CENTRAL EUROPEAN UNIVERSITY

BETWEEN PROGRESSIVENESS AND SILENCE: STRUCTURAL RACISM AGAINST AFRO-DESCENDANT POPULATIONS IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS JURISPRUDENCE (ARGENTINA, BRAZIL, AND COLOMBIA)

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EXECUTIVE SUMMARY (OR ABSTRACT)

Although one in four Latin Americans identifies as people of African descent –120 million of Latin America's 500 million population – afro-descendant people are among the region's poorest, most marginalized groups. Discrimination, economic exclusion, and underrepresentation in government, civil society, and the media are critical factors in the overrepresentation of Afro-descendants among low-income people and their underrepresentation and exclusion in decision-making positions in the private and public sectors. Concurrently, the Inter-American Court of Human Rights has used its case law to combat inequality and social exclusion and advance substantive equality. This study will look into the Inter-American Court's rulings that dealt with structural racism or discrimination against populations of African Descent to understand the Court's perspective on the issue, as well as changes in how the American Convention on Human Rights' Articles 1.1 and 24 have been interpreted in recent years, and the general idea of equality and non-discrimination. The methodology will focus on the jurisprudence of the Court case-law related to Brazil, Colombia, and Argentina, as the first two have large African-descendant populations in their demographic composition, and the last has publicly recognized the impact of systemic racism in its functioning. The research offers human rights activities a tool to assess what is lacking and what can be improved in cases related to systemic racism against the African descendant population in Latin America, particularly concerning the legal classification (e.g., what are the violated rights?). Finally, the work considers that democracies around Latin America would benefit from applying the interpretation model of rights adopted by the Court in cases related to forced disappearances to cases concerning systemic racism against African descent in the region. This reconfiguration is indispensable for this group's due human rights protection and more significant social and economic opportunities.

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TABLE OF CONTENTS

INTRODUCTION

In terms of the general population, it is fair to conclude that a great deal of Latin America's citizens is non-white. What is surprisingly shocking for many people is that Latin America is also very black. Or at least that African-descendant populations are very prominent in the region.

Despite having the numerical upper hand, African-descendant populations are overlooked by many of the States in the region and ultimately by the Inter-American Court of Human rights (hereinafter "The Court," "Court," or "Tribunal"). The former is considered a beacon for progressiveness and protection of human rights. However, jurisprudence is scarce on matters related to African-descendant populations. Concerning the latter, silence is the rule for the Court.

The absence is more acutely seen in the Court's decisions relating to States that have been at the forefront of the discussions regarding racial oppression in the region, such as Argentina, Brazil, and Colombia. In all these jurisdictions, the human rights discourse has been pivotal for African-descendant social movements[1]. Moreover, those countries have been active in the institutional human rights framework of the region, actively engaging with the Inter-American System of Human Rights (IASHR) for matters concerning racial equality[2]. Finally, they were parties to cases decided by the Court in which the petitioners, the Inter-American Commission on Human Rights (herein after "IAHCR", or "Commission"), or the State flagged to the Court that the issue at hand was intertwined with structural racism.

[1] Caribe, *Pueblos indígenas y afrodescendientes de América Latina y el Caribe*, 63.
[2] Hooker, "Afro-Descendant Struggles for Collective Rights in Latin America," 287.

This study will investigate the decisions issued by the Court that discussed structural racism or discrimination against African-Descendant populations to understand the Court's approach towards the phenomenon and the developments in the interpretation of Articles 1.1 and 24 of the American Convention of Human Rights (hereinafter "The Convention") and the principle of nondiscrimination and equality.

By focusing on the jurisprudence of the Court, the research will only have a fraction of the Inter-American System of Human Rights understanding concerning structural racism, as it will lose sight of the Commission's role in that regard. The IACHR has been pivotal in developing the matter in the region through the analysis of cases, elaboration of reports, and organization of hearings, for example[3]. The Court's role, on the other hand, is still unclear. There is still little research on the decisions issued by the Court concerning structural racism related to African-Descendant populations. This study intends to uncover this exact issue.

In the first chapter, I study the unique process of racial stratification in Latin America and its relation with legislation. In the region, two elements were co-constitutive in this sense: i) the mestizaje ideology, which worsened racial imbalances by denying the existence of racism and promoting mixed-race individuals as the symbol of the nations; ii) the naturalization and institutionalization of racial exclusion through law. Likewise, I briefly demonstrate how Afro Descendant communities used the human rights language to contest and resist structural racism. Finally, I provide a general overview of how structural racism manifested in Argentina, Brazil, and Colombia to highlight the biggest challenges in the quest for racial equality in each country.

In the second chapter, I investigate all of the cases that Argentina, Brazil, and Colombia were part of in which Afro-descendant populations or individuals were mentioned. The research was

[3] See the Commission's report on Economic, social, cultural, and environmental rights of Afro-descendants, in which the IACHR drafts standards for the prevention, combating and eradication of structural racism: "Derechos económicos, sociales, culturales y ambientales de las personas afrodescendientes."

restricted to cases judged by the Court that explicitly cited Afro-descendant individuals. The analysis considers the written manifestations of the petitioners, the Commission, and the State, to assess the depth in which structural racism was handled during the litigation but ultimately focuses on the Court's decision and interpretation.

In the third chapter, I evaluate how (and if) the Court addresses structural racism in the cases, expose the shortcomings in those approaches, and propose a possible bridge to the found gaps based on the model constructed by the Court to address forced disappearances.

In this research, I will adopt the term structural racism. I use Bonilla-Silva (1997)'s general concept of racialized social systems to define "*societies in which economic, political, social, and ideological levels are partially structured by placement of actors in racial categories or races*"[4]. This new concept accounts for a structural foundation of racism from which hierarchical patterns are built. Those patterns are not unique – other structuration such as class and gender also generate inequalities - but acquire autonomy and singular effects[5]. Simply put, the racial social system creates hierarchical racial categories that produce social relations and the racial structure of a society. This system – or rather, those relations – grants economic, social, and even psychological advantages (and disadvantages) based on race[6].

Based on those premises, I argue that while race is the invented category that organizes social relations and informs social relations of subordination, racism is the crystallization of this ideology in the social system, with the subsequent normalization of actions along racial lines[7]. Structural racism accounts for this system: it is a social order in which all actors are hierarchically racialized and, therefore, all practices, cultures, mechanisms, and institutions act

[4] Bonilla-Silva, "Rethinking Racism," 469.
[5] Bonilla-Silva, 473.
[6] Bonilla-Silva, 474; Almeida and Ribeiro, *Racismo estrutural*, 32.
[7] Bonilla-Silva, "Rethinking Racism," 474.

along racial lines. Consequently, race becomes an informing point of all actions, be it conscious or unconsciously, and thus the racial phenomena become the natural outcome of the structure of the society. The subordinate group is placed in a disadvantageous social order because this is the place they are naturally directed toward in the racialized process[8].

Perhaps the most valuable lesson of this approach is its new interpretation regarding the relation of prejudice, discrimination, and structural racism. According to the concept, both prejudice and discrimination are only a fracture of structural racism[9]. The notion of discrimination has always been behavioral. As usually conceptualized, it refers to practice –behaving discriminatorily towards a group of people[10]. The new concept of structural racism, as odd as that may seem, marginalize the concept of discrimination[11]. Instead of following the historical trend of putting the concept in the centrality of the debate, the structural approach rather highlights the normative actions that reproduce and maintain the racial organization of life. Instead of researching the racist action, the approach attends to the racist culture[12]. In that way, structural racism pays as much attention to the practice of racial profiling by the police and governmental authorities or the maintenance of all-white neighborhoods, even in the absence of official segregation norms, as it does to the use of slurs to forcefully impede racial minorities from entering a restaurant. The difference is only that the former pertains to the racist culture while the latter refers to overt discrimination.

Similarly, the structural understanding shows how tactics to reverse discrimination are insufficient to tackle structural racism. In this sense, Eduardo Bonilla-Silva (2021) understands that normative, everyday behaviors have a larger impact on racial affairs than overt

[8] Bonilla-Silva, 473.
[9] Almeida and Ribeiro, *Racismo estrutural*, 34.
[10] Quillian, "New Approaches to Understanding Racial Prejudice and Discrimination," 301.
[11] Bonilla-Silva, "What Makes Systemic Racism Systemic?," 515.
[12] Bonilla-Silva, 515.

discrimination[13]. The statement is only understandable as we retake his definition of racial structures. They are flexible, everlasting, and determined by social struggles (processes of racial stratification and contestation). This dynamic, throughout time, allowed overt discriminatory acts to acquire a stigma (as something irrational and unlawful), which in turn prompted a methodological response from institutions[14]. It is hard to find any State that condones discrimination in the explicit model adopted during the South African Apartheid or the United States' Jim Crow laws.

Conversely, having them recognize the different practices, rules, devices, and discourses that maintain racial domination is not easy. This silence is a tool that keeps the racial stratification machine going[15]. In this sense, structural racism is the clear detachment of racism from the limitations of ideologies, behaviors, or even consciousness. Once again, it is not that they don't matter –they are only small pieces of a big machinery.

Bottom line, adopting the structural approach means recognizing that a system is required to dismantle another[16]. This process begins with naming the problem accurately, uncovering how it operates, and mobilizing actors to confront the pervasive consequences of racial stratification[17]. I depart from Jones (2002)'s lessons on measuring institutionalized racism to identify three essential features concerning addressing structural racism: identification, monitoring, and rebuilding[18]. Identification means the documentation of the factors leading to racial stratification. This would be as much a historical evaluation as a contemporary mapping of factors that lead to racial divisions[19].

[13] Bonilla-Silva, 516.
[14] Bonilla-Silva, 516.
[15] Jones, "Confronting Institutionalized Racism," 10.
[16] McCluney et al., "From 'Calling in Black' to 'Calling for Antiracism Resources,'" 52.
[17] Jones, "Confronting Institutionalized Racism," 7.
[18] Jones, 16.
[19] Jones, 18.

On the other hand, monitoring refers to the examination of policies, laws, structures, institutions, or mechanisms that maintain racism. This phase would entail the analysis of policies that are in place and those that are absent[20]. Finally, rebuilding means developing national campaigns aimed at dismantling racism. In this instance, the focus shall be the structures and processes that maintain institutionalized racism[21].

On the other hand, the scope of the research is also its greatest limitation. Based on international law, the Inter-American System approach to racial justice carries colonialism ideals[22]. As Tzouvala (2020) mentioned, "*the relationship between international law and racism reveals itself to be co-constitutive as much as it is antagonistic.*"[23]. Because of that, as indigenous internationalists have developed it, the ideal would be to work with, against, and beyond international law[24]. Translating this to racial discussions: recognizing human rights is an insufficient fragment of emancipation. However, I understand that the path to transformation is filled with different fragments – individually, they are insufficient; collectively, they make a difference. This is one of the fragments the scholarship needs to unveil, and for which I was willing to contribute.

[20] Jones, 18.
[21] Jones, 19.
[22] Mutua, "Critical Race Theory and International Law," 843.
[23] Tzouvala, "Settler Colonialism, Race, and the Law," 9.
[24] Tzouvala, 15.

STRUCTURAL RACISM IN LATIN AMERICA

Latin America is a region of contrasts. It is marked by a rich racial and ethnic[25] diverse composition. However, diversity is not – it has been not – translated to equality. Afro-descendants, for example, compose at least 120 million of the region's 500 million population but are mostly concentrated at the bottom of the class structure[26]. Racial discrimination and structural racism are ultimately mixed with the region's features.

A great deal of scholarship recognizes that, albeit undeniably present in Latin America, structural racism is not homogeneously manifested in the region[27]. While some countries are marked by strong negative stereotypes associated with indigenous and Afro-descendant populations, others institutionalized racist practices through authoritarian political power or carried out racial massacres and widespread incorporation of racist ideologies in the political institutions[28].

To understand the way that racial stratification was uniquely built in the region, three aspects must be understood: i) how law and race were influenced by and influenced global, regional, and transregional patterns; ii) the mestizaje ideology and iii) the process of contestation and resistance of social movements in the region.

[25] On the choice between racial or ethnic identity, I adhere to the differentiation that the scholarship draws between them. As a rule, Latin American scholarship refers to racial identity to examine Afro-descendant communities and ethnic identity to examine indigenous peoples' rights. See, in this sense: Hernandez, "Afrodescendants, Law, and Race in Latin America," 3.
[26] Freire et al., "Afro-descendants in Latin America," 16; Caribe, *Situación de las personas afrodescendientes en América Latina y desafíos de políticas para la garantía de sus derechos*, 9; "Derechos económicos, sociales, culturales y ambientales de las personas afrodescendientes," 32.
[27] Pombo, "Estudios sobre el racismo en América Latina," 294.
[28] Pombo, 294.

The relationship between Law and Race in Latin America: a global, regional, and transregional movement enforcing racial exclusion

In Latin America, Law has been historically used to naturalize and legitimize racial discrimination[29]. However, as the use of law differed from those of the United States or South Africa, where *de jure* segregation systems were installed, Latin America was framed as the realm of constitutional and legal idealism[30].

The comparisons are not completely out of place. As developed in the United States and South Africa, in Latin America, the ideological construction of race aimed at rationalizing the transatlantic slavery and subjugation of Native Americans within the colonization[31]. As an ideology, it crossed borders and represented, in Quijano's (2000)'s words, "*a global model of control of work*." In this sense, the regime of racial stratification embedded a transregional regime based on colonialism, white supremacy, enslavement, and economic exploitation. Legislation – and the structure behind it – justified and legitimized colonization and race-based inequalities along the same patterns, regardless of the geographic limitations[32].

This global perspective allowed the interchangeability of customs and practices across different nations. In this sense, legal frameworks in different contexts were often similar and mutually dependent. In Latin America, national legal frameworks concerning race followed and influenced regional tendencies, including the ways established in Haiti, the United States, Spain, and the United Kingdom.

As Góngorra-Mera (2012) explained:

> (…) National patterns of social exclusion are influenced by domestic legal frameworks, but such frameworks are usually consistent with other interrelated legal

[29] Góngora-Mera, "Transnational Articulations of Law and Race in Latin America: A Legal Genealogy of Inequality," 9.
[30] Góngora-Mera, 11.
[31] Góngora-Mera, 12.
[32] Góngora-Mera, 12.

> frameworks at different levels beyond the state (regional, transregional, global); such regimes are mutually dependent and may directly influence state behavior and exert a transnational disciplinary power oriented for normalizing differences[33].

Nonetheless, similarities and influences are not always translated into copies. In other words: legislation in Latin American states was influenced by regional, transregional, and global trends but constituted a singular form. For example, different from the United States, legislation in the region ended slavery and provided some protection towards ethno-racial groups. This does not mean, however, that the continent was a beacon of progressiveness. In fact, regarding racial hierarchies, the legal arrangements acted through hindrance or normalization. Thus, legislation hid the real situation of ethno-racial groups through the enactment of ineffective legislation, the unequal application of the law, or normalized racial hierarchies and transregional race-based inequalities[34].

Before the independence movements, protective measures enacted to prevent the massacre of Native groups of African descendants' populations were purposefully not enforced[35]. The colonial powers adopted leniency as a tool. From protective measures enacted by the Spanish Crown to prevent the destruction of the Native groups to the ones enacted by France concerning enslaved Africans, the pattern remained the same: the colonial powers established a culture of noncompliance, nonenforcement, and selectively. The law was applied along social and racial status[36]. Consequently, the most vulnerable groups remained unprotected.

Another feature of the relationship between law and race was the practice of purchasing higher racial status through the negotiation of racial identity[37]. In this context, the law allowed individuals to gain 'whiteness' status and, therefore, social privileges. Legislation, then, naturalized race-based inequalities, as it institutionalized racial hierarchies (the status of white

[33] Góngora-Mera, 16.
[34] Góngora-Mera, 16.
[35] Góngora-Mera, 18.
[36] Góngora-Mera, 19.
[37] Góngora-Mera, 19.

or nonwhite defined one's access to goods and services) and created possibilities of mobility within the established hierarchy based on race[38].

The independence movements slightly shifted the dynamics. The rising nation-States needed to create a national identity[39]. However, because the independence movements were dominated by the white creole elite and driven by the maintenance of the social status quo and racist regime, much of the efforts followed European models of legal structure. Those models replicated a national project based on western, catholic, and white Europeans and therefore excluded Natives and afro descendants[40].

Moreover, the legislation and structures behind it, based on European ideas of homogeneity and nationalism as they were, proved incompatible with the divisions established by colonialism in Latin America and crippled the application of the principle of equality under the conditions of post-colonial societies[41].

Quijano (2000) is the one that explains this process the best:

> Homogenization was achieved not by means of the fundamental democratization of social and political relations, but by the exclusion of a significant part of the population, one that since the sixteenth century had been racially classified and marginalized from citizenship and democracy. Given these original conditions, democracy and the nation-state could not be stable and firmly constituted. The political history of these countries, especially from the end of the 1960s until today, cannot be explained at the margin of these determinations[42].

In addition, the region was generally influenced by patterns created in the United States and Haiti concerning nationality and citizenship: on the one hand, the United States practice of silence (the Constitution did not prohibit racial discrimination, slavery or declare all individuals

[38] Góngora-Mera, 19.
[39] Góngora-Mera, 20.
[40] Góngora-Mera, 20.
[41] Góngora-Mera, 20.
[42] Quijano and Ennis, "Coloniality of Power, Eurocentrism, and Latin America," 564.

as citizens); on the other Haitian Constitution declared all citizens black[43]. The aftermath of the duality was, in Góngorra-Mera's (2012) words, that Latin American countries, when regulating race and citizenship, changed everything so that everything stayed the same[44].

The countries indeed stepped away from the two opposite radical patterns adopted in the United States and Haiti. Generally, the Latin American states adopted the principle of equality before the law, refrained from restrictions of citizenship based on race, and prohibited slavery[45]. They did not adopt silence or radicalization. The chosen path was a certain neutrality – States included provisions establishing equality in a region marked by selectivity and noncompliance without mention of legal intervention to correct the already existent racial stratifications[46]. In this sense, they adopted omission in a region that demanded firm actions. According to Góngorra-Mera (2012), "*in the absence of special measures in favor of disadvantaged groups, this legal veil covered the persistence of structural discrimination*"[47]. By doing so, these stratifications were maintained.

Even within the law, the duality between discourse and practice is another distinctive feature in Latin America. While most of the countries included the formal equality principle, prohibited slavery, and formally recognized citizenship for all people, therefore proclaiming inclusiveness, many adopted legislation for the promotion of immigration of desirable races and the discouragement of immigration from certain nations[48]. In this sense, for many decades, Latin American States restricted African and/or Asian immigration and welcomed European migrants[49]. Following the success of those policies, the States reoriented their strategy towards

[43] Góngora-Mera, "Transnational Articulations of Law and Race in Latin America: A Legal Genealogy of Inequality," 21.
[44] Góngora-Mera, 22.
[45] Góngora-Mera, 23.
[46] Góngora-Mera, 24.
[47] Góngora-Mera, 24.
[48] Góngora-Mera, 25.
[49] Góngora-Mera, 25.

a rhetoric of mestizaje ideology. Although the meaning and extent of this ideology will be explored in the next chapter, it is important to highlight that it served as a process of racial and cultural assimilation that contributed to the marginalization of ethno-racial groups and, thus, their marginalization.

It is clear, therefore, that in Latin America, law historically naturalized and institutionalized racial exclusion. Albeit having refrained from articulating segregation legislation as conceived in the United States, law in Latin America played a key role in the racialization of the society and the enforcement of coloniality. After the independence movements, the discourse of racial harmony camouflaged a regime intended to be used as the official means of carrying out a process of racial and cultural assimilation. Ethnoracial groupings were made invisible in national statistics and, as a result, in public policies, strengthening the colonial legacy of structural discrimination[50].

The turning point of racial relations in Latin America: The mestizaje ideology and its implications

Many authors have denied their existence as racial hierarchies in Latin America are blatantly different from their shapes in the United States and Europe[51]. Following the European colonization and widespread enforcement of slave Africans, many countries in the region adopted national projects of *mestizaje* (cultural mixing). These projects sold the idea of erasing racial distinctions by promoting mixed-race individuals as the nation's symbol[52]. The project was effectively implemented: scholars noted high intermarriage and residential proximity rates and the use of elements derived from African and indigenous culture within the national

[50] Góngora-Mera, 28.
[51] Pombo, "Estudios sobre el racismo en América Latina," 290.
[52] Telles and Bailey, "Understanding Latin American Beliefs about Racial Inequality," 1560.

folklore[53]. Based on the misguidance that the numbers provided, some authors claimed that the idea of mestizaje indicated evidence of higher racial tolerance in Latin America compared with the United States.

However, a great share of scholarship warned that the mestizaje ideology was not far off from colonialism and racism: it meant to promote whitening, wiping out black and indigenous identities, denying the pre-existent racial tensions, and weakening antiracist mobilization[54]. If a society doesn't recognize a stiff between social groups – if it denies the conflict -, then it denies the structures that maintain those tensions and refrains from the call for significant changes. In this sense, mestizaje is yet another layer of structural racism aimed at maintaining the racial and ethnic status quo.

Nevertheless, the mestizaje ideology is arguably the strongest turning point in Latin America's racial hierarchies. It was not a deviation from racism or the race theory at that time, by which blacks, indigenous, and mullatos were regarded as inferior. However, as it promised to promote national unification, it was easily sold out as a mode of governance[55]. This model took the form of a unitary package of citizenship rights that could only be enjoyed by the conformation to the homogenous mestizo cultural idea[56]. However, there was always a discrepancy between official discourse and practice in Latin America regarding racism. Often, when directly asked, people would reject racial discrimination, while data would show general social and economic inequalities across racial groups[57]. This disparity refers back to the divergence in which the mestizaje ideology was born: where, on the one hand, state nationalism would vouch for the existence of a unitary, homogenous community; on the other, social and cultural practices

[53] Telles and Bailey, 1560.
[54] Telles and Bailey, 1561; Pombo, "Estudios sobre el racismo en América Latina," 294.
[55] Telles and Bailey, "Understanding Latin American Beliefs about Racial Inequality," 1563.
[56] Telles and Bailey, 1563.
[57] Pombo, "Estudios sobre el racismo en América Latina," 294.

would expose wide racist symbolisms and costumes[58]. In this sense, the mestizaje ideology was ultimately the wolf in sheep's clothing: it promised progressiveness but, in reality, was a racial project based on the forced assimilation of indigenous and afro descendants' populations.

The outcome of the ideology varied significantly. In Argentina, the project was rejected in the name of another based on the pursuit of whiteness through European migration[59]. On the other hand, in Brazil, the project was incorporated into ideologies of national identity through cultural and educational campaigns[60]. In Colombia, the ideology unfolded in a discourse of a homogenous (white) nation that, at the same time, maintained the image of a heterogenous nation marked by distinctions of class, race, and region[61]. As a result, the ideas of mestizaje covered, at least formally, the racial tensions and marginalization of nonwhite populations.

Ultimately, the mestizaje ideology retarded racial mobilization in the region insofar as it masked the structural causes of racial stratification and therefore promoted color blindness and denied the existence of racism[62]. Practically, the ideology prompted an avoidance of linking economic and social marginalization to race while maintaining unscathed the same structures that maintained that marginalization[63]. Therefore, the region generally denies the systematic disadvantaged based on race and only slowly and sparsely furthers multiculturalism.

The effects of the mestizaje ideology in the present are a general indifference to racial dynamics and denial of racial struggles, which translates to the absence of institutional addressing of race-related disadvantages[64]. Moreover, the ideology singularly impacted afro descendants. Under the realm of new multiculturalist citizenship regimes, indigenous populations have been

[58] Pombo, 294.
[59] Graham et al., *The Idea of Race in Latin America, 1870-1940,* 39.
[60] Telles and Bailey, "Understanding Latin American Beliefs about Racial Inequality," 1563.
[61] Wade, "Repensando el mestizaje," 280.
[62] Telles and Bailey, "Understanding Latin American Beliefs about Racial Inequality," 1566.
[63] Telles and Bailey, 1566.
[64] Safa, "Challenging Mestizaje," 309.

recognized more than Afro-descendants, as the former is more likely to be perceived as having cultural distinctiveness[65]. Consequently, inclusionary efforts by Afro-descendants have been restrained systematically. Another variance pertains to the identification process. Who is part of the dominant group, or rather, who is nonwhite, differs across states. In some of them, mestizos are considered part of the dominant population[66].

The existence of those consequences does not mean that the discussions lack nuances. For example, research conducted by Telles and Bailey (2013) in eight Latin American countries showed overall high percentages of preference for structural explanations[67] concerning minority disadvantage, as well as an equivalence between minorities and dominant group responses on the explanation for socioeconomic discrepancies across races. The data unveiled that in many countries, the recognition of discrimination toward racial minorities is the norm, even across minorities and dominant groups. Paradoxically and very telling, the authors found contradictions to this norm in Brazil, where minorities were more likely to claim structuralist explanations than dominants. Telles and Bailey (2013) argued that targeted policies adopted by the countries for afro descendants heightened racial groups conflicting interests. They also found an anomaly in Mexico, where dominants recognized discrimination more than the minority population.

The research conducted by Telles and Bailey (2013) demonstrated that abrupt variances across countries in racial stratification and understanding of the relation between socioeconomic disadvantage and race mark the region. Therefore, it is virtually impossible to draw only one antiracist guideline applicable to Latin America as a whole. This conclusion is relevant both

[65] Paschel and Sawyer, "Contesting Politics as Usual," 198.
[66] Telles and Bailey, "Understanding Latin American Beliefs about Racial Inequality," 1569.
[67] In the research, the authors regarded as 'structural explanations' all the answers that attributed unfair treatment and low education as the reasons for minority poverty. Conversely, individualist attributions deemed insufficient work effort, less intelligence or cultural complacency as the main reason for the socioeconomic gap across races. See: Telles and Bailey, 1571.

for the justification of this research and the conclusion herein. I will develop this relationship in the third chapter. For now, it suffices to say that different countries demand different analyses regarding the strategies and changes necessary to tackle structural racism.

The process of contestation and resistance of social movements in the region: an overview of the main struggles and response of Afro-descendant movement to structural racism

The attempt at subjugating African descendants has always been matched with resistance, even in the context of the colonies[68]. Similarly, as colonialism established the global model of exploitation that created a transregional regime of racial stratification, Afro-Latin American movements have nurtured transnational networks of resistance to counter racism and social exclusion[69].

The counter-movements had to face many challenges. First, the legacy of the ideology of mestizaje and the praise for race mixture created multiple political categories – way more than black or white. Consequently, the process of identity, or collective identity, was jeopardized and therefore hampered the development of social movements[70]. As Tianna Paschel and Mark Sawyer (2008) worded it, "*black activists who choose to emphasize their racial identity above their national identity are often charged with being racists themselves or with having imported ideas from foreign lands*"[71].

Second, African-descendant populations faced challenges concerning their status vis-à-vis the states. On the one hand, they were incorporated as second-class citizens, thus naturalized within

[68] Caribe, *Situación de las personas afrodescendientes en América Latina y desafíos de políticas para la garantía de sus derechos*, 15.
[69] Paschel and Sawyer, "Contesting Politics as Usual," 198.
[70] Paschel and Sawyer, 198.
[71] Paschel and Sawyer, 199.

paths of social and economic exclusion[72]. Without basic services, education, or work, they faced severe limitations in creating or nurturing movements to challenge governments and civil society[73]. On the other hand, they did not receive much support from international organizations nor had a transregional declaration recognizing their rights. This lack of support derived from the uncertainty of their juridical status: while indigenous populations in Latin America claimed their rights in terms of cultural distinctiveness and ethnicity, many African movements did not use that discursive tool and therefore faced much more political opposition from the states[74].

Third, racial struggles and tensions in the region have been undermined for a long time. By drawing conclusions between the context of the United States, social scientists often claimed that racism did not exist in Latin America. Therefore, they did not analyze the impacts of the ideology of mestizaje on the experiences of discrimination of racial hierarchies in the region[75]. This absence was widespread: from the absence of public policies to the lack of an official census measuring the population and state recognition of African Descendants' struggles[76]. A good portrait of the dichotomy between the outside image of racial relations in Latin America and the reality and the impact of this dichotomy on racial struggles was the research conducted by the United Nations for Education, Science, and Culture (UNESCO) in 1951 and 1952 in Brazil. While the research intended to convey a positive remark on the country concerning racial matters, having indeed concluded that Brazil was an example of a country where racial

Paschel and Sawyer, 199.

[73] Paschel and Sawyer, 199.
[74] Safa, "Challenging Mestizaje," 311.
[75] PeñA, Sidanius, and Sawyer, "Racial Democracy in the Americas," 750.
[76] Caribe, *Situación de las personas afrodescendientes en América Latina y desafíos de políticas para la garantía de sus derechos,* 184.

relations were harmonious, it recognized how racial prejudice was ignored in the country and the complexity of racial relations in Brazil[77].

Nonetheless, ethno-racial politics in Latin America gained a peculiar prompt in the late nineties. The political opening was directly linked to changes in policy norms at the international level, the human rights revolution, the norms of racial equality in the postwar period, and the preparation for the third United Nations (UN) World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance held in Durban, South Africa in September 2001[78]. Those events marked a turning point in Latin America's fight against racism and racial inequality and allowed multicultural policies to emerge in the following 20 years[79]. The black social movement actors took advantage of this political opening to push for inclusion policies in their home countries, albeit the frameworks and tactics used varied drastically[80]. As such, historically, domestic politics concerning racial equality mixed with global and regional anti-racist struggles in what some others call "activism without borders"[81].

There are several examples of illustrations of these patterns. Perhaps the most emblematic two are the Colombian and the Brazilian cases. Shortly after ratifying the International Labor Organization (ILO) 1989 Convention, Colombia mirrored in its 1991 constitution the legislative protection of ethnic groups guaranteed by the international treaty [82]. Correspondingly, black social movements in Brazil took advantage of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance to use the

[77] Maio, "O Projeto Unesco e a agenda das ciências sociais no Brasil dos anos 40 e 50," 151.
[78] Paschel, "The Right to Difference," 740.
[79] Paschel, 740.
[80] Paschel, 741.
[81] Keck, Keck, and Sikkink, *Activists Beyond Borders*, 15.
[82] Paschel and Sawyer, "Contesting Politics as Usual," 745.

provisions therein and push for the implementation of affirmative action in the country; and succeeded[83].

It is, therefore, clear that black movements in Latin America relied greatly upon the human rights movements to forward their claims and that states wielded that strategy and language. However, it remains yet to see whether the human rights movement has been structured to accommodate the claims of equality in the form needed to improve the protection initially granted by the States to those populations.

a. Argentina

The manifestation of structural racism in Argentina is two-fold. For one, it denies the existence and contributions of African descendants in the country[84]. And second, it forges a certain identity of the country in which African descendants are excluded[85].

There are three historical periods in which the presence of Africans and African descendants in Argentina is worth noting. The first one corresponds to the period of the slavery trade. Although hard to pinpoint precisely, it is estimated that between 1534 and 1778, at least 30% of the population in Argentina were Africans that the slave trade had forcefully taken into the country[86]. Without records of immigration flows or widespread disease among those populations, it is hard to imagine that they abruptly ceased to exist. The second period, which encompasses the 19th and 20th centuries, marked the entrance of African descendants from the Cape Verde Islands[87]. They fled the region to Argentina to pursue a better life. Similarly, the

[83] "Full Article: Remaking Racial Inclusion: Combining Race and Class in Brazil's New Affirmative Action," 159.
[84] Kleidermacher, "Africanos y afrodescendientes en la Argentina: Invisibilización, discriminación y racismo," 2; Frigerio, "Quebrando La Invisibilidad," 140.
[85] Kleidermacher, "Africanos y afrodescendientes en la Argentina: Invisibilización, discriminación y racismo," 2; Frigerio, "De la 'desaparición' de los negros a la 'reaparición' de los afrodescendientes: comprendiendo las políticas de las identidades negras, las clasificaciones raciales y de su estudio en Argentina," 118.
[86] Kleidermacher, "Africanos y afrodescendientes en la Argentina: Invisibilización, discriminación y racismo," 3.
[87] Kleidermacher, 2.

third period reflects the entrance of African Descendants from immigration flows: from 1990 on, immigrants from Senegal, Nigeria, Mali, Sierra Leone, Liberia, Ghana, and Congo, besides African Descendants from Peru, Brazil, Cuba, Colombia, Ecuador, and Honduras entered Argentina[88].

Nonetheless, it is still strong in Argentina the belief that the country is homogenously white and was built upon European lineages[89]. The idea was state-sponsored. During the eighties, inspired by scientific racism, the state prompted massive European immigration[90]. The project behind it was simple: to modify the country's social structure by changing its ethnic composition. The liberal elite at the time believed that European and white populations had better values and could contribute more to building a new national identity in Argentina[91]. Therefore, the project behind immigration wanted to homogenize by promoting the disappearance of African Descendant populations.

The ideology of mestizaje catapulted this process. The latter provided the discursive tool needed to prevent counter-narratives. Thus, while the State attempted to promote the idea of a white nation, the ideology claimed that to counter that narrative meant to counter the idea of the nation. As the African descendants had been born in a State that claimed to have a particular identity (white), all the others became stigmatized[92]. Thus, the official discursive framework focused on national identity over the racial, and to insist on the latter meant to challenge national identity and split the country unnecessarily[93]. To put it simply: African descendants had two options; to abide by the idea that all Argentines were one and that one was white, or to challenge that and, along with it, challenge the very idea of being Argentinian. This identity

[88] Kleidermacher, 2.
[89] Kleidermacher, 3; Monkevicius, "'No tenía que haber negros,'" 89.
[90] Kleidermacher, "Africanos y afrodescendientes en la Argentina: Invisibilización, discriminación y racismo," 7.
[91] Kleidermacher, 7.
[92] Kleidermacher, 4.
[93] Paschel and Sawyer, "Contesting Politics as Usual," 199.

mutation set the tone for the debates on ethnicity and race in the country and thus became central to the debate on the rights of African and African descendants[94].

At the same time, the rejection of non-whiteness in the country hindered the self-identification of people as such. They hid their origins to attempt better social inclusion[95]. Moreover, the racial classification system established in the country assigned as black an increasingly reduced number of people, allowing for the preponderance of whiteness[96]. This dynamic belongs to the realm of structural racism insofar as derived from a process of internationalization that started with the dominant narrative constructed by the state but gained a life of its own with the social interactions in daily life[97]. As illustrated by Frigerio (2008):

> Esta "ceguera cromática" de los porteños –argumento en aquel trabajo– no se debe a que ser considerado negro o "no negro" sea irrelevante, sino que, por el contrario, la ubicación dentro de la primera categoría es considerado peyorativo –para el caso argentino, tanto para el individuo como para la sociedad a la que pertenece–. La categorización de una persona como "no negro" se produce a través de un trabajo constante (en el sentido de trabajo de construcción social de la realidad) de invisibilización de los rasgos fenotípicos negros a nivel micro. Esta invisibilización a nivel de las interacciones micro-sociales, se corresponde a nivel macro con la invisibilización –constante también– de la presencia del negro en la historia argentina y de sus influencias en –y aportes a– la cultura Argentina[98].

The social context that promoted the shame of being black generated another type of appropriation: the attempt at cultural annihilation[99]. The contributions of African descendants to the Argentine culture were denied to the national identity. Some of them were banned, such

[94] Monkevicius, "'No tenía que haber negros,'" 91.
[95] Kleidermacher, "Africanos y afrodescendientes en la Argentina: Invisibilización, discriminación y racismo," 4.
[96] Frigerio, "De la 'desaparición' de los negros a la 'reaparición' de los afrodescendientes: comprendiendo las políticas de las identidades negras, las clasificaciones raciales y de su estudio en Argentina," 120.
[97] Frigerio, 121.
[98] Unofficial translation: "This "chromatic blindness" of the porteños -argument in that work- is not due to the fact that being considered black or "not black" is irrelevant, but, on the contrary, the location within the first category is considered pejorative -for the Argentine case, both for the individual and for the society to which he/she belongs-. The categorization of a person as "non-black" is produced through a constant work (in the sense of work of social construction of reality) of invisibilization of black phenotypical features at the micro level. This invisibilization at the level of micro-social interactions, corresponds at the macro level with the invisibilization -also constant- of the presence of blacks in Argentine history and of their influences in -and contributions to- Argentine culture." Frigerio, 120.
[99] Kleidermacher, "Africanos y afrodescendientes en la Argentina: Invisibilización, discriminación y racismo," 5.

as the traditional "cadombes"[100]; others were diluted, as they were marginalized and blatantly ignored[101].

Given this context, the greatest challenge of the black social movements in Argentina has been to counteract the historical position of "forgetting" they were assigned to, as it is from the state discourse of concealment and denial that the current vulnerabilities of African and African descendants arose[102]. The construction of this old-new identity is both inward and outwardly: it demands what Monkevicius (2012) calls a process of "communalization" of the "Afro" aimed at promoting a shared sense of belonging between the African and African Descendant populations in Argentina[103]; and a reaffirmation of existence and belonging vis-à-vis the state and the social relations that undisputedly put this group in a place that assures them the right to access social goods and full citizenship[104]. This challenge is heightened because, historically, the state of Argentina has been indifferent to those struggles – or any that pertains to African descendants or racism – and resistant (at best) to include racial equality demands in the public agenda[105].

b. Brazil

The most prominent feature of structural racism in Brazil is the false conception of racial harmony and the never-ending influence of the mestizaje ideology[106].

Unlike Argentina, racial structures in Brazil failed to deny the existence of African and African descendants. For one, four million Africans were forcefully transported to Brazil into

[100] Kleidermacher, 5; Frigerio, "Quebrando La Invisibilidad," 142.
[101] Kleidermacher, "Africanos y afrodescendientes en la Argentina: Invisibilización, discriminación y racismo," 6.
[102] Monkevicius, "'No tenía que haber negros,'" 92.
[103] Monkevicius, 93.
[104] Monkevicius, 102.
[105] Frigerio, "Quebrando La Invisibilidad," 141.
[106] Bailey, "The Race Construct and Public Opinion," 407.

slavery, which is more than a third of the global slave trade[107]. As a result, Brazil is thought to be the country with the greatest concentration of individuals of African heritage outside of Nigeria[108]. Moreover, the dominant discursive in the aftermath of independence praised – at least officially- mixing over whitening[109]. In this sense, the nation's future was directed at the "mixed" Brazilians (African, European, and indigenous)[110].

From this process, they attempted to create a new category of race and therefore diminish over time the visible number of persons of African descent, their demands, and the possibility of demanding targeted policy actions[111]. As described by Hernandez (2004), "*the social recognition of the racially mixed racial identity of "mulato/pardo" was a mechanism for buffering the numerical minority of White-identified elite Brazilians from the discontent of the persons of African descent's vast majority*"[112]. At the same time, individuals were pushed to disassociate from their African origin, as social status, prestige, and economic privileged were accorded based on the approximation of a European phenotype[113]. In any case, the ideology of mestizaje is considered the decisive mechanism in the ethno-racial organization in Brazil, especially after the biopolitical strategies adopted by the country from the 1930s on[114].

At the same time, in Brazil, the procedure of identifying a person's race also developed an unintended degree of flexibility. Race in the nation is determined by phenotype rather than genetic, ancestry, or ethnic factors[115]. Simply expressed, the most crucial component of racial identification has to do with visual evaluations, which explains why prejudice is attached by

[107] "Slavery in Brazil | Wilson Center."
[108] Hernandez, "To Be Brown in Brazil," 684.
[109] Bailey, "The Race Construct and Public Opinion," 409.
[110] Bailey, 409.
[111] Telles, *Racismo à brasileira*, 120.
[112] Hernandez, "To Be Brown in Brazil," 685.
[113] Hernandez, 686.
[114] Weschenfelder and Da Silva, "A Cor Da Mestiçagem," 314.
[115] Hernandez, "To Be Brown in Brazil," 686.

one's phenotype (prejudice of mark) and why people of the same racial origin are frequently socially defined by different racial designations[116].

Indeed, all of that combined facilitated the popularization of several national myths. The main ones were that racism did not exist as a social phenomenon and that racial mixture created a racially harmonious society[117]. The strength of those beliefs has historically operated as a vehicle for perpetuating white supremacy and racial segregation[118]. However, this specific framework also exposed the binary feature of racial relations in Brazil. This third category ("mulatto/pardo") was not white or black and therefore was not white. As in Brazil, non-whites always endured social, economic, and political disadvantages in relation to whites. The racial cleavages were identifiable even without the identification of blacks *per se*[119]. Consequently, the utter denial of racism became more difficult, albeit still widely accepted.

Black movements in Brazil took advantage of this rhetorical opening to both expose the existing racial disparities in the country and push for the implementation of targeted public policies. Following the historical racial mobilization from the 1930s, with "Frente Negra Brasileira/FNB" was formed, and the lead of Afro-Brazilian intellectuals and artists in the 1940s and 1950s to assert the relations between social inequality and racial relations, Afro-Brazilian youth groups in the 1970s formed the "Movimento Negro Unificado/MNU" (Unified Black Movement)[120]. Having understood the socio-economic similarities between people classified as black and *pardo* (brown), they pushed for the agglutination of black and *pardos* in statistical analyses and description of data while still promoting consciousness toward the definition of black, that included dark or light-skinned Afro-Brazilians[121]. This move

[116] Hernandez, 686.
[117] Bailey, "The Race Construct and Public Opinion," 407; Hernandez, "To Be Brown in Brazil," 685; Weschenfelder and Da Silva, "A Cor Da Mestiçagem," 319.
[118] Hernandez, "To Be Brown in Brazil," 684.
[119] Schwartzman, "Seeing Like Citizens," 226.
[120] Hernandez, "To Be Brown in Brazil," 687.
[121] Schwartzman, "Seeing Like Citizens," 226.

influenced social policy, especially in light of the 2001 World Conference Against Racial Discrimination, Xenophobia, and Related Intolerance in Durban[122]. The strategies combined and the constant pressure from the Black Movement were somewhat fruitful. After the conference, race-based affirmative actions were implemented, race-target policies were created, and Congress approved a Statute of Racial Equality[123].

Many other policies followed, and the Black Movement has been relentless over the years in pushing for improvements[124]. It is reasonable to say that Brazil is one of the countries that implemented more targeted policies pertaining to African-descendant populations in Latin America. However, those policies lack transversal coordination, properly planned funding, and training[125]. Simply said, in some instances, public policies need to be implemented, and in many others, they need to be reformed[126].

Regardless of whether to implement or restructure public policies, when it comes to targeted policies focused on African-descendant populations[127], Brazil faces a great deal of backlash. Historically, all legal frameworks or public policies aimed at promoting racial equality had a strong opposition in academia, media coverage, and society in general, including with the disqualification and criminalization of social movements[128]. In the country, the clashing interests of racial groupings were heightened by the governments' targeted programs for people of African descent[129].

[122] Schwartzman, 227.
[123] Schwartzman, 228.
[124] Hasenbalg et al., *Lugar de negro*, 29.
[125] Carneiro, *Racismo, sexismo e desigualdade no Brasil*, 18.
[126] Carneiro, 22.
[127] Some of the main public policies are: Law 10.639/03, that included the theme "Afro-Brazilian History and Culture" in the official curriculum of the Education Network; the implementation of the National Policy on the integral health of the black community by the National Council of Health; the implementation of the adoption by the Executive of the Project to Combat Institutional Racism, among other. For a detailed account of those actions, see: Carneiro, 18–25.
[128] Carneiro, 33.
[129] Telles and Bailey, "Understanding Latin American Beliefs about Racial Inequality," 1582.

c. Colombia

In Colombia, one of the main features of structural racism is the difficulties in effectively implementing targeted public policies for African-descendant populations based on the intersections between race and ethnicity and the struggles those populations face concerning armed conflict and dispossession.

The mestizaje ideology in the country promoted a process in which the black population was discursively made invisible[130]. Although mixing in the country indeed carried a whitening tone (the notion that black and natives were inferiors and the mixing would prompt the country forward through their elimination), the mixedness happened alongside the exclusion and silencing of blacks[131]. Moreover, in Colombia, race, class, and region are closely connected[132]. As pointed out by Paschel (2010): "*In the end, black Colombians were, and continue to be, disproportionately impoverished, with a high concentration of the population residing in certain regions, resulting in a de facto regional segregation*"[133].

This entangled relation explains the framework in which racial equality is handled in Colombia. Instead of claims of integration and sameness based on a perception of race based on racial discrimination and equality, in Colombia, black movements used ethnic difference as a frame and therefore relied on notions of cultural distinctiveness, cultural identity, autonomy, and the right to land[134]. For some authors, this specific framing is the reason that African descendants have been granted rights. For example, Bailey and Peria (2014) claim that in the fight for

[130] Paschel, "The Right to Difference," 736; Wade, "The Cultural Politics of Blackness in Colombia," 341.
[131] Paschel, "The Right to Difference," 736.
[132] Paschel, 736.
[133] Paschel, 737.
[134] Paschel, 741.

collective rights and social inclusion in Latin America, there may be a dynamic where success is correlated with emphasizing ethnicity and downplaying race[135].

Nonetheless, the relation between framing racial equality based on cultural distinctiveness stemmed from the relation between race, class, and region. By the time that global policy norms and internal relations provided the opening that civil society actors needed to demand racial equality[136], two social movements were prominent: the rural movements that emerged in majority black regions; and the urban-based organization named Cimarrón[137]. While the former articulated racial equality within the framing of racial equality and integration, the latter used the language of integration and equality[138]. This divisiveness, together with the scarcity of resources, regional fragmentation, and a pervasiveness discourse that specific legislation for Afro-Colombians had the potential to racially split the country weakened the stance of black organizations in the National Constitutional Assembly (ANC) of 1990[139]. Consequently, they did not get a candidate elected to the ANC[140]. To fill this gap and guarantee the inclusion of new rights for Afro-Colombians in the incoming constitution, they partnered with Francisco Rojas Birry, an indigenous leader from the Pacific Coast of Colombia[141]. The consequence of this alliance was an argumentative battle in which the issues of indigenous populations were regarded in conjunction with the ones of the black people[142].

The result of all of that was the 1991 Constitution of Colombia, which recognized as black communities those "*which have come to occupy uncultivated lands in the rural zones adjoining the rivers of the Pacific Basin, in accordance with their traditional cultivation practices and*

[135] Peria and Bailey, "Remaking Racial Inclusion," 157.
[136] Paschel, "The Right to Difference," 746; Wade, "The Cultural Politics of Blackness in Colombia," 343.
[137] Paschel, "The Right to Difference," 748.
[138] Paschel, 750.
[139] Wade, "The Cultural Politics of Blackness in Colombia," 347.
[140] Paschel, "The Right to Difference," 751.
[141] Paschel, 751.
[142] Paschel, 752.

the right to collective property over the areas which the same law shall demarcate". The discussions following the provision's enactment were held in the making process of the legislation mentioned by the Constitution. Ultimately, they represented the struggle the black communities faced to advance their stance as an ethnic group, especially because the majority of the anthropologists in the Commission responsible for the draft argued that Afro-Colombians did not have a collective identity and distinctiveness[143]. To counter that, Afro-Colombia presented proofs and documents of their particular dynamic with nature, land, and culture[144]. In Paschel (2010)'s words: "*since the inclusion of Afro-Colombians in the Constitution had already been established in cultural and ethnic terms with a specific focus on the Pacific Coast, between 1991 and 1993 Afro-Colombian representatives mainly worked within this framework, though simultaneously appropriating these new discourses of a multicultural nation*"[145].

The result of this debate was Law 70, which adopted a narrow interpretation of the black community by focusing on rural black populations of the Pacific Coast[146]. Moreover, the law only once addresses racism and discrimination, besides lacking clear policies and proposals concerning this issue[147]. In this sense, on the one hand, the adopted approach was a stepping stone in rural black community claims territory and official recognition[148]. On the other, it led to the perpetuation of a regionally specific notion of black people as being from the pacific coast and living in rural areas that effectively excluded the accommodation of the urban blacks, that is, a majority in Colombia[149]. As Wade (1995) pointed out: "*for blacks, therefore, specific institutions with the state open a concessionary space that these institutions also try to control,*

[143] Paschel, 756.
[144] Paschel, 759.
[145] Paschel, 760.
[146] Paschel, 762.
[147] Paschel, 762.
[148] Delgado, "El territorio," 60.
[149] Paschel, "The Right to Difference," 759.

using a preexisting indígena model, limiting the issue to regional land rights, and restricting the definition of 'ethnic group' to a specific type of black community"[150].

In addition, after 1994, the increasing guerrilla activity in Colombia forced Afro-Colombian populations to leave their lands and prevent others from obtaining collective land grants[151].

[150] Wade, "The Cultural Politics of Blackness in Colombia," 350.
[151] Arocha, "Inclusion of Afro-Colombians," 84.

JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS RELATED TO AFRO-DESCENDANT POPULATIONS AND STRUCTURAL RACISM

A brief introduction to the Inter-American System of protection

The basic document of the system is the American Convention on Human Rights. The treaty establishes two organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, both of which have the competence to oversee the correct application of the Convention[152]. While the Court only hears cases referred to them by the Commission or the States[153], the former is not bound by the conclusions reached by the latter.

The Inter-American Court of Human Rights' role in Latin America

The Inter-American Court of Human Rights was envisioned as a beacon of cultural transformation and institutional shift within the heterogenous region of America. The historical and socio-economic background of the American context has been constructed, in this sense, as both a result of and a guide to the structures of the Court. Ramírez (2015) describes this process as the "American Voyage": from a departure of democratic building, systematic mass crimes sponsored by states, and development of a doctrine on forced disappearance, right to the truth, and amnesties, to the definitive reign of human rights[154].

In this sense, scholarship has reported the Court's understanding of its role within the region as an agency for the development of human rights law, acting through the analysis of transcendent cases to guide the national jurisdictions in a broad consolidation process of the most effective protection of human rights[155].

[152] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, 133.
[153] Faúndez Ledesma, 562.
[154] García Ramírez, "The Relationship between Inter-American Jurisdiction and States (National Systems)," 119.
[155] García Ramírez, 124.

The scholarship does not entirely accept this guidance. Malarino (2012), for example, perceived the Court's case law through three tendencies: a) modifying laws (even when the goal is to update them in alignment with current social needs); b) creating new rights that are not provided in the American Convention; c) interfering with the functions of national structures[156]. Consequently, he considered the Court's case law antidemocratic and illiberal[157], which in turn undermines legality, legal certainty, democracy (self-government), and the principle of self-determination of peoples[158]. By the same token, Contesse (2017) warned that some of the Court's behavior and the level of intrusiveness thereof end up delegitimizing the court in the face of its constituents–governments, domestic courts, and the general public[159]. He claims that when the Court expands its powers or roles, it may lose legitimacy and international authority[160].

Nevertheless, be it beneficial or not for the region and the Tribunal, the case law has shown at least three patterns in terms of the Inter-American Court's aims: i) set standards for the formation and consolidation of international jurisprudence; ii) promote an *ius commune* in the region; iii) develop public policies that incorporate human rights and their various implications in fields such as political, economic, social, and cultural life[161].

The enumerated objectives are derived from different scholars' understanding of the Inter-American Court's ordeal. Some of them view it as an intent to demand national systems to halt violations and encourage the culture of rights[162]. Others reflect on the use of "non-repetition measures" to read the Court's endeavor as a tool to push for structural changes in the region,

[156] Malarino, "Judicial Activism, Punitivism and Supranationalisation," 668.
[157] Malarino, 668.
[158] Malarino, 695.
[159] Contesse, "The International Authority of the Inter-American Court of Human Rights," 1169.
[160] Contesse, 1177.
[161] Abramovich, "From Massive Violations to Structural Patterns," 10.
[162] García Ramírez, "The Relationship between Inter-American Jurisdiction and States (National Systems)," 131.

especially related to a rule-of-law practice and culture[163], or point to the Court's tendency to promote unified standards of human rights and reinforce the obligations of domestic judges to consult and protect international judgments[164]. While the authors used different focuses to rely on their claims, they all seem to converge into an understanding of the Court's demands related to reparation that aligns with implications of regional unification, human rights policy-making, and standardized jurisprudence in relation to the protection of individuals. Another relevant function of the Court highlighted by the scholarship is the one related to transnational activism: The Court is understood as a boomerang strategy that civil society can use to denounce violations and allow dialogue with governments using the international repercussion[165].

Aligned with the last objective, Abramovich (2009) noted an increasingly confronted agenda in the Inter-American human rights system: the combat of inequality and social exclusion, particularly when related to the historical institutional deficit[166]. In this realm, the topic of structural discrimination and structural racism arises. Over the years, the jurisprudence of the Court has evolved to accommodate the challenges in recognizing structural discrimination and thus has expanded the notion of equality to include not only non-discrimination (elimination of arbitrary differences) but also substantive equality, which requires an active role from the State to diagnose its social reality, identify vulnerable populations, and provide them with urgent and special measures of protection[167].

To do so, the Court explored two aspects: the concept of vulnerability and the content of equality. For the concept of vulnerability, the Court attributed a specific meaning: an exclusion dynamic that limits the access to rights of an individual[168]. From this understanding, the Court

[163] Huneeus, "Courts Resisting Courts," 506.
[164] Kosař and Lixinski, "Domestic Judicial Design by International Human Rights Courts," 733.
[165] Abramovich, "From Massive Violations to Structural Patterns," 14.
[166] Abramovich, 16.
[167] Abramovich, 18.
[168] Estupiñan Silva, "La Vulnerabilidad En La Jurisprudencia de La Corte Interamericana de Derechos Humanos: Esbozo de Una Tipología," 202.

has built the connection between vulnerability and structural inequality and discrimination[169]. The established relationship between them was one of causation in the sense that cultural prejudice facilitates the reproduction of vulnerability[170]. This conceptualization allowed the Court to explore vulnerability stemming from groups: not only the case-law recognized that vulnerability could be derived from social, cultural, and historical contexts that undermine the access to rights of certain groups[171], but it also ascertained the vulnerability of specific groups, such as migrants, woman, and minority sexual identities[172]. Finally, the Court declared that a context of vulnerability closely relates to the right of nondiscrimination[173] and determines the extent of the obligations of the States[174].

This new realm – one that addresses vulnerabilities of groups derived from cultural, historical, and social conditions – prompted the Court to advance the traditional formula of nondiscrimination based on formal equality. The case-law required – and the Court responded – a step forward into substantive equality and the recognition of the detrimental influence of economic and cultural dominant patterns on the enjoyment of rights[175]. However, the content of the principle of equality is still an unfinished business in the Court's jurisprudence, at least where studies on structural inequalities are concerned: the scholarship signalized, for example, the need to better develop notions of redistribution and recognition[176], and the implications of intersectionality[177].

[169] Estupiñan Silva, 204.
[170] Estupiñan Silva, 204.
[171] Caicedo Camacho, "El alcance de la vulnerabilidad en la jurisprudencia de la Corte Interamericana de Derechos Humanos," 85.
[172] Estupiñan Silva, "La Vulnerabilidad En La Jurisprudencia de La Corte Interamericana de Derechos Humanos: Esbozo de Una Tipología," 204.
[173] Caicedo Camacho, "El alcance de la vulnerabilidad en la jurisprudencia de la Corte Interamericana de Derechos Humanos," 86.
[174] Caicedo Camacho, 79.
[175] Clérico and Aldao, "Nuevas Miradas de La Igualdad En La Jurisprudencia de La Corte Interamericana de Derechos Humanos," 177.
[176] Clérico and Aldao, 178.
[177] Pou Giménez, "La Igualdad Sustantiva Interamericana," 1247.

Argentinian Case (Case "Acosta Martínez and others v. Argentina, Judgment of August 31, 2020)

Summary of the case

The case was presented to the Inter-American System by "*Comisión de familiars de víctimas indefensas de la violencia social"* – COFA, "*Centro de Investigaciones Sociales y asesorías Legales Populares"* – CISALP, and Paola Gabriela Canova[178], all of which will be from now on referred to as "the petitioners".

It pertains to the illegal detention following the death of José Delfín Acosta Martínez (hereinafter "José Delfín" or "the victim"), which took place on April the 5th of 1996.

The petitioners alleged that José Delfin Acosta's arrest was arbitrary, based on his race and nationality. They indicated that José Delfin was an Uruguayan African descendant, which was the sole motive for his arrest[179]. Moreover, they argued that the case investigation was hampered by generalized corruption in the judiciary[180]. Therefore, their claims were dismissed without regard for the proof offered by the parts. Similarly, the brother of the victim, Ángel Costa, solicited political asylum following telephonic interventions and attempts on his life[181]. Based on the above, the petitioners alleged that the State of Argentina violated: i) the right to personal integrity and the right to life of José Delfín Acosta for a violent attack perpetrated by the police under state custody and that caused the death of the victim; ii) right to personal liberty, for the arbitrary arrest; iii) right to judicial guarantees and protection, for the lack of

[178] Inter-American Commission of Human Rights, "Informe de Fondo (No. 146/18, Caso 12.906)," 1.
[179] Martinez and Centro de Investigaciones Sociales y asesorías Legales Populares, "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de Las Presuntas Víctimas," 3.
[180] Martinez and Centro de Investigaciones Sociales y asesorías Legales Populares, 28.
[181] Martinez and Centro de Investigaciones Sociales y asesorías Legales Populares, 8.

proper investigation following the arbitrary arrest and death of the victim; iv) the right to equality before the law, as the arrest of the victim had a racial motive[182].

The Commission followed along the same lines of argumentation as the petitioners. It concluded that the State violated the right to life, personal integrity, personal liberty, equality before the law, and non-discrimination (articles 4.1, 5.1, 5.2, 7.2, 7.3, 7.4 and 24 of the American Convention on Human Rights, in conjunction with articles 1.1 and 2 of the same instrument) of José Delfín, as well as judicial guarantees and judicial protection (articles 8.1 and 25.1 of the Convention) of the family of the victim[183]. In sum, the Commission understood[184] that: i) the detention of José Delfín was illegal, arbitrary, and discriminatory, as it was based on an unlawful police enactment and conducted without reasonable justification; ii) the State did not act with the sufficient assistance as to safeguard the victim's physical integrity and life, despite the state's special position as guarantors of detained persons; iii) Argentina did not provide the family of the victim with a fair trial or criminal proceeding, having disregarded practices of proof gathering or diligences that were asked and failed to assess criminal or administrative responsibility to police agents that had the custody of José Delfín at the time.

While the State initially argued against the victims and the Commission's standing, the position taken to the Court was one of agreement. Following a change of administration, Argentina recognized its international responsibility concerning the violations appointed by the Commission[185]. More than that, the State claimed that the case of José Delfín was paradigmatic in relation to the persecution and stigmatization of the Afro-descendant community in

[182] Martinez and Centro de Investigaciones Sociales y asesorías Legales Populares, 43.
[183] Inter-American Commission of Human Rights, "Informe de Fondo (No. 146/18, Caso 12.906)," 1.
[184] Inter-American Commission of Human Rights, "Observaciones Finales Escritas (José Delfín Acosta Martinez y Familiares Vs. Argentina)," 5.
[185] Ministério de Relaciones Exteriores, Comercio, Internacional y Culto, "Alegatos Finales Escritos Presentados Por El Estado," 1.

Argentina and police brutality[186]. Even more, and taking a stand that it was arguably more far-reaching than the petitioners and the Commission, the State constantly referred to institutional racism in a broader sense than the specific circumstances of the case (the State mentioned other cases of police brutality, discriminatory behaviors, judicial bias, etc.[187]) and asked for the formulation of institutional measures aimed at addressing discrimination and tackling impunity concerning cases related to racial discrimination[188].

The Commission's claims

In the background report, the Commission brought out the issue of racial discrimination more as a leap of interpretation than a tool of analysis of Argentina's broader historical and political context. In assessing the context underlying the alleged violations, the Commission pointed out that, at the time of the violation, there were police enactments under which it was possible to detain people without judicial order or flagrancy[189]. According to the commission, those enactments did not meet the requirements of lawful detention, namely the objectivity, typicality, and obligations related to the procedural safeguards[190]. All those missing safeguards – especially the ones designed to ensure the objectivity of the application of the law – provided a fertile context for arbitrary detention and, in tandem with prejudices and stereotypes affecting groups that have been historically discriminated against[191], for the violation of the right to personal liberty and equal protection before the law.

[186] Ministério de Relaciones Exteriores, Comercio, Internacional y Culto, 2.
[187] Ministério de Relaciones Exteriores, Comercio, Internacional y Culto, 10.
[188] Ministério de Relaciones Exteriores, Comercio, Internacional y Culto, 11.
[189] Inter-American Commission of Human Rights, "Informe de Fondo (No. 146/18, Caso 12.906)," 3.
[190] Inter-American Commission of Human Rights, 17.
[191] Inter-American Commission of Human Rights, 17.

In that way, the enactments themselves, along with the lack of concrete and objective justification for the detention of José Delfín, conjured the arrest's arbitrariness and its discriminatory feature[192].

On the other hand, in the closing arguments, the Commission expressly referred to structural racism faced by African descendant populations in the Americas[193]. The Commission acknowledged that this type of discrimination is not linked to individual and isolated acts. Rather, it stems from historical, socioeconomic, and cultural contexts and influences a society's decisions, practices, politics, and culture[194].

The more comprehensive approach was not necessarily translated into assessing the facts of the cases or analyzing the State's responsibility. Instead, the Commission focused on drawing the connection between the existing legal framework when the facts occurred (and, more specifically, the police enactment) and the subsequent persecution of certain groups that followed[195]. Simply put, according to the Commission, the police enactment lacked objectivity, did not set up the unlawful conduct precisely, and left too much discretion to the police in the assessment and imposition of sanctions. Consequently, certain groups were more easily tagged as dangerous or suspicious, leading to the arbitrary and discriminatory arrest of José Delfín[196].

From this point of view, the legal framework was the creator, and not the manifestation, of racism (and therefore the unlawful profiling). This might explain why the Commission did not use the discriminatory argument in any further analysis. If the enactment was the source of discrimination, only the police actions could be regarded as tainted, as they were the only ones

[192] Inter-American Commission of Human Rights, 18.
[193] Inter-American Commission of Human Rights, "Observaciones Finales Escritas (José Delfín Acosta Martinez y Familiares Vs. Argentina)," 4.
[194] Inter-American Commission of Human Rights, 4.
[195] Inter-American Commission of Human Rights, 5.
[196] Inter-American Commission of Human Rights, 5.

directly linked with the enactment. This left unscathed, for example, the following omission of the State within the investigation of the facts, support for the family, and criminal proceedings. It did not touch upon why such legislation remained unchallenged in Argentina for over ten years or what other procedural structures were in place to support the enactment. Ultimately, the Commission used the term structural racism but reviewed the case under the lens of individual discrimination.

The petitioners' claims

The petitioners stepped beyond the individual aspects of the case. They highlighted that African-descendants and African Communities in Argentina in general (not only the victim) face structural discrimination and social exclusion, which legitimized over the years the practice of illegal racial profiling in police interventions and persecution of activists of the black movement.

In the briefs, the individual aspect was more developed than the structural. This means that the particular situation of José Delfín and his relatives was more at the center of the narrative than the general situation of African descendants in Argentina. For example, while the petitioners pointed out that both José Delfín and his brother "*sabían muy bien antes de llegar a Argentina, de la negación y ocultamiento sistemático del Estado argentino y la sociedad de la existencia de los/as afro argentinos/as*" [197] therefore signaling toward the existence of structural discrimination, the document focused in connecting this background situation (structural racism), the history of activism for the afro-descendant populations of José Delfín Acosta and the human rights abuse. In that way, they argued that the victims' racial awareness and activism

[197] Martinez and Centro de Investigaciones Sociales y asesorías Legales Populares, "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de Las Presuntas Víctimas," 4.

was the reason for his arrest[198]. Simply put, they delineated more the fact that the arrest had racial motives than the structure behind the arrest that allows for the continuation of arbitrary detention based on race.

Ultimately, the representatives argued that the arrest was not only arbitrary on procedural grounds but also because it had discriminatory motives (based solely on the fact that the detainees were of African descent and foreigners). The racial element was present in the analysis of articles 7 and 24 of the American Convention, in conjunction with articles 1.1 and 2 of the same instrument (which accounts for the rights of personal liberty, equality before the law, and non-discrimination). The other articles were not described along racial lines.

On the other hand, the closing arguments expanded the scope of the protection to include more of a structural understanding. The document was presented after the State recognized its international responsibility for the violation of the human rights of José Delfín. Despite the State's recognition, the petitioners claimed that, beyond recognizing the human rights abuse, it was important to outline the growth of racial profiling in the country and to settle the Inter-American Court jurisprudence concerning persecution with racial motives, arbitrary detention, and judicial guarantees[199]. In this sense, they went beyond the case's specific circumstances (that was, at that point, already settled) to reaffirm the necessity of addressing not only the individual case but also the patterns and structures/systems behind it. The following excerpt was very clear in that regard:

> (…) desde el momento de los hechos hasta el presente, la discriminación racial, las detenciones arbitrarias y la marginación social de los afrodescendientes no sólo ha continuado, sino que en la República Argentina se ha agravado[200].

[198] Martinez and Centro de Investigaciones Sociales y asesorías Legales Populares, 17.
[199] Martinez, "Alegatos Finales Escritos Presentados Por Los Representantes," 2.
[200] Martinez, 56.

However, even this attempt at a systematic approach developed in the document was two-fold. On the one hand, the petitioners undoubtedly emphasized that the situation of invisibility, deprivation, and marginalization faced by African-descendant and African communities in Argentina leads to a context of racial profiling and persecution[201]. This broader outline was a clear attempt to delineate how the violations pointed out in the cases went beyond the individual and stretched out to the institutions of the state. On the other, the emphasis was carefully linked to the facts of the case to frame that the arrest of José Delfín was motivated by persecution of his activism[202]. This contrast is evident in two consecutive paragraphs of the closing argument:

> Es en ese contexto de persecución racial al que se hace referencia, que el 5 de abril de 1996 en la intersección de las calles Sarmiento y Rodríguez Peña la policía (...)[203]
>
> (...) Fue por ese motivo que la víctima intervino, él sabía de detenciones arbitrarias y de las torturas a las que podían ser sometidos únicamente por "ser negros", las había sufrido en carne propia (ver declaraciones de Acosta Martínez, Blanca Martínez Gutiérrez y Chagas Techera, ya citadas), por eso es que cuestiona la detención, de acuerdo con los testimonios recogidos de las personas que presenciaron los hechos[204].

Moreover, yet again, in the closing arguments, the racial factor was only developed in the analysis of the arrest (and therefore, articles 1.1, 2, 7, and 24 of the American Convention). It was not mentioned in the analysis of the treatment and custody while in prison, the death itself, and the aftermath (investigation, judicial procedures).

The Court's standing

Following the State's recognition of its international responsibility, the Court found that there was no controversy concerning the detention and death of José Delfín, as well as the actions of the family to uncover the truth of the facts[205]. However, one thing was very interesting. The

[201] Martinez, 6.
[202] Martinez, 13.
[203] Martinez, 12.
[204] Martinez, 13.
[205] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 9, §20.

Court ruled that the illegality and arbitrariness of the detention (benchmarks of articles 7.2 and 7.3 of the Convention) was placed within a context of racial discrimination (benchmarks of articles 1.1 and 24 of the Convention)[206]. The wording of the Court seemed to lean on the ideals of structural racism way closer than the ones adopted by the petitioners or the Commission. The way the Court used it, "the context of racial discrimination" appears as an underlying factor accompanying the violation instead of a consequence of the latter. In this sense, they are both independent and correlated.

Other aspects of the decision reinforced this isolated interpretation. For example, the Court ruled that the decision would be issued regardless of the State's recognition and the apparent lack of controversy thereof, as the death of José Delfín was not accidental or random[207]. Moreover, the Court highlighted the need to set jurisprudential criteria on the circumstances of the case to improve the protection of victims[208]. The Court also extensively acknowledged the complex context of structural racism in Argentina, in particular, the pattern of denial of the existence of Afro-descendant populations[209]and racial profiling in police activities[210]. Up until then, it can be argued that the context of structural racism was regarded not only as the background of the violation but as a violation in itself. That would explain satisfactorily why the Court ruled even amongst that recognition from the State: the case was a paradigm, not an individual assessment.

As the State recognized the violations, the Court delved into the scope of the international responsibility of Argentina in relation to the obligation to adopt internal measures concerning both the detention procedures and analysis of the arbitrariness of the detention in connection

[206] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 9, §21 (b).
[207] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 10, §24.
[208] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 10, §25.
[209] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 12, §35.
[210] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 14, §40.

with the principle of equality and nondiscrimination[211]. While doing so, the Court refrained from developing a more far-reaching understanding regarding structural racism. Despite the State's willingness to accommodate rulings beyond the legal framework highlighted in the case (police enactment)[212], the Court only ruled in relation to the enactment[213]. Accordingly, the Court connected the analysis of racial profiling to the enactment, ruling that the former hindered the discriminatory motives behind the detention.

The two-fold approach of the Court is noticeable in the decision. On the one hand, the Court placed the arrest of the victim within the broader context of racial discrimination and police prosecution faced by Afro-descendant populations in Argentina[214] . It recognized that racial profiling and other acts of racial discrimination were often dissolved in various state agent acts[215]. On the other, it closed off the discussion by subsuming the act of racial profiling to the imperfections of the enactment[216] and therefore attaching the discrimination to one piece of legislation. In this sense, according to the Court, the violation was embodied only in the law.

Conclusion

"*Acosta Martínez and other V. Argentina*" showcased three framings concerning structural racism against African-descendant populations. All three have shortcomings compared to the struggles faced by the group in Argentina concerning racial equality.

The first one, constructed by the petitioners, while recognizing the situation of invisibility, deprivation, and marginalization faced by the group in Argentina, ended up chaining that

[211] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 27, §77.
[212] Ministério de Relaciones Exteriores, Comercio, Internacional y Culto, "Alegatos Finales Escritos Presentados Por El Estado," 10.
[213] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 31, §90.
[214] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 32, §94.
[215] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 33, §99.
[216] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 34, §101.

general context to the facts of the case. In this case, there was a clear link between the phenomena of racial profiling that marks the police conduct in the State and the arrest of José Delfín[217]. Therefore, the petitioners acknowledged the existence of structural racism and its implications in society but put it aside to focus on the individual aspect of this structure: the individual.

The second one was developed by the Commission, which placed racism as a consequence of the irregularities of the police enactment. According to the Commission, the illegalities of the regulation, being as unclear and open to discretion as it was, created space for discriminatory arbitrariness and, ultimately, the arrest of the victim[218]. Here, it is hard to claim that the Commission adopted the concept of structural racism in its analysis. At odds with the understanding of racism encompassing the structures of society and focusing on the institutions, structures, and collective practices that maintain racial hierarchization[219], the Commission focused on the legality of the enactment and thus put aside even the conceptualization of overt discrimination.

The Court crystalized the third framing in between the last two. Aligned with the petitioners, the Court indeed acknowledged structural racism in Argentina[220], including the consequence derived from it: the pattern of denial of the existence of Afro-descendant[221]. In this sense, the Court placed the context of structural racism as an underlying factor accompanying the violation – a little bit further than the petitioners did and with a lot more boldness than the Commission framed the phenomena.

[217] Martinez, "Alegatos Finales Escritos Presentados Por Los Representantes," 13.
[218] Inter-American Commission of Human Rights, "Informe de Fondo (No. 146/18, Caso 12.906)," 4.
[219] Bonilla-Silva, "What Makes Systemic Racism Systemic?," 515.
[220] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 12, par. 35.
[221] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 12, par. 35.

However, this is not to say that the case developed much in conceptualizing structural racism. As aforementioned, in analyzing the State's responsibility and the placement of rights, the Court was quite conservative, ruling that the police enactment served as a veil to the discriminatory motives behind the detention and thus focusing on the enactment itself. The discussion of racial profiling and what is behind it was subsumed to the imperfections of the enactment, fundamentally understanding that, when it comes to structural racism, the analysis of the legality of the law is central. The Court did not analyze, as it was not induced to by the petitioners nor the Commission, whether the other rights might have been affected in the case. For example, in the analysis of judicial guarantees, it would be within the realm of discussion of structural racism to ask if the victim would have been mistreated in prison had he been white. Or if he would have had such a difficult and strenuous investigation procedure.

Comparing the greatest challenge in Argentina concerning structural racism and the decision issued so far, it cannot be said that the case is much helpful. Insofar as the black movements in Argentina have been trying to counteract the historical denial of the existence of Afro-descendant[222], the decision is beneficial, as the Court indeed recognized both. This evaluation assumes that when specific normative protection is lacking – or, in this sense, where the official recognition of the population as citizens of the State is insufficient -, the aid of international human rights law, even if only to provide recognition, is relevant to be a parameter for evaluating the legality of the administration's actions and improve the development of human rights[223].

However, in regards to everything else, the value was not so high: The Court did not develop an understanding of the right to equality in the context of structural racism, it did not step up

[222] Monkevicius, "'No tenía que haber negros,'" 92.
[223] Nash Rojas et al., "Impacto Del Derecho Internacional de Los Derechos Humanos En La Protección Jurisdiccional de Grupos En Situación de Discriminación Estructural En Chile," 225.

the discussion toward broader aspects than the individual and did not assist afro-descendant populations to gain a better position vis-á-vis the State to improve racial equality demands in the public agenda[224]. On the contrary, all in all, the decision relates to irregular administrative and legislative enactments.

Marks (2011) illustrates this insufficiency very clearly. She welcomes the current practice of the human rights movements to dwell on the reasons behind the violations and focus on addressing the root causes of human rights abuses, as it is a step beyond the previous model based on which the human rights violations were analyzed in detachment of the political, economic, and social contexts which created and maintained the violation[225]. However, she warns that a distinctive shallowness marks the analysis that key institutions such as the United Nations provide. The various reports and documents produced tend to identify the factors that facilitate violations but do not explain why human rights abuses occur and how they can be prevented[226].

Following this lead, Marks (2011) affirms that when discussing root causes, human rights institutions halt the investigation too soon, treat effects as causes, and identify causes only to set them aside[227]. This system implies that bad procedures and rules, if replaced, could halt human rights abuses. Moreover, it narrows the discussions to individual policies and behaviors that allegedly put the identified incorrect procedures in place[228]. Consequently, human rights institutions disregard the systemic character of violations and fail to contemplate violations as part of a political decision rather than an anomaly. At the same time, they fail to address systematic abuse as systemic maintains the violation[229]. From this perspective, the human

[224] Monkevicius, "'No tenía que haber negros,'" 102.
[225] Marks, "Human Rights and Root Causes," 59.
[226] Marks, 62.
[227] Marks, 70.
[228] Marks, 71–73.
[229] Marks, 71.

rights system does more to effectively limit the possibilities of unveiling the causes of human rights violations and correcting unfairness than expand it[230].

Her analysis clearly shows that she does not propose abandonment of the human rights language or mechanisms. Rather, she explains that the current practice is insufficient by arguing that it fails to convey the processes and structures that sustain the violation of rights or, in her words, "*the socio-economic conditions within which those ideas were able to develop and gain influence*"[231]. Translating this to racial discussions means recognizing human rights as one fragment of emancipation while warning about the gaps, inconsistencies, and shortcomings of the human rights practice. In the Argentinian case, the Court did delve into the inconsistences of the law – one aspect of human rights promotion – and even recognized the structures that hamper racial justice. However, the investigation into the cause was not developed further, leaving a gap where effective protection should be.

[230] Marks, 71.
[231] Marks, 76.

Brazilian Cases (Favela Nova Brasília V. Brasil, Judgment of February 16, 2017; Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil, Judgment of July 15, 2020; Trabalhadores da Fazenda Brasil Verde V. Brazil, Judgment of October 20, 2016)

Summary of the case

i. *" Trabalhadores da Fazenda Brasil Verde V. Brazil" (2016) and "Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil" (2021)*

Both cases relate to acts committed by non-state actors under workers' rights, so they will be studied together.

"*Trabalhadores da Fazenda Brasil Verde V. Brazil"* was presented by *Comissão Pastoral da Terra* (CPT) and *Centro pela Justiça e o Direito Internacional* (CEJIL) – here in "the petitioners". It related to an alleged practice of forced labor analogous to slave labor and debt bondage at the Brasil Verde farm, located in the state of Pará.

The petitioners stood their grounds on alleged knowledge of the State of forced labor practices in Brazil and at Brasil Verde farm specifically. Based on that, they claimed that the State failed to protect and prevent human rights violations and, therefore, could be held accountable for acts perpetrated by private actors. Following this rationale, the petitioners claimed that Brazil violated articles 3, 4, 5, 6, 7, 8, 11, 19, 22, and 25 of the Convention in relation to articles 1.1 and 2 of the same instrument. The Commission concluded that the State was responsible for the same articles addressed by the petitioners. The State opposed the arguments, mainly

claiming that reports and inspections hadn't signalized any forced labor at Brasil Verde farm[232] and that the State adopted all effective preventive measures related to the facts[233].

"*Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil"* was presented by "Centro de Justiça Global", "Movimento 11 de Dezembro", "Comissão de Direitos Humanos da Ordem dos Advogados do Brasil (OAB) - Subseção de Salvador", "Fórum de Direitos Humanos de Santo Antônio de Jesus/Bahia", Ailton José dos Santos, Yulo Oiticica Pereira and Nelson Portela Pellegrino. The case related to the explosion at a fireworks factory in Santo Antônio de Jesus occurred on December 11, 1998, in which 64 people died, and six survived, including 22 children.

The petitioners and the Commission asked for the international responsibility of the State for violations of articles 4.1, 5.1, 19, 24, 26, 8.1, and 25.1 of the Convention in relation to articles 1.1 and 2 of the same instrument. The State challenged the arguments by claiming that it didn't know the real and immediate risks the victims were under[234]. Furthermore, the State claimed that the case did not convey a violation of Article 24, as Brazil had progressively improved the promotion of rights in the northeast region, aiming at developing the quality of life of the entire population and, in special, individuals in situations of vulnerability[235].

ii. Favela Nova Brasília v. Brasil (2018)

The case was presented by "Centro pela Justiça", "Direito lnternacional (CEJIL/Brasil)" and "Human Rights Watch /Americas". It referred to the failures and delays in the investigation and punishment of those responsible for the alleged extrajudicial executions of 26 people in

[232] "Escrito de Interposición de Excepciones Preliminares, Contestación a La Demanda y Observaciones al Escrito de Solicitudes, Argumentos y Pruebas Presentado Por El Estado (Caso 12. 066)," 24.
[233] 297.
[234] "Escrito de Contestación Del Estado (Caso 12.428)," 264.
[235] 264.

the context of two police raids and sexual abuse of 3 women (2 of them minors) carried out by the Civil Police of Rio de Janeiro on October 18, 1994, and May 8, 1995, in Favela Nova Brasilia.

The petitioners and the Commission claimed that Brazil violated articles 5, 8, 19, 22, and 25 of the American Convention, in conjunction with articles 1.1 and 2 of the same instrument; articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture and article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women. The State challenged all of the claims.

The Commission's claims

iii. "Trabalhadores da Fazenda Brasil Verde V. Brazil" (2016) and *"Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil" (2021)*

In the two cases related to worker's rights, the connection between the background context of the country in relation to Afro-descendant populations, the alleged violations, and the legal standing before the American Convention was underdeveloped by the Commission.

In "*Trabalhadores da Fazenda Brasil Verde V. Brazil*", they claimed that the case had symbolic importance and was inserted in a broader structural context, highlighting the Inter-American Court's importance in providing standards[236].

Very early on in the initial report, the Commission pointed out that slavery in Brazil existed as far back as the 17th century as a result of colonization[237]. Once the practice was formally

[236] Inter-American Commission of Human Rights, "Alegatos Finales Escritos Presentados Por La Comisión Interamericana (Caso 12.066)," 2.
[237] Inter-American Commission of Human Rights, "Escrito de Sometimiento Del Caso e Informe de Fondo Presentado Por La Comisión Interamericana de Derechos Humanos (Caso N° 12.066)," 11.

abolished, the former slaved were left without assistance and therefore integrated into the lowest social class of the country[238]. Consequently, they often had to turn to structures or work that amounted to reconfigurations of slave labor[239]. Moreover, the Commission acknowledged that since the 20th century, industrial development expanded the phenomenon of slavery labor, which was carried out by private companies but facilitated by the collaboration of the state[240]. Finally, the Commission reported that, in Brazil, the main victim of slavery were Afro-descendant populations (black or brown) of the northeast region coming from the poorest states, and the structural causes relate to poverty and land accumulation[241]. In this sense, the Commission clearly presented a background of the use of contemporary forms of slave labor in Brazil, in which the Afro-descendant populations were the main victims.

However, this background was not used to expand the interpretation of the right to equality accordingly. The background was used for something else: to establish the state's responsibility for acts of private actors. To create that link, the Commission disaggregated the criteria in three: i) state knowledge of the existence of a real and immediate risk, ii) particular situation of the victims, and iii) the reasonable possibility of prevention based on what the state knew or should have known[242]. Following this, the Commission used the background to prove that the criteria had been met. For one, it stated that the widespread use of slave labor was so common in Brazil that attracted for the state a reasonable expectation of knowledge of that practice in the State of Pará (where the facts took place) and in the "Brasil Verde Farm" specifically, therefore meeting the first criteria[243]. On the other hand, the Commission claimed that the victims of the case mostly constituted the generally targeted victims of slave labor (afro-descendant males

[238] Inter-American Commission of Human Rights, 12.
[239] Inter-American Commission of Human Rights, 12.
[240] Inter-American Commission of Human Rights, 12.
[241] Inter-American Commission of Human Rights, 13.
[242] Inter-American Commission of Human Rights, 40.
[243] Inter-American Commission of Human Rights, 40.

coming from the poorest states of the country), which placed them under a special vulnerability that, in turn, enhanced the duty of protection from the State[244].

Furthermore, while the Commission called for an extensive interpretation of the rights of the declaration and the convention based on other international instruments pertinent to the case[245], effectively using this extensive interpretation to shape the definition of contemporary slavery[246] and to assert that contemporary slavery connects to violations to other rights, such as personal integrity, right to a dignified life, education, access to justice[247], it did not analyze slavery within the lens of the right to equality and nondiscrimination. In other words, the Commission did not answer whether the practice of contemporary slavery amounts to an independent violation of the article do equality and why.

This underdevelopment was clearer when the Commission specifically referred to non-discrimination. The Commission considered that the background context highlighted a structural historical and social problem that disproportionally affected Afro-descendant man, that was poor and came from the northeast region of Brazil[248]. That problem denoted, in turn, a *de facto* discrimination against a certain group, marginalized in exercising the analyzed rights[249]. The Commission concluded that Brazil failed to adopt sufficient and effective measures to guarantee, without discrimination, the rights of life, liberty, personal security, and equality to a family and the workers' work. Therefore, the right to equality was not violated independently but insofar as the other rights were violated. In this sense, for example, slavery was not considered a violation of the right to equality – it was regarded as a violation of the

[244] Inter-American Commission of Human Rights, 42.
[245] Inter-American Commission of Human Rights, 35.
[246] Inter-American Commission of Human Rights, 36.
[247] Inter-American Commission of Human Rights, 38.
[248] Inter-American Commission of Human Rights, 45.
[249] Inter-American Commission of Human Rights, 45.

right to circulation that, because it disproportionally affected a group of people, also amounted to a violation of the right to equality.

Despite that, the Commission turned to the analysis of nondiscrimination in relation to access to justice, which was not done in any other case related to Afro-descendant populations. The Commission stated a connection between violence, discrimination, and due diligence, concluding that impunity constitutes discrimination in the access to justice and the duty to guarantee[250]. Therefore, the Commission found concrete actions in the access to justice that reflect the context of structural discrimination in the country, namely how the numerous class suits were inefficient[251], how the disappearance of teenagers in the case and the vulnerability they were subjected to originated their exclusion from the legal and institutional order of the state and kept them out of the real and juridical world[252]. According with the Commission: "*a mensagem enviada pelo Estado aos trabalhadores submetidos a condições de escravidão indicava que as autoridades não realizariam investigações nem protegeriam os trabalhadores das fazendas que se encontravam numa situação similar*"[253].

In "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil",* race was only briefly mentioned [254] . The Commission followed the same pattern to establish state responsibility for the acts of private actors as in the previous case[255], but the knowledge of the risk was connected to the obligations of regulation, supervision, and oversight of the factory

[250] Inter-American Commission of Human Rights, 56.
[251] Inter-American Commission of Human Rights, 56.
[252] Inter-American Commission of Human Rights, 60.
[253] Translation from the author: "*the message sent by the state to workers subjected to slave-like conditions indicated that the authorities would not conduct investigations or protect workers on the farms that were in a similar situation"* Inter-American Commission of Human Rights, 60.
[254] Inter-American Commission of Human Rights, "Observaciones Finales Presentadas Por La Comisión Interamericana (Caso 12.428)," 8.
[255] Inter-American Commission of Human Rights, "Informe de Fondo Presentado Por La Comisión Interamericana (Caso 12.428)," 20.

activities[256]and the special care of the state, in the case, derived from the situation of poverty they were subjected to[257]. According to the Commission:

> Em virtude de todos esses elementos, a Comissão considera que as mortes e lesões das 70 vítimas do presente caso não ocorreram de maneira isolada, mas como consequência de uma situação de abandono e indiferença por parte de um Estado que reconheceu ter conhecimento disso, sem adotar, por décadas, medidas para oferecer aos habitantes do Município condições para atender aos conteúdos mais mínimos do direito ao trabalho. Tampouco cumpriu suas obrigações de fiscalização e supervisão, ao não exigir das empresas implicadas nessas atividades medidas de devida diligência que permitissem a proteção desse direito[258].

iv. Favela Nova Brasília v. Brasil (2018)

In "*Favela Nova Brasília*", the context was used to measure the extent of state obligation. In this sense, the Commission elaborated on the background of security forces in Brazil, marked by extrajudicial execution, unlawful arrests, lack of investigation, impunity[259], violence against children, and excessive use of force[260]. Another distinguishing factor was the inertia in the investigations of the irregularities or lack of relevant procedural activity[261], which created impunity and institutional tolerance that reinforced the violent context and therefore encouraged it[262]. Based on those findings, the Commission found that the State violated the right to life in the case because the police exceeded the limits of the use of force in a context

[256] Inter-American Commission of Human Rights, 20.
[257] Inter-American Commission of Human Rights, 30.
[258] Translation of the author: "In view of all these elements, the Commission considers that the deaths and injuries of the 70 victims in the present case did not occur in an isolated manner, but as a consequence of a situation of abandonment and indifference on the part of a State that acknowledged that it was aware of this, without adopting, for decades, without adopting measures to offer the inhabitants of the municipality conditions to meet the most minimum content of the right to work. Nor has it fulfilled its inspection and supervision obligations, by not requiring the companies involved in these activities to take the companies involved in these activities with due diligence measures that would allow the protection of this right. the protection of this right." Inter-American Commission of Human Rights, 31.
[259] Inter-American Commission of Human Rights, "Informe de Fondo Presentado Por La Comisión Interamericana (Casos 11.566 e 11.694)," 25.
[260] Inter-American Commission of Human Rights, 20.
[261] Inter-American Commission of Human Rights, 34.
[262] Inter-American Commission of Human Rights, 25.

where the excess was common, as well as because the context of tolerance or encouragement of those practices is incompatible with effective protection to the right to life[263].

This connection is interesting because the Commission recognized that, in Rio de Janeiro (where the facts took place), there's a tendency for social and racial profiling regarding police violence[264]. However, as the Commission did not develop how and why certain racial groups (namely Afro-descendant populations) were disproportionately affected nor developed the relation between that discrepancy and the enjoyment of rights, the right to equality was not connected to the background or the application of international law.

The petitioners' claims

i. "Trabalhadores da Fazenda Brasil Verde V. Brasil" (2016) and "Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil" (2021)

In "*Trabalhadores da Fazenda Brasil Verde V. Brasil*", the petitioners used different strategies to connect the facts of the case to the principle of nondiscrimination. Ultimately, they used Article 1.1 of the Convention to do so[265]. However, those strategies were not necessarily translated to legal standings.

For one, the petitioners claimed that discrimination was a dimension of slavery, along with control, appropriation, and violence[266]. They further argued that structural discrimination justified the practices and allowed for the persistence of exploitation and slavery[267]. Moreover,

[263] Inter-American Commission of Human Rights, 49.
[264] Inter-American Commission of Human Rights, 23.
[265] "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de Las Presuntas Víctimas (Caso 12.066)," 5.
[266] 94.
[267] 94.

the petitioners sustained that in Brazil, contemporary slavery was produced in a context of multiple discrimination, be it socioeconomic, educational, or racial[268]. The argument was that black or brown men from the northeast region of Brazil were under great vulnerability and therefore were forced to accept precarious conditions of labor[269].

After that, the petitioners claimed that the structural process of inequality and exclusion refrained people from specific social sectors from accessing justice[270]. Through this argument, discrimination was not analyzed as a constituent of the phenomena (slavery) but as a factor that deterred the victims from accessing the legal system. Likewise, they claimed that, in this case, the lack of effective actions by the labor inspection and the recurrence of the facts highlighted a situation of structural discrimination in the state's response that effectively perpetuated the exploitation of certain groups[271].

Those arguments were not developed within legal standings. If discrimination were to constitute slavery, then the most reasonable claim would be that the violation of the right to equality or nondiscrimination only established the violation of Article 6 (freedom from slavery). The principle of nondiscrimination would not produce any further consequences. However, the petitioners claimed that the violation of the principle of nondiscrimination aggravated the violation of Article 6 and other connected rights.

On the other hand, the petitioners argued that the State violated the right to judicial protection and guarantees concerning the right to non-discrimination. In this sense, they were aligned with their claim that the right to judicial guarantees subsumed discrimination, as it was more of a cause that impeded victims from accessing the legal system than an independent violation. This

[268] 102.
[269] 103.
[270] 104.
[271] 136.

understanding was enhanced throughout the document. The petitioners argued, for example, that slavery originated multiple violations of human rights but did not include nondiscrimination or equality among the affected rights[272].

Ultimately, the petitioners shifted between finding discrimination the origin of a violation, as when they argued that discrimination was at the root of the submission of someone to slavery and led to violation of one's dignity[273]; and the consequence of the violation, evident when they claimed that slavery stripped away the possibility to exercise rights, and therefore puts the individual in an unequal position[274].

Finally, when specifically addressing the right to non-discrimination, the petitioners claimed that structural discrimination against Afro-descendant populations and people affected by poverty placed them in a situation of special vulnerability and attracted a special duty of care from the state[275]. Therefore, the violation of the right to nondiscrimination derived from the omission of the State to perform its aggravated duty of care in the face of a group in special vulnerability.

This pattern of argumentation was kept in the closing arguments[276]. However, by then, the link to discrimination was attached along the lines of poverty instead of racial imbalances[277]. The petitioners claimed that discrimination was an underlying influence in every aspect of the violation of Article 6 of the Convention, be it the perception of control, the possibility of the victims seeking resources, or the perpetuation of illegal practices[278].

[272] 106.
[273] 109.
[274] 111.
[275] 116.
[276] "Alegatos Finales Escritos Presentados Por Los Representantes," June 28, 2016, 29, 49 and 70.
[277] 30, 41.
[278] 98.

On the other hand, the petitioners in "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil"* had a way clearer and more focused legal standing related to the situation of Afro-descendant populations and the facts of the case. After highlighting that the facts were inserted in a historically unequal structure that placed certain groups in a situation of vulnerability[279], narrating the social conditions of the black population, and how historical developments led to the current exploitation system that affected them primarily[280], the petitioners claimed that victims of the case were in a situation of vulnerability[281]. In this sense, they argued that the right to equality enshrined in article 24 of the Convention, read in conjunction with article 1.1 of the same instrument, demanded from the state a special duty of care in the face of vulnerable groups[282] that Brazil did not oblige to[283].

In this sense, the right to equality was forecasted as an independent violation. The background of inequality and discrimination created a vulnerability that exposed certain groups to a situation of vulnerability, placing them at aggravated risk of violation of human rights[284]. Therefore, according to the petitioners, the omission related to the special care violated the right to equality, regardless of other violations that followed[285].

ii. Favela Nova Brasília v. Brasil (2018)

In "*Favela Nova Brasília*", the petitioners extensively described the broader context of police violence in Brazil. They explicitly conveyed, for example, that the main victims of lethal police

[279] "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de Las Presuntas Víctimas," 6.
[280] 7.
[281] 18.
[282] 18.
[283] 22.
[284] "Alegatos Finales Escritos Presentados Por Los Representantes," 49.
[285] 59.

violence in the country were black men[286]and that police violence was an indicator of the relations of segregation in Brazil[287]. However, even after claiming that police violence targeted specific groups, the petitioners did not argue for an independent violation of the right to equality or nondiscrimination. They also did not use racial discrimination as an underlying factor in the analysis of other rights.

The Court's standing

iii. "Caso Trabalhadores da Fazenda Brasil Verde V. Brasil" (2016) and "Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil" (2021)

In "*Trabalhadores da Fazenda Brasil Verde",* the Court mostly referred to the link between the situation of poverty, vulnerability, and obligations of States. Even within this connection, the legal liability stemming from structural issues was not clearly developed. All in all, the racial implications were not confronted by the Court.

Right at the beginning of the assessment of the facts, the Court provided a historical approach to slave labor in Brazil, tracing the phenomena back to colonial enterprises and, in current times, to poverty and property concentration[288]. Simultaneously, the Court recognized that the main victims of slave labor were poor, afro-descendant men between 18 and 40 years old[289]. According with the Court "*debido a su extrema pobreza, su situación de vulnerabilidad y su desesperación por trabajar, los trabajadores muchas veces aceptan las condiciones de trabajo*

[286] "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de Las Presuntas Víctimas (Casos11.566 e 11 .694)," 23.
[287] 24.
[288] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 27.
[289] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 28.

antes descritas"[290]. It was not clarified, however, whether the vulnerability stemmed from poverty, or another factor, particularly considering that the Court mentioned earlier several factors that could be read as points of vulnerability.

This uncertainty was accompanied by another interesting factor: the Court only sparsely mentioned nondiscrimination and the right to equality. For example, the Court chose to analyze the allegations of the Commission and the petitioners under the scope of Article 6 of the American Convention. The tribunal regarded the content of individual rights such as personal integrity, liberty, and restriction of freedom of movement as constitutive elements of slavery. It, therefore, subsumed its analysis to the analysis of Article 6[291]. Discrimination or racism was not among those constitutive elements. At the same token, while the Court focused on establishing that the case constituted a situation analogous to traditional slavery[292], little attention was paid to the victims of this type of exploitation or the reasons behind it. That underdevelopment was withstood even when the Court stated that the State had the responsibility to guarantee the creation of required conditions to impede the production of violation of the prohibition to slavery[293]. Maybe because of that, the Court mainly cited measures of prevention that could only be taken after the phenomena, such as investigating to identify and judge the responsible or adopting measures of protection and assistance to victims[294]. Only briefly, the Court stated that States must adopt preventive measures in specific

[290] Translation from the author: "*Due to their extreme poverty, their vulnerable situation and their desperation to work, workers often accept the working conditions described above*." Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 28.
[291] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 79.
[292] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 72.
[293] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 82.
[294] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 82.

cases in which it is evident that determined groups may be victims of slavery[295]. In any case, in the chapter focused on linking the duty to prevent and non-discrimination, the Court linked the State's responsibilities to take action in the face of the civil society organizations' reports of the existence of situation analogous to slavery in "*Brasil Verde*", and chose not to mention the existence of vulnerable groups[296].

On the other hand, the case was a benchmark in the Court's jurisprudence for the specific mention of structural discrimination under the independent analysis of Article 24 of the Convention. The court clarified that if discrimination is found in the guarantee of a given right established in the convention, the State is responsible for violating Article 1.1 and the substantive right in question. If, however, discrimination is manifested in unequal protection of internal law or its application, then the facts must be analyzed under Article 24 of the convention[297]. Moreover, the Court stated that all discriminatory treatment in relation to the enjoyment of any right guarantee in the convention is, *per se,* incompatible with the Convention[298]. If the state fails to respect and guarantee human rights through discriminatory treatment, then the state is internationally responsible[299]. In this sense, the Court specifically constructed a link between the obligations to respect and guarantee human rights and the principle of equality and nondiscrimination.

[295] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 82.
[296] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 83.
[297] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 86.
[298] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 86.
[299] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 86.

Most importantly, the Court stated that any person in a situation of vulnerability is entitled to special protection due to the special duty of the state to respect and guarantee human rights[300]. This special protection may be derived from a personal condition or specific situation, like extreme poverty or marginalization. If that condition or situation arises, the state must adopt positive measures. Based on that understanding, the Court established a jurisprudence that recognized a state's responsibility stemming from a situation of structural discrimination – which, in turn, reflected in a violation of article 1.1 of the Convention[301]. The discrimination was analyzed through class status, as follows:

> La Corte constata, en el presente caso, algunas características de particular victimización compartidas por los 85 trabajadores rescatados el 15 de marzo de 2000: se encontraban en una situación de pobreza; provenían de las regiones más pobres del país, con menor desarrollo humano y perspectivas de trabajo y empleo; eran analfabetas, y tenían poca o nula escolarización (supra párr. 41).

This understanding was brought back in "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil"*. While in the last case, it was unclear from where the Court had considered that the vulnerability stemmed, in "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus",* the victims were clearly identified. The Court signalized that the region where the violations took place was known for having a historical presence of Afro-descendant populations, that in turn, faced exclusion and restriction of several rights[302] and that the concerned factory mostly employed Afro-descendant women that lived in poverty and had a low level of education[303].

[300] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 87.
[301] Caso Trabalhadores da Fazenda Brasil Verde Vs. Brasil (Exceções Prelim inares, Mérito, Reparações e Custas) at 88.
[302] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 19.
[303] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 22.

Furthermore, the Court analyzed the violations of Article 24 and 1.1 of the convention, considering that the arguments of the commission and the petitioners focused on the discrimination suffered by the victims given their conditions as an afro-descendant women living in a situation of poverty; as well as the omission in the duty to adopt positive measures to guarantee their rights[304]. In the same token, the Court identified an intersection of discrimination factors, with a concurrence of poverty, gender, and race, besides the confluence of all of them[305]. Particularly, the Court traced back the conditions of discrimination suffered by Afro-descendant populations[306].

Having detected that the victims belonged to a group of special vulnerability, the Court established that the State was under a heightened duty of respect and guarantee[307]. Even more, the Court stated that Article 24 of the Convention demands the construction of material equality, defined as the adoption of positive promotion measures in favor of historically discriminated against or marginalized groups[308]. In this sense, according to the Court, the right to equality implies the correction of existing inequalities, the promotion of the inclusion and participation of historically marginalized groups, and the guarantee that individuals in positions of disadvantage effectively enjoy their rights[309]. Omission by the State to adopt such measures worsens the experience of victimization of marginalized groups[310]. In the words of the Court:

[304] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 52.
[305] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 55.
[306] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 56.
[307] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 57.
[308] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 57.
[309] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 57.
[310] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 57.

> En el caso concreto, este Tribunal ha determinado que las empleadas de la fábrica de fuegos hacían parte de un grupo discriminado o marginado porque se encontraban en una situación de pobreza estructural y eran, en una amplísima mayoría, mujeres y niñas afrodescendientes. Sin embargo, el Estado no adoptó ninguna medida que pueda ser valorada por la Corte como una forma de enfrentar o de buscar revertir la situación de pobreza y marginación estructural de las trabajadoras de la fábrica de fuegos, con atención a los factores de discriminación que confluían en el caso concreto.

To sum it up, from this understanding of the Court, structural discrimination was recognized as having legal consequences, and those consequences were deemed independent from other substantive rights. In this sense, it could be argued based on this jurisprudence that article 1.1 of the Convention is violated every time a State faces a situation of structural discrimination and does not adopt positive measures to reverse it. Moreover, the groups that face structural discrimination are considered vulnerable and demand the State's special duty of care. Finally, in the face of a violation of a substantive right, the situation can be reviewed under the context of structural discrimination, as the latter will determine the extent of the State's obligations in relation to that specific right, in conjunction with article 1.1 of the Convention.

In this case, it is interesting that the Court argued for the existence, in Brazil, of structural poverty[311]. However, there was no mention of structural racism, named as discrimination[312].

iv. Favela Nova Brasília v. Brasil (2018)

In stark contrast to the other cases, in "*Favela Nova Brasília*", the Court did not make a connection between the broader context and the obligations of the State. While the Court indeed mentioned that, in Brazil, the main victims of police violence were young black, poor, and unarmed individuals[313], that context did not determine the tone of the analysis of the judicial

[311] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 57.
[312] Caso Empleados de La Fábrica de Fuegos en Santo Antônio de Jesus Y sus familiares Vs Brasil (Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) at 56.
[313] Caso Favela Nova Brasília Vs. Brasil (Exceções Preliminares, Mérito, Reparações e Custas) at 28/29.

guarantees in the case. Indeed, the Court recognized that a series of omissions and negligence marked police actions at the time[314]. But there was no analysis of why those omissions occurred, what was behind them, and who suffered the most. The principles of equality and nondiscrimination were not mentioned.

Conclusion

The essential characteristic of the Brazilian cases was the Court's willingness – to a certain degree - to abide by the petitioners' standing on structural racism, despite the conservative approach adopted by the Commission. In this sense, three different approaches were visible in the Brazilian cases, in a more starking way than the Argentinian's and the Colombian's: the first one, more conservative, adopted by the Commission; the second one, bolder, adopted by the petitioners, and the third one, in an intermediate stance, adopted by the Court.

The one-sided and conservative approach adopted by the Commission was more visible in "*Trabalhadores da Fazenda Brasil Verde*" (2016). In this case, the Commission acknowledged the existence of a historical and social problem that disproportionally affected Afro-descendant men that were poor and came from the northeast region of Brazil, which could lead to the use of the concept of structural racism. However, the chosen path of the Commission was to display the phenomena as *de facto* discrimination[315]. The discrimination, in turn, prompted the obligation of the State to adopt sufficient and effective measures to guarantee without discrimination the rights discussed in the case.

While the Commission used innovative understandings that could have sewed together a new legal paradigm, it leaned on inadequate terminologies (discrimination instead of structural

[314] Caso Favela Nova Brasília Vs. Brasil (Exceções Preliminares, Mérito, Reparações e Custas) at 53.
[315] Inter-American Commission of Human Rights, "Escrito de Sometimiento Del Caso e Informe de Fondo Presentado Por La Comisión Interamericana de Derechos Humanos (Caso Nº 12.066)," 45.

racism) and arguably inadequate legal classifications (right to equality as subsumed to other rights instead of having independent standing). This trend is interesting to follow considering that the case related to context analogous to slavery, where not only could the right to equality have been developed further, but also demanded a more advanced understanding from the Commission.

Where the racial element and discrimination were not as obvious, the Commission was even less bold. In "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus" (2021),* which also touched upon the responsibility of the State for the actions of private actors, race was not developed at all. The Commission based the discussions of the special duty of the state on the victims' poverty situation[316]. By the same token, in "*Favela Nova Brasília" (2018),* the Commission acknowledged the context of racial profiling within the police in Brazil. Still, it did not develop how this background translates into the State`s responsibility.

The petitioners, however, framed the racial issues distinctively. The oldest case is "*Trabalhadores da Fazenda Brasil Verde" (2016),* where the petitioners used multiple framing strategies. On the one hand, the petitioners claimed that discrimination constituted slavery, in other words being an undissociated element of the phenomena[317], and argued that the violation of the principle of nondiscrimination aggravated the violation of Article 6 and other connected rights. On the other, they argued that discrimination was a cause that impeded victims from accessing the legal system and therefore constituted an independent violation alongside the violation of substantive rights. At the same time, they shifted between finding discrimination as the cause of the violation[318]and the consequence of the same[319]. When specifically dealing

[316] Inter-American Commission of Human Rights, "Informe de Fondo Presentado Por La Comisión Interamericana (Caso 12.428)," 20.
[317] "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de Las Presuntas Víctimas (Caso 12.066)," 94.
[318] 109.
[319] 111.

with the right to non-discrimination, the petitioners used the Commission's claim that structural discrimination placed the victims in a situation of special vulnerability and required a special duty of care from the State[320].

All in all, despite using the terminology discrimination instead of racism or structural racism, the petitioners seemed to adhere to structural racism (what they call discrimination). Stemming from the same fact (the one's subjection to a situation analogous to slavery), they conceptualized the influence of discrimination in the origin of the fact, the causes behind it, and the consequences after it. In this sense, they were aligned with Bonilla-Silva's understanding of structural racism: a system that conforms to society hierarchically and produces racially hierarchical categories in all social relations[321]. This broader interpretation is what explains why structural racism would constitute the violation of rights (one of the elements of modern slavery would be discrimination and segregation along racial lines), causes the violations of rights (the pattern established by structural racism would create modern slavery) and reverberates in the consequences of violation (the victims would have less access to courts as they would be more vulnerable to the violation of rights).

This approach is already bolder than the one adopted by the Commission when dealing with structural racism. However, overall, the petitioners used too much of an uncoordinated strategy. The petitioners adopted a rich conceptualization but failed to translate the richness into the legal standing – for example, they did not argue that modern slavery originates a violation of nondiscrimination and equality; they claimed that the principle of nondiscrimination aggravates the violation of article 6 and other connected rights instead of disaggregating them;

[320] 116.
[321] Bonilla-Silva, "Rethinking Racism," 469.

and over-focused on the influence of discrimination in the violation of article 6, instead of furthering the relation in the other concerned rights.

In "F*avela Nova Brasília*", the petitioners did not develop the relationship between police violence and discrimination to construct a solid background context capable of influencing legal standing or State responsibility. Therefore, structural racism was not even mentioned.

On the other spectrum, in the newest studied case, *'Empregados da Fábrica de Fogos de Santo Antônio de Jesus",* the petitioners positioned the unequal structure that maintains racial hierarchization well enough to argue for an independent claim on the right to equality. They claimed that the exploitation system generated the State a special duty to protect stemming from articles 1.1 and 24 of the Convention, regardless of other violations that may follow[322], while also claiming that the affected population was in a situation of vulnerability that aggravated the responsibility of the State in case of violations of substantive rights.

Facing those almost opposing framing strategies, the Court overall decided on an intermediary stance. This is clearer in "*Trabalhadores da Fazenda Brasil Verde",* where the Court's understanding was somewhat middle-ground between the Commission's conservative position and the petitioner's multiple strategies that were not translated into placement in the legal standing.

On the one hand, the Court indeed adhered to the idea of structural discrimination, not only to recognize its existence but also to state that the phenomena attracted to the State an obligation to adopt positive measures. Conversely, the said recognition was attached to class vulnerabilities instead of racial ones. Moreover, the Court only sparsely mentioned

[322] "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de Las Presuntas Víctimas," 18.

nondiscrimination and the right to equality in the analysis of substantive rights, besides having left unclear whether the belonging of a specific race constituted a situation of vulnerability.

In "*Favela Nova Brasília v. Brasil (2018)*", the Court did not address race whatsoever in the legal standings, much like the petitioners and the Commission.

In "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus" (2021),* the Court used the basis that it had already settled in "*Trabalhadores da Fazenda Brasil Verde"* to reaffirm that structural discrimination has indeed legal consequences. The Court brought back the reflection on structural discrimination to declare that the right to equality implies the correction of existing inequalities and the promotion of the inclusion and participation of historically marginalized groups, and the guarantee that individuals in a position of disadvantaged effective enjoy their rights, besides stating that omission by the State in adopting such measures worsens the experience of victimization of the marginalized group. Furthermore, the Court set three legal consequences that follow the recognition of structural discrimination: a) article 1.1 of the Convention is violated every time a State faces a situation of structural discrimination and does not adopt positive measures to reverse it; b) the groups that face structural discrimination are considered to be in special vulnerability and demands from State special duty of care; c) in the face of a violation of a substantive right, the situation can be reviewed under the context of structural discrimination, as the latter will determine the extent of the obligations of the State in relation to that specific right, in conjunction with article 1.1 of the Convention. However, the Court decided to refer to poverty as structural poverty and structural racism as discrimination.

The patterns of the Court showcase that the decision has been following more or less the lead set by the petitioners. The Court is as forward-looking as the petitioners are willing to go in terms of legal standings and placement of State-responsibility, albeit the recognition of

structural racism is not developed in the jurisprudence even in "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus",* where the petitioners stretched the understanding of the phenomena. While this research does not intend to tackle the hesitancy of the Court to refer to structural racism as such, the hesitation is worth noting and does little to help address the most prominent indication of structural racism in Brazil: the need to implement or restructure public policies, that focus on African-descendant populations, in the quest to reverse the vulnerability and marginalization they are subjected to[323]. The Court did not use the background of human rights protection to incorporate concrete additional and complementary obligations to the State, as it did in other occasions related to the rights of health or education[324]. Therefore, it seems that the Court, much like it is done within the traditional approach toward racism, did not account for how policies (or the lack thereof) produce racial harm[325]. The absence of those standards and developments overlooks how institutional arrangements play a role in constructing a society and, therefore, how institutional tinkering can reshape racial meanings toward a more equitable framework[326].

Colombian Case [Caso de las comunidades afrodescendientes desplazadas de la Cuenca del Río Cacarica (Operación Génesis), Judgment of November 20, 2013]

Summary of the case

The case was presented by the "Comisón Interclesial de Justicia y Paz" (hereinafter the "petitioners". It concerns the State's responsibility for alleged human rights violations committed in connection with "Operación Génesis", near the territories of the Afro-descendant

[323] Carneiro, *Racismo, sexismo e desigualdade no Brasil*, 33.
[324] Nash Rojas et al., "Impacto Del Derecho Internacional de Los Derechos Humanos En La Protección Jurisdiccional de Grupos En Situación de Discriminación Estructural En Chile," 228.
[325] Powell, "Structural Racism," 794.
[326] Powell, 813.

communities of the Cacarica River basin, which resulted in the death of Marino López Mena and the forced displacement of hundreds of people, many of whom were members of the Afro-descendant communities living along the banks of the Cacarica River.

The petitioners claimed that the disputed territory had been ancestrally inhabited by the Afro-descendant populations, which, in turn, developed deep community and collective bonds with the land, besides distinctive cultural practices and communal lifestyle[327]. They also argued that "Operación Genesis" was carried out by the national army of Colombia with the collaboration of paramilitary groups and targeted the communities, causing forced displacement, terror, and loss of land of projects of life[328]. According to the victims, Marino López was tortured and killed, and dozens of assassinations, forced disappearances, threats, and harassment were carried out against the communities. Additionally, the properties of the communities were destroyed, and private companies unlawfully exploited the land[329]. This context showcased the generalized and systematic violation of human rights faced by the Afro-descendant populations in Colombia that lived along the Cacarica River, which allegedly constituted a violation of individual and collective rights and a crime against humanity[330].

The Commission supported the claims of the petitioners and found that the State was responsible for the violation of Articles 4, 5, and 1.1 of the American Convention in relation to Marino López; articles 1.1, 5, 11, 17, 19, 21, and 24 of the same instrument in relation to the community, their woman and their children, besides article 8 and 5 of the Convention and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture[331].

[327] Giraldo et al., "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de La Presunta Víctima," 6.
[328] Giraldo et al., 6.
[329] Giraldo et al., 7.
[330] Giraldo et al., 7.
[331] Inter-American Commission of Human Rights, "Informe de Fondo (No. 64/11, Caso 12.573)," 3.

The State recognized its international responsibility concerning the violation of articles 8 and 25 of the Convention concerning Marino López and the community[332]. However, it argued that: i) the displacement and the death of Marino López were a result of actions of paramilitary forces only[333]; ii) the "Operación Génesis" aimed at hitting a paramilitary group's fronts and rescuing kidnapped children and therefore did not target civilian[334]; iii) general context should not be taken into consideration in the assessment of the case, only the specific facts concerning "Operación Génesis"[335]; iv) the State never collaborated with paramilitary or armed groups[336].

The Commission's claims

To trace back the relation that the Commission drew between the facts of the case and the race element, it is important to break down the main aspects of rights delineated by the petitioners: a) the individual rights of Marino López and his family; ii) the collective rights of the members of the afro-descendant communities, before, during and after the displacement. Those were two big umbrellas under which the Commission regarded the case. The interesting feature of this case is that they were carefully intertwined, albeit separate.

Even before assessing the rights, the Commission signalized that the geographic, historical, socioeconomic, and cultural situation of the Afro-descendant population in Colombia would be decisive in the case analysis[337]. That is the first ground laid by the Commission: the situation of the Afro-descendant communities in Cacarica[338]. The Commission highlighted three aspects: i) that the region held a rich biodiversity and was mainly occupied by an Afro-

[332] República de Colombia, "Alegatos Finales Escritos Presentados Por El Estado (Caso 12. 573)," 2.
[333] República de Colombia, "Escrito de Contestación a La Demanda y Observaciones al Escrito de Solicitudes, Argumentos y Pruebas Presentado Por El Estado," 25.
[334] República de Colombia, 24.
[335] República de Colombia, 31.
[336] República de Colombia, 32.
[337] Inter-American Commission of Human Rights, "Informe de Fondo (No. 64/11, Caso 12.573)," 21.
[338] Inter-American Commission of Human Rights, 22.

descendant population; ii) that the communities placed there had traditional practices and distinctive cultural identity and were entitled to collective property, which was recognized by national legislation; iii) that the communities had long suffered acts of violence by armed groups that wanted to take control of the region[339].

Additionally, the Commission pointed out that the armed conflict in the region caused widespread violence against the Afro-descendant communities, including massacres, executions, disappearances, torture, sexual violence, etc[340]. The acts were carried out both by state agents and paramilitaries groups and aimed at obtaining information and perpetuating social cleansing[341]. On that note, the Commission noted that Afro-Colombians were victims of what they called active and passive discrimination of the State, which accounts for the systemic, official, and nonofficial discrimination stemming from Colombia towards the groups[342]. Following this puzzle, the Commission found indications that the displacement of the communities was not voluntary, to run away from the ongoing conflict, but rather specifically ordered by the armed actors in their invasions[343].

Another interesting document was the decision issued by the Constitutional Court of Colombia in 2004. The Commission displayed that the Court characterized the displacement as an "unconstitutional state of affairs", as it constituted a massive and reiterated violation of human rights facilitated by the structural failures of the public policies of the State[344].

The path followed by the Commission led to a declared extensive interpretation of the American Convention[345], at least when it comes to the analysis of the duty to protect and

[339] Inter-American Commission of Human Rights, 23.
[340] Inter-American Commission of Human Rights, 24.
[341] Inter-American Commission of Human Rights, 24.
[342] Inter-American Commission of Human Rights, 25.
[343] Inter-American Commission of Human Rights, 25.
[344] Inter-American Commission of Human Rights, 26.
[345] Inter-American Commission of Human Rights, 26.

prevent of the States. Bottom line, the Commission stated that given the circumstances, the State was under a special and heightened duty to protect and prevent human rights violations, and the communities were under a special context of vulnerability[346]. However, it was unclear if that special duty and this vulnerability stemmed from the displacement only or the combination of displacement and racial discrimination. The ambiguity was evident in this excerpt:

> Los grupos paramilitares habían anunciado que iban a tomar el control de la zona por lo que era razonable, que el Estado, que hacía presencia en el área com la Brigada XVII del Ejército Nacional, tuvlera conocimiento del riesgo que significaban las amenazas de incursiones paramilitares para las comunidades afrodescendientes. Esta situación de riesgo para la población civil y el hecho que dicha población pertenezca a um grupo en especial riesgo de violación de sus derechos humanos obliga a um deber de protección, en este caso especial, por parte del Estado. Por lo tanto, la Comisión considera que para el caso concreto era razonable pensar que este riesgo que el Estado adoptara medidas conforme a esse deber especial de prevención y protección de la población civil afrodescendiente, por lo que Colombia tenía la obligación de adoptarlas y no las adoptó[347].

The Commission regarded the forced displacement in Colombia at that time as a humanitarian catastrophe[348] that created multiple human rights violations[349]. The Commission also mentioned the Constitutional Court of Colombia's decision declaring that people affected by forced displacement were more vulnerable and required special care[350]. In that case, the character of a "specially protected group" flowed from the displacement[351]. On the other hand, the Commission mentioned the Constitutional Court's recognition of the Afro-descendant population as one that falls under special constitutional protection[352] and how the displacement disproportionately impacted the group[353]. In this sense, it appeared like the Commission argued that displacement, regardless of the group affected, generated a special duty to prevent and

[346] Inter-American Commission of Human Rights, 58.
[347] Inter-American Commission of Human Rights, 62.
[348] Inter-American Commission of Human Rights, 70.
[349] Inter-American Commission of Human Rights, 72.
[350] Inter-American Commission of Human Rights, 72.
[351] Inter-American Commission of Human Rights, 74.
[352] Inter-American Commission of Human Rights, 73.
[353] Inter-American Commission of Human Rights, 74.

protect in the State and a special layer of protection for the displaced[354]. However, considering that the targeted group, in this case, was Afro-descendant, which already harbored special protection in Colombia, the duty was even more heightened[355].

The question is then how and why that differentiation mattered, particularly because the Commission did not deepen this analysis. For example, the Commission pointed out that children have a right to physical and emotional protection but did not link this development to the belonging of a racialized group, for example[356]. This connection could have been developed, as it was done by the Constitutional Court of Colombia, which highlighted that the displacement promoted a rupture of the life projects of afro Colombian children, both in its individual and collective dimensions[357].

Furthermore, the Commission recognized that even before the displacement, the Afro-descendant populations in Cacarica were victims of systematic discrimination, which was worsened by the armed conflict and the lack of data[358]. The Commission also noted that the discrimination suffered by the group following the displacement demanded an extensive interpretation of the American Convention[359]that encompassed notions of intersectionality[360] and obligations to the State to refrain from discriminating, prohibit discriminatory acts in its jurisdiction, and adopt positive measures to combat discrimination[361]. However, the Commission did not mention – it didn't even address – which measures would be and how they would differ from other measures adopted for white displaced populations. This was not

[354] Inter-American Commission of Human Rights, 79 and 85.
[355] Inter-American Commission of Human Rights, 74.
[356] Inter-American Commission of Human Rights, 82.
[357] Inter-American Commission of Human Rights, 82.
[358] Inter-American Commission of Human Rights, 89.
[359] Inter-American Commission of Human Rights, 90.
[360] The Commission defined intersectionality as situations of multiple discrimination. Inter-American Commission of Human Rights, 92.
[361] Inter-American Commission of Human Rights, 93.

developed in the closing arguments, which for the most attached to the special situation of vulnerability to the displacement[362].

As for the individual aspect of the case, the Commission carefully tangled it with the collective. The Commission explicitly stated that the torture and death of Marino López were inserted in a context of armed conflict that, through Operation Génesis, aggravated the violence and violations of human rights faced by the Afro-descendant communities[363]. In this sense, the individual violation could only be understood – and ultimately only existed – because of the broader background pattern of systematic violation of human rights against Afro-descendant communities. The Commission even further claimed that this pattern – in the case constituted by violent operatives causing the death, torture, and disappearance of the communities -, as it was persistent and directed at the same group, amounted to a crime against humanity[364].

The petitioners' claims

Within the petitioners' arguments, the race element was distinctively relevant. The background of the situation of Afro-descendants in Colombia was the first element of fact established in the document[365]. They highlighted that albeit Afro-descendant populations were the second largest ethnic-racial group in Colombia, they have suffered a historical pattern of discrimination, exclusion, and socioeconomic disadvantages[366]. Inserted in this context, the concerned group descended from the freed slave after 1850, gathered along the Cacarica River and established a communal lifestyle[367]. This communal lifestyle included the particular role

[362] Inter-American Commission of Human Rights, "Alegatos Finales Escritos Presentados Por La Comisión InterAmericana (Caso 12.573)," 25.
[363] Inter-American Commission of Human Rights, "Informe de Fondo (No. 64/11, Caso 12.573)," 66.
[364] Inter-American Commission of Human Rights, 67.
[365] Giraldo et al., "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de La Presunta Víctima," 13.
[366] Giraldo et al., 14.
[367] Giraldo et al., 16.

of women and the care of children[368]. In this sense, the group was marked by the special, historical, and traditional use of the land and cultural distinctiveness, all of which provided them with the subsistence the community needed[369]. The attachment to the land and communal living was, therefore, not only a cultural trait but a way out of the marginalization and exclusion faced by Afro-Colombians in the State[370].

Despite the attempt to carry out a dignified life in the community, the petitioners pointed out that business activities threatened their ownership of the land and the use therein and used violence, fraud, and unlawful measures to explore the region[371]. According to them, the State was aware of the unlawful takeovers from businesses and tolerated and consented to them[372]. The petitioners showcased, then, that Afro-descendant populations in Colombia either lived in urban areas under marginalization, poverty, and exclusion from the State or had their livelihood threatened by private actors and the State.

By highlighting those aspects even before the assessment of the facts of the case (the State operations and the displacement), the petitioners covered three questions left unattended by the Commission: i) how and why the racial identity of the group played a role in the evaluation of the responsibility of the State; ii) how the background situation of the group related to the violation of the right to equality and nondiscrimination; iii) how the race element influenced the analysis of the extent of the violation of other rights.

In alignment with the Commission's understanding, the facts of the case related to an aggravated responsibility of the State[373]. This aggravated responsibility stemmed from the

[368] Giraldo et al., 19.
[369] Giraldo et al., 18.
[370] Giraldo et al., 18.
[371] Giraldo et al., 16.
[372] Giraldo et al., 23.
[373] Giraldo et al., 111.

knowledge of Colombia of the risks and attacks that the group was already subjected to and the fact that the Afro community was in a situation of vulnerability[374]. The novelty of the arguments of the petitioners in relation to the Commission is that the former laid out the racial identity of the group as the benchmark from which both the vulnerability and the content of the rights at hand should be analyzed[375]. The petitioners argued that the acts of violence, the armed conflict, and the subsequent forced displacement disproportionately affected the Afro-descendant population because they were forced to leave their ancestral land and therefore abandoned their livelihoods, communal living, values, and social practices, besides having been submitted to precarious living conditions, limited access to social goods, and marginalization[376]. In this sense, the State had a special duty to prevent and protect those communities, considering their particular needs and the risks that they had been historically submitted to[377]. This entailed special regard for the group's cultural distinctiveness and food, hygiene, and socialization customs[378].

The analysis made by the petitioners also tightened the relation between the background situation of the group, the facts of the case, and the analysis of the violation of the right to equality and nondiscrimination. They argued that the right to equality was closely related to the State's duty to carry on positive obligations to eliminate material inequality[379]. Based on this understanding, they analyzed the specific circumstances of the case and the underlying context of the violations. Ultimately, they claimed that the violence, intimidation, and displacement were nothing but a materialization of a precedent context that denied the

[374] Giraldo et al., 111.
[375] Giraldo et al., 101.
[376] Giraldo et al., 125.
[377] Giraldo et al., 123.
[378] Giraldo et al., "Alegatos Finales Escritos Presentados Por Los Representantes," 129.
[379] Giraldo et al., "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de La Presunta Víctima," 140.

community's rights[380]. Therefore, the circumstances of the case were regarded as a symptom, not the disease. To use the words of the document: "*El desplazamiento forzado, se presenta como una de las expresiones de la situación de desventaja en la que se encuentra la población afrodescendiente respecto del resto de la población de país*"[381]. The disease was the denial of the community's rights that already placed them in a disadvantageous position to start with[382]. Sided with the circumstances of the case, the lack of positive actions from the State promoted the violation of the right to equality[383]. For that reason, the petitioners demanded more than temporary measures of redress. They required the development of long-term projects of life[384]. Even further: from this understanding, the petitioners claimed that the violation of rights preceded the facts of the case, being contemporary to the inability of the State to eliminate the ongoing disadvantaged faced by the Afro descendant populations[385].

Finally, they addressed how the race element influenced the analysis of the extent of the violation of other rights. Bottom line, they affirmed that "*los derechos que encontramos violados por el Estado se deben interpretar en un enfoque diferencial, a partir de la condición de afrodescendientes de las víctimas del presente caso*"[386]. Consequently, besides reserving a singular chapter to analyze the developments of the racial element to the understanding of the right to equality enshrined in Article 24 of the Convention, the petitioners analyzed how the racial identification of the group, language, and cultural practices should be used to evaluate the right to life[387], family[388], honor[389], etc. To illustrate, the petitioners claimed that Afro-

[380] Giraldo et al., 112.
[381] Giraldo et al., 153 and 155.
[382] Giraldo et al., 155.
[383] Giraldo et al., 154.
[384] Giraldo et al., "Alegatos Finales Escritos Presentados Por Los Representantes," 55.
[385] Giraldo et al., 129.
[386] Giraldo et al., "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de La Presunta Víctima," 101.
[387] Giraldo et al., 124.
[388] Giraldo et al., 134.
[389] Giraldo et al., 130.

descendant children were particularly affected by the displacement, as the loss of the land was followed by disruption of family stability, full development, and communal bonding[390].

The Court's standing

The Court advertised the tone under which the decision would be discussed very early on. When mentioning the assessment of facts, the Court directly delved into the circumstances of the case, mentioning the "Operación Génesis" and the displacement and leaving untouched the claims related to the group identity and the consequences of historical discrimination and marginalization they had been subjected to[391]. The Court qualified the population at hand: it described how they were predominantly Afro-descendants and lacked basic needs[392], besides having cited NGO reports pointing to the condition of marginalization, vulnerability, and segregation of the communities[393]. But this was as far as the Court was willing to yield to the arguments provided by the petitioners concerning the connection between their racial identity and the violations.

The case was strictly reviewed under the circumstances of the case. The Court focused on the attempt of the paramilitary and other armed groups to take control of the disputed region[394], the relation between the violent endeavors of those groups and the displacement[395], and the illegal exploitation of the territory after the displacement[396] and spent quite a considerable

[390] Giraldo et al., 139.
[391] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 29.
[392] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 31.
[393] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 32.
[394] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 35.
[395] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 52.
[396] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 57.

amount of the decision assessing the proofs and sorting out controversies of facts[397]. Particularly, the Court concluded that no evidence supported the claim that the bombing carried out in "Operación Génesis" targeted the civilian population and therefore stated that the State was not responsible for violations of articles 4 and 5 of the Convention[398].

On the other hand, the Court established that the case provided proof that State agents, especially army members, collaborated with the armed groups in the region, facilitating a context of omission and coordination between them[399]. From this context of collaboration alone, the Court drew its conclusions concerning the majority of the allegations of the case, namely the right to life and personal integrity in relation to Marino López (articles 4.1, 5.1, and 5.2 of the Convention in relation with article 1.1 of the same instrument) and the right to life, personal integrity, and circulation and residency (which incubated the right not to be forced displaced) concerning the communities[400].

Ultimately, the Court considered that the forced displaced were directly related to the actions of the paramilitary groups in the context of "Operación Cacarica". As it was proved that State agents collaborated with the group and that the operation could not have happened without this coordination, the Court established the State's responsibility under international law[401]. By adopting this interpretation, the Court reviewed the situation through the same lens as other displacements in other areas of Colombia[402] . It, therefore, refused the theory of a singularity

[397] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 89.
[398] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 90.
[399] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 95.
[400] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 106.
[401] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 106.
[402] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 105.

of the case. If the case situation were, bottom line, attributed to the private actors and could have happened with other groups, nothing about the context of Afro-descendant populations stood out as needing special regard.

For that reason, the analysis conducted by the Court was way less developed than the one presented by the Commission or the petitioners. For example, the Court only mentioned the vulnerability stemming from the displacement, besides pointing out how the forced displacement disproportionately impacted rural populations, women, and children[403]. It did not mention the vulnerability under the lens of the population itself and how the context of previous marginalization and discrimination contributed to the special needs the group required. Moreover, in opposition to the petitioner's claims, the Court was hesitant to recognize the communal lifestyle of the Afro-descendant population in Cacarica and their consequent cultural distinctiveness[404]. Therefore, the Court measured the States actions during the displacement according to general minimum standards[405]instead of the specific needs of the community; it also considered that there was not enough information on the communal lifestyle of the Afro-descendant populations in Cacarica. to assess possible violations to the right to family[406]; and did not cite any of the specificities brought up by the petitioners concerning the relation between the right to children to develop, the project of life and connection with the communal lifestyle of the group when regarding the violation of children's rights in the case[407].

[403] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 112.
[404] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 115.
[405] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 115.
[406] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 115.
[407] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 116.

The Court adopted a strict interpretation of the right to equality and nondiscrimination. It signalized that Article 1.1 pertains to the general obligation of the State to respect and guarantee the enjoyment of the rights of the Convention without discrimination, while Article 24 protects the right of equality before the law[408]. Based on that, the Court dismissed the claims of violation of articles 1.1, 11.2, 17, and 24 of the Convention, arguing that the petitioners did not point out which internal norms or applications of the norm were contrary to the convention[409]. In addition, the decision held that:

> En segundo término, el Tribunal nota que otros alegatos referidos a la obligación de garantizar los derechos sin discriminación también fueron presentados con relación a la falta de atención diferenciada para los desplazados por su condición de mayor vulnerabilidad. Al respecto, la Corte toma nota que ni la Comisión ni los representantes han presentado alegatos e información específica que permitan analizar esas presuntas violaciones a la luz de las disposiciones de la Convención Americana[410].

Under a similar strict interpretation, the Court found that the State violated the right to property of the communities by simply assessing that the territory had been assigned by national law to the community and the properties therein were destructed at the same time as that the land was exploited without permission, which amounted to the violation[411]. The Court did not place any special regard on the connection that the communities had with the land or how the loss of the land impacted their vulnerability as Afro-descendant populations.

Conclusion

In "*Comunidades afrodescendientes desplazadas de la Cuenca del Río Cacarica*", the petitioners and the Commission adopted a specific approach towards structural racism. They

[408] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 117.
[409] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 117.
[410] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 118.
[411] Caso de Las Comunidades Afrodescendientes Desplazadas de La Cuenca Del Río Cacarica (Operación Génesis) vs. Colombia ((Excepciones Preliminares, Fondo, Reparac iones y Costas) at 122.

both recognized the Afro-descendant populations living along the Cacarica River as one with cultural distinctiveness, traditional practices, and entitlement to collective property. To an extent, the Commission agreed with the petitioners that Afro-Colombians were victims of structural racism in the country, as the Commission specifically stated that the group was a victim of systemic, official, and nonofficial discrimination[412]. Moreover, the Commission was also aligned with the petitioners regarding the link between the individual aspect of the case, related to the death of Marino López, and the broader background pattern of systematic violation of human rights against Afro-descendant communities that were victims of systemic, official, and nonofficial discrimination. Moreover, the Commission was also aligned with the petitioners with the link between the case's individual aspect, related to Marino López's death, and the broader background pattern of systematic violation of human rights against Afro-descendant communities[413].

Their difference lay in how deeply they were willing to connect structural racism to the State's responsibility in the case. While the Commission was more modest, arguing that the community was under a special situation of vulnerability that created an aggravated responsibility from the State[414], the petitioners claimed that racial identity played a fundamental role in the analysis of the content of the rights. In this sense, the latter not only claimed that the State had a special duty to prevent and protect the group, considering their particular needs and the risks that they had been historically subjected to[415], but also that the violence and the displacement were consequences of a precedent context of denial of rights. In this sense, their requirements exceeded temporary measures and touched upon long-lasting positive measures

[412] Inter-American Commission of Human Rights, "Informe de Fondo (No. 64/11, Caso 12.573)," 25.

[414] Inter-American Commission of Human Rights, "Informe de Fondo (No. 64/11, Caso 12.573)," 74.
[415] Giraldo et al., "Escrito de Solicitudes, Argumentos y Pruebas Presentado Por Los Representantes de La Presunta Víctima," 123.

to reverse inequality[416]. Moreover, they included racial awareness in the analysis of the obligations of the State concerning the right to life, family, honor, protection of children, etc. The statement was that marginalization (structural racism) intrinsically preceded the violation; the latter would not exist without the former. Therefore, all the rights under the scrutiny of the Court should consider the marginalization when evaluating the State's responsibility on the matter and connect structural racism to the State's responsibility in the case.

The Court went in an entirely different direction. It did not abide by the Commission's claim that the communities were under special vulnerability given their race identification and did not fully recognize the cultural distinctiveness of the group. Moreover, it did not recognize any violation of the right to equality.

Given that, in Colombia, structural racism manifests in the difficulties in effectively implementing targeted public policies for African-descendant populations based on the intersections between race and ethnicity and the struggles faced by those populations concerning armed conflict and dispossession, the decision of the Court presented itself as a refusal to advance the culture of human rights in that regard, refraining from assisting black movements from enjoying their rights.

This is even more worrying considering the influence of the Court on Colombia's behavior, from the government to judicial practice. For example, the Colombian Constitutional Court often uses the interpretation of the Inter-American Court to review national laws and practices[417]. Colombia was cited as an example of a constitutional order in which the Inter-American's authority shapes state behavior, law, and politics outside the individual level[418]. Especially in this context, according to Huneeus (2016), "*the judgments of the IACtHR are not*

[416] Giraldo et al., "Alegatos Finales Escritos Presentados Por Los Representantes," 55.
[417] Huneeus, "Constitutional Lawyers and the Inter-American Court's Varied Authority," 179.
[418] Huneeus, 181.

only a tool pushing for state compliance on the international plane following a judgment; they are also a tool for challenging laws and practices before the domestic judiciary."[419] At the same token, scholarship has been calling attention to the transnational impact of the Court's jurisprudence: the order from the Court has a regional impact, reaching not only the case under judicial review but other cases and States[420].

When the Court ruled out most of the petitioners' claims concerning reparations, providing monetary reparations below the standard offered in similar cases[421], the Court denied the community recognition, compensation, and aid within the international human rights law in their quest for racial justice. And more: The Court directly contradicted the ongoing dialogue between afro Colombian social movements and the Inter-American Commission of Human Rights. For years, they had strategically used the human rights language as a tool to promote the right to life, visibility, the elimination of structural racism, and the right to define their development proposal[422]. By ignoring those developments, the Court aligned with the State's historical position of denying recognition and thus maintaining systemic poverty and racism as it stands[423], and moved backward from several of its objective for the region, such as serving as catapults for civil society to foster dialogue with the government and denounce violations of human rights, or combat social exclusion.

This can negatively impact the development of international judicial decisions on behalf of the community, as well as national laws and public policies sensitive to the group's struggles. By denying the singularity of the case, the Court allowed state organs to do the same.

[419] Huneeus, 187.
[420] Ventura-Robles, "EL CONTROL DE CONVENCIONALIDAD Y EL IMPACTO DE LAS REPARACIONES EMITIDAS POR LA CORTE INTERAMERICANA DE DERECHOS HUMANOS," 208.
[421] Niño, Salazar, and Rodríguez, "El impacto del control de convencionalidad en la jurisprudencia del Consejo de Estado colombiano en la reparación a víctimas de graves violaciones a derechos humanos," 171.
[422] Bonilla, "Racismo y Derechos Humanos En Colombia - Racismo e Direitos Humanos Na Colômbia," 92.
[423] Bonilla, 93.

COMPARATIVE ANALYSIS OF THE CASES INVOLVING ARGENTINA, BRAZIL AND COLOMBIA

The evaluation of the cases related to structural racism against African-Descendant populations points to a discrepancy between the Inter-American Court project for Latin America (to consolidate international jurisprudence, push for structural changes and promote an *ius commune* in the region, and develop public policies that incorporate human rights) and the performance of the Court in the cases themselves.

Even in the small sampling presented in the research, there was no consistency in the approach adopted by the Court, refraining from the construction of solid jurisprudence. Moreover, the Court was hesitant to recognize structural racism as such, although they recognized structural poverty.

To evaluate the repercussions of those inconsistencies, I will draw from McCarty et al. l (2023) research on structural racism. Although their research focused on the psychologist's practices toward combatting structural racism, the three-way approach they developed is also useful for this study. They systematized reckoning structural racism through i) developing structural thinking, defined as the ability to attribute structural causes to group inequities[424]; ii) promoting upstream change to prevent racial inequality, protect vulnerable groups, and promote racial equity[425]; and iii) promoting redress interventions, be it race-based or class-based[426]. In this sense, it is possible to say that the Court overall did not conceptualize structural racism in a way that reckons the phenomenon effectively. In the Argentinian case, none of the steps were followed – the Court recognized a structural cause underlying the facts of the case but

[424] McCarty et al., "Toward a Moral Reckoning on Structural Racism," 37.
[425] McCarty et al., 38.
[426] McCarty et al., 38.

ultimately attributed the violation to the flawed legislation. By the same token, in the Colombian case, the Court considered that the structural factor was not proved; thus, it was not recognized. Lastly, in the Brazilian cases, the Court did attribute structural thinking and redress interventions to the facts, but that was partial, as the Court recognized structural poverty but not structural racism.

Furthermore, the extent of the inconsistency makes it impossible to draw temporal conclusions related to the cases. It would be unwise to contrast the Colombian case, judged in November 2013, where the Court did not recognize structural racism despite the petitioners' and the Commission's use of that language, to the Argentinian case, judged in August 2020, in which the Court specifically used the language. First of all, in the Argentinian case of 2020, the State expressly recognized the existence of structural racism in the country – as the Court did not attribute any legal consequence to the phenomena, it is impossible to conclude whether the recognition of structural racism as such derived from the evolution of the Court's understanding or simply a mirror of the State's recognition. This is especially relevant considering that even in the most progressive Brazilian case ("*Empregados da Fábrica de Fogos de Santo Antônio de Jesus"),* the Court used the terminology "structural discrimination" rather than "structural racism."

On the other hand, between the three Brazilian cases, the inconsistencies are broader. While the temporal distance between the first ("*Trabalhadores da Fazenda Brasil Verde")* and second case ("*Favela Nova Brasília")* is of only one year, the Court developed a jurisprudence of recognition of structural poverty and structural discrimination in the first case but did not acknowledge the implication of those phenomena in the second. Still, in the third case ("*Empregados da Fábrica de Fogos de Santo Antônio de Jesus"),* the rationale behind the first case was reused by the Court to draw further conclusions on the matter. Admittedly, the

petitioners in the third case explicitly used the terminology structural racism and structured the legal framing and State's responsibility in more progressive terms than in the second case. However, the temporal aspect alone is insufficient to draw conclusions on the Court's developments. First, seven years before the Brazilian case ("*Empregados da Fábrica de Fogos de Santo Antônio de Jesus")*, the petitioners in the Colombian case had already used advanced language and legal strategies to frame structural racism; this alone did not guarantee the Court's abiding of the petitioners' approach. Moroever, in the second Brazilian case, the Court did not fully adhere to the petitioners' claim where structural racism was concerned.

In this sense, the cases do not possess a temporal linearity that allows for any promising conclusion. On the contrary, as the cases were so inconsistent, it is possible to affirm that the Court deviated from its ongoing objectives for the region: it did not set standards on the matter nor promoted an *ius commune* (at least not one beneficial for vulnerable groups) or developed public policies that incorporate human rights. The quest against inequality and social inclusion, where Afro-descendants are concerned, seems stuck in the Court's agenda.

Closing remarks

Evaluation of the Court's jurisprudence on structural racism

When a case reveals the necessity to analyze the facts under the lens of structural racism, many elements of the decision must change. Stemming from the analysis of Paola Quiñones (2014) on decisions regarding structural discrimination, it is possible to name at least three relevant modifications: a) the Court needs to adopt a sound definition of structural discrimination based

on specific standards[427]; ii) the burden of proof changes, to accommodate the challenges of identifying such a complex phenomenon[428]; c) the decision must reinterpret principle of equality and therefore articles 1.1 and 24 of the Convention[429].

In the brief comparative analysis, Paola Quiñones (2014) declared that the Court still needed to adopt a definition of structural discrimination[430]. The author indeed had an optimistic undertone in her analysis, but overall showcased context in which structural discrimination was present, but regarded as systematic practices of human rights violations[431], only dealt with briefly in the reparations sector[432], or the concept was underdeveloped[433].

The cases analyzed in this research followed the same shallowness. The Court either straight-up refused to address structural racism based on traditional analysis of the burden of proof, as in the Colombian case or recognized the existence of structural racism – at broader or lesser levels – but refrained from developing the legal consequences of this recognition, as in the Argentinian and the Brazilian cases. Concerning the latter, it is important to highlight that in both "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus V. Brasil"* and "*Trabalhadores da Fazenda Brasil Verde"* the Court emphasized class relations way more than race imbalances in the construction of innovate legal consequences toward structural discrimination. Considering the Court's hesitancy to build up the same forwardness of the Brazilian jurisprudence into the Colombian's, where the petitioners and the Commission highlighted race over other situations of *de facto* discrimination, it is unwise to conclude that

[427] Pelletier Quiñones, "La 'discriminación estructural' en la evolución jurisprudencial de la Corte Interamericana de Derechos Humanos," 215.
[428] Pelletier Quiñones, 212.
[429] Pelletier Quiñones, 205.
[430] Pelletier Quiñones, 215.
[431] Pelletier Quiñones, 214.
[432] Pelletier Quiñones, 209.
[433] Pelletier Quiñones, 211.

the same construction developed to tackle structural poverty would be used by the Court to address structural racism.

Another relevant aspect of the analyzed cases was the plurality of approaches the Court adopted toward the reinterpretation of the principle of equality and, therefore, articles 1.1 and 24 of the Convention. The most extreme cases were the Colombian case, in which the Court did not recognize the structural racism faced by the Afro-descendant populations and dismissed the claims of violation of articles 1.1 and 24 of the Convention. Following that, the Court didn't develop jurisprudence on the connection between articles 1.1 and 24 and structural racism in the Brazilian case "*Favela Nova Brasília",* where there wasn't any mention of the principles of equality and nondiscrimination.

On the other side of the spectrum, the Argentinian case sowed articles 1.1 and 24 into the broader context of structural racism, although doing so in a way that attached them to the analysis of articles 7.2 and 7.3. As discussed before, by stating that "*the broadness of the provisions regulating police authority to detain people for committing offenses enabled the use of racial profiling and detentions based on discriminatory practices, for which reason the detention was also arbitrary and discriminatory*"[434] while recognizing the context of structural racism in Argentina, the Court confined the discussions toward equality and discrimination to the enactment alone, and thus attributed to the articles a formal understanding: the articles are violated when a substantive right is violated based in a discriminatory motive.

In two of the Brazilian cases ("*Trabalhadores da Fazenda Brasil Verde"* and *"Empregados da Fábrica de Fogos de Santo Antônio de Jesus"),* the understanding of the articles was more expansive. The court recognized three reverberations of obligations stemming from the articles: a) when discrimination is found in the guarantee of a given right established in the convention;

[434] Caso Acosta Martínez y Otros Vs. Argentina (Fondo, Reparaciones y Costas) at 32.

b) when discrimination is manifested in unequal protection of internal law or its application; c) when the discrimination is the basis for the disrespect of the general obligation of the State to respect and guarantee human rights. The last reverberation is derived from the obligations of Article 1.1 of the Convention. However, within the analysis of Article 24, the Court acknowledged the State's responsibility towards structural racism. According to the Court, Article 24 of the Convention demands the construction of material equality and thus implies the correction of existing inequalities and the promotion of the inclusion and participation of historically marginalized groups. If a State fails to do so, then it violates both Article 24 (because it didn't conform to its obligations) and Article 1.1.

The reason behind adopting multiple interpretations of the same articles following the recognition of the same phenomenon in the Argentinian and Brazilian cases is unclear. One possibility could be that, in the Argentinian case, neither the petitioners nor the Commission offered such an interpretation to the Court, although that does not represent a full impediment to that construction. Considering that Colombian case and the fact that, in both Brazilian cases, the Court leaned more towards the analysis of structural poverty than structural racism, it is more reasonable to theorize that the Court is more hesitant to touch upon strictly racial arguments. In the Colombian case, as the victims were Afro-descendant populations, there was no way around the issue – the Court chose to dodge it. In the Brazilian cases, the Court used the concepts of intersectionality and structural poverty to address the matter, but not completely.

Despite this hesitancy, it is reasonable to affirm that, following the researched case studies, structural racism demands from the Court a two-fold interpretation: the first that recognize independent breaches of articles 1.1 and 24, as implemented in the Brazilian cases; and the second that relates those articles to substantive rights. This multi-sided model better reflects

the changes in the analysis of responsibility, response, and remedy required by the understanding of structural racism[435]. Through this method, the Court can simultaneously address, for example, how structural racism conveys both independent effects and interactions among multiple forms of racism and thus how efforts to dismantle racial inequality must be coordinated and complex[436].

Moving Forward: opportunities in a bridge between the forced disappearance model and structural racism

As pointed out above, only recently – and rarely – the Court developed a broader understanding of structural discrimination in relation to articles 1.1 and 24 of the Convention, and even this understanding lacks specific recognition for structural racism against African Descendants. Overall, three trends concern the latter: a) the Court recognizes structural racism as an underlying phenomenon to the violation at hand, therefore stating that a substantive right was violated in connection with articles 1.1 and 24 – this model was used in the Argentinian case; b) the Court does not recognize structural racism or deem it as devoid of legal consequence, as in the Brazilian case "*Favela Nova Brasília"* and the Colombian case; c) the Court recognizes structural discrimination, giving independent effects to articles 1.1 and 24, as the other two Brazilian cases.

Although the last development may seem major if compared to the previous options, it can be considered insufficient if compared to the general jurisprudence of the Court, particularly in regard to forced disappearances[437]. While structural racism against African-descendant and

[435] Powell, "Structural Racism," 809.
[436] Gee and Ford, "STRUCTURAL RACISM AND HEALTH INEQUITIES," 128.
[437] Forced disappearance is defined by the Inter-American Convention of Enforced Disappearances as "the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees." See: "INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS."

forced disappearances are strongly different phenomena, they also have unquestionable similarities: i) they have marked the history of most Latin American jurisdictions, particularly the three under study in this research; ii) they have long-lasting consequences to the States and the enjoyment of human rights; iii) they demand from the Court new approaches to the international law of human rights. However, while forced disappearance has been developed in the Inter-American Court jurisprudence to the point of being recognized as an independent phenomenon with specific legal consequences[438], structural racism hasn't been given the same attention. A parallel between them – where applicable – might shift the discrepancy between them.

The Court repeatedly held that forced disappearances convey multiple violations and therefore cause – and reflects in – multiple and continuous violations of numerous rights recognized in the Convention[439]. In this sense, in those cases, there is a combination of injury to personal freedom and other rights, in connection and independently[440] This is important because the Court regards that once recognized, a forced disappearance rejects isolated, divided, and fragmented examination of the case[441]. Secondly, the Court established criteria for recognizing forced disappearances, i.e., elements of the phenomenon[442]. Thirdly, the demonstration of patterns is relevant to the construction of the case, from the making of a prima facie case to the burden of proof[443] and the interpretation of rights, which often take a rather innovative approach[444]. And lastly, the Court independently asserted forced disappearance as an

[438] Claude, "A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence," 429.
[439] González, "The Crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights," 480.
[440] González, 481.
[441] Claude, "A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence," 430.
[442] Claude, 422.
[443] Claude, 422.
[444] Claude, 430.

autonomous right, although the Inter-American Convention on Forced Disappearance of Persons does not[445].

Those elements can be translated into the case law studied in this research. The global understanding of forced disappearance as demanding a specific examination of the case and entitling multiple violations of human rights would be useful in the Argentinian case to prevent the underdevelopment of articles 1.1 and 24 of the Convention in relation to structural racism and improve the approach to the connection between substantive rights and the aforementioned articles. In this sense, the Court would be able to recognize that structural racism is a complex phenomenon that entails continuous and multiple violations of human rights instead of confining this recognition to analysis of the legality of the law and the conformity with articles 7.1 and 7.2.

The criteria for establishing structural racism in the same structure as the one developed in forced disappearance would prevent the disregard of structural racism as such and the legal consequences that follow, and therefore assist the Brazilian "*Favela Nova Brasília"* and the Colombian cases.

Finally, the approach towards patterns to the construction of the case, the will to adopt an innovative interpretation of rights, and the recognition of autonomous rights regardless of the text of the Convention would be valuable to the other Brazilian cases. Those changes would force the Court to regard structural racism as both an autonomous violation (and, by default, of equality as an autonomous right) under articles 1.1 and 24 and underlying factors influencing the enjoyment of other substantive rights. This path would not be completely new, as it is close to the one the Court adhered to in "*Empregados da Fábrica de Fogos de Santo Antônio de*

Jesus V. Brasil", when the decision asserted that the State's liability pertained to various substantive rights in relation to discrimination, as well as conveyed an independent violation of the rights to nondiscrimination[446].

Through that, the Court would be able to tackle structural racism completely: as the cause of the violation, as the violation, and as an explanation of the consequences of the violation.

[446] Pou Giménez, "La Igualdad Sustantiva Interamericana," 1244.

CONCLUSION

The research uncovered how the legal framework in Latin America had endorsed the racial stratification that feeds a system of structural racism. While strong peculiarities marked the experiences in Argentina, Brazil, and Colombia, they were similar in the pervasiveness of racism and social exclusion endured by African descendants.

In that sense, the Inter-American Court of Human Rights could have played an important role in the quest for equality in the region. Not only the Court confronted the agenda of combatting inequality and social exclusion, but it also embraced conceptualizations of vulnerability and substantive equality in relation to Articles 1.1 and 24 of the American Convention that could have advanced the main racial struggles of the studied countries: for Argentina, recognition; for Brazil, development of public policies under the govern of substantive equality and for Colombia, the development of group-based protection along the intersections of race and ethnicity.

However, the analysis of the case law demonstrated that the Court hasn't yet conceptualized structural racism in a way that reckon the phenomenon effectively. Among the main concerns is the lack of consistency in the approach adopted by the Court concerning the same phenomenon, and the absence of a definite recognition of structural racism as such, even when structural discrimination is acknowledged. It is, however, worth noting that, in the case law studied, the chosen approach adopted by the Court to the issue follows, to some extent, the methodological patterns presented by the petitioners and the Commission. While the Court adopted some variations – for better or for worse – in the conceptualization of structural racism, the approach to the issue in the Argentinian and the Brazilian cases mirrored the steps of the petitioners or the Commission. In this sense, there is a clue of a connection between the

arguments presented by the petitioners and the Commission and the Court's decision outcome that can be explored in further research.

Similarly, the Court hesitates to develop the conceptualization of structural racism against Afro-descendant populations within the substantive equality framework when the arguments are presented focusing on the racial aspect. This disparity is evident in the Colombian case, where both the petitioners and the Commission highlighted the influence of structural racism in the alleged violations (the Court dismissed the claims), and in the Brazilian case "*Empregados da Fábrica de Fogos de Santo Antônio de Jesus*", where the petitioner's claim regarding structural racism was subsumed – and shrank - within the broader concept of structural discrimination. The pattern opposes the one adopted by the Court toward indigenous rights and the associated principles, considered progressive[447]. In those cases, the Court is comfortable with recognizing ownership of communal land – including through innovative interpretation of the right to property -and the right to celebrate a particular culture and traditions, elements usually linked with components of ethnicity[448].

To put it simply: the Court is developing a posture that links the right to property and cultural distinctiveness to grant indigenous populations their rights[449] while demonstrating hesitancy to cover arguments based on racial distinctions and the connected violations. This is yet another topic that requires further research to uncover the reasons behind the hesitancy – and the extent of the link between it and the lack of Afro-descendant judges in the Court's composition.

Be it as it may, this level of underdevelopment on racial issues related to Afro-Descendant populations is astonishing. First, at least 120 million of the region's 500 million population are

[447] Pasqualucci, "The Evolution of International Indigenous Rights in the Inter-American Human Rights System," 284.
[448] Pasqualucci, 287; Hooker, "Indigenous Inclusion/Black Exclusion," 288.
[449] Antkowiak, "Rights, Resources, and Rhetoric," 160.

Afro-Descendant, and most of this total faces inequality and social exclusion. The fact that this reality hasn't prompted a more consistent approach by the Court is at least worrying. Second, the Court already has a specific model that could help improve litigation concerning structural racism against Afro-Descendants: the one adopted in cases of forced disappearances.

As this research demonstrated, in the forced disappearances model, the Court conveys multiple human rights violations (individually and collectively), establishes criteria for the phenomenon, and adopts specific patterns of acceptance of the case, the burden of proof, and interpretation of rights. Each one of those elements could have been useful in the case law studied in this research. In the Argentinian case, the global understanding of forced disappearance as demanding a specific examination of the case and entitling multiple human rights violations would have recognized structural discrimination as a complex phenomenon requiring a specific understanding of articles 1.1 and 24 of the Convention. Likewise, the same close examination of the case would have prevented the disregard of structural racism as such and the legal consequences that followed in the Brazilian "*Favela Nova Brasília"* and the Colombian cases. Finally, the innovative interpretation of rights would have assisted the other two Brazilian cases insofar as it would have allowed the Court to regard structural racism as both an autonomous violation (and, by default, of equality as an autonomous right) under articles 1.1 and 24, and underlying factors influencing the enjoyment of other substantive rights. This approach allows the Court to address numerous issues at once, such as how structural racism has both independent impacts and relationships with other forms of racism and how complex and coordinated measures are needed to reduce racial disparity.

Bottom line, the jurisprudence of the Court concerning structural racism against Afro-Descendants is more filled with "could have been" than with concrete legal developments to the recognition and addressing of the phenomenon.

While the most important International Human Rights Court of the Americas continues to avoid the topic, the region's legal framework – including the human rights language - will remain more sided with the system of structural racism than it is with the quest for racial equality. In this sense, Afro-Descendant communities will need to resist despite the Court instead of resisting in tandem with the Court.

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