

# The Inter-American Court and Constitutionalism in Latin America

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More than forty years have elapsed since the adoption of the American Convention on Human Rights, which, among other advances, resulted in the establishment of the Inter-American Court of Human Rights, installed in 1979.<sup>1</sup> As is common in history, there have been high and low points, yet the progress the Inter-American Court has made in developing consistent human rights standards with increasing impact and usefulness is worth mentioning.

The development of international human rights law has been one of the most important legal advances of the twentieth and twenty-first centuries to date. Major international instruments and mechanisms of protection have been brought into operation at global and regional levels. Latin America has played a significant role in this evolution.

Indeed, within the Latin American forum, extremely important human rights standards have developed. Some believe that it was in Latin America, at the beginning of the sixteenth century, that the concept of what is today known as “human rights” was born when Bartolomé de Las Casas declared that all human beings are equal.<sup>2</sup> Latin America again played a relevant role when the two declarations on human rights, the American and the Universal, were drafted and approved more than sixty years ago.<sup>3</sup>

Nevertheless, the extraordinary development of international principles, norms, decisions, and organs of protection has not been reflected in a consistent manner on the domestic front. That is why some people consider that although the universalization of human rights referred to by Norberto Bobbio has been a significant development in the consolidation of the protection of

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\* President, Inter-American Court of Human Rights. All translations in this Article are the author’s unless otherwise indicated.

1. See *Información historia [Historical Information]*, CORTE INTERAMERICANA DE DERECHOS HUMANOS [INTER-AMERICAN COURT OF HUMAN RIGHTS], <http://corteidh.or.cr/historia.cfm> (describing how the court’s first meeting took place in June 1979).

2. See Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281, 289–93 (2003) (asserting that Las Casas was the prime figure in the birth of modern human rights, which occurred during the clashes following the Spanish conquest of the New World).

3. American Declaration of the Rights and Duties of Man, May 2, 1948, <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>; see also Carozza, *supra* note 2, at 282 (“Latin American proposals formed the first models upon which the Universal Declaration of Human Rights was drafted, and many of the rights in it were inserted or modified . . . through the intervention of Latin American Delegates . . .”).

human rights,<sup>4</sup> the challenge today is, essentially, the application of international commitments. In this regard, the Inter-American Court's jurisprudence plays a relevant role as a bridge of communication.

The court has been developing and fine-tuning its jurisprudence, and it is currently being manifested dynamically, particularly in the actions taken by domestic courts. Today, the binding nature of the court's judgments is not up for discussion, and for the most part, states comply with its judgments.<sup>5</sup> However, the most important factor is that domestic courts are increasingly adopting the court's jurisprudential criteria—the international forum is today inspiring the jurisdictional reasoning of the most relevant courts of Latin America.<sup>6</sup> In this way, the court's jurisprudence is multiplied in hundreds or perhaps thousands of domestic courts in cases that it would never have been able to hear directly.

The mechanisms of the Inter-American system are establishing guidelines and standards on very diverse issues. Nevertheless, the states are supposed to be the actors performing the leading role. Within the state, the judges are supposed to be the first guarantee of human rights, but at times they have been so merely in a formal sense.<sup>7</sup> By accepting international standards and substantive criteria that place the rights of the individual at the

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4. Martín Abregú, *La Aplicación de los Tratados Sobre Derechos Humanos por los Tribunales Locales: Una Introducción* [The Application of Human Rights Treaties by Local Tribunals: An Introduction], in LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES [THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS] 5 (Martín Abregú & Christian Cortis eds., 1997) (citing Norberto Bobbio, EL PROBLEMA DE LA GUERRA Y LA PAZ [THE PROBLEM OF WAR AND PEACE] 129 (1982)).

5. See Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights* 14 (N.Y. Univ. Sch. of Law Ctr. for Human Rights & Global Justice Working Paper No. 1, 2005), available at <http://www.chrgj.org/publications/docs/wp/s05buergenthal.pdf> (stating that the court has gained legitimacy since its creation and that states generally comply with its judgments); see also Emily Rose Johns, *Timely and Complete Compliance by Panama in Tristán Donoso Suggests Promising Direction*, THE HUMAN RIGHTS BRIEF (Feb. 12, 2011), <http://hrbrief.org/2011/02/timely-and-complete-compliance-by-panama-in-tristan-donosu-suggests-promising-direction/> (noting Panama's compliance with a 2009 Inter-American Court of Human Rights judgment, and speculating that this represents a shift from Panama's previous noncompliant actions).

6. See Diego García-Sayán, *Una viva interacción: Corte Interamericana y Tribunales Internos* [A Lively Interaction: Inter-American Court and National Courts], in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO: 1979–2004 [THE INTER-AMERICAN COURT OF HUMAN RIGHTS: A QUARTER OF A CENTURY: 1979–2004] 323, 350–51 (2005), available at <http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf> (describing the influence of the Inter-American Court on courts in several Latin American countries).

7. See Yoav Dotan, *Legalising the Unlegalisable: Terrorism, Secret Services and Judicial Review in Israel 1970–2001*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 190, 204 (Marc Hertogh & Simon Halliday eds., 2004) (“The primary duty of courts in democracies is to protect human rights.”); see also JUAN CARLOS CALLEROS, *THE UNFINISHED TRANSITION TO DEMOCRACY IN LATIN AMERICA* 136–58 (2008) (detailing situations in which Latin American “domestic judicial systems are reasonably believed to have failed, exposing considerable breaches in their capacity to protect human rights”).

forefront, domestic judicial systems are legitimizing and revitalizing their role and, thereby, that of the rule of law as a core value.

### I. International Standards and Domestic Law

A central element of the American Convention on Human Rights is the harmonization of domestic law and of the actions of state authorities with the provisions of a treaty. This is indicated, above all, in the provisions of article 1(1) and article 2, derived from the basic principle of the interpretation of human rights treaties, which is to ensure the maximum protection of the individual. The European Court of Human Rights has clearly interpreted that there is no place for implicit limitations;<sup>8</sup> the Inter-American Court of Human Rights has done the same when establishing that exceptional situations cannot be invoked to the detriment of human rights.<sup>9</sup>

The harmonization of international standards with the provisions of domestic law and the acts and policies of the state has fundamentally manifested in the conduct of the domestic courts. This is directly related to essential aspects of the functions of the state and its duty to organize itself in accordance with its international obligations.<sup>10</sup> In this regard, it is essential to determine whether the courts are establishing links with international human rights law, bearing in mind that, by their nature, the international norms and mechanisms of protection are designed to be expressed in the domestic law and order of sovereign countries.<sup>11</sup>

Indeed, states that by sovereign decision become parties to international human rights treaties or support the functioning of their organs of protection undertake the obligation to incorporate these commitments into their domestic law.<sup>12</sup> This purpose of international human rights law establishes

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8. See, e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 65 (1978) (holding that the text of the Convention did not allow for implicit exceptions to the prohibition on torture even when the “life of the nation” was threatened).

9. See, e.g., *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 42–43 (Jan. 30, 1987) (holding access to a writ of habeas corpus is required to protect human rights and could not be implicitly limited, even by a national constitution).

10. See *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 174–179 (July 29, 1988) (stating that the American Convention on Human Rights imposed a duty on the state parties “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights”).

11. See William J. Eisenman, *Eliminating Discriminatory Traditions Against Dalits: The Local Need for International Capacity-Building of the Indian Criminal Justice System*, 17 EMORY INT’L L. REV. 133, 170–73 (2003) (describing nationally-driven capacity-building movements that replicate international standards in domestic law).

12. See, e.g., American Convention on Human Rights, art. 1 ¶ 1, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 144 (entered into force July 18, 1978) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . .”).

the conceptual basis for its interaction with domestic law and the conduct of the different state institutions.<sup>13</sup>

Under article 1(1) of the Convention, the states have undertaken a twofold obligation to: (a) respect human rights; and (b) ensure their free and full exercise.<sup>14</sup> Regarding this “obligation to guarantee,” Article 2 requires the states “to adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms.”<sup>15</sup> The domestic courts have a central role in all of this; as part of the state apparatus, they are required to coordinate the norms and the conduct of the state authorities with the international commitments of which they are a part.<sup>16</sup>

From this perspective, the domestic courts have a crucial role to play as guarantors of the rights established by international undertakings, because access to the international organs of protection is subject to prior exhaustion of domestic remedies.<sup>17</sup> Courts also play a crucial role in the implementation of the binding decisions of an international tribunal organ such as the Inter-American Court. It is true that the “normative” component is of particular relevance, but the record shows that discrimination and lack of protection are more likely to result from the conduct of the different state apparatuses than from the formal legal rules.<sup>18</sup> Consequently, references to “domestic law” should be understood as applying to the actual operation of all public institutions, especially the domestic courts.

## II. Judgments of the Inter-American Court and Domestic Courts

The state obligation to organize itself so that it ensures respect for human rights is required by the Convention and has been enforced by the Inter-American Court since its 1988 judgment in the case of *Velásquez-Rodríguez*.<sup>19</sup> More than two decades after this founding judgment, the

13. See Eisenman, *supra* note 11, at 170–73 (discussing the shift in priorities from setting international norms to domestic implementation of those norms).

14. American Convention on Human Rights, *supra* note 12, art. 1 ¶ 1.

15. *Id.* art. 2. In one of its first decisions, the Inter-American Court determined, in relation to Article 2, that the state party “has a legal duty to take whatever legislative or other steps may be necessary to enable it to comply with its treaty obligations.” Enforceability of the Right to Reply and Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/86, Inter-Am. Ct. H.R. (ser. A.) No. 7, ¶ 30 (Aug. 29, 1986).

16. See *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 174–179 (July 29, 1988) (imposing a duty on governments under the Convention to use all legal means to prevent human rights violations and finding that the courts had failed to meet this duty).

17. See American Convention on Human Rights, *supra* note 12, art. 46 ¶ 1 (“Admission . . . of a petition . . . shall be subject to the following requirement[. . .] that the remedies under domestic law have been pursued and exhausted . . .”).

18. See *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 183–184 (observing that a student’s abduction and detention were illegal under national law but were conducted by government authorities).

19. American Convention on Human Rights, *supra* note 12, art. 2; see *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (“[An] obligation of the States Parties is to ‘ensure’ the free

democratic demand of the people of the region has intensified in the sense that the state must comply with its obligation to assume a proactive role in the protection of human rights and not merely abstain from torturing, murdering, or kidnapping.<sup>20</sup>

From this point of view, it is singularly relevant that the Inter-American Court's jurisprudence is increasingly inspiring the highest courts of several countries of the region in several complex substantive matters. During its thirty years of operation, the court has adopted relevant decisions on issues such as the obligation to adopt domestic legal provisions, the obligation to investigate and punish those responsible for human rights violations, and the right to due process and an effective judicial remedy.<sup>21</sup> These jurisprudential developments have enormous legal and conceptual significance. Over and above the specific cases, the domestic courts have, for their part, been engines for the significant creative impact of the Inter-American Court's jurisprudence, opening a space of relativism and questioning certain classic norms of positive law that are formally in force.<sup>22</sup>

Consequently, without a doubt, it can be stated that important progress is being made. Increasingly, the highest courts of several countries of the region are taking inspiration from the Inter-American Court's jurisprudence and supplementing, in a conceptual manner, their national circumstances with certain developments of the Inter-American Court.<sup>23</sup> In this dialectic process of interaction between national and international law, the role of judges and lawyers is fundamental to ensuring that the domestic courts guarantee the implementation of international norms and standards at the domestic level.

A first step in this long and complex process was the affirmation of the thesis that international jurisdictional decisions should serve as interpretation guidelines for the domestic courts. Regarding this point of view, the pioneer decision in the Argentinian supreme court case of *Giroldi*<sup>24</sup> in 1995, confirming this principle, was extremely important. When referring to the Inter-American Court of Human Rights as the "ultimate guardian of rights in the region," the Constitutional Court of Peru established that it was not sufficient to have recourse to international norms, but rather that it was necessary

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and full exercise of the rights recognized by the Convention . . . [t]his obligation implies the duty . . . to organize the governmental apparatus . . . through which public power is exercised . . .").

20. See Ángel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185, 230–31 (2008) (detailing the Inter-American Court's role in influencing state actors to recognize and uphold human rights).

21. See *infra* subparts II(B)–(C).

22. See *infra* notes 24–29 and accompanying text.

23. See *infra* notes 24–29 and accompanying text.

24. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/4/1995, "Horacio Giroldi y otro / recurso de casación," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-514), slip op., available at [http://www.csjn.gov.ar/cfal/fallos/cfal3/ver\\_fallos.jsp?id=52300&fori=RHG00342.260](http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=52300&fori=RHG00342.260).

to take into consideration the Inter-American Court's interpretation of those norms.<sup>25</sup>

Another fundamental step was taken by some of the most important courts in the region when they established the principle that the Inter-American Court's judgments were binding on all domestic courts. Thus, for example, in several judgments, the Constitutional Court of Colombia established in its consistent jurisprudence the binding nature of the Inter-American Court's decisions.<sup>26</sup> In this regard, the judgment of the Constitutional Court of Peru of June 19, 2007, in the action on unconstitutionality, filed by the Callao Bar Association against Law 28,642, is of particular interest.<sup>27</sup>

There, the Peruvian court underscored that: "the judgments of the Inter-American Court of Human Rights are binding for all public authorities, and this binding nature is not exhausted by its operative paragraphs, but extends to the *ratio decidendi*, even in those cases in which the Peruvian State has not been a party to the proceedings."<sup>28</sup>

Additionally, the court stressed that

the judgments of the Inter-American Court of Human Rights, . . . and its advisory opinions on similar matters, are binding for the Peruvian State and, by forming part of domestic law under Article 55 of the Peruvian Constitution, disregard of said international decisions could result in a violation of the Constitution, or worse still, an offense committed during the course of duty, under Article 99 of the Constitution.<sup>29</sup>

This positive conduct of the highest courts of several Latin American countries reflects a dynamic interaction, which leads to the gradual redesign or reinterpretation of the norms of positive domestic law, even though such norms do not necessarily change at the formal level. This is an encouraging

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25. Tribunal Constitucional de Peru [TC] [Constitutional Court of Peru] Apr. 17, 2002, Cartagena Vargas, No. 218-02-HC/TC, "Fundamentos," ¶ 2, available at <http://www.tc.gob.pe/jurisprudencia/2002/00218-2002-HC.html>.

26. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], Sala Plena marzo 19, 2002, Sentencia C-200/02 (slip op. at 18), available at <http://www.corteconstitucional.gov.co/relatoria/2002/C-200-02.htm> (mandating that interpretation of the trial procedure laws in question take into account the jurisprudence of the Inter-American Court); C.C., Sala Plena enero 19, 2000, Sentencia C-010/00 (slip op. at 48-49), available at <http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm> (recognizing and respecting the authority of rulings of the Inter-American Courts regarding freedom of expression); C.C., Sala Cuarta de Revisión de Tutelas agosto 10, 1999, Sentencia T-568/99 (slip op. at 20), available at <http://www.corteconstitucional.gov.co/relatoria/1999/T-568-99.htm> (declaring that states should refrain from legislating contrary to internally ratified treaties, using language of the Inter-American Court as support).

27. TC, Pleno Jurisdiccional, June 19, 2007, Colegio de Abogados del Callao c. Congreso de la República, No. 00007-2007-PI/TC, available at <http://www.tc.gob.pe/jurisprudencia/2007/00007-2007-AL.html>.

28. *Id.* "Fundamentos," ¶ 36.

29. *Id.* "Fundamentos," ¶ 41.

sign of the commitment to compliance with the binding decisions of the Inter-American Court.

It is of importance to illustrate this perspective via the analysis of four fundamental issues: (a) amnesties; (b) the obligation to investigate human rights violations; (c) the right to an effective remedy; and (d) nondiscrimination and the rights of indigenous peoples.

#### A. *Amnesties*

On various occasions, the Inter-American Court has indicated that amnesties constitute major obstacles to full compliance with the international obligation to guarantee human rights. In its consistent jurisprudence, the court has established that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations . . . .”<sup>30</sup> In *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*,<sup>31</sup> the court recalled that “in cases of grave violations of human rights, it has ruled on the incompatibility of amnesties with the American Convention in relation to Peru (*Barrios Altos* and *La Cantuta*) and Chile (*Almonacid Arellano et al.*).”<sup>32</sup>

The Inter-American Court’s case with the greatest impact to date is the case of *Barrios Altos*—regarding so-called self-amnesty laws enacted in Peru in 1995.<sup>33</sup> The court ruled that

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>34</sup>

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30. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001). The court has cited *Barrios Altos* in numerous other opinions. *E.g.*, *Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 5 n.1 (Mar. 1, 2005); *Gómez-Paquiyaqui Bros. v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 232–233 (July 8, 2004); *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 116 (Sept. 18, 2003); *Trujillo-Oroza v. Bolivia*, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 106 (Feb. 27, 2002); *Barrios Altos v. Peru*, Interpretation of Judgment of the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 15 (Sept. 3, 2001).

31. *Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219* (Nov. 24, 2010).

32. *Id.* ¶ 148.

33. *Barrios Altos*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 1.

34. *Id.* ¶ 35.

The effect of this judgment is particularly interesting for two reasons. First, the steps taken in Peru to comply in full with this judgment of the court resulted in effective measures to combat the impunity of grave human rights violations. In addition, the judgment had an impact on the reasoning and conceptual development of several of the highest courts in the region in relation to the crucial issue of impunity.

The case of *Barrios Altos* confronted a heinous 1991 event during which the paramilitary group known as “Colina” murdered fifteen people in downtown Lima.<sup>35</sup> The court considered that the amnesty laws enacted by Fujimori in 1995

prevented the victims’ next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.<sup>36</sup>

Furthermore, it established that “[s]elf-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.”<sup>37</sup> As a result of these considerations, the Inter-American Court established that “Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect.”<sup>38</sup> In a subsequent interpretation of the judgment, the court established that the judgment in *Barrios Altos* “has generic effects.”<sup>39</sup>

Of special and immediate significance was the impact that this Inter-American Court judgment had in Peru. A succession of decisions by the Peruvian courts annulled the stays of proceedings resulting from amnesties in the context of major political changes. The Fujimori regime had fallen in November 2000, and the transitional government presided over by Valentín Paniagua—in which I had the honor of serving as Minister of Justice—acknowledged the state’s international responsibility.<sup>40</sup> The only matter that

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35. *Id.* ¶ 2.

36. *Id.* ¶ 42.

37. *Id.* ¶ 43.

38. *Id.* “Decides,” ¶ 4.

39. *Barrios Altos v. Peru*, Interpretation of the Judgment of the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, “Decides,” ¶ 2 (Sept. 3, 2001).

40. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 31 (Mar. 14, 2001) (discussing and quoting from a communication from the state’s agent dated February 19, 2001).

remained was that of the self-amnesty laws, which the executive branch did not have the authority to resolve. It was the Inter-American Court that divested the laws of their legal effects.<sup>41</sup>

Once notified of the judgment of the Inter-American Court, the transitional government of Peru forwarded the decision to the supreme court, which on that same day sent it to several lower courts, indicating that the criminal proceedings for the events of Barrios Altos needed to be reopened due to the binding and inexorable nature of the Inter-American Court's judgment.<sup>42</sup> The lower courts complied. That same day, the special prosecutor requested and obtained an arrest warrant for thirteen people implicated in the killing, including two army generals.<sup>43</sup> The accused were detained and subjected to the corresponding criminal proceedings in the ordinary courts.<sup>44</sup> Another of the accused persons, former President Fujimori himself, was later tried and sentenced to twenty-five years imprisonment by the supreme court.<sup>45</sup>

When the Inter-American Court's judgment was received in Peru, interesting reasoning was developed in the military justice system. A few weeks after receiving the Inter-American Court's judgment, the Supreme Council of Military Justice,<sup>46</sup> at its two levels, decided to annul the stays of proceedings at the military tribunals and ordered that they be forwarded to the ordinary justice system.<sup>47</sup>

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41. *Id.* ¶ 4.

42. See Kai Ambos, *The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus*, 9 J. INT'L CRIM. JUST. 137, 141 (2011) (discussing the reopening of Peruvian criminal investigations following the Peruvian supreme court's endorsement of the *Barrios Altos* decision).

43. See Ana Véliz, *Arrestan a miembros del grupo Colina [Members of Colina Group Arrested]*, LA REPÚBLICA [THE REPUBLIC], Mar. 25, 2001, <http://www.larepublica.com.pe/node/122875/comentario/comentario> (Peru) (noting that former heads of Peruvian intelligence agencies, Julio Salazar Monroe and Juan Rivero Lazo, were among those identified in the arrest warrants); *Peru Reopens Death Squad Inquiry*, BBC NEWS, Mar. 29, 2001, <http://news.bbc.co.uk/2/hi/americas/1248998.stm> (stating that thirteen arrest warrants were issued by the special prosecutor).

44. See *Investigan a integrante del grupo Colina [Grupo Colina Member Under Investigation]*, LA REPÚBLICA [THE REPUBLIC], Mar. 29, 2001, <http://www.larepublica.com.pe/node/123264/comentario/comentario> (Peru) (describing the investigation by anticorruption judges of Julio Salazar Monroe and Juan Rivera Lazo after their arrest).

45. Corte Suprema de Justicia de la República [Supreme Court of Justice of the Republic], Apr. 7, 2009, *Casos Barrios Altos, La Cantuta y sótanos SIE [Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases]*, No. AV 19-2001 (slip op. at 706), available at [http://historico.pj.gob.pe/CorteSuprema/spe/index.asp?codigo=10409&opcion=detalle\\_noticia](http://historico.pj.gob.pe/CorteSuprema/spe/index.asp?codigo=10409&opcion=detalle_noticia).

46. The Supreme Council of Military Justice is the highest body of the Peruvian military justice system.

47. See TC, Jan. 9, 2008, *Hermoza Ríos*, No. 04441-2007-PA/TC, "Atendiendo A" ¶¶ 5-7, available at <http://www.tc.gob.pe/jurisprudencia/2008/04441-2007-AA%20Resolucion.html> (describing the plenary chamber judgment of June 1, 2001, and the review chamber decision of June 4, 2001).

The reasoning of the Plenary Chamber of the Supreme Council of Military Justice is substantial and consistent. In addition to referring to article 27 of the Vienna Convention on the Law of Treaties,<sup>48</sup> it established that since the Peruvian State was a party to the treaty, the military justice system “must comply with the international judgment in keeping with its specific terms and in a way that makes its decisions fully effective.”<sup>49</sup> The review chamber reaffirmed these considerations and added that the stays of proceedings ordered clearly violated “the fifth operative paragraph of the judgment of the Inter-American Court of Human Rights, which ordered the State to investigate the facts so as to determine those responsible for the human rights violations.”<sup>50</sup>

Following these advances and the Inter-American Court’s subsequent interpretation of the judgment, in which the court determined that its decisions had general effects, several of the region’s courts made a series of significant decisions.

For example, when deciding the appeal for review filed by those accused of the detention and subsequent disappearance of Miguel Ángel Sandoval Rodríguez<sup>51</sup> perpetrated by DINA agents in 1975, the court of appeals of Santiago, Chile considered that the interpretation made by the Inter-American Court was the reliable and ultimate interpretation of the American Convention.<sup>52</sup> Moreover, the court of appeals explicitly assumed the Inter-American Court’s interpretative parameters, citing paragraph 41 of the *Barrios Altos* judgment in its entirety.<sup>53</sup> Subsequently, the supreme court established that amnesty in cases of forced disappearances would only relate to the period referred to in the respective law (up until March 1978) and that amnesty was not applicable if the disappearance of the person had continued after that date.<sup>54</sup> More

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48. Consejo Supremo de Justicia Militar [CSJM] [Supreme Council of Military Justice], June 1, 2001, No. 494-V-94 (slip op. at 5) (on file with author).

49. *Id.*

50. *Id.* at 6. The review chamber was referring to the portion of the Inter-American Court’s judgment that decided that “the State of Peru should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible.” *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, “Decides,” ¶ 5 (Mar. 14, 2001).

51. See Humberto Nogueira Alcalá, *Una Senda que Merece ser Transitada: La Sentencia Definitiva de Casación de la Quinta Sala de la Corte de Apelaciones de Santiago, Rol 11.821-2003, Caso Miguel Ángel Sandoval Rodríguez* [A Path that Deserves to be Traveled: The Final Judgment of the Appeal for Review by the Fifth Chamber of the Court of Appeals of Santiago, Roll 11.821-2003, Miguel Ángel Sandoval Rodríguez], 9 REVISTA IUS ET PRAXIS 233, 233–36 (2003) (Chile) (discussing the implications of the case).

52. *Id.* at 235.

53. *Id.*

54. See Fannie Lafontaine, *No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case Before the Supreme Court of Chile*, 3 J. INT’L CRIM. JUST. 469, 470–72 (2005) (describing the Chilean supreme court’s rejection of defendants’ argument that they should be

recently, the same supreme court annulled an acquittal in the case of *Lecaros Carrasco*,<sup>55</sup> invalidating the application of the amnesty law, considering that the “offense of kidnapping . . . is similar in nature to a crime against humanity, and consequently, it is not admissible to invoke amnesty as a cause for the extinction of criminal responsibility.”<sup>56</sup>

In Argentina, there have been several developments. Two are of particular relevance. One is the judgment of the Federal Chamber of Salta of July 29, 2003,<sup>57</sup> and the other is the case of Julio Héctor Simón, which culminated in a very significant ruling by the Supreme Court of Argentina in June 2005.<sup>58</sup>

In its decision, the Federal Chamber of Salta declared that Laws 23,492 and 23,521 (*Obediencia Debida y Punto Final*) [Due Obedience and Full Stop] were unconstitutional and null and ordered the detention of the accused, Carlos Mulhall and Miguel Raúl Gentil, so that they could be questioned in the case *Cabezas, Daniel Vicente*.<sup>59</sup> The Inter-American Court and the judgment in the case of *Barrios Altos* were central ingredients of the Federal Chamber’s reasoning.<sup>60</sup>

The case with the greatest impact in Argentina was, however, the case of Julio Héctor Simón, who filed a complaint for alleged unlawful deprivation of liberty before all the courts—up to the supreme court which, in June 2005, delivered a judgment of enormous importance.<sup>61</sup> Simón, a former federal police sergeant, had been tried for the kidnapping and subsequent disappearance in 1978 of José Liborio Pobrete Rosa and his wife, Gertrudis Marta Hlaczik, following a pre-trial detention.<sup>62</sup> The supreme court decided to divest the Full Stop and Due Obedience Laws of all legal effects and declared them unconstitutional.<sup>63</sup>

entitled to amnesty protection because their crimes occurred between September 1973 and March 1978).

55. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 mayo 2010, “Claudio Lecaros Carrasco,” Rol de la causa: 3302-2009 (Chile), available at [http://www.poderjudicial.cl/modulos/BusqCausas/BCA\\_esta402.php?rowdetalle=AAANoPAAkAABTrwAAG&consulta=100&causa=3302/2009&numcua=16699&secre=UNICA](http://www.poderjudicial.cl/modulos/BusqCausas/BCA_esta402.php?rowdetalle=AAANoPAAkAABTrwAAG&consulta=100&causa=3302/2009&numcua=16699&secre=UNICA).

56. *Id.*

57. Cámara Federal de Apelaciones [CFed.] [Federal Courts of Appeals] Salta, 29/7/2003, “Cabezas, Daniel Vicente y Otros s/ Denuncia - Palomitas - Cabezas de Buey,” No. 27/03 (slip op.), available at [http://www.pparg.org/pparg/carceles/salta/\\_b/contentFiles/Causa\\_Palomitas-fallo-inconstitucionalidad.pdf](http://www.pparg.org/pparg/carceles/salta/_b/contentFiles/Causa_Palomitas-fallo-inconstitucionalidad.pdf).

58. CSJN, 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.,” Fallos (2005-328-2056), slip op., available at [http://www.csjn.gov.ar/cfal/fallos/cfal3/ver\\_fallos.jsp?id=222714&fori=RHS01767.383](http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=222714&fori=RHS01767.383).

59. CFed. Salta, “Cabezas” No. 27/03 (slip op. at 1).

60. *See id.* at 19 (citing *Barrios Altos* for the proposition that amnesty orders are inadmissible in cases involving grave violations of human rights).

61. CSJN, “Simón,” Fallos (2005-328-2056) (slip op.).

62. *Id.* at 1–2.

63. *Id.* at 145–46.

The extensive reasoning in this judgment is based on the Inter-American Court's jurisprudence, with special emphasis on the *Barrios Altos* case.<sup>64</sup> The supreme court reasoned that *Barrios Altos* established that "nation-states have a duty to investigate violations of human rights, punish those responsible, and prevent them from claiming immunity."<sup>65</sup>

The Constitutional Court of Colombia, for its part, in its repeated jurisprudence has been clear about the inadmissibility of amnesties and self-amnesties. Colombian law establishes that the authors or participants in crimes of terrorism, kidnapping, and extortion may not benefit from amnesties and pardons.<sup>66</sup> When the constitutionality of this law was challenged, the Constitutional Court upheld the law, referring to international law and to the judgments of the Inter-American Court of Human Rights to hold that in the case of atrocious crimes, "as the Inter-American Court of Human Rights has emphasized, the granting of self-amnesties, blanket amnesties, full stop laws, or any other mechanism that prevents the victims from exercising an effective judicial remedy" is impermissible.<sup>67</sup>

The reasoning of this same Constitutional Court is interesting in relation to Colombia's approval of the Rome Statute of the International Criminal Court by means of Law 742 of June 5, 2002.<sup>68</sup> The Constitutional Court declared that this law was in accordance with the constitution.<sup>69</sup> Basing its decision on the jurisprudence of the Inter-American Court of Human Rights, the court reiterated,

[T]he principles and norms of international law accepted by Colombia (Constitution, Article 9), the Rome Statute, and our constitutional law, which only allow amnesty or pardon for political crimes and following the payment of a corresponding compensation (Constitution, Article 150, numeral 17), do not admit the granting of self-amnesties, blanket amnesties, full stop laws, or any other mechanism that prevents the victims from exercising an effective judicial remedy, as the Inter-American Court of Human Rights has emphasized.<sup>70</sup>

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64. *Id.* at 126–27.

65. *Id.* at 111.

66. L. 733/02, enero 29, 2002, [44693] DIARIO OFICIAL [D.O.].

67. C.C., Sala Plena agosto 28, 2002, Sentencia C-695/02 (slip op. at 18), available at <http://www.corteconstitucional.gov.co/relatoria/2002/c-695-02.htm>.

68. L. 742/02, junio 5, 2002, [44826] D.O.

69. C.C., Sala Plena junio 30, 2002, Sentencia C-578/02 (slip op. at 53), available at <http://www.corteconstitucional.gov.co/relatoria/2002/c-578-02.htm>.

70. *Id.* at 108. In a footnote, the Constitutional Court stated,

The Inter-American Court of Human Rights has indicated the conditions in which an amnesty is compatible with the commitments assumed by the States Parties to the American Convention on Human Rights. For example, in the case of *Barrios Altos* (Chumbipuma Aguirre et al. v. Peru), judgment of March 14, 2001, the Inter-American Court decided that the Peruvian amnesty laws were contrary to the Convention and that

In Uruguay, in 2009, the Supreme Court of Justice ruled emphatically on the Expiry Law of the State's Ability to Impose Punishment, establishing that it was illegitimate because it was

enacted for the benefit of members of the military and the police who had committed [grave human rights violations] and enjoyed impunity during de facto regimes, and this has been declared by courts of both the international community and States that underwent similar processes to that experienced by Uruguay in the same era. Owing to the similarities of the matter under analysis and to the relevance of these rulings, they cannot be ignored when examining the constitutionality of Law [No.] 15,848, and the Court has taken them into account when delivering this judgment.<sup>71</sup>

### B. *Obligation to Investigate Human Rights Violations*

The Inter-American Court's jurisprudence has been consistent in emphasizing the importance of the obligation to guarantee, which entails the obligation to prevent, investigate, and punish grave human rights violations.<sup>72</sup> A series of decisions has reaffirmed this state obligation.

The Constitutional Court of Colombia has repeatedly adopted this approach based on the Inter-American Court's jurisprudence. For example, in an action for protection of constitutional rights filed by an individual requiring that "a thorough investigation" be conducted into the death of her son,<sup>73</sup> the Constitutional Court held that "[t]hose affected have the right to know what has happened to their next of kin, as the Inter-American Court of Human Rights has established."<sup>74</sup> On several occasions, this same Colombian Constitutional Court has ruled on the "right to the truth" and the

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the State was responsible for violating the right of the victims to know the truth about the facts and to obtain justice in each case in the national context.

*Id.* at 106 n.167.

71. Mauricio Pérez, *Histórico Fallo: La SCJ Declaró Inconstitucional a la Ley de Caducidad N. 15,848* [Landmark Ruling: The SCJ Held Expiry Law No. 15,848 Unconstitutional], LA REPUBLICA [THE REPUBLIC], Oct. 20, 2009, <http://www.larepublica.com.uy/politica/385131-ley-violo-separacion-de-poderes> (Uru.) (discussing Suprema Corte de Justicia [S.C.J.] [Supreme Court], 19 octubre 2009, "Sabalsagaray Curutchet, Blanca Stela. Excepción de Inconstitucionalidad Arts. 1, 3 y 4 de la Ley No. 15.848" (Uru.) available at [http://www.ielsur.org/desarrollo/documentos/inconstituc\\_ley\\_15848\\_.pdf](http://www.ielsur.org/desarrollo/documentos/inconstituc_ley_15848_.pdf)).

72. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).

73. C.C., Sala Plena junio 15, 1994, Sentencia T-275/94 (slip op. at 4) (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/1994/T-275-94.htm>. The petitioner's son, Nelson Joaquín Peñaranda Guerrero, was a voluntary soldier in the No. 16 Counterinsurgency Battalion of the Second Mobile Brigade. *Id.* He died on September 7, 1993, when he was shot on the premises of the No. 5 Mechanized Battalion in Cúcuta. *Id.*

74. *Id.* at 1.

“right to justice,” always referring to judgments of the Inter-American Court.<sup>75</sup>

When examining another action of unconstitutionality—this time against Article 220, section 3, of the code of criminal procedure—the Constitutional Court reaffirmed and developed important principles relating to the obligation to investigate and punish human rights violations.<sup>76</sup> The petition raised the objection that when facts or evidence arose that had not been examined by the judge during the trial, the review of the judgment should not only serve to absolve the accused or declare his lack of criminal responsibility.<sup>77</sup> According to the petition, this would exclude “the possibility of ensuring that justice is carried out, should new facts or evidence arise that would lead to review of the judgment in order to declare a much more serious criminal responsibility and higher compensation for those who were affected by the harmful act.”<sup>78</sup> Hence, principles such as double jeopardy and *res judicata* were raised:

The Constitutional Court, referring to *Barrios Altos*, emphasized that the rights of the victims exceed mere compensation, because they include the right to the truth and that justice be obtained in the specific case. In this regard, the judgment of Inter-American Court of Human Rights of March 14, 2001, in the *Barrios Altos* case is of particular importance . . . wherein that Court decided that the Peruvian amnesty laws were contrary to the American Convention and that the State was responsible for violating the right of the victims to know the truth about the facts and to obtain justice in each case.<sup>79</sup>

The court emphasized that it had taken into consideration three different rights when examining the contested norm: the right to the truth, the right to obtain justice in a specific case, and the right to reparation of damage through financial compensation.<sup>80</sup> The Constitutional Court admitted the claim contained in the petition.<sup>81</sup>

In the case of another motion of unconstitutionality concerning an aspect of the code of criminal procedure, the Constitutional Court reaffirmed the principles established in its case law and based its reasoning on the Inter-

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75. See, e.g., C.C., enero 20, 2003, Sentencia C-004/03 (slip op. at 22–23), available at <http://www.corteconstitucional.gov.co/relatoria/2003/C-004-03.htm> (citing *Velásquez-Rodríguez* for the proposition that human rights victims have a right to know the truth and *Barrios Altos* for the proposition that human rights victims have a right to know the truth and to obtain justice in their concrete case).

76. See *id.* at 38 (holding article 220, section 3 to be constitutional so long as review of cases involving grave human rights violations also includes review of acquittals and termination of proceedings against the defendant when new evidence comes to light).

77. *Id.* at 9.

78. *Id.*

79. *Id.* at 22.

80. *Id.* at 23.

81. See *id.* at 38 (finding that the state had severely breached its duty of serious and impartial investigation of the alleged violations).

American Court of Human Rights with regard to the obligation to investigate.<sup>82</sup> The petition highlighted the double jeopardy principle.<sup>83</sup> The applicants stated that the contested norm of the code of criminal procedure, which made it possible to review acquittals and subsequently declare them null, “evidently and flagrantly contradict[ed] the American Convention on Human Rights.”<sup>84</sup>

In its decision, the Constitutional Court emphasized that “constitutional jurisprudence has been defending the criminal-procedural rights of victims and those injured by a punishable act to financial reparations, to the truth, and to justice,”<sup>85</sup> indicating that

the Inter-American Court of Human Rights has stated that the victims of human rights violations have the right to the truth, justice, and reparations; consequently, the State must carry out the obligation to investigate [the] facts, punish those responsible, and reestablish, to the extent possible, the rights of the victims. In this regard, the Inter-American Court has emphasized that the investigation “must be undertaken seriously and not as a mere formality condemned to be ineffective in advance” since, [with situations] to the contrary it can be said that the State has failed to comply with the obligation to guarantee the free and full exercise of the rights of all persons subject to its jurisdiction, which would compromise its international responsibility.<sup>86</sup>

As is logical, this reasoning led the Constitutional Court to reject the petition’s claims and to reaffirm the principles already stated in Judgment C-004 of 2003 concerning the obligation to investigate grave human rights violations, whose prevalence over the double jeopardy principle had been indicated by said court.<sup>87</sup>

Finally, the same Constitutional Court gave weight to the Inter-American Court’s jurisprudence in declaring unconstitutional part of the definition of forced disappearance as a crime contained in article 165 of Law 599 of 2000, which promulgated the criminal code.<sup>88</sup> The petition chal-

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82. C.C., Sala Plena septiembre 30, 2003, Sentencia C-871/03 (slip op. at 28–29), *available at* <http://www.corteconstitucional.gov.co/relatoria/2003/C-871-03.htm>.

83. *See id.* at 6 (summarizing the petition’s double jeopardy claims in advance of the Constitutional Court’s holdings).

84. *Id.* at 6 (internal quotations omitted).

85. *Id.* at 28.

86. *Id.* at 33 (emphasis omitted).

87. *Id.* at 27 (quoting C.C., Sala Plena enero 20, 2003, Sentencia C-004/03 (slip op. at 24), *available at* <http://www.corteconstitucional.gov.co/relatoria/2003/C-004-03.htm>).

88. C.C., Sala Plena mayo 2, 2002, Sentencia C-317/02 (slip op. at 39–40) (Colom.), *available at* <http://www.corteconstitucional.gov.co/relatoria/2002/C-317-02.htm>. Article 165 stated,

Anyone who, belonging to an illegal armed group, subjects another person to deprivation of liberty in any form, followed by his concealment and the refusal to acknowledge the said loss of freedom or to provide information on his whereabouts, removing him from the protection of the law, shall be punished with 20 to 30 years’

lenged the portion of the forced-disappearance statute requiring that the private individual or the public servant perpetrating the act must belong to an illegally armed group.<sup>89</sup> According to the petitioner, it was not permissible that the private individual or the public servant was only punished under those circumstances.<sup>90</sup> In other words, the elements of the crime would not be met if the group was unarmed, if the perpetrator did not belong to a group, or if the armed group was legal.<sup>91</sup>

When examining the petition, the Constitutional Court cited at length the judgment of the Inter-American Court in *Godínez-Cruz*.<sup>92</sup> The Constitutional Court emphasized that with *Godínez-Cruz*, the Inter-American Court established that

in principle, the State can be attributed with any violation of the rights recognized in the Convention by an act of the public authorities or of people taking advantage of the authority that they possess, owing to their official role, and even then, this does not exhaust all the situations in which a State is obliged to prevent, investigate, and punish human rights violations, or all the [situations] in which its responsibility may be entailed, as a result of a harm to those rights.<sup>93</sup>

In its considerations, the Constitutional Court held, based on the description of the conduct contained in the norm being contested, “the assertion of the applicant that members of the Armed Forces are excluded from being active subjects of the forced disappearance, [is not valid].”<sup>94</sup> Regarding the active subject of the crime of forced disappearance and the requirement that he belong to an “illegal armed group,” the Constitutional Court found that this text was unconstitutional because it significantly reduced the meaning and scope of the protections of the victims.<sup>95</sup> In keeping with this reasoning, the Constitutional Court established that

in accordance with the jurisprudence of the Inter-American Court of Human Rights cited above, the mere failure of the States to prevent the forced disappearances perpetrated by private individuals or to control illegally armed groups that execute these acts, implies that the respective State has not complied with its

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imprisonment and a fine of 1,000 to 3,000 monthly minimum legal wages in force and prohibited from exercising public functions and rights for 10 to 20 years.

L. 599, julio 24, 2000, D.O.

89. *Id.* at 8.

90. *Id.* at 9.

91. *Id.*

92. *Id.* at 18–20 (quoting *Godínez-Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶ 161–167 (Jan. 20, 1989)).

93. *Id.* at 21.

94. *Id.* at 33.

95. *Id.* at 34.

obligation to prevent and punish those responsible for such acts, and consequently, merits the corresponding sanctions.<sup>96</sup>

In several cases, the Constitutional Court of Peru has reaffirmed fundamental principles of the obligation to investigate. For example, in the appeal after execution of judgment filed by Gabriel Orlando Vera Navarrete—who believed that he had been imprisoned arbitrarily and requested immediate release from prison—the court referred to the complex nature of the criminal proceedings against Vera Navarrete (allegedly a member of the so-called Colina Group) for the crimes of aggravated homicide, aggravated kidnapping, and forced disappearance of persons.<sup>97</sup> Against this background, referring to the case of *Velásquez-Rodríguez*, the Constitutional Court reaffirmed the principle of the obligation to guarantee, established both in international standards and in the Inter-American Court’s judgments.<sup>98</sup> In the same judgment, the court developed the meaning and precise scope of the obligation to investigate based on the case of *Bulacio v. Argentina*.<sup>99</sup>

Thus, Inter-American jurisprudence decisively influences the radical reinterpretation of certain norms of domestic positive law. In this way, some legal guarantees are part of a dynamic process of reinterpretation, and without ceasing to be valid, they are subjected to a degree of “relativization” in their application to specific extreme situations. In summary, the norms of positive criminal law continue to be in force formally, but the courts decide not to apply them based on considerations derived from rules of international law.

Hence, positive law is reinterpreted in relation to principles that are considered to be of a higher order and that undoubtedly relate to one of the

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96. *Id.*

97. TC, Dec. 9, 2004, Vera Navarrete, No. 2798-04-HC/TC, “Fundamentos,” ¶ 2(b)(i), available at <http://www.tc.gob.pe/jurisprudencia/2005/02798-2004-HC.html>. Vera Navarrete was also tried for his alleged participation in the Barrios Altos and La Cantuta killings.

98. *Id.* ¶ 10. The court noted,

The obligation of guarantee has been developed in the jurisprudence of the Inter-American Court of Human Rights. Thus, in the judgment in the case of *Velásquez Rodríguez*, the Court indicated that the obligation of guarantee implied that the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, if possible, attempt to restore the right violated and provide compensation as appropriate for any harm resulting from the human rights violation. The obligation of the State consists in the exercises of the corresponding criminal action against those public officials, or any individual, who is allegedly responsible for the alleged violation. Hence, international human rights law ensures the protection of the rights of the individual but, at the same time, requires the intervention of criminal law against those who are responsible for the violation.

*Id.* (citing *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 164, 166 (July 29, 1988)).

99. TC, *Vera Navarrete*, No. 2798-04-HC/TC, “Fundamentos,” ¶ 19 (citing *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 110–112 (Sept. 18, 2003)).

essential components of the contemporary phenomenon of globalization: human rights.

*C. Right to an Effective Recourse*

The right to effective recourse, established in articles 8 and 25 of the American Convention, has been reinforced and developed by the domestic courts based on the Inter-American Court's decisions.<sup>100</sup> In this regard, the highest courts of several countries have adopted interesting decisions.

In Argentina, Fernando Daniel López had been convicted of culpable homicide and denied an appeal for review.<sup>101</sup> However, the National Court of Appeal on Criminal Matters agreed to hear his appeal, basing its choice on the fact that "every person who has been sentenced and convicted must have access—based on the right to defense—to a renewed examination of the question (in principle, as extensive as possible)" in the judgment in the case of *Herrera-Ulloa v. Costa Rica*.<sup>102</sup>

Directly related to the right to an effective recourse and due process, on July 2, 2004, the Inter-American Court handed down a judgment in the case of *Herrera-Ulloa v. Costa Rica*, declaring that the state had violated the right to judicial guarantees and consequently must annul the judgment delivered by the criminal court of the First Judicial Circuit of San José of November 1999 sentencing and convicting Mauricio Herrera-Ulloa.<sup>103</sup> A few weeks later, in compliance with the judgment, the criminal court ordered the cancellation of the entry in the records of Herrera-Ulloa's trial, the annulment of the imposed fine and pecuniary damages, as well as the order to publish the judgment.<sup>104</sup> In November 2010, the Inter-American Court closed the case because the state had complied with all aspects of the judgment by amending the code of criminal procedure, expanding the procedures for contesting judgments by incorporating the remedy of appeal of a criminal judgment, reforming the appeal for review (cassation), and enhancing the principle of oral proceedings in criminal cases.<sup>105</sup>

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100. See American Convention on Human Rights, *supra* note 12, arts. 8, 25 (establishing the right to a fair trial and the right to judicial protection).

101. Cámara Nacional de Casación Penal [C.N.C.P.] [National Court of Appeal on Criminal Matters], sala IV, 15/10/2004, "López, Fernando Daniel s/ recurso de queja," No. 4807 (slip op. at 1), available at <http://www.pensamientopenal.com.ar/04042008/30fallo2.pdf>.

102. *Id.* at 2.

103. *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C), No. 107, ¶¶ 167–168, "Decides," ¶ 4 (July 2, 2004).

104. See *Herrera-Ulloa v. Costa Rica*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen," ¶ 4 (Inter-Am. Ct. H.R. Sept. 12, 2005), available at [http://www.corteidh.or.cr/docs/supervisiones/herrera\\_12\\_09\\_05.pdf](http://www.corteidh.or.cr/docs/supervisiones/herrera_12_09_05.pdf) (noting the remedial measures taken by Costa Rica in Mr. Herrera-Ulloa's case).

105. *Herrera-Ulloa v. Costa Rica*, Monitoring Compliance with Judgment, Order of the Court, "Resolves," ¶ 1 (Inter-Am. Ct. H.R. Nov. 22, 2010), available at [http://corteidh.or.cr/docs/supervisiones/herrera\\_22\\_11\\_10.pdf](http://corteidh.or.cr/docs/supervisiones/herrera_22_11_10.pdf).

Another interesting example relates to the judgment delivered by the Inter-American Court in the case of *Fermín Ramírez v. Guatemala*.<sup>106</sup> Fermín Ramírez had been sentenced to death.<sup>107</sup> However, the Inter-American Court declared that the Convention had been violated during the criminal proceedings and, consequently, that the punishment established by the Guatemalan courts “was arbitrary for having violated impassable limitations for the imposition of said punishments in the countries that still have it.”<sup>108</sup> On this basis, the court determined that “[t]he State must hold, within a reasonable period of time, a new trial against Fermín Ramírez, satisfying the demands of the due process of law, with all the guarantees of hearings and defense for the accused.”<sup>109</sup>

In January 2006, after the Supreme Court of Justice of Guatemala learned of this judgment, it ruled that “since the State of Guatemala is subject to the compulsory jurisdiction of the Inter-American Court of Human Rights, the judgments that the latter delivers concerning the interpretation and application of the American Convention on Human Rights are final and are unappealable,” and decided that, in compliance with said judgment, a new criminal trial should be held for Fermín Ramírez.<sup>110</sup> The proceedings were held in accordance with the standards of due process, and the accused was sentenced to forty years of imprisonment.<sup>111</sup>

The judicial protection of human rights has been an important aspect that the Constitutional Courts of Colombia and Peru have dealt with on several occasions. The Colombian Constitutional Court developed important principles in a case involving a constitutional challenge to provisions of the country’s code of criminal procedure regulating the constitutional rights of the aggrieved person in a civil action.<sup>112</sup> In its decision, the court reinforced

106. Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C), No. 126 (June 20, 2005).

107. *Id.* ¶ 2.

108. *Id.* ¶ 79.

109. *Id.* “Decides,” ¶ 7.

110. *Fermín Ramírez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, “Considering,” ¶ 9 (Inter-Am. Ct. H.R. Sept. 22, 2006), available at [http://www.corteidh.or.cr/docs/supervisiones/Fermin\\_22\\_09\\_06.pdf](http://www.corteidh.or.cr/docs/supervisiones/Fermin_22_09_06.pdf).

111. *Id.* “Having Seen,” ¶ 6 (citing to *Fermín Ramírez v. Guatemala*, La Corte Suprema de Justicia [SCJ] [Supreme Court of Justice] Jan. 23, 2006, available at <http://www.juridicas.unam.mx/publica/librev/rev/dialjur/cont/2/cnt/cnt14.pdf> (Guat.)).

112. The petition indicated that article 137 of the code of criminal procedure violated the principle of equality with regard to access to justice, because the law granted the accused “the freedom to act directly in the defense of his case, . . . and not obligatorily through a lawyer,” while it imposed on the complainant or the person adversely affected the obligation to act through legal counsel, which violated the principle of equality. C.C., Sala Plena abril 3, 2002, Sentencia C-228/02 (slip op. at 9), available at <http://www.corteconstitucional.gov.co/relatoria/2002/C-228-02.htm>. In addition, it indicated that it prevented the civil party from having any information about the judicial proceedings during the preliminary investigation stage, because he or she was not a party to the proceedings and because that information was protected by the confidentiality of the proceedings. *Id.* at 10. In the petitioner’s opinion, this was contrary to articles 93 and 95(4) of the constitution. *Id.*

the principles that protect the rights of victims.<sup>113</sup> Citing Advisory Opinion OC-9/87, it underscored that the inexistence of an effective remedy against violations of the rights recognized in the convention constitutes a breach thereof.<sup>114</sup> It cited, *in extenso* the judgment of the Inter-American Court in *Barrios Altos* in order to indicate that “laws that deny victims the possibility of knowing the truth and obtaining justice are contrary to the American Convention on Human Rights.”<sup>115</sup>

Basing its decision on the jurisprudence of the Inter-American Court of Human Rights, the Constitutional Court of Peru reaffirmed, among other aspects, the right to remedy from a competent court in the face of any act or omission that harms fundamental rights.<sup>116</sup> It emphasized that this right, “[a]ccording to the binding jurisprudence of the Inter-American Court of Human Rights, constitutes a central element of the American Convention on Human Rights, and consequently, access to it cannot be obstructed unreasonably or its full enjoyment and exercise prevented.”<sup>117</sup>

The June 2007 judgment of the Peruvian Constitutional Court is especially relevant in regard to the motion of unconstitutionality filed by the Callao Bar Association against Law 28,642, which established the inadmissibility of actions for the protection of constitutional rights against decisions of the National Electoral Board.<sup>118</sup> The judgment declared the application admissible based on the 2005 judgment of the Inter-American Court in the case of *Yatama v. Nicaragua*.<sup>119</sup> To reaffirm the right to effective recourse, the court based its decision essentially on the consideration that

as the Inter-American Court of Human Rights has established, under no circumstances (even during states of exception), can the right be disregarded of every individual to have recourse to the constitutional procedures of amparo and habeas corpus when faced with a violation of the fundamental rights recognized in the Constitution of the State, as a specific manifestation, at the domestic level, of the human right of everyone ‘to a simple and prompt remedy, or any other effective recourse, before a competent court or tribunal for protection against acts that violate individual fundamental rights . . . .’<sup>120</sup>

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113. *Id.* at 14.

114. *Id.* at 18.

115. *Id.*

116. TC, Jan. 27, 2003, Almenara Bryson, No. 1941-2002-AA/TC, “Fundamentos,” ¶ 3, available at <http://www.tc.gob.pe/jurisprudencia/2003/01941-2002-AA.html>.

117. *Id.*

118. TC, June 19, 2007, COLEGIO DE ABOGADOS DEL CALLAO C. CONGRESO DE LA REPÚBLICA, No. 00007-2007-PI/TC, “Ha Resuelto,” ¶ 1, available at <http://www.tc.gob.pe/jurisprudencia/2007/00007-2007-AI.html>.

119. *Id.* “Fundamentos,” ¶ 22 (citing *Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 174–176 (June 23, 2005)).

120. *Id.* “Fundamentos,” ¶ 41.

Lastly, another relevant example comes from Mexico, where in September 2008, the supreme court decided that it was necessary to create appropriate mechanisms to ensure the existence of legal remedies to contest the constitutional reform process.<sup>121</sup> This decision was based on the judgment of the Inter-American Court in the case of *Castañeda Gutman v. México*,<sup>122</sup> among other relevant sources.<sup>123</sup> The Inter-American Court decided that the “real possibility of access to a judicial remedy so that the competent authority, with jurisdiction to issue a binding decision, determines whether there has been a violation of a right claimed by the person filing the action . . . .”<sup>124</sup>

#### D. *Nondiscrimination and the Rights of Indigenous People*

The rift between international law and the rights of indigenous people is, today, much less profound and dramatic than it was in the past. But it has been and continues to be an extremely complex problem that affects a sector of the population that has been harshly affected by a long history of oppression and exclusion.

At its inception, Inter-American justice did not focus its attention on the rights of indigenous people and the historic abuses to which they have been subjected, such as exclusion and discrimination.<sup>125</sup> However, indigenous communities are increasingly resorting to the international legal system to assert their rights. The first pertinent case filed before the Inter-American Court was decided in 1991.<sup>126</sup> It is only as of 2001 that cases of this type have begun to arrive more frequently.<sup>127</sup>

121. See Amparo en revision 186/2008, Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Novena Época, Septiembre de 2008, slip op. at 52–57, available at <http://www.ijf.cjf.gob.mx/cursososp/2010/CONFERENCIAS/sentencias/revisi6%20186-2008.pdf> (discussing the need for remedies of constitutional violations and limitations of the amparo remedy).

122. Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 100 (Aug. 6, 2008).

123. Amparo en revision 186/2008, SCJN, at 61 (citing *Castañeda Gutman v. Estados Unidos Mexicanos*, Sentencia (Inter-Am. Ct. H.R. Aug. 6, 2008)).

124. *Castañeda Gutman*, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 100.

125. See Hurst Hannum, *The Protection of Indigenous Rights in the Inter-American System*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 323, 325 (David J. Harris & Stephen Livingstone eds., 1998) (“The mandate of the Inter-American Commission on Human Rights extends to all OAS member states, but the Commission has had no special authority or obligation to concern itself with the rights of indigenous peoples.”).

126. *Aloeboetoe et al. v. Suriname*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991).

127. See Diana Contreras-Garduño & Sebastiaan Rombouts, *Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights*, 27 MERKOURIOS: UTRECHT J. INT’L & EUR. L. 4, 14–17 (2010) (Neth.) (discussing the landmark 2001 case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and subsequent collective-reparation cases that demonstrate the Inter-American Court’s pioneer status when it comes to protecting indigenous communities).

Several analysts, such as Pasqualucci, consider that at the global level, the Inter-American Court of Human Rights is one of the driving forces for the progressive development of law in this area.<sup>128</sup> Fundamental factors, such as nondiscrimination, the right to participate in public affairs, and respect for customary law are, today, important ingredients of international human rights law.<sup>129</sup> As Nash has indicated,

Although the jurisprudence of the Inter-American Court, in exercise of its contentious jurisdiction, cannot resolve every problem of the indigenous people (it is not the role of the international courts to do so), it can make a contribution, establishing the content and scope of the State's obligations in this area.<sup>130</sup>

In its jurisprudence, the Inter-American Court has consistently affirmed the principle of nondiscrimination, establishing that states have the obligation not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual. A distinction that lacks objective and reasonable justification is discriminatory.<sup>131</sup>

Clearly, the state has the international obligation to guarantee human rights “without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition” as stipulated in article 1 of the American Convention on Human Rights.<sup>132</sup> The Convention also establishes the principle of equality, reaffirming that all persons “are entitled, without discrimination, to equal protection of the law.”<sup>133</sup>

To the extent that this obligation involves the need to adapt the state's laws to the Convention, it is not merely a matter of not discriminating, but the state must also guarantee that the laws will be effective. This means not only abstaining from adopting discriminatory laws and regulations,<sup>134</sup> but

128. Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281, 284 (2006). Pasqualucci calls this “progressive case law.” *Id.* at 281.

129. *Id.* at 286–90.

130. Claudio E. Nash Rojas, *Los Derechos Humanos de los Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos [The Human Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights]*, in DERECHOS HUMANOS Y PUEBLOS INDÍGENAS: TENDENCIAS INTERNACIONALES Y CONTEXTO CHILENO [HUMAN RIGHTS AND INDIGENOUS PEOPLES: INTERNATIONAL TRENDS AND CHILEAN CONTEXT] 29, 29 (José Aylwin O. ed., 2004).

131. *Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 185 (June 23, 2005) (footnotes omitted).

132. American Convention on Human Rights, *supra* note 12, art. 1 ¶ 1.

133. *Id.* art. 24.

134. Pasqualucci, *supra* note 128, at 287 (citing *Yatama*, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 185).

also enacting the necessary legal provisions and ensuring that public institutions, in general, behave with equal respect for ethnic and juridical pluralism, as well as for nondiscrimination.<sup>135</sup>

From this point of view, juridical pluralism is a concept with increasing acceptance and legitimacy that the Inter-American Court applies when developing its jurisprudence in cases of this type.<sup>136</sup> The same is true of customary law as one of the sources of interpretation of state obligations in these matters.<sup>137</sup> The rights of indigenous people occupy a special place from the perspective of juridical pluralism. These rights include respect for customary law, the right to collective ownership of the land and territory, and recognition of indigenous justice, where mechanisms and procedures that differ from those of written law are applied.<sup>138</sup>

Individual rights are exercised in communities and they must be interpreted precisely in each specific context.<sup>139</sup> This is how the Inter-American Court's jurisprudence regarding the rights of indigenous peoples has developed.<sup>140</sup> Indeed, since its decisions relate to individual victims, the court has interpreted the provisions of the American Convention and other international instruments (such as the International Labor Organization Convention 169) in the context of indigenous peoples whose rights have been affected. The court does this both to establish the dimension of the effects on the individual right—since collective rights form part of their cultural

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135. See *Yatama*, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 185 (dictating that states “establish norms and other measures that recognize and ensure the effective equality before the law of each individual”); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 51, 63 (June 17, 2005) (emphasizing that “States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population” including “their customary law, values, and customs”).

136. See, e.g., *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 63 (deeming it essential to effective protection of indigenous peoples' rights that states take into account “their customary law, values, and customs”).

137. Pasqualucci, *supra* note 128, at 289 (citing *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151 (Aug. 31, 2001)).

138. See Contreras-Garduño & Rombouts, *supra* note 127, at 13 (“The protection of indigenous peoples is an area of special concern for the entities of the Inter-American Human Rights System.”); Pasqualucci, *supra* note 128, at 283–84 (analyzing the indigenous rights case law of the Inter-American system, which considers matters relating to indigenous customary law, communal ancestral land rights, and the applicability of indigenous law, among other things).

139. See Jeffrey B. Hall, *Just a Matter of Time? Expanding the Temporal Jurisdiction of the Inter-American Court to Address Cold War Wrongs*, 14 *LAW & BUS. REV. AMERICAS* 679, 696–97 (2008) (discussing the Inter-American Court's use of contextual considerations in determining individual rights).

140. See, e.g., *Awás Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, “Concurring Opinion of Judge Sergio García Ramírez,” ¶ 15 (discussing the significance of interpreting indigenous rights in context, as supported by expert reports).

identity—and to maintain a collective perspective when granting reparations, since it is a segment of the identity that has been affected.<sup>141</sup>

In this regard, the 2001 judgment of the Inter-American Court in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*<sup>142</sup> was particularly clear. This was the first binding decision of an international court that recognized the collective right of indigenous people to ownership of land and natural resources.<sup>143</sup> As Anaya and Grossman indicated, “This is the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state’s failure to do so.”<sup>144</sup>

This judgment established the right of the Awas Tingni indigenous people to title to the land and the parallel obligation of the state to award those property titles.<sup>145</sup> The court established that the concept of property included the communal property of the indigenous people as defined by customary law.<sup>146</sup> Among other considerations, the court ruled on the communal tradition and indigenous people’s special relationship with the land.<sup>147</sup>

The court established that the members of the Awas Tingni Community “have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities.”<sup>148</sup> On this basis, the court determined that the state must “carry out the delimitation, demarcation, and titling of the territory belonging to the community.”<sup>149</sup> In 2008, the Nicaraguan government awarded the community property titles to

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141. See, e.g., *Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 87 (Aug. 24, 2010) (proclaiming that “the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession ‘does not focus on individuals but on the group and the community,’” and noting that this arises “from the culture, uses, customs, and beliefs of different peoples” and should be protected by the American Convention); *Bámaca-Velásquez v. Guatemala, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, “Concurring Opinion of Judge Sergio García Ramírez,” ¶ 2 (Feb. 22, 2002) (asserting that evaluation of indigenous rights “recognizes the individuality of the subject with his wide range of particularities and nuances”); *Awes Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 138 (stating pursuant to the American Convention, Nicaragua is required to implement measures for “delimitation and titling of the property of the members of the [indigenous Nicaraguan] Awes Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community”).

142. *Awes Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (expounding the significance of traditions of collective ownership for interpreting indigenous property rights).

143. S. James Anaya & Claudio Grossman, *The Case of Awes Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1, 2 (2002).

144. *Id.* at 2.

145. *Id.* at 12–13.

146. *Awes Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148.

147. *Id.* ¶ 149.

148. *Id.* ¶ 153.

149. *Id.* ¶ 153(a).

over 73,000 hectares, the matter in dispute, thus complying with that aspect of the judgment.<sup>150</sup>

Based on the American Convention, the concept of “human rights” is recreated in related jurisdictional decisions in which customary law, juridical pluralism, and multiculturalism are relevant ingredients. This reinforces concepts and values such as equality and nondiscrimination.

From this perspective, the relationship between state law and indigenous law occupies an important place, which will probably achieve increasing protagonism. For some, these are conflicting concepts that lead to a dualist perspective between the two orders of law.<sup>151</sup> In our region, for example, the Colombian sociologist, Carmen Andrea Becerra Becerra, has organized “legal pluralism” conceptually in order to understand indigenous law as a mechanism that would appear to have absolute autonomy.<sup>152</sup> Thus, according to Becerra Becerra, if the indigenous legal system had to abide by certain normative or institutional parameters, this would be “conditioned autonomy” or “legal ethnocentrism.”<sup>153</sup>

This relates to an essential issue: whether a state authority, in exercising its obligation of guarantee, can or should examine an alleged violation of human rights by the indigenous authority and, above all, whether an institutional mechanism, such as a constitutional court, can become involved in this matter. As an example of conditioned autonomy that the constitutional court can review, Becerra Becerra cites the “orders issued by indigenous authorities that are considered to affect the exercise of a fundamental right, [because] they are the most evident expression of the subjection of such judicial decisions—issued under the special indigenous jurisdiction—to the provisions of higher ranking norms.”<sup>154</sup>

The basic issue is the relationship or connection between the fundamental rights embodied in national and international norms, on the one hand, and indigenous law and authority, on the other. The Colombian

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150. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Monitoring Compliance with Judgment, Order of the Court, “Having Seen,”* ¶ 14 (Inter-Am. Ct. H.R. Apr. 3, 2009), available at [http://www.corteidh.or.cr/docs/supervisiones/mayagna\\_03\\_04\\_09\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/mayagna_03_04_09_ing.pdf).

151. See JOAN CHURCH ET AL., *HUMAN RIGHTS FROM A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 52 (2003) (propounding that “it might perhaps be argued that recognition of indigenous law alongside the general law indicates legal dualism that recognises cultural diversity”); Abraham Korir Sing’Oei, *Customary Law and Conflict Resolution Among Kenya’s Pastoralist Communities*, *INDIGENOUS AFFAIRS*, Jan.–Feb. 2010, at 16, 17 (describing how “dualism, a hybrid legal space where more than one legal or quasi-legal regime occupies the same social field,” includes the existence of customary community systems alongside formal legal systems).

152. Carmen Andrea Becerra Becerra, *La jurisdicción especial indígena y el derecho penal en Colombia: Entre el pluralismo jurídico y la autonomía relativa [Indigenous Special Jurisdiction and Criminal Law in Colombia: Between Legal Pluralism and Relative Legal Autonomy]* 35 *EL OTRO DERECHO [THE OTHER RIGHT]* 213, 216 (2006) (Colom.).

153. *Id.* at 217.

154. *Id.* at 227.

Constitutional Court has established four rules of interpretation concerning the relationship between fundamental rights and the exercise of the indigenous jurisdiction:

- Greater conservation of usage and customs results in greater autonomy.
- Fundamental constitutional rights constitute the minimum necessary for the coexistence of all individuals.
- Peremptory legal norms (of public order) of the republic take precedence over the usage and customs of the indigenous communities, provided they directly protect a constitutional entitlement that is superior to the principle of ethnic and cultural diversity.
- The usage and customs of an indigenous community take precedence over positive legal norms.<sup>155</sup>

Becerra Becerra directly questions the Constitutional Court, indicating that by establishing these parameters, the court is “revealing . . . an ethnocentric conception of some human rights that have been decided from a westernized perspective, according to the principles of equality, individuality and freedom, thus relegating recognition of Colombia as a multicultural country to a secondary rank.”<sup>156</sup>

From this perspective, conditioning human rights to normative and conceptual parameters would be contrary to juridical pluralism and to the principle of nondiscrimination. Hence, the central issue is whether there are certain minimums that have to be respected within the juridical pluralism of a democratic society. This problem relates to a complex issue of “weighing”<sup>157</sup> in the juridical system, and the corresponding theoretical framework, which cannot and must not be ideological concepts or the individual ethics of each person. The answer lies with international human rights law and the relevant interpretations that the Inter-American Court and the domestic courts can make in keeping with this body of law.

In this regard, I refer to the constitutional jurisprudence of Colombia, a Latin American country whose constitutional court has made the most significant contributions on this issue at the jurisdictional level. With good reason, Bonilla calls the Constitutional Court of Colombia “one of the most progressive juridical and constitutional frameworks in Latin America regarding multicultural matters.”<sup>158</sup> Several analysts have stressed the importance of the Constitutional Court’s Judgment No. T-349 of August

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155. C.C., mayo 30, 1994, Sentencia T-254/94 (slip op. at 15–16), available at <http://www.corteconstitucional.gov.co/relatoria/1994/t-254-94.htm>.

156. Becerra Becerra, *supra* note 152, at 229.

157. “Ponderación” in Spanish.

158. DANIEL BONILLA MALDONADO, LA CONSTITUCIÓN MULTICULTURAL [THE MULTICULTURAL CONSTITUTION] 25 (2006).

1996,<sup>159</sup> in the case of the motion for the protection of constitutional rights filed by an indigenous person (Ovidio González Wasorna) against the General Assembly of Indigenous Councils (Cabildos), region-Chamí, and the Cabildo Mayor Único (CRIR).<sup>160</sup>

The judgment relates to what the claimant considered to have been a breach of his rights, while he was tried for homicide by an indigenous community.<sup>161</sup> When he and another man accused had been detained, they delivered themselves voluntarily to the prosecutor's office, indicating that they had received death threats from members of their community and that they had been tortured.<sup>162</sup> According to the case file, the claimant alleged that he had been subject to the punishment of the "stocks" and that this constituted "cruel and inhuman treatment."<sup>163</sup> The condemned man alleged that he had no way of defending himself because no recourse was permitted against the community's decisions.<sup>164</sup> Furthermore, since it was the first murder case decided by the community, according to the claimant, "there was no . . . custom or usage that could be applied based on consistent and continued use."<sup>165</sup> Also, he had been tried based on norms that did not precede the facts, he was not present during his trial, members of the victim's family acted as judges, and the accused was denied the possibility of presenting or contesting evidence.<sup>166</sup>

The Constitutional Court concluded that the indigenous community had exceeded its jurisdictional authority, and violated due process by affecting the principle of the legitimacy of the punishment.<sup>167</sup> When reaching this conclusion, the Constitutional Court incorporated conceptual and normative elements that go beyond indigenous law conceived as an absolute and self-sufficient mechanism. Hence, it is questionable whether the Constitutional Court's reasoning and conclusion can be classified as conditioned autonomy or juridical ethnocentrism in this case. To the contrary, it could even be considered limited and partial to conclude that this right (due process) could only have been affected by the action adopted by said indigenous authority (the

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159. C.C., agosto 8, 1996 (slip op.) (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/1996/T-349-96.htm>.

160. See Kimberly Inksater, Resolving Tensions Between Indigenous Law and Human Rights Norms Through Transformative Juricultural Pluralism 40 (July 28, 2006) (unpublished manuscript), available at [http://www.justgovernancegroup.org/en/Assets/Inksater\\_PluralismIndigenousLaw&HumanRights.pdf](http://www.justgovernancegroup.org/en/Assets/Inksater_PluralismIndigenousLaw&HumanRights.pdf) ("The Court advanced the autonomy of indigenous justice significantly with the 1996 decision in *Gonzalez Wasorna v. Asamblea General de Cabildos Indigenas Region Chami y Cabildo Mayor . . .*").

161. C.C., Sentencia T-349/96 (slip op. at 3–4).

162. *Id.* at 3.

163. *Id.* at 16.

164. *Id.* at 4.

165. *Id.* at 4.

166. *Id.* at 4–5.

167. *Id.* at 19.

General Assembly of Indigenous Councils for the Chamí region and the First Town Council).

As Bonilla indicates, this is a complex issue that causes “considerable juridical and political tension,”<sup>168</sup> and constitutes “one of the major challenges currently faced by democracies worldwide.”<sup>169</sup> Nevertheless, this fact is far from being an unusual element. To the contrary, this tension is a structural part of contemporary states that requires a case-by-case response.<sup>170</sup> In this regard, the interaction between Inter-American jurisprudence and the opinions of the highest national courts, such as the constitutional courts, is crucial.

### III. Conclusion

Tribunals such as the Constitutional Court of Colombia have faced specific situations where they have had to decide to make use of substantive instruments found in the affirmation of juridical pluralism, but within the framework of human rights laws and specifically within the approach and perspective of the corresponding Inter-American jurisprudence.

International human rights obligations establish limits to an unrestricted juridical pluralism. The challenge is to respect plurality and affirm nondiscrimination compatible with respect for international obligations. This is the common denominator within which juridical pluralism is inserted and limited, and it is reflected in the approach inferred from the decisions of the Constitutional Court—not to impose a “Western” vision, but to establish substantive criteria that the state must guarantee and society must respect.

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168. Daniel Bonilla, *Los Derechos Fundamentales y la Diferencia Cultural Análisis del Caso Colombiano* [Fundamental Rights and Cultural Difference Analysis of the Colombian Case], UNIVERSIDAD NACIONAL DE COLOMBIA [NATIONAL UNIVERSITY OF COLOMBIA], III-3, available at <http://www.seminario2005.unal.edu.co/Trabajos/Bonilla/Los%20derechos%20fundamentales%20y%20la%20diferencia%20cultural.pdf>.

169. BONILLA MALDONADO, *supra* note 158, at 20.

170. *Id.* at 105.