall ensure the satisfaction of this right by attending to the needs of the people in their different contexts.[86]

A minor detail, in the first place, is that the International Covenant on Economic, Social and Cultural Rights articles do not contain a right to water. The constitutionalization of this right, in the present case, represents a hardening of *soft law* standards into a binding legal norm. In fact, the right to water was first recognized in a resolution adopted by the General Assembly in 2010 (A/RES/64/292). Secondly, the Committee on Economic, Social and Cultural Rights has declared that "[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[87] The Committee on Economic,

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[85] In fact, just as art. 11.1 International Covenant on Economic, Social and Cultural Rights states, here the right to adequate housing is guaranteed whereas other constitutions – such is the case of the South African constitution – provide for "the right of access to adequate housing." SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION (2010).

[86] It should be noted that Chile's Supreme Court has issued opinions in which it has recognized, despite the lack of express text in the 1980 constitutional regulation, the right to water. Interestingly, it has done so on the basis of different international human rights law instruments. PROPUESTA CONSTITUCIÓN, *supra* note 65.

[87] U.N., Comm. on Econ., Soc., & Cultural Rts., *General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on*

Social and Cultural Rights interprets Article 11.1 of the International Covenant on Economic, Social and Cultural Rights broadly: the realization of the right to an adequate standard of living must be read as an open catalog of certain factors which *includes* not only "adequate food, clothing and housing" but also the right to water itself.[88] General Comment No. 15 relies on different sources to configure what State practice in the matter should be.[89] These developments in international law were closely followed by the Convention. Article 57 recognizes several standards that have been part of the international human rights law canon ever since.[90] These developments, in fact, have decisively influenced the growing constitutionalization of the right to water.[91]

The drafting of the right to housing and the right to water in the Proposed Constitution can be considered as examples of an international borrowing. Both cases show that the Convention's constituent debate closely followed international human rights law in all its dimensions, from hard law rules to soft law standards. In its norm-drafting work, the Convention made both sets of sources interact in defining fundamental rights. Secondly, the international human rights law did not predetermine a hierarchical order for the control of decisions to constitutionalize rights.[92] The Convention reviewed treaties and General Comments to find the best version of the right it

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Economic, Social and Cultural Rights), § 2, E/C.12/2002/11 (Jan. 20, 2003).

[88] *Id*. § 3.

[89] *Id.*

[90] PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 57.1.

[91] Malcolm Langford & Anna F.S. Russell, *Introduction: The Right to Water in Context*, *in* THE HUMAN RIGHT TO WATER 1, 7 (Malcolm Langford & Anna F.S. Russell eds., 2017).

[92] Salgado et al., *supra* note 18, at 1364-66.

wanted to constitutionalize.[93] Thus, the fact that the International Covenant on Economic, Social and Cultural Rights does not explicitly establish the right to water or that the treaty does not set out in detail the content of the right to adequate housing did not prevent the Convention from recognizing these rights with the content that seemed reasonable in the light of the international instruments. These are undoubtedly the opportunities that international human rights law has opened up.

IV. LIMITS?

Previous sections II and III proved a point made by the extensive literature available on the sociology of constituent moments that international human rights law still has an impact on the work of constituent bodies, an enormous impact in the Chilean case. This is the case even if there was no juridical mechanism that legally bound the Convention's work to international human rights law.

We want to end these reflections by showing that, despite the fact that international human rights law may make room for opportunities and even given the "floor not the ceiling" motto normally attached to it, international human rights law has also played a restrictive role. We will mention two examples, but

[93] The Office of the United Nations High Commissioner for Human Rights prepared a document setting out the various sources and delivered it to the Constitutional Convention. *Chile: Los Derechos Humanos al Centro de la Nueva Constitución*, ALTO COMISIONADO PARA LAS NACIONES UNIDAS, http://acnudh.org/constitucion/ (last visited May 13, 2023). *See also*, CONVENCIÓN CONSTITUCIONAL, CONVENCIÓN CONSTITUCIONAL RECIBE A RED DE ORGANIZACIONES COLABORADORAS (Mar. 8, 2022), https://www.chileconvencion.cl/news_cconstitucional/convencion-constitucional-recibe-a-red-de-organizaciones-colaboradoras/.

there may be many others. We will begin by showing, first, how international human rights law ended up limiting the possibilities for innovation in the recognition of freedom of assembly; and second, its limited usefulness when it comes to institutional arrangements.

The current Constitution recognizes the right of assembly without prior permission, but it adds some conditions for its exercise: namely, it must be exercised "peacefully" and "without arms."[94] These two conditions can be considered reasonable requirements for the exercise of any right. But, if this is so, is it reasonable to expressly impose these conditions only for the right of assembly? There is no reason to state expressly that the right of assembly must be exercised in a way that is applicable to all rights. To answer this question, there are at least two alternatives: one in which "peacefully" and "without arms" are required for every fundamental right. For example, it could be stipulated that the right to property must be exercised peacefully or freedom of enterprise without recourse to arms.[95] Posing the question in this way has an obvious implication: the fact that these limitations are *not* mentioned for any other right does not mean that the right in question can be exercised legitimately with weapons and violently. The other alternative would be not to require these conditions of exercise for any right in particular, since as we have said, they are obvious conditions for the exercise of all fundamental rights.

However, what constitutional texts generally do, and we shall see the same in international law as well, is to impose

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[94] C.P., *supra* note 4, at art. IXX no. 13.
[95] Both rights do not stipulate such conditions in the text of the Constitution. *See id.* at no. 21, 24.

these requirements *only with respect to freedom of assembly*.[96] This has proved to be particularly problematic, to the degree that these conditions have served only to establish more demanding limitations on this freedom.[97]

The Convention proposed to modify the wording of this right by eliminating these two conditions.[98] Justification of the change related to an institutional practice, since the conditions have served only as a gateway to abundant restrictions on the exercise of this right, some of them more drastic (such as criminal prosecutions), others less so (such as administrative penalties).[99] Freedom of assembly inevitably generates some level of disruption of daily life. Maintaining the requirements of "peaceful" and "without arms" only for the right of assembly, keeps the door open to restrictions that end up affecting the essential core of one of the few ways citizens must voice their demands. The wording approved by the Convention's plenary and submitted to the Harmonization Committee, established the right in the following terms: "263.- Article 44.- Right to peacefully assemble and demonstrate. All persons have the right to assemble and demonstrate in private

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[96] *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5.XVI (Braz.). S*ee also*, Organization of American States, American Convention on Human Rights art. 15, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[97] Domingo A. Lovera Parmo, *Human rights, poverty and mobilizations*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND POVERTY 338, 341 (Martha F. Davis et al. eds., 2021).

[98] *Informe de Reemplazo de la Comisión sobre Derechos Fundamentales, Relativo a Definiciones Generales sobre Derechos Fundamentales y sobre Derechos Civiles y Político*s, COMISIÓN DE DERECHOS FUNDAMENTALES DE LA CONVENCIÓN CONSTITUCIONAL (Mar. 25, 2022), https://www.plataformaconstitucionalcep.cl/wp-content/uploads/2022/11/informe_de_reemplazo_de_la_comision_derechos_fundamentales.pdf.

[99] *See generally* ORSOLYA SALÁT, THE RIGHT TO FREEDOM OF ASSEMBLY: A COMPARATIVE STUDY (2015).

and public places, without prior permission."[100] The approved article did not mention the requirements of "peacefully" and "unarmed," thus standardizing the legitimate exercise of fundamental rights without any additional restrictive language with respect to freedom of assembly.[101]

However, some maintained that these two conditions should be respected in order to have a constitutional text in alignment with international human rights law.[102] Appealing to the International Covenant on Civil and Political Rights, they argued that the draft of the Convention "[did] not coincide with the treatment in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which require [freedom of assembly] to be 'peaceful' and in the Inter-American [sic] Convention [on Human Rights], which prescribes that it be 'peaceful and unarmed.'"[103] This use of the international human rights law is intended to avoid or limit any recognition of norms on fundamental rights that aim to limit state discretion or favor the exercise of these freedoms.

The second example concerns a structural caveat we should bear in mind during moments of political redefinition or constitution-making. At such moments, it is important to note that international human rights law has paid too little attention to institutional issues. According to Javier Couso, in spite of its

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[100] CONSTITUTIONAL CONVENTION, BORRADOR NUEVA CONSTITUCIÓN 87 (May 2022), https://www.chileconvencion.cl/wp-content/uploads/2022/05/PROPUESTA-DE-BORRADOR-CONSTITUCIONAL-14.05.22-1-1.pdf.
[101] PROPUESTA CONSTITUCIÓN, *supra* note 65, at art. 75.
[102] José Miguel Poblete & Juan Francisco Galli, *Derecho a reunión: pacífica y sin armas*, LA TERCERA (Feb. 4, 2022, 8:48 PM), https://www.latercera.com/opinion/noticia/mineria-no-volver-al-pasado/ZWLTYWU2SJBMXO5FX3HEXJQILE/.
[103] *Id.*

success in the areas of rights and procedures, the dominant (liberal) transnational legal order regulating constitution-making processes has not been as successful with regard to the sections of the constitution that organize political power.[104]

This limitation, which may already be problematic during the ordinary functioning of states—particularly given the turbulent life cycles of Latin American democracies—becomes even more critical in times of political redefinition.[105] Indeed, one of the main issues raised by the mass protests of the "social outburst" concerned the problems faced by the machinery of power in meeting citizens' political demands.[106] One possible explanation for this phenomenon lies in the region's neglect of what Gargarella calls "the engine room of the Constitution": the organization of power.[107] While the so-called Latin

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[104] Javier Couso, *The Possibilities and Limits of a Constitution-Making Transnational Legal Order: The Case of Chile*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 265, 267 (Gregory Schaffer et al. eds., 2019).

[105] It is true that some may claim Couso's observation seems obvious as it is not an international human rights law concern. However, there are some exceptions in the region, as the Advisory Opinion on the unlimited reelection of presidents shows. Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System, Advisory Opinion OC-28/21, Inter-Am. Ct. H.R. (ser. A) No. 28 (June 7, 2021) (Interpretation and scope of articles 1, 23, 24, and 32 of the 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); *See also* Richard Albert's piece in this symposium, *Does the World Need an International Constitutional Court?* (page 1).

[106] Domingo Lovera Parmo, *Protestas Constituyentes: Octubre del '19,' in* PROCESO CONSTITUYENTE EN CHILE: DESAFÍOS PARA UNA NUEVA CONSTITUCIÓN 97-118 (Jaime Bassa ed., 2020).

[107] ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION (2013).

American social constitutionalism[108] shows a growing and increasingly profuse recognition of social rights, the structures and institutions for the exercise of power are "old and regressive…."[109] This has resulted, as Gargarella has pointed out, in a situation in which: the system of concentrated power begins to conflict with the social demands generated in the name of constitutional rights—which ends up implying that a part of the Constitution begins to work against the success of the second.[110]

Of course, this is not mere negligence, which, however, could well describe the attitude of academia and political activism. As Gargarella himself explains, these power structures have been maintained for a definite purpose: that of keeping the exercise of power out of the hands of the people, despite the promises and lofty declarations of the constitutional texts, In the case of Chile, this was the specific purpose of the dictatorship's constitutional design: to neutralize politics.[111] In particular, by decoupling the responses of the institutional system from the demands of the people,[112] making it move slowly and within an intricate environment of substantive limits that the Constitutional Court has been ready to expand

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[108] *See generally* Natalia Angel-Cabo & Domingo Lovera Parmo, *Latin American Social Constitutionalism: Courts and Popular Participation*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 105 (Helena Alviar et al. eds., 2015).

[109] Roberto Gargarella, *Deliberative democracy, dialogic justice and the promise of social and economic rights*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 105 (Helena Alviar et al. eds., 2015).

[110] Angel-Cabo & Lovera Parmo, *supra* note 108, at 7.

[111] FERNANDO ATRIA ET AL., DEMOCRACIA Y NEUTRALIZACIÓN: ORIGEN, DESARROLLO Y SOLUCIÓN DE LA CRISIS CONSTITUCIONAL (2017).

[112] JAIME BASSA MERCADO, CONSTITUYENTES SIN PODER: UNA CRÍTICA A LOS LÍMITES EPISTÉMICOS DEL DERECHO MODERNO 24-25 (2018).

and enforce.[113] The constituent debates focused on the impact of international law on constitutional norms of principles or rights. Institutions, rules of procedure and other checks and balances were not significantly influenced by international law.

CONCLUSION

International law, especially international human rights law, accompanied the Chilean constituent process. Part of its role was predetermined by the rules set by the constituted powers. Law No. 21,200, which established the contours of the constituent process, created a special rule to the effect that the Constitutional Convention must respect international treaties ratified by Chile and currently in force.[114] This rule served to delineate the powers of the Convention and circumscribe its mandate to the task of drafting a new constitutional text.[115] At the same time, being a norm without judicial control, it was a standard for political deliberation.

This influence of international treaties and, more broadly, international human rights law, was projected onto the constituent discussion.[116] Regulations and procedures of the Convention were influenced by human rights standards. The proposed text engaged in a dialogue with international law in the constitutionalization of rights enshrined in different treaties. Furthermore, state duties were characterized by

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[113] *See generally* EL TRIBUNAL CONSTITUCIONAL FRENTE AL PROCESO CONSTITUYENTE: ENSAYOS CRÍTICOS SOBRE SU JURISPRUDENCIA Y SUS PRÁCTICAS (Pablo Soto Delgado & Viviana Ponce de León Solís eds., 2021).
[114] *Id.* ¶ 1.
[115] Salgado et al., *supra* note 18.
[116] *Id.* ¶¶ 2-3.

applying *soft law* standards, particularly in the case of the right to decent housing and the right to water.

We believe there are two main lessons to be learned from the Chilean experience. First, international human rights law—which ought in any case to play a central role in constituent processes—should be regarded as the floor, not the ceiling. This is a mantra that international human rights law activists themselves recite, that may be easy to put on paper but is sometimes hard to practice with a constituent body composed of a myriad of political actors, including some who oppose all mention of international human rights. For them, merely agreeing to the inclusion of international human rights law may be a big political concession, whereas for international human rights law activists it may be a big gain. However, as we have shown, this tug-of-war may inhibit constitutional innovations that may benefit the people.

Second, the positive reception of international human rights law gave rise to a dialogue that favored the inclusion of different sources of international law and even chose to constitutionalize soft law standards. This strategy for the recognition of human rights sought to strengthen their protection.[117] Thus, it generated a rule of broadly internalizing international human rights obligations (including treaties, principles, and customary international law), while combining specific treaty obligations with standards from General Comments or from resolutions or other international instruments. This modality of the recognition of rights in the proposal makes it possible to direct the action of the legislator while opening space for novel interpretations in determining applicable sources and specifying the content of rights.

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[117] *Id.* ¶ 3.

As of 2023, Chile is facing a new constituent process. The lessons learned from the previous process and the way in which the transnational human rights dialogue is engaged can be an opportunity. Such a dialogue should reflectively reflect human rights obligations and enable the reconfiguration of the constitutional identity for the twenty-first century.