



universität
wien

MASTER THESIS | MASTER'S THESIS

Titel | Title

„The Transformative Impact of Inter-American Legal Standards on Indigenous Rights in Colombia“

verfasst von | submitted by

Laura Victoria Mendoza Velandia, BA

angestrebter akademischer Grad | in partial fulfilment of the requirements for the degree of
Master of Advanced International Studies (M.A.I.S.)

Wien | Vienna, 2024

Studienkennzahl lt. Studienblatt |
Degree programme code as it appears on the
student record sheet:

UA 992 940

Universitätslehrgang lt. Studienblatt | Degree
programme as it appears on the student
record sheet:

Internationale Studien

Betreut von | Supervisor:

Prof. Dr. Holger Hestermeyer



diplomatische
akademie **wien**
Vienna School of International Studies
École des Hautes Études Internationales de Vienne

Abstract

This thesis aims to provide a comprehensive overview of the impact that the inter-american system of human rights has had on legal practices in Colombia concerning indigenous rights. Through an analysis of references to inter-american legal instruments and legal precedents in the judgments of the Constitutional Court of Colombia, the thesis will demonstrate that the impact of inter-american standards manifests in three key aspects: equipping the Constitutional Court with a progressive jurisprudence toolbox from the Inter-American Court of Human Rights, offering Indigenous Peoples a remedy for rights protection post-exhaustion of domestic legal avenues, and potentially imposing stricter obligations on the Colombian state regarding issues such as prior consultation through a pending case before the Inter-American Court of Human Rights.

Ziel dieser Arbeit ist es, einen umfassenden Überblick über die Auswirkungen des interamerikanischen Menschenrechtssystems auf die Rechtspraxis in Kolumbien in Bezug auf indigene Rechte zu geben. Anhand einer Analyse der Verweise auf interamerikanische Rechtsinstrumente und Präzedenzfälle in den Urteilen des kolumbianischen Verfassungsgerichts wird gezeigt, dass sich die Auswirkungen der interamerikanischen Standards in drei Schlüsselaspekten manifestieren: Sie statten das Verfassungsgericht mit einem fortschrittlichen Rechtsprechungsinstrumentarium des interamerikanischen Menschenrechtshof aus, bieten den indigenen Völkern einen Rechtsbehelf zum Schutz ihrer Rechte, nachdem der innerstaatliche Rechtsweg ausgeschöpft ist, und können potenziell dem kolumbianischen Staat durch ein anhängiges Verfahren vor dem Menschenrechtshof strengere Verpflichtungen in Bezug auf unter anderem vorherige Konsultationen auferlegen.¹

¹ Translated with DeepL.com

“On my honour as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorised assistance on it.”

Laura Victoria Mendoza Velandia

Contents

Abstract	1
Acknowledgments	4
List of Abbreviations.....	5
1. Introduction	7
2. Literature Review	11
3. Methodology.....	15
4. Indigenous Communities in Colombia	18
5. Analysis of relevant Legal Instruments	23
5.1. Indigenous Rights at the International Level.....	23
5.2. Indigenous Rights at the Inter-American Level	25
5.3. Indigenous Rights at the National Level	29
6. Impact Evaluation.....	34
C-139 of 1996	34
SU-383 of 2003.....	35
T-009 of 2013	38
T-294 of 2014	40
C-463 of 2014	43
SU-123 of 2018.....	45
SU-092 of 2021	47
SU-245 of 2021	49
7. Current Challenges – the U’wa Indigenous Peoples v. Colombia case.....	52
8. Discussion and Policy Recommendations	55
9. Conclusion	59
10. References	62
10.1. List of cases	62
10.2. Domestic Legal Instruments	62
10.3. International Legal Instruments	62
10.4. Secondary Literature.....	63

Acknowledgments

I am deeply indebted to several people who have supported me throughout the process of writing this thesis. First, I sincerely express my gratitude to my supervisor, Prof. Holger Hestermeyer, for his invaluable guidance, keen interest in my research topic, and practical advice. His encouragement reassured me that I could indeed write a legal thesis without being a lawyer.

I would also like to thank Prof. Flávia Piovesan for her advice during the initial stages of the thesis. Her life's work has been a significant inspiration for this thesis. I have been deeply influenced by her passion for the Inter-American Human Rights System, a passion that I now share.

The incredible people I have met over the past two years at the Diplomatic Academy have been essential to my journey. They have supported me through countless long nights of studying and writing. Sharing this time with them has enriched me intellectually, as I learned from each of them, and personally, as I have built friendships and lived experiences that I will carry with me always.

Lastly, I am deeply grateful to my family for their unwavering support and belief in me. I am profoundly thankful to my parents, whose sacrifices have provided me the opportunity to pursue my academic interests. I am committed to honouring their efforts by striving to make them proud every day going forward.

Thank you all.

Vienna, 7 June 2024,

Laura Victoria Mendoza Velandia

List of Abbreviations

ACHR	American Convention on Human Rights
AFP	<i>Acuerdo Final de Paz</i> (Final Peace Agreement)
CRIC	<i>Consejo Regional Indígena del Cauca</i> (Regional Indigenous Council of the Cauca)
ELN	<i>Ejército de Liberación Nacional</i> (National Liberation Army)
FARC-EP	<i>Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo</i> (Revolutionary Armed Forces of Colombia – Army of the People)
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
ILO	International Labour Organization
INCODER	<i>Instituto Colombiano de Desarrollo Rural</i> (Colombian Rural Development Institute)
M-19	<i>Movimiento 19 de Abril</i> (Movement of the 19 of April)
ONIC	<i>Organización Nacional Indígena de Colombia</i> (National Indigenous Organisation of Colombia)
OPIAC	<i>Organización Nacional de los Pueblos Indígenas de la Amazonia Colombiana</i> (National Organisation of the Indigenous Peoples of the Colombian Amazon)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

“Yent”sang quematsmënëng

*Inÿe luaróca yentsang quematsmënënga
jtsebosán bid jëftsebomnam;
ndocna luarentsa yentsang quematsmënëng
yëts mochantsuenan jtsichamuan
Bëng tsënjamna ca;
ndoñe inÿe luarëngocan Puebl shjajnëng
bëng camuentsëng fsëndmën yentsang
puebl fsëndmën.
Fshants jashenoiquentsan onynanëng
quem luarentsa oyjuay sosong
taitang tojëftsayents bashejuán
uáman luar uaishanÿang
uaishanÿang y enyeonan yentsang.
Chë luar enangmen Puebl
bëngbe báseng
oyejuayëng y quetsomñëngcá chamuetsiyenam ”.*²

We are not Peoples

We are not Peoples of a foreign world
with a longing to keep on living;
we are not Peoples of territory
of whom will be heard to speak
that we were.
We are not Peoples from other places,
our roots are here.
We are tree-men, we are people, we are Peoples,
born from the deepest of the earth,
trees walking on the land
inherited from our *taitas* (fathers),
Peoples caring for harmony and nature,
a People building the house
so that our children
will live joyfully and in harmony with nature.³

² Poem by Hugo Jamioy Juagibioy, indigenous activist and poet of the Kamsá People of Putumayo.

³ English translation by the author of the thesis based on Spanish version of the poem.

1. Introduction

In 2023, the seventh anniversary since the signature of the Final Peace Agreement (AFP) between the Colombian government and the guerrilla *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP), a total of 188 social leaders were brutally murdered in Colombia, with 37 of them being indigenous. This number is not only disturbing but also worrying, as the AFP signalled the official end of the Colombian armed conflict, but in reality, there is a persisting trend of violence and human rights deficit in the country.⁴ Indigenous leaders and traditional authorities hold and transmit knowledge that has been in indigenous communities for centuries, they are essential for the survival of these communities. In Colombia, Indigenous people⁵ represent only about 4.4% of the total population of the country, with 60% of them living in reservations (*resguardos*),⁶ and they are among the most marginalised and vulnerable populations in the country. Their survival has been threatened ever since the Spanish arrived in Latin America at the end of the 15th century, and currently 71 Peoples are at serious risk of extinction.⁷

In 1991, the new Political Constitution elevated the recognition and respect for ethnic groups in the country. The Constitutional Court of Colombia has since then oftentimes protected the rights of Indigenous people, including those of political, territorial, and cultural autonomy, participation through prior consultation and respect for their cosmovision and ancestral territories. Colombia has also ratified several international and regional legal instruments dealing with indigenous rights. Nonetheless, Indigenous people remain in a situation of high vulnerability, as they are deeply affected by the internal armed conflict, poverty, and systematic discrimination, which poses a threat to their cultural and physical survival.⁸

⁴ Espitia Cueca, C. E., Cabezas Palacios, J. V., & González Perafán, L. (2023). *Violencia en Colombia. Informe Anual 2023*. Observatorio de Derechos Humanos y Conflictividades Indepaz. <https://indepaz.org.co/violencia-en-colombia-informe-anual-2023/>

⁵ In this thesis, the terms Indigenous people and Indigenous Peoples are consistently capitalised as a sign of respect to the indigenous communities this thesis writes about.

⁶ ACNUR. (n.d.). *Colombia Situation (Colombia, Costa Rica, Ecuador, Panamá y Venezuela) Indígenas*. https://www.acnur.org/fileadmin/Documentos/RefugiadosAmericas/Colombia/Situacion_Colombia_Pueblos_indigenas_2011.pdf

⁷ Calí Tzay, F. (2024). *Declaración final del Relator Especial de las Naciones Unidas sobre los derechos de los Pueblos Indígenas, Francisco Calí Tzay, al concluir su visita oficial a Colombia*. Office of the United Nations High Commissioner for Human Rights. <https://www.ohchr.org/sites/default/files/documents/issues/indigenouspeoples/sr/statements/20240315-sr-ipeoples-oem-statement-colombia.pdf>

⁸ Jost, S. (Ed.). (2019). *KasPapers No. 4: Situación de los pueblos indígenas de Colombia*. Konrad Adenauer Stiftung. https://www.kas.de/c/documentlibrary/get_file?uuid=ec6ec8c5-2fdc-9064802d78b9de590265&groupId=252038

In a nation-state system, where indigenous communities have historically lived under distinguished forms of organisation and self-governance, ensuring, and effectively protecting their rights poses unique challenges. The international human rights apparatus, having its roots in the Universal Declaration of Human Rights (UDHR) adopted in 1948, evolved throughout the 20th century to create a system that establishes consensus on the rights that human beings are entitled to enjoy, as well as the obligations that states have to ensure that these rights are fulfilled. Recognising the vulnerability of certain groups such as children and women, the international human rights regime, along with regional regimes, has developed specific rights aimed at protecting these group. These legal instruments establish mechanisms and institutions that aim to ensure that states uphold their legal obligation in the protection of minorities.⁹

Indigenous resistance movements gained international recognition in the 1980s, which simultaneously initiated the focus on the issues of Indigenous people and the legal recognition of indigenous rights by international organisations such as the International Labour Organization (ILO) and the United Nations (UN),¹⁰ but also within the Inter-American System of Human Rights (IAHRS) of the Organization of American States (OAS).

Today, colombian politicians extensively refer to the ratified ILO Convention No. 169 of 1989, when praising the domestic legal framework on indigenous rights,¹¹ but less frequently discuss the effects that the inter-american system has had on this matter. In an attempt to analyse the influence that the IAHRS has had on the legal practice concerning indigenous rights in Colombia, this thesis will attempt to answer the following question: *to what extent do the legal standards and precedents of the inter-american human rights regime impact the practice of recognition and protection of indigenous rights in Colombia?*

The findings of this thesis will show that the impact of inter-american standards showcases in three ways, first by providing the Constitutional Court with a toolbox through the progressive and increasing jurisprudence of the Inter-American Court of Human Rights (IACtHR), by providing a legal avenue for indigenous peoples to demand the protection of their rights once they have exhausted all domestic legal remedies, and by setting important precedents and

⁹ Smith, R. K. M. (2020). *Indigenous Peoples. In Texts and Materials on International Human Rights*. Taylor & Francis.

¹⁰ Ibid.

¹¹ Gómez-Rojas, J. F. (2010). Argument Analysis of the Position of Colombia regarding the UN on the Rights of Indigenous Peoples. *International Law, Revista Colombiana de Derecho Internacional*, 16.

potentially imposing stricter obligations on the Colombian state on the matter of prior consultation in a pending case before the IACtHR.

Through this research question, I seek to investigate the tangible influence of legal frameworks at the regional level on the practical implementation of indigenous rights in Colombia. Through an in-depth analysis, I aim to explore how established legal standards and precedents within the IAHRs translate into legal practice affecting the recognition and protection of indigenous rights in the Colombian context. This research is highly significant as it sheds light on the dynamic interplay between regional legal norms, and local realities in Colombia concerning indigenous rights, a crucial step to comprehend the challenges faced in the implementation of these rights. Moreover, this study has practical implications for policymakers, legal practitioners, and indigenous communities themselves. By uncovering the barriers between legal standards and their implementation, this research can inform policy reforms and empower indigenous communities by providing them with insights into the relevant legal landscape. Furthermore, this research contributes to the broader discourse on human rights of minorities. By examining the multilevel nature of legislation concerning indigenous rights, spanning the inter-american and domestic spheres, this study offers valuable insights into the complexities of legal pluralism. Ultimately, this research seeks to promote social justice and human rights protections for Indigenous Peoples in Colombia and beyond.

This thesis aims to underscore the significance of understanding the (potential) impact of the IAHRs within the legal framework of its member states. However, it is evident that due to time constraints and the scope limitations inherent in a Master's Thesis, not all the cases issued by the Constitutional Court of Colombia on indigenous rights can be discussed. Therefore, this work does not claim to be exhaustive in its coverage of the entire legal system, but rather aims to initiate an exploration of the interconnectedness between domestic and international legal frameworks concerning minority issues. Additionally, the thesis cannot delve into the monitoring of the implementation of judgments by the Constitutional Court of Colombia, as well as the pending landmark decision of the IACtHR in the U'wa Indigenous Peoples v. Colombia case. Lastly, given the scope constraints, the analysis will primarily focus on the impact of inter-american standards, rather than international standards set by the ILO Convention No. 169.

The methodological approach of this thesis includes providing a comprehensive context of the legal frameworks on the matter of indigenous rights and then analysing how inter-american legal standards on the topic of indigenous rights are considered in the decision-making process

of the Constitutional Court of Colombia, in eight of its landmark cases on indigenous rights. Furthermore, an analysis of the U'wa Indigenous Peoples v. Colombia case, currently pending a decision before the IACtHR will show the insufficiencies in the Colombian legal system and the potential impact of the IAHRs.

This thesis will begin with a contextualisation of the history, and the past and current challenges faced by Indigenous people in Colombia, highlighting their case of special vulnerability, especially in the context of the Colombian armed conflict. I will then proceed by presenting the existing legal framework on indigenous rights at the international, the inter-american and the domestic level. I will then continue with the analytical part of the thesis. In chapter 6, I will analyse how legal standards on the protection of Indigenous people set by the inter-american system have impacted the protection and enforcement of indigenous rights in Colombia, by examining eight cases of the Constitutional Court of Colombia on the issues of land rights and territorial autonomy, cultural rights and identity, consultation and participation, and the suffered consequences from the armed conflict.¹² In the next section I will further analyse the adjudicatory interplay between the inter-american and the Colombian human rights systems through the exemplification of a current case pending before the IACtHR against the Colombian state (U'wa Indigenous Peoples v. Colombia). This the first historic case brought against Colombia before the Court on the matter of indigenous rights and will highlight the deficiencies in the Colombian legal framework, as well as in both the inter-american and Colombian systems, regarding compliance and monitoring. Lastly, I will discuss the findings and reflect on possible policy recommendations to be made to harmonise the effective promotion and protection of indigenous rights in the inter-american system and in Colombia, to ensure that Indigenous people can live freely and according to their beliefs without facing discrimination or marginalisation.

During periods of political instability characterised by violent conflicts and geopolitical crises, as well as emerging challenges like climate change, it is essential to enhance and enforce human rights as the fundamental guarantees of dignity, freedom, and equality in our society. It is thereby especially important to focus on vulnerable groups, such as indigenous communities. In the Colombian context, the conflict resolution and transitional justice process calls for a strict monitoring of how and if human rights are being implemented for the benefit of Indigenous people, as particularly vulnerable victims of the long-lasting and devastating civil war.

¹² All Colombian legal documents cited in this paper were retrieved from the national database Sistema Único de Información Normativa (SUIN), available at <https://www.suin-juriscol.gov.co/>

2. Literature Review

The topic of human rights has been heavily studied and researched across various disciplines since the adoption of the UDHR in 1948. Foundational textbooks by renowned authors such as Jack Donnelly, David S. Weissbrodt and Connie de la Vega, Christian Tomuschat and Rhona K.M. Smith provide comprehensive accounts of the mechanisms of international human rights.¹³ These textbooks also explore different topics within human rights including the rights of women, children, and Indigenous Peoples, emphasising their need for heightened protection due to their vulnerabilities. Recently, the discipline of human rights has increasingly focused on emerging challenges related to business and human rights regulation, as well as on environmental issues, as highlighted by academics like Peter T. Muchlinski.¹⁴ However, the special focus on minorities within human rights remains crucial. Authors such as Shelton and Duque have shown the different challenges that Indigenous Peoples face when it comes to the protection and recognition of their rights, specifically when securing rights to ancestral lands, cultural preservation amid threats from assimilation and globalisation, and the struggle for self-governance due to insufficient support for their institutions, highlighting the critical role that international cooperation has had in supporting efforts to achieve indigenous rights.¹⁵

As human rights are exercised at the international level, within states, but also regionally, it is valuable to study these different regional systems. This thesis focuses on the IAHRs, a regime that has been extensively analysed by numerous scholars. Notably, von Bogdandy et al. have contributed significantly to this field with their work on the inter-american system, covering its history, legal instruments, and main organs, including the Court and the Commission. Regarding indigenous rights, they argue that the IACtHR has frequently ruled in favour of Indigenous Peoples and their rights, interpreting the American Convention on Human Rights (ACHR) as a living instrument, highlighting the most significant cases within the system, such as the Mayagna (Sumo) Awás Tingni Community v. Nicaragua case. Additionally, they

¹³ See Donnelly, J. (2013). *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press; Smith (2020); Tomuschat, C. (2014). *Human Rights: Between Idealism and Realism*. Oxford University Press; Weissbrodt, D., & de la Vega, C. (2007). *International Human Rights Law: An Introduction*. University of Pennsylvania Press.

¹⁴ See Muchlinski, P. T. (2022). *Advanced Introduction to Business and Human Rights*. Edward Elgar Publishing.

¹⁵ Shelton, D. L., & Duque, F. G. (2024). *Advanced Introduction to Indigenous Human Rights*. Edward Elgar Publishing.

mention the power that provisional measures have had in the IAHRs to protect indigenous rights in a timely manner.¹⁶

Various international and regional organs addressing human rights regularly publish reports on the global situation of Indigenous people, including in Colombia. Recently, the UN Rapporteur for Indigenous Rights visited Colombia to assess the situation. In his final report, he welcomed the ethnic chapter of the AFP, which upholds Indigenous Peoples' rights to self-determination, autonomy, and consultation. He also noted relevant issues for Indigenous Peoples in the National Development Plan and acknowledged the protection of indigenous rights by the Constitutional Court. However, the rapporteur emphasised that significant structural problems remain unresolved and that the human rights situation of Indigenous Peoples in Colombia is still severe and concerning. The historical debt of effectively recognising their rights to self-determination, autonomy, land, territory, and political participation has not been addressed. The lack of state presence and effectiveness, especially at the local level, exacerbates the situation. This is further worsened by the presence of non-state armed groups, criminal organisations, and economic agents operating without respect for human rights.¹⁷ The Inter-American Commission on Human Rights (IACHR) routinely publishes thematic reports, portraying the human rights situation on different topics in member states within the system, including Indigenous Peoples' rights. Additionally, the Commission publishes country reports on the human rights situation in the member states after conducting onsite visits. In 2013, the Commission published its last report¹⁸ on the human rights situation in Colombia, in which it expressed concern for the impact and violence suffered by Indigenous Peoples during the course of the armed conflict that affects the communities' physical and cultural survival and makes recommendations to the state to mitigate this situation. Human rights organisations such as Amnesty International also publish yearly studies on human rights around the world, as does the International Working Group on Indigenous Affairs (IWGIA) on the specific status of Indigenous people. In Colombia itself, both governmental and non-governmental organisations study the situation of Indigenous people periodically, with the Colombian Supreme Court presenting the evolution in the recognition of indigenous rights and showing all that has been

¹⁶ See von Bogdandy, A., Ferrer Mac-Gregor, E., Morales Antoniazzi, M., Piovesan, F., & Soley, X. (Eds.). (2017). *Transformative Constitutionalism in Latin America: the emergence of a new ius commune*. Oxford University Press; and von Bogdandy, A., Piovesan, F., Ferrer Mac-Gregor, E., & Morales Antoniazzi, M. (Eds.). (2024). *The Impact of the Inter-American Human Rights System: Transformations on the Ground*. Oxford University Press.

¹⁷ Cali Tzay (2024).

¹⁸ Inter-American Commission on Human Rights. (2013). *Truth, justice and reparation: Fourth report on the human rights situation in Colombia*.

achieved in this matter, as for example in increasing equality and support to the communities during judicial proceedings,¹⁹ and ONIC and other organisations such as the Konrad Adenauer Stiftung delivering the most comprehensive overview on the challenges experienced by Indigenous people in Colombia. These critical voices highlight that the implementation of attained indigenous rights by political and administrative institutions is rather ineffective, and that the indigenous population of Colombia are among the communities that have suffered most during the internal armed conflict in the country, being often displaced.²⁰ Other academic authors such as Vermund Olsen have also studied the situation of Indigenous Peoples and the legal landscape of their rights in Colombia. He argues that, despite the presence of an advanced system in Colombia aimed at safeguarding the human rights of the indigenous population, there is a consistent infringement on these rights in practice. The wealth of natural resources on indigenous lands has led to systematic violations of indigenous rights by the State, illegal armed groups, and private enterprises seeking economic gains. Legal changes undermine Indigenous Peoples' sovereignty over their ancestral territories. According to Olsen, these reforms prioritise economic interests over the physical and cultural well-being of indigenous communities. They breach constitutional principles and violate established international human rights standards.²¹

The protection of indigenous rights in Colombia is governed by a combination of domestic and international legal frameworks, in what is known as the *bloque de constitucionalidad*. This includes the Colombian Constitution, laws, regulations, and jurisprudence from the Constitutional Court, as well as international and regional instruments. Many authors have problematised in which way international legal standards set by international bodies and instruments such as the ILO Convention No. 169 have impacted the practice of indigenous rights protection in Colombia. For instance, Frank Semper shows that while the indigenous legal system is recognised by the Colombian Constitution and is given a special status, its relationship with domestic standards is often unclear, which can generate conflicts in their practical application. Furthermore, he highlights that the Constitutional Court has often referred to international human rights treaties such as the ILO Convention No. 169 and other instruments in its rulings. He argues that international human rights instruments have contributed to the

¹⁹ Corte Suprema de Justicia. (2017). *Justicia y pueblos indígenas: Jurisprudencia, ritos, prácticas y procedimientos*.

²⁰ Jost (2019).

²¹ Olsen, V. (2008). *Marco legal para los derechos de los pueblos indígenas en Colombia*. Human Rights Everywhere.
https://site.inali.gob.mx/pdf/Colombcartilla_derechos_pueblos.pdf

establishment of a normative framework that has increased the rights of Indigenous Peoples in the country.²²

There is however limited research on the impact of the IAHRs on the practice of indigenous rights in Colombia. One notable exception is María Sol Bucetto's examination of the impact of inter-american standards in the context of prior consultation. Bucetto argues that inter-american standards set by the IACtHR in the case of the Saramaka people v. Suriname have influenced the decisions of the Constitutional Court, aligning them with international standards and emphasising principles like good faith, and respect for customs and authorities. However, she argues that challenges remain particularly regarding the need for legislative regulation to ensure consistent and non-regressive application of this right.²³

The available literature and primary sources indicate a clear need for a holistic assessment of the impact of the IAHRs on the practice of indigenous rights in Colombia. Therefore, this thesis aims to do just that, by presenting an overarching analysis of the status of impact across four recurring themes: land rights and territorial autonomy, cultural rights and identity, consultation and participation, and the Colombian armed conflict. Ultimately, this research aims to contribute valuable insights to the existing discourse on indigenous rights and the role of international human rights mechanisms in shaping legal practices and policies in Colombia.

²² See Semper, F. (2006). Los derechos de los pueblos indígenas de Colombia en la jurisprudencia de la Corte Constitucional. *Anuario de Derecho Constitucional Latinoamericano*, pp. 761–778.

²³ See Bucetto, M. S. (2018). El derecho de los pueblos indígenas a la consulta previa, libre e informada, y los principios de progresividad y no regresividad. Estudio de la aplicación práctica de los estándares fijados por el Sistema Interamericano de Derechos Humanos en Colombia. *LEX*, 16(21). <https://doi.org/10.21503/lex.v16i21.1540>

3. Methodology

As detailed in the research question, this thesis relies on showing the impact of one system on another. Impact as conceptualised by von Bogdandy et al., refers to “the intended or unintended effects on practices, structures, and social outcomes stemming from adjudicatory and non-adjudicatory actions by international bodies,”²⁴ in this case the IAHRs. An adequate methodology for this research is essential to study the connections between the inter-american legal framework and the Colombian framework on indigenous rights. Therefore, the primary approach involves identifying references to the inter-american legal system within a limited number of landmark cases of the Constitutional Court of Colombia and analysing these references in depth.

The assessment of the IAHRs’ impact begins with studying its principal document, the ACHR, which gives individuals the opportunity to make their voices heard and hold their states accountable for human rights violations. The main organs of the IAHRs, the Commission and the Court, employ the Convention and other legal instruments to address human rights violations within member states, by issuing directives, setting human rights standards, highlighting concerns, documenting violations, and providing assistance to member states. As these instruments are adopted by various actors they are integrated into both discourses and practices related to human rights. At this stage, impact becomes evident as actors’ discourses and practices undergo transformation through the incorporation of IAHRs standards. Following this, there is an institutional response to these transformed discourses, leading to organisational changes. While institutional responses may manifest positively through the enactment of new legislation, jurisprudence, or public policies, they can also be negative, with institutions either ignoring or resisting these demands. Impact is measured by observing shifts in collective institutional frameworks and practices. Finally, when these standards are institutionally incorporated, changes should be observable in the lives of affected individuals and their enjoyment of rights, potentially leading to improvements in their living conditions. This stage represents the most ambitious aspect of impact analysis, as it involves assessing actual changes in people’s lives.²⁵

To measure impact, several strategies can be utilised. For the purpose of this thesis, which focuses on the appropriation of IAHRs standards by the Constitutional Court of Colombia, the incorporation of standards into the Court’s practices will be studied through case analysis.

²⁴ von Bogdandy et al. (2024), p. 177.

²⁵ von Bogdandy et al. (2024), chapter I.5.

To comprehensively address the research question, this thesis will systematically study the legal instruments that establish standards for indigenous rights at the inter-american and national level, while also briefly contextualising their position at the international level of indigenous rights promotion and protection. At the inter-american level, an in-depth analysis will cover the American Convention on Human Rights (1969), the American Declaration on the Rights of Indigenous Peoples (2016), and the first case from the Inter-American Court of Human Rights, the *Mayagna Awas Tingni v. Nicaragua* case (2001). Here, a comprehensive overview of the legal apparatus, as well as the machinery of the IAHRS and the set legal standards will be provided, especially when it comes to rights such as the right to collective property and prior consultation. At the domestic level, the exploration will study the Political Constitution of Colombia (1991) and the Peace Accords of 2016 (specifically the ethnic chapter).

The following jurisprudence analysis will examine the complex interplay between the standards articulated by these legal instruments and the jurisprudence of the IAHRS, and legal practice in Colombia. The investigation will involve the qualitative examination of references to these instruments and cases in judgments of landmark cases of the Constitutional Court of Colombia. Notably, the ongoing case before the IACtHR initiated by the Commission on behalf of the U'wa Indigenous Peoples against Colombia will highlight the shortcomings of the domestic legal framework, including the mandate of the Constitutional Court of Colombia, indicating potential future changes within the Colombian legal framework, depending on the outcome of the proceedings.

The cases used were chosen according to their relevance for indigenous rights in Colombia as evidenced in the available literature. They draw attention to essential fields within indigenous rights: land rights and territorial autonomy, cultural rights and identity, and consultation and participation, identified as predominant areas in existing literature.²⁶ One of the cases also focuses on the violations of human rights experienced by indigenous communities during the armed conflict in Colombia.

The methodological approach of analysing references to inter-american standards in court cases of the Constitutional Court of Colombia offers several advantages. First, it allows for the identification of instances where Colombian courts adhere to or incorporate inter-american human rights norms, demonstrating compliance with international obligations and promoting accountability. Secondly, tracking the contents of the references to inter-american standards enables us to assess the extent of the inter-american system's influence on judicial reasoning

²⁶ Smith (2020).

and decision-making in Colombia, providing evidence of its impact on domestic legal practice. Additionally, this methodology facilitates comparative analysis by examining how Colombian courts interpret and apply inter-american standards alongside domestic law, highlighting areas where domestic legislation may need alignment with international human rights norms.

4. Indigenous Communities in Colombia

The Indigenous Peoples of Colombia's history dates back around 30,000 years, and it is believed that in South America there were more than 100 million Indigenous people.²⁷ In Colombia today, the indigenous population makes up 4.4% of the total population, amounting to 1,9 million people,²⁸ across 87 different recognised communities.²⁹ These communities possess their "own culture and history, social and political organisation, economic and productive structure, vision of the cosmos, spirituality and ways of interrelating with the environment".³⁰ Even though Spanish has become the predominant and official language of the country since the times of colonisation, there are still over 65 indigenous languages across twelve linguistic families, as well as ten isolated languages.³¹ Today, most of the indigenous communities reside in rural and isolated territories, such as *resguardos indígenas* (reserves)³², where around 60% of the total indigenous population lives.³³ Most of the indigenous population is part of the Wayuu, Zenú, Nasa and Pastos communities, with the highest concentration found in the departments: Vaupés, Guainía, Vichada and Amazon.³⁴

When the Spanish arrived in Colombia in the early 16th century, they asserted their control over Native Peoples through violence, driven by a belief in their own superiority. This enabled the subordination of Indigenous Peoples, aided by religious missions, the imposition of the Spanish language and the establishment of authoritarian governing institutions, causing the extinction of many indigenous communities in the process.³⁵ Over nearly three centuries of colonisation,

²⁷ Observatorio del Programa Presidencial de Derechos Humanos y DIH. (2008). *Los Indígenas Colombianos: la constancia de los Pueblos por mantener sus costumbres*, pp. 3-4.

²⁸ According to the 2018 national population census by the National Statistics Department (DANE).

²⁹ It is to be noted that while the Colombian state recognises 87 indigenous communities, indigenous organisations such as ONIC talk about more than 102 present Indigenous Peoples on the Colombian territory, see Inter-American Commission on Human Rights (2013), p. 293.

³⁰ Ibid.

³¹ Observatorio del Programa Presidencial de Derechos Humanos y DIH (2008), p. 2.

³² *Resguardos* today are recognised indigenous collective properties and special legal and socio-political institutions. These territories are autonomously managed and protected by indigenous jurisdiction and normative systems, see Decree 2164 of 1995, art. 21.

³³ Mendoza, D. A. (2023). Colombia. In D. Mamo (Ed.), *El mundo indígena 2023*. Grupo Internacional de Trabajo sobre Asuntos Indígenas (IWGIA), p. 345; Observatorio del Programa Presidencial de Derechos Humanos y DIH (2008), p. 5.

³⁴ Departamento Administrativo Nacional de Estadística. (2018). *Censo Nacional de Población y Vivienda 2018*. Retrieved from <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivienda-2018>

³⁵ Rodríguez, G. A. (2015). *Los derechos de los pueblos indígenas: Luchas, contenido y relaciones*. Editorial Universidad del Rosario, pp. 24-25; Observatorio del Programa Presidencial de Derechos Humanos y DIH (2008), p. 4.

Spanish monarchs enacted laws to control abuses and ensure a labour force for colonial, economic and political development in the territory, often incorporating local indigenous customs into a complex legal framework. Institutions like *resguardos* and *cabildos* (councils) inherited from Spain provided territorial rights but also facilitated labour exploitation through practices such as the *encomienda*, where Indigenous people were assigned to Spanish settlers for labour and conversion to Christianity, and the *mita*, a system of mandatory labour service.³⁶ During the Republican era, the primary goal was assimilating Indigenous people into national society, though they were still excluded from political participation until the early 20th century.³⁷ While in the 19th century certain policies and legislation had granted Indigenous people some autonomy and the legal recognition of their territories, many of these were revoked and sold off in the 20th century under the guise of promoting development. In addition, Indigenous people remained under the moral guardianship of the catholic church until the 1970s, as they were still perceived as inferior.³⁸ The adoption of the Political Constitution of 1991 initiated an era of multiculturalism, where Indigenous people were officially recognised and protected for the first time, showcasing the appreciation of the ethnic and cultural diversity of the country. The State was mandated to prevent discrimination based on race or origin and to implement measures to support marginalised groups, including indigenous communities. Within this multicultural framework, indigenous organisations strengthened, and significant progress was made in securing indigenous rights on paper.³⁹

Since the times of colonisation, Indigenous people have actively resisted discriminatory and exploitative policies imposed by the colonial regime, as well as those perpetuated into the Republic. Among the first prominent indigenous leaders was Manuel Quintín Lame at the beginning of the 20th century. Quintín Lame, an indigenous leader of mixed indigenous descent from the Cauca department, led an uprising in Cauca in 1914 with the goal of protecting indigenous reserves against widespread deforestation, the imposition of non-indigenous farming practices and forced labour, inspiring a nationwide indigenous movement with the hopes of establishing an autonomous indigenous republic.⁴⁰ In the 1960s and 70s, amid the rise of indigenous movements across Latin America, the indigenous movement in Colombia

³⁶ Rodríguez (2015), pp. 25-26.

³⁷ This point only includes men, as women only got the right to vote in the 1950s.

³⁸ Rodríguez (2015), p. 9.

³⁹ Rodríguez (2015), pp. 28-29.

⁴⁰ Jimeno, M. (2014). *Juan Gregorio Palechor: the story of my life*. Duke University Press, p. 3; Rodríguez (2015), p. 27.

emerged as a unified, institutionalised and distinct movement after separating from the nation-wide agrarian movement. Leading indigenous organisations such as the Regional Indigenous Council of the Cauca (CRIC) or the National Indigenous Movement of Colombia (ONIC), have since fought to reclaim indigenous land, preserve indigenous languages, demand respect for indigenous *cabildos* (councils)⁴¹ and other indigenous authorities, as well as to promote health, educational and cultural programs to guarantee indigenous livelihood.⁴² While Indigenous people have primarily engaged in peaceful forms of activism, with the influence of the armed conflict, occasionally they were involved in armed struggle. The assassination of indigenous leaders by guerrilla groups in the 1980s led to the founding of the Movement Manuel Quintín Lame, inspired by the efforts of the historic indigenous leader. The movement engaged in armed confrontations with the FARC until 1991.⁴³ Since the adoption of the new constitution, indigenous communities have frequently taken part in nation-wide demonstrations alongside other social activist groups across various sectors, as well as independently in departments such as Cauca, and were also very active in the campaign that brought current president Gustavo Petro to power.⁴⁴ Despite their activism, indigenous activists and leaders continue to face stigmatisation and criminalisation, as they are often unjustly associated with armed groups by national and local authorities.⁴⁵

Since the election of Petro in 2022, the attitude of the State towards Indigenous people has shifted even further, with direct dialogue occurring between the government and indigenous leaders to implement proposals to further the rights of Indigenous people. The current government has also actively included ethnic representation in high positions of public administration, sending a message of inclusion and acknowledgment of historical debt. Nevertheless, the physical, psychological, and structural violence against Indigenous people remains.⁴⁶

⁴¹ *Cabildos* today are public indigenous entities that follow indigenous sociopolitical organisation with the mandate to legally represent an indigenous community, exercise authority, and carry out several regulatory activities, see Decree 2164 of 1995, art. 2.

⁴² Rodríguez (2015), pp. 27-28.

⁴³ Velasco, M. (2017). Movimientos sociales contenciosos en Colombia: 1958-2014. In P. Almeida & A. Cordero Ulate (Eds.), *Movimientos Sociales en América Latina: Perspectivas, Tendencias y Casos*. CLACSO, p. 516.

⁴⁴ *Ibid.*, pp. 513, 516.

⁴⁵ Jimeno (2014), pp. 1-2; Herrera Arenas, F. (2023). *Conflicto y Violencias Armadas contra los Pueblos Indígenas de Colombia*. Organización Nacional Indígena de Colombia, p. 16.

⁴⁶ Amnistía Internacional. (2023). *Informe 2022/2023 Amnistía Internacional: La situación de los derechos humanos en el mundo*. Amnesty International Ltd., p. 158; Mendoza (2023), p. 347.

For over 50 years now, Colombia has faced a significant challenge: the internal armed conflict that began in 1964 and has claimed thousands of lives. Initially started as a peasant uprising by leftist armed groups due to high inequality and insufficient opportunities for political participation, the conflict quickly escalated into a highly violent one. Leftist guerrilla groups, such as the FARC-EP, the *Ejército Nacional de Liberación* (ELN), and the *Movimiento 19 de Abril* (M-19), fought against the Colombian military and right-wing paramilitary groups. Additionally, Colombian drug cartels have exacerbated the conflict since the late 1970s.⁴⁷ In its course, Indigenous Peoples have experienced severe humanitarian crises as disproportionate violence was perpetrated by these various legal and illegal armed groups, endangering their autonomy and survival.⁴⁸ Indigenous communities have always been seen as a threat by armed groups, no matter the ideology, because they primarily inhabit territories that are strategically and materially important. These groups aim to exert military control over these areas, threatening the cultural and physical survival of Indigenous Peoples in the process.⁴⁹

Despite the signing of the AFP in 2016,⁵⁰ the implementation since has been slow, particularly regarding the needs of ethnic groups.⁵¹ Since the beginning of the conflict, over 609,000 indigenous victims of displacement, confinement, assassinations and harassment have been identified, mostly in rural areas and coastal regions with high levels of impunity, such as the departments of Chocó and Cauca.⁵² Even though the conflict with the biggest guerrilla group is officially over, indigenous territories are still targeted due to their strategic importance in organised crime activities such as drug trafficking, which funds remaining armed groups involved in the conflict,⁵³ leaving indigenous populations in the line of fire. This continuing

⁴⁷ *Conflicto en Colombia: antecedentes históricos y actores*. (n.d.). Barcelona Centre for International Affairs. Retrieved June 2, 2024, from https://www.cidob.org/publicaciones/documentacion/dossiers/dossier_proceso_de_paz_en_colombia/dossier_proceso_de_paz_en_colombia/conflicto_en_colombia_antecedentes_historicos_y_actores

⁴⁸ Murcia Caro, E., & Hurtado Estrada, S. (2022). *Afectaciones a los Derechos Humanos en los Pueblos Indígenas de Colombia y situación de los Pueblos Indígenas en frontera Colombia - Venezuela*. Organización Nacional Indígena de Colombia, p. 7.

⁴⁹ Osorio Calvo, C. A., & Satizabal Reyes, M. (2019). El movimiento indígena como víctima del conflicto armado en Colombia y su apuesta por una paz desde una visión territorial. *Hallazgos*, 17(33). <https://doi.org/10.15332/2422409x.4369>

⁵⁰ The *Acuerdo Final de Paz* led to the disarmament of the largest guerrilla group, the FARC-EP. However, their demobilisation has created power vacuums in several regions of the country. The absence of a strong state presence in these areas has allowed FARC-EP dissidents and other guerrilla groups, such as the ELN, as well as paramilitaries and organised crime groups, to gain control.

⁵¹ Amnistía Internacional (2023), p. 159.

⁵² Herrera Arenas (2023), pp. 6, 13.

⁵³ Murcia Caro and Hurtado Estrada (2022), p. 16.

violence shows the urgent need for the effective implementation of the ethnic chapter of the AFP, to safeguard the rights to life and autonomy of Indigenous people.⁵⁴

When it comes to data on current violations of indigenous rights, there is not an accurate documentation of the cases, as human rights violations are often not reported due to fear of retaliation, difficulty of access to indigenous territories and lack of communication resources or access to internet, but also because violence has become normalised.⁵⁵ Given the historic discrimination toward Indigenous people, and continued hostility and tensions due to the persisting armed conflict, communities suffer from both physical and psychological violence, putting many at the verge of extinction. In recent years, indigenous land has also become attractive for resource-extraction companies, besides the already notorious armed actors, increasing the threat to their livelihood. The presence of Indigenous Peoples in these resource-rich lands often presents an obstacle to extraction projects and they are thus coerced or forcibly displaced, with over eight thousand registered victims of forced displacement only in 2022;⁵⁶ in some cases, they have been threatened or even killed for the attainment of their ancestral lands.⁵⁷ Indigenous leaders, who are the main activists for indigenous rights are often murdered as retaliation for their opposition.⁵⁸ They present a crucial role in preserving indigenous ancestral cultures, therefore violence against them affects entire communities.⁵⁹ The presence of armed groups in indigenous territories also leads to an increased militarisation of their lands and thus less governability and autonomy.⁶⁰ Additionally, Colombia is one of the most unequal countries in the world,⁶¹ with a big gap between the richest and the poorest citizens. Indigenous communities, given their historic and systematic discrimination, are more likely to experience poverty than other communities, and have difficulties accessing health services and education.⁶²

⁵⁴ Murcia Caro and Hurtado Estrada (2022), p. 29.

⁵⁵ Murcia Caro and Hurtado Estrada (2022), p. 29.

⁵⁶ Murcia Caro and Hurtado Estrada (2022), pp. 8-9.

⁵⁷ Inter-American Commission on Human Rights (2013), p. 299; Mendoza (2023), p. 348.

⁵⁸ Mendoza (2023), p. 347.

⁵⁹ Inter-American Commission on Human Rights (2013), p. 302.

⁶⁰ Mendoza (2023), p. 348.

⁶¹ Colombia has a GINI Coefficient Index of 51.5, one of the highest in the world. See: <https://www.worldeconomics.com/Inequality/GiniYear/Colombia.aspx#:~:text=Colombia's%20Gini%20Coefficient%20Index%20is,WID>.

⁶² Inter-American Commission on Human Rights, (2013).

5. Analysis of relevant Legal Instruments

This chapter provides an introduction into the relevant legal instruments which deal with indigenous rights on two levels, the inter-american, and the national level. The chapter begins though with a brief presentation of the international legal framework to contextualise the subject at hand.

5.1. Indigenous Rights at the International Level

Contemporary human rights law gained momentum after the Holocaust and other severe human rights violations that occurred in the first half of the 20th century. The UDHR, adopted by the UN General Assembly in 1948, and the UN Charter (1945) laid foundation for the UN Human Rights system, including state obligations. The UDHR declared that “all human beings are born free and equal in dignity and rights.”⁶³ Although the UDHR is a non-binding instrument, it is now widely accepted as a normative document that outlines state obligations. Following the adoption of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966. These covenants, together with the UDHR and the UN Charter, form the International Bill of Human Rights.⁶⁴ The international system of protection of indigenous rights includes several instruments and mechanisms at the international level. In the international system of human rights, individual complaints can be brought before the Human Rights Council, which addresses patterns of gross human rights violations. Additionally, there are treaty bodies that are part of specific human rights treaties, with some having inquiry procedures for emergency, grave, or systematic violations. Most treaty bodies offer individual complaint mechanisms, though states generally need to opt into these procedures. Urgent appeals or allegation letters can also be sent to UN special procedures mandate-holders, applicable to all UN member states regardless of treaty obligations. These mechanisms do not require the exhaustion of domestic remedies, and each special procedure decides the appropriateness of communications based on its criteria.⁶⁵

⁶³ United Nations. (1948). Universal Declaration of Human Rights, art. 1.

⁶⁴ Buergenthal, T. (2007). Human Rights. In *Max Planck Encyclopedias of International Law*. Oxford University Press, paras. 8-9

⁶⁵ The Advocates for Human Rights. (2014). Appendix I: Complaint Mechanisms. In *Paving Pathways for Justice & Accountability: Human Rights Tools for Diaspora Communities*.

The organisation that has developed the most comprehensive legal framework on indigenous rights and remains the only legally binding convention on the topic is the ILO Convention No. 169, signed in 1989 and in force since 1991. It marks a crucial point of development in recognising and protecting the rights of Indigenous and Tribal peoples. It shifts away from assimilationist approaches prevalent since colonial times and still included in its Convention No. 107 from 1954, instead emphasising Indigenous Peoples' autonomy over their institutions and ways of life. It seeks to establish a new relationship between states and indigenous communities based on the recognition of their cultural and ethnic diversity and highlights indigenous societies as permanent and distinct entities, affirming their rights in the context of labour and employment, social protection and cultural integrity, and also addresses issues such as prior consultation and participation, land rights, education and health, and holds states responsible for developing mechanisms to guarantee these rights.⁶⁶ Being a convention however, it at times, especially when it comes to specific ways in which states should guarantee indigenous rights, remains rather vague and ambiguous.⁶⁷

Within the United Nations, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted on September 13th of 2007,⁶⁸ sets an ambitious goal for the realisation of indigenous rights, much more so than the ILO Convention,⁶⁹ by recognising the historic injustices endured by indigenous peoples. While not legally binding like a ratified treaty, UNDRIP holds profound symbolic importance as it applies to all UN member states. The Declaration emphasises the rights of indigenous communities and individuals, urging states to uphold the principles of self-determination⁷⁰ and non-discrimination, underscores the evolving nature of international legal interpretations, and impacts practices under broader human rights treaties and specialised instruments like the ILO Convention No. 169.⁷¹

⁶⁶ Kingsbury, B. (2006). Indigenous Peoples. In *Max Planck Encyclopedias of International Law*. Oxford University Press, para. 20; Rodríguez (2015), pp. 20-23; Observatorio del Programa Presidencial de Derechos Humanos y DIH (2008), p. 18; Smith (2020), p. 36.

⁶⁷ Specifically on the matter of prior consultation, in 6(2) the Convention envisions consultations “with the objective of achieving agreement or consent to the proposed measures,” but does not explicitly require consent.

⁶⁸ Colombia abstained from the vote on the adoption of this Declaration.

⁶⁹ Article 32 of the UNDRIP demands that states should consult with indigenous communities “in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources,” making this a much stricter standard.

⁷⁰ The legal instruments expressively note the fact that self-determination does not authorise for actions that go against the territorial integrity of states, see UNDRIP, art 46 and ILO C169, art. 1 §3.

⁷¹ Smith (2020), p. 370; Kingsbury (2006), paras. 10-13; Rodríguez (2015), p.23.

Further mechanisms established within the United Nations include the UN Permanent Forum on Indigenous Issues, established in 2000 by the Economic and Social Council, which produces reports on the rights of Indigenous Peoples and promotes the production of qualitative data on health, education, and cultural issues among indigenous peoples. The position of the Special Rapporteur on the Rights of Indigenous Peoples was first established in 2001 and he/she utilises the UNDRIP and other legal instruments to address specific allegations of violations of the rights of Indigenous Peoples. Lastly, the Expert Mechanism on the Rights of Indigenous Peoples, established in 2007 by the UN Human Rights Council, produces studies on issues affecting Indigenous Peoples, but its impact has been modest.⁷² Furthermore, provisions concerning the rights of Indigenous Peoples can be found in several international legal instruments, notably those with concerns of the environment.⁷³

5.2. Indigenous Rights at the Inter-American Level

The Inter-American Human Rights System originated from the OAS' significant focus on human rights starting in 1948. Amidst the political situation in Latin America during the second half of the 20th century, characterised by authoritarian rule and political and armed revolutions, the OAS recognised the urgent need to establish human rights standards that would benefit the population in these countries and would support the transition towards democracy in Latin American states. Today, the OAS has 34 member States, with 23 having ratified the ACHR.⁷⁴⁷⁵

The ACHR, which was opened for signature in 1969 and entered into force in 1978, is the main legal instrument of the IAHRs. It includes a range of civil and political rights, such as life, humane treatment, liberty, fair trial, privacy, freedom of religion and expression, assembly and association, property and nationality rights, and judicial protection. Additionally, it devotes one chapter to economic, social, and cultural rights,⁷⁶ requiring states to progressively fulfil these rights as outlined in the OAS Charter.⁷⁷ The state parties are obliged to respect the rights granted

⁷² Kingsbury (2006), paras. 16-19.

⁷³ see Rio Declaration on Environment and Development. (1992), p. 22; Convention on Biological Diversity. (1992), art. 8(j); and United Nations. (1989). Convention on the Rights of the Child, art. 30.

⁷⁴ Smith (2020), pp. 108-109.

⁷⁵ Nicaragua left the OAS at the end of 2023, see <https://english.elpais.com/international/2023-11-21/the-ortega-regime-has-officially-withdrawn-nicaragua-from-the-oas.html>

⁷⁶ Expanded on by the Additional Protocol of San Salvador (1988) to the ACHR in the Area of Economic, Social and Cultural Rights.

⁷⁷ See Neuman, G. L., & Duhaime, B. (2024). American Convention on Human Rights (1969). In *Max Planck Encyclopedias of International Law*.

by the Convention and to guarantee their fulfilment, providing domestic legal effect for their attainment (Arts. 1(2) & 2).

The American Declaration on the Rights of Indigenous Peoples (ADRIP), adopted by the OAS General Assembly in 2016, addresses specific regional issues not covered by other international instruments, such as the rights of indigenous peoples in voluntary isolation and those affected by armed conflict. While it strengthens UNDRIP's provisions concerning indigenous peoples' treaty rights, experts note some shortcomings. It falls short in fully guaranteeing indigenous peoples' participation in decision-making processes, limiting their involvement to specific indigenous matters. Additionally, it lacks provisions for consultation before military activities or hazardous material disposal on indigenous lands and fails to address their right to redress for confiscated or damaged lands.⁷⁸⁷⁹

The main organs of the IAHRs are the Commission (IACHR) and the Court (IACtHR). The Commission promotes and enforces human rights across the region. It conducts investigations, issues thematic reports, and monitors the human rights situation in member states, with special attention to minority rights through rapporteurships, such as the one on the rights of indigenous peoples. Additionally, the Commission can issue provisional measures and based on individual petitions, bring cases before the Court. It investigates alleged violations and issues reports with recommendations for states to address these issues. If a state fails to comply with the recommendations, the Commission refers the case to the Court and acts as the legal representative of the victims. The Court's jurisdiction includes interpreting and deciding on legal issues related to the instruments of the IAHRs. It has both an advisory and an adjudicatory function, with the latter only applying to states that have chosen to accept its jurisdiction. If the Court finds a state responsible for the violation of one of the provisions of an OAS Convention, in a legally binding judgment, it may request financial reparation or other extensive forms of remediation.⁸⁰ The IAHRs benefit from several innovative ways of ensuring the realisation of human rights, namely through the Court's mandate on imposing reparations with the goal of restitution of the pre-violation status. Besides financial reparations, the Court has issued means

⁷⁸ Errico, S. (2017). The American Declaration on The Rights of Indigenous Peoples. *American Society of International Law Insights*, 21(7).

⁷⁹ In its Article XXIII, the ADRIP states "States shall consult and cooperate in good faith with the indigenous peoples concerned, through their own representative institutions, in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them", setting stricter standards on prior consultation than the ILO Convention No. 169, as consent is mandated.

⁸⁰ See Smith (2020), chapter 19.

of “[restitution], rehabilitation, restoration of liberty to people illegally detained, return of illegally seized property, protection for displaced victims to return to their homes, reinstatement of employment, expungement of public records, and return of lands to indigenous communities”, to remedy individual harm. When it comes to its systemic impact, the Court has often ordered “state apologies and public acts to acknowledge responsibility, the publication or diffusion of the judgment and the different measures to commemorate the victims”, and most importantly, “guarantees of nonrepetition”, which are adopted through new legislation.⁸¹

Since its establishment, the IACtHR has facilitated the attainment of human rights in the American continent. Given the democratic transitions many states were experiencing during the second half of the 20th century, the Court often ruled on matters relating to transitional justice and democratic institutions such as, reparations for forced disappearances or torture. The Court has also been innovative when interpreting its existing legal framework to protect the rights of minorities, such as Indigenous Peoples.

The *Mayagna Awás Tingni v. Nicaragua* (2001) case was the first contentious ruling from the IACtHR on matters relating to Indigenous Peoples. In a progressive judgment, the Court ruled for the restitution and delimitation of ancestral land belonging to the indigenous community in question, after the Nicaraguan government had given a resource exploitation corporation concession to the land. In this ruling, the Court recognised the collective nature of the right to property found in Art. 21 of the American Convention and noted the distinct value that such ancestral territories hold for Indigenous Peoples. The Court has often referred to this landmark case when dealing with indigenous rights and as will be shown in Chapter 6, so has the Constitutional Court of Colombia.⁸²

The IAHRs sets crucial standards for indigenous rights, emphasising equality, non-discrimination, and an evolutionary interpretation of the ACHR and other legal instruments. In the system, legal personality, communal property, and consultation rights are recognised, alongside economic, social, cultural, and environmental rights.

Collective property rights are fundamental for indigenous peoples, ensuring their connection to ancestral lands and resources. The Court emphasises effective recognition mechanisms, requiring states to establish clear procedures for delineating and titling indigenous territories.

⁸¹ von Bogdandy et al. (2017), p. 291.

⁸² See Inter-American Court of Human Rights. (2001). *Mayagna (Sumo) Awás Tingni Community vs. Nicaragua*.

Conflict resolution mechanisms must also be in place to address disputes between communal and private property rights, respecting both sets of rights. Additionally, indigenous peoples have the right to own and benefit from natural resources within their territories, subject to reasonable restrictions meeting legality, necessity, and proportionality criteria. Impact assessments and benefit-sharing are mandatory before authorising activities affecting indigenous lands, ensuring their cultural survival and well-being.⁸⁴

Participation and consultation standards require states to engage indigenous peoples in decisions affecting their rights and interests. This involves obtaining their free, prior, and informed consent, respecting their cultural practices and traditions. Consultation processes must adhere to principles of prior, free, and informed consent, initiated early in development plans or investments, and conducted in good faith. Indigenous communities should be adequately informed about potential benefits and risks, with procedures tailored to their cultural context and linguistic diversity. For large-scale projects, obtaining free, prior, and informed consent becomes imperative, respecting indigenous customs and traditions. Additionally, states must conduct environmental and social impact assessments to evaluate project impacts and inform affected communities. These standards uphold the right of indigenous peoples to participate in decisions affecting their lives, ensuring their voices are heard and their rights respected. States must also reasonably share project benefits with affected communities. This concept, inherent in the right to compensation, extends not only to expropriation cases but also to situations where communities are deprived of regular use and enjoyment of their property.⁸⁵

Personal freedom standards stress the exceptional nature of imprisonment for indigenous peoples and require culturally sensitive criminal justice approaches, ensuring fair treatment and respectful prison conditions. Access to justice for indigenous peoples demands due process, effective remedies, and indigenous-specific approaches, ensuring accessibility and resolving disputes sensitively. States must investigate and prosecute violations, especially violence against vulnerable groups. Freedom of thought and expression standards highlight language's

⁸⁴ Based on Article 21 of the ACHR and several landmark cases of the IACtHR such as *Garífuna de San Juan and members v. Honduras*, *Yakye Axa v. Paraguay*, *Kichwa de Sarayaku v. Ecuador* and *Mayagna (Sumo) Awás Tingni v. Nicaragua*.

⁸⁵ Based on Articles 21 and 23 of the ACHR and landmark cases of the IACtHR such as *Garífuna de San Juan and members v. Honduras*, *Kaliña and Lokono v. Suriname* and *members of the association Lhaka Honhat (Nuestra Tierra) v. Argentina*.

importance for cultural identity and media pluralism, advocating for indigenous media representation and state support.⁸⁶

The IAHR family life standards acknowledge indigenous family structures' significance and address challenges like forced disappearances, recognising their impact on cultural transmission. Lastly, equitable working conditions, health, and social security standards ensure indigenous dignity and welfare, upholding their rights within the legal framework.⁸⁷⁸⁸

5.3. Indigenous Rights at the National Level

The enactment of the Political Constitution of Colombia in 1991 marked a significant step towards the acknowledgment and celebration of the nation's rich cultural and ethnic diversity. From its preamble onwards, the Constitution commits to ensuring equality among all citizens of the Colombian state. Within the framework of fundamental rights afforded to Indigenous people, Colombia is recognised as a participatory and pluralist republic (Article 1), committed to safeguarding its acknowledged ethnic and cultural diversity, alongside the natural and cultural treasures within the nation (Articles 7 and 8).

While Spanish retains its status as the official language, the Constitution grants official status to ethnic languages and dialects within their respective territories, mandating bilingual education for communities with distinct linguistic traditions (Article 10). Article 13 guarantees equality before the law and prohibits discrimination. Furthermore, the State acknowledges the equality and dignity of all cultures within Colombia as integral components of its national identity (Article 70). To safeguard the cultural heritage, the State extends special rights to ethnic groups in territories rich in archaeological significance (Article 72).

Regarding the political participation of Indigenous people, the Constitution reserves two additional Senate seats for indigenous representation, to be occupied by indigenous authorities or leaders (Article 171). Principles of self-government and autonomy for Indigenous people are underpinned by commitments to self-determination (Article 9), freedom of religion (Article

⁸⁶ Based on Articles 8 and 25 of the ACHR and landmark cases of the IACtHR such as *Kaliña and Lokono v. Suriname*.

⁸⁷ Based on Articles 17 and 11.2 of the ACHR and the *Maya Kaqchikel de Sumpango and others v. Guatemala* case before the IACtHR.

⁸⁸ Corte Interamericana de Derechos Humanos. (2024). Jurisprudencia de la Corte IDH y buenas prácticas sobre derechos de los pueblos indígenas y tribales, derecho a un medio ambiente sano y personas defensoras de derechos humanos. In <https://escuelajudicialpj.poder-judicial.go.cr/images/bibliotecavirtual/PueblosIndigenas/BuenasPracticasIndigenasAfro.pdf>, pp. 9-27.

19), culturally sensitive education (Article 68). Indigenous authorities in Colombia are empowered to exercise jurisdictional functions within their territories according to their own norms and traditions, coordinated with the national judicial system (Article 246). Indigenous territories, governed by indigenous *cabildos*, adhere to distinct traditions and norms designed to safeguard their territories and the Peoples. Resource exploitation within indigenous territories must not compromise their cultural, social, and economic integrity, ensuring meaningful indigenous participation in decision-making processes.

Designated as inalienable, imprescriptible, and unseizable entities (Article 63), indigenous territories are held as collective properties (Article 329) and categorised as communal territories, and *resguardos* are considered integral territorial entities of the nation (Article 286). The demarcation of indigenous territories is entrusted to the national government, with active community participation.⁸⁹ Finally, indigenous populations in border areas are recognised as Colombian citizens (Article 96(c)).

When these rights, or any fundamental rights have been violated, under the Constitution, individuals have the right to seek protection for their rights through a legal mechanism known as a *tutela* action. This allows Colombians to petition the judiciary for the safeguarding of their fundamental rights in instances where they perceive these rights to be violated or under threat due to actions or inactions by the State. The Constitution also establishes another legal mechanism, known as *acción popular* (popular action), to protect collective rights and interests related to heritage, public space, public safety and health, administrative morality, the environment, and economic competition. This mechanism, outlined in Article 88 of the Constitution, allows individuals or groups to take legal action to address issues affecting broader societal concerns beyond individual grievances.⁹⁰

In 2016, after 50 years of internal armed conflict, the Colombian government and the most notorious guerrilla, the FARC-EP, signed the AFP, bringing the conflict to an official end. The agreement focuses on disarmament of the FARC-EP, allowing for their political participation, as well as the implementation of comprehensive sanctions and reparations, and establishment of a rural reform to combat inequality and execute restitutions of land. Additionally, it envisions

⁸⁹ In Articles 360 and 361 of the Political Constitution, it is stipulated that the decisions on the exploitation of natural sources are at the discretion of the State, and that affected communities are invited to participate in the decision-making process of this law, not specifying the need for consent.

⁹⁰ Refer to Article 86 and Article 88 of the Colombian Constitution. In the jurisprudence of the Constitutional Court, *tutela* actions and *amparo* requests are interchangeably used to describe the petitions and proceedings on individual rights.

a roadmap to tackle the problem of drug trafficking.⁹¹ The AFP is integrated into the Colombian constitutional framework through several Legislative Acts, Laws, and Decrees. Most importantly, Legislative Act 01 of 2017 sets up a title of transitional provisions in the Constitution specifically for the termination of the conflict,⁹² and Legislative Act 02 of 2017 adds a such an article that stipulates that the contents of the AFP must serve as a reference for the development of new laws and regulations aimed at implementing the agreement. Additionally, it mandates that state institutions and authorities are obligated to comply with the provisions of the AFP.⁹³⁹⁴

On the matter of indigenous rights, the agreement acknowledges the historical suffering of ethnic communities due to colonialism and the armed conflict. It emphasises incorporating an ethnic perspective throughout the agreement's interpretation and implementation, prioritising principles like self-determination, autonomy, and participation. In the projected rural reform, ethnic perspectives are given priority, ensuring legal protection for ancestral lands and inclusion of ethnic communities in land access measures. Foreseen territorial development programs must include consultation mechanisms for ethnic perspectives. According to the agreement, ethnic authorities will have full participation in the implementation of the agreement, including in security and protection programs for their territories. Measures are outlined for the inclusion of ethnic candidates in special territorial peace circumscriptions. The agreement also addresses the issue of illicit drugs, ensuring ethnic community participation in substitution programs and prioritising affected ethnic territories in demining efforts. Additionally, there is a commitment to developing programs for settlement and restitution of territories for indigenous and afro-colombian communities. In addressing victims of the conflict, the agreement respects the jurisdictional functions of traditional authorities and incorporates ethnic perspectives into judicial mechanisms. Coordination with the special indigenous jurisdiction and ancestral authorities is mandated, along with the development of a program for the reintegration of disengaged individuals, those that were combatants of the FARC-EP, from ethnic communities. The agreement also outlines measures for the implementation and verification of agreements

⁹¹ *Cartilla pedagógica: Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera.* (n.d.). Cancillería de Colombia. <https://www.cancilleria.gov.co/sites/default/files/cartillaabcdelacuerdofinal2.pdf>, pp. 8-9.

⁹² Legislative Act 01 of 2017.

⁹³ Legislative Act 02 of 2017.

⁹⁴ One of the mechanisms established in Legislative Act 01 of 2017 is the Special Jurisdiction for Peace (JEP), a judicial body that operates within the Colombian Legal Framework with a specific mandate derived from the AFP to address serious human rights violations during the conflict (Transitional Article 1).

involving ethnic communities, proposing the creation of a special high-level body to oversee these efforts, and emphasising the importance of maintaining existing budgetary commitments made in consultation with indigenous and afro-colombian communities.⁹⁵ The AFP was signed in late 2016, but since then not much has been achieved. Specifically on the ethnic chapter, indigenous communities and other critics have highlighted that the implementation of the ethnic approach has been low in comparison to the overall implementation, and only one of the 13 commitments had been completed by November of 2023, with current special challenges on issues of consultation.⁹⁶

Regarding the position of international legal documents in the Colombian legal framework, Article 93 of the Constitution mandates the integration of international treaties and conventions on human rights ratified by Congress into national law, obliging the Colombian state to adhere to these international norms. Colombia is a signatory to the ILO Convention No. 169 and ratified it through Law 21 of 1991, ensuring rights for Indigenous and Tribal Peoples. As a member of OAS, Colombia is a part of the IAHRS, having ratified the OAS Founding Charter in 1951.⁹⁷ Within the regional system, Colombia has signed a total of 54 conventions, treaties, agreements and protocols, and ratified 39 of them.⁹⁸ It signed the ACHR in 1969 and ratified it in 1972, and ratified its Additional Protocol of San Salvador on Economic, Social and Cultural Rights in 1996.⁹⁹ Colombia recognised the jurisdiction of the IACtHR in 1985,¹⁰⁰ which means that the country is bound by the provisions of the treaties and the rulings of the IACtHR, having to make legal adaptations to comply with human rights obligations and with the obligation of Colombian judges to interpret national laws in light of these obligations. Colombia has been brought before the Court about 30 times, with the first case on indigenous rights currently pending a decision.¹⁰¹ In matters of international indigenous rights, Colombia issued

⁹⁵ Government of Colombia & Revolutionary Armed Forces of Colombia—People's Army (FARC-EP). (2016). *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, chapter 6.

⁹⁶ Idrovo, C. S., & Quinn, L. (2024). *Seven Years of Final Accord Implementation: Perspectives to Strengthen Peacebuilding at the Halfway Point*. University of Notre Dame, p. 5.
<https://doi.org/10.7274/25651407.v1>

⁹⁷ Ratification of the OAS Founding Charter by means of Law 1 of 1951.

⁹⁸ Organization of American States. (n.d.). *Current Status of Signatures and Ratifications of the Inter-American Treaties - Colombia*. www.oas.org. Retrieved June 6, 2024, from https://www.oas.org/en/sla/dil/inter_american_treaties_signatories_member_states_CO.asp

⁹⁹ Ratification of ACHR by means of Law 16 of 1972 and of the Additional Protocol of San Salvador by means of Law 319 of 1996.

¹⁰⁰ Inter-American Court of Human Rights. (2018). *Annual Report of the Inter-American Court of Human Rights*. https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2017.pdf, p. 14.

¹⁰¹ See *U'wa Indigenous Peoples v. Colombia*.

reservations during the negotiation process of the UNDRIP and the ADRIP. The Colombian delegation noted that some of the provisions, especially on the exploitation of non-renewable resources on indigenous land, and processes of prior consultation were contrary to other international law instruments such as the ILO Convention 169 and its national law. Colombia, in its Constitution gives the State the responsibility of administering non-renewable resources, to distribute them equally among the population, even if these resources are found on indigenous land. Regarding prior consultation, the Constitution recognises the obligation of conducting prior consultation processes, but it does not mandate the obligation to gain consent in order to begin with extraction projects, rather it encourages reaching an agreement.¹⁰² Given that both of these legal documents were adopted but are not legally binding, there are no consequences for the state's formal legal obligations. However, as will be shown in chapter 7, these standards could become binding on Colombia depending on the outcome of the U'wa Indigenous Peoples v. Colombia case.

The evolution of indigenous rights legislation reflects a significant shift from historical attempts to assimilate Indigenous Peoples into the broader national population towards a more inclusive approach that recognises and protects their unique cultures and ways of life. This transformation is evident in the guarantee of indigenous claims for autonomy and self-determination within their territories at the international and national level. Understanding the existing legislation is crucial to explore the interrelationship between legal systems, particularly the Colombian and inter-american jurisdictions. Consequently, it is essential to examine how inter-american standards and institutions have influenced Colombia's approach to indigenous rights protection, shaping legal frameworks that seek to uphold international norms and ensure the rights and autonomy of indigenous communities are respected and safeguarded.

¹⁰² Gómez-Rojas (2010).

6. Impact Evaluation

The following analysis will show how the outlined legal instruments and jurisprudence of the IAHRS have influenced the protection of indigenous rights in Colombia, through the Constitutional Court's case law. The cases focus on four recurring themes: land rights and territorial autonomy, cultural rights and identity, consultation and participation and the impacts faced by indigenous communities during the armed conflict. The cases have been structured in chronological order to showcase the increased reliance on inter-american standards during the years. Each case will be presented and the references to inter-american standards on indigenous rights will be discussed, to draw the connecting line between the regional and the national level of indigenous rights protection.¹⁰³

C-139 of 1996

One of the earliest rulings of the Constitutional Court concerning indigenous rights occurred in 1996, a few years after the adoption of the new constitution. The Case **C-139 of 1996** reviewed Articles 1, 5, and 40 of Law 89 of 1890 considering the principles of the 1991 Constitution, aiming to rectify laws that disregarded ethnic and cultural diversity. The plaintiffs argued that Article 1, which stipulated that general legislation did not apply to Indigenous people transitioning to "civilised life," with governance determined by the government and ecclesiastical authorities, disregarded the principle of a dignified life per Article 1 of the Constitution and Article 113, as it delegated authority to the Catholic Church. They also contended that Article 5, which allowed the governor to issue arrest warrants for offenses committed by Indigenous people, violated Article 116 of the Constitution since the governor is not among the indigenous authorities authorised to administer justice, and Article 246, as indigenous jurisdiction could not be enforced until a law governing its coordination with the national judicial system was enacted. Lastly, regarding Article 40, which allowed "assimilated" indigenous minors to sell their indigenous lands according to national laws for minors under 21, the plaintiffs argued that setting the age at 21 violated Article 98 of the Constitution, which sets adulthood at 18, and infringed on the rights of indigenous peoples to sell their lands.¹⁰⁴

¹⁰³ It is worthwhile mentioning, that in its judgments concerning indigenous rights the Constitutional Court regularly mentions instruments at the international level such as the ILO Convention N. 169 and the UNDRIP. However, as the focus of this thesis lies on the inter-american system, the international instruments will not be discussed further.

¹⁰⁴ Constitutional Court of Colombia. (1996). C-139, pp. 5-6.

The Court emphasised that the provisions of the mentioned articles treated Indigenous people as incapable and in need of paternalistic oversight, contradicting the pluralistic principle of the 1991 Constitution. Specifically, Article 1 of Law 89 granted powers to the government and ecclesiastical authorities, contrary to Article 330, which mandates Indigenous governance by Indigenous authorities. Similarly, Article 5 of Law 89 limited ethnic diversity by granting inappropriate authority the power to impose sanctions, and Article 40 mandated the sale of Indigenous land, which is inalienable under the Constitution since it aims to protect Indigenous territorial integrity.¹⁰⁵

In the end, the Court deemed Articles 1, 5 and 40 of Law 89 of 1890 unconstitutional and unenforceable,¹⁰⁶ and thereby emphasised the Constitution's recognition of indigenous self-governance and collective property rights while rejecting derogatory terms and limitations on indigenous jurisdiction and land transactions. Notably, the ruling of the Constitutional Court references international norms stemming from the ILO Convention No. 169, to explain the incorporation of certain indigenous rights in the Political Constitution of 1991, but it does not reference the IAHRs. This absence makes an important point about inter-american indigenous rights standards. It can be argued that at the time, there were in fact not legal standards, as the ACHR, the legal basis of the system, does not expressly mention indigenous rights and the first indigenous rights judgment of the IACtHR was only issued in 2001 (*Mayagna Awás Tingni v. Nicaragua*). This suggests, and as the following cases will show, that an integral part of indigenous rights standards of the IAHRs are set by the jurisprudence of the inter-american Court and have been progressively developed from 2001 onwards.

SU-383 of 2003

The case **SU-383 of 2003** was brought before the Constitutional Court for review by the National Organisation of the Indigenous Peoples of the Colombian Amazon (OPIAC). They sought protection for their rights to life, communal existence, a healthy environment, free development of personality, due process, and participation, as they were at risk from aerial spraying efforts conducted by governmental institutions at that time, in an effort to solve the country's drug trafficking problem.

¹⁰⁵ C-139, pp. 11-16.

¹⁰⁶ C-139, p. 16.

The initial plea for protection was denied by a civil court of Bogotá, arguing that aerial spraying using herbicide glyphosate did not cause serious harm to human health and that environmental damage was attributable to the illicit crop cultivation process, not the fumigation itself. Additionally, the Judge argued that prior consultation with indigenous communities was only required for lawful activities within their territories, not for eradicating illicit crops. OPIAC appealed this decision, but the Superior Court of Bogotá reaffirmed the previous decision, arguing that protection could not be granted solely based on a collective right without specific individual claims and that even if the protection was deemed appropriate, indigenous communities were only entitled to prior consultation regarding the exploitation of natural resources in their territories, not state policies related to crime enforcement.¹⁰⁷ Following this decision, OPIAC brought the case before the Constitutional Court.

The Constitutional Court needed to determine whether it would grant the transitional constitutional protection to the rights invoked by OPIAC against the state institutions involved, given the significant environmental harm on the communities' territories caused by aerial spraying in the process of eradicating illicit crops. Specifically, the Court needed to address if the legal framework provided mechanisms to protect the right to prior consultation and if environmental protection regulations included mechanisms to halt activities that could harm the environment and related societal interests.¹⁰⁸

The Court emphasised Colombia's historical commitment to protecting indigenous land rights, citing laws such as Law 81 of 1958 and Law 135 of 1961, as well as adherence to ILO Convention 107 in 1967. The 1991 Constitution further advanced this protection by recognising ethnic and cultural diversity and establishing a participatory republic. Ratification of ILO Convention 169 solidified indigenous rights, including the right to prior consultation (Article 6). Colombia's Political Constitution, particularly Articles 1, 7, and 330, reinforces this, recognising diversity and mandating consultation for resource exploitation in indigenous territories. Article 94 stipulates alignment with international human rights treaties.

The Court underscored the state's obligation to ensure prior consultation for indigenous peoples, essential for preserving their cultural, social, and economic integrity. The Court's consistent support for prior consultation in rulings like T-428 of 1992, T-380 of 1993, and SU-039 of 1997 was highlighted, and international obligations highlight that judges cannot justify the lack of prior consultation based on public interest or illegal plantation crimes.¹⁰⁹

¹⁰⁷ Constitutional Court of Colombia. (2003). SU-383, pp. 56-60.

¹⁰⁸ SU-383, pp. 60-61.

¹⁰⁹ SU-383, pp. 119-122.

Regarding the justification for omitting or flexibly applying consultation based on internal security concerns, illicit nature of plantations, and international commitments against drug trafficking, the Court established that indigenous consultation is fundamental in a society governed by the rule of law, balancing interests with broader societal concerns, safeguarding the values of Indigenous Peoples in Colombia, as supported by Colombia's adherence to international human rights instruments such as the ACHR¹¹⁰ and the ICCPR, which are part of the *bloque constitucional*, also aligning with previous constitutional jurisprudence. The Court also argued that a failure to consult undermined indigenous autonomy and cultural survival, highlighting the importance of prior consultation in indigenous jurisdiction within their territories (Penal Code, Article 246) and their customs and laws (ILO Convention 169, Articles 7, 8, and 9). It additionally emphasised the cultural significance of coca for indigenous communities, citing the Inter-American Indigenist Institute, a subsidiary body of the OAS, that was active between 1940 and 2009. Lastly, while supporting the Illicit Crop Eradication Program,¹¹¹ the Court again pointed towards the obligation of prior consultation with affected indigenous peoples, as outlined in ILO Convention 169, and that that the pursuit of drug trafficking must not lead to disregarding the cultural identity of indigenous communities protected by the Constitution.¹¹²

In its final decision, the Court partially¹¹³ overturned the rulings of the Civil Courts of Bogotá and instead granted the *tutela* action, safeguarding the fundamental rights to ethnic and cultural integrity, diversity, participation, and the free development of personality of the Indigenous Peoples of the Colombian Amazon. Beyond that, it mandated the Colombian state to conduct effective and efficient consultations with indigenous communities regarding decisions related to the eradication of illicit crops within their territories, in accordance with the ILO Convention No. 169, aiming to obtain their consent. These consultations must commence within three months and should cover topics such as the consultation process itself, the territorial scope, and the methods for eradicating illicit crops. Furthermore, the Court emphasised the state's

¹¹⁰ Relevant here are Articles 1 and 2, putting obligations on states to make the rights provided for in the Convention effective.

¹¹¹ This followed the guidelines of the Inter-American Strategy for the fight against drugs from the Inter-American commission against drug abuse (CICAD).

¹¹² SU-383, pp. 119-130.

¹¹³ The Constitutional Court decided not to grant temporary protection of the rights to life, health, and a healthy environment, as Article 88 of the Constitution establishes the mechanism of Popular Actions (*acciones populares*), which allows judges to adopt precautionary measures to prevent imminent and irreparable environmental damage, and a current action was in process at the time before the Administrative Court of Cundinamarca seeking such protection, and precautionary measures have already been ordered, see *ibid.*, p. 134.

obligation to respect the rights of indigenous peoples, including the right to life, personal integrity, security, and health, when implementing crime prevention policies in the interest of the nation.¹¹⁴

T-009 of 2013

The Constitutional Court's ruling in case **T-009 of 2013**, presented by ONIC on behalf of the Arizona-Cupepe Community of the Sikuani people, emphasised indigenous land rights and due process. It upheld the community's entitlement to a dignified life, cultural identity, self-determination, collective property, education, and health. The Court drew upon both national and international legal frameworks concerning indigenous territorial and property rights to support its decision.

In 1998, the indigenous community Arizona-Cupepe submitted a request to the public office INCORA¹¹⁵ for the land titling of their territories and the constitution of the *resguardo*, following their return from forced displacement dating back to the 1970s. Despite INCODER conducting a single visit to the territory in 2007, no progress was made in the land titling process thereafter. After the community's repeated, unresolved requests, ONIC, acting on behalf of the community, filed a *tutela* action. They argued that the prolonged process was violating their fundamental right to cultural identity, impeded their right to education, and requested protection for their rights to a dignified life, health, cultural identity, and collective property. ONIC demanded that INCODER be compelled to issue the land title of the indigenous *resguardo*.¹¹⁶

In the first instance, a civil court of the circuit of Bogotá had ruled in favour of ONIC, ordering INCODER to finalise the land titling process for the Arizona-Cupepe *resguardo*. However, the Civil Decision Chamber of the Superior Court of Bogotá overturned this decision on appeal, as it argued that ONIC had failed to provide adequate proof of the existence of the indigenous organisation and its legal representation by the person who signed the *tutela*,¹¹⁷ leading to ONIC bringing the case before the Constitutional Court to challenge the reversal.

¹¹⁴ SU-383, pp. 135-136.

¹¹⁵ The Colombian Institute of the Agrarian Reform (INCORA) was the predecessor to INCODER.

¹¹⁶ Constitutional Court of Colombia. (2013). T-009, pp. 36-38.

¹¹⁷ T-009, pp. 7-8. The Constitutional Court overturned this decision of the Civil Decision Chamber of the Superior Court of Bogotá, as they deemed ONIC a legitimate entity with the authority to act on behalf of the communities and found that all procedural requirements for filing a *tutela* action had been met, see pp. 40-43.

The Constitutional Court therefore needed to decide if INCODER had violated the fundamental rights of due process, dignified life, health, cultural identity and collective property of the Arizona Cupepe community because of its delayed land titling and *resguardo* constituting process.¹¹⁸ In its sentence, the Court begins by examining the concept of collective property within indigenous territories, referencing the IACtHR's interpretation in the Mayagna (Sumo) Awás Tingni v. Nicaragua case, where the IACtHR emphasised the cultural and communal significance and dimension of indigenous territories, offering a progressive understanding of Article 21 of the ACHR (right to individual property).¹¹⁹¹²⁰ The Court then outlines the normative basis for the right to collective property of indigenous territories, integrating international and inter-american law as per Article 93 of the Colombian Constitution (*bloque de constitucionalidad*).¹²¹ Therefore, it is relevant that the Court highlights the recognition of territorial rights and collective property rights of Indigenous people in the IAHRs, as the IACtHR has reiterated its progressive interpretation of Article 21 of the ACHR in several cases, including the Yakye Axa v. Paraguay case (2005), the Saramaka v. Suriname case (2007) and the Kichwa of Sarayaku v. Ecuador case (2012). The Constitutional Court underscores the relevance of the IACtHR's interpretations, which impose specific obligations on the Colombian state, that the Constitutional Court derives to be: respecting indigenous ethnic and cultural diversity, acknowledging their communal property rights in traditional territories, ensuring timely demarcation and titling of lands with community consensus, enabling indigenous resource utilisation aligned with their beliefs, protecting territories from arbitrary intrusion, and involving communities in decision-making processes, including through prior consultation and providing alternative lands if necessary, while respecting their autonomous governance structures.¹²²

Moving to its argumentation on the given case, when discussing indigenous rights to territory and collective property, and the establishment of *resguardos* stemming from these rights, the Court clarified that it is the responsibility of the State to create the necessary administrative mechanisms to uphold this right and ensure the fulfilment of due process guarantees, including a reasonable timeframe for land titling processes. In this context, the Court directly referenced

¹¹⁸ T-009, p. 12.

¹¹⁹ T-009, pp. 13-14.

¹²⁰ The Court also references its own definition of collective property found in SU-383 of 2003.

¹²¹ T-009, p. 26. The relevant national law on this issue can be found in Articles 36, 329 and 330 of the Political Constitution.

¹²² T-009, pp. 21-26.

standards established by the IACtHR, which indicated that the reasonable time for concluding the demarcation and titling of indigenous territories, since its case *Indigenous Community Yakye Axa Vs. Paraguay* in 2005, had not been more than three years in most cases in the inter-american system. Furthermore, the Court relied on its own jurisprudence¹²³ to argue that the indigenous community in question faced heightened risks during the delayed land titling process due to their experiences of suffering and threats during the internal armed conflict.¹²⁴

In the end, based on jurisprudence of the Constitutional Court, relevant national legislation as well as international obligations, the Court concluded that INCODER's delay in constituting the *resguardo* was unjustifiable and irrational. Given the added context of the armed conflict, this delay violated the fundamental right to due process, as well as the rights to a dignified life, cultural identity, self-determination, collective property, education, and health. Consequently, the Court decided to revoke the second instance ruling issued by the Civil Decision Chamber of the Superior Court of Bogotá and granted the requested *amparo*¹²⁵ for the Sikuani Arizona Cupepe indigenous community. Therefore, the Court ordered INCODER to complete the process of constituting the *resguardo* within six months.¹²⁶ In this case, the Court relied on inter-american legal standards, specifically jurisprudence from the IACtHR, to provide a normative framework for the collective property rights of indigenous communities, alongside national legislation. This framework served as the basis for the Court's argument that INCODER had failed to fulfil its obligation to title indigenous land in the present case and to uphold the mentioned rights. This illustrates the indirect and direct influence of inter-american standards on the Constitutional Court's decision-making process.

T-294 of 2014

In the Constitutional Court case **T-294 of 2014**, the Venado Community of the Zenú People initiated a proceeding against various state authorities to protect their fundamental right to human dignity, equality, collective property, the right not to be displaced, the recognition of ethnic and cultural diversity in the nation, health, a healthy environment, and prior consultation because of development projects affecting their indigenous territories.

¹²³ See Constitutional Court of Colombia. (2011). T-433.

¹²⁴ T-009, pp. 44-46.

¹²⁵ See footnote number 84.

¹²⁶ T-009, pp. 57-60.

The indigenous community of Venado, part of the Zenú People, resides in the Cantagallo Road. In 2010, the company CORASEO S.A. was granted an environmental license to construct a landfill in the area, with financial support from local authorities. However, the leader of the Zenú indigenous *resguardo* in San Andrés de Sotavento, representing the community's interests, urged national authorities to halt the project in 2011. The leader argued that the project would harm indigenous communities and their way of life. Despite this request, no action was taken to stop the project. In response, the indigenous community sought legal recourse by filing a *tutela* action, seeking to suspend the project and construction activities until a consultation process with the community could be conducted. The aim to protect their rights and interests.¹²⁷ The community initially brought their case before the Superior Tribunal of Montería, which granted protection for their fundamental rights to a healthy environment, human dignity, and life. The Tribunal ordered state authorities to suspend the construction of the Cantagallo landfill project until an agreement was reached with the affected communities. The companies assigned to the project appealed this decision to the Supreme Court of Justice, which overturned the previous ruling and denied the community's request, arguing that the community should have filed an *acción popular* to protect its collective rights instead of a *tutela*, as there was no evidence that fundamental rights had been violated. Following this decision, the case was brought before the Constitutional Court.¹²⁸

The Court needed to decide on two issues: First, whether the initiation of the Cantagallo landfill project violated the fundamental rights of the indigenous community by not ensuring adequate participation means. Second, whether there was a violation of the rights to prior consultation and the recognition and subsistence of the indigenous community, given that the authorities denied their presence in the affected area and refused to engage in prior consultation, arguing that the community was not officially recognised as indigenous.¹²⁹

First, the Court presented the constitutional framework regarding the right to a healthy environment and prior consultation, citing international, national, and inter-american sources. It emphasised the fundamental right to a healthy environment, as enshrined in Article 79 of the Constitution, and equitable access to environmental benefits, as well as a fair distribution of burdens, as outlined in Article 13. The Court stressed the importance of special protection for marginalised communities, arguing that affected communities should receive adequate

¹²⁷ Constitutional Court of Colombia. (2014). T-294, pp. 4-6.

¹²⁸ T-294, pp. 9-11.

¹²⁹ T-294, pp. 33-34.

compensation for environmental harm caused by lawful activities and should have the opportunity to participate in decisions regarding the equitable distribution of benefits and burdens, citing the Additional Protocol of San Salvador to the ACHR, that makes part of Colombia's *bloque de constitucionalidad*. Article 3 of this Protocol obligates states to ensure environmental rights without discrimination, while Article 11 protects the right to a healthy environment.¹³⁰ Regarding prior consultation, the Constitutional Court addressed the issue of formally recognising indigenous communities. While it adopted the definition of Indigenous Peoples outlined in Article 1 of ILO Convention 169, the Court also emphasised the importance of self-identification for indigenous communities, citing inter-american standards, supported by the IACHR and jurisprudence, as in the case *Xákmok Kásek v. Paraguay* (2010), the IACtHR affirmed that self-identification is a crucial aspect of indigenous autonomy, allowing communities to determine their name, composition, and ethnic identity.¹³¹

The Court argued that based on the constitutional framework the competent authority and the company CORASEO S.A. had violated the rights to equitable distribution of environmental burdens and benefits, access to potable water, and participation of the population affected by the Cantagallo landfill project. The Court referred specifically to Decree 838 of 2005, which establishes parameters for landfill site location, and the Environmental Impact Assessment process, highlighting the deficiencies in addressing the impacts on the local population in the specific case. Additionally, the Court reiterated the need for prior consultation with indigenous communities, as stipulated in ILO Convention 169, and emphasised the obligation to ensure access to potable water, in accordance with constitutional and international human rights standards.¹³²

The Court ultimately decided to revoke the previous decision made by the Supreme Court of Justice and partially confirm the decision by the Superior Court of Montería. This decision protected the rights of the affected community to a dignified life and a healthy environment. Additionally, the Court expanded the protection to include the rights to equitable distribution of environmental burdens and benefits, access to potable water, participation of the local population, prior consultation, and the recognition and subsistence of the Venado indigenous community. Furthermore, the Court ordered state authorities to assume responsibility for the environmental licensing of the Cantagallo landfill project and review the granted environmental

¹³⁰ T-294, p. 43.

¹³¹ T-294, pp. 62-63.

¹³² T-294, pp. 110-115.

license. The authorities were also instructed to implement mechanisms ensuring effective and meaningful participation of the local population. This includes establishing effective dialogue and coordination with Zenú authorities.¹³³ In its decision the Court relied heavily on international standards, including inter-american ones, regarding environmental rights and prior consultation. They effectively served as the cornerstone of its argumentation. These standards, forming part of the constitutional framework, provided the normative rules guiding the Court's reasoning in the case.

C-463 of 2014

The case **C-463 of 2014** examined the boundaries of indigenous autonomy and self-governance, as well as conflicts between the Political Constitution and existing national laws. An individual filed a lawsuit challenging Article 11 of Law 1890, claiming it violated the Constitution's preamble and Articles 3, 13, and 246 by allowing municipal mayors to settle disputes among Indigenous Peoples. The Court agreed to review the case solely on the grounds of the alleged violation of Article 246 of the Constitution.¹³⁴

The Constitutional Court needed to determine whether Article 11 of Law 89 of 1890¹³⁵, which granted municipal mayors and other administrative authorities the power to resolve conflicts among Indigenous people of the same Peoples, contravened Article 246 of the Political Constitution, which establishes the right of indigenous communities to autonomously resolve internal disputes according to their own norms and customs.¹³⁶

First, the Court referred to the constitutional framework on the principle of indigenous autonomy, emphasising the integration of international norms into the *bloque de constitucionalidad*, through ratified international treaties and conventions; however it does not mention regional instruments explicitly.¹³⁷ The legal basis for indigenous autonomy and the special indigenous jurisdiction is Article 246 of the Constitution, which empowers indigenous communities to establish their own judicial authorities within their own territories. When

¹³³ T-294, pp. 115-118.

¹³⁴ Constitutional Court of Colombia. (2014). C-463, pp. 5-6.

¹³⁵ Given that the law had not been repealed prior to this case, the article in question remained in effect, underscoring the significance of examining whether it aligns with the constitutional framework. C-463, p. 21.

¹³⁶ C-463, p. 16.

¹³⁷ C-463, pp. 21-26.

discussing the factors that define the competence of the special indigenous jurisdiction, the Court relied on its own jurisprudence, which has established the idea that territorial scope transcends of territorial limits.¹³⁸ Additionally, it referenced jurisprudence from the IACtHR specifically citing cases such as *Moiwana Community vs. Suriname* (2005), *Awás Tingni vs. Nicaragua* (2001), and *Yakye Axa vs. Paraguay* (2005), where the Court set the precedent for how indigenous territory should be regarded. According to the IACtHR's jurisprudence, recognition of territorial rights for Indigenous communities is essential as it reflects their profound connection to the land, which is not just a resource, but a foundation of their cultural and spiritual identity, ensuring both individual security and group unity.¹³⁹ Furthermore, the Court referred to the victim-centred approach of the IAHRs, as it sets the standards of the guarantees that should be given to victims of human rights violations in proceedings such as truth, justice and reparation, and that within Indigenous rights this should be understood within the criteria of reasonableness and proportionality.¹⁴⁰

In its analysis of the given case, the Court made a historical presentation highlighting the evolution of the legal landscape since the adoption of Law 89 of 1890, as it played a crucial role shaping indigenous rights in Colombia. However, the Court asserted that reconciling Article 11 of the Law with Article 246 of the Constitution was untenable, as the latter demanded that issues of disputes be resolved by the communities themselves, citing precedents from its own jurisprudence. The Court also argued that Article 11 granted powers to administrative authorities, which contravened Article 116 of the Constitution, prohibiting them from assuming jurisdictional functions. Moreover, in line with its established jurisprudence and that of the IACtHR, the Court underscores the unique bond between indigenous peoples and their territories. This bond significantly informs how conflicts are addressed within indigenous communities.¹⁴¹

In making its decision, The Court ultimately declared Article 11 of Law 1890 unconstitutional and unenforceable.¹⁴² In this instance, national standards on territorial rights of indigenous peoples were relied on more so when presenting the normative framework on the issue at hand,

¹³⁸ C-463, pp. 35-41.

¹³⁹ C-463, pp. 41-43.

¹⁴⁰ C-463, p. 45.

¹⁴¹ C-463, pp. 51-58.

¹⁴² C-463, p. 62.

as the legal question here was examining the harmony between Colombian law and the Constitution, where the Court was more inclined to refer to domestic law and jurisprudence.

SU-123 of 2018

In case **SU-123 of 2018**, the governor of the Awá La Cabaña *cabildo* filed a *tutela*, against various government institutions to protect the fundamental rights of his indigenous community, including prior consultation, democratic participation, equality, and cultural and ethnic integrity. This was in response to the initiation of petroleum exploration activities in areas adjacent to their territories without undergoing the required prior consultation process with the community. The community argued that these activities had impacted their ecosystem, affected their customs and traditions, and demanded that the activities be stopped. In 2014, environmental authorities had granted environmental licenses and expedited concessions for exploration activities to the corporations ECOPETROL and Consorcio Colombia Energy to commence the project in these areas. In 2015, the indigenous governor asked for the protection of his community's rights before the Superior Tribunal of Mocoa, which denied the *tutela*, citing that the community's territory was outside the impacted perimeter and that the project had started before the formal recognition of the indigenous community was finalised. This decision was later upheld by the Supreme Court of Justice. Therefore, the case was brought before the Constitutional Court.¹⁴³

The Constitutional Court was tasked with deciding whether to grant the *amparo* to the Awá La Cabaña community and, if so, whether the authorities and corporations were required to conduct a prior consultation process in this case. Specifically, the Court had to determine whether the environmental certification issued by the authorities, which stated that there was no indigenous presence in the affected area, was sufficient to justify bypassing the prior consultation process. The Court also had to analyse whether, in fact, the environmental impacts of the project had affected the community, and its right to a healthy environment.¹⁴⁴

When presenting the normative framework, the Court extensively referred to inter-american standards on the right to prior consultation and territory. It calls attention to the right to prior consultation. Although the right is not explicitly outlined in the ACHR, the IACtHR had established this right in the *Sarayaku vs Ecuador* case (2012), aligning it with Article 1.1 and

¹⁴³ Constitutional Court of Colombia. (2018). SU-123, pp. 6-13, 18-20.

¹⁴⁴ SU-123, pp. 21-27.

Article 23 of the Convention, restating its importance and pointing out that consultation processes must be culturally appropriate, respecting traditions and decision-making methods. This responsibility relies both on states and corporations and applies retroactively.¹⁴⁵ In relationship to indigenous land rights, the Constitutional Court highlighted that the IACtHR¹⁴⁶ had emphasised a broader understanding of property rights for Indigenous Peoples, considering the cultural, spiritual, and economic importance of their lands and natural resources essential for their survival. The Court also drew from IACtHR criteria to assess indigenous land claims, as it focused on the community's characteristics, circumstances, and continuous connection to the land through traditional practices.¹⁴⁷ The Court also referenced the IACtHR decision in the *Garifuna Cruz v. Honduras* case (2015) in order to discuss the need for clear judicial rules, noting that states can restrict collective property rights if the restrictions are lawful, necessary, proportional, and serve a legitimate democratic purpose – provided they do not threaten the community's survival or existence.¹⁴⁸

Based on the normative framework, the Court found that the Awá community La Cabaña had been directly affected by the exploitation project. The oil exploitation had caused negative environmental impacts that had unfavourable consequences for life in the community and its cultural integrity, violating their right to a healthy environment. These impacts included contamination of water sources used for fishing and drinking, loss of local fauna crucial for sustenance, destruction of flora crucial for traditional medicine, deterioration of air quality due to oil transport pollution, and overall damage to community health. Furthermore, the project affected the community's territory and essential natural resources, vital for their customary practices and cultural identity. Despite environmental licenses acknowledging potential negative impacts in areas inhabited by the community, the Court found repeated violations of the right to prior consultation, as the community excluded from crucial project decision-making stages. The responsible authorities failed to adequately engage and consult with the Awá community, violating their rights, and ECOPETROL and Consorcio Colombia Energy failed in their duty to recognise and consult with the community.¹⁴⁹

¹⁴⁵ SU 123, pp. 30, 32-33; 53-55; 83.

¹⁴⁶ The IACtHR had done this in various instances such as the cases *Mayagna (Sumo) Awás Tingni v. Nicaragua*, *Yakye Axa v. Paraguay*, *Sawhoyamaya v. Paraguay*, *Xákmok Kásek v. Paraguay*, *Moiwana v. Suriname*, *Saramaka v. Suriname*, *Kichwa de Sarayaku v. Ecuador*, *Garifuna Triunfo de la Cruz and members v. Honduras*, and *Kaliña and Lokono v. Suriname*.

¹⁴⁷ SU-123, pp. 35-36.

¹⁴⁸ SU-123, p. 58.

¹⁴⁹ SU-123, pp. 98-101.

In its decision, the Court reversed the previous ruling by the Supreme Court of Justice, protecting the rights of the Awá La Cabaña community to prior consultation and a healthy environment. The Court ordered the state authorities to initiate a consultation process within three months to determine and mitigate the potential negative impacts of the project on the community, and if an agreement could not be reached, make decisions subject to court oversight. Additionally, the Court mandated the national government and congress to regulate the issuance of certificates of presence and impact for ethnic communities and ordered the decision to be translated into the indigenous language of the community and publicly communicated to the indigenous community.¹⁵⁰ Once again, in this case inter-american standards provided part of the crucial normative framework that the Court used to make its decision to protect the rights of the indigenous community.

SU-092 of 2021

The case **SU-092 of 2021** dealt with the human rights violations experienced by indigenous communities in Colombia that resulted from the internal armed conflict. The Jiw indigenous community had been displaced from their ancestral lands due to the armed conflict and had been living in the Las Zaragozas area for over ten years, facing various problems such as loss of traditional practices, housing issues, lack of access to healthcare and clean water, food insecurity, and limited access to education. Despite the Constitutional Court's orders to take urgent measures to protect the rights of indigenous peoples, these measures had not been implemented, and the community had been awaiting the recognition of their indigenous reserve, Naexal Lajt, which had been pending for several years.¹⁵¹ In 2019 a *tutela* action was filed against several entities seeking protection for the fundamental rights of 999 indigenous Jiw individuals, including rights to life, health, food, water, territory, cultural identity, resettlement, socio-economic stabilisation, housing, ethno-education, and children's rights as guaranteed by the Colombian constitution. Initially, a court in Villavicencio negated the *tutela*, arguing through that the Constitutional Court had already made decisions regarding the rights of indigenous peoples in the armed conflict context. The Court also ruled that the petition was not

¹⁵⁰ SU-123, pp. 101-103.

¹⁵¹ Constitutional Court of Colombia. (2021). SU-092, pp. 9-12.

specific to individual people and that the community should have used other legal means to protect his community's rights.¹⁵² Therefore the case was moved to the Constitutional Court.

The Court had to determine if the case met all the necessary requirements for a *tutela* and then assess whether the rights to reparations for victims, health, clean water, housing, basic sanitation, food security, education, and indigenous autonomy were violated by state authorities due to their inaction during the community's humanitarian crisis.¹⁵³

The Court presented the normative framework of all rights that were claimed to have been violated, referencing national jurisprudence as well as inter-american standards in most cases, and analysed the measures taken by the State in response to the humanitarian crisis. The Constitutional Court, addressing the right to health, invoked the ADRIP, which affirms that indigenous communities have the right to the highest standard of health and the protection of their traditional health practices and resources. Indigenous communities are also entitled to access all general health services, and states must promote intercultural health practices. The IACtHR emphasised that the right to life, as stated in Article 4 of the American Convention, includes ensuring the highest level of health due to their vulnerability.¹⁵⁴ For the right to ethno-education, the Court again refers to the ADRIP, particularly Article XV, which asserts that indigenous communities, especially children, have the right to all education levels in their own language and according to their traditions. The ADRIP places an obligation on the State and indigenous communities to reduce educational disparities and providing culturally sensitive education for those living outside their communities. Educational systems should promote understanding of indigenous cultures and histories.¹⁵⁵ Regarding reparations for victims of Colombia's internal conflict, the Constitutional Court refers to Article 63.1 of the ACHR, which obligates the State to restore violated rights, and provide reparations.¹⁵⁶ On the right to a dignified life, the Court referred to the ADRIP's Article XXV, that protects traditional property, cultural survival, and land rights. The IAHRs guarantees Indigenous Peoples the right to their ancestral lands and resources, and states must recognise these forms of property and control. Additionally, there is reference to the IACtHR's case of the Indigenous community Yakye Axa v. Paraguay (2005), where it was ruled that states must adopt measures ensuring a dignified life,

¹⁵² SU-092, pp. 16-17.

¹⁵³ SU-092, p. 23.

¹⁵⁴ SU-092, pp. 55-58.

¹⁵⁵ SU-092, p. 109.

¹⁵⁶ SU-092, p. 122.

especially for vulnerable communities.¹⁵⁷ Lastly, regarding food security, the Constitutional Court cited the IAHR Additional Protocol of San Salvador, specifically Article 12, which guarantees the right to adequate nutrition for health development. States must ensure food production and distribution to realise this right, and indigenous communities have the right to pursue their own subsistence and development freely and safely according to their autonomy.¹⁵⁸

The Court argued that all the requirements for the issuing of a *tutela* had been met, and found that the community's rights to health, water, autonomy, ethnic education, and food security had been violated, as well as their traditional institutions weakened. It affirmed that the measures taken by the State to address the crisis had been insufficient.¹⁵⁹

In the end, the Constitutional Court revoked the previous ruling and granted protection to the fundamental rights of the Jiw indigenous community from Naexal Lajt, including health, water, ethno-education, and food security. The government authorities were ordered to reactivate health brigades, conduct a health assessment, ensure access to water services, evaluate water source impacts, improve educational conditions, address soil fertility issues, and implement a productive project for nutritional sustenance in the community's new territory.¹⁶⁰ Here, inter-american standards were crucial, as the Court used these standards, together with national and international legal norms to analyse the rights that had been violated due to the inaction of the State, to form the normative framework on which its final decision was based.

SU-245 of 2021

The **SU-245 case** is an important case that unified and highlighted the rights of ethnoeducators and the equality of indigenous and public education. The case stems from a request by the then-governor Fidencio Hernando Maingual Getial to register the ethnoeducators from the Yascual Reserve in the teaching staff defined by Decree 2277 of 1979. The Secretary of Education in Nariño rejected the request, leading Maingual Getial to file an action for compliance in 2018, in which he sought the protection of the rights to protection of ethnic and cultural diversity, bilingual education, and equality with other groups, as well as ensuring that the State prioritised the rights of children and adolescents. Specifically, the plaintiff requested compliance with

¹⁵⁷ SU-092, pp. 135-136.

¹⁵⁸ SU-092, p. 151.

¹⁵⁹ SU-092, pp. 168-69.

¹⁶⁰ SU-092, pp. 170-176.

Articles 10, 13, 68 of the Constitution, and Articles 62 and 23 of the International Labour Organization's Convention 169. This was rejected by the Administrative Court of Pasto and the Administrative Tribunal of Nariño, as they stated that the plaintiff had other legal mechanisms of defence. This initial rejection sparked a series of appeals, ultimately resulting in a request to the Constitutional Court. The request asked of the Court to review these decisions (four in total) of common origin, namely the rights of ethnoeducators in the Yascual Reserve. Maingual Getial argued that the previous decisions had violated the fundamental rights of the Yascual indigenous community and its ethnoeducators to due process, respect of cultural and ethnic identity, and education of children and adolescents.¹⁶¹

The Court had to determine whether the refusal to apply Decree 2279 of 1979 to ethnoeducators violated their fundamental rights to job stability and benefits and assess whether lower courts had correctly applied the law and constitutional precedent. The Court then analysed what remedies to establish in addressing the legislative vacuum affecting ethnoeducators' rights.¹⁶²

The Court begins its examination of the given case by presenting the normative framework on the procedural issue of the *tutela*, and the substantives question of the right of Indigenous Peoples to ethnoeducation. On the first question it begins by guaranteeing that Colombian citizens have the right to question judicial decisions, based on Articles 86 and 229 of the Political Constitution, as well as Article 25 of the American Convention (right to judicial protection). Furthermore, through an analysis of its judicial precedents, the Court determined that the lower courts did not fully consider the Constitutional Court's previous decisions did not fully consider the scope of fundamental rights in their decisions.¹⁶³ The constitutional framework for the right to ethnoeducation in Colombia is established through several key articles, as well as previous decisions of the Constitutional Court. Article 67 recognises the right to education, while Article 7 acknowledges the ethnic and cultural diversity of the country. Article 8 protects the country's cultural heritage, Article 10 recognises indigenous languages as official in indigenous territories, Article 70 expands the concept of equality by promoting mutual respect and understanding among different cultures, and Article 13 enshrines the principle of equality before the law and non-discrimination. Additionally, the Colombian Constitutional Court references the ILO Convention 169 and the UNDRIP.¹⁶⁴

¹⁶¹ Constitutional Court of Colombia. (2021). SU-245, pp. 9-19.

¹⁶² SU.245, pp. 45-46.

¹⁶³ SU.245, pp. 46-60.

¹⁶⁴ SU-245, pp. 60-66.

On the argumentation of the case at hand, the Court argued that the previous judges made several mistakes that violate the Constitution and the right to due process and access to justice, failing to consider the constitutional rights being claimed. Instead, the Court contended that the previous focus on procedural rules, led to ignoring Article 9 of Law 393 of 1997, which prioritises the procedure of *tutela* when fundamental rights are threatened or violated. Here the Court again referenced the ACHR (Article 25) as grounds for reasoning that the Colombian state has a responsibility to provide an effective means for the protection of the right of access to justice.¹⁶⁵ The Court determined that there were serious violations of fundamental rights of indigenous communities, ethnoeducators, and students in the context of ethnic education. Despite existing constitutional jurisprudence and legislation, the implementation of the right to ethnic education had been deficient and led to a lack of guarantees and resources for Indigenous Peoples. The Court based its argumentation on Decree 2277 of 1979, modified by Decree 85 of 1980 (on the exercising of the teaching profession), Law 115 of 1994 (Law on Education) and Decree 804 of 1995 (special education for ethnic groups), as it argued that the Colombian judicial framework had taken steps towards the autonomous management of indigenous education.¹⁶⁶

In conclusion, the Court revoked the previous, while also ordering the Secretary of Education in Nariño to apply certain rules to ethnoeducators in the Yascual Reserve, allowing them to access their rights and benefits. The Ministry of Education was also tasked with creating a temporary system to ensure these ethnoeducators can enjoy the same rights and benefits as regular teachers. Finally, the Court urged Congress and Government to pass laws that respect the rights and principles established in the decision and to advance the development of an indigenous educational system.¹⁶⁷ In this case, the Court based its argumentation on the substantive issue on its existing jurisprudence and national legislation on the right to ethnoeducation. However, it did include Article 25 of the ACHR when arguing for the prevalence of the right to file a *tutela* action, as part of the *bloque de constitucionalidad*.

¹⁶⁵ SU-245, pp. 84-86.

¹⁶⁶ SU-245, pp. 102-109.

¹⁶⁷ SU-245, pp. 116-117.

7. Current Challenges – the U’wa v. Colombia case

The cases presented in the previous chapter showcase that inter-american standards have often served the Constitutional Court to protect the rights of Indigenous Peoples in Colombia. The IAHRs however also serves another purpose, as it is the way that communities can make their voices heard even after exhausting all legal remedies. The pending U'wa Indigenous Peoples v. Colombia case under consideration by the IACtHR serves as a clear illustration that there are in fact flaws in the implementation of indigenous rights in Colombia. The very fact that this case has reached the Court signals systemic challenges in safeguarding the rights of indigenous communities.

In 1991, the US oil company Oxy signed a contract with Shell and ECOPETROL to explore the Samoré block in U’wa territory. The Colombian state gave Oxy the first concession to conduct seismic studies in the block, prompting the U’wa community to file a *tutela* because the license was granted without prior consultation. The Constitutional Court confirmed that the right to prior consultation had been violated, infringing on the U’wa's rights under ILO Convention No. 169 and the Political Constitution. The Court ordered consultation proceedings to be conducted within 30 days, contingent on a pending administrative decision regarding the nullification of the environmental license resolution. However, since the Council of the State (Colombia's highest administrative court) ultimately ruled that the environmental license was valid, the ordered consultation never occurred. In 1999, the U’wa community petitioned the IACtHR against the concession of the Samoré license and the lack of prior consultation. That same year, the U’wa *resguardo* was established, but the State excluded the Gibraltar exploitation area and did not recognise the entirety of the ancestral territory, claiming there to be no indigenous presence in Gibraltar – despite some authorities acknowledging the U’wa as ancestral inhabitants. Since then, the State has granted several other concessions in the Gibraltar block for natural gas and mining exploration. After 2003, ECOPETROL, which had taken over the concession from Oxy, initiated various prior consultation processes. However, the U’wa community argued that these processes did not meet necessary standards and did not participate, as they were not willing to concede their land. Since the 1990s, the U’wa community has been increasingly affected by violence from guerrilla groups, particularly the FARC-EP, experiencing abductions and killings of their leaders, as well as blockades of their access to food, water, and other necessities to force them out of the Gibraltar zone. In 2009, the

Constitutional Court recognised the U'wa as a community at risk of extinction due to the internal armed conflict and the impacts of extractivism.¹⁶⁸

In the year 2015, the Commission finally accepted the U'wa Indigenous Peoples' petition to examine the case. In its merits report, the Commission found the Colombian state responsible of having violated the right to collective property, access to information, and political and cultural rights, as found in Articles 21, 13, 23 and 26 of the American Convention, in relation to the obligations set out in Articles 1.1 and 2 of that same instrument.¹⁶⁹ It noted inadequacies in titling and effectively cleaning the U'wa's ancestral territory and that the Colombian state did not adequately provide the U'wa Indigenous People with access to information regarding projects and incursions into their territory. It recommended the State to adopt all necessary measures to ensure the collective property rights and possession of the U'wa Indigenous People. This included titling and effective cleaning of their ancestral territory to fully repair the consequences of the violations identified in the report, considering too the damages caused to the U'wa Indigenous People by the lack of sanitation of their ancestral territory, as well as the damages caused by projects and the incursion of state agents and third parties into their territory. No projects linked to concessions and business activities should continue or begin execution without complying with standards established in the report, specifically regarding prior, free, and informed consultation and consent. This would ensure that any pending judicial resources filed by the U'wa People were resolved promptly, conducting a conventionality control in accordance with Colombia's international obligations under the American Convention as described in the report, and adopting the necessary legislative, administrative, or other measures to prevent similar events in the future. This included the recommendation to create simple, fast, and effective resources that protect the right of Indigenous Peoples to claim their ancestral territories and to peacefully enjoy their collective property through titling, demarcation, delimitation, and sanitation, and adopting a law on prior consultation that aligned with the standards outlined in the report.¹⁷⁰ The Commission submitted the case to the IACtHR in 2020 after the Colombian state requested a fourth extension to fulfil the recommendations in the

¹⁶⁸ *La Nación U'wa contra el Estado de Colombia*. (n.d.). EarthRights International. Retrieved June 5, 2024, from <https://earthrights.org/case/nacion-uwa-contra-estado-colombia/>

¹⁶⁹ Inter-American Commission on Human Rights (2019), p. 32.

¹⁷⁰ Ibid., pp. 33-34; IACHR Press Office. (2020, October 30). IACHR refers case on Colombia to the Inter-American Court. oas.org. https://www.oas.org/en/iachr/media_center/PReleases/2020/261.asp

merits report. The Commission determined that after nearly a year, there had been no substantive progress in implementing the recommendations.¹⁷¹

On April 25 and 26 of 2023, the case was heard in a public hearing of the 157th period of ordinary sessions of the IACtHR, in Santiago de Chile. For the first time, two U'wa leaders had the chance of making their case heard, emphasising the violations of their rights. In its final allegations, the community argued that the State had failed to protect their territorial rights, particularly by not conducting prior consultations for extractive projects, despite international standards equating traditional possession of ancestral lands to full legal title. In its defence, the State alleged that adequate mechanisms for land titling and legal validation had been taken, arguing that projects outside the demarcated *resguardos* did not require consultation and asserting that the decision would impact other local communities, so it did not accept responsibility of the violations. However, the U'wa contended that these projects have led to significant environmental damage, cultural harm, and increased vulnerability due to militarisation, and that the state's restrictive interpretation of territorial rights had undermined their autonomy and fundamental rights.¹⁷² This case is the first instance in which an Indigenous People have brought the Colombian state before an international court like the IACtHR, alleging violations of their territory, environment, and culture. The Court has a range of possible reparations it could demand from Colombia, which might include financial compensation, restitution of land, termination of all extractive projects in the territory, and the establishment of new legislation on prior consultation that ensures non-repetition of these violations. The IACtHR could require that consent from indigenous communities be obtained through a prior consultation mechanism, aligning Colombian legislation with inter-american standards, as national law currently only requires an intention to agree, not the requirement of consent by indigenous communities. A decision in favour of the indigenous community would be historic, setting a precedent in the fight for indigenous rights not only in Colombia but across the region.

¹⁷¹ Inter-American Commission on Human Rights. (2020, October 21). *Submission of Case 11.754 U'wa Indigenous Peoples v. Colombia to the Inter-American Court of Human Rights* [Letter to Secretary of the Inter-American Court of Human Rights].

¹⁷² Niño, C. (2023, May 4). Consideraciones de alegatos por el estado ante la CIDH en el caso U'wa. *La Silla Vacía*. <https://www.lasillavacia.com/red-de-expertos/red-etnica/consideraciones-de-alegatos-por-el-estado-colombiano-ante-la-corte-idh/>

8. Discussion and Policy Recommendations

In 2023, President Gustavo Petro acknowledged the right of the U'wa Indigenous Peoples to their autonomy and ancestral land during his intervention at the UN Indigenous Forum, recognising that the worldview of indigenous peoples and their desire for a permanent balance with nature were accurate and practical for today's world.¹⁷³ However, this public support from the president strongly contrasts with the legal strategy of the Colombian state during the public hearing of the U'wa Indigenous Peoples v. Colombia case before the IACtHR. This situation highlights a discrepancy between the state's public attitudes before the international community and its actions within Colombia.

One of the findings of this thesis is that while Colombia has progressive legislation regarding indigenous rights, cases presented before the Constitutional Court show a systematic disregard for these normative rules by governmental institutions, extractive companies, and armed groups. The Constitutional Court has been essential in protecting the rights of the indigenous population by upholding the constitutional framework and considering international and inter-american standards. For its purposes, the inter-american system has been a crucial tool for the protection of indigenous rights in Colombia. The Constitutional Court often draws from inter-american standards set by the IACtHR, which has progressively interpreted the ACHR to include minimum protection standards for indigenous peoples, such as extending the concept of private property to collective property.

As the IACtHR's jurisprudence on indigenous rights grew, the Constitutional Court increasingly relied on these inter-american standards, confirming the thesis that the value of the IAHRs lies in its organs. Prior to the first indigenous rights case before the IACtHR, the IAHRs were rarely mentioned by the Court.¹⁷⁴ Notably, while the Constitutional Court primarily references the ILO Convention No. 169 in its decisions, the IACtHR case law has also been crucial. However, the Court rarely mentions the ADRIP, leading to several points of discussion. The ADRIP sets stricter standards on prior consultation, an issue that indigenous peoples in Colombia have long flagged as a major concern. While the Colombian state relies on the vagueness of Article 6 of ILO Convention No. 169, which calls for the intention to reach an agreement with the indigenous community, the ADRIP makes this a requirement. The Colombian state has openly

¹⁷³ Cote, J. S. (2023, May 1). *La contradicción del Gobierno Petro sobre la autonomía del territorio indígena*. ELESPECTADOR.COM. <https://www.elespectador.com/judicial/la-contradiccion-del-gobierno-petro-sobre-la-autonomia-del-territorio-indigena/>

¹⁷⁴ In the cases C-139 and C-463 did not rely on inter-american standards since the legal question was on reviewing internal legislation and harmonising it with the constitutional framework.

objected to this stricter requirement. Now, here a second potential impact of the IAHRs becomes tangible, apparent in the pending case *U'wa Indigenous Peoples v. Colombia*. In this case, the State has argued that prior consultation is not a necessary requirement, but a ruling of the IACtHR in favour of the indigenous community U'wa could force the State to halt all projects in the affected area. This possibility showcases the value of the IAHRs as an avenue for victims to bring their cases for protection of their fundamental rights forward when all domestic remedies have been exhausted without a positive resolution. Furthermore, if the Court determines that the State must adopt guarantees of non-repetition, this will force Colombia to change its framework and adopt stricter rules in matters of prior consultation and free and informed consent.

The analysis of the cases before the Constitutional Court and the case before the IACtHR also showcases significant infrastructure challenges within both systems. Firstly, in the IAHRs, the lack of financial resources and the limited number of Commissioners and Judges contribute to a slow process in bringing cases before the Court, as evidenced by the *U'wa v Colombia* case. The system struggles to handle the volume of cases necessary to address all human rights violations in the region, and mechanisms to monitor states' compliance with Court judgments and Commission reports are limited. Secondly, in Colombia, despite possessing an extensive and progressive legal framework on indigenous rights, mechanisms for ensuring compliance with these standards are inadequate, given the persistent violations of indigenous rights, as evidenced in the case analysis. The slow implementation of the Final Peace Agreement and the failure to apply promised ethnic lenses further exacerbate the precarious situation for indigenous communities, leaving them at heightened risk and vulnerability.

Moreover, the cases illustrate a point of tension within the Colombian state between protecting indigenous rights and accelerating economic development. While Colombia seeks to attract foreign investors, extractive industry companies often have interest in resources located on indigenous territory. Corruption at regional and local levels facilitates the granting of concessions to these companies, endangering indigenous lives and exacerbating conflicts over land rights. The cases and legislation reveal fundamental tensions between human rights systems rooted in individual rights and the application of collective rights, particularly concerning the relationship of indigenous peoples to their land. This underscores the need for reflection on the nature of human rights and the unique status of Indigenous Peoples within states, not merely as distinct groups but as integral components of society. This reflection is essential to navigate the complexities of protecting indigenous rights that necessitate both the

promotion of a more sustainable economic development and the upholding of human rights principles.

From the findings of this thesis, concerning the status of the impact of inter-american legal standards on the protection of indigenous rights in Colombia, there are several recommendations to be made, both to the IAHRs and the domestic framework in Colombia. First, as one of the difficulties that the IAHRs system faces is the lack of resources to take on cases and resolve them in a timely manner, more financial resources to its organs are necessary. This could enhance their capacity to address indigenous rights violations faster and more effectively and. Additionally, streamlining by way of increasing the number of Commissioners and the number of regular sessions of the Court could contribute towards speeding up the case procedures. Finally, enhancement of monitoring compliance mechanisms of the system would surely prove helpful.

Second, the IAHRs should strive to achieve consensus on the issue of indigenous rights. While states like Colombia have ratified the ILO Convention No. 169, the most ambitious standards are set forth in subsequent declarations (UNDRIP and ADRIP). Within the IAHRs the ADRIP is not a legally binding instrument, nevertheless, efforts should be made to harmonise national legislations with its standards, and this should be promoted by the organs of the IAHRs, especially when it comes to the right to prior consultation. In the long run, the IAHRs should strive to negotiate a legally binding instrument out of the ADRIP, as it has on other issues such as the eradication of violence against women. In such a process, peer-pressure could force reluctant states such as Colombia to support such a new legally binding document and adapt its legal framework of protection of indigenous rights to more progressive standards.

Third, data on the situation of indigenous peoples in Colombia shows armed conflict is one of the biggest sources of suffering. The priority of the State should be to expedite the implementation of the Final Peace Agreement, ensuring that an ethnic lens is utilised in all aspects of policymaking and implementation processes, so that the unique concerns and perspectives of indigenous communities are considered.

Lastly, the findings have shown that the Colombian state must prioritise land rights by strengthening the legal protection of these lands and better monitor the effective implementation of mechanisms for meaningful consultation and consent with Indigenous Peoples regarding projects or activities that may affect their lands, and thus their sustenance, lives, and cultures. Additionally, while Colombia continues its path of development, sustainable development practices that prioritise the well-being and interests of indigenous communities while fostering

economic growth should be prioritised. Most importantly, it should be the state's priority to hold extractive industry companies accountable for their social and environmental impacts.

9. Conclusion

The aim of this thesis was to study the relationship between two legal systems, the IAHRs and the Colombian legal framework on the matter of indigenous rights, answering the following research question: *to what extent do the legal standards and precedents of the inter-american human rights regime impact the practice of recognition and protection of indigenous rights in Colombia?* For this, the method was to study the impact through an analysis of cases from the Constitutional Court. Firstly, functioning as a background, the challenges that indigenous communities face in the country were presented, and the legal frameworks both on the regional and domestic scale contextualised. This was followed by an analysis of landmark cases before the Constitutional Court of Colombia on indigenous rights and studying the references to the IAHRs in these judgments. Additional consideration of the ongoing U'wa v. Colombia case before the IACtHR highlighted how the domestic legal landscape could be potentially changed for the first time in thirty years by a landmark decision from the IACtHR.

The results have shown that the impacts of inter-american standards on the practice of indigenous rights are three-fold. First, the growing inter-american jurisprudence has given the Constitutional Court of Colombia extensive tools that set minimum protection standards, standards that the Court used in several instances to protect indigenous rights. Second, the IAHRs presents an avenue for indigenous victims of rights violations to bring their cases forward when having exhausted all domestic legal remedies, as has recently been done by the U'wa Peoples. Third, the potential impact of inter-american standards, which on issues such as territory are in fact stricter than the national standards, could be imposed on Colombia, setting an important precedent for indigenous rights in Colombia but also for the entire region, depending of course on its outcome.

This thesis underscores the urgent need for effective mechanisms to ensure accountability and enforcement of legal protections for indigenous communities. By revealing the discrepancies between stated commitments to indigenous rights and the actual implementation of these protections, the study highlights the pressing need for robust mechanisms that hold states accountable for upholding their obligations, which includes ensuring compliance with domestic laws and international human rights standards. Without such mechanisms in place, indigenous communities remain vulnerable to ongoing violations and struggles for survival.

Given the scope of the thesis, certain interesting aspects could not be thoroughly examined. Firstly, while the Constitutional Court has consistently ruled in favour of indigenous rights

protection, it remains unclear whether these rulings were effectively implemented for the benefit of affected communities. Additionally, due to the pending decision in the U'wa Indigenous Peoples v. Colombia case, the full implications of this landmark could not be assessed, and only prospective insights could be provided. Lastly, while the Court frequently referenced the ILO Convention No. 169, there was no opportunity to delve into the interconnectedness of these standards with inter-american norms.

The impact of the legal standards set within a regional human rights body, in this case the IAHRs, transcends a domestic court's judgment. It necessitates ongoing evaluation, tracing from the establishment of standards all the way to tangible outcomes for affected communities. It is crucial to monitor the implementation of Constitutional Court decisions and evaluate their real-world effects. Moreover, with significant legal developments anticipated in Colombia, particularly with the impending judgment in the U'wa v. Colombia case, scholarly attention should focus on tracking the implementation process and analyse its potential transformative effects on Colombia's legal landscape. Lastly, exploring the interrelationship between standards set by the IAHRs and those of the ILO Convention No. 169, which were pivotal for the Court's decisions, presents an intriguing avenue for future research.

The practical applications of this thesis are diverse, spanning legal advocacy, policymaking, judicial decision-making, and diplomacy. It can be used by legal practitioners and human rights advocates to inform their strategies and advocacy efforts, while additionally contributing to the international promotion of human rights. By showcasing the government's recent stance on Indigenous people's rights and their contradicting actions before the IACtHR, this thesis sheds light on areas where alignment with inter-american standards, particularly regarding prior consultation, is lacking. The findings can guide policy reforms aimed at strengthening the legal protections for indigenous rights. Additionally, legal scholars can benefit from this analysis of landmark cases from the Constitutional Court to understand how regional human rights norms have influenced domestic judicial decision-making. Moreover, the insights into Colombia's engagement with inter-american human rights bodies can inform diplomatic efforts.

Indigenous Peoples are indispensable members of society, not only their centuries-long protection of the environment, preserving natural resources, but also rich history, knowledge, and cultural traditions. Moreover, they are citizens entitled to the same rights and treatment as any other member of society. While states are historically indebted to them and should make reparations for the historical violations and suffering caused, they must also honour their promises to not repeat such violations. Indigenous Peoples are still under enormous pressure,

and as this thesis has underscored, remain at the brink of extinction, because of violence inflicted upon them in the context of the armed conflict, but also pressures from corporations interested in natural resource extraction in their ancestral territories. The Colombian state has an obligation to protect them from these perils and obligations to acknowledge and promote the survival of their languages, cultures, sustenance ways, and self-government structures, which contribute so much to its diversity. While it is true that Colombia has a progressive legislation on indigenous rights compared to other states in the Latin-American continent and in the world, the goal of full protection will not have been reached until indigenous communities can experience safety and are enabled to freely pass on their cultural heritage to the next generations. Full protection is only achieved when their physical and cultural survival becomes guaranteed. Instead of arguing that all the possible rights have already been attained, attainment of indigenous rights should be regarded as a constant progression towards full recognition, equality, and celebration of indigenous lives.

10. References

10.1. List of cases

Constitutional Court of Colombia. (1996). C-139.

Constitutional Court of Colombia. (2003). SU-383.

Constitutional Court of Colombia. (2013). T-009.

Constitutional Court of Colombia. (2014). C-463.

Constitutional Court of Colombia. (2014). T-294.

Constitutional Court of Colombia. (2018). SU-123.

Constitutional Court of Colombia. (2021). SU-092.

Constitutional Court of Colombia. (2021). SU-245.

Inter-American Court of Human Rights. (2001). *Mayagna (Sumo) Awás Tingni Community vs. Nicaragua*.

Inter-American Court of Human Rights. (n.d.). *U'wa Indigenous Peoples v Colombia*.

10.2. Domestic Legal Instruments

Political Constitution of Colombia. (1991).

Government of Colombia & Revolutionary Armed Forces of Colombia—People's Army (FARC-EP). (2016). *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*.

10.3. International Legal Instruments

Organization of American States. (1969). *American Convention on Human Rights*.

Organization of American States. (2016). *American Declaration on the Rights of Indigenous Peoples*.

International Labour Organization. (1989). *Indigenous and Tribal Peoples Convention N. 169*.

United Nations. (1948). *Universal Declaration of Human Rights*.

United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples*.

United Nations. (1966). *International Covenant on Civil and Political Rights*.

United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights*.

10.4. Secondary Literature

ACNUR. (n.d.). *Colombia Situation (Colombia, Costa Rica, Ecuador, Panamá y Venezuela) Indígenas*.

[https://www.acnur.org/fileadmin/Documentos/RefugiadosAmericas/Colombia/Situacion Colombia - Pueblos indígenas 2011.pdf](https://www.acnur.org/fileadmin/Documentos/RefugiadosAmericas/Colombia/Situacion%20Colombia%20-%20Pueblos%20indigenas%202011.pdf)

Amnistía Internacional. (2023). *Informe 2022/2023 Amnistía Internacional: La situación de los derechos humanos en el mundo*. Amnesty International Ltd.

Bucetto, M. S. (2018). El derecho de los pueblos indígenas a la consulta previa, libre e informada, y los principios de progresividad y no regresividad. Estudio de la aplicación práctica de los estándares fijados por el Sistema Interamericano de Derechos Humanos en Colombia. *LEX*, 16(21). <https://doi.org/10.21503/lex.v16i21.1540>

Buergenthal, T. (2007). Human Rights. In *Max Planck Encyclopedias of International Law*. Oxford University Press.

Calí Tzay, F. (2024). *Declaración final del Relator Especial de las Naciones Unidas sobre los derechos de los Pueblos Indígenas, Francisco Calí Tzay, al concluir su visita oficial a Colombia*. Office of the United Nations High Commissioner for Human Rights. <https://www.ohchr.org/sites/default/files/documents/issues/indigenouspeoples/sr/statements/20240315-sr-ipeoples-oem-statement-colombia.pdf>

Cartilla pedagógica: Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera. (n.d.). Cancillería de Colombia. <https://www.cancilleria.gov.co/sites/default/files/cartillaabdelacuerdofinal2.pdf>

Conflicto en Colombia: antecedentes históricos y actores. (n.d.). Barcelona Centre for International Affairs. Retrieved June 2, 2024, from https://www.cidob.org/publicaciones/documentacion/dossiers/dossier_proceso_de_paz

[en_colombia/dossier_proceso_de_paz_en_colombia/conflicto_en_colombia_antecedentes_historicos_y_actores](#)

Corte Interamericana de Derechos Humanos. (2024). Jurisprudencia de la Corte IDH y buenas prácticas sobre derechos de los pueblos indígenas y tribales, derecho a un medio ambiente sano y personas defensoras de derechos humanos. In <https://escuelajudicialpj.poderjudicial.go.cr/images/bibliotecavirtual/PueblosIndigenas/BuenasPracticasIndigenasAfro.pdf>.

Corte Suprema de Justicia. (2017). *Justicia y pueblos indígenas: Jurisprudencia, ritos, prácticas y procedimientos*.

Cote, J. S. (2023, May 1). *La contradicción del Gobierno Petro sobre la autonomía del territorio indígena*. ELESPECTADOR.COM. <https://www.elespectador.com/judicial/la-contradiccion-del-gobierno-petro-sobre-la-autonomia-del-territorio-indigena/>

Departamento Administrativo Nacional de Estadística. (2018). *Censo Nacional de Población y Vivienda 2018*. Retrieved from <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivienda-2018>

Donnelly, J. (2013). *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press.

Errico, S. (2017). The American Declaration on The Rights of Indigenous Peoples. *American Society of International Law Insights*, 21(7).

Espitia Cueva, C. E., Cabezas Palacios, J. V., & González Perafán, L. (2023). *Violencia en Colombia. Informe Anual 2023*. Observatorio de Derechos Humanos y Conflictividades de Indepaz. <https://indepaz.org.co/violencia-en-colombia-informe-anual-2023/>

Gómez-Rojas, J. F. (2010). Argument Analysis of the Position of Colombia regarding the UN on the Rights of Indigenous Peoples. *International Law, Revista Colombiana de Derecho Internacional*, 16.

Herrera Arenas, F. (2023). *Conflicto y Violencias Armadas contra los Pueblos Indígenas de Colombia*. Organización Nacional Indígena de Colombia.

IACHR Press Office. (2020, October 30). *IACHR refers case on Colombia to the Inter-American Court*. oas.org. https://www.oas.org/en/iachr/media_center/PReleases/2020/261.asp

- Idrovo, C. S., & Quinn, L. (2024). *Seven Years of Final Accord Implementation: Perspectives to Strengthen Peacebuilding at the Halfway Point*. University of Notre Dame. <https://doi.org/10.7274/25651407.v1>
- Inter-American Commission on Human Rights. (2013). *Truth, justice and reparation: Fourth report on the human rights situation in Colombia*.
- Inter-American Commission on Human Rights. (2019). *Informe No. 146/19, Caso 11.754. Fondo. Pueblo Indígena U'Wa y sus Miembros. Colombia*.
- Inter-American Commission on Human Rights. (2020, October 21). *Submission of Case 11.754 U'wa Indigenous Peoples v. Colombia to the Inter-American Court of Human Rights* [Letter to Secretary of the Inter-American Court of Human Rights].
- Inter-American Court of Human Rights. (2018). *Annual Report of the Inter-American Court of Human Rights*. https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2017.pdf
- Jamioy Juagibioy, H. (2010). Yent"sang quematsmënëng - No somos gente. In H. Jamioy Juagibioy (Ed.), *Danzantes del viento: poesía bilingüe = Bínýbe Oboyejuayëng*. Ministerio de Cultura de Colombia.
- Jimeno, M. (2014). *Juan Gregorio Palechor: the story of my life*. Duke University Press.
- Jost, S. (Ed.). (2019). *KasPapers No. 4: Situación de los pueblos indígenas de Colombia*. Konrad Adenauer Stiftung. https://www.kas.de/c/document_library/get_file?uuid=ec6ec8c5-2fdc-9064-802d-78b9de590265&groupId=252038
- Kingsbury, B. (2006). Indigenous Peoples. In *Max Planck Encyclopedias of International Law*. Oxford University Press.
- La Nación U'wa contra el Estado de Colombia*. (n.d.). EarthRights International. Retrieved June 5, 2024, from <https://earthrights.org/case/nacion-uwa-contra-estado-colombia/>
- Mendoza, D. A. (2023). Colombia. In D. Mamo (Ed.), *El mundo indígena 2023*. Grupo Internacional de Trabajo sobre Asuntos Indígenas (IWGIA).
- Muchlinski, P. T. (2022). *Advanced Introduction to Business and Human Rights*. Edward Elgar Publishing.

- Murcia Caro, E., & Hurtado Estrada, S. (2022). *Afectaciones a los Derechos Humanos en los Pueblos Indígenas de Colombia y situación de los Pueblos Indígenas en frontera Colombia - Venezuela*. Organización Nacional Indígena de Colombia.
- Neuman, G. L., & Duhaime, B. (2024). American Convention on Human Rights (1969). In *Max Planck Encyclopedias of International Law*.
- Niño, C. (2023, May 4). Consideraciones de alegatos por el estado ante la CIDH en el caso U'wa. *La Silla Vacía*. <https://www.lasillavacia.com/red-de-expertos/red-etnica/consideraciones-de-alegatos-por-el-estado-colombiano-ante-la-corte-idh/>
- Observatorio del Programa Presidencial de Derechos Humanos y DIH. (2008). *Los Indígenas Colombianos: la constancia de los Pueblos por mantener sus costumbres*.
- Olsen, V. (2008). *Marco legal para los derechos de los pueblos indígenas en Colombia*. Human Rights Everywhere. https://site.inali.gob.mx/pdf/Colombcartilla_derechos_pueblos.pdf
- Organization of American States. (n.d.). *Current Status of Signatures and Ratifications of the Inter-American Treaties - Colombia*. Wwww.oas.org. Retrieved June 6, 2024, from https://www.oas.org/en/sla/dil/inter_american_treaties_signatories_member_states_C_O.asp
- Osorio Calvo, C. A., & Satizabal Reyes, M. (2019). El movimiento indígena como víctima del conflicto armado en Colombia y su apuesta por una paz desde una visión territorial. *Hallazgos*, 17(33). <https://doi.org/10.15332/2422409x.4369>
- Rodríguez, G. A. (2015). *Los derechos de los pueblos indígenas: Luchas, contenido y relaciones*. Editorial Universidad del Rosario.
- Semper, F. (2006). Los derechos de los pueblos indígenas de Colombia en la jurisprudencia de la Corte Constitucional. *Anuario de Derecho Constitucional Latinoamericano*, pp. 761–778.
- Shelton, D. L., & Duque, F. G. (2024). *Advanced Introduction to Indigenous Human Rights*. Edward Elgar Publishing.
- Smith, R. K. M. (2020). *Texts and Materials on International Human Rights*. Taylor & Francis.
- The Advocates for Human Rights. (2014). Appendix I: Complaint Mechanisms. In *Paving Pathways for Justice & Accountability: Human Rights Tools for Diaspora Communities*.

- Tomuschat, C. (2014). *Human Rights: Between Idealism and Realism*. Oxford University Press.
- Velasco, M. (2017). Movimientos sociales contenciosos en Colombia: 1958-2014. In P. Almeida & A. Cordero Ulate (Eds.), *Movimientos Sociales en América Latina: Perspectivas, Tendencias y Casos*. CLACSO.
- von Bogdandy, A., Ferrer Mac-Gregor, E., Morales Antoniazzi, M., Piovesan, F., & Soley, X. (Eds.). (2017). *Transformative Constitutionalism in Latin America: the Emergence of a new ius commune*. Oxford University Press.
- von Bogdandy, A., Piovesan, F., Ferrer Mac-Gregor, E., & Morales Antoniazzi, M. (Eds.). (2024). *The Impact of the Inter-American Human Rights System: Transformations on the Ground*. Oxford University Press.
- Weissbrodt, D., & de la Vega, C. (2007). *International Human Rights Law: An Introduction*. University of Pennsylvania Press.