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SERIE DE  
**DOCUMENTOS DE TRABAJO**  
DEPARTAMENTO DE DERECHO CONSTITUCIONAL

**There is just one step from  
indifference to coexistence:  
The necessary relationship  
between human rights,  
international law and national law**

Paola Andrea Acosta Alvarado

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## **SERIE DOCUMENTOS DE TRABAJO**

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# Presentación

Los *Documentos de Trabajo* son un espacio para la reflexión y el debate. A diferencia de otros formatos, esta serie ofrece un palco para los trabajos inacabados, para la discusión de las ideas en formación y el perfeccionamiento de los procesos de investigación. Se trata pues, de textos que salen a la luz para ser enriquecidos con la crítica y el debate antes de pasar por el tamiz editorial.

En esta colección se sumarán cinco grandes áreas del conocimiento: el derecho constitucional, el derecho internacional, la sociológica jurídica, la teoría y filosofía del derecho. Además, de poner a prueba nuestras ideas, el cometido principal de esta publicación es aportar a los debates actuales, tanto aquellos que se viven en la academia como los que resultan de la cada vez más compleja realidad nacional e internacional.

Esta publicación está abierta a todos los miembros de nuestra Casa de Estudios, profesores y estudiantes, así como a quienes nos visitan. Esperamos contar con el aporte de todos aquellos interesados en la construcción de academia.

MAGDALENA CORREA HENAO  
*Directora del Departamento  
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# **There is just one step from indifference to coexistence: The necessary relationship between human rights, international law and national law**

**Abstract:** Thanks to the special normative tools of the Interamerican System of Human Rights and the dynamic work of the Interamerican Court of Human Rights, as well as the recent constitutional reforms in the region, there is a new way to build the relationship between the International Human Rights Law and the national legal orders in Latino America. In this essay we will try to prove that, as consequence of these new relationship, the dialogue and harmonization between both legal orders is not just useful but, above all, mandatory.

**Keywords:** Interamerican Court of Human Rights, National legal order, International human rights law.

## INTRODUCTION

It is increasingly evident how the complex symbiosis between international and domestic systems is occurring. Today no one can speak of a sharp separation of these orders or conceive them as separate compartments whose agents are unrelated. Indeed, national law has grown from a mere datum possibly relevant to international law, to become a basic tool for its efficiency at the same time that national legal orders have understood the advantage of using international standards to achieve many of its goals. We must recognize the truth: as two passionate lovers of a bad soap opera, with infinite barriers, despite their differences, they need each other, the happiness (effectiveness) of one, is in the hands of the other.

Perhaps the scenario in which this relationship is more evident this important relationship is in the area of human rights since the harmonization of both orders is necessary to achieve a common goal: the protection of individuals and their rights.

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The Latin-American scenario is one of which has allowed the major advances in this new way of understanding the relationship between international law and domestic law. Thanks to the way it is designed the Interamerican System of Human Rights Protection (IaSHR), as well as the recent constitutional reforms in several countries in this region, the judiciary of either scenario have promoted a rereading of the relationship between the two jurisdictions on the basis of what has been achieved and an harmonization of both legal orders. Most important of what is happening in Latin America is that given the evolution of the dialogue between the two systems, the harmonization exercise is not only convenient but, above all, mandatory which means that the relations between these two systems have moved from indifference to the helpful mutual need and coexistence.

In what follows we will try to prove these ideas. To this end, first, we will show the context, as the standards and tools which both national and international judges use to reformulate the relationship between the two legal systems and, second, we will show some examples that let see the usefulness of this new way of articulating these orders.

#### A. THE ROAD FROM INDIFFERENCE TO THE COEXISTENCE

From our point of view, in our region we can speak about the existence of a new way to conceive the relations between International and National Law thanks to a combination of three particular factors: the context which gives place to the interaction, the rules under which it is based and the judicial tools that are being used.

About the context, we must say that there are two phenomena that have determined the characteristics of both, the interamerican order and the national law, these are: humanization and neo-constitutionalism. The first allowed the creation of the IaSHR, the second allowed the recent constitutional reforms in the region.

These are two concomitant processes from different scenarios -national and international- that pursue a common goal and agree on the tools to achieve it. Indeed, humanization and neo-constitutionalism agree, first, on the relevance of human dignity to the legal system and, therefore, on the need to protect human rights, second, the importance of judges to achieve such protection and, finally, the essential role of the interaction of national and international legal systems to that common goal. This confluence of objectives and tools explain why the rules of either system made possible their harmonization.

With regard to national standards, despite the wide differences between national systems in the region, we can point out three common features that allow interaction between those two orders. First, most orders recognise

constitutional<sup>1</sup> or supra legal<sup>2</sup> level to the International Human Rights Law (IHRL), second, many constitutions include an obligation to read national standards in light of the mandates of IHRL<sup>3</sup>; finally, in many orders there are national norms called “bridge norms”, ie, the rules that determined the ways to fulfil international judgments<sup>4</sup>.

Meanwhile, the interamerican order has several useful standards to the harmonization process. First, the principle of subsidiarity (preamble American Convention of Human Rights –ACHR–<sup>5</sup>), second, the general obligations to respect, guarantee (art. 1.1 ACHR<sup>6</sup>), adapt (art. 2 ACHR<sup>7</sup>) and made an appropriate interpretation (Art. 29 ACHR<sup>8</sup>), third, the right of access to justice as contained in Articles 8 and 25 of the Convention<sup>9</sup>, finally, the rule about

1. Article 94 Constitution of Argentina, Article 93 Constitution of Colombia, among others

2. Article 7 Constitution of Costa Rica is just one of the examples

3. Article 1 Constitution of México & Article 4 Final Transitory Constitution of Peru, among others.

4. For example in Colombia the Act No. 288 of 1994

5. “**Recognizing** that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states”

6. “1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, “person” means every human being.

7. “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”.

8. “No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have”.

9. “Article 8: 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense; d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to com-

integral reparation (Article 63 ACHR<sup>10</sup>), the one about mandatory sentencing (art. 68<sup>11</sup>) as the one about the rules to develop the supervision process (art. 68 ACHR and Art. 69, IACrHR Rules).

In addition, national and interamerican judges themselves have developed tools that incentive jurisprudential dialogue and harmonization. National court uses the rule of “harmonious interpretation” under which they must always interpret the national standards in light of international protection mandates seeking thereby the interpretation most favourable to individual’s rights. For its part, the IACrHR has created the “Conventionality Control” under which both, the regional and national, judges should consider the compatibility of national rules with the interamerican commitments. If they find an inconsistency, they are required to exclude the norm from the national law or, at least, avoid its use<sup>12</sup>.

Once we know the three factors that allow the interaction between both legal orders, we will try, in what follows, to provide the main reasons why the

municate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g. the right not to be compelled to be a witness against himself or to plead guilty; and h. the right to appeal the judgment to a higher court. 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. 4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause. 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 25: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted”.

10. “1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission”.

11. “1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state”.

12. About the conventionality control, among others, see Case of Cabrera-García and Montiel-Flores v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. IACrHR (2010) Series C, No. 220.

national and national norms form a whole that allows the dialogue between the judges of protection and, therefore, the articulation between international and national law.

Let's take as a starting point the hierarchy and harmonization rules at the national level. According with that rules, judges are compelled to make use of international law as grounds for their decisions, or at least as a hermeneutic tool. In addition to this constitutional framework, we have the articles 1.1, 2 and 29 of the ACHR. These rules come to strengthen national provisions of interpretation and hierarchy where they exist or to fill the gap left by its absence in those jurisdictions which does not have them since, in pursuance thereof, States and all their agents must ensure the compatibility of the law, their interpretation and application, with the interamerican commitments.

Indeed, national courts use IHRL as supra- legal or constitutional norms if their legal order allows them, but if not, the judiciary can claim that such use is justified in fulfilling an international commitment of protection, adaptation and / or interpretation *pro personae*. So, either by constitutional command or under an international obligation, the local judge is compelled to project his work in the light of regional standards; it is not just a matter of courtesy but of strict compliance with a legal duty.

Similarly, given the importance of national law for the effectiveness of interamerican order, and taking in consideration the principle of subsidiarity and the article 29 of the Convention, the regional court has been concerned with the recognition of the relevance of national standards to fulfil their tasks<sup>13</sup>.

Precisely in this context of recognition and use it is even easier to understand the relationship between the different standards that we have listed. For example, as noted by Carozza<sup>14</sup>, the subsidiarity principle has two aspects, one negative and one positive. Once the States decide to adapt their national law to the international commitments, the negative side of the subsidiarity principle is guaranteed because the national judges will safeguard human rights in light of the regional law, ensuring in every case the best possible protection, so the activation of the regional protection mechanism will be exceptional as expected by the ACHR.

Under the positive side, the principle enjoins to the national law and its agents to provide an effective protection mechanism, an issue that is closely related to the implementation of Articles 8 and 25 of the Convention, rules which in turn, are aligned with national provisions on judicial structures and powers. All of them are trying to build a more effective scenario to guarantee

13. For example: Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. IACrHR, (2006) Series C, No. 140

14. CAROZZA, P. Subsidiarity as a structural principle of International human Rights Law. 93, *American Journal of International Law*, AJIL (2003) 38 -79.

the right of access to justice and, specifically, to supply suitable resources for the protection of human rights.

For that reason, many times the effectiveness of the work of the national court depends on its relationship with the interamerican parameters and, in turn, the regional court's decision regarding the effectiveness of a remedy must necessarily take into account the provisions of domestic law and the behaviour of national officials.

In this context, both national and regional judges interact not only to determine what is meant by effective remedy, but, above all, in order to be constructed themselves as agents of these resources.

Finally, we note that the existence of "bridge rules", and overall national rules related to compliance with international court decisions, are the counterparts of the provisions of Articles 63 and 68 of the Convention. Both are articulated to ensure the effectiveness of interamerican protection so, at the end, the scope of international protection is closely related to the provisions of national law.

Consequently, the context for dialogue is served. It is the result of a working circle built by hierarchy and harmonization standards, as well by the obligations to respect, guarantee and adaptation, and thanks to which it has been a serious transformation in the way that national and interamerican order are related. As shown, either under constitutional standards or as a result of international mandates or because the sum of them, the dialogue is not only practical, but above all, mandatory.

In this context arise the judicial mechanisms that contribute to this interaction: the control of conventionality and the "consistent interpretation", both as different steps of the same process of harmonization. Thus, judicial officers are compelled, always, to seek the most favourable interpretation of human rights (either under a constitutional clause or Article 29 of the Convention). Failure to achieve the most favourable interpretation of the norm and, the judges must, or avoid its use, or exclude it from the national legal order. It is, in any case, a harmonization exercise, with different effects, which seeks the effective protection of human rights.

## B. THE SCOPE OF THE HARMONIZATION

The scope of this framework and these tools can be seen in a jurisprudence of one of the issues that has marked the recent history of human rights in Latin America: the transition to democracy in several countries that were involved in dictatorships or breaks of the constitutional order.

In 2001, the Interamerican Court of Human Rights (IACrHR), in the *Barrios Altos Case c. Peru*, said that the amnesty norms issued during the Fujimori government was incompatible with the obligations of the Interame-

rican order whenever it contradicted the provisions of Articles 2, 8 and 25 of the ACHR<sup>15</sup> and, therefore, should no longer be applied by the state officers.

Peruvian judges, using the constitutional mandates that licensed them to use international law and as well trying to fulfil the international obligations, but especially the orders issued by the Interamerican judge, declared unconstitutional the amnesty norms and reopened hundreds of processes against those responsible for serious human rights violations, including the case against the ex-President Alberto Fujimori who was sentenced to 25 years in prison<sup>16</sup>.

Drawing on this same rule, the Argentinian Supreme Court, in the *Simon Case*<sup>17</sup>, said that the laws of “*punto final y obediencia debida*” issued during the period of transition from the dictatorship lived in the country between 1976 and 1983, were unconstitutional. Although there was no Interamerican condemnation against Argentina on this particular topic, in its judgment the Supreme Court specifically cited the Interamerican case law and said that such harmonization was necessary not only because of the international commitments but also because Article 94 of the constitution granted the constitutional level to the international standards.

Thanks to this case law and as part of the ripple effect generated by the decision of the Supreme Court, last June it was possible the historic ruling that sentenced the former dictator Jorge Videla to 50 years in prison for the systematic theft of babies from pregnant women between 1976 and 1983. In addition to Videla, were also convicted other members of the Naval School of Mechanics (ESMA), who were responsible for most of the horrors during that period.

In 2006, the Criminal Chamber of the Supreme Court of Chile<sup>18</sup>, using international standards and Interamerican case law, declared the inapplicability of the amnesty law. Thanks to the decisions of the Supreme Court was achieved, among others, the condemnation of the staff of the Directorate of National Intelligence (DINA), principal responsible for serious violations during the dictatorship of Augusto Pinochet.

In addition to these cases where the interamerican rules and case law are cited to adapt national standards and shaping the judicial conduct as a remedial effect (after the violation to the rights to access to justice occurred), there are cases where that regulatory framework is used preventively to avoid that domestic operators violate human rights. Such is the case, for example, of

15. Case of Barrios Altos v. Peru. Merits. IACrHR (2001)Series C, No. 75, Paras 41-44.

16. Supreme Court of Justice, judgement of 7th April, 2009. Causa No. 19-2001-AV.

17. Supreme Court of Justice of the Nation, judgement of 14th June 2005. Causa No. 17.768, paras. 23, 27, 29.

18. Supreme Court of Justice, judgement of 13th December 2006. Causa N° 559-04. Supreme Court of Justice, judgement of 18th December 2006. Causa N° 2666-04. Supreme Court of Justice, judgement, of 13th December 2006, Causa N° 559-04.

Colombian Constitutional Court work's which making use of Interamerican standards adapted the legal framework of the transition process in Colombia before it came into force<sup>19</sup>.

#### CONCLUSIONS

The way we have recast the relationship between international human rights law and domestic law in Latin America shows that the harmonization and coordination of legal orders is essential when what really matters is the effective promotion and protection of human rights even beyond the defence of state sovereignty and the primacy of the States interests'.

The examples we brought let see that, without doubt, national legal orders are increasingly open to international law, as well that international law can have a significant influence in shaping internal laws, the resolution of constitutional conflicts and, in general, the behaviour of all state authorities. At the same time, those examples show that national norms and, above all, the proper behaviour of national authorities, are essential to the effectiveness of international law.

This interaction between the two systems has many rules and exceptions and, in some cases is conflicting. However, given the scope of this text we cannot take care of these matters now, for the moment, it is enough to say that the relationship between International Human Rights Law and National legislation has gone from a sad indifference to a useful and necessary coexistence.

19. Constitutional Court, judgement C-370 de 2006.

