Furthering the fight against impunity in Latin America: the contributions of the Inter-American Court of Human Rights to domestic accountability processes

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Voor Ivan,
die alles veranderde

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1 Introduction

1 The international fight against impunity: beyond Rome and The Hague

1.1 The importance of national prosecutions for the international fight against impunity

10 May 2013 was a historic day. In the words of David Tolbert, President of the International Center for Transitional Justice, it was a day which would be "carved into the history of the fight against impunity for mass atrocities".[1] On that day, Efraín Ríos Montt, the former dictator of Guatemala, was found guilty, by a Guatemalan court, of the crime of genocide and of crimes against humanity and sentenced to 80 years imprisonment. It was the first time a former head-of-state had ever been tried and convicted for the crime of genocide by the courts of his own home state. Many in the packed courtroom celebrated the conviction with cheers and song, while the press crowded around Ríos Montt and the judge shouted to security to make sure the convict would not leave the room before the police had arrived to escort him to prison. That night, the former dictator, who had seemed utterly untouchable for so many decades, found himself in a prison cell.

The Ríos Montt trial underscores the fact that national proceedings continue to be an important front in the international fight against impunity for atrocious crimes, and that important victories can indeed be won through national courts. At the same time, however, the aftermath of the Ríos Montt conviction unfortunately illustrates the extreme sensitivity and fragility of such domestic proceedings. Only ten days after the tumultuous scenes described above, the Guatemalan Constitutional Court intervened in the proceedings and annulled the trial court's judgment, leading many to believe that the Constitutional Court had given in to political pressure exerted by Ríos Montt's many powerful friends and allies.[2]

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1 ICTJ, 'ICTJ: Conviction of Rios Montt on genocide a victory for justice in Guatemala, and everywhere', report of 10 May 2013, available at <https://www.ictj.org/news/ictj-conviction-rios-montt-genocide-victory-justice-guatemala-and-everywhere>, last checked: 08-02-2018.

2 *See for example* J.M. Burt and G. Thale, 'The Guatemalan genocide trial: using the legal system to defeat justice', available at < https://www.ijmonitor.org/2013/06/jo-marie-burt-and-geoff-thale-the-guatemala-genocide-case-using-the-legal-system-to-defeat-justice/>, last checked: 04-05-2018.

That domestic proceedings form an important part of the fight against impunity has at times seemed forgotten by those involved in it at the international level. For many, the international struggle against impunity has become almost synonymous with the development of international criminal law as a field of law, and more particularly with the development of the various international criminal tribunals. The creation of the International Criminal Court ("ICC"), through the adoption of the Rome Statute, is often presented as the crowning achievement or the "culmination" of the fight against impunity.[3] This fight had started, the narrative goes, with the pioneering work of the Nuremburg and Tokyo Tribunals after World War II. It then lay in hibernation for decades, waiting out the geopolitical winter of the Cold War. It was resumed, and accelerated, in what has been called the "long decade" of the 1990s,[4] which saw the end of the Cold War, a surge in international interventions and institutions and the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda. This rocky road eventually led the fight against impunity to full maturity in 1998 with the creation of the ICC. Thanks to the work of these international criminal courts, it is said, "the old era of impunity" has come to an end and "a new age of accountability" is arising in its stead.[5]

When the international criminal courts were being established in the 1990s, their role in the fight against impunity was envisaged primarily as that of trial courts. International criminal courts were to be the prime venue for bringing those responsible for mass atrocities to justice. After all, history had shown that, if left to decide for themselves, states are generally not inclined to prosecute international crimes of their own accord. This had been the entire motivation behind the fight against impunity to begin with. Thus, in the years leading up to the establishment of the ICC, the need for such an institution was articulated as a response to the failure of national jurisdictions to fulfill their obligation to bring the perpetrators of international crimes to justice.[6] Moreover, the proponents of international criminal

3 P. Seils, *Handbook on complementarity – an introduction to the role of national courts and the ICC in prosecuting international crimes* (ICTJ, 2016), p. 8.

4 F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann, T. Unger and V. Cadelo (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 4, citing J.H. Quataert, *Advocating dignity: human rights mobilizations in international politics* (University of Pennsylvania Press, 2009), pp. 16-17.

5 Ban Ki Moon, 'The Age of Accountability', Speech at the Review Conference of the Rome Statute, Kampala, 11 June 2010, available at https://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability, last checked: 03-05-2018. *See also* A. Cassese, 'Reflections on international criminal justice', (2011) 9(1) *Journal of International Criminal Justice* 271-275, p. 272, stating that: "This system of justice [individual criminal accountability for atrocities] had been a dream for centuries. The dream came true in 1945 then halted but resumed in the early 1990s, with the establishment first of ad hoc tribunals and subsequently of the International Criminal Court and many hybrid courts."

6 *See for example* A. Cassese, 'Reflections on international criminal justice', (1998) 61(1) Modern Law Review 1-10, pp. 6-8.

courts have long been skeptical of the capacity of national courts to remain neutral and maintain certain minimum standards of due process in politically sensitive cases, as those concerning international crimes inevitably are.[7] The example of the Ríos Montt trial and its aftermath described above, underscores the legitimacy of such concerns.

However, no matter how legitimate these concerns about states' political will and judicial capacity to successfully investigate and prosecute atrocities may be, the first 15 years of the International Criminal Court's operations have shown that the fight against impunity cannot be fought without them. The various limitations of the International Criminal Court itself – both practical and political[8] – make it impossible for this institution to fulfill its stated goal of ending impunity for the most serious crimes of concerns to all of mankind in isolation. Moreover, the continued importance of national prosecutions is necessitated by the Rome Statute itself, which envisions a relationship between the ICC and national justice systems based on the principle of complementarity.[9] As a result, many of those who support the fight against impunity have now come to accept that "if the fight against impunity is to progress, it will have to be largely […] through national efforts".[10]

Interestingly enough, this realization has not diminished the centrality of international criminal courts, and especially the ICC, in the narrative of the fight against impunity. In the words of Elena Baylis, the discussion has simply shifted "from international trials as such to international courts' influence upon national trials and domestic legal systems."[11] Thus, much scholarship has been dedicated to the question how the impact of inter-

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7 Idem. *See also* K.J. Heller, 'The shadow side of complementarity – the effect of Article 17 of the Rome Statute on national due process', (2006) 17 Criminal Law Forum, 255-280, pp. 255-256.

8 *See for example* J.I. Turner, 'Nationalizing international criminal law', (2005) 41(1) *Stanford Journal of International Law* 1-51, pp. 3-13 for a discussion of the political constraints of the ICC as a result of the 'limited commitment' of Members States and the active resistance of powerful non-Member States; and E. Baylis, 'Reassessing the role of international criminal law: rebuilding national courts through transnational networks', (2009) 50(1) *Boston College Law Review* 1-85, p. 15, for a discussion of how the limited resources of the ICC make it difficult to investigate and prosecute more than a fraction of the population of cases the ICC was created to address.

9 Under this principle, states retain the primary responsibility for investigating and prosecuting the crimes under the Court's jurisdiction, and the ICC can only step in to exercise its jurisdiction where states are unwilling or unable to do so. The principle of complementarity is enshrined in Article 17 of the Rome Statute, in combination with paragraphs 4 and 5 of its preamble. For more on the principle of complementarity, *see generally* C. Stahn and M.M. El Zeidy, *The International Criminal Court and complementarity – from theory to practice* (Cambridge University Press, 2011).

10 N. Roht-Arriaza, 'After amnesties are gone: Latin American national courts and the new contours of fight against impunity', (2015) 37 *Human Rights Quarterly* 341-382, p. 344.

11 E. Baylis, 'Reassessing the role of international criminal law: rebuilding national courts through transnational networks', (2009) 50(1) *Boston College Law Review* 1-85, p. 2.

national criminal courts on domestic proceedings for international crimes may be maximized.[12] At the ICC itself, the Office of the Prosecutor has developed the notion of 'positive complementarity', meaning the idea that the ICC Prosecutor should not limit its activities to investigating cases that domestic authorities fail to investigate, but that it should actively encourage domestic authorities to investigate cases.[13] This notion has been further theorized and developed over the years by a variety of scholars in a steady stream of books and academic articles.[14] Some scholars built on the idea of positive complementarity and invited the International Criminal Court to see itself as part of a "system of multi-level global governance" in which the ICC and national courts share the competence and the burden of furthering the fight against impunity.[15] This system of multi-level global governance has been dubbed the Rome System of Justice.[16]

12 An important example of such scholarship can be found in the work of the DOMAC research project. *See* http://www.domac.is/about/, last checked: 26/02/2015.In this project, which was concluded in 2011, researchers from the law faculties of several European and Israeli universities cooperated in order to "assess the impact of international court procedures on domestic procedures for putting to trial the perpetrators of mass atrocities, with a view of maximizing such impact and improving thereby the quantity and quality of the domestic response to mass atrocities". While the scope of the research project was thus broad enough to examine the work of different types of international courts, DOMAC focused its analysis mostly on the impact of international criminal courts and tribunals and less on (regional) human rights courts. The DOMAC project only produced one report on the impact of the ECHR: S. Borelli, 'The impact of the European Court of Human Rights on domestic investigations and prosecutions of serious human rights violations', DOMAC/7, May 2010. Also, with the exception of Colombia, the Latin American region was not considered in the work of this project .http://www.domac.is/about/.

13 This notion was first introduced by the OTP at the very start of its operations. *See* ICC-OTP, 'Draft paper on some policy issues before the Office of the Prosecutor', September 2003, available at https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf, last checked: 05-05-2018 and ICC-OTP, 'Informal Expert Paper: Complementarity in practice', 2003, available at https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf, last checked: 05-05-2018.

14 *See for example* W.W. Burke-White, 'Complementarity in practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of the Congo', (2005) 18 *Leiden Journal of International Law* 557-590, C. Stahn, 'Complementarity: a tale of two notions', 19 *Criminal Law Forum* (2008), 87-113 and C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity – from theory to practice* (Cambridge University Press, 2011).

15 W.W. Burke-White, 'Complementarity in practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of the Congo', 18(3) *Leiden Journal of International Law* (2005), 557-590, W.W. Burke-White, 'Implementing a policy of positive complementarity in the Rome System of Justice', (2008) 19(1) *Criminal Law Forum* 59-85 and W.W. Burke-White, 'Proactive complementarity: the International Criminal Court and national courts in the Rome System of Justice', (2008) 49(1) *Harvard International Law Journal* 53-108.

16 Idem.

Thus, the ICC is still understood as the "keystone" of global justice,[17] even if it is recognized that it cannot fight the fight against impunity alone. Critics have noted that, at times, discussion of how international criminal courts may encourage national prosecutions has in fact focused more on "whether and how to preserve a central role for these international courts, in which the international community has invested so much hope".[18] While that may be a somewhat cynical way of framing the interest in notions of positive or proactive complementarity, the continued focus on international criminal courts does unnecessarily limit our perception of how the fight against impunity may best be advanced.

This study is motivated by the same interest of much of the scholarship described above, namely in the question how national authorities can be motivated to advance the fight against impunity by investigating and prosecuting those responsible for mass atrocities through their domestic justice systems. However, it proposes that answers to this question can also be found outside of Rome and The Hague. That is to say: outside of the international criminal courts.

Instead, this study seeks to examine the important contributions of human rights bodies to the fight against impunity, through their support for victims' claims to truth and justice. These contributions date back to before the establishment of the *ad hoc* tribunals. Already during the Cold War, which had paralyzed the fight against impunity on the international level, victims and their allies in civil society were continuing it at the national level, fighting tooth and nail to force their governments to recognize and investigate serious and systemic violations of human rights and bring the perpetrators to justice.[19] Recourse to human rights bodies was, and remains, an important strategy for these actors in their struggle for justice at the domestic level.[20] Nowhere has this mechanism been more visible than in Latin America, where victims of civil wars and military dictatorships brought their claims for truth and justice to the Inter-American human rights system ("IAHRS").

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17 Ban Ki Moon, 'The Age of Accountability', speech at the Review Conference of the Rome Statute, Kampala, 11 June 2010, available at https://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability, last checked: 03-05-2018.

18 E. Baylis, 'Reassessing the role of international criminal law: rebuilding national courts through transnational networks', (2009) 50(1) *Boston College Law Review* 1-85, p. 3. More recently, Marieke Wierda has also been critical of the 'Court-centric conception of complementarity' on the part of ICC officials and certain international legal scholars. *See* M. Wierda, 'The local impact of a global court – assessing the impact of the International Criminal Court in situation countries' (PhD thesis, Leiden University, 2019), pp. 87-91.

19 Joinet explains how this movement started out by petitioning their governments to provide amnesty to political prisoners and later moved to demanding truth and justice for the victims of abuse by the State. *See* E/CN.4/Sub.2/1997/20/Rev.1, 'Question of the impunity of perpetrators of human rights violations (civil and political)', Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, 2 October 1997.

20 *See for example* B.N. Schiff, *Building the International Criminal Court* (Cambridge University Press, 2012), pp. 27-29.

1.2 The Inter-American human rights system and the fight against impunity in Latin America

The Inter-American human rights system is one of the three regional systems for the protection of human rights. It is part of a broader regional organization, the Organization of American States (OAS), which was created in 1948 at the Ninth International Conference of American States in Bogotá. The system is built on two basic documents: the American Declaration on the Rights and Duties of Man ("American Declaration"), which was adopted along with the OAS Charter in 1948,[21] and the American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978. These two basic documents establish the rights protected by the Inter-American system and create its two organs: The Inter-American Commission on Human Rights ("IACmHR") and the Inter-American Court of human rights ("IACtHR").

The IACmHR is the political organ of the Inter-American system, created through the OAS Charter. It was, however, not established in practice until 1960. Its purpose is to promote human rights in the Americas and advise the OAS on human rights related issues. To this effect, it has been given three main tasks: monitoring and reporting the human rights situation in the individual OAS Member States (country reports), monitoring and reporting on regional trends and concerns in relation the protection of human rights (thematic reports), and hearing individual complaints in relation to concrete and specific human rights violations. The IACmHR reports to the General Assembly of the OAS. It can make recommendations to Member States as to how they can improve their human rights policies and resolve individual cases. However, in line with the Commission's mandate, these recommendations are not binding.

The Inter-American Court, on the other hand, is the judicial organ of the Inter-American system, created by the ACHR and tasked with the protection of the rights included therein through adjudication. The IACtHR's jurisdiction includes "all cases concerning the interpretation and application of the provisions of [the ACHR] that are submitted to it" (Article 62(3) ACHR). It can deliver advisory opinions on matters concerning the interpretation of the ACHR when so requested by Member States or organs of the OAS (Article 64 ACHR) and hear cases concerning alleged violations of human rights committed by Member States against individuals (Article 63 ACHR). Its judgments regarding violations of human rights of individu-

21 As the simultaneous signing of these two documents shows, respect for and the protection of human rights was part of the OAS' mission from the beginning. In accordance with the preamble to the OAS Charter, the organization was established, in part, with an eye to "the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man". Accordingly, Article 3(l) of the Charter proclaims "the fundamental rights of the individual" to be one of the principles underlying the organization.

als are binding on the states involved in them. However, the scope of the IACtHR's jurisdiction is limited in two important ways: firstly, its jurisdiction must be accepted separately by each State Party to the ACHR (Article 62(1) ACHR); secondly, the IACtHR can only hear cases brought before it by States Parties or by the Inter-American Commission (Article 61(1) ACHR). In other words, individuals do not have direct access to the IACtHR, but must rely on the Commission's judgment in deciding whether to pursue their case further or not.

That the Inter-American human rights system has become a key player in the fight against impunity is only logical, if one considers the historical and political background against which it has developed its operations. The first three decades of the IACmHR's practical existence coincided with the darkest years of the Cold War and its devastating effects in Latin America in the form of proxy-wars, military dictatorships and the violent oppression of political opposition. During these years, as mechanisms were being set up all over the continent to facilitate the large scale disappearance and murder of dissidents, the promotion of human rights was not an easy task. In the words of former IACtHR judge Thomas Buergenthal, "[e]ffective human rights institutions were not something many governments in the region believed in at the time".[22]

One can imagine the challenges this situation presented to the nascent IACmHR, which was allowed to exist mainly for propaganda purposes.[23] However, unsatisfied with the role of fig-leaf envisioned for it by the governments of the region, the Commission decided that the only way to meaningfully fulfill its mandate would be through confrontation, rather than cooperation, with Member States. Taking its monitoring role seriously, the Commission started reporting critically on the developing human rights situation in countries like Chile, Uruguay and Argentina as early as the mid-1970s.[24] In doing so, it was unable to rely on the information provided by the various governments, as it had originally planned to do.[25] Instead,

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22 J. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* (2nd edition, Cambridge University Press, 2013), p. xv.

23 Idem.

24 *See for example* OEA/Ser.L/V/II.34 - doc. 21 corr.1, 25 October 1974, Report on the status of human rights in Chile; OEA/Ser.L/V/II.37 - doc. 19 corr.1, 28 June 1976, Second report on the situation of human rights in Chile; OEA/Ser.L/V/II.43 - doc. 19 corr.1, 31 January 1978, Report on the situation of human rights in Uruguay; and OEA/Ser.L/V/II.49 - Doc. 19 corr.1, 11 April 1980, Report on the situation of human rights in Argentina.

25 As the IACmHR noted in its second report on the situation in Chile, it had originally planned to base its report entirely on the written reports it had hoped to receive from the Chilean government in response to its requests for information. However, this work plan was "seriously perturbed by the attitude adopted by the government of Chile", which simply denied the Commission's requests. *See* OEA/Ser.L/V/II.37 - doc. 19 corr.1, 28 June 1976, Second report on the situation of human rights in Chile, para. I.II.9 (describing "methods of work"). On other occasions, the Commission was denied access to Members States' territories to conduct *in loco* observations. *See for example* OEA/Ser.L/V/II.43 - doc. 19 corr.1, 31 January 1978, Report on the situation of human rights in Uruguay.

it has had to rely on "other sources" to obtain the information it needed,[26] including the denunciations of individual victims of human rights violations, victims associations, NGOs, labor unions, religious leaders and UN organizations present in the countries under investigation.[27] The IACmHR was thus compelled to cement strong relationships with civil society groups opposing political repression and to become "a vehicle for the presentation of denunciation and the issuance of condemnation of this repression".[28]

As the Cold War thawed, the political situation in the region also began to change. By the time the IACtHR heard its first cases in the late 1980s,[29] much of Latin America was in a process of transition from dictatorship to democracy and/or from war to peace. Accordingly, the priorities of the Inter-American human rights system and its allies in civil society began to change. In the previous decades the Commission had focused on reporting the developing human rights crisis in the region and applying pressure on governments to end their practices of enforced disappearance and other forms of political oppression. Now that these practices were indeed coming to an end, the question how to respond to the legacies of violence asserted itself.

The representatives of the previous regimes, who still held positions of power in many Latin American states, had a very clear answer to this question: amnesty. Those who had been responsible for the systematic violation of human rights were not to be touched. Pinochet, for example, famously threatened the civilian government that succeeded his regime by saying that "the day they touch any of my men, the rule of law ends".[30] In a region with a long tradition of military coups, such threats carry a particular punch. Amnesty laws were duly adopted, not only in Chile but in most of Latin America, to pacify the still powerful representatives of former regimes.

Of course, the victims of those previous regimes and the civil society groups that had long opposed (and, as a result, suffered) their oppressive practices proposed a very different answer: they demanded justice. For

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26 *See for example* OEA/Ser.L/V/II.37 - doc. 19 corr.1, 28 June 1976, Second report on the situation of human rights in Chile, para. I.II.12 (describing "methods of work").

27 *See for example* OEA/Ser.L/V/II.49 - Doc. 19 corr.1, 11 April 1980, Report on the situation of human rights in Argentina, para. I.B (describing the "Activities of the Commission during its on-site observation").

28 D.J. Padilla, 'The Inter-American Commission on Human Rights: a case study', (1993) 9(1) *American University International Law Review* 95-115, p. 97.

29 As Jo Pasqualucci explains, the Court was established in 1979, when the first judges were selected to the bench. However, the Commission did not forward individual cases to the Court until 1986. During the first half of the 1980s, the work of the Court was therefore limited to providing Advisory Opinions. *See* J.M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* (Cambridge University Press, second edition, 2013), p. 6.

30 Pinochet made this statement in October 1989, during a speech the city of Coyhaique. It was cited in a constitutional complaint against Pinochet presented to the Chilean parliament in March 1998. *See* B. Loveman and E. Lira, *El espejismo de la reconciliación política – Chile 1990-2002* (LOM ediciones, 2002), p. 194. *See also* S.P. Huntington, *The third wave: democratization in the late twentieth century* (University of Oklahoma Press, 1993), p. 216.

these groups, the impunity enjoyed by even the worst offenders from previous regimes showed that the *status quo* had not really changed, formal transition to democracy notwithstanding. The denial of justice through official amnesty legislation and unofficial tactics of delaying and undermining investigations was regarded as only the latest in a long line of violations their most basic human rights. Thus, the demand for justice for past crimes became an important rallying cry for social mobilization post-transition. As before, these groups found an important ally in the IACmHR, which now became a vehicle through which they were able to present their claims for justice.

This was the context in which the Inter-American Court, in 1988, delivered its first judgment in the case of *Velásquez Rodríguez et al. v. Honduras*. As will be discussed further on in this study, through this seminal first judgment the Court committed itself to the fight against impunity, which would come to dominate its agenda for decades to come. In this judgment, the IACtHR held that, as part of their obligation to ensure human rights under Article 1(1) ACHR, states have an obligation to investigate, prosecute and punish violations of those rights. In another early judgment the Court defined impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention" and held that "the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives".[31]

Since then, the Court has dedicated much of its case law to denouncing the lack of investigation and prosecution of grave human rights violations, analyzing the precise mechanisms through which victims are denied justice, ordering Member States to take specific measures to resolve entrenched forms of *de jure* and *de facto* impunity and following up on their progress in taking those measures.

1.3 Research questions

The Inter-American human rights system has thus been involved in the fight against impunity for decades. However, this fact has long been ignored by scholarship on the fight against impunity[32] or presented as a phase that had been 'overcome' through the establishment of the interna-

31 IACtHR *Bámaca-Velásques v. Guatemala (merits)*, 25 November 2000, para. 211, citing IACtHR *Paniagua Morales et al. ('White Van') v. Guatemala (merits)*, 8 March 1998, para. 174. *See also* IACtHR *Baldeón-García v. Peru (merits reparations and costs)*, 6 April 2006, para. 168.

32 *See* A. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *American Journal of International Law* 1-44, p. 1, noting that the practice of human rights bodies to order states to investigate and prosecute international crimes has been "[a]lmost entirely overlooked by the scholarship on these mechanisms for accountability".

tional criminal courts.[33] As demonstrated by Alexandra Huneeus in her pioneering study on the 'quasi-criminal jurisdiction' of human rights courts, the focus on international criminal courts as the main international legal institutions driving the fight against impunity does not reflect reality.[34] Not only do international human rights bodies like the (organs of the) IAHRS regularly order states to investigate, prosecute and punish grave violations of human rights, Huneeus' study suggests that the practical effects of their involvement in the fight against impunity are far more significant than sceptics have always assumed.[35] Consequently, the experience of the IAHRS in interacting with domestic authorities to achieve justice at the domestic level holds valuable lessons for the international community. It may inform the ICC's policy of positive complementarity[36] and "should be considered as an alternative and complement to the existing mechanisms for accountability".[37]

This study therefore seeks to analyze further how the Inter-American human rights system, in the exercise of its judicial function,[38] has contributed to the fight against impunity in Latin America. In doing so, this study builds on Alexandra Huneeus' important work. However, it takes a different approach to studying those contributions and to conceptualizing the types of contributions the Inter-American system makes to the fight against impunity. In Huneeus' view, the Inter-American system contributes

33 *See for example* P. Seils, *Handbook on complementarity – an introduction to the role of national courts and the ICC in prosecuting international crimes* (ICTJ, 2016), pp. 2-3, noting that the creation of the international criminal courts marked the moment when "states had caught up with civil society and human rights bodies around the world in recognizing that impunity for serious crimes was unacceptable" and that it created a new system for dealing with the world's most egregious crimes.

34 A. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *American Journal of International Law* 1-44.

35 *See* A. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *American Journal of International Law* 1-44, pp. 15-20.

36 *See* A. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *American Journal of International Law* 1-44, pp. 31 and 40 and A. Huneeus, 'Pushing states to prosecute atrocity: The Inter-American Court and positive complementarity', in: H. Klug and S. Engle Merry (eds.), *The new legal realism – studying law globally* (Cambridge University Press, 2016).

37 A. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', 107(1) *American Journal of International Law* (2013), 1-44, p. 43.

38 Like Alexandra Huneeus, this study focuses primarily on the contributions made by the Inter-American system through the exercise of its judicial function, i.e. the case law of the IACtHR and those aspects of the IACmHR's work that relate to individual complaints. As a result, the more political monitoring and reporting duties of the IACmHR remain outside the scope of this study, unless those political tasks are particularly salient to the system's handling of its judicial function. For an exploration of the more political aspects of the work of the Inter-American human rights system and their impact on domestic human rights outcomes in Latin America, *see* P. Engstrom (ed.) *The Inter-American human rights system: impact beyond compliance* (Palgrave Macmillan, 2019).

to the fight against impunity by triggering local prosecutions for international crimes through the judgments of the IACtHR and its supervision of compliance procedure.[39] As will be further discussed below, the approach taken in this study is informed by the belief that a compliance-based logic is insufficient when analyzing the significance of the Inter-American system.[40]

This study, in contrast, is based on the idea that the contributions of the Inter-American human rights system to domestic accountability processes are almost always indirect, but that they may affect a circle of cases far beyond the limited number which are subject to proceedings before the IACtHR. Domestic accountability processes benefit not only from individual judgments in particular cases, but also from the proceedings leading up to those judgments and from IACtHR doctrines relevant to the fight against impunity. In a more practical sense, the Inter-American system contributes to domestic accountability processes not by directly triggering prosecutions – whatever that may mean – but rather by supporting the work of domestic actors engaged in accountability processes at the national level.

Based on these considerations, the central research questions of this project are:

1. How has the Inter-American human rights system, especially the Inter-American Court of Human Rights, contributed to the development of legal doctrines and techniques to advance the fight against impunity?
2. How have these doctrines and techniques, and the work of the Inter-American system more broadly, aided the work of the relevant actors in domestic accountability processes?

These two questions examine different dimensions of the Inter-American contribution to the fight against impunity. They also pertain to different disciplines. The first question is primarily a legal question, which focuses on the legal obligations on states in the context of the fight against impunity developed over the course of the IACtHR's case law. The second question, on the other hand, is an empirical, socio-legal question, which focuses on the practical contributions of the Inter-American system to domestic accountability processes. In particular, this study will examine the Inter-

39 This was the approach taken in Huneeus' 2013 publication on the 'quasi-criminal jurisdiction' of human rights courts described above, which has been an important point of reference in the early stages of this research project. In more recent work, Huneeus seems to have shifted her attention somewhat from compliance with IACtHR judgments, to the effects produced by the *proceedings* conducted by the IACmHR and the IACtHR. *See* A. Huneeus, 'Pushing states to prosecute atrocity: The Inter-American Court and positive complementarity', in: H. Klug and S.E. Merry, *The new legal realism, Volume II – studying law gobally* (Cambridge University Press, 2016), pp. 229-233.

40 A recent volume on the impact of the Inter-American human rights system takes the same view. *See* P. Engstrom (ed.) *The Inter-American human rights system: imact beyond compliance* (Palgrave Macmillan, 2019).

American system's practical contributions to domestic accountability processes in two countries: Guatemala and Colombia.[41]

This could create the impression that the two questions are only loosely connected through the fact that both relate to the same international institution. This impression is incorrect. To the contrary, the legal and practical contributions of the Inter-American system to the fight against impunity are highly connected. As this study will show, the capacity of the Inter-American system to support the work of domestic pro-accountability actors depends in large part on the particular, legally binding status of its judgments and the doctrines developed in its case law. Moreover, certain choices made by the organs of the Inter-American human rights system, which have become the subject of criticism by legal scholars from various fields of law, can be better understood in light of the dynamics involved in the system's interactions with domestic actors in the context of encouraging domestic accountability processes. In short, in order to fully understand the contributions of the Inter-American human rights system to the fight against impunity, this study aims to examine its organs both as legal actors and as social actors.

2 Scientific context of this study: what we know about the contributions of the Inter-American system to the fight against impunity

Having thus articulated the research questions which this study seeks to answer, it is important now to sketch the insights from various relevant fields of study which have shaped the approach taken in this study. The study has been informed by a number of debates which have developed in various disciplines of relevance to this study. This section will first describe these debates and then explain how the approach taken in this study builds on the aforementioned debates and what it seeks to add to them. The methodological implications of this approach will be discussed in section 3 of this Chapter.

2.1 Legal scholarship on the obligation to investigate, prosecute and punish as developed by the Inter-American system

The overarching legal doctrine employed by human rights bodies to further the fight against impunity, is that of the obligation to investigate, prosecute and punish human rights violations. This doctrine, which is often referred to simply as the 'duty to prosecute', is therefore the starting point of the analysis in the first part of this study. This study seeks to provide

41 The basis on which these two countries were selected for study and other methodological issues related to the case study research conducted in this study will be discussed in detail in section 3 of this Chapter.

a comprehensive overview of the IACtHR's jurisprudence on the duty to prosecute, of its development over time and of the plethora of more specific obligations developed by the Court under the umbrella of that overarching legal doctrine. In doing so, this study builds on the considerable body of international legal scholarship which has analyzed – and often criticized – aspects of the IACtHR's case law on the fight against impunity ever since the *Velásquez Rodríguez* judgment.

Firstly, a body of descriptive work, produced mainly by insiders like (former) IACtHR judges and IACmHR commissioners, discusses the development of various legal concepts relevant to the fight against impunity in the IACtHR's case law, presumably with the aim of disseminating these standards among legal scholars and practitioners in the region.[42] A second strand of academic literature analyzes the Court's case law on these topics in relation to similar developments at the international level, with a particular focus on the contribution of the Inter-American system to the development of international norms.[43] Finally, a third strand in the literature criticizes the Court's case law on the duty to investigate and prosecute human rights violations from a criminal law perspective and focuses particularly on the threat this case law poses, or could pose, to the rights of the accused in criminal proceedings.[44] This is a particularly lively debate, which should be seen in light of the broader international debate about human rights lawyers 'victim-centered' approach to issues related

42 *See for example* M.E. Ventura Robles, *La jurisprudencia de la Corte Interamericana de Derechos-Humanos en materia de acceso a la justicia e la impunidad*, presentation at the regional workshop on democary, human rights and the rule of law, organized in Costa Rica on 10 August 2005 by the Office of the United Nations High Commissioner of Human Rights, available at < http://www.corteidh.or.cr/tablas/r31036.pdf>, last checked 25-03-2015; P. Saavedra Alessandri, 'La respuesta de la jurisprudencia de la Corte Interamericana a los diversos formas de impunidad en los casos de graves violaciones de derechos humanos y sus consecuencias', in: *La Corte Interamericana de Derechos Humanos - un cuarto de siglo: 1979 – 2004* (San José, 2005) and D. García-Sayán, 'Una viva interacción: Core Interamericana y tribunales internos', in: *La Corte Interamericana de Derechos Humanos - un cuarto de siglo: 1979 – 2004* (San José, 2005).

43 *See for example* A.A. Cançado Trindade, 'Enforced disappearance of persons as a violation of jus cogens: the contribution of the jurisprudence of the Inter-American Court of Human Rights', (2012) 81(4) *Nordic Journal of International Law* 507-536; L.J. Laplante, 'Outlawing amnesty: the return of criminal justice in transitional justice schemes', (2009) 49(4) *Virginia Journal of International Law* 915-984 and J.M. Pasqualucci, 'The whole truth and nothing but the truth: truth commissions, impunity and the Inter-American human rights system', (1994) 12(2) *Boston University International Law Journal* 322-370.

44 *See for example* E. Malarino, 'Judicial activism, neopunitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12(4) *International Criminal Law Review* 665-695; F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2007) 12(1) *Am. U. Int'l L. Rev.* 195-229 and D. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114.

to (international) criminal justice.[45] At the same time, the IACtHR has also been criticized by human rights lawyers for its turn to criminal law as a method of human rights protection, warning that human rights bodies should not 'align' themselves with the state's repressive apparatus in this fashion.[46] In short, legal scholars from different fields have debated the proper relation between human rights law and (international) criminal law and questioned whether the IACtHR, may be overstepping its boundaries by ordering criminal prosecutions.[47]

What these different strands of the literature on this topic have in common, however, is that they usually discuss the Court's case law on the prosecution of human rights violations in a rather fragmented fashion, by either considering only one particular element of that case law, like the prohibition of amnesty laws,[48] or by focusing on or criticizing one particular judgment.[49] For example, the first comprehensive and systematic English language overview of and commentary to the IACtHR's case law,[50] does not consider the duty to prosecute as an autonomous concept and therefore does not dedicate a separate chapter to it. It does, however, discuss the duty to investigate and prosecute in several chapters in relation to, and as a part of, other rights. On the other hand, Anja Seibert-Fohr's comparative study of the duty to prosecute in various human rights regimes does recognize the autonomous nature of that duty in the IACtHR's case law and, on that basis, provides the most detailed and comprehensive discussion thus far of the IACtHR's jurisprudence relevant to this study.[51] However, as Seibert-

45 *See for example* F. Tulkens, 'The paradoxical relationship between criminal law and human rights', (2011) 9(3) *Journal of International Criminal Justice* 577-595 and D. Robinson, 'The identity crisis of international criminal law', (2008) 21(4) *Leiden Journal of International Law* 925-963.

46 *See for example* K. Engle, 'Anti-impunity and the turn to criminal law in human rights', (2015) 100(5) *Cornell Law Review* 1069-1127 and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015).

47 These critiques of the IACtHR's 'anti-impunity' jurisprudence will be discussed in more detail in Chapter 4 of this book.

48 *See for example* C. Binder, 'The prohibition of amnesties by the Inter-American Court of Human Rights', (2011) 12(5) *German Law Journal* 1204-1229 and L.J. Laplante, 'Outlawing amnesty: the return of criminal justice in transitional justice schemes', (2009) 49(4) *Virginia Journal of International Law* 915-984.

49 *See for example* F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2007) 12(1) *Am. U. Int'l L. Rev.* 195-229, whose criticisms of the IACHR seem to be based almost exclusively on the case of *Bulacio v. Argentina*.

50 L. Burgorgue-Larsen and M. Ubeda de Torres, *The Inter-American Court of Human Rights: case law and commentary* (Oxford University Press, 2011).

51 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009).

Fohr herself notes,[52] her study started as an exploration of the prohibition of amnesties under international human rights law and, as a result, the focus of her analysis falls mostly on that particular aspect of the duty to prosecute.

The first part of this study will build on and contribute to the existing literature by analyzing the duty to prosecute as an autonomous doctrine and by tracing its development in the IACtHR's case law, from it very first judgment in the case of *Velásquez Rodriguez v. Honduras* until the present. Rather than focus on one element of the duty to prosecute, it will identify the full set of more concrete doctrines developed by the IACtHR under the umbrella of the duty to prosecute and discuss their interrelations. Moreover, while this study will present the current state-of-the-art – under the IACtHR's case law – of these doctrines, it will contextualize current standards by tracing their development over the course of the IACtHR's case law and clarifying the circumstances under which certain leaps in their development came about. Finally, this study will further contextualize the IACtHR's case law on the duty to prosecute by providing an overview of the most fundamental objections which have been raised against it in international legal scholarship.

2.2 What we know about the contributions of the Inter-American system to domestic accountability processes

Whereas the contributions of the Inter-American human rights system to legal doctrine on the obligation to investigate, prosecute and punish have thus been the subject of some study and debate, very few efforts have been made to say anything about its contributions to practice.[53] This situation can be at least partly explained by the fact that traditional legal scholarship does not concern itself with questions of the 'contributions' of legal norms and institutions to society. When legal scholars do concern themselves with such questions, they tend to do so from the angle of compliance with rules and orders. Therefore, legal scholarship concerning the societal relevance of the Inter-American human rights system has so far been limited to attempts to

52 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p ix.

53 Two recent studies have attempted to tackle this question directly. *See* P. Engstrom (ed.), *The Inter-American human rights system: impact beyond compliance* (Palgrave MacMillan, 2019) and H. Duffy, *Strategic human rights litigation: understanding and maximizing impact* (Hart Publishing, 2018). Moreover, as noted above in fn.39, Alexandra Huneeus has also explored this topic to some extent in her more recent work. *See* A. Huneeus, 'Pushing states to prosecute atrocity: The Inter-American Court and positive complementarity', in: H. Klug and S.E. Merry, *The new legal realism, Volume II – studying law gobally* (Cambridge University Press, 2016). However, given the recent publication of these studies, they did not inform the approach taken in this study to analyzing the contribution of the Inter-American system to domestic accountability processes. They will, therefore, not be included in the discussion in th remainder of this chapter.

measure state compliance with the reparations and other measures ordered by the Court.[54]

Such compliance studies have consistently indicated that compliance rates in the Inter-American system are low, and especially so when it comes to the Court's orders to investigate and prosecute human rights violations.[55] In fact, the low level of compliance with its orders has become an important source of criticism against the Inter-American human rights system and its work.[56] However, comparisons to other international legal regimes have suggested that the low levels of compliance with the IACtHR's orders to investigate, prosecute and punish are not as exceptional as is often believed. Hawkins and Jacoby indicated that compliance with the orders of the Inter-American Court are comparable to those of its European counterpart.[57] At the same time, Alexandra Huneeus' important study of the 'quasi-criminal

54 *See for example* F. Basch et al., 'The effectiveness of the Inter-American System of human rights protection: a quantitative approach to its functioning and compliance with its decisions', (2010) 7(12) *SUR Journal -International Journal on Human Rights*. *See also* A.V. Huneeus, 'Human rights between jurisprudence and social science', (2015) 28(2) *Leiden Journal of International Law* 255-266, p. 260, explaining the importance of Basch et. al.'s contribution to legal scholarship on the Inter-American human rights system, as it was the first attempt to assess the compliance with the Court's judgments and orders based on empirical data. Up until that point, legal cholarship on the issue had limited itself to examining the legal framework for compliance with the Court's judgments.

55 *See for example* F. Basch et al., 'The effectiveness of the Inter-American System of human rights protection: a quantitative approach to its functioning and compliance with its decisions', 7(12) *SUR-International Journal on Human Rights* (2010) and D. Hawkins and W. Jacoby, 'Partial compliance – a comparison of the European and Inter-America Courts of Human Rights', (2010) 6(1) *Journal of International Law and International Relations* 35-85. *See also* Inter-American Human Rights Network Reflective Report, 'Strengthening the impact of the Inter-American human rights system through scholarly research', (April 2016), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764897, last checked: 26-04-2018, p. 2, stating that: [b]ased on the available data, research by the Network has empirically demonstrated that general compliance rates with both the Commission and the Court are very low."

56 *See for example* Inter-American Human Rights Network Reflective Report, 'Strengthening the impact of the Inter-American human rights system through scholarly research', (April 2016), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764897, last checked: 26-04-2018, pp. 2-3, noting that: "[f]or some, the patchy compliance record demonstrates the limited impact of the Inter-American System in ways that undermine its legitimacy and authority."

57 D. Hawkins and W. Jacoby, 'Partial compliance – a comparison of the European and Inter-America Courts of Human Rights', 6 *Journal of International Law and International Relations* (2010-2011), 35-85. This study has, however, done little to mitigate the long-standing idea among many scholars that the IACtHR is a particularly 'weak' human rights court in terms of compliance with and practical impact of its judgments. The persistence of this notion can perhaps partly be explained by certain ingrained prejudices about 'Latin American law'. *See* J. Esquirol, 'The failed law of Latin America', (2008) 56(1) *American Journal of Comparative Law* 75-124, commenting on the tendency, which exists in some circles, to project certain inherent limitations of the law particularly on 'Latin American law'. Esquirol describes, for example, the belief that the gap between the 'law in the books' and the 'law in practice' often observed in Latin American is a quality of 'Latin American law', rather than of law in general.

jurisdiction' of human rights courts has suggested that, when it comes to the investigation and prosecution for grave violations of human rights, the levels of compliance with the IACtHR's orders should be compared to the results achieved by international criminal courts.[58] When contextualized in this way, she notes, the number of prosecutions undertaken and convictions rendered following orders to that effect by the IACtHR is considerable.[59]

In short, the available literature sheds little light on the practical contributions of the IACtHR's case law on the obligation to investigate and prosecute grave violations of human rights to domestic accountability processes. What literature exists limits itself to the question of compliance with the Court's orders which, for reasons discussed below, is not an appropriate framework for answering the research questions posed in this study. Moreover, the available literature mostly limits itself to discussing the level of compliance with IACtHR orders to investigate and prosecute and to the question whether this level of compliance is exceptionally low or not. It does not, however, seek to explain why states do or do not comply with these orders and which domestic circumstances make compliance possible.[60] As a result, it is of limited use when answering the questions driving this study.

2.3 How to study the influence of international norms and institutions on domestic processes: lessons from different disciplines

International legal scholarship thus provides no direct answers to the question how the Inter-American human rights system has contributed to domestic accountability processes in Latin America. However, several bodies of academic literature do provide insights into how one can conceptualize and study such contributions and which actors are involved in making them possible. This study draws on lessons learned from international legal scholarship on the impact of international courts, social science literature on the impact of international norms, especially human rights norms, on domestic politics and transitional justice literature on the dynamics of domestic accountability processes.

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58 A. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *American Journal of International Law* 1-44, pp. 2 and 15-20.

59 Idem, pp. 15-20.

60 An important exception in this respect is the work of Courtney Hillebrecht, a social scientist who has conducted interdisciplinary research into the domestic mechanisms explaining compliance with the orders of human rights courts, and particularly the IACtHR. *See* C. Hillebrecht, 'The domestic mechanisms of compliance with international human rights law: case studies from the Inter-American human rights system', (2012) 34(4) *Human Rights Quarterly* 959-985 and C. Hillebrecht, *Domestic politics and international human rights tribunals – the problem of compliance* (Cambridge University Press, 2014).

2.3.1 *International legal scholarship: moving beyond compliance*

A described above, the literature has so far concerned itself mostly with measuring compliance with the IACtHR's orders to investigate, prosecute and punish. Compliance with judgments and decisions is the traditional way in which lawyers understand the practical contributions of international courts to society. Legal scholarship therefore often analyzes individual judgments and the specific acts undertaken by states following such judgments.[61] For lawyers, thinking about the contributions of an international court in terms of compliance with its orders is logical, because it follows from the logic of legality and normative and institutional hierarchy on which the (international) legal system is based. In other words, it "conforms to their idea of who they are and what the law is."[62]

In recent years, however, some legal scholars have started to question the appropriateness of compliance as a framework for assessing the law's true impact. Inspired by insights from certain strands of the social sciences, these scholars argue that compliance as a framework is both too narrow and too broad.[63] Compliance is seen as too broad because it simply asks whether a state's behavior is in line with an international rule or an order by an international court, without considering the reasons for that behavior. Following this reasoning, one may count as an instance of compliance "behavior that conforms to law for reasons not having to do with the law".[64] On the other hand, scholars have argued that compliance is too narrow a framework, because it excludes from consideration all effects a judgment may have which are not directly related to the orders given by the court in question. Moreover, and very important in the context of this study, a compliance based framework – with its focus on the orders given in individual judgments – also excludes from consideration any possible effects of the *proceedings* conducted before international courts[65] and of the *doctrines* developed by international courts over a series of cases.

As a result of this debate, international legal scholarship has slowly expanded its horizons to include alternative frameworks for understanding the contributions of international courts to society.

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61 In the words of Alexandra Huneeus, such scholarship examines whether "a state or other actor subject to a court carries out the actions required by a ruling of the court or refrains from carrying out actions prohibited by said ruling."A. Huneeus, ' Compliance with judgments and decision', in: CPR Romano, KJ Alter and Y Shany, *The Oxford handbook of international adjudication* (Oxford University Press, 2014), p. 442.

62 Idem, p. 441.

63 For an overview of this debate, *see* idem, pp. 438-441.

64 Idem, p. 439.

65 *See for example* A. Huneeus, 'Pushing states to prosecute atrocity: The Inter-American Court and positive complementarity', in: H. Klug and S.E. Merry, *The new legal realism, Volume II – studying law gobally* (Cambridge University Press, 2016), pp. 229-233, discussing the effects of the supervision of compliance *proceedings*, and the 'dialogic tools' employed by the IACtHR in the context of those proceedings, on domestic accountability efforts.

One important example of this development is the work of Yuval Shany, who has developed a framework for assessing the *effectiveness* of international courts in achieving the *goals* set for each court by those who provided its mandate.[66] This approach is based on the normative argument that "courts should execute their mandates"[67] and on the idea that the performance of international courts is best assessed by measuring the extent to which they are able to do so effectively.

The 'goal-based approach' proposed by Shany thus allows for consideration of a wider set of effects than the traditional focus on compliance, but is still somewhat constrained by its aim of rating their performance. In contrast, a third approach found in the literature is to assess the *impact* of international courts. This approach aims to assess "what courts actually do",[68] without seeking to compare this to what they should be doing. The most advanced examples of this type of inquiry have combined legal analysis with more interdisciplinary work.[69] However, notwithstanding the interdisciplinary methodology applied in such studies, their approach to impact continues to be based on, and limited by, a legal logic. Such studies usually focus on the relation and interaction between international courts and domestic officials, mostly their counterparts in the domestic criminal justice system.[70] In other words: the focus is on the formal stages of domestic accountability processes, excluding from their consideration the wider social context in which these take place. Little attempt has so far been made to *explain how* international courts may affect domestic politics or legal processes to produce those outcomes and to shed light on the domestic circumstances under which they might be able to do so. Also, legal scholarship

66 *See* Y. Shany, *Assessing the effectiveness of international courts* (Oxford University Press, 2014). In this book, Shany further expands and elaborates a theory he introduced in a 2012 publication in the American Journal of International Law. *See* Y. Shany, 'Assessing the effectiveness of international courts: a goal based approach', (2012) 106(2) *American Journal of International Law* 225-270.

67 Y. Shany, 'Assessing the effectiveness of international courts: a goal based approach', (2012) 106(2) *American Journal of International Law* 225-270, p. 237.

68 Idem, p. 228.

69 The DOMAC research project is an important example of legal scholarship attempting to assess the impact of international (criminal) courts. It made use of both quantitative and qualitative empirical data and undertook in-depth case studies.

70 The DOMAC project, for example, identified and analyzed four areas of impact: 1.) prosecution rates; 2.) sentencing policies; 3.) legal reforms; and 4.) domestic capacity building. *See* Y. Shany, 'How can international criminal courts have a greater impact on national criminal proceedings? Lessons from the first two decades of international criminal justice in operation', (2013) 46(3) *Israel Law Review* 431-453, p. 436.
This narrow focus on the relation between international courts and their domestic counterparts ties into the concept of an international 'judicial dialogue', according to which the various domestic and international courts take inspiration from and refer to each other's work in their interpretation and application of international law, thereby contributing to the development of that law.

is still rather limited in the type of domestic actors it deems relevant when examining the societal impact of international courts. For a more detailed consideration of these issues, we have to look at insights from the social sciences.

2.3.2 *Social sciences: broadening the circle of relevant actors*

The extensive social science literature on compliance with and the impact of international norms and international institutions has produced some key insights of relevance to this study. Specifically, this literature sheds light on the categories of actors and the domestic circumstances which shape state responses to international norms and international courts.

Social scientists belonging to the constructivist school of thought have made important contributions to our understanding of the ability of international human rights norms to influence state behavior by focusing on processes of norm socialization. According to this theory, human rights norms may influence state behavior when these norms become internalized by states and help to shape their preferences and their sense of identity.[71] Such processes of norm socialization are driven in large part by so-called 'transnational advocacy networks' or 'principled issue networks', defined as a group of "relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services" and consisting mostly of domestic and international NGOs.[72] According to Risse, Ropp and Sikkink, such networks can create a 'boomerang effect', by which "domestic groups in repressive states can bypass their state and directly search out international allies to bring pressure on the state from outside".[73] Under certain circumstances, this combined pressure from above and below[74] may set the state

71 *See generally* T. Risse, S.C. Ropp and K. Sikkink (eds.), *The power of human rights – international norms and domestic change* (Cambridge University Press, 1999). It should be noted that such processes of norm-socialization are understood to operate alongside other, more traditional mechanisms driving state behavior. Constructivists do not deny the importance of military and economic interests and power in explaining state behavior, but merely suggest that other, 'softer' mechanisms may also sometimes play a role in shaping that behavior.

72 T. Risse, S.C. Ropp and K.Sikkink (eds.), *The power of human rights - international norms and domestic change* (Cambridge University Press 1999), p. 18. *See also* M.E. Keck and K. Sikkink, 'Transnational advocacy networks in international and regional politics', (1999) 51(1) *International Social Science Journal* 89-101 and K. Sikkink, 'Human rights, principled issue-networks and sovereignty in Latin America', (1993) 47(3) *International Organization* 411-441.

73 T. Risse, S.C. Ropp and K.Sikkink (eds.), *The power of human rights - international norms and domestic change* (Cambridge University Press 1999), p. 18.

74 *See also* A. Brysk, 'From above and below – social movements, the international system and human rights in Argentina', (1993) 26(3) *Comparative Political Studies* 259-285.

on a slow and multi-staged path towards internalization of the relevant human rights norm.[75]

Whereas these scholars have thus emphasized the work of transnational networks, others have highlighted the role of domestic activists in pushing domestic politics to comply with international norms. Beth Simmons, for example, argues that "no one has a more consistent, intense interest in whether and how a government complies with its human rights commitments than the human beings on the ground in that country".[76] As a result, she has focused her analysis of how international human rights norms affect domestic politics on the work of domestic civil society groups, who hold their state accountable for its human rights performance. Moreover, Sonia Cardenas has emphasized that, just as there are domestic constituencies working towards their state's compliance with human rights norms, there are domestic groups who have an interest in their state's continued violation of those norms.[77] Consequently, she argues that any analysis of the influence of human rights norms over domestic politics should take into account these 'pro-violation constituencies' well.

In short, social scientists studying the impact of international law and human rights have highlighted the role of civil society actors, particularly human rights NGOs, rather than that of domestic officials and magistrates, as international lawyers tend to do.

2.3.3 Transitional justice: dynamics of domestic accountability processes

These insights have spilled over into the final area of academic literature of relevance to this study, which is that on transitional justice in Latin America, and particularly the struggle to 'overcome impunity' for international crimes in the region. Here too, social and political scientists have made important contributions to existing knowledge. They have described and analyzed the 'justice cascade', the process of norm-internalization through which impunity for human rights violations is increasingly seen as ille-

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75 Risse, Ropp and Sikkink call this process the 'spiral model' of human rights socialization. T. Risse, S.C. Ropp and K.Sikkink (eds.), *The power of human rights - international norms and domestic change* (Cambridge University Press 1999). This model was refined, and the scope conditions under which it may function further developed, in: T. Risse, S.C. Ropp and K. Sikkink (eds.), *The persistent power of human rights – from commitment to compliance*, (Cambridge University Press, 2013).

76 B. Simmons, *Mobilizing for human rights: international law in domestic politics* (Cambridge University Press, 2009), p. 356, noting that she "do[es] not argue that transnational actors have not been crucial to the question of compliance" with human rights norms, but objecting to the narrative presenting transnational networks as "white knights" acting on behalf of victims, thereby denying agency to local stakeholders.

77 S. Cardenas, Conflict and compliance – State responses to international human rights pressure, (University of Pennsylvania Press, 2007).

gitimate.[78] Again, civil society organizations like victim groups and human rights NGOs are seen as important driving forces behind the justice cascade.

Such studies often focus on the Latin American region specifically, a fact which can be explained from the region's recent history of repressive military dictatorships and grave human rights violations, transition to democracy and the subsequent efforts of new governments to overcome the shadows of the past. Some have described Latin America as a 'hemispheric laboratory' for transitional justice,[79] and the region has seen more domestic transitional trials than any other in the world.[80]

One of the main lessons to be learned from the Latin American experience is that transitional justice bargains, made at the moment of the transition when the political situation is sensitive and generally unfavorable to criminal prosecutions, are "neither durable nor dichotomous".[81] This a correction to much of the early transitional justice scholarship, which tended to focus almost exclusively on the transitional justice policies and mechanisms put in place by states at, or shortly after, the transitional moment. These policies, and the scholarship exploring them, have been criticized for being "over-determined by "the stability v. justice dilemma""[82] and, more generally, for being over-determined by the interests of states, rather than the interests of those who suffered the impact of the crimes of former regimes.

In Latin America, in particularly, it has been observed that amnesties, once instated, do not necessarily exclude the possibility of achieving criminal accountability for grave human rights violations in the long run. Victims and NGOs have continued to demand justice for the crimes of former regimes, amnesty laws notwithstanding, and have achieved results with varying degrees of success. This has led some to argue that the transitional justice framework should be complemented by a 'post-transitional justice' framework,[83] to better articulate the reality that the hard work of achieving accountability often takes place *after* the transitional moment. Latin America, in particular, has known various pathways from amnesty to accountability.[84]

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78 *See for example* K. Sikkink, *The justice cascade: how human rights prosecutions are changing world politics* (W.W. Norton & Company, 2011)

79 D. Rodríguez Pinzón, 'The Inter-American human rights system and transitional processes', in: A. Buyse and M. Hamilton (eds.) *Transitional jurisprudence and the ECHR – justice, politics and rights* (Cambridge University Press, 2011)

80 K. Sikkink and C.B. Walling, 'The impact of human rights trials in Latin America', (2007) 44(4) *Journal of Peace Research* 427-445.

81 Idem.

82 C. Collins, *Post-transitional justice: human rights trials in Chile and El Salvado*r (Columbia University Press 2010), p.8.

83 C. Collins, *Post-transitional justice: human rights trials in Chile and El Salvado*r (Columbia University Press 2010). *See also* J. Davis, *Seeking human rights justice in Latin America: truth, extra-territorial courts and the process of justice* (CUP 2013).

84 F. Lessa, T.D. Olsen, L.A. Payne, G. Pereira and A.G. Reiter, 'Overcoming impunity: pathways to accountability in Latin America', (2014) 8(1) *The International Journal of Transitional Justice* 75-98.

In other words: recent transitional justice literature teaches us that accountability for the crimes of past regimes cannot be reduced to policy choices made at the transitional moment or to a particular mechanism or outcome (i.e. conviction of the guilty party). Accountability, including criminal accountability, should rather be understood as a process.[85] Jeffrey Davis, for example, has argued that "the process of legal justice, including the process that precedes, includes, and follows the verdict, can have a broad impact on reconstituting human dignity and contributing to the full transition from widespread human rights violations."[86]

In a recent overview article, Francesca Lessa *et. al.* have described four factors which play an important role in this process of justice: 1.) civil society demand for prosecutions; 2.) the absence or weakness of 'veto players' (i.e. actors with an active interest in maintaining impunity from crimes committed by past regimes, often because they were complicit in them or have profited from them); 3.) domestic judicial leadership (i.e. prosecutors and judges willing to pursue investigation and prosecution of crimes committed by past regimes); and 4.) international pressure.[87] This framework thus combines insights from legal and social science scholarship, in that it includes both domestic officials and civil society groups in its analysis. The addition of the 'veto players' further broadens the focus to studying not only those forces working in favor but also those working against accountability for human rights violations.

2.4 This study's approach to examining Inter-American contributions to domestic accountability processes

In its analysis of the contribution of the Inter-American human rights system to domestic accountability processes, this study builds on all these lessons taken from various relevant fields of study. Firstly it should be noted that, while this study focuses on the judicial function of the Inter-American human rights system, its analysis of the practical contributions made by this system is not guided by the logic of compliance with IACtHR judgments.

85 *See generally* J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014).

86 J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014), p. 51.

87 F. Lessa, T.D. Olsen, L.A. Payne, G. Pereira and A.G. Reiter, 'Overcoming impunity: pathways to accountability in Latin America' 8 *The International Journal of Transitional Justice* 2014, 75-98. *See* also F. Lessa and L.A. Payne (eds.), *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012).

Choosing compliance as the framework for answering the second research question would not only limit the analysis to a very limited set of individual cases, it would also unduly limit the temporal scope of the analysis. A study of compliance starts at the moment the Court renders a final judgment in a particular case, and focuses on the timeframe between the delivery of that judgment and the moment the domestic situation is brought in line with the orders given in that judgment. Domestic accountability processes, however, do not start because they are ordered by the Inter-American Court. They are initiated within the domestic context by domestic actors, well before the Inter-American system is ever seized of the matter. Only when the domestic justice system proves unreceptive to the claim for justice, can victims groups and human rights NGOs decide to engage the Inter-American system by filing a complaint.[88] Thus, while a judgment from the Inter-American Court will often give a new impulse to domestic accountability processes, it is not what triggers them in the first place. Likewise, there is no reason to assume that the Inter-American system only contributes to domestic processes through its judgments in individual cases or that its contributions only start with the delivery of those judgments. In fact, as this study will demonstrate, its contribution may start from the very moment the Inter-American system declares the case admissible. This study will look for contributions made by the Inter-American system through 1.) judgments delivered by the IACtHR; 2.) doctrines developed over the course of the IACtHR's case law; and 3.) the proceedings in individual cases conducted by the organs of the Inter-American system.

Moreover, compliance logic takes the ruling of an international court as its focal point, whereas this study takes domestic accountability processes as its focal point. For this same reason, analyzing the contribution of the Inter-American human rights system also cannot be equated with assessing its effectiveness. The notion of effectiveness relates to the Court's ability to achieve the goals it has set for itself and assessing a court's effectiveness is a way of rating that courts performance. The purpose of this study, however, is not to rate the performance of the Inter-American system, but to investigate how domestic accountability processes may be supported by international institutions like (the organs of) the Inter-American system. The difference between 'making a contribution' and 'being effective' is subtle but relevant. After all, it is not the effectiveness of the Inter-American system, but that of domestic accountability processes that this study is most concerned with.

88 Engstrom and Low describe the decision of such domestic groups to litigate a case before the Inter-American system as "the result of a strategic choice". P. Engstrom and P. Low, 'Mobilizing the Inter-American human rights system: regional litigation and domestic human rights impact in Latin America', in: P. Engstrom (ed.), *The Inter-American human rights system: impact beyond compliance* (Palgrave MacMillan, 2019), pp. 30-31.

Secondly, when analyzing these domestic accountability processes, the case studies will not focus on outcomes alone, but on the *process* of justice, which plays out over an often extended period of time. The accountability processes usually start long before any criminal cases make it to trial, if indeed this ever happens. The 'preparatory work' includes not only the investigation, which in itself can be very lengthy, but also overcoming any *de jure* and *de facto* obstacles to investigation and prosecution. Since international crimes almost always entail the involvement of state-agents and other powerful structures within society, this is often the most difficult part of the process.[89] Focusing only on an eventual trial, as legal scholarship has often done, would mean excluding most of the process from this study.

At the same time, however, it is the outcome of such processes, achieving criminal accountability through prosecution and trial of those responsible, which makes them interesting from the point of view of the fight against impunity. Likewise, it is its contribution to such outcomes that makes the IAHRS an interesting object of study. Thus, while recognizing that achieving accountability through criminal trials is the social change to which the IAHRS seeks to contribute, this study is mindful of the fact that such trials – if they ever occur – are always the outcome of a long process. When this study speaks of domestic accountability processes, it refers to the process as a whole.

Thirdly, this study recognizes that domestic accountability processes are driven by the involvement of a multitude of actors from different backgrounds, not all of them being state agents. In line with the literature described in the previous section, the case studies will focus in particular on the role of 1.) human rights NGOs and victims' organizations demanding accountability; 2.) 'judicial leadership' by both judges and prosecutors; and 3.) the relative power of domestic veto players. Since these are the actors that drive domestic accountability processes, this study assumes that the capacity of the Inter-American system to contribute to and advance those processes will depend on its capacity to build relations with them. In other words, a contribution by the Inter-American system to a domestic accountability process will be understood to have occurred where the Inter-American system can be shown to have supported or enhanced the work of domestic actors working towards criminal accountability, or even to have

89 In this context, some authors speak of 'pathways to accountability' and have tried to categorize the various paths states can take to overcome impunity and make accountability for international crimes possible. *See* F. Lessa, T.D. Olsen, L.A. Payne, G. Pereira and A.G. Reiter, 'Overcoming impunity: pathways to accountability in Latin America', 8 *The International Journal of Transitional Justice* 2014, 75-98.

sustained it in the face of potentially undermining domestic circumstances.[90] Moreover, while the Inter-American system cannot be seen to trigger domestic accountability processes, it may trigger certain developments within those larger processes.

3 Research design and methodology

The research project is divided into two parts, corresponding to the two research questions which this study seeks to answer. The approach taken in this study to examining the contributions, both legal and practical, of the Inter-American human rights system to the fight against impunity in Latin America has certain methodological implications. These implications will be further discussed in this section.

3.1 Analysis of Inter-American jurisprudence on the duty to investigate, prosecute and punish human rights violations

The first part of this study looks at the legal doctrines and techniques developed by the Inter-American human rights system, under the umbrella of the states' obligation to investigate and prosecute human rights violations, in order to advance the struggle against impunity. In doing so, this part of the study will focus on the case law of the Inter-American Court, and will mostly leave aside the work of the Inter-American Commission, unless discussion of that work is necessary in order to shed light on issues left ambiguous by the Court. This choice is necessitated by the vast number of cases brought to the Inter-American system concerning states' failure to provide justice for serious human rights violations. And while the work of the Commission has certainly been important in the development of the concepts under study, the Court remains the ultimate interpreter of the ACHR, endowed with the authority to impose these concepts on states through its judgments.

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90 The notions of 'enhancing' or 'sustaining' domestic processes are inspired by a particular approach to impact evaluation, namely contribution analysis. This approach had been developed as a tool for evaluating the effectiveness of development policy and, in particular, specific interventions undertaken as part of such policy. While this study does not undertake a proper contribution analysis, which is a largely deductive exercise based on a distinct logic and applied in a distinct context, it is submitted that its certain features of this approach are relevant in the context of this study. In particular, the different ways in which international interventions can contribute to domestic processes or development, i.e. by 'triggering', 'enhancing' or 'sustaining' desired outcomes. *See* B. Befani and J. Mayne, 'Process tracing and contribution analysis: a combined approach to generative causal inference for impact evaluation', (2014) 45(6) *IDS Bulletin* and Stern et. al., 'Broadening the range of designs and methods for impact evaluations', Department for International Development, working paper no. 38 (April 2012), available at http://r4d.dfid.gov.uk/Output/189575/, last checked: 30-03-2015.

In order to be able to provide a complete and integral analysis of the standards developed by the IACtHR over the course of its case law, the case law review which forms the basis for the first part of the study has had to cast a wide net in terms of which cases to select. In fact, it has been decided to include all judgments delivered by the Court since the start of its operations in which it addresses the obligation of states to provide justice for human rights violations in any detail.[91] And given the central importance, and dominant presence, of (the fight against) impunity in the Court's case load, this means that the number of cases analyzed has been considerable.

Given the large number of cases to be analyzed, the review has been conducted in several phases. First, a preliminary review was undertaken, in which a sample of the entire body of case law was analyzed. This sample included the judgments relevant to the fight against impunity in the two countries which are the focus of the second part of this study: Guatemala and Colombia. On top of that, it included a number of judgments against other states which were repeatedly referenced in the judgments against Guatemala and Colombia and which were therefore believed to be landmark cases. Finally, this first phase of the analysis included a review of the literature concerning the case law of the IACtHR and its relation to the struggle against impunity.

On the basis of this preliminary review, it was possible to establish the scope of the obligation to investigate and prosecute human rights violations and its legal nature under the ACHR and to identify its various components. These preliminary results were organized in a schematic overview, included in Annex 1 to this study, which subsequently formed the basis for the analysis of the remainder of the selected case law. Throughout the process, the schematic overview was continuously updated to accommodate new insights. The schematic overview provides a birds-eye view of all the doctrines identified by the IACtHR as falling under the state's overarching obligation to investigate, prosecute and punish human rights violations, the relations between these various elements and their basis in the provisions of the ACHR. The schematic overview forms the basis for the description of the doctrines and techniques developed in the Court's case law in Chapters 2 and 3 of this study.

Thus, over and above answering the first research question, the first part of the study serves a separate, very practical purpose by making the IACtHR's large body of case law on the obligation to investigate, prosecute and punish more easily accessible to those who are interested in it. The quantity of cases of the Court relevant to the fight against impunity makes its case law a rich source for academics and advocates who concern themselves with the topic, but it also makes it difficult to gain a real overview of the case law in its entirety. As a result, advocates and academics often

91 The case law review is updated until the summer of 2017, when the analysis underlying this part of the study was concluded.

focus on a limited number of main issues addressed by the Court, while much of the detail is lost in the sheer number of pages produced by the Court. Chapters 2 and 3 and the accompanying schematic overview seek to present and integral overview of the IACtHR's case law on the obligation to investigate, prosecute and punish human rights violations and elucidate the interrelations between its various elements, without sacrificing its detail and complexity.

3.2 Analysis of the IAHRS' contributions to practice: design and case selection

Studying the contribution of the IAHRS to domestic accountability processes requires the type of in-depth study of complex processes that is typically associated with a qualitative research strategy. Moreover, the research strategy employed in relation to the second research question is inductive and aims at theory generation through the drawing of generalizable inferences out of observations,[92] rather than theory testing.

The design of this qualitative, inductive study is that of three separate case studies. The case study design is suitable for the type of research undertaken in this part of the study, because it concerns a "how" question about events over which the researcher has no control and which are not entirely historical, but continue in the present.[93] With regard to the phenomenon of study, contextual conditions are especially important and the boundary between the phenomenon and its context are not clear-cut.[94] Moreover, the study aims to analyze how the Inter-American system interacts with actors pushing for accountability on the national level interact and how the former contributes to the work of the latter. To this aim, the in-depth study of particular instances of this interaction in their context is especially useful.[95]

The study analyzes three examples of such interactions in the context of the Court's involvement in domestic accountability efforts in two different countries: Guatemala and Colombia. These countries have been selected based on their suitability for studying the mechanisms through which the IAHRS has contributed to domestic accountability efforts. Firstly, both countries have been the subject of a considerable body of case law by the IACtHR on issues that are relevant to this study. Secondly, both countries are highly unlikely protagonists in the international struggle against impunity. Both countries' justice systems have historically been weak and underdeveloped, and were undermined further in the second half of the

92 A. Bryman, *Social research methods* (Oxford University Press, 4th edition, 2012), p. 26.
93 *See* R.K. Yin, *Case study research – design and methods* (Sage, 5th edition, 2014), pp. 9 – 15.
94 *See* P. Baxter and S. Jack, 'Qualitative case study methodology: study design and implementation for novice researchers', (2008) 13(4) *The Qualitative Report* 544-559, p. 545.
95 *See* J. Gerring, 'What is a case study and what is it good for?', (2004) 98(2) *American Political Science Review* 341-354, p. 348.

20th century by armed conflict and the rise of organized crime. However, notwithstanding these considerable obstacles, both countries have known strong and persistent anti-impunity movements, which have, at times, yielded unexpected and spectacular results. In 2013, Guatemala became the first country in the world to prosecute, try and convict a former head of state for the crime of genocide within its own domestic justice system. Colombia, on the other hand, has managed to secure peace agreements with several armed groups, paramilitaries and guerrillas, in which it has achieved a delicate balance between the interest of achieving peace through negotiation and providing justice for the victims of human rights violations. In this way, both countries have achieved unprecedented results of interest to anyone involved in the international struggle against impunity. Due to this combination of factors, the two countries provide ample opportunity to analyze the possible contribution of the IAHRS to domestic accountability processes taking place under difficult circumstances.

Each of the three case studies will focus on a different aspect of the fight against impunity. In relation to Guatemala, this study focuses on the work of civil society groups, particularly NGOs and victim organizations, pushing for accountability for grave human rights violations committed in the context of the Guatemalan civil war. The activists who are the focus of the case study pursue their work in a post-transitional situation characterized by the continued dominance of those responsible for these violations. This results not only in a particularly stubborn and entrenched situation of impunity, but also in an environment that is hostile towards those who seek to make inroads into that situation of impunity. The first case study therefore seeks to analyze how the work of the IAHRS has supported the often dangerous and frustrating work of domestic pro-accountability activists and these activists strategic recourse to the Inter-American system.

The second case study focuses on the legislative processes conducted in Colombia towards the establishment of special mechanisms to adjudicate grave human rights violations committed in the context of the Colombian civil war. These processes took place against the background of ongoing negotiations between the government and different insurgent groups, both paramilitaries and guerrillas, to end that war. The study analyzes how a host of diverse domestic actors managed to insert into these processes an awareness of interests which were not directly represented at the negotiating table: the interest of providing justice for the victims of human rights violations. It also analyzes the contribution of the Inter-American human rights system to the work of these domestic actors in putting this interest on the agenda.

The third case study focuses on the work of Colombian prosecutors tasked with the prosecution cases of grave human rights violations in the context of an ongoing armed conflict. The nature of the cases in their caseloads presents these prosecutors with a range of practical, political and legal obstacles in their work. The study analyzes how the IAHRS has supported, and sometimes further complicated the work of human rights prosecutors

in Colombia, by requiring them to include new avenues of research and analysis in their investigations and grapple with the wider context in which the human rights violations in question were committed. Something which was not traditionally understood as being part of a prosecutor's work.

Since this project undertakes three case studies, it follows, in that sense, a multiple case study design. However, as each of these case studies has its own particular focus, it should be noted that this study does not follow a comparative design. Its outcomes are, therefore, not based on cross-case comparison, but rather on within-case analysis. This choice was made because of the complex nature of the cases, the large number of contextual factors involved in domestic accountability processes and the lack of control over these contextual factors, which makes comparison of the cases difficult.

Instead, the study explores the ways in which the IAHRS can influence domestic accountability efforts on the basis of within-case inferences. The aim of each case study is to provide a full account of the process in the case at hand. This approach necessarily affects the generalizability of the conclusions of the case studies to a larger population.[96] That is not to say, however, that the conclusions from the case studies hold no value whatsoever outside of the context of the specific case at hand. Case studies, even single-case designs, can be and regularly are used for drawing conclusions of relevance to a larger population.[97] This is done, for example, by comparing the mechanisms uncovered through the case studies to those found in other studies of similar cases.[98] Furthermore, comparing and contrasting the findings the case studies with the theoretical concepts used in in their design can also help to infer lessons and hypotheses which are relevant beyond the concrete cases at hand (analytic generalization).[99] Generalizations of this type are, of course, far from certain. In line with the above, the purpose of the case studies is explanatory with regard to the specific cases under study, but exploratory with regard to the larger population. This means that possible generalizations will take the form of propositions and working hypotheses which will have to be confirmed or rejected through further research.

Finally, it should be noted that the IAHRS has not been the only international institution to intervene in domestic accountability processes in the two countries selected for the case studies. The UN has had an important presence in Guatemala and has been an important voice on transitional

96 This "tradeoff between comparability and representativeness" is inherent in all case study research. *See* J. Gerring, 'What is a case study and what is it good for?', (2004) 98(2) *American Political Science Review* 341-354, p. 348.

97 Blatter and Haverland, *Designing case studies – explanatory approaches in small-N research* (Palgrave Macmilan, 2012), p. 134.

98 A.L. George and A. Bennett, *Case studies and theory development in the social sciences* (MIT Press, 2005), p. 179, stating: "The result of individual case studies, each of which employs within-case analysis, can be compared by drawing them together within a common theoretical framework without having to find two or more cases that are similar in every respect but one."

99 *See* R.K. Yin, *Case study research – design and methods* (Sage, 5th edition, 2014), pp. 40 - 41.

justice issues in the country, starting with its monitoring of the peace negotiations in the early 1990s. More recently, the UN Commission against Impunity in Guatemala ("CICIG") has played a fundamental role in strengthening the domestic justice system and exposing high-profile cases of corruption.[100] The ICC, meanwhile, has famously opened a preliminary examination into the situation in Colombia. Through this preliminary investigation, the ICC has sought to push the Colombian authorities to investigate and prosecute international crimes committed during the internal armed conflict, making the country an important 'test-case' for its policy of positive complementarity.[101] In focusing on the contributions of the Inter-American human rights system to domestic accountability processes in Guatemala and Colombia, this study does not deny the important contributions made to those processes by these other international bodies. Rather, it is submitted that the contributions of these various international bodies exist side-by-side and, in some cases, may even reinforce each other. This is particularly true for the contributions to the development of transitional justice mechanisms in Colombia, as discussed in Chapter 6 of this study, which should be understood to exist in parallel to those made by the ICC.[102] However, given the limited scope of this study, it will limit itself to exploring and analyzing the role of the Inter-American human rights system.

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100 For more on CICIG, *see* A. Hudson and A.W. Taylor, 'The International Commission against Impunity in Guatemala: a new model for international criminal justice mechanisms', (2010) 8(1) *Journal of International Criminal Justice* 53-74, E.Gutiérrez, 'Guatemala fuera de control – la CICIG y la lucha contra la impunidad', (2015) 263 *Revista Nueva Sociedad* 81-95 and S.J. Wirken and H. Bosdriesz, 'Privatisation and increasing complexity of mass violence in Mexico and Central America: exploring appropriate legal responses', in: H. van der Wilt and C. Paulussen, *Legal responses to transnational and international crimes* (Edward Elgar Publishing, 2017).

101 *See for example* R. Urueña, 'Prosecutorial politics: the ICC's influence in Colombian peace processes, 2003-2017', (2017) 111(1) *American Journal of International Law* 104-125, p. 107.

102 The contributions of the ICC to the Colombian peace process have been the topic of some study. Several authors writing on this topic have noted – but not explored further – the important contributions made by the Inter-American human rights system. *See for example* A. Chehtman, 'The impact of the ICC in Colombia: positive complementarity on trial', DOMAC/17, October 2011, p. 11 and R. Urueña, 'Prosecutorial politics: the ICC's influence in Colombian peace processes, 2003-2017', (2017) 111(1) *American Journal of International Law* 104-125, pp. 107-109. Elsewhere, Alejandro Chehtman has even suggested that "all in all, the Inter-American Court has been much more influential on the Colombian case than the ICC". A. Chehtman, 'The ICC and its normative impact on Colombia's legal system', DOMAC/16, October 2011, p. 36. Marieke Wierda, meanwhile, noted that "Some actors in Colombia have trouble distinguishing between the difference in roles of the Inter-American Court and the International Criminal Court, and generally may perceive their roles as similar". M. Wierda, 'The local impact of a global court – assessing the impact of the International Criminal Court in situation countries' (PhD thesis, Leiden University, 2019), p. 262.

3.3 Data collection and analysis

3.3.1 Types of sources used

The three case studies which form the basis of the second part of this book were conducted using a combination of different sources. Because each case study has a different focus, the types of sources used in each case study also vary. The case study on the transitional justice mechanisms designed and implemented in the context of the Colombian peace process essentially analyzes a legislative process, of which there exists an official and publically accessible paper trail. Therefore, this case study is based primarily on the official records of this legislative process.[103] For the two other case studies, concerning the work of pro-accountability activists in Guatemala and human rights prosecutors in Colombia respectively, such a paper trail is not (publically) available. Therefore, these two case studies are based primarily on two series of interviews conducted with relevant domestic actors, in which they directly discuss the way in which the Inter-American human rights system has contributed to their work. Moreover, since reception of its case law by domestic courts is one of the main avenues for the Inter-American system to contribute to domestic accountability processes, all three case studies include discussion of domestic case law citing the Inter-American system and/or incorporating concepts and doctrines developed by it.

The information gained from the main sources described above has been supplemented and, where possible, triangulated with information taken from other relevant sources. These supplementary sources include: relevant IACtHR case law; reports and recommendations from the IACmHR; policy documents published by the domestic authorities; reports in local newspapers; reports and publications of domestic and international NGOs;[104] and academic work, especially from local scholars. Finally, for the Guatemalan case study in particular, this study has been able to draw on the raw footage from a 2015 documentary film about former Guatemalan Attorney General Claudia Paz y Paz.[105] This documentary followed Claudia Paz y Paz throughout her term as Attorney General and focuses particu-

103 These documents were accessed through the website www.congresovisible.org, a long-running project of the Political Science Department of the *Universidad de los Andes*.

104 In relation to the reports and publications of local NGOs, it should be noted that the extent to which the study was able to rely on these reports and publications depends on the extent to which the organizations in question has made these publically available through their respective websites. Whereas some organization have a very professional website, providing access to all the relevant documentation, others do not. In particular, many of the organizations relevant to the Guatemalan case study do not publish reports etc. through their websites. With regard to those organization, the study has to rely on the limited documentation their representatives were able to provide during or following interviews.

105 J. Boink and S.J. Wirken, 'Burden of Peace' (Framewerk Productions, 2015), <www.burdenofpeace.com/the-movie.html>.

larly on the Ríos Montt trial, which was conducted during this time. While the documentary does not explore the contribution of the Inter-American human rights system to Paz y Paz' work, the system – and particularly the IACtHR – does come up on various occasions in the interviews conducted in the context of the documentary. The filmmakers provided me with a full transcript of the raw footage of the documentary, from which I was able to select a (limited) number of interviews relevant for the purpose of this study. The filmmakers then provided me with the footage of those interviews.

The relevant materials were collected, in large part, over the course of two research trips to Guatemala and Colombia, undertaken in 2014 and 2015 respectively. After an initial round of analysis of the materials collected in the field, they were complemented, where necessary, by further desk research. Of course, this desk research has been limited to materials which can be accessed online, like news sources and case law.

3.3.2 Research trips: purpose and domestic circumstances

The main purpose of the research trips carried out as part of this research project has been to allow the researcher to collect materials which are not readily available in print and over the internet. Specifically, the research trips have made it possible to conduct a series of interviews with individuals who have played an important role in domestic accountability processes, which became the main source of data for the case studies concerning the work of pro-accountability activists in Guatemala and of human rights prosecutors in Colombia. Because conducting these interviews was the main purpose of the trips, the main activities undertaken while on those trips were related to identifying relevant respondents, making contact with them and, if successful, preparing and conducting the interviews themselves. How I went about these activities will be discussed in detail in the next section.

Apart from this practical purpose of collecting relevant materials, the research trips served a second, less tangible purpose: they have allowed the researcher the possibility to gain a deeper understanding of the ongoing domestic accountability processes described in the case studies and the social and political relations which shape these processes. Being immersed, at least for a time, in the processes in question is an invaluable complement to the more theoretical understanding of such processes one gains from desk research and from reading the accounts of those processes written by others.

However, it should be noted that the research trips provide the researcher with a snapshot of the domestic accountability processes under study. Those processes span decades and are still on-going, whereas the research trips lasted only three months each. As a result, the impressions and experiences gained during the research trips are necessarily colored by the particular set of circumstances prevailing at the moment those trips

were undertaken. At the same time, the researcher's own previous experience and their relation to the situation and the people under study may also color the way in which they perceive the situation encountered on the ground. It is therefore imperative here to provide some background on the circumstances I encountered during the trips and the angle from which I approached the situations under study.

Prior to the research trip to Guatemala, which took place between early February and late May 2014, I had already spent a considerable amount of time in the country, working on projects unrelated to the topic of this study. Through that work I had built a network in Guatemala, and of Guatemalans living in the Netherlands, which helped me to make contacts within the circles relevant to this study. In particular, I was able to make contact with local NGOs involved in the efforts to achieve accountability for crimes committed during the civil war and with investigators and prosecutors working on those cases from within the Guatemalan Public Ministry.

Because the group of people working on these issues in Guatemala is small and because I was introduced in these circles through mutual friends, I quickly became integrated into the human rights 'community'. Some of the people whose work I studied became friends that I interacted with socially. This closeness to the topic of study carries some risks, as it makes it difficult to retain the distance considered necessary for conducting academic research. At the same time, however, it was also immensely helpful and enriching, as it helped me get interviews that would have otherwise been impossible to get and to attend certain events I would not have otherwise been aware of.

Apart from my own social context, the political context in Guatemala at the time of the research trip has also been important in shaping the research conducted. During the conceptualization and design phase of this research project, in 2012 and early 2013, Guatemala was making rapid and remarkable steps forward in bringing to justice those most responsible for the immense suffering inflicted on the civilian population during the civil war. The country had long been considered a weak state, with failing state institutions and, especially, a failing criminal justice system. And now, suddenly, Guatemalan prosecutors and judges were investigating, indicting and even convicting former military officers, including high-ranking officers, for the most serious crimes committed during the civil war. The high-water mark of this development was, of course, the trials against former General and former head-of-state Efraín Ríos Montt, described in the introduction to this chapter. The idea, then, had been to analyze exactly which domestic circumstances had made these remarkable developments possible and what had been the contribution of the Inter-American system towards the creation of those circumstances.

However, by the start of the research trip the situation in Guatemala had shifted dramatically. The opening salvo of this shift had been the annulment by the Constitutional Court of the judgment against Ríos Montt. By early 2014, Guatemalan those opposing the prosecution of crimes committed

during the civil war were moving against all the main pro-accountability actors and their work. Thus, the Guatemalan research trip took place against the background of what, at the time, seemed to be the systematic dismantling of the Guatemalan pro-accountability movement and the domestic process it had set in motion.

The various ways in which the Guatemalan accountability process was being undermined in the first half of 2014 will be further discussed in Chapter 5. What should be noted here, is that this context created an atmosphere of unease and even fear in the circles relevant to this study and that this atmosphere has inescapably influenced my perception of the Guatemalan situation. Had the research trip taken place only a year earlier, at the time of the Ríos Montt trial, my perception might have been different. However, the backlash I witnessed against those who had been involved in the accountability movement's recent successes hammered home the instability of such successes and the vulnerability of pro-accountability actors, even those who would, from the outside, seem protected on account of their position and status.

The climate of polarization and tension in which the research took place also influenced it in a more practical way, as the circumstances made it risky for many prospective respondents to speak about the issues discussed in this study, even to a foreign researcher. This was particularly true for people working in official capacities, like judges, prosecutors and investigators, who could risk losing their position if they were seen as having an affinity with human rights causes.[106] Thus, while I had originally hoped to focus the Guatemalan case study on the work of the judges and prosecutors involved in recent trials concerning crimes committed during the civil war, it soon turned out that securing interviews with them would be next to impossible. This angle for the case study thereby became closed off. On the other hand, activists operating from civil society, whose position is less dependent on political developments, were more open to being interviewed. In fact, speaking out about what was happening and about how the pro-accountability movement was being undermined, constituted an important tool for them. As a result, the focus of the Guatemalan case study shifted from the official level to the work of civil society actors and how the Inter-American system has contributed to it.

The research trip to Colombia, which took place between late August and late November 2015, was conducted in a very different social and political context. A first important difference is that, in contrast to the first research trip, I had no pre-established network to fall back on in Colombia. Before conducting this research trip I had never been in Colombia and I knew the country only through the news and through the academic literature and IACtHR case law I had studied in preparation for the trip.

106 In this context, it is also noteworthy that the first research trip coincided with the start of the process for the selection of judges for the higher courts. This timing made judges even more wary to say anything which might risk their (re)election into office.

Thus, with no social network to provide access to the persons and organizations relevant to the topic under study, I pursued this access through participation in relevant academic networks. For example, as a visiting researcher at the *Universidad del Rosario* in Bogotá, I was able not only to interact with and learn from the academic staff of that university, but also to use their local network to connect with relevant NGOs and government bodies. This more professional point of entry into the circles relevant for the research made for a more formal and detached relationship to the processes under study and to the respondents I interviewed, compared to my experiences during the first research trip.

With regard to its political context, it should be noted that the second research trip coincided with an important breakthrough in the peace process between the Colombian government and the FARC guerrilla group, which had been the main reason to select Colombia as a case study for this research project. In the months before the start of the research trip, the negotiations between the two parties had seemed completely stuck and some commentators were starting to express doubts as to whether a peace agreement would ever be signed. It was widely believed that the part of the negotiations concerning transitional justice and the rights of victims formed the main stumbling block keeping the parties from making progress. Then, in September 2015, the parties suddenly announced that they had come to an agreement on exactly those issues, leading to a historic, if somewhat awkward handshake between president Santos and FARC leader "Timochenko" in Havana.

This moment, and the largely positive response[107] to the transitional justice agreement in the months immediately following its announcement, determined the climate in which much of the research underlying the Colombian case studies took place. In stark contrast to that of the first research trip, that climate was one of (cautious) optimism about the peace process and the special justice mechanisms to be implemented after the signing of the final peace accords. Upon the announcement of the transitional justice agreement, all doubt that the negotiating parties would be able to conclude a final peace agreement seemed to evaporate and the realization that the longest-running civil war in the world would come to an end began to set in. Inevitably, this spirit of hope and optimism has shaped my perception of the Colombian peace process and the accompanying accountability mechanisms.

To be clear, this study does not reduce the respective accountability processes in Guatemala and Colombia to the events and circumstances I witnessed during these two trips. The case studies do take into account the developments in both countries before and after the period during

107 Of course, there was strong opposition to the transitional justice agreement from the start from the side of president Santos' political rival, former president Álvaro Uribe, and his followers. However, the international community and much of the Colombian press initially responded favorably to the announcement of the agreement.

which this research was carried out, thereby balancing the impression left by my own experiences. In fact, the main function of the research trips, as explained above, was simply to collect materials in order to be able to study and analyze those processes as a whole. However, it is important to keep in mind the circumstances under which the relevant materials were collected, since those circumstances may have had an effect on my interpretation of them.

3.3.3 Open Interviews

Two of the three case studies included in this study are based primarily on interviews conducted during the two research trips. Firstly, the case study on the contribution of the Inter-American system to the work of human rights activists pushing for accountability in Guatemala, described in Chapter 5 of this study, is based primarily on a series of 23 interviews conducted with such activists and other human rights professionals during the first research trip. Secondly, the case study on the work of prosecutors in Colombia investigating cases of human rights violations is based primarily on a series of 16 interviews conducted during the second research trip. A full list of the interviews conducted during the two trips, including dates and locations of the interviews, is provided in Annexes 2 and 3. Considering the sensitive work of all the respondents, and particularly the difficult situation which continues to exist in Guatemala until this day, it has been decided not to identify any of the respondents by name. Rather, respondents are identified based on their position and work, in so far as it is relevant to this study.

Given the differences in the domestic circumstances and my own prior involvement in those circumstances during both research trips, the procedure for identifying and contacting relevant respondents was different in both cases as well. For the Guatemalan case study, the identification of and outreach to potential respondents was conducted largely on the basis of 'snowball' or 'chain' sampling.[108] This sampling method is used in particular to access research populations which are 'hidden' as a result of marginalization and social stigma and/or access to which relies heavily on informal social relations. As such, it was extremely useful in the heavily polarized climate in Guatemala. Under the circumstances, no one was willing to speak out, unless they were introduced to the interviewer in question through a mutual contact they knew and trusted, who could reassure them that the interviewer was *de confianza*.

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108 *See generally* C Noy, 'Sampling knowledge: the hermeneutics of snowball sampling in qualitative research', (2008) 11(4) *International Journal of Social Research Methodology* 327-344; R. Atkinson and J. Flynt, 'Accessing hidden and hard-to-reach populations: snowball sampling strategies', (2001) 33 *Social Research Update* <http://sru.soc.surrey.ac.uk/>, last checked: 30-01-2018.

In preparation for the Guatemalan research trip, I had prepared a list of persons and organizations of interest, based on a review of relevant domestic and Inter-American case law and available literature. This list I then discussed with my network in Guatemala and the Netherlands, to see if they could put me in contact with any of the persons or organizations listed. Through this avenue I obtained several initial interviews, and each of these respondents provided me with further contacts. This way, I was able to gain access to many of the NGOs and victim organizations involved in the struggle against impunity in Guatemala. Furthermore, I was able to interview a number of people working for organs of the state which have historically been close to civil society and active in human rights causes, such as the *Procuraduría de Derechos Humanos* (the Human Rights Ombudsman) and the Presidential Human Rights Committee (COPREDEH, to its Spanish acronym).

In contrast, the series of interviews with prosecutors of human rights cases, which forms the basis for the case study in chapter 7 of this study, was arranged through more formal channels. Rather than relying on my personal network and that of the respondents to secure interviews, I was able to connect directly with the head of the human rights office within the Colombian Public Ministry. Through her, I was granted access to all the prosecutors relevant to the topic under study. I was provided with a list of all prosecutors investigating cases which had been subject of proceedings at the Inter-American level and I was able to choose which of these prosecutors I would be interested in interviewing. To limit the number of respondents, I selected to speak to those prosecutors who were responsible for the investigation of cases which had been the topic of a judgment by the Inter-American Court itself. Those prosecutors, many of whom have been investigating the same cases for years, have experienced the effects of the involvement of the IAHRS throughout the various stages of its proceedings. Moreover, due to their heavy case load, they were able to compare their experience investigating cases in which the IACtHR had rendered its judgment, with their experience investigating other cases concerning similar types of human rights violations, but in which the IAHRS has not been involved, or in which the involvement of the IAHRS did not reach the level of a judgment by the IACtHR. Of the 11 prosecutors thus selected, I was able to interview 9, the other two being stationed outside of the capital at the time.

Apart from this series of interviews with human rights prosecutors, I also conducted a number of 'incidental' interviews with persons involved, in some way, in the process of designing transitional justice mechanisms in the context of the Colombian peace processes. These interviews serve as a complementary source to the case study in chapter 6 of this study. The respondents for these interviews were identified through a review of relevant case law and literature conducted prior to the research trip, in combination with the information I gained through participation in relevant academic and professional networks while in Colombia. However, due to a

combination of factors, I was unable to employ the snowball sampling tactic to the same effect as I had been able to do in Guatemala. As a result, these interviews serve to supplement the extensive written sources collected on the topic of this case study.

All interviews were conducted using an open interview format, to allow respondents to speak as freely as possible. Thus, respondents were not presented with a questionnaire or a predetermined list of questions guiding the interview. Rather, the interviews were conducted on the basis of a topic list, which could vary depending on the line of work and the previous experience of each respondent. Unless explicitly requested, the topic list was not shared with the respondent prior to the interview. This approach provides the flexibility to let the interview be guided by the input of the respondent and to pursue themes which come up during the interview. At the same time, information and insights gained during one interview could be used to inform the questions raised during later interviews and respondents could be asked to respond to remarks made by others, obviously without revealing the identity of the latter.

Audio records were made of the majority of the interviews, which were later transcribed and analyzed using the Atlas.ti software. In a limited number of cases it was decided to refrain from making such recordings, if it was thought that this would lead to more openness on the part of the respondent. In other cases, the interview continued informally after it had been concluded officially and the recording device had consequently been turned off, as a result of which the audio recording is incomplete. In all such cases, reports were prepared directly after the interview, based on notes taken by hand during the interview, to make sure that the insights and viewpoints gained from the interview were not lost. For those interviews, the analysis proceeded on the basis of the interview reports.

Finally, it is relevant to note that the interviews were conducted – and transcribed – in Spanish. The analysis of the interviews was conducted on the basis of the Spanish language audio and transcriptions. Only the quotes which are used in the text before you have been translated to English. These translations were done by the author. In translating the relevant quotes, I have attempted to stay as close as possible to the original audio and transcriptions. Where literal translation was not possible, for example because the respondent uses sayings or colloquial speech, the original Spanish phrasing is provided. Moreover, in the interest of clarity and brevity it has sometimes been necessary to interfere more profoundly in the quotes, for example to leave out irrelevant words or sentences or provide context to a statement. In such instances, the author's interventions are indicated using square brackets. This way, the integrity of the respondent's words is guaranteed and the reader will be able at all times to distinguish between the respondent's own words and the author's interpretation of those words.

4 Structure of the book

In line with the above, this study has been divided into two parts. Part I of this study, consisting of Chapters 2 to 4, discusses the jurisprudence developed by the IACtHR to further to international fight against impunity. Chapter 2 analyzes the IACtHR's case law – particularly its early case law – on the obligation to investigate, prosecute and punish as such, its basis in the ACHR and its relation to other important concepts in the IACtHR jurisprudence, such as the right to truth and the crime of enforced disappearance. Chapter 3 examines the numerous more specific doctrines developed over the course of the IACtHR's case law to give content to the overarching obligation to investigate, prosecute and punish human rights violations. Finally, Chapter 4 summarizes the main points of criticism directed against the IACHR's case law on the obligation to investigate, prosecute and punish and against the ethos of 'anti-impunity' on which it is based.

Part II of this study, consisting of Chapters 5 to 8, discusses the contributions of the IAHRS to domestic accountability efforts for serious human rights violations in Guatemala and Colombia. Chapter 5 analyzes how the Inter-American human rights system has supported the efforts of pro-accountability actors in Guatemala to achieve 'post-transitional justice' for the serious crimes committed by the military in the context of the Guatemalan civil war. Chapter 6 analyzes how the Inter-American human rights system has influenced the Colombian peace processes in the 21st century, and particularly the transitional justice mechanisms developed as part of those processes. Chapter 7, meanwhile, examines how the Inter-American human rights system has influenced the work of prosecutors from the Human Rights Unit of the Office of the Attorney General of Colombia in investigating and prosecuting serious human rights violations committed in the context of the Colombia internal armed conflict. Finally, Chapter 8 provides a synthesis of the three case studies and proposes a number of hypotheses on the IACtHR's practical contributions to domestic accountability efforts, which may be tested through further research.

Part I:

The fight against impunity in the jurisprudence of the Inter-American Court of human rights

2 The IACtHR's doctrine on the duty to investigate, prosecute and punish human rights violations

1 Introduction: structural impunity and the development of the IACtHR's case law

It has been noted that the spectacular rise of the fight against impunity as a policy goal of the international community and a matter of international law was shaped by the 'special circumstances' in which the international community found itself in the early 1990s.[1] The same is certainly true for the Inter-American Court's turn to the fight against impunity. As will be discussed in Chapter 4 of this study, 'anti-impunity' is not a traditional concern of human rights courts. But the circumstances in which the region under the Inter-American Court's jurisdiction found itself in the late 1980s, put it at the top of that particular court's agenda.

As discussed in the introduction to this study, the regional context in which the IACtHR delivered its first judgment included the transition from civil war to peace and/or from military dictatorship to democracy. An important issue in all of those transitions was the question whether and how the atrocities committed by dictatorial regimes and/or during civil wars should be addressed. More particularly, the question arose whether these atrocities should be officially investigated and those responsible prosecuted or whether the 'crimes of the past' should better be forgotten. It seemed that the region had committed itself to the latter option, as many new regimes adopted amnesty legislation. Moreover, the first post-transitional years made it clear that, even though warring parties had officially laid down their weapons and dictatorships had officially ceded to democracy, those who had been involved in the commission of serious crimes remained powerful and continued to exert influence over their respective societies, including the criminal justice systems. The criminal justice apparatuses of the region, which in many states had operated under the control of the military for many decades, were fragile and still developing and vulnerable to interferences by other powerful elements in society.

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1 *See for example* B.N. Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008), pp. 1-39. Schiff argues – amongst other things – that, while the idea of accountability for human rights violations has a much longer history, the politicization of the Cold War made it impossible to act on such ideas. However, "[w]ith the end of the Cold War, that politicization receded in significance. Meanwhile, the development of globalized international communications and the increasing effectiveness of nongovernmental organizations in using these technologies to publicize violations the world over enhanced the salience of human rights issues." Idem, p. 29-30.

On top of this tense and unstable (post-)transitional situation, the first decades of the IACtHR's operation were characterized by the emergence of a 'new' threat in the region: that of organized crime. The region's still-fragile criminal justice systems were mostly unable to adequately respond to the rise of increasingly wealthy and powerful criminal organizations, leading to soaring rates of crime and of impunity. When state forces did respond to the crime wave, they often did so in ways that ran afoul of the law and the mandate it provided them. The systematic practices of disappearance, torture and extrajudicial killing which had previously been used against those who were (suspected of being) subversives or members of a terrorist group, were now employed in the fight against organized crime.[2] And as before, the crimes committed by state agents in the context of the fight against organized crime were rarely investigated, let alone prosecuted.

All of these factors contributed to the existence of a situation of widespread and structural impunity in the region, which the IACtHR has had to confront as it developed the jurisprudence which will be discussed in these chapters. It should be noted, moreover, that this widespread and structural impunity existed not only as the result of the fragility of criminal justice systems, the incompetence of individual state agents, and the complexity of cases or the simple lack of evidence. As the IACtHR's case law and its analysis of the mechanisms underlying impunity shows, impunity was often the result of active obstruction by elements within the state.[3] In certain

2 *See for example* IACtHR *Villagrán Morales ('Street Children') v. Guatemala (merits)*, 19 November 1999, which concerned the extrajudicial execution of a number of young men and boys from an underpriviledged areas, who were suspected of being gang members. The mechanisms used in executing these youths were the same as those used during the internal armed conflict to eliminate political opponents of the regime. Another example can be found in the case of *Tibi v. Ecuador*, which concerned the illegal detention and torture of the material victim in the context of a police operation against an organized crime group. In his separate opinion to this judgment, Judge García Ramírez noted: "Persistence of old forms of crime, the appearance of new expressions of crime, systematic attacks by organized crime, the extraordinary virulence of certain extremely grave crimes – such as terrorism and drug trafficking – have determined a sort of "exasperation or desperation" which is ill advised: it suggests setting aside progress and going back to systems or measures that already demonstrated their enormous ethical and practical flaws." IACtHR *Tibi v. Ecuador (preliminary objections, merits, reparations and costs)*, judgment of 7 September 2004, separate opinion by Judge García Ramírez, para. 30.

3 See for example IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 73 and p. 28 (testimony Jennifer Harbury).

cases, impunity was also enforced through violence, committed either by state agents[4] or by groups close to the state.[5]

It is helpful, going forward, to be mindful of the context of structural and entrenched impunity in which the IACtHR operated, because it helps to explain certain developments in its case law and certain choices made along the way. In particular, as noted by Anja Seibert-Fohr, the "grave systemic deficits" in the criminal justice systems of the region pushed the IACtHR to develop a jurisprudence that is particularly "ambitious and strict […] on prosecution and punishment" of human rights violations.[6] It also gives context to the IACtHR's understanding that "impunity fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenseless"[7] and that it erodes the confidence of the population in public institutions.[8]

The following chapters will analyze the legal instrumentarium developed by the Inter-American Court to combat such structural and entrenched impunity. This chapter will discuss the main tool and overarching doctrine developed to this effect: that of the state's obligation to investigate, prosecute and punish those responsible for human rights violations. None of the ACHR's provisions explicitly require states to investigate and prosecute human rights violations. In spite of the lack of such a clear and explicit basis in the Convention, the obligation to investigate, prosecute and punish human rights violations has become a major theme in the Court's case law. The Court found this obligation to be implied in several provisions, including the general obligation of states to ensure to those under their jurisdic-

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4 *See for example* IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs)*, 25 November 2003, para. 134.95-100 and IACtHR *Bámaca-Velásquez v. Guatemala (merits),* 25 November 2000, para. 34.

5 The case of *La Rochela Massacre v. Colombia* offers a disturbing illustration of how impunity is enforced. It concerns the massacre of 15 judicial officers, perpetrated while they were investigating the crimes committed by paramilitary groups in the Colombian Magdalena Medio region. These crimes have been the object of a separate case before the Court, the case of the *19 Tradesmen v. Colombia*. The massacre of the judicial officers was committed by paramilitary organizations, with acquiescence of the State. The Court notes "the seriousness of the fact that this massacre was directed at judicial officials in the course of their work, and was aimed at affecting their investigation of grave violations in which members of paramilitary groups and senior military commanders had participated. At the same time, the massacre represented a clear and threatening message that this type of crime should not be investigated." IACtHR *La Rochela Massacre v. Colombia* (merits, reparations and costs), 11 May 2007, para.149.

6 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 108-109.

7 *See for example* IACtHR *Baldeón García v. Peru (merits, reparations and costs)*, 6 April 2006, para. 168 and IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para 211.

8 IACtHR *Barrios Altos v. Peru (merits)*, 14 March 2001, Concurring Opinion of Judge A.A. Cançado Trinadade, para. 4. *See also* X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin American national prosecution of mass atrocities' (2013) 46(3) *Israel Law Review* 405-430, p. 413.

tion the free and full exercise of their rights. The Court has proceeded to gradually develop the duty to prosecute, to the point where investigation and prosecution is now treated not only as a duty on states, but also as a right of the victim. The following pages will analyze how, and through which judgments, this development came about.

This chapter will focus on the doctrine of the state's obligation to investigate, prosecute and punish as it has developed from its origins in the *Velásquez Rodríguez* judgment. It will discuss the legal basis of this doctrine in the ACHR, the scope of its application and its relation to two other important doctrines developed by the Court, namely the concept of enforced disappearance[9] and the victim's right to truth. Finally, it will compare the IACtHR's doctrine to the jurisprudence developed on the same topic by other human rights bodies and to soft law instruments developed by the UN. In doing so it will consider the Court as part of the broader, international movement.

2 Legal basis and rationale of the duty to investigate, prosecute and punish human rights violations under the ACHR

2.1 From procedural obligation

The judgment which introduced the IACtHR's concept of an obligation to investigate, prosecute and punish human rights violations in the case of *Velásquez Rodríguez v. Honduras* was truly ground-breaking for a number of reasons. Firstly, it was the very first judgment (on the merits) ever delivered by the IACtHR, and it clearly signaled to the states under its jurisdiction the Court's approach to the law and the role it envisioned for itself within the region. Secondly, it tackled head-on some of the most sensitive and controversial themes of relevance to practically all states under its jurisdiction, such as systematic practices of enforced disappearance and the question how to officially respond to such legacies of violence and impunity. Thirdly, it introduced legal concepts in response to those difficult questions which were new and relevant not only to the states under its jurisdiction, but to all states going through political transitions and also to the international institutions which were just starting to give serious thought to these questions. The *Velásquez Rodríguez* judgment coincided with the rise of the fight against impunity as a global phenomenon, described by UN Special Rapporteur

9 The concept of enforced disappearance as a serious human rights violation and an international crime has of course not exclusively been developed through the case law of the IACtHR. Today, this concept is regulated by several international human rights conventions, both regional and universal in scope, and by the Rome Statute of the ICC. Other regional human rights courts, including the ECtHR, have also discussed and ruled on the issue and thereby contributed to its development as a legal concept. However, the IACtHR was an early contributor to this process and the first international court to tackle the concept of enforced disappearance.

Louis Joinet as its "fourth stage",[10] when the need to combat impunity was introduced as an important goal of the international community and the issue was beginning to be understood in terms of states' legal obligations, rather than a moral claim by the victims. In effect, *Velásquez Rodríguez* provided the opening salvo of this development.

The facts underlying the *Velásquez Rodríguez* case concerned the disappearance of Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras, allegedly at the hands of National Office of Investigations and the G-2 (military intelligence) of the Armed Forces of Honduras. First, the Court established that enforced disappearance constituted a "multiple and continuing violation of many rights under the Convention",[11] especially those protected Articles 4 (right to life), 5 (prohibition of torture) and 7 (right to personal liberty). It then went on to consider whether these violations could be attributed to the state which, due to the particular circumstances of the case, posed a bit of a puzzle. It was in this context that the IACtHR introduced the concept of an obligation to investigate, prosecute and punish human rights violations under Article 1(1) ACHR.

The Commission had been able to prove, through a combination of testimony and documentary evidence, that there existed in Honduras at the relevant time a systematic pattern of disappearances, often combined with torture and extrajudicial execution, carried out by state officials and that the disappearance of Manfredo Velásquez seemed to fit this pattern very well. However, there was no direct evidence as to the identity of the perpetrators of this particular disappearance, making it difficult for the Court to establish the direct involvement of the state. The Court made clear its belief that the disappearance of Manfrédo Velásquez was carried out by state agents, but said that "even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention".[12]

Article 1(1) ACHR contains the signatory states' obligation to respect the rights contained in the Convention and, as such, is essential for establishing the conditions under which a particular violation can be imputed to the state.[13] It reads:

> "The States Parties to this Convention undertake to *respect the rights and freedoms recognized herein* and to *ensure to all persons subject to their jurisdiction the free and full exercise of those rights* and freedoms, without any discrimination for reasons

10 Revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II (2 October 1997), para. 5.

11 IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 155.

12 Idem, para. 182.

13 Idem, para. 160.

> of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." [emphasis added]

The first part of this paragraph, concerning the obligation to respect human rights, describes the states' negative obligations, or, in the words of the Court, it provides limits to the exercise of public authority.[14] As a result, "any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State".[15] Beyond that, the second part of the paragraph, which addresses the obligation to *ensure* human rights, forms the basis for the states' positive obligations under the Convention and implies:

> "the duty of States Parties to organize the governmental apparatus, and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of those rights. As a consequence, the *States must prevent, investigate and punish any violation of the rights recognized by the Convention* […]." [16]

Thus, according to the Court, the obligation to investigate and punish human right violations after they occur is part of the obligation of the state to ensure human rights to all persons subject to their jurisdiction, as enshrined in Article 1(1) ACHR. The Court then returned to, and further clarified, this obligation to investigate and punish human rights violations, stating:

> "The State has a legal duty […] to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[17]

As noted by Anja Seibert-Fohr,[18] the rationale underlying the obligation to investigate, (prosecute) and punish as articulated in the *Velásquez Rodríguez* judgment is twofold: firstly, investigation and punishment is necessary in the interest of general prevention, in order to prevent further human

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14 Idem, para. 165.
15 Idem, para. 172.
16 Idem, para. 166.
17 Idem, para. 174. As will be further discussed below, this quote from the Velásquez Rodríguez judgment is considered "the first truly complrehensive statement of a state's human rights obligations" in the area of transitional justice and has had an important effect on the further development of the fight against impunity on the international level. M. Freeman, *Truth commissions and procedural fairness* (Cambridge University Press, 2009), p. 8. See *also* F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann, T. Unger and V. Cadelo (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17.
18 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 55-58.

rights violations.[19] Secondly, investigation and punishment of human rights violations also serves the 'retrospective protection' of the rights of the victim, even if doing so cannot truly restore those rights – as in the case of an enforced disappearance. The reasoning here seems to be *a contrario*: if the state does not investigate a human rights violation and punish those responsible, it communicates its subsequent acquiescence to that violation. In the words of the Court:

> "[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."[20]

For the case at hand, this meant that the lack of evidence as to the identity of the perpetrators of the disappearance of Manfredo Velásquez did not preclude the Court from holding the state responsible for it, as its agents had clearly failed to properly investigate the disappearance.[21] The Court thus found that Honduras had violated Articles 4, 5 and 7 in relation to its obligation to ensure rights under Article 1(1) ACHR.

Finally, the *Velásquez Rodríguez* judgment also provided the first outlines for the further development of the Court's doctrine on the state's duty to investigate, prosecute and punish. Specifically, the Court established that the obligation ensure human rights violations, of which the obligation to investigate, prosecute and punish is part, has implications both for the state's legal and institutional framework for investigation and punishment of human rights violations and for its enforcement of that framework. In the word of the Court:

> "The obligation to ensure the free and full exercise of human rights is not fulfilled by the *existence of a legal system designed to make it possible to comply* with this obligation --it also requires the government to *conduct itself so as to effectively ensure the free and full exercise of human rights*."[22]

Applying the same logic to the obligation to investigate, prosecute and punish itself, this would require two things: 1.) the existence of a (legal) system which makes it possible to investigate, prosecute and punish human rights violations; 2.) an effort, on the part of the state to investigate, prosecute and punish individual human rights violations effectively. Given the facts of the

19 IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 175.
20 Idem, para. 177.
21 Idem, para. 180.
22 Idem, para. 167.

case,[23] the judgment is especially explicit on the second of these two dimensions. In this context, the Court remarked:

> "In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[24]

Thus, while the Court considers the obligation to investigate, prosecute and punish human rights violations to be an obligation of effort rather than result, it does require states to make a genuine effort and perform an effective investigation whenever they become aware that a human rights violation may have occurred – and prosecute and punish those responsible if appropriate.

The other dimension, that the state has an obligation to create a (legal) system which makes investigation and punishment of human rights violations possible, was not explicitly discussed in *Velásquez Rodríguez* – primarily because this had not been the problem keeping the state from investigating the underlying human rights violation in that particular case. It does however, seem to be implied in the Court's observation that the obligation to ensure human rights includes the duty to "ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages".[25] In its later case law, the Court has confirmed that the obligation to investigate, prosecute and punish indeed includes an

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23 *See* idem, para. 178, stating that: "In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velásquez, and of the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1 (1) of the Convention." Thus, in the case of the disappearance of Manfredo Velásquez, the legal and institutional framework was adequate (in theory), to investigate and prosecute those responsible. The problem was a lack of effective enforcement of that framework in the case at hand.

24 Idem, para. 177.

25 Idem, para. 175. It should be noted that the Court made this observation primarily in relation to the obligation to prevent human rights violations, which, like the obligation to investigate, prosecute and punish, flows from the broader obligation to ensure under Article 1(1) ACHR. While the IACtHR in *Velásquez Rodríguez* makes an explicit distinction between the obligation to prevent and the obligation to investigate, prosecute and punish, the two are closely related, as evidenced by the fact that the prevention of further violations is part of the rationale underlying the obligation to investigate, prosecute and punish.

obligation to create an appropriate legal and institutional framework and to "remove all *de facto* and legal mechanisms and obstacles that maintain impunity […]"[26]

In short, the *Velásquez Rodríguez* judgment established that states have a positive, procedural obligation under Article 1(1) ACHR to investigate, prosecute and punish human rights violations. This obligation entails a duty to create a state apparatus conducive to the investigation, prosecution and punishment and to carry out an effective investigation whenever the state becomes aware that a human rights violation may have occurred. Through this interpretation of Article 1(1) ACHR and the procedural obligation contained in it, the IACtHR gave a considerable impulse to the fight against impunity, in Latin America and worldwide, and to the growing sense that the investigation and punishment of human rights violations is a question not 'just' of morality, but of international law.

2.2 To a form of reparation

While the *Velásquez Rodríguez* judgment on the merits thus constituted a considerable leap in the development of the international legal framework of the fight against impunity and a significant expansion of the scope of the ACHR's material provisions, the Court was more conservative when determining reparations in the same case. The Commission and the victims' representatives had requested the Court to order the state to investigate the disappearance of Manfredo Velásquez as part of the reparatory measures, and to punish those responsible. However, the IACtHR explicitly declined to do so.[27] The Court noted that it had already found in its judgment on the merits that the state was under an obligation to investigate the disappearance and that this obligation would continue to exist for as long as there was uncertainty regarding the fate of the disappeared person. It did not deem it necessary to include this duty separately in the reparations. Instead, it chose a more conventional line of ordering only monetary compensation for the violations committed by the state.

In the years following *Velásquez Rodríguez*, it became clear that this conservative stance on reparations was a disappointment for the victims who appeared before the IACtHR. They considered money to be a wholly

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26 IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 277. S*ee also* IACtHR *Gómez Paquiyauri Brothers v. Peru (Merits, Reparations and Costs)*, 8 July 2004, para. 232; IACtHR *Tibi v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 7 September 2004; IACtHR *Carpio Nicolle et al. v. Guatemala (Merits, Reparations and Costs)*, 22 November 2004, para. 134; IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 226; IACtHR *Heliodoro-Portugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 246; and IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, para. 257 and IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 249.

27 IACtHR *Velásquez Rodríguez (reparations)*, 21 July 1989, paras. 32-36.

inadequate reparation for the violations they suffered, especially in cases concerning the death of a loved one.[28] Faced with structural impunity on the national level, they came to the Court looking for something else: justice. Monetary compensation did not provide any incentive for the state to provide this. On the contrary, it offered states a way to 'buy off' their human rights obligations. Thus, in order to maintain its credibility in the eyes of the victims, the Court was moved to change its stance on reparations.

It first did so in 1996, in its reparations judgment in the case of *El Amparo v. Venezuela*, [29] which concerned the massacre of 14 fisherman in the village of El Amparo by members of Venezuela's armed forces in October 1988. The relevance of this judgment, which represents a remarkable step forward in the IACtHR's interactions with states concerning the investigation and prosecution of human rights violations, is not immediately apparent upon reading it. In relation to non-pecuniary damages, the Commission had requested the Court, amongst other things, to order the state to effectively investigate the massacre and punish those responsible. Nothing in the Court's discussion of this request indicates a fundamental break from its decisions in previous cases. In fact, the Court seemed to channel its remarks in the *Velásquez Rodr*íguez reparations judgment, when it remarked that:

> "[c]ontinuation of the process for investigating the acts and punishing those responsible is an obligation incumbent upon the State whenever there has been a violation of human rights, an obligation that must be discharged seriously and not as a mere formality."[30]

Beyond this short paragraph, there is no further substantive discussion of the Commission's request. However, in contrast to previous practice, the operative paragraph of the judgment contained the unanimous decision of the Court "that the State of Venezuela shall be obliged to continue investigations into the events referred to in the instant case, and to punish those responsible".[31] The operative paragraph provided no explanation as to why the IACtHR decided to diverge from its previous practice on this point, nor does any other part of the judgment. This lack of substantive discussion of what, in retrospect, constitutes an important step in the IACtHR's case law may be partly explained by the fact that, at the time, this step would have seemed mostly symbolic. The Court had already established in *Velásquez Rodríguez* that states have an obligation under the ACHR to investigate and

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28 *See* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, p. 5, citing Viviana Krsticevic, 'Reparation in the Inter-American system', (2007) 56 *American Univ. Wash C.L.* 1375, p. 1419.

29 IACtHR *El Amparo v. Venezuela (reparations and costs)*, judgment of 14 September 1996. *See also* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, p. 8.

30 IACtHR *El Amparo v. Venezuela (reparations and costs)*, 14 September 1996, para. 61.

31 Idem, para. 64, under 4.

prosecute human rights violations. The fact that this obligation was now reiterated in the operative paragraph, in the list of reparations ordered to the state, does not, at first glance, seem to add much to that fact.

The real relevance of the *El Amparo* reparations judgment only becomes apparent in retrospect, in light of two important subsequent developments in the Court's case law. Firstly, it represents a first step in what Anja Seibert-Fohr sees as the promotion, by the IACtHR, of a remedial rationale for the obligation to investigate and prosecute human rights violations.[32] By this, Seibert-Fohr refers to the idea that investigation and prosecution is necessary not only in the interest of society and general prevention of human rights violations, but (also) in the interest of individual victims in order to remedy the violation of their rights. Prior to *El Amparo*, the obligation to investigate had only been discussed in terms of a duty incumbent on the state, which flows from its position as guarantor of human rights within its territory.[33] This duty is general in nature, based on the harmful effects of impunity to society as a whole and not dependent on the individual victim in the case at hand. However, by ordering investigation and prosecution in a specific case in order to remedy the wrongs done to a particular victim or set of victims, the Court goes one step further. It recognizes that the application of the criminal law serves not just the general interest, but also the interests of the individual victim. Ultimately, this development would lead the IACtHR to recognize the victim's right to justice, which will be further discussed in the next section.

Secondly, the move to include investigation and prosecution in the list of reparations proved to be especially relevant in the context of the supervision of compliance procedure, which the IACtHR began to develop in the years after *El Amparo*.[34] As noted by Alexandra Huneeus, the supervision of compliance proceedings constitute a separate and open-ended stage of the litigation before the IACtHR, during which all the parties in the proceedings

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32 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 59-68, 190-192 and 281-285.

33 *See for example* IACtHR *Vera Vera v. Ecuador (preliminary objection, merits, reparations and costs)*, 19 May 2011, para. 88.

34 *See* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, pp. 9-12. The supervision of compliance proceedings are not explicitly provided for in the ACHR. However, the IACtHR bases its mandate to monitor compliance with its judgments on Article 65 ACHR, which reads:

> "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

According to the Court, this provision implies its mandate to monitor compliance, as it would not be possible for the Court to inform the General Assembly of the state of compliance with its judgments and to make recommendations unless it monitors compliance. *See* IACtHR *Baena-Ricardo et al. v. Panama (competence)*, 28 November 2003, para. 91.

(state, Commission and victims) report on the progress of the state's compliance with the reparations ordered by the Court, and the Court, in turn, "move[s] the parties toward overcoming obstacles to implementation".[35] These proceedings are conducted on the basis of the list of reparations ordered by the Court in its reparations judgment.[36] Including investigations and prosecution of serious human rights violations in that list, as has been the Court's standard practice since the *El Amparo* reparations judgment, therefore "opens the way for a proactive review of national prosecutions of international crimes".[37]

In this way, the *El Amparo* reparations judgment provided the basis for what Huneeus has described as the IACtHR's 'quasi-criminal jurisdiction', i.e. the open-ended review of domestic prosecutions of serious human rights violations.[38] According to Huneeus, three characteristics make this quasi-criminal jurisdiction of particular interest to the fight against impunity: firstly, the depth of the scrutiny the IACtHR applies to domestic proceedings and the level of detail of the follow-up orders issued during the supervision of compliance proceedings. Secondly, the fact that the supervision of compliance stage often takes place in parallel to domestic prosecution and therefore allows the IACtHR to review them as they unfold. In contrast, Huneeus notes, the review of domestic proceedings in the IACtHR's judgments on the merits is necessarily retrospective in nature. Thirdly, while the merits stage of the litigation before the IACtHR is adversarial, the supervision of compliance stage is dialogic. It intends to "foster dialogue among public authorities and civil society actors" in order to help overcome obstacles to the domestic investigation, prosecution and punishment of serious human rights violations.

In short, the IACtHR's consistent practice of ordering investigation, prosecution and punishment as a form of reparation to victims, in combination with its practice of supervising compliance with those orders, has considerably expanded the Court's involvement in and review of domestic accountability processes. Moreover, it marked the first step in a development which has seen the Court increasingly conceptualizing the need for investigation and prosecution of human rights violations as flowing (also) from the rights and interests of the individual victim, rather than (exclusively) from the interest of society in preventing further violations.

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35 A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, p. 10.

36 As noted by Huneeus, the merits and reparations stages of the litigation before the IACtHR, which used to be separate, have become integrated. In effect, proceedings before the Court now exist of two stages: one concerning preliminary objections, merits and reparations and one concerning compliance. Idem, p. 9.

37 Idem, p. 10.

38 *See generally* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44.

2.3 To separate human right('s violation): the victim's right to justice

This move towards recognition of the individual victim's interest in the criminal investigation and prosecution of the violation of their human rights continued after *El Amparo*. Confronted with the continuous stream of victims seeking justice through the Inter-American system and their testimony on the many ways in which they were denied justice by their home state, the IACtHR has recognized a right of victims to have access to (criminal) justice. It did so under two provisions which have traditionally been associated more with the rights of the defendant in a criminal trial: articles 8(1) and 25 ACHR.

Article 8(1) ACHR protects the right to due process of law, or, in other words, the right of every individual to have their case heard within a reasonable time by a competent, independent and impartial tribunal.[39] While the protection afforded by Article 8(1) extends to the determination of rights in any type of legal proceedings, not just those of a criminal nature, Article 8 as a whole is clearly geared towards the protection of the rights of the *accused* in a criminal trial and includes all the traditional fair trial guarantees. Article 25 ACHR, meanwhile, provides the right to judicial protection of rights through a prompt and effective remedy. This provision essentially codifies the typically Latin American legal concept of the *amparo*, which gives every individual the possibility to enforce their rights through the courts.[40] This is a very broad guarantee and it has is often called upon by defendants in order to enforce their fair trial rights over the course of the proceedings against them.

The Court first applied these provisions in favor of the *victim* in a criminal investigation in the case of *Genie-Lacayo v. Nicaragua*. The case concerned the killing of a young man at the hands of military personnel on 28 October 1990 and the criminal investigation and prosecution which followed. Although the Court could not look into the killing of the material victim, which happened before Nicaragua accepted the Court's jurisdiction

39 Article 8(1) ACHR reads:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

40 *See* K. Sikkink, 'Latin American Countries as norm protagonists of the idea of international human rights', (2014) 20(3) *Global Governance* 389-404, p. 398. The special relevance of the amparo within the Latin American legal system and culture is illustrated by Judge García Ramirez' separate opinion in the case of *Tibi v. Ecuador*, where he describes it as "a precious guarantee, which is exactly, the "guarantee of guarantees," the "right that serves all rights"" and "the culmination of a protective system that ultimately places its expectations in a means of defense that all may resort to and that all may satisfy". IACtHR *Tibi v. Ecuador (preliminary objections, merits, reparations and costs)*, 7 September 2004, separate opinion Judge García Ramirez, para. 45.

on 12 February 1991, the Commission did request it to consider whether the procedural rights of the young man's family members, particularly those of his father, had been violated "as a result of the Judicial Branch's reluctance to prosecute and punish those responsible" for the murder.[41]

The Court accepted this request by the Commission and analyzed the procedural rights of the victim's family under Article 8 ACHR. Its analysis starts from the acknowledgment that Article 8 protects the right to due process of law, "which consist of the right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other measure."[42] Accordingly, the Court noted that:

> "In order to establish violation of Article 8, it is necessary, first of all, to establish whether the *accusing party's procedural rights* were respected *in the trial to determine those responsible* for the death of young Genie-Lacayo."[43] [emphasis added]

In this paragraph the IACtHR thus explicitly accepted the notion that the 'accusing party' – i.e. the victim or their family members – has certain rights under the ACHR in the proceedings initiated as a result of their complaint. This is a controversial position which has, as a result, been severely criticized by a number of legal scholars from the region.[44] However, the controversiality of this position is not recognized in the judgment itself and the Court provided no explanation or justification for it. It simply proceeded to analyze whether the (lack of) actions of the authorities in the investigation into the death of the material victim have violated the accusing party's rights under Article 8(1) and comes to the conclusion that this is indeed the case. Those violations came about through the actions of certain military authorities, who obstructed the trial and refused cooperation, making the collection of evidence next to impossible for the responsible judges,[45] and through the "excessive delays" which had occurred at various stages in the proceedings.[46]

Genie-Lacayo thus established that, according to the Inter-American Court, victims have certain rights in the context of criminal proceedings. However, this case concerned the position of the victim in a criminal investigation which, though ineffective, had already been initiated by the state. The Court, therefore, did not have to address the fundamental question of

41 IACtHR *Genie-Lacayo v. Nicaragua (preliminary objections)*, 27 January 1995, para. 2.
42 IACtHR *Genie-Lacayo v. Nicaragua (merits, reparations and costs)*, 29 January 1997, para. 74.
43 Idem, para. 75.
44 These critiques will be discussed in detail below in chapter 4 of this study.
45 Idem, para. 76.
46 Idem, para. 80.

whether victims of human rights violations also have the right to an investigation in the absence of such initiative by the competent authorities. Or, in other words: whether victims have the right to access to criminal justice. The answer to that question came one year later, in the case of *Blake v. Guatemala*. This case concerned the disappearance and killing of Nicholas Chapman Blake, a journalist and US citizen, at the hands of agents of the Guatemalan state. While the abduction and murder took place in1985, before Guatemala accepted the Court's jurisdiction in 1987, the Court found that it did have jurisdiction over the case, because both the underlying disappearance and the resulting lack of an investigation continued well into the 1990s. In its handling of the case, the Court thus limited itself only to those elements. In the context of the denial of justice perpetrated against Nicholas Blake's relatives, the Court said:

> "This Tribunal considers that Article 8(1) of the Convention must be given a broad interpretation based on both the letter and the spirit of this provision …. Consequently, Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained."[47]

That such a right exists is not directly evident from the text Convention. Taken together, Articles 8(1) and 25 protect the right to access to fair and effective judicial protection of rights. While the language of these provisions makes it clear that the remedy should be judicial, i.e. before a competent court or tribunal rather than another, less formal type of institution,[48] it is less clear that the remedy should necessarily be of a penal nature. Thus, some states have argued before the Court that the victims' right to a remedy had been – or could have been – satisfied through other, non-criminal avenues, like civil or administrative proceedings. However, the Court has consistently denied such claims.[49] It seems to take the position that certain rights can only be effectively protected – and remedied – through the appli-

47 IACtHR *Blake v. Guatemala (merits)*, 24 January 1998, paras. 96-97. Note that these considerations of the Court relate exclusively to the victim's rights under Article 8(1), and not under article 25. As in *Genie-Lacayo*, the Court in the case of *Blake* still made a rather strict division here between the two provisions, interpreting article 25 to extend only to the remedy of *amparo* and not to criminal proceedings. This strict division was given up in later case law. *See supra* n. 29.

48 *See* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), paras. 26.06-26.09.

49 *See for example* IACtHR *Moiwana community v. Suriname (preliminary objections, merits, reparations and costs)*, 15 June 2005, paras. 144-147 and IACtHR *The "Mapiripán massacre" v. Colombia (merits, reparations and costs)*, 15 September 2005, paras. 211-214.

cation of criminal law. Thus, as noted by Anja Seibert-Fohr, the IACtHR is the only human rights institution that recognizes "an individual right to criminal prosecution and punishment", or, in other words, a "right to justice" under Articles 8(1) and 25 ACHR.[50]

To be clear, the emergence of the right to justice has not replaced its counterpart, the duty of states to investigate, prosecute and punish such violations. Nor has it made the investigation of human rights violations dependent on the victims invoking their right to justice. To the contrary, the Court has consistently held that the state should "assume this duty [to investigate, prosecute and punish human rights violations, HB] as a legal obligation"[51] and start its investigation "ex oficio and without delay" and not "as a mere reaction to private interests, which would depend on the procedural initiative of the victims or their family members".[52] And as the Court noted, this, in turn, is "not contrary to the right of the victims of human rights violations or their family members to be heard during the investigation and the judicial proceedings, as well as their right to participate extensively in them".[53] In other words, while the state's obligation to investigate prosecute and punish and the victim's right to justice may rely on two different rationales,[54] they are, in the eyes of the IACtHR, two sides of the same coin and exist side by side.[55] As the Court noted it in the case of the *Serrano-Cruz sisters v. El Salvador*:

50 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 190-191.

51 *See for example* IACtHR *Kichwa indigenous people of Sarayaku v. Ecuador (merits reparations and costs)*, 27 June 2012, para. 265.

52 *See for example* IACtHR *Zambrano Vélez et al. v. Ecuador (merits reparations and costs)*, 4 July 2007, paras. 119-120.

53 Idem, para. 120.

54 As noted by Anja Seibert-Fohr, the obligation to investigate, prosecute and punish is based primarily on the need to protect society as a whole through general prevention. The right to justice, on the other hand, is based on a remedial logic, in which investigation, prosecution and punishment of human rights violations serves the individual interest of the victim to have their rights vindicated. *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 190.

55 Burgorgue-Larsen and Úbeda de Torres note that there have been fluctuations over time in the extent to which the Court would emphasize either the victim's right or state's obligation to investigate and prosecute human rights violations. In the first years after Blake v. Guatemala, under the presidency of Judge Cançado Trindade, the Court tended to focus more on the victim's rights under articles 8(1) and 25. More recently, there has been a tendency to stress the state's obligation under Article 1(1) ACHR in combination with the violation of a material right protected by the Convention. *See* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.14. The latter line of reasoning is closer to the ECtHR's case law on positive obligations under Articles 2 and 3 ECHR. However, notwithstanding such changing preferences, the Court's overall case law points in the direction of accepting investigation and prosecution as both a right of victims and a duty of the state.

> "*[T]he next of kin of the alleged victims have the right to expect, and the States the obligation to ensure*, that what befell the alleged victims will be investigated effectively by the State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the losses suffered by the next of kin repaired.[56] [emphasis added]

In short, the IACtHR has approached the question of investigation and prosecution of human rights violations from different angles: starting in its very first judgment in the case of *Velásquez Rodríguez*, the Court has consistently held that states have a legal obligation to investigate, prosecute and punish human rights violations under Article 1(1) ACHR. Later, beginning with its reparations judgment in the case of *El Amparo*, it began to develop a more victim-centered approach to the issue, recognizing that investigation and prosecution serves not only the interest of society, but that of individual victims as well. As a consequence, it began to order the investigation, prosecution and punishment of human rights violations as a reparation measure. Combined with the IACtHR's rigorous supervision of compliance procedure, this became the basis for its 'quasi-criminal jurisdiction'. The move to a more victim-oriented approach eventually culminated in the Court's recognition of the victim's rights to justice, which exists next to the state's obligation to investigate prosecute and punish.

3 The duty to prosecute, the right to truth and the crime of enforced disappearance

Parallel to and in close relation with the obligation to investigate, prosecute and punish, the Court has developed another legal concept of relevance to the investigation and prosecution of human rights violations: the right of victims to know the truth about the violations committed against them. Both the duty to prosecute and the right to truth, in turn, have been developed by the IACtHR in large part in response to cases concerning one particular type of human rights violation: the enforced disappearance of

56 IACtHR *Serrano-Cruz sisters v. El Salvador (merits, reparations and costs)*, 1 March 2005, para. 64. In some cases, this dual nature of the duty to prosecute has had concrete legal effects. For example, in its famous judgment in the case of *Almonacid-Arellano et al. v. Chile*, which concerned the legality of the self-amnesty promulgated by the Pinochet regime in the final days of its reign, the Court decided that the promulgation and upholding of the amnesty law violated the State's duty to investigate, prosecute and punish those responsible for the crimes committed during the military dictatorship, while the application of the law to the detriment of the individual victims violated their right to justice. IACtHR *Almonacid-Arellano et al. V. Chile (preliminary objections, merits reparations and costs)*, 26 September 2006, paras. 105-129. This judgment, and the distinction described here, will be discussed in detail below in sections 2.1 and 2.2 of Chapter 3.

persons.[57] Even the IACtHR's very first judgment in the case of *Velásquez Rodríguez* concerned a case of enforced disappearance committed by, or with the approval of, the government of Honduras. The parallel development of these three concepts is only logical given the severity of the practice of enforced disappearance and its wide application on the Latin American continent in the decades leading up to the start of the IACtHR's operation. Under their national security doctrines, the military dictatorships of the Cold War era had used enforced disappearances on a large scale to suppress political dissidents and prevent any type of opposition to their rule. The *juntas* of the southern cone even joined forced in 'Operation Condor' to create a coordinated international practice of enforced disappearance, so that wanted 'terrorists' who had fled one country could be apprehended in another.[58] Moreover, there are important conceptual linkages between the crime of enforced disappearance, the right to truth and the duty to prosecute.[59] This section will explore those linkages and how they affected the IACtHR's understanding of and case law on the obligation to investigate, prosecute and punish.

3.1 The crime of enforced disappearance and the emergence of a right to the truth

While the practice of enforced disappearance is surely much older, its legal definition as a violation of human rights and, eventually, an international crime was only developed towards the end of the 20th century, largely in response to the repressive policies enacted by the military dictatorships in Latin America.[60] The monitoring by the IACmHR and the UNCmHR of

57 *See* Concurring opinion of Judge Hernán Salgado Pesantes to IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, stating that "[t]he *right to the truth* has been shaped in a historical context where the State's abuse of power has caused serious conflicts, particularly when the forced disappearance of persons has been used by State agents". *See also* P. Galain Palermo, 'Relaciones entre el "derecho a la verdad" y el proceso penal. Analisis de la jurisprudencia de la Corte Interamericana de Derechos Humanos", in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II* (Konrad Adenauer Stiftung, 2011), 249-282.

58 M.L. Vermeulen, *Enforced disappearance – determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia 2012), p. 5-8.

59 *See generally* P. Galain Palermo, 'Relaciones entre el "derecho a la verdad" y el proceso penal. Analisis de la jurisprudencia de la Corte Interamericana de Derechos Humanos", in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II (Konrad Adenauer Stiftung, 2011), 249-282.

60 *But see* B. Finucane, 'Enforced disappearance as a crime under international law: a neglected origin in the laws of war', (2010) 35(1) *Yale Journal of International Law* 171-197, arguing that the criminalization of enforced disappearance under international law is actually older than commonly assumed and that it has its roots in International Humanitarian Law and its protection of the family and familial integrity.

the developing human rights situation paved the way for the adoption of several international instruments on the phenomenon.[61] All of these instruments contain their own definitions of enforced disappearance which, while containing the same basic elements, are not completely identical.[62] This section will focus on the concept as defined in the context of the IAHRS, particularly the definition provided by Article II of the Inter-American Convention on Forced Disappearance of Persons, which the IACtHR applies in its case law, and the further clarifications provided by the Court.

The Inter-American definition of enforced disappearance contains the following elements: 1.) any deprivation of liberty; 2.) by a state agent or person acting on behalf or with acquiescence of the state; 3.) followed by denial of the detention and/or a lack of information on fate and whereabouts of the victim; 4.) as a result of which the victim remains outside the protection of the law. Moreover, ever since its judgment in the case of *Velásquez Rodríguez* the IACtHR has consistently described enforced disappearance as "a multiple and continuous violation of many rights under the [ACHR] that the States Parties are obliged to respect and guarantee".[63] The recognition of enforced disappearance as a 'multiple' human rights violation means that this act "violates various legal interests and rights" including the right to physical liberty, the right to life and the right to humane treatment of both

61 The UNCmHR's monitoring of the situation in Chili, for example, moved the UNGA to adopt Resolution 33/173 of 20 December 1978, condemning the practice of enforced disappearance. As a result of this resolution, Felix Armacora was appointed by the UNCmHR as an independent expert to study the phenomenon. The presentation of his expert report, in turn, led to the establishment of the UN Working Group on Enforced and Involuntary Disappearance. *See* UNGA 'Report of the expert on the question of the fate of missing and disappeared persons in Chile' (21 November 1979) UN Doc. A/34/583/Add.1.

62 The relevant human rights definitions of enforced disappearance are found in: 1.) the fourth preambular paragraph and Article 1.2 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance; 2.) Article 2 of the 1994 Inter-American Convention on Forced Disappearance of Persons; and 3.) Article 2 of the 2006 International Convention on the Protection of All Persons from Enforced Disappearance.With regard to the UN Declaration, the drafters decided not to include a proper definition of enforced disappearance in the text of the Declaration, so as not to restrict the WGEID in its working methods. However, the preamble reflects "the main elements of what constitutes a disappearance". R. Brody, 'Commentary on the draft UN "Declaration on the protection of all persons from forced or involuntary disappearance"' (1990) 8(4) *Netherlands Quarterly of Human Rights* 381-394, p. 386.
Enforced disappearance is also separately in Article 7(2)(i) of the Rome Statute, which lists it as a crime against humanity.

63 IACHR *Velásquez Rodríguez v. Honduras*, 29 July 1988, para. 155.

the material victim and their family and loved ones.[64] That it is recognized as a 'continuous' (or 'permanent') violation of human rights means that a disappearance, which starts at the moment when the material victim is deprived of his liberty, continues to be committed until the moment they are released, or until the moment that the fate and whereabouts of the victim or their mortal remains can be determined.[65]

The third element of its definition, the element of secrecy, can be regarded as the defining element of enforced disappearance. It is what sets enforced disappearance apart from other human rights violations such as arbitrary detention or extrajudicial execution. It also constitutes the conceptual link between enforced disappearance and the right to truth.[66] The simple denial on the part of the state that the disappeared person is in its custody or that it has any knowledge of their fate and whereabouts has several important effects: 1.) in the first stages of the disappearance it withholds the protection of the law from the material victim; 2.) in the later stages of the disappearance it shields state agents from prosecution for the illegal acts they committed; and 3.) throughout the disappearance it inflicts additional suffering on the victim's next of kin and terror on society as a whole. The denial of information can continue long after the material victim has been killed, keeping the next of kin in an enduring state of uncertainty about their loved one's fate and whereabouts, which has been recognized by the Court as a violation of their right to humane treatment under Article 5 ACHR.[67]

The secrecy element to enforced disappearance and its brutal effects on the material victims, their next of kin and society as a whole, form the background in response to which the Inter-American human rights institutions have developed the victims' right to know the truth. The idea first surfaced

64 K. Ambos, 'Latin American and international criminal law: introduction and general overview' (2010) 10(4) *International Criminal Law Review* 431-439, p. 433. *See also* J.L. Modolell González, 'El crimen de desaparición forzada de personas según la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 198-199.

65 *See for example* IACtHR *Heliodoro Portugal v. Panama (preliminary objections, merits, reparations and costs)*, 12 August 2008, para. 112. *See also* J.L. Modolell González, 'El crimen de desaparición forzada de personas según la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 206-208.

66 *See* P. Galain Palermo, 'Relaciones entre el "derecho a la verdad" y el proceso penal. Analisis de la jurisprudencia de la Corte Interamericana de Derechos Humanos", in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II (Konrad Adenauer Stiftung, 2011), 249-282, pp. 259-263.

67 This was first recognized in IACtHR *Blake v. Guatemala (merits)*, 24 January 1998, paras. 114-116.

in Latin America in the 1980s.[68] In those years, the question whether to 'forget' the systematic practice of enforced disappearances committed by past regimes or to confront it was hotly debated among both academics and politicians.[69] Recognizing that trying to forget the past without fully clarifying it would mean that the suffering of those whose loved ones had been disappeared would continue, the Inter-American Commission and, with time, the Court, chose the latter.[70] In the same way that the duty to prosecute arose as the logical antidote to structural impunity, the right to truth serves to break the crippling secrecy through which practices of enforced disappearance control society. This close connection between the practice of enforced disappearance and the emergence of the right to truth is underscored by the first two cases in which the question of the existence of a right to truth was put before the IACtHR: The cases of *Castillo Paéz v. Peru* and *Bámaca Velásquez v. Guatemala*. Both cases concerned the forced disappearance of (suspected) members of subversive groups by the state's armed forces.

3.2 Legal basis of the right to the truth and its link to the duty to prosecute

It was the Inter-American Commission that pushed for the recognition of the right to truth as an autonomous right under the ACHR, based on the right to information and freedom of expression contained in Article 13 ACHR. It picked up the concept, which until then had been elaborated by legal scholars and human rights activists, in the latter half of the 1980s and started using it in the exercise of both its political function and its judicial function.[71] It wasn't until the 1997 judgment in the case of *Castillo Paéz v. Peru*, however, that the Court had the opportunity to respond to this conception of the right to truth as an autonomous right. When it did, it responded in the negative.

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68 The idea of a 'right to know the truth' is by no means exclusive to the Latin American region and the Inter-American human rights system. For example, the *1997 Joinet Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* include both a collective and individual right to the truth (Principles 1 and 3), a corresponding collective 'duty to remember' past human rights violations and the duty for states to give effect to the right to the truth. *See* Revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II (2 October 1997). However, for the purpose of this chapter I will focus on the development of the right to truth and its meaning within the Inter-American system.

69 L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), paras. 27.01-27.02.

70 Idem, paras. 27.03-27.05.

71 Idem, para. 27.06, explaining that in this way the Commission "attempted to be the link between theory (legal scholarship and doctrine) and practice (the courts).

The case concerned the abduction and disappearance of Ernesto Rafael Castillo-Paéz, a young man suspected of being a member of the Shining Path subversive group. He was last seen on 21 October 1990 while being arrested by Peruvian police officers and placed in the trunk of a patrol vehicle, after which they drove off with him to an unknown location.[72] The legal proceedings initiated against the police officers suspected of having been involved in Ernesto's disappearance did not lead to any results and the fate he suffered after his arrest was never clarified nor were his remains found. When the Commission initially submitted the case to the Court in January 1995, it did not address the right to truth, but based the complaint on a violation Articles 7, 5, 4, 8 and 25 in relation to Article 1(1),[73] which are the standard provisions invoked in cases of enforced disappearance. However, when it submitted its final arguments to the Court in June 1997, the Commission chose to add new arguments relating to two more violations, one of which was a violation of the right to the truth to the detriment of Ernesto Castillo.[74] It based this violation on the lack of efficacy of the investigation and judicial proceedings into his disappearance and the state's obstruction of this process.[75] The Court noted that the Commission claimed this violation "without citing any specific provision of the Convention, while pointing out that this right has been recognized by several international organizations".[76] The Court's response to the Commission's attempt at legal innovation was short and clear:

> "The … argument refers to the formulation of a right that does not exist in the American Convention, although it may correspond to a concept that is being developed in doctrine and case law, which has already been disposed of in this case by the Court's decision to establish Peru's obligation to investigate the events that produced the violations of the American Convention."[77]

While this statement seemed to leave no room for debate, that did not stop the Commission from trying again to have the right to truth recognized as an autonomous right in the case of *Bámaca Velásquez v. Guatemala*. Efraín Bámaca was a commander of a guerilla group fighting the Guatemalan military dictatorship during the country's civil war. He was wounded and captured during an armed encounter on 12 March 1992.[78] In contrast to the Castillo-Paéz case, the Court was able to uncover some of the cruel fate that befell Efraín Bámaca after his arrest through the testimony of several

72 IACtHR *Castillo-Paéz v. Peru (merits)*, 3 November 1997, para. 43(d) and (e).
73 Idem, para. 1.
74 Idem, para. 34. The other violation claimed by the Commission in its final arguments was a violation of Article 17 ACHR, right to family life.
75 Idem.
76 Idem, para. 85.
77 Idem, para. 86. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), paras. 27.07 – 27.08
78 IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 121(h).

guerilla members who had been captured by the military and were forced to work as informants. The Court established that Efraín Bámaca was kept alive for at least a number of months after his capture.[79] He was moved between several military bases and installations, interrogated and tortured severely. He was last seen alive around 18 July 1992 in the infirmary of a military base in San Marcos, tied to a metal bed.[80] After his disappearance, Bámaca's next of kin started a campaign to establish his fate and whereabouts, initiating *habeus corpus* proceedings, special pre-trial investigations and filing criminal complaints.[81] The Guatemalan authorities, on their part, denied having captured Bámaca and did everything in their power to obstruct any investigations into the case or efforts to locate his mortal remains.[82]

Among other violations, the Commission claimed that "as a result of the enforced disappearance of Bámaca Velásquez, the State violated the right to truth of the next of kin of the victim and of society as a whole".[83] This time, the commission did base its claim on the provisions of the ACHR, claiming that the right to truth is protected Articles 1(1), 8, 25 and 13 of the American Convention.[84] In responding to the Commission's claim, the Court recognized, at least implicitly, the existence of a right to the truth under the ACHR.[85] It also recognized that, through its obstruction of the investigation, the state "prevented Jennifer Harbury and the victim's next of kin from knowing the truth about what happened to him". However, the Court declined to find a separate violation of the right to truth, because:

> "the right to the truth is *subsumed* in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."[86] [emphasis added]

79 Idem, para. 121(i)-(l).
80 Idem, para. 121(l).
81 Idem, para. 121(m).
82 In one particularly spectacular episode, which illustrates the resolve on the part of the state to prevent the truth about the case from coming out, the then Attorney General of Guatemala flew in on a helicopter, accompanied by 20 military men, to stop the exhumation of a body which was thought to be that of Efraín Bámaca. *See* IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 73 and p. 28 (testimony Jennifer Harbury). However, not all the domestic authorities obstructed the investigations, and some even undertook considerable efforts to clarify the case. For example, then Human Rights Ombudsman Ramiro de Léon Carpio worked closely together with Bámaca's next of kin to locate his remains. Such efforts towards clarification of the case came at a considerable riks to those individual state agents, as is illustrated by the murder, on 20 May 1998, of Shilvia Anabella Jerez Romero, the prosecutor assigned to investigate the case.
83 Idem, para. 197.
84 Idem.
85 Idem, paras. 199-202.
86 Idem, para. 201.

Thus, according to the Court, the right to truth logically has the same basis in the Convention as the duty to prosecute, being Articles 1(1), 8(1) and 25 ACHR.

The findings of the IACtHR in the case of *Bámaca Velásquez v. Guatemala*, which have been upheld in later case law,[87] make clear that there exists, in the eyes of the Court, an inextricable link between the victim's right to truth and the state's duty to prosecute / the victim's right to justice, both conceptually and in its practical application.[88] As the Court expressed it in

87 The first case upholding the reasoning from the *Bámaca Velásquez* case was the Court's famous judgment in the case of *Barrios Altos v. Peru*. *See* IACtHR *Barrios Altos v. Peru (merits)*, 14 March 2001, para. 45-49. Since then, it has been repeated in a long line of cases. For an enumeration of these cases up to 2014, *see* IACtHR *Rodríguez Vera et al. (disappeared from the Palace of Justice) v. Colombia (preliminary objections, merits, reparations and costs)*, 14 November 2014, para. 509, fn. 789. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American C ourt of Human Rights – case law and commentary* (OUP, 2011), para. 27.09.

88 The Inter-American Commission, on the other hand, has maintained its position that the right to the truth is an autonomous right under Articles 1(1), 8(1), 13 and 25 ACHR and has continued to request the Court to make findings to this effect. The only case so far in which the Court has followed this reasoning by the IACmHR, to an extent, has been the case of *Gomes Lund v. Brazil*. The case concerned the disappearance of 70 (suspected) members of a subversive group between 1972 and 1975, under the Brazilian military dictatorship, and the subsequent lack of investigation and prosecution of these disappearances. In this case, the criminal investigations had been blocked by the Brazilian amnesty law and were therefore unable to proceed. However, the family members had also initated separate legal proceedings to gain access to information concerning the disappearances from the authorities. Under these circumstances, and after again emphasizing the close links between the right to truth and the right to access to justice, the Court held that, even if the criminal investigations could not go forward, the victims had a right to the truth, and therefore to acces to the relevant documentation, under Article 13. *See* IACtHR *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil (preliminary objections, merits, reparations and costs)*, 24 November 2010, para. 201. However, this judgment has remained an exception in the IACtHR's case law. In subsequent cases, the Court has re-emphasized the links between the right to truth and the right to justice, stating that the former is subsumed in the latter. See for example IACtHR *Rodríguez Vera et al. (disappeared from the Palace of Justice) v. Colombia (preliminary objections, merits, reparations and costs)*, 14 November 2014, paras. 509-511. In that case, the criminal investigations into the disappearances at issue, while ineffective, were still ongoing. Under those circumstances, the Court considered that "anyone, including the next of kin of the victims of gross human rights violations, has the right to know the truth, according to Articles 1(1), 8(1), 25, as well as in certain circumstances Article 13, of the Convention […]. However, it considers that, in this case, the right to know the truth is subsumed basically in the right of the victims or their family members to obtain from the competent organs of the State the clarification of the acts that violated human right and the corresponding responsibilities, by the investigation and prosecution established by Articles 8 and 25 of the Convention, which also constitutes a form of reparation." In conclusion, it seems that the IACtHR generally regards the right to truth as being subsumed in the right to access to justice. It will only find a separate violation of that right in cases where criminal investigation are blocked completely and it is therefore impossible to provide reparation for the violation of the right to truth through that avenue.

its judgment in the case of *Palma Mendoza v. Ecuador*, the right to access to justice and the right to truth "are closely related, and usually have reciprocal impact".[89]

On the one hand, the right to truth serves as one of the philosophical foundations underlying the duty to prosecute and the victim's right to justice.[90] At the same time, the Court sees the application of justice – more specifically: the state's effective investigation of the facts – as the primary road to satisfying the victim's right to know the truth.[91] As Judge García Ramírez explained in his concurring opinion to the *Bámaca Velásquez* judgment: "the victim – or his heirs – has the right that the investigations that are or will be conducted will lead to knowing what "really" happened."[92] In short, the link between the right to truth and the duty to prosecute is so intimate that the former is considered to be subsumed in the latter, while the latter represents the most appropriate path to satisfaction of the former.

3.3 Implications for the duty to prosecute

Its notion of an intrinsic link between the right to truth and the obligation to investigate, prosecute and punish has important implications for the way the IACtHR approaches criminal justice, and the criminal investigation in particular. According to Álvaro Paúl, the right to truth, "a paramount value of the Inter-American system", forms the "lens" through which the IACtHR

89 IACtHR *Palma Mendoza v. Ecuador (preliminary objection and merits)*, 3 September 2012, para. 85.

90 *See* A. Paúl, 'The admissibility of evidence before the Inter-American Court of Human Rights' (2017) 13(2) *Revista Direito GV* 653-676, p. 665, arguing that the IACtHR has "extracted, as a consequence of the right to the truth, a duty to investigate and punish".

91 *See for example* IACtHR *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil (preliminary objections, merits, reparations and costs)*, 24 November 2010, para. 201.

92 IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, concurring opinion Judge García Ramírez, para. 20. In a way, this position had been foreshadowed bythe Court in its *Velasquez Rodríguez* judgment, when it stated that the investigation in question should not be a mere formality, but should entail "an effective search for the truth by the government". IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 177. *See also* T.M. Antkowiak, 'Truth as right and remedy in international human rights experience' (2002) 23(4) *Michigan Journal of International Law* 977-1013, p. 990.

views the application of criminal justice.[93] This, in turn, has important practical consequences for the way in which the IACtHR has formulated state's obligations under the ACHR in this area, two of which will be discussed here.

Firstly, the IACtHR has consistently held that criminal investigations should be undertaken with the aim of discovering the whole truth and be conducted in such a way that it might realistically lead to the discovery of that truth. In this context, the relation between the right to truth has practical implications not only for the question how the state should investigate (its working methods) but also for the question *what* it should investigate. The latter question relates to the scope of the investigations or, in other words, how much truth the state should aim to uncover. This issue was discussed at length in the case of the *La Rochela Massacre v. Colombia*, which concerned the murder of a judicial commission working on the investigation of a prior massacre.[94] The Court saw a clear connection between these two cases, as the judicial commission had been murdered exactly because of their investigative work. It chastised the state for considering these two cases entirely separately[95] and for dealing with them in an *ad hoc*, fragmented fashion. The Court remarked that:

> "[i]n cases of grave violations of human rights, the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory and complete way.

93 A. Paúl, 'The admissibility of evidence before the Inter-American Court of Human Rights' (2017) 13(2) *Revista Direito GV* 653-676, pp. 664-665. Paúl makes this argument specifically in relation to the IACtHR's case law on the admissibility of evidence obtained under duress. As Paúl explains, Article 8(3) ACHR provides that "[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind". Paúl argues that its "lens" of the right to truth moved the IACtHR to adopt a broad and "absolue" interpretation of this provision, according to which any evidence – including secondary evidence – should be exluded when obtained under duress. This firm stance on the exclusion of evidence has been developed by the IACtHR in particular in response to a string of cases in which the confession of guilt has been extracted by the authorities through torture. Thus, this case law on excluding evidence obtained under duress primarily benefits the accused. However, in the famous *"Cotton field"* case, the IACtHR discussed this question from the point of view of the victims of the underlying human rights violations, and held that the 'fabrication of evidence' through torture is not only a violation of the rights of the accused, but that it also "affects the ability of the judicial authorities to identify and prosecute those responsible and to impose the corresponding punishment, which makes access to justice ineffective". IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 16 November 2009, para. 346.

94 The prior massacre had also been brought before the IACtHR, and is the object of the Court's judgmentin the case of the *"19 Tradesmen"*. *See* IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004.

95 IACtHR *La Rochela Massacre v. Colombia (merits, reparations and costs)*, 11 May 2007, para.162.

> … The Court emphasizes that the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities."[96]

Thus, when dealing with (grave) human rights violations, the investigating state should always be mindful of the context in which these violations are committed and try to uncover as much of that context as possible. In doing so, it should develop "all logical lines of investigation".[97] Only that way can the investigation fully live up to demands put on it by the right to truth.[98] This obligation to search for the whole truth and to develop "all logical lines of investigation" will be discussed below on more detail.[99]

Secondly, the IACtHR's perception of an inextricable link between the right to the truth and the duty to prosecute clearly implies a rejection of the rationale underlying the well-known "truth v. justice dichotomy", which was a prominent theme on the transitional justice debate in the 1990s.[100] This dichotomy is based on the idea that the application of justice and the resulting threat of punishment might dissuade the accused from coming forward with the truth about the human rights violations in which they were involved. Thus, it was thought, the application of criminal justice would actually form an obstacle to truth-finding.

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96 Idem, para. 195. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.28.

97 IACtHR *La Rochela Massacre v. Colombia (merits, reparations and costs)*, 11 May 2007, para. 158.

98 Some commentators have connected this obligation to investigate the broader historical and political context of particular human rights violations to the 'collective dimension' of the right to truth. *See* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.27-27.28. The distinction between the collective and the individual dimensions of the right to truth was addressed by Judge García Ramírez in his separate opinion to the Bámaca Velásquez case, where he explained that: "[i]n its first acceptation, the so-called right to the truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently. In the second, the right to know the reality of what has happened [to an individual victim, HB] constitutes a human right that is immediately extended to the judgment on merits and the reparations that arise from this." IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, concurring opinion Judge García Ramírez, para. 19. Whereas the IACmHR, in its application and final arguments in the *Bámaca Velásquez* case, had relied heavily on the collective dimension of the right to truth, the IACtHR in its judgment focused on its individual dimension, since the convention it upholds confers rights on individuals and not societies as a whole. As Judge García explained in his separate opinion: "the Court has confined itself to the individual perspective of the right to the truth, which is the one that is strictly linked to the Convention, because it is a human right." Idem, para. 20.

99 *See infra* Chapter 3, Section 4.2.2.

100 *See* K. Engle, 'Anti-impunity and the turn to criminal law in human rights' (2015) 100 *Cornell Law Review* 1069-1127, pp. 1089-1090 and 1097-1099.

Contrary to this thinking, the IACtHR sees the application of criminal justice and the state's effective investigation of the facts as the most appropriate instrument of establishing the truth and, thereby, satisfying the victim's right to truth. Concretely, this has led the IACtHR to reject, on several occasions, the establishment of truth commission as an *alternative* to criminal prosecutions.[101] The Court first had a chance to consider this question in the case of *Almonacid Arellano v. Chile*, which concerned the legality of the Chilean amnesty legislation decreed by the Pinochet regime. Having found this legislation and its application to the case of the petitioners to be in violation of Articles 8 and 25 in relation to Articles 1(1) and 2 ACHR, the Court then went on to consider whether the work of the various Chilean truth commissions could be seen as sufficient reparation for the victims in this case. In this context, the Court stated:

> "[T]he Court wishes to highlight the important role played by the different Chilean Commissions … in trying to collectively build the truth of the events which occurred between 1973 and 1990 …
>
> Notwithstanding the foregoing, the Court considers it relevant to remark that the "historical truth" included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect the truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano's death…"[102]

The Court again reflected on the relation between historical truth and judicial truth in the case of *Zambrano-Vélez v. Ecuador*. Here, the Court expanded on its reasons for rejecting truth commissions as an alternative for criminal investigations and prosecutions, explaining that:

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101 In this context, it should be noted that the truth commissions set up in Latin America were of a different nature and came about in very different circumstances than the South-African TRC. They were almost invariably 'negative choices', inspired not by the wish to seek reconciliation but by the de jure or de facto impossibility of criminal prosecution due to the continued influence of the perpetrators of the crimes in question on society and politics. In fact, the truth commissions often operated alongside unconditional amnesty legislation, making prosecutions on the basis of their work and conclusions impossible, at least for the time being. In fact, in many cases such legislation had been created by the very people who were responsible for the pardoned crimes, as a result of which they were called 'self-amnesties'. As Naomi Roht-Ariazza put it, the Latin American truth commissions were a last resort, following the logic that, since criminal prosecution were impossible, having a truth commission would be better than having no transitional justice at all.

102 IACtHR *Almonacid-Arellano et al. v. Chile (preliminary objections, merits, reperations and costs)*, 26 September 2006, para. 149-150. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.26.

> "[t]he recognition of historical truths through [a truth commission, HB] should not be understood as a substitute to the obligation of the State to ensure the judicial determination of individual and state responsibilities through the corresponding jurisdictional means, or as a substitute to the determination, by this Court, of any international responsibility. Both are about determinations of the truth which are complementary between themselves, since they all have their own meaning and scope, as well as particular potentialities and limits, which depend on the context in which they take place and on the cases and particular circumstances which form the object of their analysis."[103]

In short, the Court considers that the establishment of a truth commission is not sufficient in itself to meet the demands put on the states by the right to truth and access to justice as protected by the Convention. At the same time, it does value truth commissions as a complementary mechanism for truth-finding and it has "granted a special value to reports of Truth Commissions as relevant evidence in the determination of the facts and of the international responsibility of the States in various cases which has been submitted before it".[104] However, while judicial investigations are a minimum requirement under the ACHR, instituting complementary, non-judicial truth-finding mechanisms is recommendable, but not required.

4 Triggering the duty to prosecute: only grave human rights violations?

As discussed in the previous section, the IACtHR has developed the duty to prosecute in large part in response to cases of enforced disappearance. That does not mean, however, that this doctrine is only applicable to such cases. To the contrary, the IACtHR has consistently held that *all* human rights violations should be investigated by the state. The IACtHR made first expressed this position in the *Velásquez Rodríguez* judgment, stating:

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103 IACtHR *Zambrano Vélez et al. v. Ecuador (merits, reparations and costs)*, 4 July 2007, para. 128. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.26.

104 IACtHR *Zambrano Vélez et al. v. Ecuador (merits, reparations and costs)*, 4 July 2007, para. 128. For example, the Court has in various cases relied heavily on the work of the truth commission the UN instituted to investigate human rights violations committed in Guatemala in the context of the civil war, the so called Commission for Historical Clarification. *See for example* IACtHR *Plan de Sánchez massacre v. Guatemala (merits, reparations and costs)*, 29 April 2004, para. 42.

> "The State is obligated to investigate *every situation involving a violation of the right protected by the Convention*. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."[105] [emphasis added]

Thus, in principle, *any* violation of human rights triggers the state's duty to investigate, prosecute and punish that violation, in order to satisfy the victim's right to truth and justice and make reparation. However, if one looks at the entirety of the IACtHR's own case law concerning the duty to prosecute, one will find an interesting contrast between its stated position and its practice. In the great majority of the judgments examined in the context of this study, the IACtHR has applied the doctrine of the duty to prosecute in cases involving the violation of three rights protected by the ACHR: the right to life, the right to physical integrity and the right to personal liberty.[106] Moreover, the IACtHR has only applied the duty to prosecute to violations of the right to personal liberty, where this violation was carried out in close connection to simultaneous violations of the right to life and physical integrity.[107] Thus, while the Court has evidently not been willing to exclude the possibility of finding a duty to prosecute for other types of human rights violations as well, it has in practice limited its application to certain core rights.

This consistent practice on the part of the Court seems to indicate a certain hierarchy or prioritization. Indeed, the IACtHR has recognized repeatedly that the duty to prosecute has a particular relevance in cases concerning violations of the right to life and physical integrity.[108] This prioritization stems from the fact that these rights "have an essential nature in the Convention" because they "form part of the non-derogable nucleus of rights".[109] Moreover, with regard to the right to life in particular, the Court has repeatedly stated that it has a special importance, because its protec-

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105 IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 176.

106 The only exception to this rule encountered in the context of this study, has been the case of *Escher v. Brazil*, where the IACtHR discussed the state's obligation to investigate, prosecute and punish in relation to a particularly flagrant violation of the right to privacy. *See* IACtHR *Escher et al., v. Brazil (preliminary objections, merits, reparations and costs)*, 6 July 2009.

107 *See for example* IACtHR *Valle Jaramillo et al. v. Colombia (merits, reparations and costs)*, 27 November 2008, paras. 97 and 104-106; and IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 26 November 2009, paras. 247, 287.

108 *See for example* IACtHR *Vargas-Areco v. Paraguay (merits, reparations and costs)*, 26 September 2006, para 74, 75, 79, 80 and 82.

109 IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 26 November 2009, paras. 244.

tion is an essential precondition for the existence of other rights.[110] Thus, the IACtHR seems to suggest that the legal goods protected by these rights are so fundamental that they can only be properly protected and upheld through the application of criminal justice.[111] This prioritization, however, remains implicit and its consequences are unclear. After all, the fact that the IACtHR has only ever applied the duty to prosecute to cases involving the violation of these two core rights does not in itself mean that other human rights violations cannot – under certain circumstances – trigger that duty.

The IACtHR *has* been explicit, on the other hand, in its recognition of a second distinction of relevance in this context: that between 'grave' (or 'gross' or 'serious')[112] violations of human rights on the one hand and 'non-grave' violations on the other. The category of "grave" or "serious" human rights violations was first introduced in the Court's famous judgment in the case of *Barrios Altos v. Peru*. This judgment concerned the legality of the amnesty law introduced to prevent investigations into human rights violations committed by the Fujimori regime. In relation to this law, the Court held that:

> "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for *serious human rights violations* such as *torture, extrajudicial, summary or arbitrary execution and forced disappearance*, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[113] [emphasis added]

110 Idem, para. 245. *See also* IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, para. 39.

111 This line of reasoning resembles the case law of the European Court of Human Rights on the procedural obligations arising from violations of Articles 2 (right to life) and 3 (right to physical integrity) of the European Convention on Human Rights. *See for example* ECtHR *the case of X and Y v. the Netherlands*, 26 March 1985, Application no. 8978/80. The IACtHR itself has referred to this case law by its European counterpart on several occasions, in support of its application of the duty to investigate and prosecute to violations of the right to life. *See for example* IACtHR *Juan Humberto Sánchez v. Honduras (preliminary objection, merits, reparations and costs)*, 7 June 2003, para. 112 and IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 26 November 2009, para. 292.

112 All three of these phrases are regularly found in English-language literature on the IACtHR's case law on the duty to prosecute and in the official English translations o fthe IACtHR's judgments. There is no substantive difference between these phrases and all three are proper translations of the phrase "violaciones graves de derechos humanos", which the IACtHR consistently uses in the Spanish versions of its judgments. In line with the official English translations of the IACtHR's judgments, this text will use these phrases interchangeably.

113 IACtHR *Barrios Altos v. Peru (merits)*, 14 March 2001, para. 41.

This paragraph of the *Barrios Altos* judgment makes reference to a special category of 'grave' human rights violations, which includes at least the practice of torture, extrajudicial execution, and enforced disappearance. Moreover, it attaches a clear legal consequence to this new category of human rights violations: when it is determined that a set of facts constitutes a grave violation of human rights, the state should not only investigate the facts effectively in accordance with its internal regulations, but also eliminate any legal obstacles to prosecution that may exist within its domestic legal system.

The requirement to remove legal obstacles to investigation and prosecution, which will be discussed in detail in Chapter 3,[114] thus requires states to go beyond the normal application of their criminal law and actually *alter* their domestic criminal justice systems in order to make prosecution of such violations possible. This dimension of the duty to prosecute entails a much stronger interference in state sovereignty, as it limits the state's freedom to regulate in the area of criminal law. Moreover, it presents a possible conflict with the rights and interests of those accused of committing human rights violations.[115] However, the IACtHR argues that this is warranted in cases of grave human rights violations "in order to maintain the States' punishing authority in force against conduct where the gravity makes repression necessary in order to avoid repeated commission of said conduct".[116] [117]

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114 *See infra* Chapter 3, Section 2.

115 *See infra* Chapter 4, Section 4.

116 IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, para. 117.

117 Not long after the *Barrios Altos* judgment, however, the IACtHR seemed to downplay the disctinction it had made in its Barrios Altos judgment between grave and 'non-grave' human rights violations, and to suggest that the obligation to remove legal obstaces to prosecution relates to all human rights violations. In its judgment in the case of *Bulacio v. Argentina*, concerning the death of a 17-year old as a result of mistreatment by police officers while in custody. In this judgment, the Court held that: "this Court has stated that extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for *human rights violations* are inadmissible. […] In accordance with the obligations undertaken by the States pursuant to the Convention, no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment *of those responsible for human rights violations*. If that were not the case, the rights enshrined in the American Convention would be devoid of effective protection." IACtHR *Bulacio v. Argentina (merits, reparations and costs)*, 18 September 2003, paras. 116-117.
The *Bulacio* judgment was widely criticized for its broad application of the obligation to remove all legal obstacles to investigation and prosecution. *See* P.F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 218-219 and A. Huneeus, 'Courts resisting courts: lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44(3) *Cornel Int'l Law J.* 493 – 533, p. 516 fn. 126.

Thus, the particular nature of grave human rights violations is what triggers the state's obligation to alter their domestic legislation in order to eliminate any legal obstacle to their investigation and prosecution. Yet, the IACtHR has never clarified precisely what types of acts can be qualified as grave human rights violations and what distinguishes them from non-grave violations. Perhaps the most detailed reflection on this issue was provided in the case of *Vera Vera v. Ecuador*, which concerned the death, while in custody, of a detainee as a result of a gunshot wound he had sustained during his arrest.[118] In the proceedings before the Court, the Commission had argued that the facts under consideration amounted to a grave violation of human rights. The Court, however, did not agree with the Commission's assessment. In this context, the Court held that:

> "[A]ny human rights violation involves a level of severity by its own nature, because it implies a breach of certain State obligations to respect and guarantee the rights and freedoms for people. However, this should not be confused with what the Court throughout its jurisprudence has deemed to be "serious violations of human rights" which […] have their own connotation and consequences. To accept the point made by the Commission, that this case is of such gravity that the statute of limitations should not apply, would imply that this procedural concept is not applicable in any case before the Court, as all cases involve violations of human rights and are therefore grave. This is not in-line with the criteria specified by the Court regarding the [obligation to remove legal obstacles to investigation and prosecution, HB]."[119]

According to *Vera Vera*, then, only a limited number of human right violations is recognized by the IACtHR as constituting grave or serious human rights violations, and not all violations of the right to life committed by state agents can automatically be assumed to fall within that category. Ximena

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Following – and perhaps in response to – these critiques, the IACtHR has 'corrected' its reasoning from the *Bulacio* judgment and returned to the wording introduced in *Barrios Altos*, emphasizing that the obligation to remove legal obstacles to investigation and prosecution applies only in cases of grave human rights violations. *See for example* IACtHR *Albán-Cornejo et al. v. Ecuador (merits, reparations and costs)*, 22 November 2007, para. 111; IACtHR *Ibsen Cárdenas and Ibsen Peña v. Bolivia (merits, reparations and costs)*, 1 September 2010, para. 207; IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, paras. 117 – 118 and IACtHR *Suárez Peralta v. Ecuador (preliminary objections, merits, reparations and costs)*, 21 May 2013, paras. 174 – 176. *See also* F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 223-226 and A. Paúl, 'The American Convention on Human Rights. Updated by the Inter-American Court', (2017) 20 *Iuris Dictio* 53-87, p. 55.

118 IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, paras. 46 – 47 and 70 – 72.

119 Idem, para. 118. This quote is largely taken from the official English translation of the judgment. However, the third sentence of this quote has been altered somewhat by the author to better reflect the meaning of the Spanish original text.

Medellín-Urquiaga has suggested, on the basis of an "initial review" of the IACtHR's case law, that it uses three criteria for determining whether a violation qualifies as a grave violations of human rights: "whether it (i) infringes a jus cogens norm; (ii) affects essential values of the international community, or (iii) violates non-derogable rights recognised by international human rights law".[120] However, the IACtHR is far from consistent in its reliance on these criteria. In fact, the only consistent factor in the Court's practice on this point, is its reliance on a (presumably inexhaustive) "list of examples" of acts which can be qualified as grave violations of human rights.[121] This list of examples, which hasn't changed since the *Barrios Altos* judgment, includes only three acts: torture, extrajudicial execution and enforced disappearance. To this date, these are the only three acts which the IACtHR has conclusively recognized as constituting grave violations of human rights.[122]

Finally, some authors have suggested that the category of grave human rights violations can "reasonably be interpreted as referring to crimes under international law".[123] Others, however, have pointed out that, although there is a 'close relation' and substantial overlap between these two categories, they are not exactly the same.[124] According to such authors, the concept of 'grave human rights violations' is broader than 'international crimes', in the sense that grave human rights violations may amount to international crimes, but only if certain additional requirements are met. More precisely, in order for a grave violation of human rights to qualify as an international

120 X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin-American national prosecution of mass atrocities', 46 *Israel Law Review* 3 (November 2013) 405-430, p. 410.

121 F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), p. 215. *See also* X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin-American national prosecution of mass atrocities', 46 *Israel Law Review* 3 (November 2013) 405-430, p. 410.

122 At times, the IACtHR has seemed to suggest that it is moving towards the recognition of forcible transfer of people and/or populations as a grave violation of human rights. *See for example* IACtHR *Chitay Nech et al. v. Guatemala (preliminary objections, Merits, reparations and costs)*, 25 May 2010 and IACtHR *The case of the afro-descendant communities displaced from the Cacarica river basis ("Operation Genesis") v. Colombia* (preliminary objections, merits, reparations and costs), 20 November 2013. However, in these cases the practice of forced displacement was closely related to the commission of acts of extrajudicial execution and/or enforced disappearance, as it was the commission of the latter that provoked the forced disaplacement.

123 F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), p. 215.

124 *See for example* J.P. Pérez-Léon Acevedo, 'The close relationship between serious human rights violations and crimes against humanity: international criminalization of serious abuses', (2017) 17 *Anuario Mexicano de Derecho Internacional* 145-186, pp. 151-155.

crime – particularly a crime against humanity – it has to meet all elements of the crime definition and specifically, it must be committed as part of a pattern of widespread or systemic violations.[125] This interpretation is supported by the case law of the IACtHR itself, which has held that:

> "[w]hen examining the merits in cases of serious human rights violations, the Court has taken into account that, if they were committed in the context of massive and systematic or generalized attacks against one sector of the population, such violations can be characterized or classified as crimes against humanity…"[126]

Thus, while an isolated act of torture, extrajudicial execution or enforced disappearance can be qualified as a grave violation of human rights, it is not a crime against humanity.[127]

In short, while the Court has always maintained that the duty to prosecute exists for any violation of human rights, its practice on the matter has been rather more selective. In effect the Court has only ordered states to open investigations and prosecutions when the underlying facts concerned violations of certain core rights, such as the right to life, physical integrity and personal liberty. Moreover, the obligation to eliminate all legal obstacles to investigation and prosecution, which is an element of the duty to prosecute, applies only to the specific category of 'grave human rights violations'. This category covers acts like enforced disappearance, torture and extrajudicial execution.

5 The IACtHR as part of a developing legal framework against impunity

The previous sections have discussed the context, development, legal basis and scope of states' obligation to investigate, prosecute and punish human rights violations within the Inter-American system. Before delving deeper into this case law to describe the various elements the IACtHR has found to be contained in that overarching obligation – as will be done in the next chapter – it is useful here to contextualize this jurisprudence within the broader international movement against impunity.

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125 Idem, p. 154.

126 IACtHR *Manuel Cepeda Vargas v. Colombia (preliminary objection, merits, reparations and costs)*, 26 May 2010, para. 42

127 *See* J.P. Pérez-Léon Acevedo, 'The close relationship between serious human rights violations and crimes against humanity: international criminalization of serious abuses', (2017) 17 *Anuario Mexicano de Derecho Internacional* 145-186, p. 154 and X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin-American national prosecution of mass atrocities', 46 *Israel Law Review* 3 (November 2013) 405-430, p. 410.

As shown by Karen Engle, the movement against impunity was starting to pick up steam around the time the IACtHR started its operations.[128] To strengthen its call for states to investigate and prosecute human rights violations, it sought to frame anti-impunity in terms of legal obligations. However, before *Velásquez Rodríguez* it would have been difficult to make such an argument. The obligation to criminalize human rights violations, and investigate and prosecute them when they do occur, existed only under some specific conventions, relating to particular acts. The most famous examples are the obligations to this effect in the UN Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in 1951, and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987.[129] Apart from these important conventions, recommendations by certain human rights bodies, including the UN Human Rights Committee ("HRC"), had called on states to investigate human rights violations more generally, and to bring those responsible to justice.[130] However, the HRC's recommendations contained neither legally binding obligations, nor did they specify exactly what 'bringing those responsible to justice' would entail, and whether it referred specifically to criminal trials.[131]

Against this background, the *Velásquez Rodríguez* judgment provided "'the first truly comprehensive statement of a state's human rights obligations'" in the context of the fight against impunity,[132] and "[set] the stage for a holistic approach to anti-impunity", which combines the obligation to

128 *See* K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 18-21.

129 Apart from these famous and oft-cited examples, Anja Seibert-Fohr notes that several other conventions in force before the delivery of the *Velásquez Rodríguez* judgment contain provisions to the same effect, namely: 1.) the Slavery Convention, in force since 1927; 2.) the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, in force since 1951; and 3.) the International Convention on the Suppression and Punishment of Apartheid in force since 1976. Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969, includes an obligation to criminalize (incitement to) racially motivated hatred and/or violence, but does not define its scope. *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 153-175.

130 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 12-14. As examples of relevant, pre-Velásquez HRC recommendations, Seibert-Fohr mentions, amongst others, HRC *Barbato et al. v. Uruguay*, Communication no. 84/1981, 21 October 1982, UN Doc. CCPR/C/17/D/84/1981; HRC *Quinteros v. Uruguay*, Communication no. 107/1981, 21 July 1983, UN Doc. CCPR/C/19/D/107/1981; and HRC *Baboeram-Adhin et al. v. Suriname*, Communication nos.146/1983, 148/1983 and 154/1983, 4 April 1984, UN Doc. CCPR/C/24/D/146/1983.

131 Idem.

132 M. Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006), p. 8, as cited in: F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17.

investigate, prosecute and punish with the obligation to make reparations to the victims and to provide guarantees of non-repetition.[133] In doing so, the IACtHR gave a significant impulse to the development of the international movement and legal framework against impunity for human rights violations.[134] The judgment obviously had important direct consequences for the states under the IACtHR's jurisdiction, for whom the investigation, prosecution and punishment of human rights violations was now understood to form part of its international legal obligations under the ACHR. Beyond that group of states, however, *Velásquez Rodríguez* has also influenced the approach to 'anti-impunity' taken by other international institutions, including the European Court of Human Rights.[135] For example, in its famous judgment in the case of *McCann and others v. the United Kingdom*, the ECtHR followed the IACtHR's example in finding that the obligation to investigate violations of the right to life should be considered a procedural obligation under the ECHR. And while the ECtHR in *McCann* does not explicitly refer to the *Velásquez Rodríguez* judgment, it does apply a similar logic. According to the ECtHR:

> "the obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State."[136]

Like the IACtHR, the ECtHR has continued to develop its jurisprudence on the obligation to investigate and prosecute human rights violations since then, focusing on the conflicts and challenges particular to its region.[137]

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133 F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17.

134 *See* idem, p. 16, noting that the IACtHR, and particularly the Velásquez Rodríguez judgment, has been "central to the development of an anti-impunity jurisprudence firmly structured around" the obligations to investigate, prosecute, make reparations to victims and provide guarantees of non-repetition.

135 *See* K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 35-36.

136 ECtHR (Grand Chamber) *McCann and others v. the United Kingdom*, 27 September 1995, Appl. No. 18984/91, para. 161. In later case law, the ECtHR has clarified that the investigation in question should be capable of leading to the identification and punishment of those responsible for the underying human rights violation, and should, therefore, be of a criminal nature. *See for example* ECtHR Kaya v. Turkey, 19 February 1998, Appl. No. 158/1996/777/978, para. 107. *See also* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p.114.

137 As observed by Anja Seibert-Fohr, the development of the obligation to investigate, prosecute and punish human rights violations by the ECtHR "was accelerated by the Kurdish and Chechnian conflicts". A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 111.

Throughout this process, it has made reference to the jurisprudence of the IACtHR when refining and expanding its interpretation of that obligation on key points, including the autonomous nature of the obligation to investigate, prosecute and punish,[138] the legality of amnesty laws[139] and the continued existence of an obligation to investigate prosecute and punish human rights violations in a situation of armed conflict or occupation.[140] In her comparative study of the obligation to prosecute human rights violations under various international instruments, Anja Seibert-Fohr has observed that the IACtHR's jurisprudence has exerted a clear influence over that of the ECtHR in certain respects.[141]

Another important component of the international framework against impunity is found in the UN Principles to Combat Impunity, a soft law document developed under the auspices of the UN Commission on Human Rights.[142] Being a soft law document, the UN Principles to Combat

138 *See for example* ECtHR (Grand Chamber) *Silih v. Slovenia*, 9 April 2009, Appl. No. 71463/01, paras. 159-160 and ECtHR (Grand Chamber) *Varnava v. Turkey*, 18 September 2009, Appl. No. 16064/90, para. 147. In these decisions, the ECtHR adopted the position, previously accepted by the IACtHR, that the obligation to investigate, prosecute and punish human rights violations is an autonomous duty, which exists separately of the obligation to respect human rights. As a result, the ECtHR, like the IACtHR, now claims jurisdiction over cases in which the underlying human rights violation took place before the ECHR became applicable for the state in question, if the (alleged) violation of the obligation to investigate the underlying human rights violations continued after that date. In such cases, the ECtHR's analysis will be limited strictly to the state's compliance with its procedural obligations under the ECHR. Even though the ECtHR has eventually settled, in this respect, on an admissibility test that differs somewhat from that employed by the IACtHR, its original decision to recognize the obligation to investigate, prosecute and punish as an autonomous obligation seems inspired by the IACtHR's jurisprudence.

139 *See for example* ECtHR (Grand Chamber) *Marguš v. Croatia*, 27 May 2014, Appl. No. 4455/10, paras. 131-139.

140 *See for example* ECtHR (Grand Chamber) *Al-Skeini and others v. The United Kingdom*, 7 July 2011, Appl. No. 55721/07, para. 94. Contrary to the other ECtHR judgments cited above, the *Al-Skeini* judgment 'only' makes reference to the IACtHR's case law in its section on relevant international law and materials, and does not refer back to it in its application of the law to the case at hand.

141 See A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 191-192.

142 The UN Principles were first drafted in the 1990s by the renowned human rights expert Louis Joinet. *Revised final report prepared by Mr. Louis Joinet pursuan to Sub-Commission decision 1996/119*, 2 October 1997, UN Doc E/CN.4/Sub.2/1997/20/Rev.1. It was later revised by Diane Orentlicher, following a resolution of the UN Commission on Human Rights, to reflect later developments in international law and practice and best practices in the area of anti-impunity. *Report of the independent expert to update the Set of Principles to Combat Impunity*, 18 February 2005, UN Doc E/CN.4/2005/102. This updated set of principles was then endorsed by the UN Commission on Human Rights in resolution 2005/81, which noted the UN Principles against Impunity "with appreciation" and called on the UN High Commissioner for Human Rights and other UN bodies to ensure their wide dissemination and their consideration in practice. *Human Rights Resolution 2005/81: Impunity*, 21 April 2005, UN Doc. E/CN.4/RES/2005/81, paras. 20-23. See also D. Orentlicher, 'Prologue', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 1.

Impunity are not legally binding on UN Members States. The Principles do, however, represent an authoritative account of international law and practice and provide a "broad strategic framework" to which states can orient their efforts in the fight against impunity. As such, they are both a "reflection of the global trend towards accountability"[143] and an important point of reference for domestic efforts against impunity.[144] The standards set out by this important, yet non-binding document were influenced greatly by the IACtHR's early case law. As noted by Haldemann and Unger in their commentary to the UN Principles to Combat Impunity:

> "the influence of this framework [the holistic approach to anti-impunity, first articulated in the *Velásquez Rodríguez* judgment, HB] on the international anti-impunity struggle in general, and the Principles in particular, can hardly be overstated. If anything, the Principles are conceptually wedded to such a holistic approach to impunity, which centrally includes, but extends well beyond, the realm of criminal justice."[145]

In short, then, the IACtHR's jurisprudence has played an important role in the development of an international legal (and soft law) framework for the fight against impunity. Its *Velásquez Rodríguez* judgment provided the first articulation of a general obligation on states to investigate, prosecute and punish human rights violations under and thereby, provided the lens through which the fight against impunity would be viewed in legal terms. Moreover, *Velásquez Rodríguez* provided a catalyst for the development of a jurisprudence on the obligation to investigate, prosecute and punish by other human rights institutions, including the ECtHR, and for the development of soft law instruments on the topic, including the UN Principles to Combat Impunity. However, it should be noted that this influence certainly isn't a one-way street. While *Velásquez Rodríguez* may have been its opening salvo, the IACtHR's later case law developed alongside the broader international framework against impunity and has often firmly and explicitly

143 F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 5.

144 *See* Independent Study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher, 27 February 2004, UN Doc E/CN.4/2004/88, summary and para 8.

145 F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17. See also N. Roht-Arriaza, 'Principle 1: general obligation of states to take effective action against impunity', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 48, noting that the UN Principles were "intended to restate existing law, not make new law" and pointing specifically to the *Velásquez Rodríguez* judgment as a source of existing law in relation to the fight against impunity.

positioned itself within that international movement. For example, as noted by Diane Orentlicher, the IACtHR has been quick to embrace the UN Principles to Combat Impunity, which have become "a key reference in decisions by the supervisory bodies for the American Convention on Human Rights".[146] Through its references to universal human rights instruments and jurisprudence developed by other human rights courts, the IACtHR emphasizes the international agreement on some of the more controversial aspects of its own established case law.[147] At the same time, it has also relied on external references, especially reference to the case law of the ECtHR, when expanding its own interpretation of the ACHR's provisions. According to Gerald Neuman, the IACtHR's "progressive elaboration of rights is supported […] quite often by references to the global and European human rights regimes".[148] This is certainly true for the IACtHR's progressive elaboration of states' obligations in the fight against impunity and the victim's right to justice.[149] The development of legal obligations to combat impunity has thus been a process of international cross-fertilization, in which the IACtHR, due, among other things, to the high incidence of the issue of structural impunity in its case law, has played a leading role.

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146 *Independent Study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher*, 27 February 2004, UN Doc E/CN.4/2004/88, para 8.

147 *See for example* IACtHR *González et al. ("cotton field") v. Mexico (preliminary objections, merits, reparations and costs)*, 16 November 2009, para. 292 and *IACtHR Juan Humberto Sánchez v. Honduras (preliminary objections, merits reparations and costs)*, 7 June 2003, para. 112. In these cases, the IACtHR makes reference to the ECtHR's doctrine on states' procedural obligation to investigate violations of the right to life, in order to emphasize international acceptance of its own doctrine on the obligations ot investigate, prosecute and punish human rights violations. Moreover, the IACtHR has undertaken extensive reviews of international instruments and jurisprudence relating to the obligation to punish international crimes and the legality of amnesty legislation, to support its own previous, and highly controversial decision that amnesty laws violate the ACHR. *See for example* IACtHR *Almonacid-Arellano et al. v. Chile (preliminary objections, merits, reparations and costs)*, 26 September 2006, paras. 95-100 and 105-111 and IACtHR *Gelman v. Uruguay (merits and reparations)*, 24 February 2011, paras. 195-214. For a detailed discussion of the IACtHR's case law on the prohibition of amnesty laws, *see infra* Chapter 3, Section 2.2.

148 G.L. Neuman, 'Import, export, and regional consent in the Inter-American Court of Human Rights', (2008) 19(1) *European Journal of International Law* 101-123, p. 107.

149 *See for example* IACtHR *González et al. ("cotton field") v. Mexico (preliminary objections, merits, reparations and costs)*, 16 November 2009, para. 292, where it held: "The Tribunal finds that […] the obligation to investigate effectively has a wider scope when dealing with the case of a woman who is killed […] within the framework of a general context of violence against women. Similarly, the European Court has said that where an "attack is racially motivated, it is particularly important that the investigation is pursued with vigor and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence." This criterion is wholly applicable when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence."

Because of this process of cross-fertilization, the standards developed through different international regimes to combat impunity are mostly congruent and mutually reinforcing. That does not mean, however, that they are completely identical or that all different regimes and instruments agree on all points. There are some important differences between the jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish and that of other international institutions. In general, it can be said that that the IACtHR has gone further than other regimes in acknowledging the rights of victims in the context of the fight against impunity and in emphasizing the state's duty to punish those responsible for human rights violations.

As noted by Anja Seibert-Fohr, the IACtHR has gone further than other human rights bodies in accepting a remedial rationale for the state's duties in the context of the fight against impunity.[150] As described above, the obligation to investigate, prosecute and punish was originally conceived, in the *Velásquez Rodríguez* judgment and in the case law of other human rights bodies, as a positive obligation based on the need to protect society from further human rights violations. With time, the IACtHR has come to see the investigation, prosecution and punishment of human rights violations also as a right of the victims of those violations, a development other human rights bodies have followed to some extent.[151] The IACtHR accepts this remedial rationale not only for the obligation to investigate human rights violations, but also for the obligation to prosecute and punish those responsible. Other human rights bodies, however, have not gone that far. The ECtHR, for example, has always denied that the ECHR "[entails] a right for an applicant to have third parties prosecuted or sentenced for a criminal offence".[152] Thus, whereas the ECtHR takes the position that "rather than punishment, it is an official investigation that is owed to the victim",[153] the

150 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 189-196.

151 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 192, noting that: "[c]riminal proceedings are increasingly seen [by the ECtHR and the UN Human Rights Committee, HB] not only as a measure of prevention, but also as a measure taken in the interest of individual victims. The influence of the Inter-American jurisprudence is evident."

152 *See for example* ECtHR (Grand Chamber) *Giuliani and Gaggio v. Italy*, 24 March 2011, Appl. No. 23458/02, para. 306 and ECtHR (Grand Chamber) *Öneryildiz v. Turkey*, 30 November 2004, Appl. No. 48939/99, para. 96.

153 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 192. *But see* ECtHR (Grand Chamber) *Öneryildiz v. Turkey*, 30 November 2004, Appl. No. 48939/99, para. 95, stating that: "the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law." In other words, while the ECtHR seems to grant greater deference to domestic authorities than the IACtHR in deciding whether the official investigation should lead to proceedings, it will review those proceedings once they have been initiated.

IACtHR believes that victims have a right to justice, which includes the right to demand the prosecution and punishment of those responsible for human rights violations.[154]

Moreover, Seibert-Fohr observes that these differences in legal rationale have "considerable practical relevance" for the way in which the IACtHR's jurisprudence has developed over the years. On the one hand, Seibert-Fohr observes that the IACtHR in general seems to focus more on punishment of those responsible for violations than do other human rights institutions. In her view, the IACtHR has attached an ever greater weight to the duty to punish, which "exists independently of the duty to […] investigate",[155] to the point where "[i]f there was initially a focus on investigation, the duty to punish is currently of equal importance" in the Court's jurisprudence.[156] This, in turn, has led the IACtHR to take a very strong position on certain 'elements' of the overarching obligation to investigate, prosecute and punish, like the prohibition of amnesty laws.[157] Finally, the IACtHR's remedial approach to the investigation and prosecution of human rights violations, in which victim's have procedural rights throughout the proceedings, has led it to "increasingly […] analyze the administration of justice" by domestic authorities.[158]

Thus, in short, the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations and the victim's right to justice is part of a developing international legal framework on the state's obligations in the context of the fight against impunity, for which its own *Velásquez Rodríguez* judgment served as an important catalyst. The development of this legal framework has come about through a process of international cross-fertilization, in which the IACtHR has enthusiastically taken part. However, it has been observed by some that its case law goes beyond the international consensus in some respects, particularly where it concerns the acceptance of the victim's right to justice, including the right to demand prosecution and punishment of those responsible for human rights violations.

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154 *See supra* p. 41 and fn. 149. On this point, the IACtHR seems to orient its jurisprudence more on the UN Principles to Combat Impunity, which recognizes and regulates the victim's right to justice in Principles 19-30. Interestingly, the IACtHR's judgment in the case of *Blake v. Guatemala*, in which it first recognized the victim's right to justice, was delivered in January 1998, not long after the UN Principles to Combat Impunity were first published by Louis Joinet.

155 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 54.

156 Idem, p. 191.

157 Idem, pp. 194-195.

158 Idem, pp. 194-195.

6 Conclusion

In its landmark judgment in the case of *Velásquez Rodríguez v. Honduras*, the IACtHR clearly established that states are under an obligation not only to refrain from violating human rights, but also to prevent such violations from occurring and to investigate, prosecute and punish them when they do occur. These obligations flow from Article 1(1) ACHR, which directs states to both respect and ensure the rights enshrined in the Convention. Moreover, *Velásquez Rodríguez* specified that the obligation to investigate, prosecute and punish human rights violations implies not only that states should put in place a legal and institutional framework conducive to such investigation and prosecution, but also that they undertake *effective* investigations whenever human rights violations do occur.

The positive obligation to investigate, prosecute and punish human rights violations recognized in the *Velásquez Rodríguez* judgment was based primarily on a rationale of general prevention. In other words: on the need to protect society as a whole from the further commission of human rights violations. In its later case law, however the IACtHR has slowly moved towards a more remedial – or victim-centered – rationale for this obligation, which recognizes that the investigation and prosecution of human rights violations serves not only a public interest, but also that of the individual victims of the underlying violation. This remedial rationale led the IACtHR first to order the investigation and prosecution of human rights violations as a measure of reparation for the victims in the case of *El Amparo v. Venezuela*. In the late 1990s, the IACtHR ultimately recognized the victim's right to justice under Articles 8(1) and 25 ACHR, which entails the victim's right to have any violation of their rights investigated and those responsible prosecuted and, if appropriate, punished. Moreover, the IACtHR recognizes that victims have procedural rights during any proceedings concerning the violation of their rights which should be respected by the relevant domestic authorities, particularly the right to be informed of (the state of) the proceedings and to participate in them. However, far from replacing the obligation to investigate and punish, the victim's right to justice and its underlying remedial rationale exist next to it, and the two doctrines mutually reinforce each other.

This progressive jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish and the victim's right to justice developed against the background of, and in response to, a context of structural and entrenched impunity in many states under its jurisdiction. At the time the IACtHR began its operations, many Latin American countries were going through complex processes of transition – from civil war to peace and/or from dictatorship to democracy – while simultaneously confronting new challenges to public order and to their justice systems, in the form of growing organized crime. This context goes a long way in explaining the IACtHR's particular focus on the need for states to combat impunity and to investigate and prosecute those responsible for serious crimes – old and

new – who continued to hold great power over Latin American societies and states.

Moreover, many of the cases with which the IACtHR has been confronted throughout its operations, from the late 1980s until today, have concerned systematic violations of the most basic human rights committed by state agents or by groups affiliated to the state, as part of the oppressive tactics of authoritarian regimes. In particular, many breakthroughs in the IACtHR jurisprudence have come in response to cases concerning the systematic practice of enforced disappearance of persons, often targeted at political dissidents. The particular nature of the practice of enforced disappearance has led the IACtHR to develop the concept of a right to truth. This development has taken place parallel and in close relation to the development of the obligation to investigate, prosecute and punish and the victim's right to justice, to which the right to truth is inextricably linked. In fact, the IACtHR sees the victim's right to truth as being subsumed in their right to justice, and believes that the right to truth should be satisfied primarily through the state's effective (criminal) investigation of the facts. As a result, the state's investigation should be such, that it is capable of uncovering the whole truth surrounding the human rights violation in question, taking account the context in which it was committed and with an eye to uncovering any structures or systems which may have been involved in their commission.

Finally, it should be noted that the IACtHR's doctrines of the obligation to investigate, prosecute and punish and the victim's right to justice developed alongside – and as a part of – a broader international movement against impunity. This movement was given a strong impulse by the IACtHR's *Velásquez Rodríguez* judgment, which was a catalyst for the development of further international jurisprudence and soft law instruments as part of a developing international legal framework against impunity. The IACtHR has continued to be an important player in this process, ever pushing the development of the legal framework against impunity forward. At the same time, however, it has been explicit in presenting itself as a part of this international movement, frequently citing other international human rights bodies and international instruments in its own case law.

3 Anatomizing the obligation to investigate, prosecute and punish human rights violations

1 Introduction: giving practical meaning to the obligation to investigate, prosecute and punish

The previous chapter analyzed and contextualized the overarching legal doctrine developed by the IACtHR in support of the fight against impunity, namely that of the obligation to investigate, prosecute and punish human rights violations and the victim's right to justice. However, this overarching obligation, in itself, soon showed itself insufficiently precise to adequately address the complex and nuanced reality of structural impunity in Latin America. In their applications to the Commission and testimony before the Court, victims and NGOs presented detailed analyses of the domestic mechanisms producing impunity. When confronted with such analyses, to state simply that a state is required to investigate and prosecute human rights violations clarifies little and provides few starting points for improving states' capacity (and willingness) to fight impunity effectively. It also provides victims little guidance as to what they can expect from the domestic criminal justice system and from other state organs in order to make investigation and prosecution of their cases possible. Thus, the Court has further elaborated and refined its overarching doctrine, giving it practical meaning through constant confrontation with the myriad ways in which domestic investigations into cases of human rights violations have become obstructed and derailed.

As noted in section 2.1 of the previous chapter, the two main lines along which the IACtHR has developed and refined its overarching doctrine were anticipated in the *Velásquez Rodríguez* judgment itself. Since then, the IACtHR has established clearly that the obligation to investigate, prosecute and punish human rights violations requires states 1.) to remove all legal and practical obstacles maintaining impunity; and 2.) to undertake effective investigations when human rights violations occur.[1] However, as these two dimensions are still very general in nature the IACtHR has not stopped

1 To be clear, the IACtHR itself has not identified the two aspects of the obligation to investigate, prosecute and punish described here as its 'main dimensions'. That qualification is an interpretation by the author, based on an analysis of the IACtHR's case law in its entirety, its consistent insistence on these two aspects since its very earliest decisions and on the fact that all other elements of the obligation to investigate, prosecute and pnuish discussed in this chapter can logically be categorized as falling under one of these two aspects.

there. Rather, taking these two dimensions as its starting point, the IACtHR has given content to the overarching obligation to investigate, prosecute and punish by identifying a number of more specific and concrete doctrines which fall under it and which form, in a way, its arms and legs.

This chapter will discuss each of these concrete obligations and prohibitions in detail. For clarity, it should be read in conjunction with the schematic overview provided in Annex 1. The schematic overview and this chapter adhere to the main dimensions of the obligation to investigate, prosecute and punish identified by the IACtHR and will arrange the various more concrete obligations along those lines, analyzing their interconnections and their relation to the overarching doctrine. It should be noted that the discussion in this chapter is based on an analysis of the IACtHR's entire case law on the obligation to investigate, prosecute and punish human rights violations. Individual cases are discussed in this chapter or referenced in the footnotes either because they represent an important change or development in the IACtHR's reasoning or because they are illustrative of the IACtHR's current reasoning on specific issues.

On this basis, section 2 will discuss the concrete doctrines developed as part of the obligation to remove all legal obstacles to investigation, prosecution and punishment of human rights violations. Section 3 will discuss the different elements of the obligation to remove all practical obstacles to prosecution – or obstructions to justice. Section 4 will analyze the different elements related to the obligation to investigate, prosecute and punish human rights violations effectively.

2 The obligation to remove all legal obstacles maintaining impunity

2.1 The obligation to remove legal obstacles maintaining impunity and Article 2 ACHR

As noted in section 4 of the previous chapter, the obligation to remove legal obstacles maintaining impunity intrudes on state sovereignty far more than other aspects of the obligation to investigate, prosecute and punish, as it limits states' freedom to regulate in the area of criminal justice. Under this umbrella the IACtHR has limited the application of well-established principles of criminal law aimed at the protection of the individual from state interference, such as the principles of *ne bis in idem* and non-retroactivity, in cases relating to grave human rights violations. According to the IACtHR, these controversial measures are necessary under Articles 8(1) and 25 ACHR, in order to guarantee access to justice in relation to the most serious violations of human rights. Moreover, the obligation to remove legal obstacles maintaining impunity has an additional legal basis in Article 2 ACHR, which reads:

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

As the IACtHR explained in a 1994 Advisory Opinion on the scope and interpretation of Articles 1 and 2 of the ACHR, this provision codifies the general rule of international law that states cannot invoke provisions of domestic law to justify non-compliance with their international obligations.[2] According to the IACtHR, this general obligation to adopt all measures necessary to give effect to the state's obligations under international law includes a commitment not to adopt any measures that run contrary to those obligations.[3] Article 2 ACHR has subsequently been applied by the Court in a variety of cases in which domestic legislation, or the lack thereof, was alleged to violate the rights of individuals protected under the Convention. In such cases, the Court consistently holds that:

> "The general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees."[4]

Taken together, it is therefore clear that Article 2 ACHR requires states to 1.) refrain from invoking existing domestic norms in order to justify non-compliance with the Convention; 2.) eliminate, if necessary, existing norms which violate the rights protected by the Convention from their domestic laws; 3.) refrain from enacting new norms which would violate the rights protected by the Convention; and 4.) enact domestic legislation furthering the domestic protection of the rights enshrined in the Convention.

In its extensive case law on the topic, the IACtHR has specified the results of these very general obligations for the investigation and prosecution of human rights violations. As the schematic overview in Annex 1

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2 IACtHR, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention of Human Rights (Advisory Opinion)*, OC-14-94, 9 December 1994, para. 35.

3 Idem, para. 36.

4 IACtHR, *Castillo Petruzzi et al v. Peru (Merits, Reparations and Costs)*, 30 May 1997, para. 207. This has become the standard articulation of the scope of the State's obligations under Article 2 ACHR, which has been repeated by the Court on many occasions. *See for example* IACtHR *Almonacid Arellano et al v. Chile (Preliminary Objections, Merits, Reparation and Costs)*, 26 September 2006, para. 118 and IACtHR *Heliodoro-Portugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 180.

shows, it has ordered states to adopt very specific legislation in order to enable the investigation and prosecution of grave violations of human rights, banned the enactment of certain legislation blocking such investigation and prosecution and it has forbidden states to apply provisions of their existing domestic criminal law which would hinder or even block such investigations. Or, as the Court summarized its position on the matter in the case of *Bulacio v. Argentina*:

> "The Court deems that the general obligations set forth in Articles 1(1) and 2 of the American Convention require that the States Party promptly adopt all types of provisions for no one to be denied the right to judicial protection, set forth in Article 25 of the American Convention. […] In accordance with the treaty obligations undertaken by the States, no domestic legal provision or institution […] may be used to avoid compliance with decisions of the Court regarding investigation and punishment of those responsible for human rights violations. If this were not so, the rights enshrined in the American Convention would be devoid of effective protection. This view of the Court is in accordance with the language and spirit of the Convention, as well as the general principles of international law; one of these principles is that of pacta sunt servanda, which requires ensuring that the provisions of a treaty have an effet utile in the domestic law of the States Party."[5]

Going forward, this section will describe the concrete obligations flowing from the IACtHR's case law with regard to the creation of a legal system conducive to the investigation and prosecution of human rights violations. First, it will describe the state's negative obligations in this respect: the prohibition of amnesty laws and of relying on provisions concerning prescription of crimes and the principle of *ne bis in idem* in order to block investigation and prosecution. Second, this section will describe the positive measures ordered by the Court to enable investigation and prosecution, particularly the codification of enforced disappearance as an autonomous crime. Finally, it will consider the possible tension between the obligation to investigate and prosecute cases of enforced disappearance and the principle of legality and non-retroactivity of the law.

2.2 The prohibition of amnesty provisions

The Inter-American Court's position on the incompatibility of amnesty laws with states' obligations under the ACHR is, without a doubt, one of

5 IACtHR *Bulacio v. Argentina (Merits, Reparations and Costs)*, 7 September 2001, paras. 116-117. See also IACtHR *Gómez Paquiyauri Brothers v. Peru (Merits, Reparations and Costs)*, 8 July 2004, paras. 150-151.

its most prominent – and debated – doctrines.[6] The judgment which first introduced it, that in the case of *Barrios Altos v. Peru*, is among the IACtHR's most famous judgments. In fact, the *Barios Altos* judgment and the prohibition of amnesty laws have, to some, become almost synonymous with the obligation to investigate, prosecute and punish as such. And while, as these chapters should make clear, this is an excessively reductive view of the IACtHR's rich jurisprudence, there is no denying that its decisions on this issue have been truly groundbreaking.

It is, therefore, worthwhile to sketch the context which led the IACtHR to rule that amnesty legislation is incompatible with international law – or, at least, the ACHR. Firstly, it should be noted that, when the Court rendered its judgment in *Barrios Altos v. Peru* in March of 2001, it seemed clear that there was international trend towards accountability for grave violations of human rights. The 1990s had seen the creation of the *ad hoc* Tribunals, the arrest of Augusto Pinochet in London and the ratification of the Rome Statute of the International Criminal Court. And while none of these developments provided a direct answer to the question whether amnesty laws are compatible with international law or not, they did seem to communicate a clear consensus that grave human rights violations cannot remain unpunished. Seen from this light, the *Barrios Altos* decision did not put the IACtHR out of step with international developments, only slightly ahead of the curve. The IACtHR itself seems to regard its case law on amnesty legislation as the product of a process of judicial cross-fertilization.[7]

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6 For a discussion of the prominent place of the IACtHR's case law in the development of international law on the issue of amnesties, s*ee for example* L.J. Laplante, 'Outlawing amnesty: the return of criminal justice in transitional justice schemes', (2009) 49 *Virginia Journal of International Law* 915-984, C. Binder, 'The prohibition of amnesties by the Inter-American Court of Human Rights', (2011) 12(5) *German Law Journal* 1203-1230, D. Jacobs, 'Puzzling over amnesties – defragmenting the debate for international criminal tribunals', in: L.J. van den Herik and C. Stahn (eds.), *The diversification and fragmentation of international criminal law* (Brill Publishers, 2012) and L. Mallinder, 'The end of amnesty or regional overreach? Interpreting the erosion of South America's amnesty laws (2016) 65(3) *International and Comparative Law Quarterly* 645-680. For a critique of the IACtHR's case law on the issue of amnesties, *see for example* E. Malarino, 'Judicial activism, neopunitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12(4) *International Criminal Law Review* 665-695, pp. 669-670 and D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II* (Konrad Adenauer Stiftung, 2011), p. 497. These and other critiques of the IACtHR's case law of relevance ot the fight against impunity will be discussed below, in Chapter 4.

7 *See* J. Dondé Matute, 'El concepto de impunidad: leyes de amnistía y otras formas estudiadas por la Corte Interamericana de Derechos Humanos' in: k. Ambos and G. Elsner (eds.), *Sistema Interamericano de Derechos Humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 264-265.

Secondly, the Barrios Altos decision is a logical extension of the Court's own previous case law on the duty to investigate and prosecute human rights violations and to combat impunity using all available legal means which started with *Velásquez Rodríguez*, as described in the previous chapter. In fact, the Court had already foreshadowed its position on amnesty laws in a prior decisions against Peru, when it ordered the investigation and prosecution of the crimes underlying its judgment as reparation for the victims.[8] In these cases, the state argued that it was unable to investigate and prosecute these crimes due to the amnesty laws in force, a position which the Court roundly rejected, stating:

> "Under the American Convention, every person subject to the jurisdiction of a State Party is guaranteed the right to recourse to a competent court for the protection of his fundamental rights. States, therefore, have the obligation to prevent human rights violations, investigate them, identify and punish their intellectual authors and accessories after the fact, and may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law. In the Court's judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected."[9]

While these prior cases did not directly concern the amnesty laws themselves, as a result of which the Court did not need to consider their validity as such, its words made clear where it stood on the issue.

Thirdly, the domestic developments in Peru at the time the *Barrios Altos* case was being heard by the Court, which shaped the proceedings and the attitude of the Peruvian government, were also conducive to a strong stance on the question of amnesty. In November 2000, president Alberto Fujimori fled Peru in the midst of a corruption scandal to seek refuge in Japan. Under Fujimori's leadership in the 1990s, the Peruvian military had committed countless human rights violations in the context of its crackdown on the Shining Path guerrilla group. Subsequently, Fujimori had enacted an amnesty law pardonning all these violations, thus creating a state-imposed situation of impunity. The Barrios Altos case was the first case before the IACtHR in which the Peru was represented by the new, post-Fujimori government,[10] which had no direct ties to the violations in question and

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8 IACtHR *Loayza Tamayo v. Peru (Reparations and Costs)*, 27 November 1998, paras. 167-171 and IACtHR *Castillo Paéz v. Peru (Reparations and Costs)*, 27 November 1998, paras. 104-105.

9 IACtHR *Loayza Tamayo v. Peru (Reparations and Costs)*, 27 November 1998, para. 168.

10 When the case was first submitted to the Inter-American Court, Fujimori was still in office and the attitude of the State in the proceedings was initially very hostile and defensive. However, over the course of the proceedings the domestic political situation changed drastically, as did the attitude of the State towards the Court. These changes are described in the Barrios Alts judgment itself. *See* IACtHR *Barrios Altos v. Peru (Merits)*, 14 March 2001, paras. 20-40.

was open to their investigation and prosecution. However, it found itself blocked from taking such action by the amnesty laws which Fujimori had enacted and which remained in place after his escape.

During the proceedings before the Court, the state recognized its international responsibility for the Barrios Altos massacre and indicated its willingness to proceed with the investigation of that case on the domestic level. In this context, it practically invited the Court to declare the nullity of the amnesty laws in place, saying:

> "…[T]he Government's strategy in the area of human rights is based on recognizing responsibilities, but, above all, on proposing integrated procedures for attending to the victims based on three fundamental elements: the right to truth, the right to justice and the right to obtain fair reparation. [...]
>
> …[T]he State reiterated its willingness to enter into direct discussions in order to reach an effective solution ... to attack the validity of the procedural obstacles that impede the investigation and punishment of those who are found responsible in the instant case; we refer, in particular, to the amnesty laws.
>
> …
>
> …The formula of annulling the measures adopted within the context of impunity in this case is, in our opinion, sufficient to promote a serious and responsible procedure to remove all the procedural obstacles linked to the facts; above all, it is the formula that permits, and this is our interest, recovering procedural and judicial options to respond to the mechanisms of impunity that were implemented in Peru in the recent past, in accordance with the law, and opening up the possibility ... of bringing about a decision under domestic law, officially approved by the Supreme Court, that allows the efforts that... are being made to expedite ... these cases, to be brought to a successful conclusion."[11]

The IACtHR, in turn, accepted the invitation extended by the state and declared the incompatibility of all amnesty provisions with the ACHR. In doing so, it made clear that the prohibition of amnesty laws flows directly from the state's obligation to investigate, prosecute and punish and the victim's right to access to justice. In the words of the Court:

> "This Court considers that *all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible*, because they are intended to prevent the investigation and punishment of those responsible *for serious human rights violations* such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.
>
> The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention;

11 IACtHR *Barrios Altos v. Peru (Merits)*, 14 March 2001, para. 35.

> they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention."[12] [Emphasis added]

Notwithstanding the very particular circumstances of the case, these paragraphs from the *Barrios Altos* judgment have since become part of the IACtHR's *jurisprudence constante*. On the basis of its own precedent, the Court has, in a series of important judgments,[13] declared invalid the amnesty laws adopted by several other Latin American states. Moreover, the IACtHR has reiterated its prohibition of amnesty provisions in many other judgments, without declaring the invalidity of any particular legislative provisions.[14]

Over the course of the IACtHR's case law, this doctrine has remained essentially unchanged. The Court has, however, provided some clarifications regarding important questions left open, to some extent, by *Barrios Altos* concerning the precise scope and legal effects of the prohibition on amnesty provisions. With regard to the latter question, the *Barrios Altos* judgment only stipulated that:

> "[o]wing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws *lack legal effect and may not continue to obstruct the investigation* of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated." [15][Emphasis added]

These words seem to suggest that the IACtHR's regards its own judgment as a sufficient basis to deprive amnesty provisions of any legal effects in the domestic legal order. Later case law, however, has clarified that the

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12 IACtHR *Barrios Altos v. Peru (Merits)*, 14 March 2001, paras. 41-42. The *Barrios Altos* judgment thus prohibits not only amnesty laws, but also to other "measures designed to eliminate responsibility", including prescription. Those other measures will be discussed separately in sections 2.3 to 2.6 of this chapter.

13 Since the Barrios Altos judgment, the IACtHR has declared the invalidty of amnesty laws adopted by Chile (IAtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006), Brazil (IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010), Uruguay (IACtHR *Gelman v. Uruguay (Merits and Reparations)*, 24 February 2011) and El Salvador (IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012).

14 *See for example* IACtHR *Case of the Moiwana community v. Suriname (preliminary objections, merits, reparatios and costs)*, 15 June 2005 and IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007.

15 IACtHR *Barrios Altos v. Peru (Merits)*, 14 March 2001, para. 44.

prohibition of amnesty requires action on the part of various state organs in order to ensure that such provisions do not continue to serve as an obstacle to justice. Logically, the prohibition of amnesty provisions is primarily addressed to the legislator, since the legislator is responsible for enacting them.[16] As the IACtHR made clear in the case of *Almonacid Arellano et al. v. Chile*, the state violates Articles 1(1) and 2 of the ACHR when its legislative organs enact an amnesty law, or keep in force an existing amnesty law after ratification of the ACHR.[17] Thus, the IACtHR has repeatedly held that, as a general rule, any amnesty laws still in force must be officially annulled by its legislative organs in order for the state to comply with its obligations under Article 1(1) in connection with Article 2 ACHR.[18]

However, the Court also added that, in case the legislative organs fail to comply with the state's obligations under the ACHR, the judiciary should step in and ensure compliance. In the words of the Court:

> "[W]hen the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention."[19]

Moreover, the Court added, the *application* of the amnesty law by the judiciary in an individual case would lead to a violation of the victims' right to access to justice.[20] The judiciary is obliged to uphold the rights protected by the ACHR and refrain from applying the amnesty law in question. This obligation of the judiciary to refrain from applying amnesty laws is part of the judiciary's obligation to perform, *ex oficio*, the control of "conventionality" of domestic laws.

Finally, the Court has made it clear that, when it comes to fulfilling the state's obligations under Articles 1(1) and 2 ACHR, the decisive issue is not the particular procedure followed by the state in clearing the amnesty law, but the end result of ensuring that the amnesty law ceases to have any legal effects at the domestic level. If there is an alternative procedure which does not include the official repeal of the amnesty law, but which may guarantee this end result more fully and adequately, the Court has shown itself willing to accept such an alternative route. Specifically, in a second case concern-

16 By legislator I do not necessarily mean the parliament, but simply the organ(s) authorized to make laws and regulations. In fact, in several cases heard by the IACtHR, the amnesty laws under consideration had been enacted by the executive, often directly by the president, in order to block investigation of the crimes committed under its orders.

17 IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, paras. 115-122.

18 See for example IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 118 and 121 and IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para.172.

19 Idem, para. 123.

20 Idem, paras. 126-127.

ing the Peruvian amnesty laws, that of *La Cantuta v. Peru*, the Court has accepted the complete and unqualified reception by domestic courts of its own judgment in *Barrios Altos* as sufficient to guarantee that the amnesty laws are devoid of any legal effects, even though the legislator has not officially moved to repeal them.[21] In this context, the Court paid particular attention to internal legislation stipulating that the decisions of international courts, whose jurisdiction had been accepted by the state, have direct effects within the Peruvian legal order.[22] Furthermore, the Court noted that an expert-witness had expressed concern that an official repeal of the amnesty laws could have unintended negative effects,[23] making the judicial route to the annulment of the amnesty laws preferable to the legislative route. However, in order for the violation of Articles 1(1) and 2 to cease without an official repeal or annulment of the amnesty provisions by the legislator, it should be clear that the alternative route is sufficiently stable to ensure that the law in question will no longer serve as an obstacle to investigation and prosecution. The IACtHR has held explicitly that the incidental non-application of the amnesty provisions by domestic courts is not sufficient to end the violation of the ACHR.[24]

A second important question left open by *Barrios Altos*, is whether the prohibition of amnesty laws is so general as to apply to *all* amnesties, or whether there are certain limitations to its scope. Here it should be noted that the wording of the *Barrios Altos* judgment indicates one possible limitation, when it states that no amnesty provisions are allowed for *serious* (/grave/ross) human rights violations. This wording has been consistent throughout the Court's case law on the issue,[25] which suggests that states would be allowed to grant amnesty for criminal acts which do not fall in this category of grave violations of human rights.

Moreover, the IACtHR's repeated use of the phrase "self-amnesties" in the *Barrios Altos* judgment has led to some speculation that, perhaps, the prohibition of amnesties relates only to laws through which an authoritarian regime attempts to evade responsibility for its own crimes.[26] Under

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21 IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, paras. 176-189.

22 IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 183.

23 According to a legal expert who had testified before the IACtHR, a repeal of the amnesty laws by the legislator would imply an official recognition of their effectiveness up until that point, whereas the repeal itself would have no retroactive effects. In contrast, the domestic courts, including the Constitutional Court, had declared the nullity of the amnesty laws ab initio, in conformity with the terms of the IACtHR's judgment in *Barrios Altos*. *See* IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 177.

24 IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 121.

25 *See supra* Chapter 2, Section 4.

26 *See for example* J. Dondé Matute, 'El concepto de impunidad: leyes de amnistía y otras formas estudiadas por la Corte Interamericana de Derechos Humanos' in: k. Ambos and G. Elsner (eds.), *Sistema Interamericano de Derechos Humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 277-285.

this logic, the process through which an amnesty law is adopted may be relevant in assessing its legality. It was thought that, while the Court had declared self-amnesties to be manifestly illegal under the ACHR, perhaps it would be more flexible with regard to amnesties which have a greater political or democratic legitimacy.

In the decade following the *Barrios Altos* judgment the IACtHR has dispelled any such notion. It first attempted to resolve the uncertainty created by its prior use of the phrase "self-amnesty" in its second judgment relating to the question of amnesty laws, that of *Almonacid Arellano v. Chile*. Even though the Chilean amnesty law is famously an example of a self-amnesty, adopted by the Pinochet regime to excuse its own crimes, the Court made it clear that this was irrelevant to the question of its legality under the ACHR. In the words of the Court:

> "[E]ven though the Court notes that Decree Law No. 2.191 basically grants a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes, it points out that a State violates the American Convention when issuing provisions which do not conform to the obligations contemplated in said Convention. The fact that such provisions have been adopted pursuant to the domestic legislation or against it, "is irrelevant for this purpose." To conclude, the Court, rather than the process of adoption and the authority issuing Decree Law No. 2.191, addresses the *ratio legis*: granting an amnesty for the serious criminal acts contrary to international law that were committed by the military regime."[27]

Thus, it is not the origin, but the content of the amnesty law in question which determines its illegality in the eyes of the IACtHR. Any legal provision which grants amnesty for serious violations of human rights is illegal under the ACHR, irrespective of the process through which it was adopted. This has been the consistent case law of the IACtHR ever since the judgment in the case of *Almonacid Arellano*.

In the case of *Gomes Lund et al. ("guerrilha do Araguaia") v. Brazil*, for example, the state argued that the "bilateralness" and "reciprocity" of the Brazilian amnesty laws distinguished them from those previously considered by the IACtHR, given that they applied to crimes committed by both sides of the "political-ideological spectrum". According to the state, the Brazilian amnesty laws, as opposed to the Peruvian and Chilean amnesty laws, should be appreciated as part of a "broad and gradual process of political change and re-democratization of the country".[28] The IACtHR, however,

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27 IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 120.

28 IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 133. *See also* F. Fernandes Carvalho Veçoso, 'Whose exceptionalism? Debating the Inter-American view on amnesty and the Brazilian case', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016).

did not agree. Relying on its reasoning from the Almonacid Arellano case it rejected the state's argument, clarifying that:

> "The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention."[29]

Similarly, in the case of *Gelman v. Uruguay* the IACtHR reaffirmed this reasoning in the face of the argument, brought forward by the state, that its amnesty law had been approved by the Uruguayan electorate through a referendum. Taking its reasoning from *Almonacid Arellano* and *Gomes Lund* to its logical extreme, the IACtHR held that even a direct democratic mandate could not relieve an amnesty law covering serious human rights violations of its inherent illegality under the ACHR. According to the Court:

> "The fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. [...]
>
> The bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law, including International Law of Human Rights [...].The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of [a] true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the majority [...]."[30]

Finally, through its most recent judgment concerning the prohibition of amnesty provisions the IACtHR has clarified its position in the international debate concerning the legality of such provisions in one very particular context, namely that of the search for a negotiated end to an internal armed conflict. This judgment, in the case of *the Massacres of El Mozote and Nearby Places v. El Salvador*, seems at first sight to indicate the Court's willingness to relax its prohibition on amnesty provisions somewhat for that particular context. In *El Mozote*, the Court discussed the Law of General Amnesty for the Consolidation of Peace, adopted by El Salvador following a peace process in which both parties to the Salvadoran civil war negotiated peace under the good offices of the Secretary General of the United Nations.

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29 IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 175.

30 IACtHR *Gelman v. Uruguay (Merits and Reparations)*, 24 February 2011, paras. 238-239.

The Court started its discussion of this law by reaffirming its previous case law, particularly it judgments in the cases of *Gomes Lund et al. v. Brazil* and *Gelman v. Uruguay*,[31] and its position on the inadmissibility of amnesty provisions seeking to impede the investigation, prosecution and punishment of serious violations of human rights. However, it then proceeded to distinguish the present case from those previous cases, stating:

> "However, contrary to the cases examined previously by this Court, the instant case deals with a general amnesty law that relates to acts committed in the context of an internal armed conflict. Therefore, the Court finds it pertinent, when analyzing the compatibility of the Law of General Amnesty for the Consolidation of Peace with the international obligations arising from the American Convention and its application to the case of the Massacres of El Mozote and Nearby Places, to do so also in light of the provisions of Protocol II Additional to the 1949 Geneva Conventions, as well as of the specific terms in which it was agreed to end hostilities, which put an end to the conflict in El Salvador[...]."[32]

In other words, given the context of the adoption of the amnesty law in question, the Court needs to take into account not only the ACHR, but also provisions of international humanitarian law in the determination of its legality under international law. In doing so, it recognizes that international humanitarian law obliges States to "grant the broadest possible amnesty to persons who have participated in the armed conflict".[33] Having said that, however, the Court notes that:

> "this norm is not absolute, because, under international humanitarian law, States also have an obligation to investigate and prosecute war crimes. Consequently, "persons suspected or accused of having committed war crimes, or who have been convicted of this" cannot be covered by an amnesty. Consequently, it may be understood that article 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity."[34]

Thus, while the IACtHR recognizes states' right, and even obligation, to adopt amnesty provisions in the context of a negotiated end to an internal armed conflict, such provisions cannot apply to international crimes. Furthermore, the Court also noted that, rather than being a necessary

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31 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 283.

32 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 284.

33 Idem, para. 285.

34 Idem, para. 286.

component of a negotiated peace, the Law of General Amnesty for the Consolidation of Peace was adopted after the negotiations had been concluded and contradicted the Peace Accords as negotiated under the good offices of the United Nations.[35] Consequently, the IACtHR found that the adoption of the amnesty law, the general situation of impunity resulting from it and the application of the law in the case at hand violate Articles 1(1), 2, 8(1) and 25(1) the ACHR.[36]

Various commentators have suggested that the *El Mozote* judgment represents an important change in the IACtHR's position on the legality of amnesty provisions in the context of transitions from war to peace.[37] However, this change essentially comes down to one thing: whereas, the IACtHR's case law generally prohibits amnesty provisions for any grave violation of human rights, in the context of a negotiated peace it 'only' prohibits amnesty provisions for international crimes. However, as discussed previously in Chapter 2 of this study, these two categories show substantial overlap, making that modification of the IACtHR's jurisprudence mostly irrelevant in practice.

In fact, the true 'innovations' of *El Mozote* are not found in the judgment itself, but in a separate opinion to that judgment drafted by judge Diego Garcia Sayán and signed by a majority of the bench. The remarks made in that separate opinion do not, strictly speaking, concern amnesty provisions at all. Rather, they concern the possibility of granting 'alternative punishment' for serious human rights violations if this is necessary in order to negotiate an end to an internal armed conflict. As such, these remarks relate to the state's obligation to punish those found responsible for human rights violations appropriately and will, therefore, be discussed below in section 4.3 of this chapter.

In conclusion, The IACtHR has determined that the obligation to investigate, prosecute and punish human rights violations and to remove all legal obstacles to such investigation and prosecution entail a prohibition of amnesty provisions. The legislative organs of the state must refrain from adopting such provisions and eliminate from the internal legislation any amnesty provisions which may already be in force. In case the legislative organs fail to do so, the judicial organs must step in and prevent such provisions from having any legal effect by refraining from applying them to individual cases. This prohibition relates to all provisions granting amnesty for grave violations of human rights, independent of the process

35 Idem, paras. 287-292.

36 Idem, paras. 295-296.

37 *See for example* J.I. Acosta-López, 'The Inter-American human rights system and the Colombian peace: redefining the fight against impunity', (2016) 110 *AJIL Unbound* 178-182, p. 180 and H. Alviar García and K. Engle, 'The distributive politics of impunity and anti-impunity: lessons from four decades of Colombian peace negotiations', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 236-237.

through which these provisions were adopted. Where amnesty provisions are adopted as part of a negotiated transition from war to peace, such provisions cannot prevent the investigation, prosecution and punishment of international crimes.

2.3 The non-applicability of provisions on prescription

While the *Barrios Altos* judgment has become famous for declaring the inadmissibility of amnesty provisions under the ACHR, its considerations are not limited to those provisions. Rather, the *Barrios Altos* judgment declares inadmissible "all amnesty provisions, provisions on *prescription* and the establishment of measures designed to eliminate responsibility" for serious human rights violations.[38] In later case law, the IACtHR has discussed the inadmissibility of provisions on prescription in some detail.

Unlike amnesty provisions, provisions on prescription are a normal part of criminal law and procedure in most states.[39] It should be noted that the IACtHR does not consider the existence of provisions on prescription *as such* to be a violation of the ACHR. Whereas a state can violate the ACHR by simply having an amnesty law in force within its domestic legal system, the same is not true for provisions on prescription. Rather, it is the application of those provisions as an obstacle to the investigation of a particular category of cases, namely cases involving grave or serious violations of human rights, which leads to a violation of the state's obligation to investigate and prosecute under the ACHR.

This was recognized by the IACtHR in its judgment in the case of *Albán Cornejo et al. v. Ecuador*, which concerned the death of Laura Susana Albán Cornejo as a result of medical malpractice in a private hospital in Quito, Ecuador. After her death, the authorities had initially declined to open a criminal investigation into the case and when it did, the proceedings moved slowly. As a result, the case against one of the doctors involved in the case had been dismissed because the statute of limitations had run out. In the proceedings before the IACtHR, the Court thus had to consider the legality of that dismissal of the criminal case on the basis of its prescription under domestic law. In this context, the Court found:

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38 IACtHR *Barrios Altos v. Peru (Merits)*, 14 March 2001, para. 41.

39 Pablo Parenti notes that, whereas the Barrios Altos judgment left some space for the argument that the prohibition only applied to statutes of limitations adopted specifically to prevent the investigation and prosecution of grave violations of human rights, this argument has been dispelled in later case law. According to Parenti, the Court's judgment in the case of *Trujillo Oroza v. Bolivia* established that the prohibition extends to the application of 'normal' statutes of limitations, of general application. *See* P.F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), p. 215.

> "In criminal cases, the statute of limitations causes the lapse of time to terminate the right to bring action for punishment and, as a general rule, it sets a restriction on the punishing authority of the State to prosecute and punish defendants for unlawful conduct. This is a guarantee that needs to be duly observed by the judge for the benefit of any defendant charged with an offense. This notwithstanding, the statute of limitations is inadmissible in connection with and inapplicable to a criminal action where gross human rights violations in the terms of International Law are involved. So has been held in the Court's constant and consistent decisions. In the instant case, the application of the statute of limitations cannot be excluded as the requirements therefor set in international instruments are not met."[40]

In short, this quote shows the IACtHR's recognition that, under normal circumstances, provisions on prescription form a guarantee of the rights of the defendant which should be "duly observed" by the judge hearing a criminal case. The Court further recognizes that, in such cases, the lack of due diligence on the part of the judicial authorities is not the responsibility of the accused and, therefore, cannot be "imposed over" them.[41] However, in the particular situation of criminal proceedings concerning serious human rights violations, an exception to this general rule should be accepted. As the Court later clarified, in its judgment in the case of *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, the inapplicability of provisions on prescription is necessary in cases of serious human rights violations "so as to maintain the State's punitive power in effect for actions which, because of their seriousness, must be stopped and also to avoid their repetition."[42] In other words, in cases of serious human rights violations the need to suppress such violations through their effective investigation and prosecution is so urgent that it must take priority over the rights of the defendant protected by provisions on prescription and over society's interest in certainty and finality in relation to criminal cases.

Finally, the IACtHR has noted that, in cases in which the serious violations of human rights in question can also be classified as crimes against humanity, there is a further basis for the inapplicability of statutes of limitations in general international law. In its judgment in the case of *Almonacid Arellano et al. v. Chile*, the Court held that:

> "as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable. As explained in paragraphs 105 and 106 of this Judgment, crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole.

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40 IACtHR *Albán Cornejo et al v. Ecuador (Merits, Reparations and Costs)*, 22 November 2007, para. 111.

41 Idem, para. 112.

42 IACtHR *Ibsen Cárdenas and Ibsen Peña v. Bolivia (Merits, Reparations and Costs)*, 1 September 2010, para. 207. *See also* IACtHR *Suárez Peralta v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 21 May 2013, para. 175.

> The damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished. In this sense, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity clearly states that "no statutory limitation shall apply to [said internationally wrongful acts], irrespective of the date of their commission."
>
> […] Even though the Chilean State has not ratified said Convention, the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (ius cogens), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule."[43]

Thus, the IACtHR based its interpretation that the state's duty to prosecute entails the non-applicability of provisions on prescription for cases of grave violations of human rights partly on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which it understands to contain norms of general international law.[44]

In conclusion, the IACtHR declared that, under the provisions of the ACHR and the rules developed in its own case law concerning the obligation to investigate and prosecute (grave) violations of human rights, and in light of other norms of general international law, provisions on prescription are not applicable in cases concerning serious violations of human rights. Whereas the mere existence of provisions on prescription does not put the state in violation of the ACHR, their application as a legal obstacle to the investigation and prosecution of serious human rights violations does.

2.4 Limitations to the principle of *ne bis in idem* and the concept of 'fraudulent *res judicata*'

Like prescription, the principle of *ne bis in idem*, which holds that an individual cannot be tried twice for the same offense, is a normal part of most criminal law systems. In fact, it is recognized as one of the most important fair trial rights protecting the accused in criminal proceedings. As such, it is protected by Article 8(4) ACHR.[45] However, notwithstanding its central importance, the IACtHR has determined that the principle of *ne bis in idem* is not "an absolute right" of the defendant.[46] It can, under certain

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43 IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, paras. 152-153.

44 *See* P.F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), p. 222.

45 The IACtHR itself ha also emphasized the importance of the principle of ne bis in idem in its case law. *See for example* IACtHR *Loayza Tamayo v. Peru (merits)*, 17 September 1997, paras. 66-77.

46 *See for example* IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 154.

circumstances, be limited in order to avoid its functioning as an obstacle to the investigation and prosecution of grave human rights violations. In its judgment in the case of *Almonacid Arellano v. Chile*, the Court indicates two situations in which this can occur: 1.) in cases in which the previous acquittal can be qualified as 'fraudulent' *res judicata*; and 2.) when new evidence is found which makes it possible to determine who is responsible for grave human rights violations.[47]

In relation to the second of these two situations, the *Almonacid Arellano* judgment clarified that:

> "the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle."[48]

Here, the gravity of the human rights violations in question and the weight of the victim's interest in seeing justice done, form the basis on which the limitation of Article 8(4) ACHR and the *ne bis in idem* principle rest. The IACtHR thus weighed the interest of justice and, especially, the rights of victims against those of the accused and decides in favor of the former. This reasoning has led to severe criticism from certain criminal law scholars, who worry that it could have serious detrimental effects for the protection of the rights of the accused in Latin America.[49] It should, however, be noted that the discovery of new evidence was not, in fact, the ground on which the Court ordered the state to reopen the domestic investigations in the

47 Idem. A precedent for both these limitations of the *ne bis in idem* principle can be found in Article 4(2) of Protocol 7 to the ECHR which provides that it "shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case." *See also* R. Roth, 'Principle 26: Restrictions on extradition / non bis in idem, in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 287-288.

48 IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 154.

49 *See for example* M. Zili, F. Girão Monteconrado and M.T. Rocha de Assis Moura, 'Ne bis in idem e coisa julgada fraudulenta – a posição da Corte Interamericana de Direitos Humanos', in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II* (Konrad Adenauer Stiftung, 2011), pp. 406-409 and D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II* (Konrad Adenauer Stiftung, 2011), p. 499.

Almonacid Arellano case.[50] Since then, the IACtHR has rarely revisited the discovery of new evidence as a ground for setting aside the principle of *ne bis in idem* in cases of grave human rights violations. And even when it does, the Court has never actually relied solely on the discovery of new evidence to set aside the *ne bis in idem* principle in cases of grave human rights violations.[51] This *obiter dictum* therefore remains an outlier in the IACtHR's case law.

The question of fraudulent *res judicata*, on the other hand, has been a far more frequent topic in the IACtHR's jurisprudence. The first mention of this concept is found in the Court's judgment in the case of *Carpio Nicolle et al. v. Guatemala*, which concerned the extrajudicial execution of a prominent opposition politician towards the end of Guatemala's 36-year civil war. The domestic proceedings into the case were characterized by undue interferences by state agencies and clandestine networks and had resulted in the acquittal of various accused. In the proceedings before the IACtHR, the Commission and the victims had requested the Court to order the state to reopen the investigations into these accused, thereby overriding the previous acquittals. In this context, the IACtHR held that:

> "[t]he development of international legislation and case law has led to the examination of the so-called "fraudulent res judicata" resulting from a trial in which the rules of due process have not been respected, or when judges have not acted with independence and impartiality.
>
> […] It has been fully demonstrated […] that the trial before the domestic courts in this case was contaminated by such defects. Therefore, the State cannot invoke the judgment delivered in proceedings that did not comply with the standards of the American Convention, in order to exempt it from its obligation to investigate and punish."[52] [footnotes omitted]

Footnote 137 in the original text, omitted in the quote above, clarified that the "international legislation and case law" mentioned here refers specifically the Rome Statute (Article 20) and the statutes of the ICTY (Article 10) and the ICTR (Article 9), all of which provide for similar limitations to the principle of *ne bis in idem*. As noted by Javier Dondé Matute, the concept of fraudulent *res judicata* is thus an instance of judicial cross-fertilization, originating in the field of international criminal law and then 'imported' by the

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50 Rather, the IACtHR ordered the State to set aside those domestic judgments because it considered that the military courts who rendered them had not been impartial and because the military courts applied the domestic amnesty law, thereby shielding the accused from prosecution. *See* IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 155.

51 *See for example* IACtHR *The la Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 197.

52 IACtHR *Carpio Nicolle et al. v. Guatemala (Merits, Reparations and Costs)*, 22 November 2004, paras. 131-132.

IACtHR into (inter-American) human rights law.[53] This is underlined by the language used by the IACtHR in later cases reaffirming the findings from *Carpio Nicole*, which closely resembles the language used in Article 20(3) of the Rome Statute. For example, in its judgment in the case of *Almonacid Arellano et al. v. Chile* the Court held that:

> "With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to *shield the accused party from criminal responsibility*; ii) the proceedings were *not conducted independently or impartially* in accordance with due procedural guarantees, or iii) there was *no real intent to bring those responsible to justice*. A judgment rendered in the foregoing circumstances produces an "apparent" or "fraudulent" *res judicata* case."[54] [emphasis added]

As this quote and the reference to Article 20(3) of the Rome Statute make clear, the rationale for relying on 'fraudulent *res judicata*' in order to set aside a final judgments delivered by a domestic court is not, in fact, based on the seriousness of the underlying human rights violations or the weight of the rights of the victims. Rather, it finds its basis in the defects of the domestic proceedings of which that judgment is a result. This point was emphasized by Judge García-Ramírez in his separate opinions to two early judgments touching on the concept of 'fraudulent *res judicata*'. In his separate opinion in the case of *Gutiérrez Soler v. Colombia*, García Ramírez explained that this concept:

> "stresses the "sham" that is rooted in some judgments, as a result of the machinations —whether their outcome be an acquittal or a conviction— of the authorities who investigate the facts, bring charges, and render judgment. The process has been "like" a process, and the judgment serves a specific design rather than the interests of justice. […]"[55]

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53 J. Dondé Matute, 'El concepto de impunidad: leyes de amnistía y otras formas estudiadas por la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), p. 289. *But see* R. Roth, 'Principle 26: Restrictions on extradition / non bis in idem, in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 287-288, noting the similarities between the IACtHR's considerations in Almonacid Arellano and the text of article 4(2) of Protocol 7 to the ECHR.

54 IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 154. *See also* IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 153.

55 IACtHR *Gutiérrez Soler v. Colombia*, 12 September 2005, separate opinion of Judge García Ramírez, para. 17.

According to Judge García Ramírez, judgments can and should be set aside when the proceedings underlying them show defects of such gravity that it can be assumed that all or some of the authorities involved in them had interests other than justice at heart. He goes on to explain that this does not, in fact, undermine the *ne bis in idem* principle, as this principle is "only justified by the authority which it derives from a regular procedure and from the legitimacy of the acts performed by the judge".[56] Thus, where domestic proceedings do not respect certain minimum standards of due process, their results cannot be regarded as constituting final judgments. García Ramírez further explained his position on this matter in his separate opinion in the case of *La Cantuta v. Peru*, where he said:

> "Does [the concept of 'fraudulent *res judicata*', HB] entail the decline of *res judicata* […] and the elimination of the *ne bis in idem* principle, creating a general risk to legal certainty? The answer to this question, which *prima facie* seems to be in the affirmative, is not necessarily so. And it is not so because the ideas expressed above do not question the validity of *res judicata* or the prohibition against double jeopardy, provided that both find support in the applicable legal provisions and do not involve fraud or abuse but entail a guarantee for a legitimate interest and the protection of a well-established right. Therefore, there is no attack on the "sanctity" of *res judicata* or the finality of the first trial […], but against the lack of a legitimate ruling —i.e. one legitimized through due process— carrying the effects of a final judgment and suitable to serve as basis for *ne bis in idem*."

In this view, relying on the notion of 'fraudulent *res judicata*' in order to set aside final judgments delivered by domestic courts does not affect the principle of *ne bis in idem* as enshrined in Article 8(4) ACHR. However, in order to declare that a domestic judgment represents fraudulent *res judicata*, the defects in the judgment or the proceedings underlying it will have to be so severe as to demonstrate the lack of a true intent on the part of the domestic authorities to bring the accused to justice. This means that the fraudulent nature of the domestic judgment will have to be established on a case-by-case basis, by looking at the procedural history of each case and the specific behavior of the authorities involved in that particular case.

This point is illustrated by a pair of recent cases. The first, the case of *Valencia Hinojosa et al. v. Ecuador* concerned domestic investigations conducted within a special jurisdiction existing in Ecuador at the relevant

56 Idem, para. 20.

time, to deal with all criminal cases involving police officers.[57] The Court concluded that, due to problems in the normative framework regulating this special jurisdiction, the system as such did not provide sufficient guarantees of impartiality and independence, which constituted a violation of Articles 8(1) and 25(1) ACHR.[58] However, apart from these systemic problems, the Court did not find any evidence of partiality or attempts to obstruct justice in the investigations into the particular case at hand. Under these circumstances, the Court showed itself unwilling to order the state to reopen domestic investigations which had been concluded in 1997 with the definitive dismissal of the proceedings. In this context, the Court remarked that:

> "In the present case, the Judge of the Second District of the National Police ordered the definitive dismissal of the criminal proceedings in favor of the accused [...] According to domestic legislation, the dismissal terminates the proceedings and those who benefit from it cannot be prosecuted again for the same facts, in conformity with the traditional principle of *ne bis in idem* [...]
>
> It is obviously unacceptable to fall in the contradiction of invoking human rights in order to violate them with regard to those who, decades before, [benefitted from] a dismissal by a final decision."[59] [translation by the author, emphasis added]

The Court ultimately managed to avoid the question whether the dismissal itself had been fraudulent, reasoning that, even if it did reopen the case, it would immediately be closed again due to the fact that the case had prescribed.[60] However, the wording in the quote above suggests that the Court did not consider the dismissal to have been fraudulent.

This impression has been confirmed in the IACtHR's subsequent judgment in the case of *Acosta et al. v. Nicaragua*. In the domestic investigations analyzed by the Court in this case, a judge had ordered the definitive dismissal of the investigations against a number of individuals, suspected of being the intellectual authors of the murder under investigation. He did so

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57 For a description of this special jurisdiction, called the Jurisdicción Penal Policial, *see* IACtHR *Valencia Hinojosa et al. v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 29 November 2016, paras. 60-65. The investigations in question concerned the death of Luis Jorge Valencia Hinojosa, himself a police officers, and the involvement therein of a nuber of police officers. Mr. Valencia Hinojosa had shot and wounded two police officers inside a police station, after which he fled the station and attempted to hide from the police. However, police officers found him dead in his hiding place in the janitor's rooms of a sports complex. The question investigated by the domestic authorities, is whether mr. Valenia Hinojosa had shot himself after becoming trapped in his hididng place by the police officers under investigation, as they claimed, or whether the police officers had broken into the hding place and executed him, as claimed by his family members.

58 Idem, paras. 82-122.

59 Idem, paras. 154-155.

60 Idem, paras. 155-156.

mere weeks after the murder had been committed, before the involvement of these individuals had been properly investigated and against the express wishes of the prosecutors investigating the case.[61] Here, the Court did find that the definitive dismissal of the investigations against these individuals had been fraudulent. In drawing this conclusion, the Court explicitly compared this case with the *Valencia Hinojosa* case, saying:

> "The Court has established that the dismissal ordered [in the domestic proceedings, HB] was unlawful, as it aimed to achieve impunity with regard to certain persons. In contrast to what has been decided by the Court in the case of *Valencia Hinojosa v. Ecuador*, this case does not concern a procedural or formal defect, and even less a mere procedural negligence, which, as grave as it may be, does not authorize the setting aside of the protective principle of *res judicata*. In this case, the Court finds an unlawful act, deliberately directed to provoke the appearance of the extinction of the criminal proceedings, meaning that, in conclusion, it concerns the mere appearance of *res judicata*."[62] [translation by the author, emphasis added]

Thus, the difference between these two cases lies in the nature of the procedural defects found by the Court. The defects in the case of *Valencia Hinojosa et al. v. Ecuador* were general in nature, as a result of which the system within which the domestic proceedings were conducted did not live up to the standards established by the ACHR.[63] However, these defects did not show a lack of intent by the specific authorities involved in the proceedings to provide justice in the particular case at hand. In the case of *Acosta et al. v. Nicaragua*, on the other hand, the procedural defects were indicative of a particular will on the part of the judge to shield the accused from criminal responsibility. This is what makes it fraudulent in the eyes of the IACtHR.

In short, the IACtHR has determined that the principle of *ne bis in idem*, enshrined in Article 8(4) ACHR, is not absolute when it comes to the investigation of human rights violations by domestic judicial authorities. Firstly, the Court's case law suggests (but does not elaborate) that this principle can be set aside when new evidence surfaces which reveals the identity of those responsible for the commission of *grave* human rights violations and crimes against humanity, even if the investigations had already been concluded through their definitive dismissal or even an acquittal. Secondly, a previous acquittal or definitive dismissal cannot be an obstacle to the investigation and prosecution of human rights violations if such a decision can be understood as a case of 'fraudulent *res judicata*'. This is the case where

61 IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, paras. 159-160.

62 Idem, para. 216.

63 IACtHR *Valencia Hinojosa et al. v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 29 November 2016, paras. 77-120

the previous judgment is the result of proceedings which were seriously flawed, and where the flaws in that particular case reveal the lack of a true will to investigate and prosecute the accused.

2.5 Codification of enforced disappearance as an autonomous crime

The Court has determined that, in order to promote the effective investigation and prosecution of serious human rights violations, states are obliged to 1.) criminalize certain types of conduct as autonomous offenses, separate from other types of criminal conduct; and 2.) ensure that the definition of such conduct under domestic law is line with their definition under international law, particularly with the Court's own case law and the Inter-American conventions relevant to the conduct in question. This obligation has been developed by the Court with a particular emphasis on the crime of enforced disappearance.[64]

In its earliest judgments on the issue, the IACtHR did not yet consider it an obligation on states to criminalize this behavior separately. Rather, it was content to allow states to prosecute enforced disappearance under other legal definitions. The issue was discussed by the Court in the reparations judgment in the case of *Caballero Delgado and Santana v. Colombia* in 1997. In this context, the Commission requested the Court to order the state to codify the crime of enforced disappearance as part of the non-pecuniary reparations for the disappearance of the two material victims at the hands of the Colombian military. The Court, however, refused to do so, saying:

> "The Court considers the codification of the crime of forced disappearance of persons into law in the terms of the 1994 Inter-American Convention to be desirable, but is of the opinion that its non-codification does not prevent the Colombian authorities from pursuing its efforts to investigate and punish the crimes committed to the detriment of the persons referred to in the instant case."[65]

Thus, in the late 1990s the Court still considered the codification of enforced disappearance as a separate crime to be a welcome and valuable step in its effective investigation and prosecution,[66] but not a necessary one, much less an obligation. Since then, however, Court has abandoned this position and

64 *See generally* J.L. Modolell González, 'El crimen de desaparición forzada de personas según la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 193-209.

65 IACtHR *Caballero Delgado and Santana v. Colombia (Reparations and Costs)*, 29 January 1997, para. 56.

66 *See also* IACtHR *Castillo Paéz v. Peru (Reparations and Costs)*, 27 November 1998, para. 108, saying: "Furthermore, the Court is of the opinion that, in principle, the Peruvian legislation typifying the crime of forced disappearance to be laudable".

by now the obligation to codify enforced disappearance as a separate crime has become part of its *jurisprudence constante*. It first found to this effect in its judgment on reparations in the case of *Trujillo Oroza v. Bolivia*,[67] after the Commission had again requested the Court to order the state to reform its criminal code to this effect. This time the Court agreed with the Commission, saying:

> "The Court notes that Bolivia ratified the Inter-American Convention on the Forced Disappearance of Persons […]
>
> Since it has not defined the forced disappearance of persons as an offense in its domestic legislation, Bolivia has not only failed to comply with the above-mentioned instrument, but also with Article 2 of the American Convention. […]
>
> It is also important to place on record that the failure to define the forced disappearance of persons as an offense has prevented the criminal prosecution in Bolivia to investigate and punish the crimes committed against José Carlos Trujillo Oroza from being carried out effectively, and allowed impunity to continue in this case."[68]

In accordance with this quote, the obligation to codify enforced disappearance as a separate crime under domestic criminal law is based on: 1.) The

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67 It should be noted that this judgment was delivered in 2002, under the presidency of Judge Cançado Trindade. In 1997, Cançado Trindade had written a separate opinion to the reparations judgment in the case of *Caballero Delgado and Santana v. Colombia*, in which he had criticized the majority's position on the codification of the crime of enforced disappearance. Contrary to the majority, Cançado Trindade was of the opinion that the Court's finding of non-compliance with Article 1(1) ACHR in the judgment on the merits was "per se sufficient to determine to the State Party that it ought to take measures, including of legislative character, to guarantee to all persons under its jurisdiction the full exercise of all the rightsprotected by the American Convention." He also pointed out that, without domestic implementation measures, human rights norms loose their practical relevance, saying: "international and domestic law are in constant interaction; national measures of implementation, particularly those of legislative character, assume capital importance for the future of the interational protection of human rights itself." IACtHR *Caballero Delgado and Santana v. Colombia (Reparations and Costs)*, 29 January 1997, dissenting opinion by Judge Cançado Trindade, paras. 19-20.

68 IACtHR *Trujillo Oroza v. Bolivia (Reparations and Costs)*, 27 February 2002, paras. 95-97. Moreover, the Court was not satisfied, in terms of reparation, by the fact that a draft law for the codification of the crime of enforced disappearance was already being discussed by the Bolivian parliament. Rather, the Court ordered the State to complete the legislative process within a reasonable time and declared that the reparation – and, by extension, the Court's supervision of compliance proceedings – would remain open until such time. Idem, para. 98.

Inter-American Convention on the Forced Disappearance of Persons;[69] 2.) Article 2 ACHR concerning states' obligation to adjust its legislative framework to the protection of the rights enshrined in the ACHR; and 3.) Article 1(1), 8(1) and 25(1) ACHR, since the lack of its codification hinders the effective investigation and prosecution of enforced disappearance at the national level.

This position has been reaffirmed in later case law.[70] An interesting illustration of this later case law is the Court's judgment in the case of *Heliodoro Portugal v. Panama*, in which the it provided specific and detailed

69 The Court's later case law seems to suggest, however, that the Inter-American Convention on the Forced Disappearance of Persons is not a necessary basis for this obligation. That is to say: when a state has ratified this convention, its provisions oblige that state to codify the crime of enforced disappearance in its domestic criminal law. However, when a state has not ratified that convention, it is *still* obligated to do so under the provisions of the ACHR and the Court's own case law. *See* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 174, stating "that El Salvador should classify this crime appropriately and adopt the necessary measures to ratify the Inter-American Convention on the Forced Disappearance of Persons" and IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 287, stating "In accordance with the foregoing, the Court urges the State to continue with the legislative processing and to adopt, in a reasonable period of time, all the measures necessary to ratify the Inter-American Convention on the Prevention and Punishment of Forced Disappearance of Persons. On the other hand, pursuant to the obligation enshrined in Article 2 of the American Convention, Brazil must adopt the necessary measures to codify the crime of enforced disappearance of persons in conformity with the Inter-American standards." Both quotes suggest that the obligation to codify the crime of enforced disappearance does not depend on the *prior* ratification of the Inter-American Convention on the Forced Disappearance of Persons.
On the other hand, the Court held in the case of *Heliodoro Portugal v. Panama*, that "the specific obligation to define the offense of forced disappearance of persons arose for the State on March 28, 1996, when the Inter-American Convention on Forced Disappearances of Persons entered into force in Panama. Accordingly, it is as of this date that the Court can declare the failure to comply with that specific obligation within a reasonable time." IACtHR *Heliodoro Portugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 185. In stating that the obligation to codify the crime of enforced disappearance only arose for the State when it ratified the Convention, the Court seems to suggest that that obligation is based solely on the convention. It should be noted, however, that in practice this question is mostly immaterial, since practically all states under the Court's jurisdiction have now ratified the Inter-American Conventionon the Forced Disappearance of Persons, and certainly all states which have known widespread practices of enforced disappearance.

70 *See for example* IACtHR *Gómez Palomino v. Peru (merits, reparations and costs)*, 22 November 2005, paras. 90-110.

instructions as to the content of that definition under domestic law.[71] While discussing the obligation to codify the crime of enforced disappearance as part of the broader obligation to investigate, prosecute and punish human rights violations effectively, the Court stated that:

> "Regarding the forced disappearance of persons, the definition of this *autonomous offense* and the *specific description* of the punishable conducts that constitute the offense are essential for its effective eradication. Considering the particularly grave nature of forced disappearance of persons, the protection offered by criminal laws on offenses such as abduction or kidnapping, torture and homicide is insufficient. Forced disappearance of persons is a different offense, distinguished by the multiple and continuing violation of various rights protected by the Convention […]
>
> […]
>
> In this regard, international law establishes a *minimum standard for the correct definition* of this type of conduct and the essential elements that must be included, in the understanding that criminal prosecution is a fundamental means of preventing future human rights violations. To define this offense, the Panamanian State must take into consideration Article II (supra para. 106) of the said Convention, which sets out the elements that the definition of this criminal offense in domestic law must contain."[72] [Emphasis added]

Thus, the Court required that the definition of this crime under domestic law conformed to its definition as developed in its own case law and recognized in Article II of the Inter-American Convention on the Forced Disappearance of Persons. Further on the same judgment, the Court proceeded to

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71 In the case of the *Serrano Cruz sisters v. El Salvador* the Court had already indicated that states must observe certain minimum standards when codifying the crime of enforced disappearance. However, it did not specify exactly what these standards entail. *See* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 174, stating that: "As of 1999, [enforced disappearance, HB] was incorporated into the Salvadoran Penal Code as the crime of "forced disappearance of persons." However, the Court observes that this classification was not adapted to international standards on forced disappearance of persons as regards the description of the elements of the criminal classification and the penalty corresponding to the gravity of the crime. The Court considers that El Salvador should classify this crime appropriately and adopt the necessary measures to ratify the Inter-American Convention on the Forced Disappearance of Persons.

72 IACtHR *Heliodoro Portugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, paras. 181, 183, 189. The Court noted that, in the case at hand, the fact that the enforced disappearance of the material victim had been investigated as a murder case had the following concrete effects of the procedings: 1.) the investigations focused only on the aspects of the victim's disappearance which related to the violation of his right to life, leaving aside all other dimensions of and rights affected by his disappearance; 2.) a stay of the investigations was ordered, due to the statute of limitations on the crime of murder, whereas neither the Inter-American Convention on the Forced Disappearance of Persons nor the Court's case law allows for prescription of cases of enforced disappearance. IACtHR *Heliodoro Portugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 182.

analyze in detail *how* the definition of the crime of enforced disappearance failed to conform to its definition as developed within the Inter-American system.[73] From this detailed analysis, it is clear that minimum requirements observed by the IACtHR with regard to the definition of the crime of enforced disappearance under domestic law include:

- Recognition that the deprivation of liberty, which is part of the crime of enforced disappearance, need not be unlawful in itself. Even lawful detention can become enforced disappearance if the other elements of the crime are met.
- Inclusion of the refusal to acknowledge said detention, or provide information about it, as a central element of the crime of enforced disappearance. According to the Court, this element is what sets enforced disappearance apart from other types of criminal conduct, like illegal detention.
- Recognition of the link between the deprivation of liberty and the refusal to provide information.
- Recognition of the continuing or permanent nature of the crime of enforced disappearance.
- Recognition of the non-applicability of statutes of limitations to the crime of enforced disappearance.

Furthermore, the Court determined that the domestic law criminalizing enforced disappearance should provide for a punishment proportionate to the severity of the crime, as will be discussed below in section 4.3.

In short, the case law of the Inter-American Court determines 1.) that states are under a specific obligation to criminalize enforced disappearance as an autonomous crime under their domestic criminal law; and 2.) that the definition of the crime of enforced disappearance under domestic law should respect certain minimum standards. These minimum standards relate to the essential elements of the crime of enforced disappearance, as developed in the case law of the IACtHR itself and codified in Article II of the Inter-American Convention on the Forced Disappearance of Persons.

2.6 The principle of legality and the prosecution of cases of enforced disappearance

Finally, the fact that, in much of Latin America, the systematic practice of enforced disappearance predates the codification of the conduct as an autonomous crime, entails an obvious tension between the classification of conduct under that definition – and its prosecution on that basis – and

73 IACtHR *Heliodoro Portugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, paras. 191-216.

the principle of legality and the non-retroactivity of criminal law.[74] The principle of the non-retroactivity of the criminal law has been codified in Article 9 ACHR, which holds that 1.) No one shall be convicted of that did not constitute a crime under the law applicable at the time it was committed; 2.) a heavier punishment shall not be imposed than the one applicable under the law in force at the time the crime was committed; and 3.) if a law enacted after the crime was committed provides for a lighter penalty, that lighter penalty shall be imposed. At the same time, of course, the IACtHR considers the obligation of the state to investigate, prosecute and punish serious human rights violations to be of central importance. When it comes to the investigation and prosecution of cases of enforced disappearance, these two important norms seem to point in opposite directions, presenting the Court – and the states under its jurisdiction – with a complicated puzzle.

In domestic proceedings concerning cases of domestic proceedings in Latin America, this puzzle has often been solved by classifying the acts under domestic crime definitions, such as murder and kidnapping, which did exist prior to the start of the disappearances in question.[75] The IACtHR has recognized that, if the proceedings started before enforced disappearance had been defined under domestic law as an autonomous crime, such an approach does not violate the state's obligation under the ACHR to investigate, prosecute and punish.[76] However, once the crime of enforced disappearance has been defined under domestic law, domestic proceedings can and should be undertaken on that basis.[77] Here, the Court avoids the possible tension between the principle of legality and the obligation to

74 For discussion of the principle of legality in international (criminal) law, *see* M Shahabuddeen, 'Does the principle of legality stand in the way of progressive development of law?' (2004) 2(4) *Journal of International Criminal Justice* 1007-1017, p. 1008 and D. Jacobs, 'International criminal law', in: J. d'Aspremont and J. Kammerhöfer, *International legal positivism in a post-modern world* (Cambridge University Press, 2014), pp. 452-453. For a more detailed discussion of the principle of legality in the field of criminal law, *see* K.S. Gallant, *The principle of legality in international and comparative criminal law* (Cambridge University Press 2009).

75 *See* N. Roht-Arriaza, 'The Spanish civil war, amnesties and the trials of Judge Garzón', (25 July 2012) 16(24) *ASIL Insights*, available at: <https://www.asil.org/sites/default/files/insight120725.pdf>, last checked: 11-10-2018. *See also* J. Dondé Matute, 'International criminal law before the Supreme Court of Mexico', (2010) 10 (4) *International Criminal Law Review* 571-581, pp. 576-577.

76 *See for example* IACtHR *Ticona Estrada et al. v. Bolivia (merits, reparations and costs)*, 27 November 2008, paras. 103-104 and IACtHR *Case of the Members of the village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala (Preliminary Observations, Merits, Reparations and Costs)*, 30 November 2016, paras. 136 and 248. In order for investigations undertaken on this basis to satisfy the state's obligation to investigate, prosecute and punish, the IACtHR notes that it is essential that the crime definitions applied in the proceedings adequately reflect the gravity of the offense.

77 *See for example* IACtHR *Case of the Members of the village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala (Preliminary Observations, Merits, Reparations and Costs)*, 30 November 2016, para. 136.

investigate and prosecute the crime of enforced disappearance by emphasizing the continuing nature of that crime.

As described above in section 3.1 of Chapter 2, the Court has consistently held that the crime of enforced disappearance is a continuing crime, which starts the moment the material victim is first deprived of his or her liberty and continues to be committed until the moment the victim, or his or her mortal remains, are found and identified and the truth of what happened to them is uncovered. The continuing nature of the crime of enforced disappearance has particular consequences for the operation of the principle of legality in relation to that crime, which were first discussed by the IACtHR in the case of *Tiu Tojín v. Guatemala*. The case concerned the disappearance of an indigenous woman and her one-month-old baby in August 1990. The crime of enforced disappearance, however, had only been criminalized under Guatemalan law in 1996. In this context, the Court considered that:

> "Because this is a continuing crime – that is to say: its commission is prolonged in time – if the author maintains his criminal behavior at the time the definition of the crime of forced disappearance of persons enters into force in the domestic criminal law, the new law is applicable."[78] [translation by the author]

Thus, according to this quote, if an enforced disappearance started before that conduct was criminalized separately under domestic law but continues to be committed after the moment of its criminalization, it should be classified and penalized under the 'new' crime definition. In the Court's view, this does not constitute retroactive application of criminal law and, therefore, does not violate the principle of legality, because the law is applied to facts which continue to occur after the new law came into force. This reasoning has since been reinforced and further clarified by the IACtHR in a string of subsequent cases. The Court has recently summarized its case law on this point in its judgment in the case of *the Members of the village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala*, where it held that:

> "The previous [i.e. the lack of criminalization of enforced disappearance as an autonomous crime under domestic law prior to the moment the commission of the crime was initiated, HB] does not prevent the State from realizing investigations based on the crime of enforced disappearance in those cases in which the whereabouts of the victim had not been determined or his or her remains had not been found before the date on which the classification of that crime entered into force in 1996. In those cases, the criminal conduct continues and, therefore,

78 IACtHR *Tiu Tojín v. Guatemala (Merits, Reparations and Costs)*, 26 November 2008, para. 87. *See also* J.L. Guzmán Dalbora, 'El principio de legalidad penal en la jurisorudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 187-189.

> the definition of the crime is applicable. The Court has already established that the application of the crime of enforced disappearance under the assumptions indicated here does not violate the principle of legality, nor does it imply a retroactive application of the criminal law."[79] [translation by the author]

Through this reasoning, the IACtHR has taken position on a question that has divided legal scholarship: the question which law should be considered to have been 'in force at the time of the commission of the crime' when the crime in question constitutes a continuing crime. As observed by Juan Pablo Gomara and Martín Daniel Lorat, three positions have been defended in relation to this question, being: 1.) the applicable law is the law in force at the moment in which a continuing crime is *initiated*; 2.) the applicable law is the law in force at the moment in which a continuing crime is *concluded*; or 3.) the applicable law is the law *most favorable* to the accused.[80] In *Tiu Tojín* and later cases, the IACtHR seems to adopt the position that, for cases concerning enforced disappearance, the applicable law is that in force at the time the crime is concluded or adjudicated, even if that law is less favorable to the accused.[81]

The IACtHR is not alone in occupying this position, which is also found in several national criminal law systems.[82] It is, however, a controversial position and has been criticized severely by some Latin American legal scholars. José Luís Guzman Dalbora, for example, has described it as "borderline illegal".[83] In Guzman Dalbora's view, the principle of legality

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79 IACtHR *Case of the Members of the village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala (Preliminary Observations, Merits, Reparations and Costs)*, 30 November 2016, para. 248. *See also* IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 178.

80 J.P. Gomara and M.D. Lorat, 'Comentario al fallo "Muiña" de la Corte Suprema de Justicia', (2017) 2(3) *Revista Derechos en Acción* 195-219, pp. 199-201. Gomara and Lorat do not argue in favor of any of these positions, but note that all three are supported by "acceptable arguments" and that reasonable people can disagree on which of the three positions is best.

81 *But see* idem, p. 208. In Gomara and Lorat's analysis, the Court has taken the position that the law applicable in cases of enforced disappearance – which is not only a continuing crime, but also a crime against humanity – is the law which best enables the State to comply with its obligation under the ACHR to guarantee human rights through the investigation and prosecution of their violation.

82 In the Latin American region this position has been adopted, for example, by the Peruvian Constitutional Court. *See* Peru, *Tribunal Constitucional*, Judgment of 18 March 2004 in the case of Genaro Villegas Namuche, Exp. No. 2488-2002-HC/TC, para. 26 and Peru, *Tribunal Constitucional*, Judgment of 9 December 2004 in the case of Gabriel Orlando Vera Navarrete, Exp. No. 2798-04-HC/TC, para 22. Outside of Latin America, this position has been codified, for example, in Article 2(2) of the German criminal code.

83 J.L. Guzmán Dalbora, 'El principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 187-189.

always requires the application of the law most favorable to the accused which, in cases like *Tiu Tojín*, would be the law in force at the time the enforced disappearance was initiated. In its recent decision in the "Muiña" case, the Argentinian Supreme Court adopted a similar interpretation of the principle of legality in relation to cases of enforced disappearance.[84]

In short, the IACtHR has consistently held that the principle of legality is not an obstacle to the investigation and prosecution of cases of enforced disappearance, even where enforced disappearance had not been criminalized under domestic law at the time the disappearance was initiated. It has avoided a conflict between the two fundamental norms at play – the principle of legality and the obligation to investigate and prosecute – by focusing on the continuing nature of the crime of enforced disappearance.[85] In this context, it seems to endorse the (controversial) position that the law applicable to a continuous crime is the law in force at the time of its conclusion.

84 *See* J.P. Gomara and M.D. Lorat, 'Comentario al fallo "Muiña" de la Corte Suprema de Justicia', (2017) 2(3) *Revista Derechos en Acción* 195-219, pp. 200-201. The "Muiña" judgment represents a departure from the Supreme Court's previous case law, in which it had adopted the position that, for continuing crimes, the applicable law is the law in force at the time of its conclusion.

85 It should be noted that the IACtHR has on occasion seemed to suggest that, if it *were* to be confronted with a clash between the principle of legality and the State's duty to investigate and prosecute enforced disappearances, it would probably give precedence to the latter. It did so, for example, in the case of *Gomes Lund et al. v. Brazil*. In that case, the State had argued, amonst other things, that "all human rights should be guaranteed in an equal manner and, as such, harmony should be sought between the principles and rights established in the American Convention with the aid of the principle of proportionality". In this case, the State observed that there existed an "apparent collision" between the obligation to investigate and prosecute and the principle of legality, as the crimes of enforced disappearance has been codified under Brazilian law long after the facts of the case took place. IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 132.
The Court, however, rejected this argument. In doing so, it reaffirmed its consistent case law that such a collision between the two principles identified by the State did not exist. Idem, para. 179.
Moreover, the Court also considered and rejected the proportionality-argument made by the State, saying: "in applying the principle of proportionality, the State has omitted any mention of victims' rights arising under Articles 8 and 25 of the American Convention. Indeed, said proportionality is made between the State's obligations to respect and guarantee and the principle of legality, but the right to judicial guarantees [fair trial] and judicial protection of the victims and their next of kin are not included in the analysis, which have been sacrificed in the most extreme way in the present case." Idem, para. 178. This response implies that the *combined* weight of the State's obligation investigate and prosecute and the victims' right to access to justice would be enough to outweigh the principle of legality.

3 The obligation to remove all practical obstacles maintaining impunity

Whereas the legal obstacles described in the previous section are necessarily public and out in the open, practical obstacles are often purposefully kept hidden. Practical obstacles arise when certain elements within the state have an interest in maintaining impunity. These elements will seek to obstruct ongoing investigations and make the work of the responsible officials difficult or impossible, at times even using their capacity and authority as state agents to do so. Throughout its case law, the IACtHR had encountered all manner of practical obstacles or obstructions to justice, including:

- Failure to arrest persons who are being investigated and whose arrest has been ordered by a competent court;[86]
- State agents manipulating evidence they have in their custody;[87]
- Refusal by elements of the state to provide relevant information to investigators;[88]
- Attempts to bribe investigators;[89]
- Threats against and harassment of witnesses and officials involved in the proceedings;[90]
- Killings of witnesses and officials involved in the proceedings.[91]

In one case, the Court described the reports of a trial judge charged with overseeing the investigations in a massacre case, who claimed that he had received "orders from above" to delay the investigations or to bring them to a standstill. According to this judge, the orders had come from the highest levels of the state, including the President of the Republic.[92]

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86 *See for example* IACtHR *The la Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, paras. 172-175.

87 *See for example* IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, paras. 172-174.

88 *See for example* IACtHR *Génie Lacayo v. Nicaragua (Merits, Reparations and Costs)*, 29 January 1997, para. 76; IACtHR *García Prieto et al. v. El Salvador (Preliminary Objections, Merits, Reparations and Costs)*, 20 November 2007, para. 113 and IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, paras. 251-252.

89 *See for example* IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, paras. 113(b) and 121.

90 *See for example* IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, para. 121 and IACtHR *Human Rights Defender et al. v. Guatemala (Preliminary Objections, Merits, Reparations and Costs)*, 28 August 2014, paras. 233-235.

91 *See for example* IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, paras. 187-188 and IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, para. 121.

92 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 259.

Obviously, such obstructions of justice are, in themselves, violations of Articles 8(1) and 25(1) of the ACHR, as they serve to make the effective investigation of the underlying human rights violations impossible[93] and, thereby, to maintain impunity.[94] Thus, the Court has consistently (and uncontroversially) held that states are under an obligation to refrain from erecting obstructions to justice. Moreover, the IACtHR has ordered states to take a number of positive measures to create an institutional culture which discourages obstruction of justice. These positive measures will be described in more detail in this section.

3.1 Obligation to cooperate in the collection of evidence

The most common form of obstruction of justice encountered by the Court in its case law is the simple refusal by certain elements of the state, often the military, to provide relevant information and evidence to officials investigating human rights violations. In response, the Court has formulated the obligation on all state agents to cooperate in the collection of evidence relevant to the investigation of human rights violations. In the words of the Court:

> "State authorities are obliged to collaborate in obtaining evidence to achieve the objectives of the investigation and to abstain from taking steps that obstruct the progress of the investigation. […]
>
> [I]t should be reiterated that the obligation to investigate, prosecute and punish, as appropriate, those responsible is an obligation that corresponds to the State as a whole. This means that all State authorities, within their sphere of competence, must cooperate, support or assist in the due investigation of the facts."[95]

This general obligation on all state agents to cooperate in the collection of evidence is made up of three more specific elements. Firstly, the state is obligated to provide the officials investigating cases of human rights violations with both the means and the mandate to gain access to any relevant docu-

93 *See for example* IACtHR *Génie Lacayo v. Nicaragua (Merits, Reparations and Costs)*, 29 January 1997, para. 76; IACtHR *García Prieto et al. v. El Salvador (Preliminary Objections, Merits, Reparations and Costs)*, 20 November 2007, para. 113 and IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, paras. 209-210.

94 IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 174.

95 IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, paras. 209-210. *See also* IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 257 and IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 252.

mentation.[96] This obligation seeks to lessen the dependence of investigators on elements of the state who do not look favorably on their work. Rather than having to ask for information, investigators should have the mandate to collect it themselves.

Secondly, in case investigators do have to request information from other state agents, these agents are obliged to promptly provide any information or piece of evidence under their custody upon request of a competent judge.[97] Moreover, the Court has added that those state agents cannot respond to a request for information by simply saying the information or documentation requested does not exist. According to the Court:

> "The State cannot shield itself behind lack of evidence of the existence of the documents requested; but rather, it must justify the refusal to provide them, demonstrating that it has taken all available measures to verify that the information requested does not exist."[98]

Finally, the IACtHR has determined that state agents cannot refuse a request for information by a competent court in the context of an investigation in a case concerning the violation of human rights, based on the argument that the information requested is confidential or secret. This issue was discussed at length in the case of *Myrna Mack Chang v. Guatemala*, where the Court held that:

> "The Court deems that in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.
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> […] The Court shares the statement of the Inter-American Commission with respect to the following:

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96 See for example IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 2569(c); IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, paras. 257, 319(d) and 321 and IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 251.

97 See for example IACtHR *Almonacid Arellano et al. v. Chile (Preliminary Objections, Merits, Reparations and Costs)*, 26 September 2006, para. 156; ; IACtHR *García Prieto et al. v. El Salvador (Preliminary Objections, Merits, Reparations and Costs)*, 20 November 2007, para. 112; IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 319(c); IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, paras. 251-252 and IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, para. 123.

98 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 257.

> [i]n the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand.
>
> […] Public authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the "clandestinity of the Executive branch" and to perpetuate impunity.
>
> Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act. "It is not, therefore, a matter of denying that the Government must continue to safeguard official secrets, but of stating that in such a paramount issue its actions must be subject to control by other branches of the State or by a body that ensures respect for the principle of the division or powers..." Thus, what is incompatible with the Rule of Law and effective judicial protection "is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system…""[99]

Thus, reliance on mechanisms like state secret or confidentiality to refuse requests for information from a competent judge would allow certain elements of the state to escape the scrutiny of the judicial branch with regard to their actions and, therefore, to act with impunity. This, of course, cannot be allowed, especially in cases concerning human rights violations.

In short, the obligation on all state authorities to cooperate in the collection of evidence, as part of the state's broader obligation to remove and prevent obstructions of justice, entails 1.) that the state should provide investigators with the means and the mandate to access all relevant information and documentation; 2.) that all state authorities who receive a request for information from a competent judge are obliged to promptly comply with that request; and 3.) that the state cannot rely on mechanisms like state secret and confidentiality to refuse a request for information by a competent judge when the investigations at hand concern violations of human rights.

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99 IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, paras. 180-181.

3.2 Obligation to punish state agents who obstruct justice

Not only has the IACtHR ordered that all state agents and institutions must cooperate in the collection of evidence in cases of human rights violations, it has also ordered states to punish those of their agents who refuse to cooperate and seek to obstruct justice.[100] The Court has made it clear that it considers the punishment of those who obstruct justice to be an important tool for the creation of an institutional culture which discourages obstructions of justice. As the Court explains in the case of the *"Cotton Field" v. Mexico*, which concerns the lack of an appropriate investigation into a series of gruesome murders of women in the city of Juarez in the 1990s:

> "The Tribunal emphasizes that administrative or criminal sanctions play an important role in creating the appropriate type of capability and institutional culture [to] deal with factors that explain the context of violence against women established in this case. If those responsible for such serious irregularities are allowed to continue in their functions or, worse still, to occupy positions of authority, this may create impunity together with conditions that allow the factors that produce the context of violence to persist or deteriorate. […] Specifically, the serious irregularities that occurred in the investigation of those responsible and in the handling of the evidence during the first stage of the investigation have not been clarified. This emphasizes the defenselessness of the victims, contributes to impunity, and encourages the chronic repetition of the human rights violations in question."[101]

As a result, the Court ordered Mexico to investigate and, where appropriate, punish its agents who had obstructed the investigations into the facts of the case "as a means combat impunity".[102]

The state can fulfill this obligation to punish those who obstruct justice through the application of both criminal and disciplinary proceedings, in accordance with their domestic law on this subject.[103] The Court thus allows states some margin of appreciation in determining the type of proceedings through which to punish state agents who have obstructed justice.

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100 *See for example* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 173 and IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 148.

101 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, paras. 377-378. The case is often referred to as the *"Cotton Field"* case, after the place in which the bodies of a number of victims in the case were found, bearing signs of sexual abuse and other extreme forms of torture.

102 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, paras. 459-460. See also IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 325-326.

103 See for example IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 173, where the Court holds that the relevant provisions of domestic law must be applied "with the greatest rigor".

For example, in the case of *The Massacre of El Mozote and nearby places v. El Salvador* the Court ordered the state to:

> "investigate, through it [*sic*] competent public institutions, the conduct of the officials who obstructed the investigation and permitted the facts to remain unpunished since they occurred and then, following an appropriate proceeding, apply the corresponding administrative, disciplinary or criminal punishments, as appropriate, to those found responsible."[104]

However, states are, at the same time, not entirely free to choose which type of proceedings suits them best. The Court has made it clear that disciplinary proceedings and criminal proceedings each have their own role to play. Disciplinary proceedings serve only to investigate and control whether the public official in question has carried out his or her function properly and acted in accordance with the rules dictated by his or her office. Thus, the existence of disciplinary proceedings has an "important protective function",[105] in that they "control the actions of […] public officials".[106] At the same time, disciplinary proceedings may help to "determine the situation in which the violation of the functional obligation was committed that led to the breach of international human rights law".[107] However, whenever the acts and omissions of the public official reach a level at which they can no longer be considered only violations of a functional norm – but, rather, are human rights violations and/or criminal acts in themselves – the state cannot rely on disciplinary proceedings alone but must resort to criminal proceedings as well. In other words, "[a] disciplinary procedure can complement but not entirely substitute the function of the criminal courts".[108]

In short, the Court has ordered states to punish public officials who obstruct investigations in accordance with their domestic laws on the topic, in order to create an institutional culture which discourages such obstructions and

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104 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 326. *See also* IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 327(f).

105 IACtHR *The la Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 215.

106 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, para. 373.

107 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, para. 374.

108 IACtHR *The la Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 215. It should be note that in both cases in which the Court discussed the relation between disciplinary and criminal proceedings, the actions of the public officials which had come under scrutiny had been rather extreme and quite clearly resulted in criminal acts. In the case of the *La Rochela Massacre*, military officials had been accused of conspiring with paramilitary organizations. In the *"Cotton Field"* case, police officers had tortured suspets to elicit false testimony, in order to be seen to make progress in the investigation of the murder underlying the case.

which seeks to break the cycle of impunity. Punishment of public officials can be done through administrative, disciplinary or criminal proceedings, taking into account the proper relation between these fields of law and their respective functions and objectives.

3.3 Obligation to protect those who participate in the domestic proceedings

Among the many practical obstacles to justice the IACtHR has encountered in its case law, the systematic threats and harassments against victims, activists, witnesses, investigators and judges participating in the investigation and prosecution of human rights violations must be the most heinous one. Threats and harassments are used by veto players as a tool to scare all but the bravest individuals out of participating in domestic proceedings. And these threats are only effective because veto players regularly demonstrate their preparedness to make good on them.

While an international institution like the IACtHR cannot directly address such a "culture of terror", as one prosecutor described it in relation to the Guatemalan situation,[109] it has ordered states to protect those involved in the dangerous work of investigating and prosecuting human rights violations. It has done so, firstly, in the context of its contentious jurisdiction. The first contentious case in which the IACtHR explicitly ordered a state to protect those participating in domestic proceedings concerning human rights violations, is that of *Myrna Mack Chang v. Guatemala*. Having described in detail the threats and harassment made against those involved in the investigation of the extrajudicial execution of the anthropologist Myrna Mack, and the chilling effect these threats had on the proceedings, the Court then went on to state that:

> "In light of the above, this Court deems that the State, to ensure due process, must provide all necessary means to protect the legal operators, investigators, witnesses and next of kin of the victims from harassment and threats aimed at obstructing the proceeding and avoiding elucidation of the facts, as well as covering up those responsible for said facts."[110]

The Court later clarified that the protection of those involved in the domestic investigations includes: 1.) setting up an "adequate security and protection system" for justice officials, which "takes into account the cir-

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109 IACtHR *Human Rights Defender et al. v. Guatemala (Preliminary Objections, Merits, Reparations and Costs)*, 28 August 2014, para. 234. In the same vein, the prosecutor spoke of a "no witness culture", describing the fact that prosecutors are often unable to persuade possible witnesses from giving their testimony, as they are afraid this will result in them becoming the object of violence or other negative consequences.

110 IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 199.

cumstances of the cases under their jurisdiction and their places of work";[111] and 2.) investigating of all threats or acts pf harassment made against people who participate in domestic investigations of human rights violations and, if appropriate, punishment of those found responsible.[112] With regard to the latter point, the Court has furthermore clarified that threats and acts of harassment made against those participating in domestic investigations of human rights violations "cannot be examined in isolation, but should be analyzed in the context of obstructions to the investigation of the case".[113]

Secondly, both the Inter-American Commission and the Inter-American Court have the power to order protective measures in favor of specific individuals, organizations or communities. While the measures ordered by the Inter-American Court usually aim to protect individuals or organizations involved in cases before the Court itself, the measures ordered by the Commission are much wider in scope and may be ordered in favor of any individual or organization involved in human rights work who has come under threat as a result of that work. Protective measures, whether ordered by the Court or by the Commission, usually entail an obligation on the state to provide the individuals or groups in question with police protection to repel the direct threat to their life or well-being.

3.4 Obligation to seek inter-state cooperation in judicial matters

Finally, states have sometimes argued before the Court that they have been unable to investigate and/or prosecute (those responsible for) human rights violations because they are unable to apprehend the person(s) accused of having committed such violations, as they are not present on their territory. In response to such claims, the IACtHR has held that, when it comes to serious violations of human rights, the states under its jurisdiction are under the obligation to cooperate in order to bring those responsible to justice. As the Court held in the case of *La Cantuta v. Peru*:

> "As pointed out repeatedly, the acts involved in the instant case have violated peremptory norms of international law (jus cogens). Under Article 1(1) of the American Convention, the States have the duty to investigate human rights violations and to prosecute and punish those responsible. In view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states for such purpose. Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States' erga omnes obligation to adopt all such

111 IACtHR *The la Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 297.

112 IACtHR *The la Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 170.

113 IACtHR *Human Rights Defender et al. v. Guatemala (Preliminary Objections, Merits, Reparations and Costs)*, 28 August 2014, para. 227.

> measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction. The Court points out that, under the collective guarantee mechanism set out in the American Convention, and the regional and universal international obligations in this regard, the States Parties to the Convention must collaborate with one another towards that end."[114]

As this quote makes clear, this obligation rests on *all* states under the Court's jurisdiction, not only the state involved directly in the case as hand. In the case at hand, Peru was under an obligation to seek the extradition of high officials from the Fujimori administration, including Fujimori himself, accused of responsibility for serious human rights violations. Other states under the Court's jurisdiction, however, are under an obligation to grant their extradition to make their prosecution possible, or to prosecute them under their own jurisdiction (*aut dedere, aut judicare*). As the Court stated further on in the same case:

> "Additionally, in line with the arguments above (supra paras. 159 and 160), further to the general obligation to respect laid down in Article 1(1) of the American Convention, Perú is to continue to adopt all judicial and diplomatic measures required in order to prosecute and, if appropriate, punish, all parties responsible for the violations committed in this case, and to continue to insist on the requests for extradition under the applicable domestic or international law rules. Furthermore, based on the effectiveness of the collective protection mechanism established under the Convention, the States Parties to the Convention are required to cooperate with each other in order to put an end to the impunity existing for the violations committed in the case at hand by prosecuting and, if appropriate, punishing, those responsible therefor [sic]."

The Court has since established that this obligation on states to cooperate in judicial matters is not limited to extradition only. It also applies, for example, to sharing information and/or pieces of evidence between states. Specifically, in a case concerning the disappearance of the material victim at the hands of the Panamanian armed forces, the Court considered that:

> "the State was unable to acquire the documents from the Panamanian Armed Forces that the United States Government obtained following the 1989 invasion and which could have provided information on what happened to Heliodoro Portugal. On this point, the Court finds it necessary to emphasize that, in the context of presumed human rights violations, States should collaborate with each other in judicial matters, so that the pertinent investigations and judicial proceedings can be conducted adequately and promptly."[115]

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114 IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 160.

115 IACtHR *Heliodoro Protugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 154.

In short, when it comes to the investigation of cases involving human rights violations, states have the obligation to seek inter-state cooperation in judicial matters, and to provide such cooperation to other states, in order enable the investigations to proceed and to end impunity.

4 The obligation to investigate, prosecute and punish effectively

From the very beginning, the Inter-American Court has required that the domestic investigations and prosecutions in cases of human rights violations should be undertaken in a serious and effective manner. This means that the proceedings should be undertaken with the intention to produce results, and in such a way that they are at least capable of producing those results. Or, as the Court held in the *Velasquez Rodríguez* judgment:

> "In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken *in a serious manner and not as a mere formality preordained to be ineffective*. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[116] [Emphasis added]

Thus, while it would be unrealistic to expect a 100% success rate in the investigation and prosecution of human rights violations, the Court does require that states make a genuine effort to bring each case to a proper conclusion.[117] As the Court began to develop its idea of the victim's right to justice in later case law, it similarly found that the recourses offered to victims to have the violation of their human rights investigated and prosecuted, should be effective. For example, the Court states in the case of the *Las Palmeras Massacre v. Colombia*:

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116 IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 177. This principle of effectiveness was reaffirmed in later case law. *See for example* IACtHR "19 Merchants" v. Colombia (merits, reparations and costs), 5 July 2004, paras. 193-194.

117 *See for example* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 66 and IACtHR *The Mapiripán massacre v. Colombia (merits, reparations and costs)*, 15 September 2005, para. 216, emphasizing that the obligation to investigate, prosecute and punish human rights violations is not satisfied simply by initiating proceedings, but that it entails a responsibility for "everything necessary to be done" so that victims may know the truth of what happened and that the responsible party may be punished.

> "It is the *jurisprudence constante* of this Court that it is not enough that such recourses exist formally; they must be effective; that is, they must give results or responses to the violations of rights established in the Convention. This Court has also held that remedies that, due to the general situation of the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. This may happen when, for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions; or any other situation in which justice is being denied, such as cases in which there has been an unwarranted delay in rendering a judgment. This guarantee of protection of the rights of individuals is not limited to the immediate victim; it also includes relatives who, because of the events and particular circumstances of a given case, are the parties that exercise the right in the domestic system."[118]

Once again, this quote makes clear that it is not the simple lack of results which makes domestic proceedings ineffective. Rather, their ineffectiveness flows from serious defects in the proceedings themselves, which makes them inadequate, or "illusory", as a response or remedy to the violation of human rights being investigated. In this context the Court has also referred to "the principle of effectiveness" which should "permeate the development of such an investigation".[119]

In this way, the obligation to investigate human rights violations seriously and effectively has provided the Court with an entry point for the evaluation of domestic judicial proceedings and the conduct of the judicial officials involved in them. The Court analyzes not only *if* the state in question has investigated human rights violations, but also whether it has done so *adequately*, in accordance with the standards set in its own case law. To this end, it undertakes a detailed and exhaustive analysis of the domestic judicial proceedings conducted in relation to the facts brought before it and the attitude and actions of the judicial authorities in those proceedings. As the Court held in the case of the *"Street Children" v. Guatemala*:

> "Guatemala may not excuse itself from responsibility for the acts or omissions of its judicial authorities, since this attitude is contrary to the provisions of Article 1.1 related to Articles 25 and 8 of the Convention.
>
> In order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings. In this respect, the European Court has indicated that the proceedings should be considered as a whole, including the decisions of the courts of appeal, and that the function of the international court is to determine if all the proceedings, and the way in which the evidence was produced, were fair. […]

118 IACtHR *Las Palmeras v. Colombia (Merits)*, 6 December 2001, para. 58.

119 IACtHR *García Prieto et al. v. El Salvador (Preliminary Objections, Merits, Reparations and Costs)*, 20 November 2007, para. 115.

> To this end, in view of the characteristics of the case and the nature of the violations alleged by the Commission, the Court must examine all the domestic judicial proceedings in order to obtain an integrated vision of these acts and establish whether or not it is evident that they violated the norms on the obligation to investigate, and the right to be heard and to an effective recourse, which arise from Articles 1.1, 8 and 25 of the Convention."[120]

The question remains, of course, what exactly the Court is looking for when it examines whether domestic judicial proceedings have been undertaken seriously and effectively. The Court has never provided a full definition of the principle of effectiveness or an definitive enumeration of its elements. However, it has gradually expanded upon the first 'building blocks' provided by the *Velasquez Rodríguez* judgment, to provide some minimum standards. As the Court found, for example, in its judgment in the "*Cotton Field*" case:

> "The duty to investigate is an obligation of means and not of results, which must be assumed by the State as an inherent legal obligation and not as a mere formality preordained to be ineffective. The State's obligation to investigate must be complied with *diligently* in order to avoid impunity and the repetition of this type of act. […]
>
> In light of this obligation, as soon as State authorities are aware of the fact, they should initiate, *ex officio and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the pursuit, capture, prosecution and eventual punishment of all the perpetrators of the facts*, especially when public officials are or may be involved."[121] [emphasis added]

This formula, while still being somewhat circular, is as close to a definition of the principle of effectiveness the Court has come and some variation of it can now be found in practically all judgments concerning the obligation to investigate, prosecute and punish human rights violations. One important aspect of it, is the statement of the goals domestic investigations should pursue. These stated goals give direction to the analysis of the effectiveness of domestic proceedings. In order to be deemed effective, those proceedings must strive for the determination of the truth and the identification, prosecution and punishment of *all* those responsible for the human rights violations under investigation, and must be capable of achieving those results, at least in theory.

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120 IACtHR *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, 19 November 1999, paras. 221-224. During the proceedings, the State had argued in this context that 1.) the State could not be found in violation of the ACHR as a result of a decision by its judicial organs, who operate with independence; and 2.) The Court does not have jurisdiction to review a decision by the Guatemalan Supreme Court. The Court rejected these arguments based on the reasoning quoted above.

121 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, paras 289-290.

Moreover, the formula sets certain minimum standards for effectiveness, including: 1.) the obligation to investigate the case *ex oficio*; 2.) the obligation to investigate without delay and within a reasonable time; 3.) the obligation to use all legal means at the state's disposal (due diligence); and 4.) the independence and impartiality of the judicial authorities involved in the proceedings. Domestic investigations which fall short of these standards cannot be deemed adequate for achieving the goals set by the Court and, therefore, are not effective.

All four of these minimum standards are included in the schematic overview of the IACtHR's case law in Annex 1. However, not all of these elements require separate discussion in this chapter. Rather, in the interest of brevity the description in the remainder of this chapter will focus on those elements of the principle of effectiveness which have been developed most by the Court and/or which have the most relevance for the case studies in Chapters 5 to 7. Thus, the remainder of this chapter will discuss the independence and impartiality of judicial officers (section 4.1) and the obligation to investigate with due diligence (section 4.2). Finally, this chapter will discuss the obligation of states to provide appropriate punishment of those found responsible for human rights violations (section 4.3). Strictly speaking, appropriate punishment is – or should be – one of the goals of a domestic investigation, rather than a minimum standard for its effectiveness. However, the Court has, on occasion, discussed appropriate punishment as a separate element of the obligation to investigate, prosecute and punish human rights violations. Moreover, its relevance for the case study in Chapter 6 merits its separate discussion in this chapter.

4.1 Impartiality and independence of judicial officers: the prohibition of military jurisdiction over human rights violations

The requirement that judges and prosecutors involved in criminal cases should be independent and impartial is a traditional and essential fair trial guarantee, protected by all major human rights instruments including the ACHR. Article 8(1) ACHR guarantees every person's right "to a hearing […] by a competent, independent, and impartial tribunal, previously established by law". This guarantee is generally understood to be a guarantee for the protection of the rights of the accused in a criminal trial, based on the idea that, if the authorities are biased, they will normally be so *against* the accused.

The right to a competent, independent and impartial tribunal[122] was given new meaning when the Court reinterpreted it as being (also) a right of victims in a criminal trial. In this context, it is important to note that, in many of the cases which made it to the IACtHR, the accused in the domestic criminal proceedings were themselves state agents. As a result, there is a real risk that the authorities overseeing the proceedings are biased *in favor* of the accused, rather than against them. A risk that the Court has often seen materialize, for example when police officers investigate murder charges against one of their direct colleagues[123] or when military courts, composed of active military personel, claim jurisdiction over cases of extrajudicial executions performed by the Armed Forces in the context of their campaigns against insurgent groups[124] or organized crime.[125] In such cases, accused have often been acquitted, or the charges against them dismissed, under suspicious circumstances and/or following short and incomplete investigations. In response to such situations, the Court has emphasized that:

> "it is particularly important that the competent authorities […] be independent, both de jure and de facto, from the officials involved in the facts of the case. The foregoing requires not only hierarchical or institutional independence, but also real independence."[126]

As this quote underlines, the Court distinguishes between the institutional and the practical independence of the authorities involved in the criminal proceedings. That is to say that, even if no formal hierarchical relationship exists between the judicial officials involved in the criminal proceedings and other state institutions which might seek to hinder or influence those

122 Technically, independence and impartiality are separate (but related) concepts. The Court itself recognizes as much. *See for example* IACtHR *Palamara Iribarne v. Chile (Merits, Reparations and Costs)*, 22 November 2005, para. 146, stating that "impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy". In other words, whereas independence refers to the possibility that judges and prosecutors are improperly influenced by others, impartiality refers to their own, subjective relationship to the facts of the case and the individuals involved in it. However, while recognizing this difference, the Court usually discusses independence and impartiality together, without properly distinguishing between them. As a result, this text will do the same.

123 IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013.

124 *See for example* IACtHR *Las Palmeras v. Colombia (Merits)*, 6 December 2001; IACtHR *Almonacid Arellano et al v. Chile (Preliminary Objections, Merits, Reparation and Costs)*, 26 September 2006 and IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006.

125 IACtHR *Zambrano Vélez et al. v. Ecuador (Merits, Reparations and Costs)*, 4 July 2007.

126 IACtHR *Zambrano Vélez et al. v. Ecuador (Merits, Reparations and Costs)*, 4 July 2007, para. 122.

investigations, such a relationship might still exist in practice. [127] Such *de facto* relationships must therefore be determined on a case-by-case basis, by examining the concrete actions and statements of the individual state agents involved in the case. The institutional independence of judges and prosecutors, on the other hand, can be determined on the basis of more objective criteria, such as the procedure for nominating judges and guarantees against their dismissal.[128]

The most notable standard developed by the IACtHR as part of the victim's right to a competent, independent and impartial tribunal relates to the issue of military jurisdiction. Specifically, the Court has determined – repeatedly and consistently – that cases concerning human rights violations committed by members of the Armed Forces cannot be adjudicated by military courts or tribunals. According to the Court, military tribunals are neither competent to hear such cases, nor can they be considered independent or impartial when hearing them.

The Court has not always held such a stern position on military jurisdiction. Until the late 1990s, the IACtHR had shown itself unwilling to make any kind of general statement on the matter. For example, in the January 1997 reparations judgment in the case of *Caballero Delgado and Santana v. Colombia* the Commission requested the Court to pronounce itself on the competence of the Colombian military courts to hear the case at hand, which concerned the forced disappearance of two unionists by members of the Colombian Armed Forces. The Court, however, declined to address this question, reasoning that:

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127 *See for example* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 103. The Court concluded that the prosecutor investigating the disappearance of the Serrano Cruz sisters had not "maintained his independence" after the case had been referred to the IACtHR. From that moment on, the prosecutor had worked together with the executive in order to direct the criminal investigation in such a way that it would support the defence of the State in the international proceedings. This conclusion was based on the prosecutors' own statements delivered during his testimony before the IACtHR and on the fact that, when the State Agent defending the State in the international proceedings had visited witnesses to invite them to testify before the IACtHR, he was accompanied by the prosecutor.

128 *See for example* IACtHR *Valencia Hinojosa et al. v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 29 November 2016, paras. 90-120, analyzing the independence of the agents of the *Jurisdicción Penal Policial* on the basis of objective, institutional criteria, such as 1.) the relationship between the special jurisdiction and the executive branch; 2.) the composition of the tribunals within the special jurisdiction; 3.) the process for nominating judges to these tribunals; 4.) the guarantees against discharge of the judges on these tribunals; and 5.) the possibility of appealing the verdicts of the tribunals of the special jurisdiction within the ordinary jurisdiction. These objective criteria are derived from the Court's case law concerning the independence and impartiality of military courts.

> "the question of the competence of military tribunals and their compatibility with international human rights instruments calls for a review of Colombian legislation, which it would be inappropriate to undertake in an incidental manner and at the reparations phase […]".[129]

Around the same time, the Court more explicitly refused to find military courts incompetent to hear cases of human rights violations in its judgment in the case of *Genie Lacayo v. Nicaragua*, also concerning an enforced disappearance at the hands of the military and subsequent proceedings before the military courts. Here, the Court responded to the Commission's request by saying that:

> "the fact that it involves a military court does not per se signify that the human rights guaranteed the accusing party by the Convention are being violated".[130]

However, in the decade or so following these two judgments, the Court's position on the issue has changed fundamentally. This change was preceded by a string of judgments concerning the use of military courts by the Fujimori administration in Peru to hear charges of treason against suspected members of the Shining Path guerilla movement.[131] In these cases, the right to a competent and impartial tribunal was argued in favor of the accused, who were civilians appearing before a military court, which would seem to make them irrelevant to the rule being discussed here. However, the legal findings of the Court in these cases became the basis upon which it later built its argumentation underlying the prohibition of military jurisdiction over cases of human rights violations committed by members of the Armed Forces.

When discussing the issue of military jurisdiction in the case of *Castillo Petruzzi et al. v. Peru*, the Court noted that Peru's internal legislation limited that jurisdiction served only "the purpose of maintaining order and discipline within the ranks of the armed forces" and, therefore, could only be applied to "military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances". [132] With this in mind, the Court found that:

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129 IACtHR *Caballero Delgado and Santana v. Colombia (Reparations and Costs)*, 29 January 1997, para 57.

130 IACtHR *Génie Lacayo v. Nicaragua (Merits, Reparations and Costs)*, 29 January 1997, para. 84. The Court then considered whether the proceedings before the military courts had shown any concrete indications of bias against the victim (or in favor of the accused) or of oter violations of the victims' procedura rights and found that this was not the case.

131 This string of judgments includes IACtHR *Loayza Tamayo v. Peru (Merits)*, 17 September 1997; IACtHR *Castillo Petruzzi et al. v. Peru (Merits, Reparations and Costs)*, 30 May 1999 and IACtHR *Cantoral Benavides (Merits)*, 18 August 1999.

132 IACtHR *Castillo Petruzzi et al. v. Peru (Merits, Reparations and Costs)*, 30 May 1999, para. 128.

> "When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts."[133]

Moreover, the Court held that, given that the military was "fully engaged in he counter-insurgency struggle", its courts could not be considered impartial in proceedings against individuals suspected of belonging to the opposing side in that struggle.[134] In short, the Court established that military courts cannot claim jurisdiction over individuals who do not belong to the military and that it cannot be considered as an impartial tribunal in cases against (suspected) members of the opposing side in a conflict in which the military itself is engaged.

Not long after, the Court began to apply the same logic to cases in which military courts had exercised jurisdiction over acts perpetrated not by the opposing side in a conflict, but by its own personel. The first example of this can be found in the case of *Durand and Ugarte v. Peru*, which concerned the death of two inmates in the context of an intervention by the Peruvian military to strike down a prison-riot.[135] The subsequent proceedings concerning the death of these two (and many other) inmates had been conducted by military courts. Firstly, the Court discussed whether military courts are competent to adjudicate cases such as the one at hand, where the human rights of civilians are violated by members of the military. Resuming its argument from the *Castillo Petruzzi* case, the Court held:

> "In a democratic Government of Laws the *penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests*, related to the functions assigned by law to the military forces. Consequently, *civilians must be excluded from the military jurisdiction scope* and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order.

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133 Idem.

134 Idem, para. 130.

135 The two victims in this case had been detained on suspicion of participation in guerrilla activity, without a warrant for their arrest and without being caught *in flagrante delicto*. While they were being held in the "El Frontón" prison, a riot broke out in that prison during which inmates had occupied parts of the premises. As part of its operation to strike down the riot, the military demolished a part of the installation known as the "Blue Pavilion", with inmates still inside, indiscriminately killing a large number of inmates, inclusing the two victims in this case. The Court found that, while the State had the right to defend itself and to strike down the riot, the force used by the Peruvian military in doing so was disproportionate. Moreover, there had been no thorough investigation into the facts of the case, and the proceedings conducted in connection to the situation had been conducted under the military jurisdiction. *See* IACtHR *Durand and Ugarte v. Peru (Merits)*, 16 August 2000, paras. 64-72 and 115-131.

> […] In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment *must be placed on the ordinary justice,* apart from the fact that the alleged active parties had been military or not."[136] [emphasis added]

Whereas in the case of *Castillo Petruzzi* the limited scope of the military jurisdiction in Peru had been based on an analysis of domestic law, *Durand and Ugarte* articulates it as a rule of general applicability. *Durand and Ugarte* also makes it clear that not only civilians are excluded from the scope of the military jurisdiction, but also certain categories of acts committed by members of the Armed Forces. In fact, the only cases over which the military courts can claim jurisdiction are those concerning "military felonies", which are related directly to the function of the military and which attempt against "legally protected interests of the military order". Later case law has clarified that, in order for an act to be considered a military felony, there must be a "direct and proximal relationship with the military function or with the infringement of juridical rights characteristic of the military order".[137]

More specifically, violations of human rights committed against civilians can never be considered military felonies and, therefore, can never be subject to military jurisdiction.[138] This is so for two reasons: firstly, human rights violations "can never be considered as a legitimate and acceptable means for compliance with the military mission", but rather, "are openly contrary to the duties of respect and protection of human rights".[139] Thus, there can be no direct relationship between human rights violations and the military function, since the military, as part of the state, is obliged to uphold human rights. Secondly, when military courts claim jurisdiction over human rights violations, they do so "not only with regard to the defendant, which must necessarily be a person with an active military status, but also with regard to the civil victim", whose interest in the case "transcends the sphere of the military realm, since juridical rights characteristic of the ordinary regimen are involved".[140] Thus, the weight and the nature of the rights of victims in cases concerning human rights violations – not only the

136 IACtHR *Durand and Ugarte v. Peru (Merits)*, 16 August 2000, paras. 117-118.

137 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 200 and IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, paras. 273-274..

138 Idem, para. 274.

139 Idem, para. 277. This paragraph refers specifically to enforced disappearance. However, the same logic would apply to other types of human rights violations, at the very least those which the Court considers grave violations of human rights.

140 IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, para. 275. *See also* IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 200.

material rights violated but also their procedural rights under Article 8(1) ACHR – preclude the exercise of military jurisdiction over such cases.

On the one hand, *Durand and Ugarte* thus established that military courts do not have jurisdiction over cases involving human rights violations. Moreover, the same judgment also clarified that the military courts could not be considered impartial in the case at hand. On this question, the IACtHR held that:

> "it is reasonable to consider that military court officials who acted in the leading process to investigate the events in El Frontón lacked the required independence and impartiality as stipulated in Article 8(1) of the Convention to efficiently and exhaustively investigate and punish the liable parties.
>
> […] As has been stipulated (supra para. 59), the courts that had knowledge of the facts related to these events "constitute a high Body of the Armed Institutes" and the military men who were members of these tribunals were, at the same time, members of the armed forces in active duty, a requirement to be part of military tribunals. Thus, they were unable to issue an independent and impartial judgment."[141]

In other words, when the judges and the defendant in a criminal case belong to the same institution, namely the military, the Court deems it reasonable to assume that there will be a lack of independence and impartiality of the part of the judges. Especially if the victim is an outsider to that institution, as is true in cases of human rights violations committed against civilians. This position has been upheld in later case law.[142]

Finally it should be noted that, as discussed in section X of this chapter, a lack of independence and/or impartiality of the judicial authorities involved in the proceedings constitutes, according to the IACtHR, a ground for considering those proceedings to be 'fraudulent'. This, in turn, has consequences for the ability of the judgments resulting from those proceedings to constitute *res judicata*. Combining the doctrine of fraudulent *res judicata*[143] with the IACtHR's position that military courts lack independence and impartiality in cases concerning human rights violations committed by members of the military, the logical conclusion would be that any acquittals resulting from such proceedings can be considered fraudulent. Such acquittals cannot, therefore, block the further investigation and prosecution of the

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141 IACtHR *Durand and Ugarte v. Peru (Merits)*, 16 August 2000, paras. 125-126.

142 *See for example* IACtHR *Las Palmeras v. Colombia (Merits)*, 6 December 2001, para. 53. However, the IACtHR normally starts its considerations on the issue of military jurisdiction by examining the competence of military courts to claim jurisdiction over human rights violations. Upon establishing that military courts lack that competence, it does not usually find the need to continue with an analysis of their impartiality.

143 *See supra* section 2.4 of this chapter.

underlying violations. The IACtHR confirmed this conclusion in the case of *La Cantuta v. Peru*.[144]

In short, the IACtHR's consistent case law holds that military courts are not competent to hear cases concerning human rights violations (allegedly) committed by members of the Armed Forces, nor can they be considered independent or impartial in such cases. If such cases are submitted to military jurisdiction, this represents a violation of the victims' procedural rights protected by Article 8(1) ACHR.[145] As a result, the Court also obliges states to provide victims with an effective recourse to challenge the referral of their case to the military courts. If such an effective recourse is not in place, this represents a separate violation of Article 25 ACHR.[146] Moreover, previous acquittals delivered by military courts in cases concerning human rights violations cannot produce *res judicata*, due to the lack of independence and impartiality of those courts. Such acquittals should not, therefore, be considered obstacles to the further investigation and prosecution of those cases by the ordinary criminal courts.

4.2 Due diligence

The notion of due diligence is central to the obligation to investigate and prosecute human rights violations seriously and effectively. As the Court held in the case of the *La Rochela Massacre v. Colombia*:

> "The focal point of analysis of whether the proceedings in this case were effective is whether they complied with the obligation to investigate with due diligence. This obligation requires that the body investigating a violation of human rights *use all available means to carry out all such steps and inquiries as are necessary to achieve the goal pursued within a reasonable time*."[147] [emphasis added]

144 *See* IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 154. The Court's endorsement of the position described here is somewhat implicit, but only because the domestic authorities had already disregarded the previous acquittals by the military courts of their own accord, making it unnecessary for the Court to formally decide the issue. The IACtHR did, however, reiterate its own case law on the question of fraudulent *res judicata* and signaled its approval, on that basis, of the decision of the domestic authorities.

145 *See for example* IACtHR *Las Palmeras v. Colombia (Merits)*, 6 December 2001, paras. 53-54; IACtHR *19 Tradesmen v. Colombia (Merits, Reparations and Costs)*, 5 July 2004, paras. 164-167 and 172-177; IACtHR *Almonacid Arellano et al v. Chile (Preliminary Objections, Merits, Reparation and Costs)*, 26 September 2006, paras. 130-133; and IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, paras. 270-282.

146 IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, paras. 290-298.

147 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 156. *See also* IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, para. 136.

In other words, the domestic judicial authorities must do everything in their power to investigate cases of human rights violations, determine the truth of what happened and identify, prosecute and punish all those responsible. This is, of course, a very broad standard, as is illustrated by the Court's judgment in the case of the *"Military Diary" v. Guatemala*, where it held that:

> "In this case, the Court concludes that the State has not conducted an investigation into the facts of this case with due diligence, because: most of the measures were aimed at obtaining information about the victims; there was an unwarranted delay in unifying the investigation; there was a lack of collaboration from the Ministry of Defense that has obstructed the progress of the investigations, and there have been serious omissions with regard to the use of the evidence in the case file."

This quote shows the number and variety of ways in which the obligation to investigate with due diligence can be violated in one single case. To some extent, then, the due diligence requirement serves as a catch-all provision, for the Court to sanction any omissions and/or lax behavior by judicial authorities. For example, the Court has relied on the due diligence requirement to hold the state responsible where its judicial authorities had not taken the necessary measures to apprehend persons whose arrest had been requested by a competent court, even though the person in question was a state agent whose location was known, or should be known, to the authorities.[148]

However, as part of this broad obligation to investigate and prosecute with due diligence, the Court has also developed a number of more specific obligations, which give concrete meaning to the concept of due diligence in relation to particular aspects of the domestic proceedings. These elements of the obligation to investigate and prosecute with due diligence concern: 1.) the collection and handling of physical evidence, especially in the early stages of the proceedings; 2.) the direction and scope of the domestic investigations; and 3.) the obligation of the judge to properly 'manage' the trial.

148 *See for example* IACtHR *Juan Humberto Sánchez v. Honduras (Preliminary Objection, Merits, Reparations and Costs)*, 26 November 2003, para. 131 and IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, para. 204. While it is clear that, in this case, the State did not do everything in its power to arrest the accused and, thereby, further the domestic proceedings, the case offers vert little guidance on how to properly conduct such proceedings in future.

4.2.1 Standards on the collection and management of forensic evidence

In cases of violations to the right to life,[149] the forensic evidence collected in the early stages of the investigation, directly after the body of the victim is discovered, is of utmost importance for the quality and success of the investigation as a whole. If the collection of evidence is not handled properly in those early stages, the possibilities for conducting an effective investigation in the long run are seriously reduced. In the words of the Court:

> "the correct management of the crime scene is the starting point for an investigation and, therefore, it is crucial in clarifying the nature, circumstances and characteristics of the crime, as well as those involved in it."[150]

In this context, the Court has held that:

> "the obligation to investigate a death means that the effort to determine the truth with all diligence must be evident as of the very first procedures."[151]

However, a review of the Court's case law shows that, in many cases, even the most basic diligence in the collection and handling of forensic evidence was not observed, due to a lack of capacity and/or will on the part of states' investigative bodies.[152] Given the central importance of the forensic evidence collected during the early stages of the investigation, the Court has not been satisfied merely to list the mistakes made by investigative bodies and find states responsible after the fact. Rather, it has imposed on the states under its jurisdiction detailed minimum standards on the collection of physical evidence and the management of the crime scene. These minimum standards are not an innovation by the Court itself, but are set out in the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and

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149 This section will refer primarily to cases of extrajudicial execution and other forms of violent death, but not enforced disappearance. The standards discussed in this section cannot be applied to cases of enforced disappearance, as the particular nature of that crime means that there usually is no body or crime scene available to collect physical evidence from.

150 IACtHR *Human Rights Defender et al. v. Guatemala (Preliminary Objections, Merits, Reparations and Costs)*, 28 August 2014, para. 209.

151 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, para. 300.

152 Examples of mistakes in the management of the crime scene and the collection of physical found in the Court's case law include: the failure to take fingerprints, discarding physical evidence already collected, incomplete or incorrect autopsy reports and even the arbitrary assignment of names to the bodies of victims. *See* IACtHR *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, 19 November 1999, para. 231; IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 166 and IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, paras. 299-333.

Summary Executions (Minnesota Protocol).[153] Whereas the Minnesota Protocol itself is a non-binding document describing best practices, the Court has made it clear that they can be seen as an elaboration of the obligation to investigate and hence non-compliance with those standards may lead to a violation of the state's obligation under the ACHR to effectively investigate and prosecute human rights violations.

The Court first referred to the Minnesota Protocol in the case of *Juan Humberto Sánchez v. Honduras*, stating:

> "This Court deems that in cases where there have been extra-legal executions the State must conduct a serious, impartial and effective investigation of what happened. In this regard, the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, or Minnesota Protocol, has set forth certain basic guidelines to conduct the respective investigations and establish whether the executions have been extra-legal, summary, and arbitrary. […]. In this case, said parameters were not fulfilled."[154]

In the quote above, the Court is still somewhat implicit about the status of the Minnesota Protocol and the guidelines articulated therein. While it does seem to use the guidelines taken from the Protocol in its analysis of the state's investigative efforts, it limits itself to noting that the Minnesota Protocol "has set forth certain guidelines", without clarifying what the relevance of these guidelines is. It was more explicit on this point in later cases. In the case of *Zambrano Vélez v. Ecuador*, the Court explained that:

> "on the grounds of the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, this Court has defined the guiding principles that should be observed when it is considered that a death may be due to extrajudicial execution. The State authorities that conduct an investigation must, inter alia, (a) identify the victim; (b) recover and preserve the probative material related to the death, in order to facilitate any

153 The UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution has recently been revised and is now called the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), available at http://www.ohchr.org/Documents/Issues/Executions/MinnesotaProtocolInvestigationPotentiallyUnlawfulDeath2016.pdf, last accessed: 01-09-2017.
As noted by Jan Hessbruegge, the Minnesota protocol, in turn, summarizes and supplements the principles concerning the investigation of violations of the right to life developed by human rights bodies, including the IACtHR, through "a process of legal cross-fertilization that reaches back to the venerable Velásquez Rodríguez judgment". J. Hessbruegge, 'Minnesota Protocol on the investigation of unlawful death gets a new life', *EJIL Talk!*, 26 May 2017, available at <https://www.ejiltalk.org/minnesota-protocol-on-the-investigation-of-unlawful-death-gets-a-new-life/>, last checked: 17-09-2018.

154 IACtHR *Juan Humberto Sánchez v. Honduras (Preliminary Objection, Merits, Reparations and Costs)*, 26 November 2003, para. 127.

> investigation; (c) identify possible witnesses and obtain their statements in relation to the death under investigation; (d) determine the cause, method, place and moment of the death, as well as any pattern or practice that could have caused the death, and (e) distinguish between natural death, accidental death, suicide and murder. In addition, it is essential to search exhaustively the scene of the crime and autopsies and analyses of human remains must be carried out rigorously by competent professionals, using the most appropriate procedures."[155]

Thus, the early stages of the investigation into a possibly unlawful death and the collection and handling of evidence, especially forensic evidence, must be guided by the basic principles and purposes listed in the quote above.[156] However, these basic principles are not the full extent of the obligations the Court has imposed on states. In the *Cotton Field* case, the Court applied much more detailed and practical standards, all of them taken from the Minnesota Protocol, concerning the way in which the responsible authorities should, 1.) manage, analyze and preserve the crime scene;[157] 2.) maintain and report on the chain of custody for each item of forensic

155 IACtHR *Zambrano Vélez et al. v. Ecuador (Merits, Reparations and Costs)*, 4 July 2007, para. 121.

156 These guidelines were listed in the original Minnesota Protocol, which was concluded in 1991. However, the revised version of the Minnesota Protocol, published in 2017, does not contain these guiding principles.

157 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, para. 301, stating that "regarding the crime scene, the investigators must, at the very least: photograph the scene and any other physical evidence, and the body as it was found and after it has been moved; gather and conserve the samples of blood, hair, fibers, threads and other clues; examine the area to look for footprints or any other trace that could be used as evidence, and prepare a detailed report with any observations regarding the scene, the measures taken by the investigators, and the assigned storage for all the evidence collected. The obligations established by the Minnesota Protocol establish that, when investigating a crime scene, the area around the body must be closed off, and entry into it prohibited, except for the investigator and his team.".

evidence;[158] 3.) conduct and report on autopsies;[159] and 4.) identify bodies and return them to the family of the victim after a positive identification has been made.[160]

Finally, the Court has made it clear that the standards from the Minnesota Protocol are applicable to investigations into all types of violent death, not only to cases concerning extrajudicial executions.[161] This position reflects a development in the Minnesota Protocol itself, which has recently been revised and expanded. The revised version is officially known as the Minnesota Protocol on the Investigation of Potentially Unlawful Death, which reflects the expansion of the scope of the standards contained in it.

In short, the IACtHR has relied on the Minnesota Protocol to give practical content to the very broad notion of 'due diligence' when applied to the collection and handling of forensic evidence in cases concerning (potential) violations of the right to life. These standards are especially important in the first stages of the investigations, which are vital to the effectiveness of the investigations as a whole. The IACtHR's reliance on the Minnesota Protocol in this respect has made the standards included in it binding on the states under the Court's jurisdiction.

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158 Idem, para. 305, stating that "the United Nations Manual indicates that due diligence in the legal and medical investigation of a death requires maintaining the chain of custody of each item of forensic evidence. This consists in keeping a precise written record, complemented, as applicable, by photographs and other graphic elements, to document the history of the item of evidence as it passes through the hands of the different investigators responsible for the case. The chain of custody can extend beyond the trial, sentencing and conviction of the accused; given that old evidence, duly preserved, could help exonerate someone who has been convicted erroneously. The exception to the foregoing is the positively identified remains of victims, which can be returned to their families for burial, on condition that they cannot be cremated and may be exhumed for new autopsies.".

159 Idem, para. 310, stating that "the purpose of an autopsy is, at the very least, to gather information to identify the dead person, and the hour, date, cause and form of death. An autopsy must respect certain basic formal procedures, such as indicating the date and time it starts and ends, as well as the place where it is performed and the name of the official who performs it. Furthermore, inter alia, it is necessary to photograph the body comprehensively; to x-ray the body, the bag or wrappings, and then undress it and record any injuries. Any teeth that are absent, loose or damaged should be recorded, as well as any dental work, and the genital and surrounding areas examined carefully to look for signs of rape. When sexual assault or rape is suspected, oral, vaginal and rectal liquid should be preserved, as well as any foreign hair and the victim's pubic hair. In addition, the United Nations Manual indicates that the autopsy report should note the body position and condition, including whether it is warm or cold, supple or rigid; the deceased's hands should be protected, the ambient temperature noted, and any insects present collected.".

160 Idem, paras. 313-324.

161 IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, para. 135, explaining that "this Tribunal has specified the guiding principles which should be observed in an investigation when confroted with a violent death […]. With respect to what has been alleged by the State, this Tribunal has noted in various cases that these principles should be observed by the responsible authorities regardless of whether the violent death can be qualified as an 'extrajudicial execution', which is not [the type of crime, HB] under analysis in the present case". [translation by the author]

4.2.2 *The obligation to investigate exhaustively and analyze all available information*

The principle of due diligence acquires a particular meaning when understood in light of the aims of criminal investigation, as determined by the IACtHR, to identify *all* those responsible for the human rights violations under investigation. From this angle, the principle of due diligence requires states to investigate the human rights violations in question exhaustively. This means that they should, on the basis of a thorough analysis of all available information, determine logical lines of investigation aimed at identifying the full circle of possible authors, both material and intellectual. [162]

This requirement has been developed by the Court in response to the many investigative 'blind spots' with which it has been confronted over the course of its case law. In the cases heard by the Court, judicial authorities regularly make choices which do not seem to be based on any rational investigative strategy, but which seriously limit the scope of their investigations and/or their chances of success. For example, in the case of *Gutiérrez and family v. Argentina*, the IACtHR examined the domestic investigations into the murder of a police commissioner who, at the time of his death, was investigating a case which was later revealed to be part of a massive corruption scandal. However, the Court noted that this corruption case was never seriously taken into consideration as a possible motive in the investigations into the police commissioner's death.[163]

Similarly, in its judgment in the case of *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, the Court considered the investigative strategy of the Guatemalan authorities upon the appearance of an important document called the Military Diary, which provides insight into the systematic practice of enforced disappearance executed by the Guatemalan military.[164] Here, the Court commented that it was "inexplicable" that the Prosecutor's Office decided to investigate each person described in the Military Diary individually, given that "[t]he complaint based on these cases was filed following the appearance of the Diario Militar […] and this document clearly reveals facts that are related, presumably committed under a chain of command, with a coordinated and common planning and execution".[165]

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162 *See for example* IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, paras. 162-164 and IACtHR *Edgar García and family v. Guatemala (Merits, Reparations and Costs)*, 29 November 2012, paras. 148-150.

163 IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, paras. 103-104.

164 The Military Diary provides an overview of some of the individuals who had been disappeared by the Guatemalan military during the internal armed conflict. Each entry in the Diary provides a picture of one of these individuals, a list of their activities, the date of their disappearance and the date of their execution.

165 IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 247.

As a third and final example, the Court noted in its judgment in the case of *The Massacre of El Mozote and nearby Places v. El Salvador* that the judicial authorities conducting the domestic investigations into the massacre did not, at any point, consult the report of the official Truth Commission installed after the internal armed conflict. Had it done so, it would have found a list of (some of) the military units involved in the operations in the relevant area and the commanders in charge of them, which could have provided indications as to the possible authors of the massacres.[166]

In each of these examples, the result of the seemingly illogical choices of the judicial authorities in charge of the investigations has been that certain categories of people have remained outside the scope of the domestic investigations, especially (high-ranking) state agents. It is in response to such situations that the Court has obligated states to investigate human rights violations exhaustively and with the aim of identifying all those responsible, both material and intellectual authors. Concretely, this requires the judicial authorities to 1.) use all available information; 2.) follow up on all logical lines of investigation; 3.) analyze the case in its historical and political context;[167] and 4.) identify systematic patterns and structures underlying human rights violations.[168]

The first of these requirements means simply that the authorities should use all relevant information for their investigation that is reasonably available to them. As the example of the *El Mozote* case makes clear, this includes information obtained through sources other than their own investigations, like truth commission reports. Moreover, the information taken from all these sources should be combined and analyzed together to maximize their utility. For example, the Court found in the case of the *"Diario Militar"* that:

> "the absence of a joint and interrelated study of the Diario Militar, the Historical Archive of the National Police, and the statements of the victims' families, among other matters, have led to the absence of significant progress in the investigation, which has resulted in its ineffectiveness and the consequent failure to identify and punish those who, in different ways, may have participated in the said violations. The Court emphasizes that the abundant documentary evidence (the Diario Militar and Historical Archive of the National Police) in the case file has appeared by accident or through unofficial channels, and thus it has not been

166 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 256.

167 *See for example* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 91 and IACtHR *Heliodoro Protugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 153.

168 *See for example* IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 247.

> the result of a serious and diligent investigation. Nevertheless, and even given this type of evidence, the competent authorities have continued not to adopt the necessary measures to take advantage of the information contained in this evidence or to follow up on the indications that emerge from it."[169]

In other words, the authorities should not only analyze all available information in order to identify logical lines of investigation, it should also combine different sources and materials and analyze them integrally, rather than consider each item in isolation.[170]

The second requirement means that the judicial authorities should thoroughly analyze the available information with an eye to identifying possible motives and hypotheses of authorship. Moreover, the judicial authorities should be willing to follow the logical lines of investigation wherever they may lead, also, and especially, if they point to the possible involvement of state agents. In the case of *Gutiérrez and family v. Argentina* described above, the Court noted, in respons to the lack of serious examination of the police commissioner's investigation of a large corruption scandal as a possible motive for his murder, that:

> "it is not incumbent on the Court to analyze the hypotheses on authorship developed during the investigation of the events and, consequently, to determine individual responsibilities, the definition of which corresponds to the domestic criminal courts. Nevertheless, the Court has stipulated that when the "facts refer to the violent death of a person, the investigation opened must be conducted in such a way that it can ensure the appropriate analysis of the corresponding hypotheses of authorship, in particular those that infer the participation of State agents."" [171]

In this case, the Court found that a proper investigation of the motives for the murder of the police commissioner would have alerted the investigators to certain 'theories of authorship' which were not examined in the domestic proceedings. Specifically, an investigation of the motives might have pointed to the involvement of state agents who were connected to the corruption scandal being investigated by police commissioner Gutiérrez.

Likewise, the Court has found that, in cases of human rights violations committed against human rights defenders, the investigations should examine whether the work of the human rights defender in question may provide a

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169 *See* IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 256.

170 *See also* IACtHR *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, 19 November 1999, para. 233.

171 IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, para. 102.

motive for the commission of violations against them.[172] For example, the case of *Acosta et al. v. Nicaragua* concerned the murder of the husband of a well-known human rights defender and the subsequent investigations conducted by the domestic authorities. The Court noted that throughout the investigations the work of the victim's wife had never seriously been examined as a possible motive for his murder, which resulted in incomplete investigations.[173] In this context, the Court, while noting again that it is not its place to determine suitable hypotheses of authorship, held that:

> "in this case, due diligence should be evaluated in light of the need to determine the veracity of the accounts or hypotheses of what happened, particularly when the alleged shortcomings in the proceedings carried out by the judicial authorities have had a decisive impact on the clarification of the circumstances of the case, the legal qualification of the facts or on the final result of the proceedings. […] The Court considers that, in cases of attacks against human rights defenders, States have the obligation to ensure that justice is done impartially, timely and with due diligence, which implies an exhaustive examination of all the information in order to design and execute an investigation aiming for the due analysis of the hypotheses of authorship, by action or omission, at different levels, exploring all logical lines of investigation towards identifying those responsible."[174] [translation by the author]

Thus, the failure by the domestic authorities to follow all logical lines of investigation and examine the full circle of possible authors of the crime in question led the Court to conclude that the investigations had not been conducted with due diligence.

In order for the judicial authorities to be able to identify all relevant lines of investigation in an individual case, the Court has ordered that cases of human rights violations should not be examined 'in isolation', but should be analyzed in their proper context.[175] As the example of the *"Diario Militar"* case described above makes clear, the artificial 'individualization' of cases which form part of a wider context is sometimes used a strategy to obscure the mechanisms and structures underlying the systematic practice of human rights violations. Such a contextual analysis requires the judicial authorities to investigate cases of human rights violations together with

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172 See for example IACtHR *Human Rights Defender et al. v. Guatemala (Preliminary Objections, Merits, Reparations and Costs)*, 28 August 2014, paras. 215-225 and IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, paras. 137 and 142-146.

173 IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, paras. 137 and 146.

174 Idem, paras. 142-143.

175 *See for example* IACtHR *Edgar García and family v. Guatemala (Merits, Reparations and Costs)*, 29 November 2012, para. 150 and IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 158.

other cases with which they have a direct connection.[176] Moreover, the obligation to conduct a contextual analysis also means that the individual case should be examined in light of the larger historical and political context in which it occurred. This is especially important for the investigation of cases involving grave human rights violations, which are often (but not necessarily) committed in situations of armed conflict or as part of a policy enforced by an oppressive regime.[177]

The Court articulated the need for a contextual analysis of the individual case particularly clearly in its judgment in the case of *Manuel Cepeda Vargas v. Colombia*. The case concerned the execution of a Senator Manuel Cepeda Vargas, one of the leaders of the *Unión Patriótica* ("UP"), a political party co-founded by a number of guerrilla organizations as part of an attempt to negotiate peace in Colombia in the 1980s. The execution of the material victim was part of a campaign of threats and violence by paramilitary organizations and certain elements of the Colombian military, in which thousands of members of the UP were killed between 1985 and 1994.[178] However, the domestic investigations into the death of Senator Cepeda Vargas did not

176 *See for example* IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 162, where the Court notes that, despite the fact that the Rochela massacre and the disappearance of the 19 Tradesmen were directly connected, this relationship was not taken into account by the Office of the Attorney General, which was responsible for the domestic investigations; IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, paras. 366-369, where the State rejected the 'individualization' of the investigations into the deaths of the victims and the State's argument that "the only common feature of the eight cases is that the bodies appeared in the same area", noting that "all the murders took place in the context of violence against women; and IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 247, where the Court found it "inexplicable" why the Prosecutor's Office decided to investigate each person found in the Military Diary individually, given that "[t]he complaint based on these cases was filed following the appearance of the Diario Militar (supra para. 166) and this document clearly reveals facts that are related, presumably committed under a chain of command, with a coordinated and common planning and execution.".

177 *See for example* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 91, noting that "neither the habeas corpus procedure nor the criminal proceedings took into account the characteristics of the reported facts, the situation of armed conflict affecting El Salvador at the time the facts under investigation allegedly occurred, or the different situations in which people who disappeared during the armed conflict when they were children have been found"; and IACtHR *Heliodoro Protugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 153, noting that the "political context"in which the disappearance of the material victim had occurred was not taken into account throughout the domestic investigations, and that doing so could have given indiciation as to the possible involvement of military intelligence officials in the planning and execution of the crime.

178 IACtHR *Manuel Cepeda Vargas v. Colombia (Preliminary Objections, Merits, Reparations and Costs)*, 26 May 2010, paras. 74-88. As the Court notes, there is no consensus over the exact number of members of the UP killed as part of this campaign. International bodies, including the UN High Commissioner for Human Rights and the Inter-American Commission of Human Rights have estimated the number to be 1500 or even higher.

take into account this larger context of violence against members of the UP. In relation to this, the Court noted that:

> "In complex cases, the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. […]
>
> As part of the obligation to investigate extrajudicial executions such as the one perpetrated in the instant case, the State authorities must determine, by due process of law, the patterns of collaborative action and all the individuals who took part in the said violations in different ways, together with their corresponding responsibilities. It is not sufficient to be aware of the scene and material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries). This, in turn, can lead to the generation of theories and lines of investigation, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime, since they may not be sufficient. Hence, it is not a question of examining the crime in isolation, but rather of inserting it in a context that will provide the necessary elements to understand its operational structure."[179]

Thus, when examining the historical and political context in which human rights violations are committed, judicial authorities should, in particular, focus on the systematic patterns and/or structures underlying their commission. The Court first imposed this obligation in the case of the *La Rochela Massacre v. Colombia*, where it held:

> "In context of the facts of the present case, the principles of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred. In addition, the proceedings should have ensured that there were no omissions in gathering evidence or in the development of logical lines of investigation. Thus, the judicial authorities should have borne in mind the factors indicated in the preceding paragraph that denote a complex structure of individuals involved in the planning and execution of the crime, which entailed the direct participation of many individuals and the support or collaboration of others, including State agents. This organizational structure existed before the crime and persisted after it had been perpetrated, because the individuals who belong to it share common goals."[180]

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179 IACtHR *Manuel Cepeda Vargas v. Colombia (Preliminary Objections, Merits, Reparations and Costs)*, 26 May 2010, paras. 118-119.

180 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 158.

In short, the study of the historical and political context in which the human rights violations under investigation were committed will alert judicial authorities to the existence of certain power structures underlying their commission. An analysis of those power structures will, in turn, enable the investigators to identify the individuals who were part of that structure and who, therefore, carry responsibility for the commission of the human rights violations. For this reason, the Court now consistently requires states to undertake such a contextual analysis as part of the obligation to investigate human right violations with due diligence.[181] In this way the investigation will benefit from the information already available concerning the historical and political context surrounding the commission of particular human rights violations, and at the same time contribute to the further development of the 'historical truth' and the fulfillment of the public's right to know that truth.[182]

4.2.3 The judge's obligation to guide the proceedings and avoid excessive formalism

The previous two section have focused mostly on the obligations of investigators and prosecutors in domestic proceedings concerning human rights violations, since the collection, handling and analysis of evidence is primarily their responsibility. However, the Court has made it clear that judges are also bound by the obligation to conduct the proceedings with due diligence. Like all other institutions involved in the investigation and prosecution of human rights violations, judges are obligated to take all necessary measures within their power to ensure the determination of the truth and the identification and punishment of those responsible. Taking into account their role and duties, the Court has determined that:

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181 See for example IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 256(a); IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, para. 194; IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 257; and IACtHR *Edgar García and family v. Guatemala (Merits, Reparations and Costs)*, 29 November 2012, para. 148-150.

182 In this context, the Court emphasized in the case of the *La Rochela Massacre* that "[i]n cases of grave violations of human rights, the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. These structures should not impose legal or practical obstacles that make them illusory. The Court emphasizes that the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities." IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 195. *See also* IACtHR *Case of the Members of the village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala (Preliminary Observations, Merits, Reparations and Costs)*, 30 November 2016, para. 212.

> "as the competent authority to lead the process, the judge has the obligation to conduct it in a manner that [takes] into account the reported facts and their context so as to manage the proceedings as diligently as possible in order to determine the facts and establish the corresponding responsibilities and reparations, avoiding delays and omissions when requesting evidence."[183]

This quote illustrates that the judge has to play his role in the investigative phase of the proceedings with due diligence, so as to ensure a swift and accurate determination of the facts of the case. Moreover, the Court has determined that the due diligence principle informs the way judges should operate throughout the proceedings and, particularly, how they should confront procedural obstacles which might arise at any stage. In this context, the Court takes the position that:

> "judges, in their capacity to guide the proceedings, have the obligation to manage and prosecute judicial proceedings *in a way that does not sacrifice justice and due process of law to formalism and impunity*; otherwise, this leads to the violation of the State's international obligation of prevention and to protect human rights, and violates the right of the victim and his or her next of kin to know the truth of what happened, that those responsible are identified and punished, and to obtain the corresponding reparations."[184] [emphasis added]

The criterion formulated here by the IACtHR has been developed and applied in response to two types of procedural obstacles: 1.) insistence on 'irrational formalities' which prevent the proceedings from moving forward; and 2.) abuse of process scenarios, where the defense uses the remedies at its disposal in such a way that the proceedings are unable to proceed.

The recent judgment in the case of *Acosta et al. v. Nicaragua*, concerning the murder of the husband of a well-known lawyer and activist, provides an example of the first of these two situations. As noted in the previous section, one of the main shortcomings of the investigations into the murder was that they did not take into account the possibility that it may have been motivated by the work of the wife of the material victim. Moreover, the judge overseeing the proceedings had ordered the definitive stay of proceedings against one person investigated as a possible intellectual author of the murder, overruling the prosecutor's requested for the continuation of the investigations against him. The wife of the material victim issued an appeal against this decision, which was accepted by the judge, under the condition that the claimant would present, within 24 hours, "the paper necessary to

183 IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 88.

184 IACtHR *Suárez Peralta v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 21 May 2013, para. 93, citing IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 211.

certify the documents and send them to the superior tribunal".[185] Upon expiration of that term, the judge concluded that the appellant had failed to present "the paper or a sum equal to the costs of the photocopies."[186] As a result, the judge declared the appeal to be void and the stay of proceedings remained in force.

The IACtHR found that the procedural rule requiring the appellant to provide the paper for photocopies of the file was baseless, as it served neither legal certainty, nor the administration of justice, nor the protection of individual rights.[187] Moreover, the Court questioned the way in which the judge had applied the rule in this particular case, noting that he could have done more to prevent that this formality would obstruct the appellant's access to justice.[188] In this context, the Court held that:

> "judges, in their capacity to guide the proceedings, have the obligation to guide and direct the judicial proceedings with the aim of not sacrificing justice and due process in favor of formalism and impunity. In this case, on top of imposing an economic burden on the victim of the crime, the Court considers that this requirement constitutes a mere formality which made it impossible for Mrs. Acosta to have access to justice to challenge nothing less than the procedural act which definitively removed the possibility of investigating an hypothesis about the participation of others [than the direct perpetrators, HB] as instigators of the crime against her husband. The State did not justify why the application of this norm was reasonably necessary for the proper administration of justice."[189] [translation by the author]

In other words, the IACtHR found that the domestic judge should have disregarded the procedural rule in question, giving preference to the appellant's interests and her right to access to justice. By not doing so, the judge contributed to the lack of diligence of the judicial authorities in investigating the possible involvement of certain persons as intellectual authors of the crime committed against the material victim.[190]

Similarly, the Court has established that judges should not allow the filing of large numbers of legal actions and remedies by the defense from becoming an obstacle to the progress and eventual completion of the proceedings. It first found to this effect in its judgment in the case of *Bulacio v. Argentina*, where a barrage of "diverse legal questions and remedies" filed

185 IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, para. 161. At the time of writing, the Acosta judgment is only available in Spanish. The Spanish original of this phrase reads: "el papel correspondiente para certificar diligencias y remitirlas al tribunal superior". The word "papel" has the double meaning of 'paper' and 'form'. From the context described here, I gather that the text refers simply to sheets of paper.

186 Idem, para. 161.

187 Idem, para. 163.

188 Idem, paras. 164-165.

189 Idem, para. 165.

190 Idem, para. 169.

by the defense had delayed the proceedings to such an extent that they were eventually declared extinguished without ever reaching a conclusion.[191] When confronted with this state of affairs, the IACtHR held that:

> "This manner of exercising the means that the law makes available to the defense counsel has been tolerated and allowed by the intervening judiciary bodies, forgetting that their function is not exhausted by enabling due process that guarantees defense at a trial, but that they must also ensure, within a reasonable time, the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.
>
> The right to effective judicial protection therefore requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights."[192]

Based on this reasoning, the Court ordered the domestic proceedings to be reopened, overruling the domestic courts' decision to declare it extinguished. The IACtHR upheld this reasoning in several later judgments, particularly in two important judgments against Guatemala, where abuse of the 'appeal for legal protection' (*amparo*) has become a standard tool for defense lawyers to derail and delay criminal proceedings against their clients.[193] In the first of these two judgments, in the case of *Myrna Mack Chang v. Guatemala*, the Court recognized that the abuse of the amparo remedy was partly the result of problems in the legislation regulating it. However, the Court found that judges were under the obligation to apply the law in such a way that the victims' right to access to justice and the state's obligation to prosecute and punish those responsible for human rights violations would not be unduly affected. In the words of the Court:

> "In the chapter on proven facts, lack of diligence and of willingness of the courts was demonstrated, as regards moving the criminal proceeding forward to elucidate all the facts pertaining to the death of Myrna Mack Chang and to punish all those responsible. The Court will not analyze here the actions of each of the courts that lacked due diligence […] but as an example it will only refer to the use of amparo remedies, the filing and processing of which led those in charge of the criminal proceeding to incur notorious delays in the instant case. […].
>
> [T]he Court calls attention to the fact that in the criminal proceeding under discussion, *frequent filing of this remedy, although permissible according to the law, has been tolerated by the judicial authorities*. This Court deems that the domestic judge, as a competent authority to direct the proceeding, has the *duty to channel it in such a manner as to restrict the disproportionate use of actions whose effect is to delay the proceeding*. Processing of the amparo remedies together with their respective

191 IACtHR *Bulacio v. Argentina (Merits, Reparations and Costs)*, 7 September 2001, para. 113.

192 IACtHR *Bulacio v. Argentina (Merits, Reparations and Costs)*, 7 September 2001, paras. 114-115.

193 IACtHR *"Las Dos Erres" Massacre v. Guatemala (Preliminary Objection, Merits, Reparations and Costs)*, 24 November 2009, paras. 108-121.

> appeals was, in turn, conducted without complying with the legal terms, as the Guatemalan courts took on average six months to decide each one. This situation caused a paralysis of the criminal proceeding.
>
> […]
>
> In light of the above, the Court deems that the judges, who are in charge of directing the proceeding, have the duty to direct and channel the judicial proceeding with the aim of not sacrificing justice and due legal process in favor of formalism and impunity. Thus, if the authorities permit and tolerate such use of judicial remedies, they turn them into a means for those who commit the illegal act to delay and obstruct the judicial proceeding. This leads to a violation of the international obligation of the State to prevent and protect human rights and it abridges the right of the victim and the next of kin of the victim to know the truth of what happened, for all those responsible to be identified and punished, and to obtain the attendant reparations."[194]

On the surface, it would seem strange for the IACtHR to order judges to limit the use of the amparo in criminal proceedings, being the most important remedy available in much of Latin America for the protection of human rights. The Court specifically addressed this seeming paradox in its judgment in the case of the *"Las Dos Erres Massacre v. Guatemala*, stating:

> "In this case the Court notes that the provisions that regulate the appeal for legal protection, the lack of due diligence and tolerance by the courts when processing them, as well as the lack of effective judicial protection, have allowed the abusive use of the appeal as a delaying practice in the proceeding. […]
>
> In light of the above, the Court believes that the appeal for legal protection is an adequate remedy to protect individuals' human rights, since it is suitable to protect the juridical situation infringed, as it is applicable to acts of authority that imply a threat, restriction or violation of the protected rights. However, in the instant case the current structure of the appeal for legal protection in Guatemala and its inadequate use have impeded its true efficiency, as it is not capable of producing the result for which it was conceived."[195]

The IACtHR thus emphasizes the importance of the amparo remedy and its utility in protecting the rights of the defendant in criminal trials. However, the improper regulation of that remedy in domestic law – leading to frivolous and even abusive appeals by defendants in criminal trial – and a lax attitude of judges in the face of such abusive appeals, may cause it to become an instrument for the obstruction of justice, rather than an instrument for the protection of human rights. In order to prevent this from happening, the Court has imposed on judges the obligation to respond to such frivolous and abusive appeals for amparo with due diligence, meaning that they should not allow them to delay the proceedings excessively. However,

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194 IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, paras. 203-211.

195 IACtHR *"Las Dos Erres" Massacre v. Guatemala (Preliminary Objection, Merits, Reparations and Costs)*, 24 November 2009, paras. 120-121.

the Court has not yet specified how exactly judges should restrict the use of a remedy which is available to the defense by law, or how to process such appeals in a way that does not obstruct the progress of the proceedings. Rather, it has left it to domestic judges and lawmakers to figure out these 'details'.

4.3 Obligation to impose a punishment proportionate to the gravity of the crime

As described above in the introduction to this section, the punishment of those responsible for human rights violations should be, according to the Court, one of the goals in light of which it will analyze the effectiveness of domestic proceedings. At the same time, the imposition of an appropriate punishment is, in itself an essential element of the obligation to investigate, prosecute and punish human rights violations. In fact, the Court suggested early on in its case law, in its judgment concerning the *"Street Children" v. Guatemala*, the complete lack of punishment of any of those responsible for the human rights violations in question is sufficient reason to conclude that the state has violated its obligations under the ACHR.[196]

Moreover, the Court requires, as a general rule, that the punishment imposed is proportional in light of the gravity of the human rights violation in question. Even where judicial authorities have succeeded in investigating those violations, identifying those responsible and successfully prosecuting them so that they gain a conviction against them, their work can still be undone by the imposition of a disproportionally light sentence, which would make the proceedings preceding the punishment illusory – and therefore ineffective – in retrospect. In the words of the Court:

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196 IACtHR *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, 19 November 1999, para. 228, saying: "If we confront the facts in this case with the foregoing, we can observe that Guatemala conducted various judicial proceedings on the facts. However, it is clear that those responsible have not been punished, because they have not been identified or penalized by judicial decisions that have been executed. This consideration alone is enough to conclude that the State has violated Article 1.1 of the Convention, since it has not punished the perpetrators of the corresponding crimes. In this respect, there is no point in discussing whether the defendants in the domestic proceedings should be acquitted or not. What is important is that, independently of whether or not they were the perpetrators of the unlawful acts, the State should have identified and punished those who were responsible, and it did not do so."
How exactly this statement relates to the Court's now standard position that the obligation to investigate, prosecute and punish is one of means, not results, is unclear. To be sure, the Court's finding from the "Street Children" case has remained a one-off. It should also be noted that this finding was done at an early stage of the development of the Court's case law on the obligation to investigate, prosecute and punish, when carefull scrutiny of domestic proceedings had not yet become part of the Court's standard practice. As a result, the Court could only judge domestic proceedings by their lack of results. In more recent cases, the Court can often identify so many serious shortcomings in the domestic proceedings that it does not need to rely on the lack of punishment alone to motivate its finding that the State has violated its obligations under the ACHR.

> "The imposing of an appropriate punishment duly founded and proportionate to the seriousness of the facts, by the competent authority, permits verification that the sentence imposed is not arbitrary, thus ensuring that it does not become a type of *de facto* impunity."[197]

A more complete statement on the requirement of proportionality of the punishment imposed on those responsible for (grave) human rights violations can be found in the case of the *La Rochela massacre v. Colombia*, where it held that:

> "With regard to the principle of proportionality of the punishment, the Court deems it appropriate to emphasize that the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events. The punishment should be the result of a judgment issued by a judicial authority. Moreover, in identifying the appropriate punishment, the reasons for the punishment should be determined. With regard to the principle of lenity based upon the existence of an earlier more lenient law, this principle should be harmonized with the principle of proportionality of punishment, such that criminal justice does not become illusory. Every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention."[198]

All in all, the principle of proportionality, as described here by the IACtHR, would seem to require the imposition of considerable prison sentences in cases concerning grave violations of human rights. However, the Court has never provided an exact indication of – or a minimum standard for – what it would consider to be a proportionate punishment.

Moreover, while it is thus clear that the IACtHR requires the impositions of a proportional punishment, case law on this element of the overarching obligation to investigate, prosecute and punish is relatively scarce. In many of the cases heard by the Court, the lack of an appropriate punishment for human rights violations arose because of a previous defect in the investigation and/or prosecution, as a result of which the case never reached the sentencing stage. In such cases, the IACtHR therefore did not discuss the issue of appropriate punishment directly. The issue has come up in a limited number of cases, in relation to one of the following two scenarios: 1.) the imposition of an 'alternative' punishment by the sentencing judge; 2.) the

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197 *See for example* IACtHR *Manuel Cepeda Vargas v. Colombia (preliminary objection, merits, reparations and costs)*, 26 May 2010, paras. 150-153, stating – amongst other things – that: "The imposing of an appropriate punishment duly founded and proportionate to the seriousness of the facts, by the competent authority, permits verification that the sentence imposed is not arbitrary, thus ensuring that it does not become a type of de facto impunity."

198 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 196.

imposition, post-conviction, of penitentiary benefits and other 'measures intended to suppress the effects of a conviction'.

In relation to the first of these two scenarios, there is some indication in the Court's case law that it might be more flexible with regard to the requirement of the proportionality of the punishment imposed for (grave) human rights violations, where an otherwise disproportionately light punishment is the result of a compromise reached in the context of peace negotiations necessary to end an internal armed conflict. The Court first discussed such a scenario, albeit indirectly, in its judgment concerning the *La Rochela Massacre,* in relation to the legality of the possible application of the Justice and Peace Law to the facts of that case. The Justice and Peace Law, which will be discussed in depth in Chapter 6, was adopted in the context of negotiations between the Colombian government and various paramilitary groups over the latter's peaceful demobilization. An important element of that law was the granting of 'alternative punishment', consisting of 5 to 8 years of imprisonment, to paramilitaries found guilty of committing grave violations of human rights in the context of the internal armed conflict in Colombia.

While the IACtHR emphasized the importance of proportionate punishment for grave human rights violations, it stopped short of declaring the Justice and Peace Law illegal under the ACHR. Since the Justice and Peace Law had been adopted only shortly before the Court issued its judgment and had not entered into operation, the Court found that it was too early to say whether the possible future application of this law to the case under its consideration would result in impunity.[199] Thus, by not declaring the alternative punishment provided for by the Justice and Peace Law to be disproportionate *per se*, the Court seemed to suggest its willingness to accept a lighter punishment, taking into account the particular circumstances surrounding the adoption of the Justice and Peace Law.

The issue of alternative punishment resurfaced in the Court's case law in its judgment in the case of *The Massacres of El Mozote and Nearby Places v. El Salvador*. Or, rather: in a much-debated separate and concurring opinion to that judgment, co-signed by a majority of the bench. As discussed above in section 2.2 of this chapter, the legislation passed by the Salvadoran parliament following the peace negotiations which ended the internal armed conflict, provided for a full and unconditional amnesty for crimes committed during the war. As a result, the judgment itself did not consider the issue of alternative and/or reduced punishment for grave human rights violations

199 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 191. Rather, the Court opted to "indicate, based on its jurisprudence, some aspects of the principles, guarantees and duties that must accompany the application of the [Justice and Peace Law, HB]". As part of these 'guidelines' for the application of the Justice and Peace Law, the Court provided its statement on the need for proportionate punishment, quoted on the previous page, *see supra* fn. 463.

following a negotiated peace. However, the concurring opinion did discuss this possibility in some detail, even though it had nothing to do with the particular case under the Court's consideration.

With regard to the tension between the state's obligation under the ACHR to investigate, prosecute and punish human rights violations on the one hand and the importance of achieving a negotiated peace on the other, the concurring opinion notes that the former is an "obligation of means and forms part of the obligation to guarantee" human rights, while the latter "introduce[s] enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace".[200] In other words, the obligation to investigate, prosecute and punish grave human rights violations is not absolute, as there are other important ways of guaranteeing human rights, like negotiating an end to a situation of armed conflict.

However, this does not mean, according to the concurring opinion, that states are therefore free to disregard the obligation to investigate, prosecute and punish completely at the negotiation table. Rather:

> "States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict. But [for transitional justice measures, HB] to be valid in international law, they must abide by certain basic standards relating to what can be processed and implemented in several ways, including the role of truth and reparation."[201]

The concurring opinion then went on to specify some of the basic standards which should be taken into account in order to ensure that the obligation to investigate, prosecute and punish and the victims' right to justice are not disproportionally affected. With specific regard to the importance of (proportionate) punishment, the concurring judges noted that:

> "[i]t can be understood that this obligation [to investigate, prosecute and punish, HB] is broken down into three elements. First, the actions aimed at investigating and establishing the facts. Second, the identification of individual responsibilities. Third, the application of punishments proportionate to the gravity of the violations. Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed."[202]

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200 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 26.

201 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 27.

202 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 28.

In other words, driven by the necessity of reaching a negotiated end to a situation of armed conflict, states may compromise somewhat on the requirement of imposing a proportionate punishment, but they should guarantee, at minimum that the facts are adequately investigated and that individual responsibility for grave human rights violations is determined. Then, the concurring judges noted, even more specifically, that states can consider imposing alternative punishments. In the words of these judges:

> "in the difficult process of weighing and the complex search for this equilibrium [between negotiated peace and the demands of justice, HB], routes towards alternative or suspended sentences could be designed and implemented; but without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the "perpetrators" and those who performed functions of high command and gave the orders."[203]

Thus, where the imposition of alternative punishment and/or suspended prison sentences is necessary in order to achieve peace at the negotiation table, the concurring judges are willing to accept them. However, when granting such benefits, transitional justice measures should take into account the position of the particular accused within the hierarchy of his or her armed group and his or her willingness to contribute to uncovering the truth of what happened during the armed conflict.

The legal status of these detailed considerations from the concurring opinion, is unclear. It should be noted that they go considerably beyond anything the IACtHR has so far established in any of its judgments. It is also remarkable that the considerations have no direct relevance to the facts of the *El Mozote* case and the amnesty provisions adopted by the Salvadoran parliament. Rather, the concurring opinion is widely considered to have been written to guide the peace process between the Colombian government and the FARC guerrilla group, which had recently started at the moment the judgment was delivered. As such, it has had a considerable impact, as will be discussed in depth in Chapter 6.

The second scenario in relation to which the IACtHR has discussed the obligation to impose an appropriate – and proportionate – punishment for human rights violations directly, is that in which measures 'intended to suppress the effects of a conviction' have been granted by the executive power post-conviction. In this context, the IACtHR has generally held that states should avoid applying such measures in favor of those convicted of grave human rights violations.[204] It first discussed this scenario in some detail in

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203 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 30.

204 *See for example* IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 263.

the case of the *Gómez Paquiyauri Brothers v. Peru*, which concerned the extrajudicial execution of two brothers, both minors, at the hands of the Peruvian National Police. Two of the material authors of the crime were eventually convicted and sentenced to 18 and 6 years of imprisonment. However, as the result of the application of penitentiary benefits, their imprisonment ended after 2 and 1 year(s) respectively. In response to this situation, the Court noted the following:

> "The Court will not analyze the penitentiary benefits established in Peruvian legislation nor those granted to Francisco Antezano Santillán and Ángel del Rosario Vásquez Chumo. However, without excluding any category of convicts, the Court deems that the State must carefully consider applying those benefits in cases of grave violations of human rights, as in the instant case, since granting them unduly may lead to a form of impunity."[205]

The disproportionally short term of effective imprisonment for the two material authors was one of the elements on the basis of which the Court eventually concluded that the state had violated its obligation to investigate, prosecute and punish under the ACHR. Likewise, in the case of *Cepeda Vargas v. Colombia*, the IACtHR noted the lax conditions of imprisonment of two of the material authors of the extrajudicial execution of the material victim and the substantial reduction of their prison sentence granted to them post-conviction. This combination of circumstances led the Court to conclude that the punishment of the material authors had become disproportionately light and that state had, therefore, "made an insufficient effort to prosecute and punish adequately serious human rights violations".[206]

The most obvious example of a 'measure intended to suppress the effects of a conviction' is, of course, the decision to grant pardon to a convict. Until recently, the IACtHR had not had the chance to make any direct finding on the legality under the ACHR of such a decision in favor of those convicted of committing grave human rights violations. It had, at times, noted in general that states should "refrain from resorting to amnesty, *pardon*, statute of limitations and from enacting provisions to exclude liability, as well as measures, aimed at preventing criminal prosecution or at voiding the effects of a conviction".[207] In May 2018, however, the Court delivered its first direct decision on the legality of pardons for those found guilty of

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205 IACtHR *Gómez Paquiyauri Brothers v. Peru (Merits, Reparations and Costs)*, 8 July 2004, para. 145.

206 IACtHR *Manuel Cepeda Vargas v. Colombia (preliminary objection, merits, reparations and costs)*, 26 May 2010, para. 154.

207 IACtHR *Gutiérrez Soler v. Colombia (merits, reparations and costs)*, 12 September 2005, para. 97. In other judgments, the Court did not refer explicitly to pardons, but noted that the stat should refrain from "using figures […] intended to suppress criminal prosecution or suppress the effects of a conviction". *See for example* IACtHR IACtHR *Serrano-Cruz sisters v. El Salvador (merits, reparations and costs)*, 1 March 2005, para.172 and IACtHR *Huilca Tecse v. Peru (merits, reparations and costs)*, 3 March 2005, para. 108.

grave human rights violations, which included its most elaborate discussion of the obligation to impose a proportional punishment to date.[208]

The decision concerned the highly controversial pardon 'on humanitarian grounds' granted by then president of Peru, Pedro Pablo Kuczynski, in favor of former head-of-state Alberto Fujimori, who had been convicted to 25 years imprisonment for his participation in grave human rights violations.[209] In its discussion of the decision to grant pardon to Fujimori, the IACtHR first reiterated the importance of the principle of proportional punishment in relation to "both the imposition of the punishment and its execution".[210] In this context, it stated that:

> "the international obligation to punish those responsible for grave human rights violations with a punishment that is appropriate in light of the gravity of the crimes committed, should not be unduly affected or become illusory during the execution of the sentence […]. As was indicated above […], the execution of the sentence is an integral part of the right of the victims of grave human rights violations and of their family members to have access to justice."[211] [Translation by the author]

This finding seems to indicate that, as a general rule, pardons should not be granted to those convicted of committing grave human rights violations. However, the IACtHR did not rule out entirely the possibility of granting a pardon on humanitarian grounds, even for this particular category of convicts. The Court's own case law firmly establishes that the state has a special duty of care for individuals who are deprived of liberty and, therefore, an obligation to safeguard their health and wellbeing and to ensure that the conditions of an individual's deprivation of liberty do not exceed "the level of suffering inherent in it".[212] Thus, when considering whether to grant pardon to an individual convicted of grave human rights violations, the state should balance its duty of care towards that individual with the victims' right to access to justice, and ensure that the latter is not unduly

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208 *See* IACtHR *Barrios Altos and La Cantuta v. Peru*, supervision of compliance decision, 30 May 2018. This decision is part of the IACtHR's supervision of compliance proceedings in relation to its previous judgments in *Barrios Altos* and *La Cantuta v. Peru*. The IACmHR and the victims' representatives argued that the pardon decision interfered with the state's compliance with the IACtHR's order to investigate, prosecute and punish the grave human rights violations committed in those cases and requested that the Court rule on the legality of the pardon decision under the ACHR.

209 As noted by the BBC, the pardon "was widely seen as part of a political deal". The pardon came only days after the president had avoided impeachment over a corruption scandal, thanks to the support of Peru's main opposition party, led by Alberto Fujimori's daughter, Keiko Fujimori. 'Peru court reverses ex-president Alberto Fujimori's pardon', *BBC*, 3 October 2018.

210 IACtHR *Barrios Altos and La Cantuta v. Peru*, supervision of compliance decision, 30 May 2018, p. 24, para. 46 [translation by the author].

211 Idem, p. 24, para. 47.

212 Idem, p. 25, para. 49.

affected by its decision.[213] Concretely, this means that the state should first take all other reasonable measures available to guarantee the well-being of the convict in captivity, and can only grant a pardon on humanitarian grounds as a last resort.[214] Moreover, the IACtHR held that the right of victims of grave human rights violation to have access to justice entails the right to appeal the decision to grant a pardon on humanitarian grounds and achieve judicial review of that decision, especially it is part of the discretionary power of the executive.[215] In the case at hand, the Court noted that the Peruvian constitution allowed for the possibility of judicial review of the president's decision to grant pardon to Alberto Fujimori, and that the domestic courts should undertake such a review taking into account the standards established by the IACtHR.[216]

In conclusion, the obligation to investigate, prosecute and punish entails a requirement that the punishment imposed on those responsible for human rights violations is proportionate to the gravity of their crimes. Disproportionately light punishment is regarded by the Court as a form of impunity and, therefore, a violation of the state's obligations under the ACHR and of the right of victims to have access to justice. Under normal circumstances, this principle of proportionality sees to require the imposition of prison sentences of considerable length. However, the Court has suggested, albeit indirectly, that it will be more flexible on this issue if the otherwise disproportionately light punishment is the result of peace negotiations necessary to end a situation of armed conflict. The principle of proportionate punishment also militates against granting pardon or other 'measures intended to suppress the effects of a conviction', as such measures could retroactively render the domestic proceedings illusory. The IACtHR does not entirely exclude the possibility of granting a pardon on humanitarian ground, even to those convicted of grave human rights violations, but such a decision can only be taken as a last resort and under strict conditions.

5 Conclusion

In the three decades since the *Velásquez Rodríguez* judgment, the IACtHR has slowly refined its jurisprudence on the obligation to investigate, prosecute and punish human rights violations ever further. Through constant confrontation with the many ways in which investigations and proceedings into such cases can be undermined and derailed, the Court has developed detailed standards addressed at several different state organs. This development has taken place along two main avenues: 1.) the obligation to remove

213 Idem, p. 26, para. 53.
214 Idem, pp. 25-26, paras. 50-52. The IACtHR further adds that a pardon on humanitarian grounds should always be granted 'duly' and should seek a legitimate aim.
215 Idem, pp. 26-27, paras. 54-58.
216 Idem, pp. 28-35.

all legal and practical obstacles maintaining impunity; and 2.) the obligation to investigate human rights violations effectively. Under the umbrella of these two dimensions of the obligation to investigate, prosecute and punish, the IACtHR has developed a number of very concrete obligations, which give practical content to the overarching obligation.

The doctrines falling under the obligation to remove all legal obstacles to investigation, prosecution and punishment of serious human rights violations are perhaps the most controversial aspect of the IACtHR's jurisprudence relevant to the fight against impunity. They include a number of very specific directions to the state's legislative organs – prohibiting them from adopting certain legislation (amnesty provisions), while obliging them to adopt others (specific crime definitions) – thereby limiting their freedom to regulate. Moreover, the IACtHR has also developed standards directing legislative organs and the judiciary to limit the operation of certain fundamental principles of criminal justice which aim to protect the interests of the accused, including prescription, the principle of *ne bis in idem* and the principle of legality. It should be noted, however, that these controversial standards only apply to cases of 'grave' or 'serious' human rights violations, a very limited category which – so far – only includes the crimes of enforced disappearance, extrajudicial execution and torture. In cases concerning these particular types of conduct, the gravity of the violations, the particular challenges involved in investigating and prosecuting them and the victim's right to justice all demand – according to the IACtHR – the interference with state sovereignty and the limitation to the rights of the accused.

The doctrines developed under the umbrella of the state's obligation to remove all practical obstacles maintaining impunity, on the other hand, relate to all violations of human rights. These doctrines are aimed more at the institutional context and seek to provide those responsible for conducting investigations and prosecutions of human rights violations with all the resources necessary to do their work. The doctrines elaborated by the IACtHR under this heading include the obligation of all state authorities to cooperate and assist in the collection of evidence, the obligation to punish state agents who obstruct the investigations and the obligation to protect those who participate in the proceedings. While these obligations may not be particularly problematic from a legal perspective, they do entail a considerable burden in terms of allocation of state resources.

Finally, the IACtHR has developed very detailed and demanding standards in relation to the state's obligation to investigate human rights violations effectively. Whereas the doctrines relating to the removal of practical obstacles maintaining impunity aim mostly to protect those conducting the investigations from external interferences, those relating to the effectiveness of the investigations seek to regulate the conduct of the responsible prosecutors and judges themselves. The IACtHR requires that the responsible authorities undertake investigations *ex officio*, impartially, with due diligence and within a reasonable time. The due diligence requirement has been interpreted by the IACtHR to include detailed standards on

the collection of evidence – taken from the UN's Minnesota Protocol – and on the direction and exhaustiveness of the investigation. In relation to the latter, the IACtHR requires the domestic authorities to follow all logical lines of investigation and analyze all the relevant evidence, taking into account the wider context in which the human rights violations occurred, with an eye to identifying possible underlying structures or mechanisms. This 'contextual analysis' is especially important where there are indications of the involvement of state agents. Ultimately, an investigation with these characteristics will lead to accomplishing the goal envisaged by the IACtHR for investigations into human rights violations: identification of *all* those responsible for the underlying human rights violations -both the material and the intellectual authors – and imposing an appropriate punishment.

4 Critiques of the fight against impunity and the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations

1 Introduction

The previous chapters have taken a detailed look at the jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish human rights violations, and situated it as both a response to the regional context from which it emerged and as part of a broader international fight against impunity. As a protagonist in that international movement, the IACtHR has pushed the boundaries of international human rights law with the aim of protecting both individual victims and society from structural impunity and further human rights violations. The Court's case law on the obligation to investigate, prosecute and punish, particularly its judgments in the case of *Velásquez Rodríguez* and *Barrios Altos*, have been praised by those supportive of the fight against impunity as representing important advancements towards a stronger protection and enforcement of international human rights. Others, however, have been far less favorable in their assessment of the same case law. This chapter will provide an overview of the most important critiques levelled against the IACtHR's jurisprudence and against the international movement against impunity more generally.

Some of the most outspoken critics of the IACtHR have questioned its interpretation methods and its universalist approach to international human rights law. In this vein, the IACtHR has been criticized for being overly activist and for not respecting the sovereignty of the states under its jurisdiction.[1] While such critiques are both interesting and important, they are somewhat separate from the focus of this study and will, therefore not be analyzed in detail. Instead, this chapter will focus on those critiques which relate specifically to the IACtHR's dedication to the fight against impunity and its implications for the protection of human rights – particularly those of the accused in criminal proceedings – in the region under its jurisdiction.

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1 *See for example* G.L. Neuman, 'Import, export and regional consent in the Inter-American Court of Human Rights', (2008) 19(1) *European Journal of International Law* 101-123; E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and anti-democratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695 and R. Gargarella, 'La democracia frente a los crímenes masivos: una reflexión a la luz del caso Gelman' (2015) 2 *Revista LatinoAmericana de Derecho Internacional*, available at < http://www.revistaladi.com.ar/numero2-gargarella/>, last checked: 25-09-2018..

Such critiques, it should be noted, are part of a wider debate about the proper relationship between human rights law and (international) criminal law. The starting point of this debate is the idea that the international movement against impunity has turned the traditional relationship between human rights law and criminal law on its head.[2] Whereas human rights have previously been thought of as a 'shield' protecting the individual from the overzealous application of the state's punitive powers, the struggle against impunity has turned them into a 'sword' for some individuals (victims) to wield against other individuals (those accused of human rights violations) by activating the state's punitive powers.[3] Because the critiques described in this chapter are part of a larger debate, not all of them have been directed exclusively against the IACtHR and its case law. However, even when these critiques take aim at other participants in the fight against impunity – including NGOs and the International Criminal Court – their logic can easily be extended to the IACtHR as well.

This chapter will discuss four of the main arguments which have been leveled against the fight against impunity and the IACtHR's role in it. Section 2 discusses the argument that the emergence of the fight against impunity has brought about a considerable shift in the focus of human rights activism, which has not been properly acknowledged or debated. Section 3 examines the argument that this shift affects the way human rights violations are understood and, more to the point, which human rights violations are important to the international community and which are not. Section 4 delves into the concern that the fight against impunity undermines respect for the rights of the accused. Finally, section 5 will analyze the meta-argument that the IACtHR's embrace of the fight against impunity leads to alignment with, and endorsement of, the state's repressive apparatus

2 *See for example* D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), p. 493.

3 *See* F. Tulkens, 'The paradoxical relationship between criminal law and human rights', 9 *JICJ* (2011), 577-595. Tulkens credits ICC judge Christine van den Wyngaert for the metaphor. However, the metaphor seems to have been around for decades and was used originally in relation to the Fourteenth Amendment to the U.S. Constitution. Zechariah Chaffee credits Justice Robert Jackson for introducing it and Robert K. Carr for developing it further, to the effect that: "The shield . . . is a negative safeguard. It enables a person whose freedom is endangered to invoke the Constitution by requesting a federal court to invalidate the state action that is endangering his rights. The sword is a positive weapon wielded by the federal government, which takes the initiative in protecting helpless individuals by bringing criminal charges against persons who are encroaching upon their rights." Z. Chaffee, 'Safeguarding fundamental human rights', (1959) 27(4) *George Washington Law Review* 519-539, pp. 525-526.

2 The 'turn to criminal law' and the diversion of the human rights movement

The first critique is based on the perception that human rights institutions' (and activists') embrace of the fight against impunity in the 1980s and 1990s, brought about a serious shift in the focus and direction of the human rights movement itself. On the one hand, this shift affects the tools employed by human rights activists and institutions in order to achieve human rights protection. According to Engle, Miller and Davis:

> "[w]hereas in an earlier era, criminal punishment had been considered one tool among many, it has gradually become the preferred and often unquestioned method not only for attempting to end human rights violations, but for promoting sustainable peace and fostering justice. The new emphasis on anti-impunity represents a fundamental change in the positions and priorities of those involved in human rights as well as transitional justice […]. With this shift, it has become almost unquestionable common sense that criminal punishment is a legal, political, and pragmatic imperative for addressing human rights violations."[4]

According to these authors, the movement against impunity thus understands criminal law as the most important tool for the protection of human rights. This notion is paradoxical, they point out, given the traditional focus of their field of law in relation to the criminal process. [5] Before the 1980s, criminal law was understood by most human rights lawyers as the state's main tool for the *violation* of individual rights, and the role of human rights law in relation to the criminal justice system was understood to be one of moderation and restraint.

Likewise, it has been noted that the fight against impunity and the 'turn to criminal law' affect the issues with which the human rights movement concerns itself. Françoise Tulkens, for example, relates the turn to criminal law to the "transition from a 'political conception of human rights', which favoured the defence of pro-democratic institutions and of the individual as a citizen participating in the political regime', to an 'individualistic conception of human rights', which in turn favoured the defence of 'individualistic values, the person and private property', entailing a 'radical reversal of

4 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p.1.

5 Idem and K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 17. See also F. Tulkens, 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577-595 and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), p. 420-422.

priorities'."[6] Engle, Miller and Davis, meanwhile, criticize the anti-impunity movement for focusing its attentions exclusively on acts of physical violence, while ignoring structural and economic inequality.[7] Likewise, Sarah Nouwens argues that by "[m]onopolizing the definition of injustice" the anti-impunity movement "quells advocacy to address less visible but more structural wrongs that have not been criminalized, for instance humiliating poverty and extreme inequality, the causes of which are located in the structure of the same international community in whose name 'international justice' is performed."[8]

A concrete example of how the fight against impunity has narrowed the focus and the toolbox of the human rights movement, can be found in the development of the debate on transitional justice and, particularly, the legality of amnesty provisions during political transitions. As noted by Karen Engle, as recently as the 1990s many human rights lawyers considered amnesty provisions to be not only perfectly legal, but even preferable to criminal prosecutions during times of transition. In her words:

> "the issue of whether truth commissions, international criminal institutions, or even amnesties offer the greatest promise for responding to mass atrocities was seriously debated among human rights advocates […] In what were often referred to as the "truth versus justice" and "peace versus justice" debates, "justice referred to criminal justice, and many considered that truth and peace might be incompatible with criminal punishment […]"[9]

Since then, the human rights movement has changed is attitude on transitional justice to such an extent, that "[t]oday, few human rights NGOs, courts, or scholars defend the legality of amnesties[…]."[10] The IACtHR's case law, particularly the *Barrios Altos* judgment, has played an impor-

6 F. Tulkens, 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577-595, p. 594, citing P. Poncela and P. Lascoumes.

7 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 6. *See also* K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 46, noting that "The turn to criminal law in his context arguably perpetuates biases against economic restructuring already inherent in the human rights framework. […] Given that neoliberalism depends upon and reinforces criminal law, in part to protect private property rights, the cards are stacked against any attempt to use criminal law to challenge neoliberalism. The aim of advocates is therefore to prevent excesses, rather than to restructure."

8 S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), p. 344.

9 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 25.

10 Idem, p. 24.

tant role in bringing about this change of heart.[11] According to some critical scholars, this strong rejection of amnesties is "more self-limiting than helpful",[12] because it "refuses to engage with the complex issues related to the implementation of human rights protection in concrete situations of regime change", and instead imposes an "inflexible, one-size-fits-all approach".[13] By limiting the debate to criminal justice only and removing amnesties from the human rights toolbox, the movement against impunity has not only narrowed and impoverished the debate on human rights, but also made it more difficult for states to reach a negotiated end to armed conflict.[14]

While the fight against impunity is thus a recent development and represents a paradoxical shift in the human rights movement's relation to criminal justice, this shift "has taken place with little systematic deliberation about the aims of criminal law or about its pitfalls".[15] In this context, critical scholars have noted the tendency of lawyers and activists to resort to a number of 'deflective' rhetorical strategies when pressed to explain their reliance on criminal law as a form of human rights protection.[16] Criminal prosecu-

11 Idem, pp. 28-36.

12 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 284.

13 F. Fernandes Carvalho Veçoso, 'Whose exceptionalism? Debating the Inter-American view on amnesty and the Brazilian case', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 186 and 205. In contrast, Fernandes Carvalho Veçoso sees amnesty laws as more contextually grounded tools, which take into account the full spectrum of interests at stake in the political transition and, thereby, "may allow a different discussion about human rights, as a discourse that may open space for political struggles".

14 *See for example* F. Fernandes Carvalho Veçoso, 'Whose exceptionalism? Debating the Inter-American view on amnesty and the Brazilian case', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016) and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 428-432 and 440-441.

15 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 17.

16 *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 68-94. Moyn identifies four deflective strategies employed to employed to prevent/deflect any inquiry into the justification of anti-impunity: promotion (the idea that accountability is a moral achievement that needs no defense), professionalism (the idea that international institutions involved in the fight against impunity provide "vocational experience" for lawyers), preservation (the idea that questioning anti-impunity weakens the already beleaguered international criminal courts) and 'victim's justice' (the idea that the application of criminal justice is the only way to provide meaningful reparation to victims of human rights violations). *See also* S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), pp. 327-351.

tions are, for example, often presented as necessary for the prevention of further human rights violations.[17] But most of all, critical scholars note, questions about the rationale for applying criminal justice are deflected by reference to 'the victims', a concept which refers not to individual persons but to "one monolithic category", which has become the "alfa and omega" of the movement against impunity.[18] And victims, it is assumed, invariably want criminal prosecution and punishment. This has led some to conclude that the necessity of applying criminal law in response to grave human rights violations has become a dogma, or even a form of "secular faith", the foundations of which are no longer seriously questioned.[19] Thus, any real debate about the necessity and utility of criminal trials in response to human rights violations and of possible alternatives to criminal prosecution becomes impossible.

What the 'deflective' strategies described here have in common, is that they rely on a denial of the political aspects inherent in the fight against impunity and in the human rights movement more broadly. Engle, Miller and Davis note that "anti-impunity discourse is often deployed in an attempt to construct a bulwark of law against politics, insisting that it can protect the former from the latter".[20] According to these critics, activists and institutions involved in the fight against impunity seek to present both the norms circumscribing criminal behavior[21] and their own work in applying those norms[22] as perfectly a-political. However, critics believe that this conception of the fight against impunity as an a-political undertaking obscures the "politics of selectivity" inherent in the selection of both the

17 *See* Immi Tallgren, 'The sensibility and sense of international criminal law', (2002) 13(3) *EJIL* 561-595.

18 S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), p. 340. See also *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 85-87.

19 *See* S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) The Cambridge companion to international law (Cambridge University Press, 2012), p. 343. *See also* Immi Tallgren, 'The sensibility and sense of international criminal law', (2002) 13(3) *EJIL* 561-595, p. 593.

20 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 5.

21 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 5-6, paraphrasing the reasoning offered for the a-political nature of international crimes and/or grave human rights violations by saying that "some acts are so violent and atrocious as to reach beyond politics" and that "amnesties, at least for certain crimes, are prohibited regardless of the trade-offs in a particular context"

22 *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 76, summarizing one of the deflective strategies used by activists and institutions involved in the fight agaist impunity as the idea that accountability is a "moral achievement *in spite* of and *against* politics" and that "interferences with anti-impunity […] are politics, but the Court [the ICC, HB] has none".

behaviors and the concrete cases to be prosecuted.[23] In the end, applying criminal justice is necessarily an act of power. Critics worry that presenting the fight against impunity as an a-political exercise and refusing to engage in critical debate about its object and purpose obscures the "hegemonic" tendencies of the movement itself,[24] while also blinding it to the possibility of abuse by politically savvy domestic operators, who seek to manipulate the movement for their own political gain.[25]

3 Individualization and decontextualization of human rights violations

In close connection to the previous point, critics have noted that the human rights movement's reliance on criminal trials to address grave and complex human rights violations affects its very understanding of such violations and their causes. According to Immi Tallgren, the focus on individual responsibility, which is inherent in the criminal process "reduces the perspective of the phenomenon to make it easier for the eye. Thereby, it reduces the complexity and scale of multiple responsibilities to a mere background."[26] Thus, in order to fit the mold of the criminal trial, human rights violations are *individualized* and, thereby, *decontextualized*. Karen Engle notes that this individualized and decontextualized view of human rights violations "affects the human rights movement's understanding of the world and it affects its strategies and ability to attend to underlying structural causes of human rights violations", because "[i]n obscuring state responsibility, it misses the ways in which bureaucracy functions – even through individual actors – to perpetuate human rights violations".[27]

Critics have further observed that the anti-impunity movement has placed on lawyers and judges "the heavy burden of narrating history through

23 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 7-8, noting that "[o]ne way that law functions as politics is by calling our attention to some things while distracting us from others, including the productive or distributive nature of law itself.".

24 *See* M. Koskenniemi, 'International law and hegemony: a reconfiguration' (2004) 17(2) *Cambridge Review of International Affairs* 197-218, p. 210 and S. Nouwen, 'Justifying justice', in: J. Crawford and M. Koskenniemi (eds.) *The Cambridge companion to international law* (Cambridge University Press, 2012), p. 341.

25 *See* S. Moyn, 'Anti-impunity as deflection of argument', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 87-88 and K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 47-48.

26 Immi Tallgren, 'The sensibility and sense of international criminal law', (2002) 13(3) EJIL 561-595, p. 594.

27 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 44.

trials and judicial opinions".[28] At the same time, however, the inherent individualization and decontextualization make criminal trials an inadequate tool for fulfilling this important truth-finding function. In the words of Karen Engle, the "refusal to take into account context […] distorts the very search for "truth" on which human rights advocates base their defense of the trials".[29] Likewise, Martti Koskenniemi observes that "the truth is not necessarily served by an individual focus", because "the meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes, such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects."[30] Therefore, he believes that criminal trials may obscure, rather than reveal, historical truth "by exonerating from responsibility those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created".[31]

Finally, Koskenniemi notes that this distortion of historical truth is not neutral or coincidental, not simply the result of the technical exercise of applying criminal procedure to a complex case. Rather, the selective emphasis on some aspects of the larger context over others serves to canonize the version of history that best suits those who possess the power to conduct criminal trials. According to Koskenniemi:

> "criminal law itself always consolidates some hegemonic narrative, some understanding of the political conflict which is a part of that conflict itself […] To focus on individual guilt instead of say, economic, political or military structures, is to leave invisible, and thus to underwrite, the story those structures have produced by pointing at a scapegoat."[32]

In short, scholars critical of the fight against impunity, and the IACtHR's role in it, believe that the human rights movement's unreflective turn to 'anti-impunity' has weakened the human rights movement in several ways. 'Deflective rhetorical strategies' employed to justify this turn seek to depoliticize the fight against impunity and thereby blind activists and international institutions to the political aspects of their work. This depolitization also contributes to a narrowing of the human rights agenda, which is now focused mostly on physical violence and disregards other types of violations, especially those of economic and social rights. Finally, the individualization and decontextualization inherent in criminal trials affects

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28 K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 9.

29 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 44.

30 M. Koskenniemi, 'Between impunity and show trials', (2002) 6 *Max Planck Yearbook of United Nations Law* 1-35, pp. 13-14.

31 Idem, p. 15.

32 M. Koskenniemi, 'International law and hegemony: a reconfiguration' (2004) 17(2) *Cambridge Review of International Affairs* 197-218, p. 210.

human rights advocates' understanding of the nature and causes of grave and complex human rights violations and undermines the utility of such trials as tools for establishing historical truth.

4 The fight against impunity as a threat to the rights of the accused

A third strand of scholarly criticism of the fight against impunity, and of the obligation to investigate, prosecute and punish human rights violations developed by the IACtHR, concerns the possibility that this movement might undermine some of the most fundamental principles underlying modern, liberal systems of criminal law, particularly those ensuring the protection of the rights of the accused from the repressive powers of the state. In the words of Mégret and Calderón, "there is a risk that the more repressive strand in human rights law may today encroach excessively on the concern with limiting states' and the international community's ambition to wield a repressive stick".[33]

Some scholars have addressed this critique primarily at the practice of international criminal tribunals and their use of interpretative techniques favoring the prosecution. Darryl Robinson, for example, has expressed concern about the emergence of 'illiberal doctrines' in the case law of those tribunals, without serious discussion or objection from academia and civil society, as a result of the application of "familiar and cherished assumptions and techniques" from the human rights field.[34] According to Robinson, the differences in focus and orientation between human rights law and criminal law mean that principles which are considered liberal in human rights proceedings, can have illiberal effects when applied in the context of a criminal trial. Thus, he observes,

> "[m]any traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are amongst the most strident pro-prosecution voices, arguing for broad definitions and modes of liability and for narrow defences, in order to secure convictions and thereby fulfil the victim's right to justice".[35]

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33 F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), p. 438.

34 D. Robinson, 'The identity crisis of International Criminal Law' (2008) 21(4) *LJIL* 925-963, pp. 930-931.

35 Idem, p. 931. Further on in the same article Robinson describes three concrete problems which have arisen as a result of this collision between human rights liberalism and the reality of the criminal trial, the first of which he calls 'victim-oriented teleological reasoning which, he says, "conflates the 'general justifying aim' of the criminal law system as a whole – which may be a utilitarian aim of protecting society – with the question of whether it is justified to puish a particular individual for a particular crime." Idem, pp. 933-946.

However, the critique that the victim-centered orientation of the fight against impunity threatens to undermine the protection of the right of the accused has by no means been limited to the practice of international criminal courts. The same worry has been voiced in relation to the jurisprudence of human rights courts. In this context, Françoise Tulkens, has noted that the in recent years the balance between the protection of the human rights of the accused and those of the victim has been turned on its head, and that human rights activists and human rights courts have played an important role in this development. In her words:

> "it is not simply a question of noting the legitimate existence of the other side of the balance [the victim's side, HB]; we should consider whether taking that other side into account does not frequently result nowadays in our forgetting that there are two sides to the balance and upsetting the necessary equilibrium between them. In this respect, it has been possible to speak of a 'turnaround in human rights', or a Copernican revolution, and to refer to the undermining of the 'shield' function and the extension of the 'sword' function of criminal law."[36]

Several Latin American scholars have expressed similar concerns with specific regard to the jurisprudence of the IACtHR and its endorsement of the victim's right to justice.[37] Felipe Basch, for example, has expressed concern that the IACtHR's case law on the duty to prosecute – or, as he labels it: the duty to punish[38] – challenges "what might be the core of Western society's constitutionalism: a higher protection of defendants' rights as opposed to states' or victims' interest in punishment".[39] Specifically, concerns have been raised about the IACtHR's doctrines regarding the state's obligation to remove legal obstacles maintaining impunity, including its limitation of

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36 F. Tulkens, 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577-595, p. 593.

37 *See for example* D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114; F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229; J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884; and E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695.

38 *See* F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229. Basch is not the only scholar to reframe the duty to prosecute in this way. Jesus-Maria Silva Sanchez similarly reframes the victim's right to justice as the 'victim's right for the perpetrator to be punished'. *See* J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884.

39 F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 216.

the operation of provisions on prescription,[40] its "cavalier attitude towards *non bis in idem*"[41] and its approach to the principle of legality in cases of enforced disappearance.[42]

While several of these critical scholars recognize that the rights of victims and those of the accuses are not mutually exclusive, they have expressed concern that the broad language in which the Court has framed its jurisprudence may lead to negative consequences for the latter.[43] Daniel Pastor takes an even stronger stance, and warns that the road taken by the IACtHR through its jurisprudence on the duty to prosecute and the victim's right to justice will eventually lead to a complete abolition of any meaningful protection of the rights of the accused.[44] In Pastor's reasoning, the modern, liberal system of criminal justice has not been developed to protect the interests of the victims of criminal acts. In fact, it does not recognize victims as bearers of human rights in the context of criminal proceedings.[45] In the words of Pastor:

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40 *See for example* F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 432-436.

41 Idem, p. 437. *See also* M. Zili, F. Girão Monteconrado and M.T. Rocha de Assis Moura, 'Ne bis in idem e coisa julgada fraudulenta – a posição da Corte Interamericana de Direitos Humanos', in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II* (Konrad Adenauer Stiftung, 2011), pp. 406-409 and D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II* (Konrad Adenauer Stiftung, 2011), p. 499.

42 *See for example* J.L. Guzmán Dalbora, 'El principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 187-189.

43 *See* F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 213 and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 438-440.

44 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), pp. 505-506.

45 *See also* J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884, p. 879, arguing that "public criminal law has historically intended to neutralize the victim".

> "The [Inter-American, HB] Court has developed a monolithical jurisprudence according to which international crimes, but also other "grave violations of human rights", should be punished by the competent States without consideration of certain legal limitations. […] In this way, it has developed a penal ideology which, in the case of international crimes (and other grave violations of human rights) takes into account exclusively the good reasons for [applying, HB] criminal justice, the valid expectations of those affected that the punishment of those responsible will be achieved (the *victim's perspective*) but which consistently undervalues the human rights of the accused […] But this ideology, which may be valid in itself, ignores the fact that human rights were not created to serve the victim of a crime; this is not its purpose and, as a result, the victim is not mentioned even once in the catalogues of these rights, an elemental fact which reminds us that the aspects of the criminal law which make reparation to the victim (investigation, prosecution, punishment) *are public function*s and that in the area of criminal law, the only addressee of human rights is the accused."[46] [Translation by the author]

Moreover, Pastor argues that it impossible under the current criminal law system to protect both the rights of the accused and those of the victim, because "each right awarded to the victim necessarily implies to suppress a right of the accused".[47] Given this absolute contradiction between the rights of the accused and the rights of victim, Pastor considers that the rights of the accused should prevail, no matter the nature of their crime or their position in society or in the state apparatus. After all:

> "once he has transformed into the suspect of a crime, he is the one who faces the punitive power of the State, while the victim only faces individuals, even when those individuals, when committing the crime, were abusing state powers or utilizing other state apparatuses. What is decisive is that they are now defendants and that the fundamental rights, both under material and procedural criminal law, can only work in one direction, in such a way that it is not possible for constitutional law to have as its mission to prevent the abuse of punitive power and, at the same time, insist on the obligation to prosecute and punish crimes."[48] [Translation by the author]

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46 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), pp. 492-494.

47 Idem, pp. 500-502. *See also* E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695, pp. 681-684, arguing that the IACtHR is developing an (unwritten) "statute of the victim", based on the victim's "super-right to justice", which stands in opposition to the "statute of the accused" which is enshrined in the ACHR.

48 D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114, para. 3.1.

For Pastor, continuing on the road taken by the IACtHR through its protection of the victim's right to justice would be to return to a pre-modern system of criminal law, based on the right of the victim to have revenge and the state's unchecked obligation to provide that revenge for the victim.[49]

5 The fight against impunity as alignment with the state's repressive powers

Perhaps the most cutting critique of the fight against impunity, and one that seems to cut across the other arguments which have been discussed thus far in this chapter, is that it leads activists and human rights institutions to align themselves with the state and its repressive apparatus. That is to say: to align themselves with the very thing the human rights movement has traditionally defined itself in opposition against. Karen Engle, for example, has been very explicit in articulating this critique, which she directs primarily at domestic human rights activists. In her words:

> "When local human rights NGOs spend time and resources promoting prosecutions, they often align themselves with the state. From feminists advocating for the enforcement of anti-trafficking legislation to indigenous groups helping to strategize and participate in the prosecution of former military leaders who targeted them for extermination, human rights advocates are often dependent upon the very police, prosecutorial and even adjudicatory apparatuses of which they have long had reason to be suspicious."[50]

This alignment with the 'adversary', Engle implies, should in itself be enough to give any human rights activist pause. However, it is not (only) deemed wrong on principle. Critics have pointed to two particular and concrete negative effect that this alignment may have. Firstly, Engle has pointed out that alignment with the "carceral state" on certain issues "cannot help but affect" the ability of human rights activists to, at the same time, "mount a serious criticism of mass and brutal incarceration and the biases we see in nearly every penal system in the world".[51] Thus, alignment with the state's repressive apparatus may lead human rights activists and, by extension of that logic, the IACtHR, to 'go soft' on that apparatus and neglect to fulfill their primary function of calling out its abuses.

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49 Idem, para. 4. *See also* E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695, p. 695 and J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884, p. 879.

50 K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), p. 47.

51 Idem, p. 48.

Secondly, critics have noted that the alignment of human rights activists and institutions with their repressive apparatus may embolden states in using it, and may thereby lead to further abuses. According to Engle, anti-impunity advocacy sometimes "encourages states to overreach in their investigations, prosecutions, and punishments", by creating a "culture of 'results' that could have catastrophic consequences for the rights soundness of the criminal justice system".[52] Likewise, but directed specifically at the jurisprudence of the IACtHR, some scholars have expressed concern over its promotion of the victim's right to justice, which includes, it is feared, their "right to punishment".[53] Such a right, "if touted a little too freely may encourage a sort of "culture of conviction" in which […] it becomes harder to constrain the state's repressive urges".[54] Pastor, even more outspoken in his critique of the IACtHR, believes that:

> "The judgments of the Inter-American system, by ordering the State's obligation to investigate, prosecute and punish […] have given the punitive power what it most desires: not only a reason to punish, but the order to punish. Any student of the lessons of the history of punitive power knows that this is tantamount to saying that, in order to protect the security of its inhabitants, the guardian must hand the keys of the house over to the robbers. Under the pretext of tending to the legitimate rights of victims, the judgments of the Inter-American system for the protection of human rights has only invented leaking dikes to the punitive power of the State. That these are dressed as "obligations" of the State, which are the flipside of the "rights" of victims, is child's play: to the executioner it does not matter whether his act is deemed an obligation or a right, as long as the consequence is that it provides him with the absolute freedom to do what he likes most: to cut off heads."[55] [Translation by the author]

Such warnings not to feed the repressive appetites of the state have to be understood against the background of certain developments taking place in the late 1990s and early 2000s – just as the IACtHR's jurisprudence on the duty to prosecute was accelerating – that indeed show a worrying tendency

52 Idem, p. 47.

53 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009) pp. 280-285 and F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 438-439.

54 F. Mégret and J.P.S. Calderón, 'The move towards a victim-centered concept of criminal law and the "criminalization" of Inter-American human rights law', in: Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia, 2015), pp. 438-439.

55 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), p. 501.

on the part of states to seek to free themselves of the restrictions on their punitive powers. On the global level, the 'war on terror' initiated by the U.S. after September 11th 2001 led even the most established rule-of-law states to resort to legal maneuvering in order to avoid having to provide the usual legal protections to those accused of terrorism.[56] Regionally, Latin American governments had been invoking the fight against organized crime, particularly drug cartels, to gradually relax the limitations on their repressive powers. Several countries have adopted far-reaching law and order policies, known as '*mano dura*' ('firm hand') in Latin America, eliminating certain rights and protections of those accused of participation in criminal organizations.[57] Critical scholars have classified such developments as expressions of a 'neo-punitivist' perspective on the part of the governments of the region, meaning "the messianic belief that punitive power can and must reach all corners of social life".[58]

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56 Felipe Basch explicitly questioned whether the IACtHR's doctrine of the duty to prosecute could be used to justify the excesses committed by the U.S. in the context of the war on terror. *See* F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 221, fn. 98, saying: "I wonder, if the United States were a party of the American Convention on Human Rights, how hard would it be to frame the atrocities committed by U.S. officials in the prisons of Aby Ghraib and Guantanamo Bay, or the restriction of detainees' rights as necessary to comply with the duty to punish doctrine? Is it not possible that the United States could claim its actions were required in order to comply with its international duty prescribed by the Inter-American Court of Human Rights to remove "any legal obstacle or institution"impeding punishment?"

57 Daniel Pastor explicitly links the development of such laws to the jurisprudence of the IACtHR on the duty to prosecute and the victim's right to justice. *See* D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), p. 485, saying: "Thus [through the IACtHR's judgments in cases of grave human rights violations, HB], the victim's right to an investigation of the facts has appeared on the scene, their right to the truth, […] to have the guilty party convicted quickly and to have no circumstance stand in the way of the realization of the proceedings and of the application of the appropriate punishment. All of this may even be welcomed, especially since it implies in almost all cases that justice is done in respect of the most severe crimes which have historically been relegated to the most perverse impunity, but it is clear that it has nothing to do with the *ideología penal* which justifies the origins and the existence of the human rights in the face of repressive state apparatuses [the understanding that human rights exist to protect those accused of crimes, HB], as a result of which these judgments have imposed a punitive power of "mano dura" or "zero tolerance", which is incompatible with all systems of fundamental human rights, whether national or international."

58 D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114, para. 1.

In academic circles, meanwhile, scholars were debating the merits of the concept of a 'criminal law of the enemy' (*Feindstrafrecht*), proposed by German legal scholar Günther Jakobs. Jakobs' theory[59] proposes the development of two separate systems of criminal law, one applying to 'citizens' or 'legal persons', and one applying to 'enemies'. The system of criminal law – if it can still be qualified as such – applicable to 'enemies' would be characterized by prevention, extensive criminalization and the limitation of procedural guarantees.[60] Jakobs characterizes as 'enemies' those individuals who have "permanently turned away from the law" in one of three ways: through their disposition (i.e. sexual offenders), through their 'employment' (i.e. drug traffickers), or, most importantly, through their participation in a criminal organization (i.e. members of terrorist organizations or organized crime groups).[61] Unsurprisingly, this concept of a 'criminal law of the enemy' sparked an intense debate among legal scholars, both in Europe and in Latin America. In Latin America, this debate carried a particular urgency, as the concept of a 'criminal law of the enemy' was seen to give academic legitimacy to the worst punitivist tendencies of the regions' governments.

Against this background, the jurisprudence on the duty to prosecute has been interpreted by some critical scholars as embodying not only an alignment of the IACtHR and the IACmHR with the state, but also with the state's punitivist, '*mano dura*' policies, and even as promoting a form of 'criminal law of the enemy'.[62] Felipe Basch, for example, has argued that,

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59 Frank Saliger explains that Jakobs introduced the term "criminal law of the enemy" in 1985 as a descriptive term, meant to reflect – and perhaps even to criticize – the growing tendency of the German legislator to criminalize inchoate acts and even *attempts* to participate in the preparation of certain crimes. It was not until many years later, around the turn of the century, that Jakobs started using the term *Feindstrafrecht* as a normative rather than a descriptive turn. However, Saliger also notes that Jakobs himself, being a "*Hegelianer* and, therefore, a holist" does not concern himself with this distinction between the descriptive and the normative aspects of his concept. *See* F. Saliger, 'Feindstrafrecht: kritisches oder totalitäres Strafrechtskonzept?', (2006) 61(15/16) *JuristenZeitung* 756-762, p. 757.

60 Idem, p. 758.

61 Idem.

62 *See for example* D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114; F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229 and D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011); and E. Malarino, 'Judicial activism, punitivism and supranationalisation: illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights', (2012) 12 *International Criminal Law Review* 665-695.

as a result of the IACtHR's jurisprudence on the duty to prosecute, "two categories of defendants" will have to face justice in the countries under its jurisdiction: those accused of crimes constituting a breach of the ACHR and those accused of other, 'normal' crimes. And "[w]hile the latter group would enjoy the full exercise of their right to a defense and every other guaranty [sic] under the due process of law, the former would not".[63] Basch' main concern with the duty to prosecute does not seem to be the IACtHR's case law itself, but its potential for abuse by repressive governments. Thus, he warns that the duty to prosecute is stated in such broad terms that it "is applicable not only for state crimes, but also for common crimes" and can therefore easily be abused by governments as a "free ride to combat crime".[64]

Daniel Pastor, on the other hand, worries that the IACtHR's case law itself willingly creates a category of defendants that should be considered an 'enemy' and has to be punished at all costs. In his words:

> "The metamorphosis happens when the Inter-American system is confronted with cases of international crimes or other grave violations of human rights. Here, it seems as if the Inter-American system changes its constitution, as the extensive and express rights of the accused are devaluated and overtaken by the rights of the victims […]"[65]

According to Pastor, those accused of grave human rights violations are thus the new 'enemy' under the IACtHR's case law and, therefore, undeserving of protection of their procedural rights. Their enemy status is exacerbated by the elevated status of their 'opponents' – victims of grave human rights violations and human rights defenders – and of the rules they are accused of breaking. Human rights are, after all, recognized as universally

63 F.F. Basch, 'The doctrine of the Inter-American Court of Human Rights regarding states' duty to punish human rights violations and its dangers', (2008) 28(1) *American University International Law Review* 195-229, p. 218.

64 Idem, p. 221. It should be noted that Basch' warning was written before the IACtHR adjusted its course and made the most invasive aspects of the duty to prosecute doctrine applicable only to grave human rights violations, i.e. extrajudicial executions, enforced disappearance and torture, as discussed above in Chapter 2, Section 4.

65 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011).

good.[66] But, Pastor warns, the moral appeal of human rights defenders and victims of human rights violations should not blind us to the fact that those accused of grave human rights violations are still human beings – vulnerable like any human being before the state's punitive powers – and that they should be protected accordingly. In his words:

> "If […] we would have to accept a special legal regimen for excellent victims and very unpopular accused, it would be better to not have any law. Luckily, this is not true in our current legal culture, which, through the law, establishes that each victim is a victim and that each accused is an accused. […] As Ferrajoli already said: the criminal law of a rule-of-law state does not distinguish between friends and enemies, but between guilty and innocent.
>
> So far, it could be said that this is all very obvious, and that no one is proposing to eradicate impunity and realize justice by violating the human rights of the accused […] But, in reality, when the objectives of criminal justice are so high-minded, as is the case with international crimes and other grave violations of human rights, it becomes difficult to maintain this balance and protect the accused from any violation of his rights."[67]

Thus, Pastor concludes, in order to protect the modern criminal law system, based on respect for the autonomy of the accused and protection of their rights, and to prevent the imposition of a 'criminal law of the enemy', the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish and the victim's rights to justice has to be rejected completely.[68]

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66 Pastor summarizes the (self-)perception of human rights, and human rights defenders, in the following way: "At the beginning of all things are these words: "human rights"; they sound good, so they have to be good. […] [W]hen someone presents themselves and says: "I work in human rights", there is no place for any ambiguity whatsoever: this person is someone admirable, honest, respectable, fair, solidary, concerned with the well-being of all, prepared to sacrifice himself to defend justice and the rights of others. In short, an exceptional and extraordinary being, the pride of their family and admired by both sexes. […]" D.R. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', (2005) 1 *Nueva Doctrina Penal* 73-114, para. 4. *See also* J.M. Silva Sanchez, 'Doctrines regarding the fight against impunity and the victim's rights for the perpetrator to be punished', (2008) 28(4) *Pace Law Review* 865-884, pp. 865-866, arguing that the doctrines regarding the fight against impunity are 'highly prominent in both academic and forensic circles, as well as in public opinion" and that this "good reputation is largely due to the specific field in which they have been formed – crimes against humanity […] and, lastly, to the source from which they have been drawn, international treates for the protection of human rights."

67 D.R. Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos ¿garantías para el imputado, para la víctima o para el aparato represiva del estado?, in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – tomo II (Konrad Adenauer Stiftung, 2011), pp. 484-486.

68 Idem, pp. 505-506.

6 Conclusion

The Inter-American Court of Human Rights has been a protagonist in the international movement against impunity, which emerged in the late 1980s and has come to occupy an important place in international policy, scholarship and activism. While its core mission – to provide justice for the most serious violations of the most basic human rights – may seem uncontroversial, it has recently become the object of serious academic debate. And with it, so has the Inter-American jurisprudence discussed in the first two chapters of this study. This chapter has summarized four important critiques of both the IACtHR's case law on the obligation to investigate, prosecute and punish human rights violations and the international movement against impunity of which it is part.

Firstly, the argument that the unreflective turn to 'anti-impunity' on the part of many human rights lawyers has unduly narrowed the human rights agenda and limited their toolbox. Rather than considering criminal justice one tool for ensuring human rights protection among many, and a tool of last resort at that, human rights lawyers have come to see it as their most important tool. Similarly, where physical violence used to be one issue among the many to which human rights lawyers dedicated their attentions, it has now become their main focus. In response to critical questions, the proponents of the fight against impunity use deflective rhetorical strategies to justify their narrow focus on physical violence and criminal justice. In short, these deflective strategies seek to present the fight against impunity as a legalistic and a-political undertaking, which serves no interest other than justice. In doing so, they mask the politics at play in any application of criminal justice and leave themselves vulnerable to manipulation by more politically astute domestic operators.

Secondly, it has been argued that the individualization and decontextualization inherent in criminal prosecutions distorts our understanding of the underlying human rights violations. One of the goals the movement against impunity, and certainly of the IACtHR's jurisprudence, has set for itself, is to uncover and narrate historical truth through criminal proceedings. But, critics argue, in applying a criminal justice lens we risk concealing rather than exposing important parts of that truth. Moreover, through individualization of guilt criminal trials deflect attention away from the economic and political structures which underlie serious human rights violations, to focus it on a handful of scapegoats.

Thirdly, some scholars fear that the 'victim-centeredness' of the fight against impunity may undermine important principles of modern, liberal criminal justice, especially those protecting the rights of the accused. The IACtHR, with its strong emphasis on the victim's right to justice, has been a particular focus of such critiques. More specifically, the IACtHR's doctrines developed as part of the state's obligation to remove legal obstacles maintaining impunity – including the limitation of the principles of prescription and *ne bis in idem* and the Court's approach to the principle of legality in

relation to the crime of enforced disappearance – have criticized by Latin American criminal lawyers as potentially dangerous to the rights of the accused.

Finally, at the most basic level the apprehension many scholars have expressed towards the fight against impunity and the IACtHR's role in it, seems to stem from the perception that it entails an alignment with the state repressive apparatus – and desires. The IACtHR, it is said, legitimizes repressive action by the state through its emphasis on the obligation to investigate, prosecute and punish human rights violations. This, in turn, may lead to a 'culture of results', in which the state is driven to ever more repressive tactics in order to be seen to be tough on crime. In the end, it might even legitimize the creation of a 'criminal law of the enemy', in which those accused of serious human rights violations are treated as an entirely separate category of criminals, undeserving of the most basic fair trial guarantees.

Part II:

The jurisprudence of the Inter-American Court of Human Rights in practice

5 Inter-American contributions to 'post-transitional justice' in Guatemala

1 Introduction: the Guatemalan civil war

The domestic accountability processes explored in this chapter relate to crimes committed during a particular time and in a particular political context: that of the Guatemalan civil war (1960-1996). While it is not feasible, given the scope and particular focus of this study, to provide an exhaustive account of the history and dynamics of the Guatemalan civil war, a short introduction to it is indispensable in order to properly contextualize the accountability processes which developed after the transition to peace.

It should be noted at the outset that Guatemala is a country with a long history of political repression and dictatorships. In fact, in Guatemalan history dictatorship, whether military or civilian, has been the rule rather than the exception.[1] Thus, while the civil war certainly brought an intensification of political repression and violence, it did not constitute a radical break from history. It was, in a way, a logical extension of the political dynamics in the country, in light of the geopolitical realities of the time. Specifically, the Guatemalan civil war must be understood in the broader context of the Cold War and U.S. intervention to prevent the spread of communism in the region.[2] The start of the civil war came on the heels of a U.S.-backed coup, which took place in 1954 and ended the reign of democratically elected president Arbenz.[3] After the coup, a counterrevolutionary regime was instituted which consisted of a "coalition between the army and the

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1 The influential Guatemalan sociologist Carlos Figueroa Ibarra has argued that state terror is a structural phenomenon in Guatemala, which has been used as a 'method of domination' since colonial times. C. Figuera Ibarra, *El recurso del miedo – estado y terror en Guatemala*, (second edition, F&G Editores, 2011), p. 6.

2 *See generally* R.H. Immerman, *The CIA in Guatemala: the foreign policy of intervention* (University of Texas Press, 1982) and S.C. Schlesinger and S. Kinzer, *Bitter Fruit – the story of the American coup in Guatemala* (Harvard University Press, 2005). Susanne Jonas characterizes the Guatemalan civil war as "a "Cold War civil war" insofar as it was ideologically, politically, and militarily part of the U.S. Cold War confrontation with the Soviet Union and communist forces (real or labeled as such) in the Third World". *See* S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 17.

3 *See* S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 18-21.

economic elites".[4] The alliance of these two power blocs would remain intact throughout the civil war, with the military in control of the highest levels of government.[5] According to the UN Truth Commission instituted to investigate and report on the Guatemalan civil war, it was this 'closing of political options', along with other structural factors present in Guatemalan society like structural racism and inequality, which led to the uprising of a guerrilla movement in 1960 and the start of the civil war.[6]

The Guatemalan civil war lasted from 1960 and 1996 and is amongst the bloodiest conflicts in the region, with an estimated death toll of around 200.000, including around 40.000 forced disappearances. The UN truth commission reported that around 93% of the atrocities registered by it were attributable to the state and its armed forces.[7] The majority of the victims of human rights violations committed in the context of the war belonged to Guatemala's indigenous Maya population, including many women and children. The CEH registered 626 massacres carried out by the armed forces

4 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 17. *See also* J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998). The close relations between the military and the economic elite actually predate the civil war considerably. In fact, the professional army was created in the late 19th century to help the economic elite maintain control over the rural population. For a long time, military officers were recruited exclusively from the economic elite, while the economic elite, including all heads of state, was educated in military institutions. *See* Mikael Rask Madsen, 'Hacia la paz y la democracia en Guatemala: estrategias legales "suaves" en derechos humanos y contrainsurgencia constitucional', *Ciencias Sociales* 88:29-46 (II-2000), p. 31.

5 Some Guatemalan commentators have qualified the ties between the military and the economic elite as 'the alliance that won the war'. Martín Rodríguez Pellecer, 'Los militares y la élite: la alianza que ganó la guerra', *Plaza Publica*, 21 August 2013. This does not mean, of course, that the alliance was completely stable at all time, or that there were never any conflicts of ineterest between the economic elite and the military, or even within the military. Jennifer Schirmer has described at length the tensions between the highest circles of the military establishment and a group of right-wing extremist landowners, supported by a group of mid-level military officers calling themselves the *Oficiales de la Montaña* (Officers of the Mountain), which led to a series of coup-attempts in the late 1980s. *See* J. Schirmer, *The Guatemalan military project – a violence called democracy* (University of Pennsylvania Press, 1998), pp. 205-234. However, notwithstanding such internal tensions, the outward unity of the military and its alliance with the economic elite remained intact.

6 'Guatemala: memory of silence', Report of the Commission for Historical Clarification – conclusions and recommendations, p. 19, paras. 11-12. As Jennifer Schirmer explains, the first guerrilla groups in Guatemala were actually set up by junior military officers who were angry with the upper-echelons of the military over a variety of issues, including their decision to betray President Arbenz and support the coup against him in 1954. *See* J. Schirmer, *The Guatemalan military project – a violence called democracy* (University of Pennsylvania Press, 1998), pp. 15-16.

7 'Guatemala: memory of silence', Report of the Commission for Historical Clarification – conclusions and recommendations, p. 20 para. 15 and p. 33, para. 82.

over the course of the war, mostly targeting various Maya communities, the perpetration of which included acts of extreme cruelty.[8] Another common strategy used by the armed forces during the war was the enforced disappearance, often combined with the torture and extrajudicial execution, of people who, in whatever way, opposed the military regime, like "social and student leaders, professors, political leaders, members of religious communities and priests".[9] Like the Mayan communities, these political opponents were targeted by the armed forces as "subversives", because of their supposed relations to or support of guerrilla groups.[10]

While these violent tactics were used throughout the entire duration of the civil war, there was a particular peak in violence between 1978 and 1985, under the successive leadership of Generals Romeo Lucas García (1978-1982), Efraín Ríos Montt (1982-1983) and Oscar Mejía Victores (1983-1986).[11] During these years, the campaign of violence against the Maya population intensified to such an extent that, according to the UN truth commission, it resulted in 'acts of genocide' committed against particular Maya communities in particular regions of the country.[12] At the same time, the practice of the enforced disappearance of political opponents also intensified. As a result, many of the domestic efforts toward accountability for crimes committed during the civil war relate to the violence perpetrated during this period.

The transition(s) from military dictatorship to a democracy at least formally at peace, began in the mid-1980s and was finally concluded in 1996. The first stage of this transition entailed the adoption of a new constitution

8 Idem, paras. 86-87. As examples of the extreme cruelty with which the massacres were committed, the report lists "the killing of defenceless children, often by beating them against walls or throwing them alive into pits where the corpses of adults were later thrown; the amputation of limbs; the impaling of victims; the killing of persons by covering them in petrol and burning them alive; the extraction, in the presence of others, of the viscera of victims who were still alive; the confinement of people who had been mortally tortured, in agony for days; the opening of the wombs of pregnant women, and other similarly atrocious acts".

9 Idem, p. 34, para. 89.

10 Idem, p. 34, para. 83.

11 Idem, p. 22, para. 27 and p. 33, para. 82.

12 Idem, pp. 38-41, paras. 108-123. To be precise, the UN truth commission concluded that 'acts of genocide' were committed against the Maya-Q'anjob'al and Maya-Chuj communities in the North Huehuetenango region; the Maya-lxil comunity in the Quiché region; the Maya-Kiche' community in the Quiché region; and the Maya-Achi community in the Baja Verapaz region.

and a return to democracy in 1986.[13] The second stage entailed the adoption of a peace agreement between the Guatemalan state and the remaining guerrilla groups, as the result of a long and difficult peace process overseen by the United Nations, in which the state was represented by both the civilian government and the military High Command. The transitional justice compromise adopted as part of this peace process, however, was protested strongly by Guatemala's nascent civil society. As noted by Susanne Jonas, these protests "left no doubt that the struggle against impunity would continue well into the post war situation".[14]

The conclusion of the peace process and its transitional justice compromise mark the starting point of the process of 'post-transitional justice' which is the object of analysis in this chapter.[15] This chapter will focus on the main driving force behind post-transitional justice: the victim groups and human rights organizations which have been "fundamental from the outset" for the Guatemalan struggle against impunity.[16] Specifically, it will analyze how those groups have used recourse to the Inter-American system and the doctrines developed by it in order to bypass domestic obstacles to justice and to catalyze and (re)direct action by the domestic justice system. Section 2 will lay the groundwork for that analysis, by sketching the contours of the domestic struggle against impunity, from its starting point in the Agreement for a Firm and Lasting Peace, and the various pro- and anti-accountability constituencies constituting it. Section 3 discusses the

13 As explained by Jennifer Schirmer, the transition to constitutional democracy was in fact part of a strategic plan developed by a section of the High Command of the Guatemalan military, in order to ensure the survival and influence of the institution in the long term. This strategic plan was a response to the escalation of violence and political repression in the coutry in the late 1970s and early 1980s, which severely affected the legitimacy of the regime, both domestically and on the international level. The military carefully planned and oversaw the transition to democracy, which it envisaged as a "mixed solution", in which the civilian government outwardly represented and legitimized the state while cooperating with the military, which retained full control over all counterinsurgency operations. As a result, the abdication of formal power to a civilian government entailed a very limited loss of *de facto* power for the military. *See generally* J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998).

14 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 54.

15 The concept of 'post-transitional justice', developed by Cath Collins, seeks to explain the "persistence of the justice question" and the "periodic re-irruptions" of accountability pressure in the post-transitional period. Rather than focusing on state-driven policies adopted at the moment of transition, post-transitional justice is understood to be mainly "non-state, driven by private actors operating both "above" and "below" the state". And while "internationalized accountability action" plays an important role in post-transitional justice, it mainly operates through domestic courts. *See* C. Collins, *Post-transitional justice – human rights trials in Chile and El Salvador* (The Pennsylvania State University Press, 2010), pp. 22-27.

16 E. Martínez Barahona and M. Gutiérrez, 'Impact of the Inter-American human rights system in the fight against impunity for past crimes in El Salvador and Guatemala', in: P. Engstrom, *The Inter-American human rights system: impact beyond compliance* (Pallgrave Macmillan, 2019), p. 265.

obstacles to justice with which the post-transitional justice movement saw itself confronted. Section 4 provides a brief overview of the main results achieved by the post-transitional justice movement and the main domestic developments which made those results possible. Finally, sections 5 and 6 analyze how the Inter-American system has contributed to the work and the (modest) successes of the post-transitional justice movement. Section 5 examines the influence the organs of the Inter-American system have had through their direct interactions with domestic authorities and civil society groups, through the proceedings before the Inter-American system and judgments delivered by the IACtHR. Section 6, meanwhile, examines how domestic pro-accountability constituencies have used the doctrines developed by the IACtHR to articulate their claims to justice in terms of rights and international obligations, in order to confront some of the legal and practical obstacles erected in their path.

2 The struggle for post-transitional justice in Guatemala: origins and main actors

2.1 The Agreement for a Firm and Lasting Peace and the start of the struggle for post-transitional justice

The process leading up to the signing of a peace agreement was long and chaotic.[17] That this process would eventually culminate in a negotiated peace was never the obvious outcome. There was strong opposition to the idea of achieving peace, especially a peace negotiated with the guerrillas, within both the military and the economic elite. However, by the mid-1990s it had become clear to many in the Guatemalan establishment, most importantly to newly elected president Alvaro Arzú, that good relations with important allies such as the U.S. would depend on the accomplishment of a peace agreement with the guerrillas.[18] Accepting this reality, the Arzú government put its full weight behind the peace process, which finally culminated in the signing of the 'Agreement for a Firm and Lasting Peace'

17 For a full account of the peace process, *see* S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000). Formally, the negotiations were conducted between the state, represented by both the civilian government and the military, and the high command of the guerrillas, and overseen by the UN mission in Guatemala (MINUGUA). Informally, all manner of interests groups, including indigenous groups, women's groups, human rights groups, but also business groups, "had come to view the peace process as an arena for discussing issues that were not being addressed in the formal political arena" and were attempting to influence the negotiations in whatever way they could. S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 43-44.

18 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 50.

on 28 December 1996. An agreement described by Emily Braid and Naomi Roht-Arriaza as "less a pacted transition than an unspoken victory for the army".[19]

One of the very last issues to be decided during the peace negotiations was that of transitional justice, more particularly the scope of the amnesty law that would be enacted by parliament.[20] Earlier on in the peace process, in 1994, the parties had already agreed to set up a truth commission, under the auspices of the UN, to investigate and report on the atrocities committed during the Guatemalan civil war. At the same time, however, this agreement between the negotiating parties included specific language prohibiting the commission from "attribut[ing] responsibility to any individual in its work, recommendations and report" and stipulating that its work would not have any judicial aim or effect.[21]

The mandate provided to the truth commission gives some indication of the low level of interest among the negotiating parties in creating a legal framework that would ensure the investigation and prosecution of the severe crimes committed during the civil war. However, strong pressure from domestic civil society organizations and the extensive involvement of the United Nations in the peace process, made it difficult to simply impose a blanket amnesty for the most serious crimes. The outcome of this conundrum was a 'Law of National Reconciliation', enacted only 10 days before the signing of the final peace agreement on 18 December 1996, which provided for a transitional justice compromise that is severely limited in terms of justice.

The Law of National Reconciliation extinguishes criminal responsibility for crimes committed during the civil war by members of the insurgency (Article 2) and by members of the state forces (Articles 5 and 6).[22] The only (important) concession made on the issue of justice is that Article 8 of the Law of National Reconciliation explicitly excludes a number of crimes from its scope of application, including genocide, enforced disappearance, torture and "those crimes which are imprescriptible or which do not allow for the extinguishment of criminal responsibility, in conformity with the international treaties ratified by Guatemala". In theory at least, these crimes could be investigated and prosecuted by the Guatemalan justice system.

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19 E. Braid and N. Roht-Arriaza, 'De facto and de jure amnesty laws – the Central American case', in: F. Lessa and L.A. Payne (eds.), *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 185.

20 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 54.

21 "Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer", Oslo, 23 June 1994, available at: <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Guatemala-Charter.pdf> , last checked: 13-07-2018.

22 *See also* E. Braid and N. Roht-Ariazza, 'De facto and de jure amnesty laws – the central American case', in: F. Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 185.

The Law of National Reconciliation was immediately unpopular with human rights groups, who had started to campaign for the investigation and prosecution of some of the serious crimes committed by the military. In fact, the very first step taken by human rights groups in this struggle was to challenge the constitutionality of the Law of National Reconciliation before the Guatemalan Constitutional Court ("CC"). This challenge was unsuccessful, however. The CC upheld the law in October 1997, arguing that, because of the exception to its scope of application provided in Article 8, it "could be interpreted and applied in a way consistent with international law".[23]

The enactment and subsequent ratification by the CC of the Law of National Reconciliation made clear that the struggle against impunity would be an uphill battle for those seeking justice for the human rights violations committed during the civil war. Moreover, many worried that, notwithstanding the formal demilitarization of the Guatemalan state agreed upon during the peace process, the military would again find a way to maintain its informal position of power, which would allow the military to obstruct and undermine the struggle against impunity from behind the scenes. These concerns were confirmed in spectacular fashion not long after the peace accords were signed.

Parallel to the official UN truth commission, a second, domestic truth commission had been initiated by the *Oficina de Derechos Humanos del Arzobispado de Guatemala* (Human Rights Office of the Archdiocese of Guatemala – "ODHAG").[24] The commission was led by Bishop Juan Gerardi, who has spent several years working as a priest in the areas hardest hit by the civil war, experiencing first-hand the devastation of the Guatemalan country side. Not hindered by the same institutional constraints as the UN truth commission, the domestic truth commission produced a scathing report, based on the testimony of thousands of victims, which not only identified the crimes committed but also the perpetrators who committed them.

Only two days after this report was presented to the Guatemalan public, Bishop Gerardi was brutally murdered in his garage. His head was smashed with a brick, a method of assassination "designed to be grotesque, the message an unmistakable reminder of the worst atrocities of the war".[25] This reminder of the past served an important goal in the present. According to Jo Marie Burt, the message sent by the murder of Bishop Gerardi was that "[t]hose who have brutalized the country for decades and have never

23 E. Braid and N. Roht-Ariazza, 'De facto and de jure amnesty laws – the central American case', in: F.Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 186.

24 The truth commission set up by the ODHAG is known as the *Proyecto Interdiocesano de Recuperación de la Memoria Histórica* (Inter-diocesan project for the recuperation of historical memory – "REHMI"). For more information on this project and for access to the full report of the truth commission, *see* www.rehmi.org.gt.

25 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 146.

had to answer for their crimes have made it clear that they will not tolerate any attempts to challenge the impunity that reigns in Guatemala".[26] And while two military officers were eventually condemned to lengthy prison sentences for this crime, this only happened after years of surreal investigations and proceedings characterized by destruction of evidence, the murder and disappearance of key witnesses and a bomb attack on the home of one of the judges hearing the case.[27] Moreover, the two military officers in question were convicted for executing the murder, while those involved in planning it were never touched.

As intended, the impact of the murder of Bishop Gerardi on Guatemalan society, and particularly on its human rights community, was profound. In the words of Susanne Jonas:

> "As the highest-level political assassination in recent Guatemalan history, it left the nation in a state of shock. Nothing after the assassination would be quite the same as before. Perhaps because the wounds of war were so far from being healed, it raised the specter of a return to the past. In its aftermath, many habits and behaviors engrained from thirty-six years of war reemerged, making the challenge of building (or even thinking about) a new society much more daunting than previously."[28]

In other words, the murder was a clear sign that the structures responsible for many of the crimes committed during the civil war still dominated Guatemala in the *posguerra* and could dictate the 'truth' about the war allowed to be known by the Guatemalan public. Moreover, it showed that these structures were still prepared to violently impose their will if challenged.

2.2 Pro-accountability constituencies: the human rights organizations driving the struggle against impunity

The origins of several of the civil society groups which have played a leading role in the struggle against impunity in Guatemala, can be trace back to the darkest days of the civil war. Several dynamics present in those days help explain how and why it was possible for organizations to form in resistance to the government at a time of intense and almost universal political repression. Firstly, there was an internal dynamic, described by Afflitto and Jesilow, in which the intensification of state violence "created cross-cutting

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26 J.M. Burt, 'Impunity and the murder of Monsignor Gerardi' (1998) 31(6) *NACLA report on the Americas*, nr.5 .

27 For a full account of the murder of bishop Gerardi and the subsequent investigation and trial, s*ee* Francisco Goldman, *The art of political murder: who killed the bishop?* (Grove Press, 2008).

28 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 146-147.

ties – networks of survivors – and a homogenization of values among large segments of the population".[29] Whereas before this period, social mobilization had often taken place along class and/or ethnical lines,[30] the campaign of state terror unleashed the Guatemalan population in the late 1970s and 1980s affected people from different segments of the population. Large numbers of people were simultaneously searching for their disappeared family members in hospitals and morgues all over Guatemala, sharing the same pain and longing for information and (later) justice. The ties which developed between these individuals would form the basis for the social movement against impunity.[31] This dynamic is illustrated by the name of one of the oldest and most important domestic groups participating in the struggle against impunity, the *Grupo de Apoyo Mutuo* (Mutual Support Group – "GAM"), which was created in 1984.

Secondly, there was an international dynamic at play, in which the intensification of state violence and political repression in Guatemala, coincided with a growing international sensitivity to human rights issues in general, and those in the Latin American region in particular. This awareness can be credited in part to the work of new transnational human rights NGOs like Amnesty International and Human Rights Watch.[32] As word of the atrocities being committed in Guatemala reached an international audience, the country became isolated on the international level. Victims and leaders from civil society groups, on the other hand, managed to link up with and find support from the international community. This international support provided some measure of protection for those speaking up about their loved ones' disappearance of murder, as it made the reputational cost of attacking them higher.[33] Taken together, these dynamics opened up a tiny

29 F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), p. 118.

30 Afflitto and Jesilow recognize the pan-Mayan movement as an important precursor to the social movement against impunity. This movement had had some success connecting to international audiences in their campaigns concerning environmental issues and indigenous land rights. These successes "had an impact on individuals who later were attracted to the movement to end impunity", as they saw that social mobilization, and their participation in it, could make a difference in Guatemala. Indigenous activists make up an important part of the struggle against impunity in Guatemala. *See* F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), pp. 105-108.

31 F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), pp. 118-122.

32 *See* Mikael Rask Madsen, 'Hacia la paz y la democracia en Guatemala: estrategias legales "suaves" en derechos humanos y contrainsurgencia constitucional', *Ciencias Sociales* 88:29-46 (II-2000), p. 38-39. *See also* F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), pp. 103-104.

33 F.M. Afflitto and P. Jesilow, The quiet revolutionaries – seeking justice in Guatemala (University of Texas Press, 2007), p. 104.

space for a domestic human rights and anti-impunity movement to take root.[34]

From this tiny space has grown a social movement against impunity which comprises individuals from different segments of the Guatemalan population – including both rural, indigenous persons and persons from an urban, middle class background – united in different types of organizations. The backbone of this movement is still made up of the organizations founded and operated by individuals whose loved ones were killed or disappeared at the hands of the military during the war, of which the GAM is the oldest. These organizations are thus driven directly by the desire of their members to learn exactly what happened to their loved ones and to see justice done against those who killed or disappeared them. The GAM, for example, has been involved in a decades-long campaign to achieve justice for the enforced disappearance of Edgar García, the husband of one of the GAM's founding members.[35] One of the GAM's other prominent members, Aura Elena Farfán, later went on to found the *Asociación de Familiares de Detenidos-Desaparecidos de Guatemala* (the association of the family members of the detained-disappeared of Guatemala – "FAMDEGUA"), an organization which has had a fundamental role in some of the most famous and successful legal cases concerning forced disappearances in Guatemala.[36] Another important example of a victim organization important to the struggle against impunity is the *Asociación por la Justicia y Reconciliación* (Association for Justice and Reconciliation – "AJR"), a group founded by survivors of the scorched earth campaigns against the Maya Ixil population during the early 1980s. AJR was one of the driving forces behind the genocide case against Ríos Montt.

With time, such victim organizations have become more professionalized, hiring legal staff to help conduct proceedings and becoming active in cases other than those relating directly to the founders' own experiences. A prominent example of this development is the *Fundación Myrna Mack* (the Myrna Mack Foundation – "MMF"), which grew out of the personal crusade taken on by Helen Mack to see justice done for the extrajudicial

34 Mikael Rask Madsen, 'Hacia la paz y la democracia en Guatemala: estrategias legales "suaves" en derechos humanos y contrainsurgencia constitucional', *Ciencias Sociales* 88:29-46 (II-2000), p. 37-39. In fact, the movement which grew from the 1980s onwards should be seen as a second wave of human rights activism. In the 1960s a similar movement began among university students. However, this first wave had been utterly destroyed by the military in the 1970s and early 1980s and most of its leaders had been murdered or disappeared.

35 The GAM and its activism in the case of Edgar García made his widow, Nineth Montenegro, a prominent member of civil society and launched her political career. Nineth Montenegro is now a member of parliament on behalf of the party *Encuentro por Guatemala*, which she founded.

36 In particular, FAMDEGUA has represented the victims in the cases of *Choatalum* and *Dos Erres*, which will be further discussed below in paragraph 5.

execution of her sister, anthropologist Myrna Mack.[37] Today, MMF is one of the most important human rights organizations of Guatemala, which has helped other victim groups organize their own campaigns[38] and which even the government sometimes relies on for advice on matters pertaining to human rights and the justice sector.[39]

Apart from such organizations which have their roots in their members' own experiences during the war, a number of organizations have developed which specialize in the legal representation of victims in human rights cases. While such organizations do not have the same direct connection to the situations that they are litigating as the victim organizations have, they cooperate closely with the (groups of) victims that they represent. For example, following its (relatively) successful litigation in the case of the murder of Bishop Gerardi, the ODHAG has become an important center for human rights litigation within Guatemala. Another prominent example is the *Centro para la Acción Legal en Derechos Humanos* (CALDH), an NGO set up by Guatemalan lawyer Frank LaRue with the specific purpose of supporting victims of human rights violations in their struggle for justice. One of CALDH's lawyers, Edgar Pérez Archila, later went on to found an independent law firm for human rights litigation called the *Bufete Jurídico de Derechos Humanos* (Law Firm for Human Rights Litigation – "BJDDHH"). Through CALDH and BJDDHH, Edgar Pérez has represented victims in many of the Guatemalan human rights cases, both within Guatemala and before the Inter-American system.

Finally, not all organizations involved in the struggle against impunity are focused on legal work. For example, an essential contribution has been made by the *Fundación de Antropología Forense de Guatemala* (Forensic Anthropology Foundation of Guatemala – "FAFG"), established and led by the internationally renowned forensic anthropologist Fredy Peccerelli. FAFG focuses on the exhumation and identification of the remains of people who were killed during the civil war, from mass graves all over Guatemala.

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37 Myrna Mack conducted extensive research into the circumstances of indigenous communities who had become internally displaced as a result of the civil war. It is believed that this research interest is what prompted the military to have her executed on 11 September 1990. *See* IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs*), 25 November 2003, pp. 29-32. Faced with the authorities' refusal to properly investigate her sister's murder, Helen Mack, who had up to that point been a business administrator, quit her job to be able to dedicate herself completely to finding justice for her sister. *See* testimonies of Lucrecia Hernández Mack and Helen Mack Chang in IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs)*, 25 November 2003, pp. 33-39.

38 MMF has helped the relatives of the disappeared identified in the 'diario militar' (military diary) organize themselves in order to pursue justice on both the national and the international level. *See* interview F and interview K. For more information on the military diary, *see* IACtHR *Gudiel Álvarez et. al. ("Diario Militar") v. Guatemala (merits reparations and costs*), 20 November 2012.

39 For example, Helen Mack has been a member of a national commission established to advise the government on police reform, *See* MMF website, available at <http://www.myrnamack.org.gt/index.php/biografias/helenmack>

The results of the exhumations carried out by FAFG have been used as evidence in various domestic criminal trials concerning massacres and disappearances carried out during the civil war, including the genocide trial against Ríos Montt. Moreover, the exhumations have provided closure to some families, as they have allowed the identification of some of the many remains of disappeared persons scattered all over Guatemala.[40]

Over the years, a community of victims and human rights organizations has thus developed which specializes in campaigning to have justice done for serious human rights violations, especially those committed during the civil war. What should be understood about these organizations and their role in the struggle against impunity, is that their contribution goes far beyond 'just' denouncing such violations before the responsible authorities and demanding that they be investigated. These organizations also conduct investigations themselves, collecting evidence to present to the authorities so that they may be used in legal proceedings. In many cases, especially those related to the massacres perpetrated in rural regions, such organizations have been the ones to find witnesses and support them in giving their testimony. Civil society organizations have also done important work in uncovering and disclosing various documents giving insight into military operations, which have been central to proving the responsibility of military officials in court.[41] Moreover, the organizations described here represent victims throughout the proceedings, both domestically and before the Inter-American Court. In Guatemala, the victim has the option to participate extensively in criminal proceedings in human rights cases as *querellante adhesivo* (joint plaintiff), which allows them to be represented and present views throughout the proceedings and even to present evidence.[42] In this capacity, victims and their representatives have participated in almost all criminal proceedings in civil war-related cases which have been conducted in Guatemala.

In short, since the 1980s a social movement against impunity has grown in Guatemala. This movement consists of both victims organization and more technical organizations of lawyers and other professionals who sup-

40 An article in the New York Time Magazine provides a moving account of one such instance in which the family of a man who had disappeared in 1988 was given a positive identification of his mortal remains, which was found at the Creompaz military base in Cobán. S*ee* M. Jones, 'The secrets in Guatemala's bones', *The New York Times Magazine*, 30 June 2016.

41 For example, the infamous 'Military Log' ('Diario Militar'), containing the identification, date of capture and date of execution of a number of person taken prisoner by the military, has been disclosed by a U.S. NGO, the National Security Archive, cooperating with domestic groups. Moreover, domestic human rights groups, including the BJDDHH have litigated for many years to gain access to the military plans on which the scorched earth campaigns of the early 1980s were based. They finally achieved this access in 2009. Interview O.

42 The concept of the *querellante adhesivo* is codified in Article 116 of the Guatemalan code of criminal proceeding.

port victims in their struggle for justice. The work of these organizations has been absolutely vital in the struggle against impunity, as they not only push for investigation by the responsible authorities, but also investigate, collect and present evidence and represent victims in domestic and international legal proceedings.

2.3 Anti-accountability constituencies: the continuation of existing power structures after the war

While a social movement against impunity has thus tentatively developed in Guatemala since the 1980s, they face strong opposition from more powerful and more established sectors of Guatemalan society. Since the campaigns for justice of the social movement described above mainly concern crimes committed by the Guatemalan military, it is obvious that the members – and former members – of that institution are firmly opposed to their work. And while it could no longer have a major official role in politics, this does not mean that the individuals and networks of individuals making up the Guatemalan military could not continue to exert influence, both openly and covertly. Rather than giving up their power after the signing of the peace accords, the power-structures which developed during the war continued through unofficial channels.

The continued influence of these power-structures has been wielded, among other things, in opposition to the social movement described in the previous section. Different strategies have been employed, both openly and covertly to delegitimize and intimidate those pushing for investigation and prosecution of crimes committed by the Guatemalan military. In public, the military and their traditional allies in the oligarchy assert their interest and exercise their influence through lobby organizations. On the part of the military, there is the *Asociación de Veteranos Militares de Guatemala* (Guatemalan Veterans Association – "AVEMILGUA"). The main lobby organization of the oligarchy is known as the *Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras* (The Coordinating Committee of the Associations of Agriculture, Commerce, Industry and Finance – "CACIF").[43] The capacity of these organizations to effectively influence public opinion and political processes through media campaigns and lobbying was demonstrated early on, by their successful campaign to derail the constitutional reforms necessary to implement many of the changes agreed upon at the negotiating table, including the demilitarization

43 CACIF is in fact an umbrella organization, in which representatives of the lobby groups for each of the important sectors cooperate and coordinate their efforts. CACIF was founded in 1958 and has since become "the most powerful private sector organization in Central America". *See* Bull, Castelacci and Kasahara, *Business groups and transnational capitalism in Central America – economic and political strategies* (Palgrave Macmillan, 2014), p. 183.

of the Guatemalan state.[44] Since then, both AVEMILGUA and CACIF have been openly critical of high-profile attempts to bring high-profile 'crimes of the past' to justice.

More recently, another organization has joined their ranks and has become an influential and radical voice in the media campaigns against those seeking accountability. The *Fundación contra el Terrorismo* (Foundation against Terrorism – "FcT") was created in 2011 as an explicit reaction to investigation and prosecution of some high military officials for crimes committed during the civil war.[45] The founder and main representative of the FcT, Ricardo Méndez Ruiz, is a businessman who has never served in the military but, as the son of a former high-level military commander,[46] he has strong ties to the institution and to many individuals who hold, or have held, positions of power within the institution. In a report in Guatemalan newspaper *Prensa Libre*, the FcT was described as the "media and propaganda-arm of the Army".[47]

Lobby groups like AVEMILGUA and the FcT are the public face of Guatemala's anti-accountability constituencies, who seek to prevent the investigation and prosecution of crimes committed during the war through the media. However, the domestic fight against impunity is also opposed by more secretive groups, operating to obstruct justice through covert political influence and acts of intimidation. In 2003, the Washington Office on Latin America ("WOLA") published a report titled 'Hidden powers in post-conflict Guatemala – illegal armed groups and the forces behind them',[48] in which it described the criminal activities and acts of intimidation

44 For a full account of the failure of the implementation of the peace agreement, see S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 189-213. According to Jonas, the political forces opposing the implementation of the peace agreements were aided significantly by the half-hearted support given by the Arzú government to the agreements it had helped to bring about.

45 In an interview with the journalistic platform Plaza Publica in 2013, the founder of the FcT, Ricardo Méndez Ruíz, emphasized that his decision to create the Foundation against Terrorism was "all because of her" [former Attorney General Claudia Paz y Paz, who oversaw the investigations against military officials, HB] and that "we [the military, HB] will not let ourselves be brought like sheep to the slaughterhouse". C. Gamazo, 'El club de la balanza y la daga', *Plaza Publica*, 25-06-2013, available at <https://www.plazapublica.com.gt/content/el-club-de-la-balanza-y-la-daga>, last checked: 23-07-2018

46 Ricardo Méndez Ruiz is the son of Ricardo Méndez Ruiz Rohrmoser, the former commander of the infamous military base in Cobán and Minister of the Interior under Ríos Montt. As the son of such a high-profile military commander, Ricardo Méndez Ruiz jr. was the victim of a kidnapping at the hands of one of the guerrilla groups in 1982.

47 P.G. Vega, 'El terror como estrategia de defensa', *ElPeriódico*, 14-08-2016.

48 S.C. Peacock and M. Beltrán, Hidden Powers in post-conflict Guatemala – Illegal armed groups and the forces behind them (WOLA, 2003). This report is based in part on information gathered and reported by the UN Mission in Guatemala ("MINUGUA") and by domestic human rights organizations such as the Myrna Mack Foundation.

carried out by 'clandestine groups',[49] working at the behest of the 'hidden powers' of Guatemala. WOLA uses the term 'hidden powers' to describe "an informal, amorphous network of powerful individuals in Guatemala who use their positions and contacts in the public and private sectors both to enrich themselves from illegal activities and to protect themselves from prosecution for the crimes they commit".[50] The WOLA report made it clear that these hidden powers and clandestine groups were a legacy from the war, stating squarely that they "can be traced back to personal relationships, patterns of interaction, and structures of authority that developed during the war and continue to operate".[51] What made these networks particularly dangerous, was the fact that they had managed to infiltrate the entire post-war political system. According to WOLA:

> "A new, and particularly dangerous, distinguishing factor is the increasingly successful consolidation of political power on the part of hidden powers. Hidden powers have relationships with most of the political parties and actors in Guatemala, through campaign contributions, and through personal connections and relationships. […] [M]ost political analysts believe that the hidden powers have contacts and influence with all the major political parties, and therefore with the legislative and executive branches of government, regardless of which party is in power."[52]

The hidden powers described here have consistently wielded their influence to ensure impunity for crimes committed by their members, including crimes committed during the civil war. The clandestine groups operating at their behest have been a particularly dangerous and effective obstacle to accountability efforts on the domestic level.

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49 Idem, p. 7, defining the clandestine groups as "small groups of men, often members of specialized military units or police forces, who carry out acts of violence and intimidation" and noted that "often concealed behind the veil of common crime, the clandestine groups are believed responsible for perpetrating vicious attacks against human rights workers and others".

50 Idem, pp. 5-7.

51 Idem, pp. 13-14. Moreover, WOLA concluded that "[c]redible sources link the metamorphosis of present day hidden powers to four groups of men, sometimes inter-related, that actively participated in the counter-insurgency strategies of the Guatemalan armed forces – La Cofradía, El Sindicato, the Presidential General Staff (Estado Mayor Presidencial, EMP) and the leadership of the Civil Self-Defense Patrols (Patrullas de AutoDefensa Civil, PACs)."

52 Idem, p. 33.

3 The fight against impunity in Guatemala: an uphill battle

The fight against impunity for crimes committed during the Guatemalan civil war has been an uphill battle for those involved in it. Pro-accountability actors have encountered a number of legal obstacles to their work, of which the amnesty law enacted as part of the Agreement on a Firm and Lasting Peace is the most obvious example.[53] However, these legal obstacles have not been the main reason for the slow progress of domestic accountability efforts, "but rather the lack of political will to prosecute and the existence of threats, corruption, and a climate of fear that have made it difficult to hold the powerful accountable for past (or present) violations".[54] This lack of political will is the result of the enduring strength of the anti-accountability constituencies described in the previous section,[55] who have employed a variety of strategies in order to intimidate pro-accountability and obstruct their work.

One important and particularly visible strategy, are the media campaigns conducted by organizations like AVEMILGUA and FcT with the aim of delegitimizing pro-accountability actors, their work and their motivations in pursuing that work. The discourse employed in such campaigns, especially by the FcT, can be summarized into the following positions: firstly, they have maintained that there was no genocide in Guatemala ("*no hubo genocidio*")[56] and that there was never any policy on the part of the

53 These legal obstacles will be discussed in detail in Section 6.2 of this chapter.

54 E. Braid and N. Roht-Arriaza, 'De facto and de jure amnesty laws – the Central American case', in: F. Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 182.

55 *See* idem, p. 184, stating that: "the political parties and social forces that governed [Guatemala] during the height of the violations […] continue to hold a large quota of power."

56 For example, retired General and former President of Guatemala Otto Pérez Molina has stated on many different occasions, both before and after ascending to the presidency, that there was no genocide in Guatemala. *See for example* K. Weld, 'A chance for justice in Guatemala', *The New York Times*, 03-02-2013 and 'No hubo genocidio en Guatemala sostiene presidente Perez Molina', *La Nación*, 07-01-2015, available at <https://www.nacion.com/el-mundo/politica/no-hubo-genocidio-en-guatemala-sostiene-presidente-perez-molina/HYPK23SSGJFSBAVFCVIESW5X2Q/story/> , last checked: 23-07-2018. Moreover, the FcT and other representatives of both the Guatemalan military and the economic elites have maintained that concluding that there has been a genocide in Guatemala, would be destabilizing for the Guatemalan state and its economy. *See for example* C. Gamazo, '"Esto no es un juego" – entrevista a Ricardo Méndez Ruiz, presidente de la Fundación contra el Terrorismo', *Plaza Publica*, 25-06-2013, available at <https://www.plazapublica.com.gt/content/esto-no-es-un-juego>, last checked: 23-07-2018.
Moreover, one year after the judgment finding Ríos Montt guilty of genocide was delivered, the Guatemalan parliament adopted a resolution stating that genocide had never taken place in Guatemala. The resolution was proposed by a member of the *Frente Republicano de Guatemala* (Guatemalan Republican Front – "FRG"), a political party founded by Ríos Montt himself. *See* J.C. Pérez Salazar, 'Guatemala: ¿por qué el Congreso dice que no hubo genocidio?', *BBC Mundo*, 16-05-2014.

Guatemalan military to attack the civilian population. Rather, the narrative goes, the military did what was necessary to protect the country from communism and only targeted the communist guerrillas. If there were any excesses against the civilian population, these were incidental. In support of this thesis, the FcT has, for example, launched a campaign through both regular and social media titled "*La farsa del genocidio en Guatemala*" ("the sham of the genocide in Guatemala").[57] Thus, these campaigns aim to demonstrate that the crimes for which pro-accountability actors seek justice, never took place.

Secondly, and building on the previous point, opponents of the struggle against impunity repeatedly question the motives of pro-accountability actors. Since, according to their campaigns, the crimes in question never took place, pro-accountability actors cannot possibly be motivated by a genuine desire for justice. Rather, they are presented as 'leaches' and 'parasites' who seek to make money off of Guatemala's difficult past.[58] At the same time, they are also often presented as *guerrilleros* seeking revenge against the military and trying to use the courts to undo the defeat they suffered on the battlefield.[59] Taking this logic even further, the FcT has presented the Guatemalan civil society organizations involved in the struggle

57 Fundación contra el Terrorismo, 'La farsa del genocidio en Guatemala – conspiración Marxista desde la Iglesia Católica', *El Periódico*, 26 May 2013 (paid add). This reference refers to the version of the campaign which was published in the newspaper *ElPeriódico* as a paid add. A longer, bulletin-style version of the campaign was distributed through social media.

58 For one of the many examples of such discourse, *see* R. Méndez Ruiz, 'Maldito', *El Periódico*, 20-10-2015, available at <https://elperiodico.com.gt/opinion/2015/10/20/maldito/>, last checked: 23-07-2018, saying: "The hitmen of the human rights [movement, HB] were those who put together the framework for the sham of the genocide; a corrupt pack of hounds who, together with supposed indigenous leaders and foreigners such as Valerie Julliand and Alberto Brunori [respectively the representatives to Guatemala of the United Nations Development Program and the United Nations High Commissioner for Human Rights, HB] made a lifestyle out of prostituting the internal armed conflict."

59 Ricardo Méndez Ruiz regularly uses such discourse against human rights defenders in his weekly columns – first in *ElPeriódico* and later in *Siglo XXI*. For one of the many examples, *see* R. Méndez Ruiz, 'Desde la carcel, si fuese necesario', *ElPeriódico*, 17-11-2015. In this column, Méndez Ruiz responds to the Guatemalan Human Rights Ombudsman's denunciation of the FcT's media campaigns after a complaint had been filed against it by a group of human rights defenders. Here, Méndez Ruiz describes the human rights defenders who filed the complaint as "terrorists and parasites from left-wing organizations", adding that "[i]t is important to note that some of [these human rights defenders, HB] are terrorists who have, publically and together with several Muslims, burned the Israeli flag, and likely applaud in secret the recent tragedy in Paris". Later on in the same column he directly equates these human rights defenders to the *guerrilleros* active during the civil war, saying that "[d]uring two weeks in 1982 I was submitted to physical and psychological torture, during a vile kidnapping at the hands of the same terrorists who today continue to obstruct progress and freedom of expression. They did not manage to defeat me then, and they will not do so now."

against impunity as part of an international, Marxist plot[60] to discredit the Guatemalan military.[61]

To achieve maximum effect, this discourse is harnessed against particular individuals, who are personally identified and singled out for their role in the struggle against impunity. One infamous, on-line campaign of the FcT, titled "*los rostros de la infamia*" ("the faces of shame"), consists of a list of people, identified with their full names and pictures, qualifying them as "traitors of the peace" on account of their role in the investigation of high military officials, and calling on "future generations" to give these traitors their due punishment.[62] One respondent, a Guatemalan lawyer involved in human rights litigation, described being targeted by such discourse in the following way:

> "We ourselves – I imagine that you know about this – are criticized for taking on these types of cases. Even though I am doing nothing bad – it is within the legal framework of the country. I am not going outside the framework. But still they call us "judicial hitmen", they call us "*guerrilleros*", "terrorists"…. "The face of shame". [laughs] And really, what is it that we do? I cannot see how we are doing anything wrong! If I am legally representing a community which was completely destroyed and the few who managed to save themselves did so only by miracle, or if I am representing family members who have been looking for their other family member for 30 years […]… I don't see any way in which this could be agitating or much less illegal or in any way which this is destabilizing. To the contrary! […] Nevertheless, we are marked, stigmatized… "Agitators"!

60 This tendency to equate participation in the fight against impunity to terrorism or even an international conspiracy, can be understood with reference to the Thesis of National Stability, formulated by the Guatemalan military towards the end of the civil war with the intention to be carried over into peace time. For a full account of this doctrine, *see* J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998), pp. 235-257. Schirmer explains that, under the Thesis of National Stability, anyone expressing disagreement with the State and its policies would be qualified as an Opponent of the State. As Schirmer explains: "[w]ithin this mental universe, "innocent dissent" is an impossibility: activities that appear to be subjectively innocent and immune from "manipulation" […] are viewed as low-level latent tendencies that eventually and inexorably grow into insurrectionary forces […]" Schirmer adds that this logic was applied in particular to the work of human rights organizations . J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998), p. 245.

61 For example, this theory was set out at length in the the FcT's '*farsa del genocidio*' campaign, which carried as its subtitle '*Conspiración Marxista desde la Iglesia Católica*' ("A Marxist conspiracy from the Catholic Church"). *See* Fundación contra el Terrorismo, 'La farsa del genocidio en Guatemala – conspiración Marxista desde la Iglesia Católica', *El Periódico*, 26 May 2013 (paid add).

62 Fundación contra el Terrorismo, 'Los rostros de la infamia', 8 May 2013, available at < https://nosomosgenocidas.wordpress.com/2013/05/08/los-rostros-de-la-infamia/>, last checked: 23-07-2018. This campaign was denounced bythe Guatemalan human rights Ombudsman as constituting a 'discourse of hate', *see* C. Gamazo, 'PDH sanciona a Méndez Ruiz por discurso "insidioso y agresivo" y solicita investigación al MP', *Plaza Publica*, 27-08-2013.

> Or that we are becoming millionaires, that we are using the victims – these are the arguments they use – that we are receiving millions and turning ourselves into millionaires."[63]

To fully grasp the impact of such discourse, especially when targeted at particular individuals, it is important to understand that, in Guatemala, the type of stigma described above has long carried a mortal risk. Throughout the civil war, people who had been labeled '*guerrillero*' – or 'communist', 'terrorist' or 'agitator' – had often been disappeared or extrajudicially executed. The stigma and fear attached to such labels was underlined by one of the respondents, an activist from a well-known Guatemalan human rights organization. While describing her work investigating one of the most infamous massacres from the civil war, she touched on the impact the word '*guerrillero*' continued to have in the community she was working with, based on their experiences during the war. In her words:

> "So, there was a lot of fear. In [this community, HB], the army came [during the war, HB] and took away those who had been marked by the military commissioners as being *guerrilleros*. Before, the word "*guerrillero*" was… terrible! Communist or *guerrillero* was terrible! Lies were told as a result of which the people of [the community, HB] were marked as *guerrilleros*, that they collaborated with the *guerrilla*".[64]

Another respondent, who also worked with a prominent Guatemalan human rights organization, explained that, because in Guatemala the concept of human rights has long been associated with the political left, the stigma attached to the word 'communist' or 'guerrillero' had, to some extent, rubbed off on human right and human rights activists. In his words:

> "Here, in Guatemala – I don't know how it is in other countries – but here, I believe there is a very wrong interpretation of what human rights are, and that they are associated with left-wing movements. So, if you use human rights standards to resolve [conflicts, HB], you will be seen as someone from the left. And for a long time, people from the left were eliminated […]"[65]

Thus, the discourse employed by organizations such as the FcT against individuals and organizations participating in the struggle against impunity

63 Interview O.
64 Interview G.
65 Interview S.

serves not only to discredit their work, but also to let them know that they are marked[66] and risk being targeted for further action.[67]

The veiled threats made through the media against domestic pro-accountability actors are, moreover, backed up by more explicit threats, and even attacks, by the clandestine groups described in the previous section. In 2002, WOLA reported "hundreds of cases of crimes against civil society organizations and their leaders" and noted that "the number and patterns of the cases point to a systematic targeting of civil society actors and others involved in "anti-impunity initiatives" – both those who seek justice for past abuses (human rights groups, forensic experts, judges, lawyers, and witnesses) and those who denounce present-day corruption by state agents".[68] At the time when the research underlying this chapter was conducted, these threats and attacks continued to occur. As a result, some individuals and organizations have been under police protections for years or even decades and others have been forced to leave the country due to security reasons.

The situation is especially difficult for those living and working in rural areas, outside the relative protection offered by the presence of media and international organizations in the capital. This reality is illustrated by a story told by one respondent, who described the situation of a family she had worked with through a Guatemalan NGO that supports human rights defenders. As the respondent explained:

> "This man was a human rights defender and a leader of his community who was from [a rural department, HB], and one morning they killed him. He was leaving his house one morning and he was shot by some men who came on bicycles and they killed him. So this man had been… during the armed conflict he had needed to go into exile in Mexico with his family, because he was a catechist and he had always worked for the benefit of the disadvantaged, on housing and education, and during the armed conflict [this would mark one, HB] as a

66 Ricardo Méndez Ruiz himself has hinted at this in an interview with the journalistic platform Plaza Pública, saying: "We are saying: "this person did that"; because I believe that for a long time they have believed that they are covered by the cloak of anonymity. And that's not how it is. And that is the objective of our publications. That they know that we know." C. Gamazo, '"Esto no es un juego" – entrevista a Ricardo Méndez Ruiz, presidente de la Fundación contra el Terrorismo', *Plaza Publica*, 25-06-2013

67 In a report in ElPeriódico, several Guatemalan analysts and members of civil society organizations expressed their disquiet at seeing a return to strategies from the civil war being used against those participating in the struggle against impunity. P.G. Vega, 'El terror como estrategia de defensa', *ElPeriódico*, 14-08-2016. One of the respondents interviewed in the context of this case study expressed a similar concern. When asked how he saw the future of the social movement against impunity, he said the following: "Well, a bit grey. A bit grey. I believe we are seeing important setbacks – "important" is not the right word, but setbacks which are not beneficial to the country. Setback which could even lead to tendencies or policies we have seen during the armed conflict. These do not exist yet, but this is the trend." Interview O.

68 S.C. Peacock and M. Beltrán, 'Hidden Powers in post-conflict Guatemala – Illegal armed groups and the forces behind them' (WOLA, 2003), p. 3.

> communist. And, moreover, he was a catechist, and with the whole issue of liberation theology and all that, they had to leave. And on top of that, his son was disappeared by the Guatemalan military, for which it was condemned by the Inter-American Court […]
>
> So they did not return to Guatemala until the year '97, after the peace accords, and they thought that in the context of the agreement […] with all the monitoring and all… so they returned to their community and he returned to the communal work that he had always done and he again took up the issue of housing, the issue of education, together with his children […] And in 2003 they appointed him the mayor of the community and months later he was killed. His daughter […] was also a human rights defender and she participated and worked a lot on the issue of women's rights, also on the municipal level, organizing community participation and such.
>
> So, there had already been conflicts with people linked to the military, military commissioners, ex-*kaibiles* [special forces of the Guatemalan military, HB] and people on the local level, because even though the armed conflict had ended, all the power structures which had developed during the conflict persisted, especially on the local level, in a village in the middle of nowhere. So there was a conflict between these structures and the family, whom they referred to as *guerrilleros* and such. So the father is killed and in the year before that, the family had suffered a series of incidents, amongst them an ex-*kaibil* who had threatened them directly, and they reported this and the State did not protect them, it did not offer them any protective measures. So the daughter […] is faced with the fact that the family had been threatened and that the State did not protect them, even though they had reported [the threats, HB], she is faced with the murder of her father and, on top of that, in the days after the murder, armed men came to their house and they stayed in their cars in front of the house – they didn't just do this one day, but several – […] and they had to go into exile a second time."[69]

The story of this particular family highlights the continuity of the threats and attacks against those involved in social struggles, including the struggle against impunity, between the civil war and the post-transitional period. It underlines that, in hindsight, the murder of Bishop Gerardi was not a one-off event, but rather a particularly high-profile example of the treats and attacks suffered by those pushing for accountability for the crimes committed by the Guatemalan military during the civil war, with the intention of intimidating them and halting their pursuit of justice.

Finally, the threats to their own lives are not the only obstacles the pro-accountability groups face. Especially in the immediate post-war years, the lack of independence on the part of the police and the judiciary and their often hostile attitude towards victims of human rights violations[70] made

69 Interview L.

70 For example interview F, describing how the questions posed to them by police officers made victims feel like " they were the ones being investigated" and how police officers would tell the wives of men who had disappeared that their husband had probably run off with another woman.

even opening an investigation into such cases almost impossible. Even when victims were willing to approach the police to denounce the crimes committed against them or their family members, they were often faced with active obstruction by the authorities who were supposed to investigate their cases, through sabotage of the efforts to identify their disappeared loved one's remains,[71] the 'losing' of case files containing many years of procedural activities,[72] or acts of intimidation and threats against their lives and against witnesses.[73]

And when the authorities in a particular case do cooperate with victims and made headway in the investigations, this may constitute a grave risk for the judicial officers involved in these cases. In the 1990s and early 2000s, such officials would often face direct threats and attacks against their physical person. For example, in the course of the investigations regarding the extrajudicial execution of anthropologist Myrna Mack in the early 1990s, a judge and a police officer involved in the case were murdered. On top of that, 10 judges were moved to drop the case as a result of death threats against them, several judges and prosecutors fled the country.[74] More recently, prosecutors pursuing cases against military commanders for crimes committed during the civil war and judges hearing such cases have often been the target of legal action by anti-accountability actors, who have filed complaints against them and requested disciplinary actions.

In short, pro-accountability actors in Guatemala have faced a number of important legal and practical obstacles to their work. The practical obstacles, which are the result of the great power-imbalance between pro- and anti-accountability constituencies, have been the most difficult for them to overcome and pose the greatest threat to their work – and to their person. Those obstacles include media campaigns aimed to delegitimize their work and question their motivations, veiled and direct threats against their person and, sometimes, direct attacks. Since the signing of the peace accords, several pro-accountability actors have been killed or forced into exile as a result of such threats and attacks. Another important practical obstacle has been the unwillingness of judicial authorities to investigate the complaints

71 *See for example* IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 73 and p. 28 (testimony Jennifer Harbury), describing how, in the course of the investigations to uncover the fate and whereabouts of the material victim, then Attorney General Acisclo Valladares stopped an exhumation ordered by the Second Criminal Trial Judge of Retalhuleu, Guatemala on the application of human rights ombudsman Ramiro de Léon Carpio by flying in on a helicopter accompanied by 20 military men and questioning its legality.

72 *See for example* IACtHR *Bámaca-Velásquez v. Guatemala (provisional measures and monitoring of compliance with judgment)*, 27 January 2009, pp. 5-6, paras. 12-14, in which the victims' representatives describe how the Office of the Prosecutor told the material victim's sisters that the case file containing 16 years worth of procedural activity had been lost.

73 *See for example* IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs)*, 25 November 2003, para. 134.95-102.

74 J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014), pp. 40-41.

filed by pro-accountability actors, combined with the threats and attacks against officials who do pursue cases concerning crimes committed during the civil war and against the witnesses willing to testify in such cases.

4 Results of the domestic struggle against impunity: criminal trials for serious human rights violations committed in the context of the civil war

Notwithstanding the many obstacles described in the previous section, the domestic struggle against impunity for civil-war related crimes has yielded some results. Difficult investigations have been carried out by the Guatemalan Public Ministry, with considerable input from victim groups and human rights organizations, and some important judgments have been delivered by domestic courts. It should be noted, however, that it is difficult to obtain reliable information about these domestic proceedings and that various sources provide different information about the total number of investigations and prosecution conducted in Guatemala concerning civil-war related crimes. This section aims to provide a short overviews of the outcomes of Guatemalan accountability efforts, based on various written sources in combination with the information provided by several respondents interviewed during the research trip to Guatemala undertaken in the context of this study.

According to Elena Martínez Barahona and Martha Gutiérrez, "information about a total of 155 investigations between 1984 and 2012 is available".[75] Of course, not all of these investigations have resulted trials, let alone convictions. Martínez Barahona and Gutiérrez make mention of "30 judgments […] issued", one of which was subsequently overturned, and 17 investigations which went on for over a decade without leading to any prosecutions. A recent overview of domestic prosecutions for crimes committed in the context of the internal armed conflict provided by members of the Guatemalan congress,[76] notes that 58 convictions have been delivered by Guatemalan courts against members of the state and paramilitary forces. Thirteen others have been detained and are currently on trial, while another 49 have been officially indicted, but remain in liberty. The crimes of which they have been accused include genocide, enforced disappearances, extra-judicial executions, torture and sexual violence.

75 E. Martínez Barahona and M. Gutiérrez, 'Impact of the Inter-American human rights system in the fight against impunity for past crimes in El Salvador and Guatemala', in: P. Engstrom, *The Inter-American human rights system: impact beyond compliance* (Pallgrave Macmillan, 2019), p. 252. The authors do not specify which investigations they have included in that number. They also do not say anything about investigations after 2012.

76 This overview was presented in the Exposition of Motives accompanying Draft Law 5377-2017, which proposes a significant expansion of the amnesty provided by the Law of National Reconciliation. Draft Law 5377 will be discussed in more detail in Section 6.2.1 of this chapter.

Over the years, there has been a clear development in both the number of proceedings conducted and the types of crimes charged and defendants involved in those proceedings. In the first decade or so after the signing of the peace accords, few trials were conducted for the types of crimes of interest to this study. The most high-profile case conducted by the Guatemalan justice system before 2008, is that against several members of the Presidential General Staff (*Estado Mayor Presidencial* – "EMP") for the extrajudicial execution of the anthropologist Myrna Mack.[77] Apart from the Myrna Mack case, these first years saw trials conducted, and convictions won, for massacres in Xamán and Tululché and an extrajudicial execution in Colotenango.[78] What these proceedings had in common, is that they focused almost exclusively on low ranking soldiers or members of the *Patrullas de Autodefensa Civil* (Civil Self-defense Patrols – "PAC"), paramilitary organizations which had been active during the latter part of the civil war and which operated under the instructions of the military. The upper echelons of the state forces, however, were not touched.

This situation has changed, however, over the last decade. Since 2008, there has been a notable increase in the number of trials conducted for civil war-related crimes, with over 30 convictions won in relation to at least 10 different cases. These cases have included the infamous massacres of Plan de Sánchez, Río Negro and Dos Erres, each of which involved the killing of several hundred people. Moreover, the accused in these more recent cases have been charged not only with murder, as had been the practice in the earlier cases, but also with other crimes of a more 'international' character

77 In 1993, one member of the EMP was foud responsible as the material author of the extrajudicial execution of Myrna Mack. In 2004, another member of the EMP was found responsible for the extrajudicial execution of Myrna Mack as intellectual author. For more information on the Myrna Mack investigation, see IACtHR *Myrna Mack Chang v. Guatemala (merits reparations and costs)*, judgment of 25 November 2003. The domestic judgments in the Myrna Mack case are available through the website of the Myrna Mack foundation, http://www.myrnamack.org.gt/index.php?option=com_content&view=article&id=302&Itemid=132, last checked: 18-12-2018.

78 *See* L. Arriaza and N. Roht-Arriaza, 'social reconstruction as a local process', (2008) 2(2) *International Journal of Transitional Justice* 152-172, pp. 158-159. 14 soldiers were convicted for the high-profile massacre in Xamán, which took place in 1995, as the peace negotiations were nearing their conclusion. One military commander was convicted for his participation in a series of massacres in the Maya town of Tululché. Finally, one PAC member was convicted for the extrajudicial execution of Juan Chanay Pablo in Colotenango. However, after his conviction he was liberated from prison by a group of former PAC members, and the authorities were unable to secure his re-arrest. See also United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2000 - Guatemala* , 26 February 2001, available at: https://www.refworld.org/docid/3ae6aaa44.html, last checked: 18-12-2018.

including enforced disappearance,[79] sexual violence,[80] crimes against humanity and genocide.

Finally, the trials conducted since 2008 have been conducted not only against PAC members, military commissioners and low level soldiers, but against military and police commanders as well. The first steps in this direction included the conviction in December 2009 of a military commander for his role in the enforced disappearance of 8 people in the municipality of El Jute and the judgments, in 2011 and 2012, against 4 former *kaibiles*, members of the elite forces within the Guatemalan military, for their role in the massacre at Dos Erres. At least two high ranking police commanders have been convicted to lengthy prison sentences, one for his role in the disappearance of unionist Edgar García and one for his leadership over the crimes committed during and after the burning of the Spanish Embassy in 1980. Moreover, a number of cases initiated since 2011 have targeted the very highest levels of the Guatemalan military command, including former heads of state.[81] In 2013, former dictator Efraín Rios Montt and his Head of Military Intelligence José Mauricio Rodríguez Sánchez were brought to trial for the crime of genocide. On 10 May 2013, Ríos Montt was found guilty and convicted to 80 years imprisonment by the first instance court, while Rodríguez Sánchez was acquitted of all charges, a judgment that was subsequently annulled by the Guatemalan Constitutional Court.[82] Following the genocide trial, proceedings against military commanders from the highest echelons have continued. In 2016, the Public Ministry file formal accusation against a number of high-ranking military commanders, including the

79 The first guilty verdict for the crime of enforced disappearance was imposed in August 2009 on the military commissioner Felipe Cusanero Coj, for the disappearance of 6 people in the municipality of Choatalum. For a more detailed discussion of this judgment, *see infra* Section 6.2.2 of this chapter.

80 The focus on sexual violence has been most explicit in two recent trials: the Sepur Zarco case, in which two defendants were found guilty of sexual violence and sexual slavery against 15 indigenous women; and the Molina Theissen case, in which 4 defendants were found guilty of, among other things, rape and 'aggravated sexual abuse'.

81 *See for example* 'Guatemala: ex-armed forces chief Lopez Fuentes arrested', BBC, 18 June 2011 and 'Guatemala genocide suspect Oscar Mejía hospitalized', BBC, 26 October 2011. Several of those initially accused by the Public Ministry of participating in genocide were found unfit to stand trial, as a result of which the proceedings against them had to be suspended.

82 For a full account of this trial, *see* H. Bosdriesz and S.J. Wirken, ' An imperfect success – the Guatemalan genocide trial and the struggle against impunity for international crimes', (2014) 14(6) *International Criminal Law Review* 1067-1094. In 2017 and 2018, a retrial of this case was conducted, during which Efraín Ríos Montt died. In September 2018, the first instance court handed down a ruling in which it found that, while the Guatemalan military committed genocide and crimes against humanity against the Maya-Ixil population, it had not been proved that Rodríguez Sánchez was responsible for this genocide. He was therefore acquitted of all charges. *See* J.M. Burt and P. Estrada, 'Court finds Guatemalan military committed genocide, but acquits military intelligence chief', *International Justice Monitor*, 28 September 2018.

former head of the General Staff of the Army, Benedicto Lucas García, in relation to a large number of enforced disappearances conducted from the CREOMPAZ military base.[83] Most recently, four high-ranking commanders – including, again, Benedicto Lucas García and former Chief of Military Intelligence Manuel Antonio Callejas y Callejas have been sentenced to lengthy prison sentences in May 2018 for ordering the rape of Emma Molina Theissen and the enforced disappearance of her 14 year-old brother, Marco Antonio Molina Theissen.[84]

5 IACtHR contributions to the Guatemalan fight against impunity: direct interactions

Having sketched the contours of the Guatemalan fight against impunity for crimes committed in the context of the civil war, it is now possible to trace the contributions made to this struggle by the Inter-American system. This section will examine the interactions between the Inter-American system, pro-accountability constituencies and various state organs in the context of the proceedings conducted before the IACtHR concerning crimes committed in the context of the Guatemalan civil war and the judgments obtained as a result of those proceedings. More importantly, this section will analyze how those interactions have influenced the domestic struggle against impunity and the investigations and prosecutions conducted by the Guatemalan justice system. First, this section will discuss the contributions of Inter-American proceedings, through 1.) the monitoring effect these proceedings may have over domestic proceedings; and 2.) the protection they provide to those involved in the domestic struggle against impunity. Secondly, this section will discuss the contributions made by the IACtHR's judgments in relevant Guatemalan cases, through 1.) the self-executing nature of those judgments; and 2.) the account provided by these judgments of the historical context of the civil war.

5.1 Involving the Inter-American system in the domestic struggle against impunity

Civil society demand for investigation of serious human rights violations cannot truly be effective in their work without some sort of cooperation on the part of the state. And, as should be clear from the previous paragraphs, the authorities responsible for the investigation and prosecution of criminal cases, the Public Ministry and the judiciary, have long been averse to the

83 *See for example* J.M. Burt, 'Eight military officers to stand trial in CREOMPAZ grave crimes case', *International Justice Monitor*, 17 June 2016. At the time of writing, the proceedings remain halted as a result of a large number of appeals filed on behalf of the defendants.

84 *See for example* J.M. Burt and P. Estrada, 'Four retired senior military officers found guilty in Molina Theissen case', *International Justice Monitor*, 23 May 2018.

work demanded from them by civil society groups. As a result, the investigations civil society groups sought at the domestic level became stuck, leading them to look elsewhere for support. In many cases, they found this support through the Inter-American human rights system.

In many cases, recourse to the Inter-American system was thus a ' negative choice', a last resort for victims who had no options available to them at the domestic level.[85] As one respondent stated: "we went to the Inter-American Court because of the denial of justice".[86] But the ultimate goal always remained to have justice done at the domestic level, because "the internal struggle is here [in Guatemala]".[87] In other cases, taking the case to the Inter-American level was a more strategic move, meant to pressure the domestic authorities into action or to provide a sort of international 'supervision' for investigations being conducted at the national level.[88] In any event, none of the respondents I spoke to saw the Inter-American level as a 'final destination', but rather as a step in the ongoing struggle to achieve justice domestically.[89]

Since the 1990s the Inter-American system has dealt with a string of important cases concerning serious violations of human rights committed during the civil war. The Inter-American Court has held the state responsible for various enforced disappearances, extrajudicial executions and massacres. In all of the civil war cases against Guatemala, the Court further found that the state had violated the American Convention on Human Rights by not investigating these crimes and by not providing justice for the victims and their next of kin. As a result, it has ordered the state to provide reparations for the victims, including, without exception, the investigation of the material violations and the prosecution of those responsible for them.

After initially responding with hostility, the state gradually began to adopt a more positive attitude towards the Inter-American system. Under the Portillo presidency (2000-2004), the state first began (partially) accepting responsibility for the violations petitioners were complaining about to the Court.[90] Furthermore, a specialized body was created in the Guatemalan executive, the Presidential Human Rights Commission ("COPREDEH"),

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85 Interview F, interview G, interview K, interview M and interview T.

86 Interview F.

87 Interview F.

88 Interview K and Interview R.

89 In this context, Jeffrey Davis speaks of "unlocking the process". See J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014), pp. 157-175, discussing at length the involvement of the Inter-American system in Guatemala in the cases of *"diario Militar" v. Guatemala* and *Garcia and family v. Guatemala*.

90 *See for example* IACHR *Myrna Mack Chang v. Guatemala (merits reparations and costs)*, judgment of 25 November 2003. As one of my repsondents explained to me, the decision to accept state responsibility comes from "the highest level", meaning the president. Interview E.

in order to represent the state before international human rights bodies, including the Inter-American system, and to coordinate compliance with their judgments and recommendations.[91] For many years, COPREDEH has been one of the state institutions most willing to cooperate with victims and to help work towards compliance with the Inter-American Court's judgments, including the domestic investigation of the human rights violations found in those judgments.[92] Thanks, in large part, to the work of COPREDEH, the state actually began providing some of the reparations ordered by the Court, including making apologies to the victims and their next of kin for the violations committed against them by state agents.

5.2 Contributions through the proceedings at the Inter-American level

5.2.1 Monitoring of domestic proceedings

A first way in which the Inter-American system has contributed to domestic accountability efforts certain individual cases, is through the monitoring of domestic proceedings. This monitoring, it should be noted, is not an independent function of either of the organs of the Inter-American human rights system, but can be seen as a side-effect of its work. More particularly, it is a side-effect of the prolonged involvement of the organs of the Inter-American system in domestic proceedings regarding individual cases, through the various stages in the proceedings at the Inter-American level, from the admissibility stage to the supervision of compliance phase. In all of these stages of the proceedings, the organs of the Inter-American system will check in with the progress of the domestic investigations and prosecutions and state agents will be called upon to report on their work and the concrete steps taken to allow the investigations to advance.

The effects such monitoring may have on domestic proceedings is not easily recognized if one has a more traditional, compliance-based perspective on the impact of the Inter-American system. This is illustrated by an interview I had with one particular respondent, who had been the director of COPREDEH under a previous administration. Given her position with COPREDEH and the function of that institution within the state, it is only natural that this respondent had such a compliance-based perspective. When discussing the effects of the Inter-American system on domestic investigations and prosecutions in cases of grave human rights violations, she said, referring specifically to the Edgar Fernando García case:

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91 Interview E, interview U.

92 Copredeh's role as an 'ally' to victims was given a huge impulse when Frank LaRue, a human rights lawyer and the founder of CALDH, was appointed president of copredeh under the Berger government. His successor, Ruth del Valle, also had a background in civil society.

"[T]he fact that there were trials in the case of Fernando García, that doesn't derive from the judgments of the [Inter-American, HB] Court. That started here, before that.

Q: And there was no impact of this case before the Court in the national proceedings in the case of Fernando García?

A: There was none. What happened is that the policemen were already tried – and one is a fugitive from justice – and all that was prior [to the IACtHR's judgment, HB]. In the same period of time that they were pursuing the case in the Court, they were doing other proceedings here against the intellectual authors and they were still convicted. But I believe it was so parallel that the road had already been established, everything was already done for them to be convicted. So the [IACtHR's, HB] judgment came out shortly before they were convicted here, but it didn't really change things. This is my assessment, that [the IACtHR's judgment in, HB] Fernando's case wasn't going to change things.

Q: And the fact that this case was already in the [Inter-American, HB] system, you do not believe there was, like, more pressure to [do the case at the national level, HB]?

A: In this case no, because the tribunal [which convicted the intellectual authors in the Fernando García case, HB] is a tribunal which is very committed to justice for the victims. The tribunal was presided by Yasmín Barrios, and judge Bustamante was also part of it. If it had been a different bench then I would have said that maybe it had an impact, but with these people no. I believe that for them it is about the commitment to doing justice and if the matter is presented well, I mean, if guilt is proven then they should be convicted, even if nothing had happened [on the Inter-American level, HB]."[93]

In short, the respondent considers that the Inter-American case concerning the disappearance of Edgar Fernando García could not have affected the domestic proceedings regarding the same case, because the proceedings were done in parallel. The IACtHR's judgment came out only shortly before the national court's judgment and the bench which convicted the intellectual authors of the disappearance were already committed to justice for victims and did not need to be further convinced. Underlying this statement is the idea that 1.) the impact of the Inter-American system starts with the judgment of the Inter-American Court, which the state is obliged to comply with; and 2.) this impact consists mostly of convincing those who are not committed to the investigation and prosecution of grave human rights violations that they should become so.

In stark contrast, another respondent, who works with an important Guatemalan human rights organization, described her experience with the parallel litigation of a case before the domestic system and the Inter-American system differently. In her words:

93 Interview U.

> "[W]e had a strategy based on the idea ["en el sentido y en el concepto"] that the Inter-American system is subsidiary. Our focus was always to do it [the criminal case, HB] at the national level, from the beginning we were… and the curious thing about the case is… the case did not move [at the national level, HB], it didn't advance… and each time it did not move forwards, we would put… right? And so, the national level moved. I brought [the domestic and the Inter-American cases, HB] in parallel. I brought it in parallel. The main issue was the national level, and the Inter-American level was subsidiary. So, when things were not moving here, the [Inter-American, HB] system would trigger it, and the system would pressure the national level so that this could move. At least, this was my strategy in [our case]. Even the judgment in cassation, it wasn't possible to do it until after the judgment of the Inter-American Court came out. I mean, the cassation judgment came out only after the judgment of the Inter-American Court came out.
>
> Q: Ah… right. And you think they were, like, waiting…
>
> A: Ah, of course. It is only logical. The judgment came out in December and in January the judgment at the national level came out. So yes, they are closely linked. In some way it was also… because, like, the judges who are committed in matters of human rights are few. When they feel backed up by an international body which has this legitimacy and credibility, obviously they feel protected and they are able to take the next step."[94]

Whereas the previous respondent approached the question of impact from the point of view of the state agent tasked with organizing compliance with the Inter-American Court's judgments, this respondent is speaking from the perspective of someone who was involved in the domestic proceedings from start to finish.[95] On the basis of this experience, she considers that 1.) in the case in which she had been involved, the Inter-American system had an impact exactly because the cases were brought in parallel; 2.) the impact was strongest before and directly after the IACtHR's judgment came out; and 3.) the Inter-American system had an impact through its support for actors who already had a positive attitude towards investigation and prosecution of grave violations of human rights, rather than by convincing those who would normally oppose it.

Another respondent also described an experience with parallel proceedings on the Inter-American and domestic levels in the case of the Dos Erres massacre. In his words:

> "In the Dos Erres case, which started in 1996, a complaint is brought to the Inter-American system because of the ineffectiveness of the State, its agents, in investigating the case. Not having an investigation in such a grave case, like this one

94 Interview K.

95 In fact, the proceedings in the Myrna Mack case have not been concluded entirely. Investigations are still ongoing concerning the involvement of certain intellectual authors of the crime and concerning the murder of the police investigator who had been in charge of the investigations in the Myrna Mack case in the very beginning. The respondent quoted here continues to be involved in these investigations as well.

> – where in the well alone[96] there were 162 skeletons, at a minimum! – this gives you the margin to say: there is no political will [to investigate, HB]. The Commission admits the case, it doesn't give it a prompt follow-up, but it accepts it. There is a series of meetings between the State and the petitioners, special prosecutors are appointed, there is progress in the domestic investigation and […] in 2000 the arrest warrants are ordered and a friendly settlement agreement is signed. And the State commits itself to a great number of things, but, in reality, they only provide economic compensation. President Portillo apologizes [to the victims of the Dos Erres massacre, HB], but in the investigation the case moves backwards, when it had already advanced significantly, it now starts to move backwards. So, the Constitutional Court, in what is clearly a case of grave violations of human rights, decides to suspend the proceedings, while it is decided whether or not to apply the Law of National Reconciliation, I mean, an amnesty, when this is clearly not possible or applicable. […] And this caused the proceedings to stop for 9 years, with an avalanche of motions for amparo, by now we have reached 60 amparos."[97]

Thus, according to this respondent, the proceedings before the Inter-American Commission concerning the Dos Erres massacre had a clear effect on the domestic investigation, but not as a continuous forward motion. Rather, the proceedings before the Commission produced an ebb-and-flow effect, where after an initial show of good will, the domestic proceedings became stuck once a friendly settlement agreement had been reached. The stalling of the domestic investigation caused the IACmHR to refer the case to the IACtHR. And, according to the respondent, it was through the judgment of the IACtHR, that the domestic procedural obstacles were finally cleared and the criminal case was resumed after a 9 year delay.[98] Asked whether he believed that the conviction in the domestic criminal case would have been possible without the proceedings at the Inter-American level and the judgment of the IACtHR, he said:

> "Maybe it would have happened, but not with this forcefulness, or maybe we would still have been waiting for them to arrest someone! That's why I say: they are small windows of opportunity, which create a little bit of political will in the minds of the judicial operators ["operadores the justicia"]."[99]

Again, this respondent observed, from the perspective of someone who had been involved in the Dos Erres case from the start, that the parallel nature of the proceedings on the domestic and the Inter-American level, allowed the

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96 In the Dos Erres massacre, a number of victims was killed by smashing them with a hammer and throwing them down a well. According to the testimony of survivors, this tactic was used in other massacres as well.

97 Interview O.

98 The domestic procedural obstacles keeping the Dos Erres case stuck in the Guatemalan courts were finally cleared as a result of the IACtHR's judgment, through an intervention by the Guatemalan Supreme Court. *See infra*, Section 5.3.1 of this chapter.

99 Interview O.

Inter-American system to monitor the domestic proceedings and exert pressure when it became stuck. Finally, the promise of this monitoring through parallel proceedings was recognized by a third respondent, working for one of Guatemala's oldest and most established human rights organization. His remarks on this issue came in the context of our discussion of a legal case his organization was busy preparing concerning massive human rights violations committed in the late 1970s and early 1980s. In terms of political sensitivity, the case would be comparable to the genocide case against Ríos Montt. Against this background, the respondent described his thoughts on the question whether to file a complaint with the Inter-American Commission first, and how such a complaint and the eventual proceedings at the Inter-American level could best be used in support of the domestic case. In his words:

> "There are two options, this is something we have not been able to decide yet: the option of… to do as what happened to CALDH [in the Ixil genocide case, HB], to wait until the end and, if I doesn't work out, to present a complaint [to the Inter-American Commission, HB]; or to present it in parallel to the domestic case, so that the monitoring of the Inter-American Commission falls on the proceedings. […] We have not been able to determine yet which one of the two would suit us best, we also do not want to harm ["perjudicar"] anyone, neither the Public Ministry nor any tribunal nor anything of the sort. So this is something we have to discuss, but those are the two options we are considering: to present [the complaint to the Inter-American Commission, HB] now so that it will be a parallel issue, and this will allow us to advance and to go about generating proof within this international process during the proceedings [at the national level, HB], or to wait until the end and present a complaint that way […]. In truth, I would prefer the first option, but…
>
> Q: The first was in parallel?
>
> A: That it would be parallel.
>
> Q: Because that way there would be more pressure on the state?
>
> A: Exactly […] So, that way there would be very little opportunity to…. That it would limit the state's room for political maneuvering [Original Spanish: "Les cerramos mucho la caja al estado", HB] […] But we haven't decided yet, we have to discuss it, there are things in favor and against it."[100]

In other words, the respondent leans towards the option of developing the domestic case and the Inter-American case in parallel, so as to allow the 'monitoring of the Inter-American Commission to fall on' the domestic proceedings. The respondent then described how exactly he believed that this monitoring would benefit the domestic proceedings, saying:

> "[F]irstly, it is a way of supporting the judges. If one sees that […] the tribunals are […] resolving and trying to avoid abuse of process […] and it is the state itself which is forcing them to permit it, in reality you are leaving them too vulnerable

100 Interview S.

> in the face of everything, I mean, in the face of public opinion, of the system itself, of the defense attorneys. […]
>
> So it *is* very important to have this support [for the judges, HB] which you cannot provide in another way. That's what I think. And for the judges it will not matter that we [human rights organizations, HB], are behind them, that provides them no support. However, the monitoring of the Inter-American Commission could do that. In fact, it would be to oblige the [domestic, HB] system to meet international parameters. Also, I believe it would be a way of making the case more agile. The limitation of the issue of abuse of process, well, it would provoke more agility in the proceedings […] For me […] it is a course of action that is more than viable, it is, like, what is necessary.
>
> […]
>
> I believe that it is necessary to have monitoring because you are fighting against things which are too big. […] In […] the genocide case you are really fighting the state, and so it is not possible to sustain it just like that, at the national level. To me, the *acompañamiento* of the Inter-American Commission is helpful, observing the proceedings in the context of… not as a matter of tourism, let's say, or purely academic, but in its proper legal function. So for me, this is a tool we cannot forget about. Moreover, […] it is a way to boost the [domestic legal, HB] system itself and… look, a case of this nature, if it's well done, it really helps us all, the legal profession itself, how to really litigate a case ethically and all that, which is what I believe did not happen in the Ríos Montt case. I believe that we all threw up our hands in horror every time we saw these people act this way, yet you did not see the bar association sanctioning anyone, you did not see the universities making some kind of statement on the matter, I mean, the whole system went backwards. […] For me, to have the […] Commission [present, HB] would be a guarantee that there would be progress in the case and, at a more general level, in the system."[101]

Thus, the respondent confirms what other respondents have pointed out as well: that the monitoring of the Inter-American system is most helpful as a support to those actors – the respondent mentions judges in particular – who are already committed to providing justice for grave human rights violations. In other words, the Inter-American system does not serve to sway anyone to the cause of justice. It simply helps those who are already committed to it to withstand the pressures exerted on them to abandon that cause. More specifically, the monitoring of the Inter-American system may help them to restrain anti-accountability constituencies somewhat, by limiting their space to raise political and procedural obstructions. To the respondents cited here, all of whom have extensive experience litigating human rights cases in Guatemala, this represents a considerable contribution to their work.

However, for the monitoring to have the effects described here by these respondents, there has to be something to monitor. In other words: there has to be some type of movement in the domestic investigation already, so that

101 Interview S.

the proceedings on the Inter-American level can be pursued *in parallel* to those on the domestic level. If there is no movement at all on the domestic level, it seems unlikely that the monitoring of the Inter-American system in itself will be sufficient to trigger it. In such a situation, the only thing the prolonged involvement of the Inter-American system may hope to achieve is that the case is not abandoned completely by domestic authorities. The requests for updated information on the status of the case, however irregular, keep it on the agenda of the institutions responsible for their investigation. Even if they are not taking any concrete steps forward, they cannot let the case die out either.

Moreover, the fact that cases are kept 'alive' through the monitoring of the Inter-American system may lead to results in the long term, when domestic circumstances change to become more favorable to the prosecution of grave violations of human rights. For example, one respondent discussed the domestic criminal cases concerning the Plan de Sánchez massacre, in which the organization he works for had accompanied the victims. According to this respondent, the IACtHR's judgment in the case had given a clear impulse to the domestic proceedings. When I asked how, then, he could explain the time which had passed between the IACtHR's judgment (2004) and the arrests of the accused (2011), he says that the investigations could not begin until there had been some changes within the MP. However, he still considers that the Court's judgment and the subsequent monitoring of compliance had given an impulse to the investigation, once these domestic changes had taken place.[102] Likewise, another respondent said of the domestic proceedings concerning the disappearances recorded in the Military Diary:

> "But there is also the order […] to continue the investigation on the national level.
>
> Q: And do you see any signs of compliance, that there will finally be an investigation?
>
> […]
>
> A: The truth is that the opportunity [to investigate human rights cases, HB] opened with the arrival of the current Chief Prosecutor, who started to also investigate human rights cases. But this policy [of not investigating human rights cases, HB] did not change until she arrived. And this is where the possibility to investigate opened, because here, there is also a judgment which says that the investigation at the national level in the Military Diary case should continue. […]
>
> And you will always have those people, because the state is not monolithic and it is a matter of finding those little windows through which you can operate and which allow you to continue to go forward, even though it is very slow."[103]

102 Interview Q.
103 Interview K.

In short, when cases are conducted in parallel between the Inter-American system and the domestic justice system, the Inter-American proceedings may have a monitoring effect over the domestic proceedings. In such cases, the Inter-American proceedings can be utilized by domestic pro-accountability actors to put pressure on the national authorities whenever the case becomes stuck at the national level. The spotlight of Inter-American monitoring through parallel proceedings tends to limit, to an extent, the possibilities for political and procedural maneuvering on the part of anti-accountability actors. Moreover, this monitoring can provide a form of support for judges and prosecutors who are willing to pursue politically sensitive human rights cases, but who are under intense external pressure to drop them. Finally, even if these two mechanisms do not work, the monitoring by the Inter-American system may simply prevent a case from dying out completely, so that it can be resumed once domestic circumstances change and become more conducive to investigation and prosecution.

5.2.2 Protection of pro-accountability actors

There is another, more concrete way in which the proceedings before the Inter-American system have supported pro-accountability actors in Guatemala: by protecting them through the protective measures ordered by both the Inter-American Court and the Inter-American Commission. Under Article 63(2) ACHR, the Inter-American Court can order the protection of people or organizations who are connected in some way to a petition under review by the Inter-American system. The Inter-American Commission, on the other hand, can order protection measures for a much wider category of people on the basis of Article 25 of its own Rules of Procedure. As explained by one respondent, who worked in the Office of the Human Rights Ombudsman (*Procuraduría de Derechos Humanos* – "PDH") at the time the interview was conducted:

> "The protective measures are to protect people who are at risk, but it does not matter whether they participate in the cases [before the Inter-American system, HB] or not. Here, in the office of the Ombudsman, is where we make the requests to the Inter-American system. The majority of the people who are protected – judges, prosecutors, human rights defenders, journalists, people who are attacked by the powers that be – request [protection, HB] through us. […] Here, we have a special office for this. If you are at risk, you come here and they send you to the office and we ask the Inter-American Commission in Washington "look, this person is at risk" and they request information [from the state, HB]."[104]

104 Interview R.

If, on the basis of the request and the information provided by the state, the Commission concludes that the person in question is indeed at risk, then it will order the state to provide protection. This protection will normally be provided by the state security forces, more specifically the police. According to a respondent who works with a Guatemalan NGO which focuses on the protection of human rights activists:

> "I forgot to mention that the issue of the protection measures of the Commission is very important in the protection [of human rights defenders, HB]. […] We have in our files the protection measures conceded to human rights defenders who we accompany, and these are defenders who find themselves in a situation where there is a risk to their lives or to their physical integrity and where the state does not want to protect them, so a request is presented to the Commission. The Commission grants the protection measures and the state has to implement them; I mean, even though the Commission grants them, it is the state who has to provide the personnel for the measures through the police."[105]

Protection measures can be ordered on behalf of individual accountability activists and their families, and also on behalf of entire organizations. Given the tense environment in which pro-accountability activists operate in Guatemala, such requests for protection have been relatively common. Since the end of the armed conflict, practically all of the high-profile organizations and individual activists involved in the struggle for justice have requested, and received, protection measures from either the Commission or the Court. And while the measures are periodically reviewed, the protection measures will in principle remain in place until the Commission or the Court concludes that the recipient of the protection is no longer at risk, without any set limit to their duration. As a result, some activists have enjoyed police protection for years, or even decades.

The importance of these protection measures for the work of accountability activists was pointed out to me spontaneously by one respondent. This respondent is an especially high-profile activist, who has suffered threats to her life almost constantly since she began her work in the early 1990s. She mentioned this particular contribution of the Inter-American system almost casually, as an aside in the context of a different point she was making. When asked to explain why she thought that the Inter-American system had an impact on the struggle for justice in Guatemala, even though she also recognized that the state does not usually comply with the Court's judgments, she said:

> "I believe that, if the Inter-American system, the Court and the Commission, had not also been involved in human rights issues – and they have saved lives, right? Through the protective measures and the provisional measures, they have saved lives. I think this is important – but if it hadn't been for this, as I was telling you,

105 Interview L.

> it might not have been possible in the region to have… all the trials in the case of Argentina, Fujimori in Peru, Ríos Montt in Guatemala… many human rights cases were possible thanks in part to the Inter-American system."[106]

When asked to elaborate on how she thought that the Inter-American system had 'saved lives', she explained:

> "Many times, protection measures have been requested for human rights defenders at the frontlines, and really, immediately from the moment of requesting [those measures, HB], what it does is shine a light on the danger the person is in. And this helps so that, maybe, the attack which was going to happen does not take place, or that at least the attention of the defenders is focused on a person who is in danger.
>
> Q: Right. And you yourself have been the object of such measures?
>
> A: Yes, of the measures, provisional measures by the Inter-American Court to be precise.
>
> Q: Until now?
>
> A: Until the present day, yes." [107]

Thus, according to this respondent, the measures ordered by the organs of the Inter-American system have a protective effect not just through the actual police protection provided to activists, but in and of themselves, because they put a spotlight on the situation of certain activists who are particularly at risk. The attention of the Inter-American system creates an impression that the world is taking notice of what happens to these activists which, it is hoped, will dissuade their opponents from attacking them. And while it is, of course, very difficult to prove that the 'spotlight' of the Inter-American system has in fact diminished the threat against pro-accountability activists and prevented attacks against their person, the very fact that some of them *feel* protected by it and that this gives them confidence to continue their work is in itself a contribution to domestic accountability efforts.

Ironically, that feeling of being protected by the measures ordered by the Inter-American system is sometimes undermined by the concrete form this protection takes, namely being under the constant watch of one or more police-officers. In practice, what some activists seek is protection *from* the police, not by the police. In the words of the respondent quoted above:

> "Q: And do you feel protected by [these measures, HB]?
>
> A: The habit, I mean, ones inclination would be to distrust the security forces, because they were among the forces who were persecuting you… But you have, like, a counterargument, which is to say that, if something were to happen while you have protection measures, there would be a greater responsibility on

106 Interview K.
107 Interview K.

> the state[…] And what we as human rights defenders have at times requested was a "*seguridad perimetral*", exactly because of the lack of trust. […] Protection measures, but that they were at a distance, right? […] Because of the distrust against the security forces"[108]

That this respondent is not alone in her mistrust of the people appointed to guard her is confirmed by the respondent who works with PDH and, as such, has been involved in assisting activists with their requests for protection. Speaking about the fact that the police is responsible for providing the protection ordered by the organs of the Inter-American system, she said:

> "This is a problem, because these people hate the police, because they [the police, HB] could be out to kill them. So from the beginning we tell them "look, if they give you protection measures, they are going to put police officers on you"; [and they say, HB] "I don't want that". […] but now that they have two police officers by their side, these people detest it, they hate it. But after a while they feel protected because they [the police officers, HB] are taking care of them."[109]

As this respondent notes, the activists who receive police protection sometimes come around to the officers assigned for their protection, so that they do feel protected by the measures. In other cases, arrangements can be made for protection through a different state agency or for a more personalized protection scheme. This was explained by one respondent, who worked for COPREDEH at the time the interview was conducted and, as such, was involved in the coordination of state compliance with the protective measures ordered by the Inter-American system. In his words:

> "[U]pon receiving the communication [from the Commission ordering protective measures, HB], one cannot… For example, if we receive an order to protect you, we cannot just tell you: "look, we are going to send over two policemen". We have to do a risk analysis. I mean, how are we going to [protect you, HB]? […] So, this way we will determine, after the risk analysis, what protection scheme suits you best. Because in some cases, you will have to be guarded by elements of the police, no matter what. The National Police is the one who physically provides the police officers for your protection, through the Department for the Protection and Security of Persons, it is called… And in *some cases*, when the people do not have much trust in the police, we ask for protection through the "SAAS", the Secretariat for Administrative and Security Affairs of the Office of the President of the Republic. […] But the protection of the [National Police, HB] really is very good. They are trained police officers… they also provide protection for all the embassies here in Guatemala."[110]

108 Interview K.
109 Interview R.
110 Interview W.

In other words, there have been some attempts to provide activists with a protection scheme that they are comfortable with, so that they may in fact feel safer through the protection measures ordered in their favor. Furthermore, it should be noted that the state has generally complied with the orders to provide protection, so that those accountability activists who have sought protection through the Inter-American system have tended to actually receive it. This was confirmed by the respondent who worked with COPREDEH during the Pérez Molina administration (2012-2015), which had otherwise not hesitated to make its disagreements with the Inter-American system known. However, this respondent also explained that, while the government had been willing to provide protection when ordered, it had actively sought to have measures already in place lifted, especially those which had been in place for extended periods of time. In his words:

> "Of course they [the police departments who provide the protection, HB] also request that the protection measures are lifted, to put it like that. We had protection measures that we had been complying with for almost 20 years. So, the purpose for which they had been ordered no longer existed. So, we requested to have them lifted and they lifted quite a few. I believe that, at the moment there are no more than 28 [orders for protection, HB] measures. 28 or 29. And, like, 25 were lifted. From the time this administration started.
>
> […]
>
> Q: And when there are measures by the Commission or the Court, does the state always provide protection?
>
> A: Yes, always. That's why we requested to have them lifted […]. But, if our requests are denied, we have to continue to protect them."[111]

Another respondent had a slightly less favorable interpretation of the state's record of compliance with the protective measures ordered by the Inter-American system. This respondent worked with UDEFEGUA and, as such, is acutely aware of the grave situation of risk in which many of the accountability activists in Guatemala find themselves. Against this background, she did not look favorably on COPREDEH's attempts to have the measures protecting these activists lifted. When asked directly whether the state complied with these measures, she replied:

> "Yes, it does. What happens is that it also depends on the type of defender we are talking about. There are for example some defenders with regard to which the state is more inclined to provide protection. […]
>
> [B]ut then, what happens is that in the reports on the supervision of these measures which the state presents [to the Inter-American Commission HB], in some cases it has an attitude which, firstly, is really comforting, minimizing the risk the defender faces, suggesting that the protection measures cannot perpetuate indefinitely, reducing the situation of risk to persons who have suffered concrete incidents. Like if you haven't suffered at least five threats in the last six

111 Interview W.

> months it is no longer justified that you have protection measures, even though there is a situation of risk if you carry out a more contextual analysis. Then, other times they do provide protection, but only as soon as this person stops their activities as a defender, for example as soon as they stop going to gatherings, stop going to manifestations, and the person says "I am a defender and I will continues to do this". So in many cases there is a defective compliance because the protection scheme is not complied with well, and in other cases it is complied with but the state tries to do whatever possible to stop providing these measures. And in many cases it starts to use an offensive tone in its reports and we have seen this above all in this government."[112]

In other words, a government that is opposed to the investigation and prosecution of grave human rights violations may seek ways to reduce the number of accountability activists they need to protect, so as to make it more difficult for these activists to do their work. Such a government may seek to have protection measures lifted or to attach certain conditions to the protection provided by state agencies. However, even such governments have not gone so far as to refuse to provide protection to accountability activists when specifically ordered by the Inter-American system to do so.

5.3 Contributions of IACtHR judgments in Guatemalan cases

5.3.1 The self-executing nature of IACtHR judgments

Apart from the proceedings, the IACtHR also 'interacts' with pro-accountability actors and relevant state organs through its judgments in individual cases. In some instances, these judgments have had important direct effects in the domestic investigations and prosecutions concerning the same facts. However, these direct contributions have required an intervention by the Guatemalan Supreme Court, which has mediated the direct legal effect of the IACtHR's judgments in the Guatemalan legal order.

In 2009 and 2010, the Supreme Court handed down a series of decisions in which it declared that the judgments of the IACtHR are self-executing. The first four decisions in this series were all delivered on 11 December 2009 and concerned the judgments of the Inter-American Court in the cases of *Paniagua Morales and others ("White Van") v. Guatemala*, *Villagrán Morales and others ("Niños de la Calle") v. Guatemala*, *Carpio Nicolle v. Guatemala* and *Bámaca velásquez v. Guatemala*. In these four cases, the domestic investigation and prosecution had come to a complete standstill due to the large number of amparos and other motions for protection filed by the defense. Unable to exit this procedural quagmire on its own, the Public Ministry filed a request with the Supreme Court for the execution of the IACtHR's judgments, in which the IACtHR had flagged these tactics on the part of the accused and

112 Interview L

had included specific orders to the state to remove all legal and practical obstacles to investigation and prosecution.

The Supreme Court, in turn, granted the request of the Public Ministry for execution of the sentences and declared that, in fact, these judgments are self-executing. According to the CSJ, Guatemala, as a member of the international community has recognized the jurisdiction of the Inter-American Court and is therefore bound by the ACHR to execute its sentences. Provisions of internal law cannot stand in the way of this obligation. As a result, the CSJ declared that the Guatemalan state is obligated to effectively investigate and prosecute these cases and that all internal legal obstacles standing in the way of such an investigation are null.[113] The CSJ then provided a number of very specific instructions as to how this obligation to effectively investigate should be executed, including the annulment of several judicial decisions to dismiss the charges against particular accused, which the IACtHR had determined were the result of fraudulent and unfair proceedings, and the inclusion of certain suspects in the investigations. Some months later, on 8 February 2010, the CSJ rendered a similar decision on a request for the execution of the Inter-American Court's judgment in the case of *Dos Erres*, in which it determined the self-executing nature of that judgment and ordered, amongst other things, the capture of a number of suspects and the non-applicability of the amnesty law.[114]

These decisions of the Supreme Court, relying on the previous judgments by the IACtHR, thus achieved a complete removal of all the legal obstacles impeding prosecution in a small number of cases. Moreover, the wording of these decisions suggests that the self-executing nature is shared by *all* judgments of the IACtHR, thereby expending the scope of application somewhat. However, with regard to four of the five judgments declared self-executing by the Supreme Court, the domestic investigations and prosecutions have not been able to move forward, even with all the legal obstacles cleared.

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113 CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2005/46063 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009; CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2008/63814 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009; CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2009/10170 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009; CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2008/2506 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009.

114 CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2006/96951 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 8 February 2010.

The real-world effects of the Supreme Court decisions have been limited to the prosecutions in the *Dos Erres* case, where they have indeed played an essential role in allowing the prosecutions to move forward to trial and, eventually, conviction. As a result of the decision on the execution of the IACtHR judgment, arrests warrants against several accused, which had been suspended by the CC in 2000 awaiting a decision on the possible application of an amnesty under the Law of National Reconciliation, came back into effect. On the basis of these arrest warrants, the first arrests in the case were made shortly after. Of course, not everyone was pleased with these results. The accused arrested on the basis of the Supreme Court's decision, and eventually tried and convicted to lengthy prison-sentences, filed an appeal against it with the Constitutional Court. However, the Constitutional Court upheld the Supreme Court's decision, arguing that it was the result of a direct and explicit order of an international court whose decisions are binding on the state.[115]

Thus, through the Supreme Court's decisions declaring that its judgments are self-executing, the IACtHR has made an important direct contribution to the removal of procedural obstacles in a limited number of cases. For most of those cases, however, the effect of that decision have been limited to paper, and the domestic proceedings have not moved forward in practice. In only one case, that of the *Dos Erres* massacre, the self-executing nature of the IACtHR's judgment has had a decisive effect, as it cleared up all the procedural obstacles put in its path and allowed the Public Ministry to bring the case to trial, resulting in several high profile convictions.

5.3.2 The IACtHR's account of what happened during the Guatemalan civil war

In the case law of the Inter-American system, pro-accountability actors have found support and legitimation not only for their demand that justice be done, but also for their account of what happened to them or to their loved ones and how this related to the larger context of the armed conflict. As previously discussed the dominant narrative in Guatemala concerning the civil war had long been based on a denial that the grave human rights violations described by victims and other pro-accountability activists actually took place, or that they had been part of a policy on the part of the armed forces. Against this background, official recognition provided through a judgment of an international court forms an important validation of the account of the facts as told by victims and activists. One respondent, a petitioner in a case

115 CC judgment of 18 January 2011 (Amparo en Única Instancia), Exp. 655-2010 and 656-2010. The CC id consider that, in removing all the legal obstacles to prosecution, the Supreme Court had not used the correct procedural mechanisms to do so. However, according to the CC, this does not need to affect the validity of the Supreme Court's decision. As a result, it decided to uphold the decision, but to 'redirect' its execution towards the appropriate procedural mechanisms.

against Guatemala before the IACtHR, summarized what the judgment of the Court had meant to him:

> "[W]hat we have achieved is that the state can no longer do anything. It can no longer deny anything because there is an unappealable sentence. We won. They had 8 years to appeal [by defending the case before the Court, HB] and they didn't do it. The state accepted what it did."[116]

Other victims interviewed over the course of this research have expressed similar feelings. For example, one respondent said that, while the judgment by the IACtHR in itself was not sufficient to satisfy her need for justice, she did consider it valuable that the judgment reflects and recognizes (part of) the truth about the disappearance of her family member. Now, the respondent said, the authorities can no longer maintain that she and the other petitioners were making up stories.[117] Another respondent discussed at length the importance of the IACmHR and the IACtHR as platforms for her to tell the truth about what had happened to her and to have her story validated.[118] She described the judgment of the IACtHR as "proof" that her account of the facts were truthful, as opposed to the false account spread by the Guatemalan military. Yet another respondent, a lawyer who has represented victims in several cases concerning grave human rights violations at both the domestic and the Inter-American level, explained that the recognition of what has happened to them is often an important motivation for his clients to bring their case to the Inter-American system:

> "In one way or another, any sentence which is handed down by any tribunal, be it national or international, is a form of reparation for the victims in this type of case. At least to have a serious pronouncement about the access to justice the victims are seeking, the recognition of the history that they are telling, like the verification or certification of this history, that it is not just a tale, that these are not made up situations, but that these are drastic events which took place in the history of this country and that the country itself has refused to accept them […]."
>
> […]
>
> But more than [economic reparations, HB], in terms of reparation , what they [the victims, HB] look for is that it is *recognized*, on the part of the state, that these grave violations of human rights were committed. Apart from the economic aspect, they do demand other reparations. Generally, they demand apolo-

116 Interview F.

117 Interview M.

118 Interview T. In the respondent's case, support for her account of the facts took on a special meaning. The respondent, who had been forcibly disappeared by the Guatemalan army and is one of the very few who survived the experience, had been forced by the military to publicly give a false account of her disappearance (saying that she had been "staying with friends") as a condition for her release. Once out of the hands of the army, it became very important for her to tell the real story of what had happened to her during the day days she had been missing. The respondent repeatedly connected being able to tell the truth about what happened with maintaining her mental health.

> gies from the state to the victims, they demand the dignification of the victims through monuments, through plaques, through official ceremonies where the victims are recognized for their struggle, for their desire to overcome, for the stigma that has been attached to the community of being a *comunidad guerrillera* – which generally has been the pattern for considering someone an internal enemy is saying that they supported the guerrilla, even though they included children, women and elderly. So these types of reparations are the ones that dignify the memory of the victims in some way. And sometimes the state finds it difficult to comply with these reparations, but they are simply reparations. But yes, in essence they [the victims, HB] go [to the Inter-American system, HB] seeking a recognition from the state[…]."[119]

In short, the IACtHR has supported victims' accounts of what happened to them through their own recounting of the facts of the case and through the reparations aimed at public recognition of the victims and the harm they suffered. Moreover, since the Portillo presidency (2000-2004), the state has maintained a practice of (partially) accepting responsibility for serious human rights violations in litigation before the IACtHR.[120] In these ways, the Inter-American system has contributed to the construction of an alternative narrative of the Guatemalan civil war, which challenges the dominant narrative promoted by veto-players.

It should be noted that the sources consulted in the context of this study do not clarify whether the case law of the Inter-American system has contributed to a greater *acceptance* of this alternative narrative among the general public. In fact, one respondent explained to me why she thought that the Inter-American case law, notwithstanding its great potential in this respect, has probably not been able to inform the public narrative of what happened during the armed conflict. According to this respondent:

> "[T]he disadvantage of having a case before the Inter-American Court is that only those of us who study human rights pay attention, but there isn't a wide dissemination. These cases aren't well studied. We have a marvelous collection of judgments, but only professors of human rights or students or those who litigate [study these judgments, HB].
>
> Q: And why do you think that these cases are not studied?
>
> A: Well, I believe that not even human rights [as such, HB] are disseminated, let alone the case law of the Inter-American Court. I believe this is a problem, not disseminating all of this and not finding the ways in which people could take an interest. The judgment says that some of its parts should be published, but how many people have read the publication of the judgment? […]
>
> Because I believe that the judgments of the Inter-American Court contain the history of this country, the sociology of this country, and they contain an MRI of the terrible justice system we have in this country. So there is a wealth of marvelous information and, on top of that, a way of interpreting this reality which is brilliant. So there should be a way of disseminating them which is not formal,

119 Interview O.
120 Interview F.

> because it is difficult for people to understand this [information from the judgments, HB]. […] I believe that there is, let's say, it's an elite who reads, who studies these cases. Those of us who teach classes, those of us who are students or who litigate, or people… an interested lawyer. But if the public would know all that is in these judgments that would be wonderful, because that is also a way of recovering memory and truth."[121]

However, while the lack of circulation of the Court's case law may have limited its ability to inform the general public's views of what happened during the civil war, there is a particular audience, especially relevant in the context of this research, which *is* aware of the case law and the narrative set out by it: "those who litigate" human rights cases. That is to say, the specialized judges and prosecutors involved in domestic prosecutions of grave violations of human rights. With regard to this particular audience, the respondent noted that they had been somewhat receptive to the narrative presented in the judgments of the IACtHR and that, as a result, these judgments have affected the way the facts are analyzed and presented in domestic trials concerning grave human rights violations. In the words of the respondent:

> "So I believe that the advantage of going to the Inter-American system in cases of grave human rights violations has been that it has already created, let's say, a whole base of proven facts. The whole use of documents like the truth reports. The Inter-American system has been the first to say that these documents, REHMI and Memory of Silence, produced proof. So for transitional justice this set of judgments which exists there is very important, because in the Inter-American system, for example, the national security doctrine is already something, like, run-of-the-mill [original Spanish: "común y corriente", HB], let's say they are convinced, it has been proven, it is a fact that has already been accepted. But that was thanks to the cases from there [in the Inter-American system, HB]. When they [the cases, HB] come to Guatemala, the case law of the Inter-American system is cited, which already produced proof, which has been very important.
>
> Q: In domestic cases?
>
> A: In domestic cases… it had to be proven the first time, but it helped to say that the Inter-American system had used these documents as proof. So many facts and issues proven in in the Inter-American system help us in our litigation here as a jurisprudence which is already established in the human rights system.
>
> Q: Aha. And do you have any concrete examples of concrete cases where the case law [of the Inter-American Court] was used?
>
> A: *Dos Erres*, *Plan de Sánchez*…
>
> Q: Here, in Guatemala, they used the case law [of the Inter-American Court, HB] in these two cases?
>
> A: Yes, in these trials, the Public Ministry and the *querellantes adhesivos* said: "*we already have a judgment*". That is to say: the state was already found responsible, here we are determining who were responsible as agents of the state. But in

121 Interview R.

> the context that there was already a judgment, which is very important, because it was already proven that the state and its agents violated [human rights, HB]. Now what we have to prove is…
> Q: Who was the person [responsible, HB]…
> A: Who it was, the individual."[122]

In this quote, the respondent discusses three ways in which she deems that the Inter-American case law has helped to establish, as she calls it, "a base of proven facts" on which domestic case law on the armed conflict has been able to build: 1.) domestic tribunals relying directly on IACtHR judgments as evidence that certain events, e.g. massacres, took place; 2.) domestic tribunals relying on the precedent established in IACtHR judgments for using the report of the Guatemalan truth commissions as evidence that certain events took place; and 3.) domestic courts following the example set by IACtHR judgments on how to interpret facts in light of their historical context.

The first of these three statements is supported by two other respondents, both of whom have been directly involved in domestic trials for grave human rights violations.[123] It should be noted that none of the respondents suggested that the IACtHR's judgments are a sufficient basis for judges to conclude that particular human rights violations occurred or that they were perpetrated by the state. The evidence which has been presented to this effect during trials concerning grave human rights violations in Guatemala is extensive and diverse, including forensics, witness testimony and (formerly) classified army documents. In this context, the added value of using an IACtHR as a form of supporting evidence to prove the occurrence of a particular set of facts would seem, at first glance, rather limited. However, the respondent quoted above suggests that "the context that there already was a judgment" has been used by prosecutors make it easier for judges to make such controversial factual findings. This use of the IACtHR's case law should be understood against the background of the many pressures to which judges hearing human rights cases in Guatemala are subject. As the respondent explained further on in the interview:

> "Of course, the legal backing of the order of a judge which is contained in a judgment of the Inter-American Court… and it is also pressure for the judges. If I am in "Dos Erres" or "Plán de Sánchez" in the local trial, national, domestic, if I [as a prosecutor, HB] tell them [the judges, HB] that the state was already found responsible, the judges are not going to say that there was no massacre, they already know there was a massacre. So I believe that it might even be easy for the judges. If it is already proven that there was a massacre and it is proven how it was done, all that remains is to find the individuals who were involved in it, who was in command that day, which soldiers were present at that hour. To find the individuals. For the judges… For me, [if I were] a judge, it would be

122 Interview R.
123 Interview P, Interview Q.

> super easy. If "Dos Erres" already has two judgments [from the Inter-American Court, HB] – not one, two – if I am saying that all this has happened and there is a judgment confirming this… For the judges, with all the pressure on them to absolve the soldiers, they cannot absolve because there it is. There are facts that are proven."[124]

In other words, the respondent suggests that IACtHR judgments are a 'cover' for judges when they make controversial factual findings, allowing them to legitimize these findings by reference to a higher authority. Illustrations of this phenomenon can be found in several domestic judgments in cases which have been subject of an IACtHR judgment as well, and in which those IACtHR judgments have been accepted as evidence.[125]

The second point discussed by the respondent, that the case law of the IACtHR has served as a precedent for using the truth reports as proof for the wider historical context of the Guatemalan armed conflict, was supported by two other respondents, both of whom have been closely involved in domestic prosecutions. One of them, a lawyer who has represented victims of grave human rights violations committed during the civil war in domestic proceedings, said that:

> "First and foremost, by emitting its judgments it has recognized that the truth reports are important elements which contextualize the cases, the stories, the concrete facts which are…. And that they are fully effective [original Spanish:

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124 Interview R. While the last two sentences of this quote, taken in isolation, would give the impression that the respondent is suggesting that IACtHR judgments are used to establish the responsibility of individuals for certain facts. However, when read in context of the quote in its entirety, it is clear that the respondent means that these judgments are used only to establish that certain facts took place. In fact, the judgments of the IACtHR do not discuss individual responsibility and can therefore not be used to that effect.

125 For example, the list of accepted evidence in one of the domestic judgments on the criminal responsibility of military commanders for the *Dos Erres* massacre, includes the following entry:

> "XLVII. Photocopy of the judgment of the Inter-American Court of Human Rights in the case of the Dos Erres Massacre Vs. Guatemala, dated 24 November 2009, concerning the facts related to the DOS ERRES massacre. A document which is awarded "valor probatorio" and with which it is irrefutably proven that the Guatemalan State was found responsible for not having complied with the obligation to respect the rights of the community of Las Dos Erres; which had as a result the grave violation of human rights, which a massacre is; ordering that those violations be investigated, which should be done with respect to all the presumed material and intellectual authors of the massacre. […]"

Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, 01076-2010-00003 Asistente 2°, judgment of 12 March 2012 (Dos Erres Massacre), p. 165. Similar entries can be found in other domestic judgments. *See also* Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, C-01076-2010-00003 OF. 1º, judgment of 2 August 2011 (Dos Erres massacre), p. 236 and Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, C-01069-1997-00001 OF. 3º, judgment of 2- September 2013 (Edgar Fernando García case), pp. 114-115 and p. 150

> "que tienen plena vigencia", HB] because they are documents which relate the history of the Guatemalan conflict in an objective manner."[126]

Another respondent, an activist who has worked with several important human rights organizations and who has acted as an external advisor to the Public Ministry in human rights cases, considered that, by relying on the truth reports, the IACtHR had strengthened both its own case law and the value of the truth reports as evidence in criminal cases. In his words:

> "And remember, also, that these are recommendations from the Commission for Historical Memory […] Because the [Inter-American, HB] Court also made some things coincide. It has made things coincide with the Commission for Historical Memory. You will find the decisions of the Commission for Historical Memory in the decisions of the Inter-American Commission. […] In the Molina case [*Molina Theissen v. Guatemala*, HB] they say… the order to search [for the remains of Marco Antonio Molina Theissen, HB] coincided… […] It is possible that the Court made the order to search coincide with the recommendation of the Commission [for Historical Memory, HB] […]. And this, afterwards, is taken on by [civil society] organizations, with the two foundations.
>
> […]
>
> Q: And do you believe that the fact that the Court, as an official body, has recognized these reports [REHMI and Memory of Silence, HB], do you believe that this strengthens them, to be recognized here?
>
> A: Ah, yes. Definitely. I believe that it is, like, well-designed […] What the Commission [for Historical Memory, HB] says, is that it cannot be used as proof in a trial. […] It does not have legal value in itself, but it can be used in accordance with the procedural rules of the country. So it is saying: "this is not a criminal sentence", it says that it is a report which can be used in accordance with national law.
>
> […]
>
> So a judgment [of the Inter-American Court, HB] which cites the Commission for Historical Memory strengthens itself. Let's say, the judges cover their backs since the Commission already said it. […] But also, the fact that the Commission appears in the judgment strengthens the force of the Commission in [domestic, HB] cases… It makes it official, basically, because it has been recognized in the majority of cases, I imagine… In the majority of the cases in which there is a judgment, it has been used in the majority of cases of the [Inter-American] Court. Yes, I believe that they strengthen each other, no? This is a good signal."[127]

An important example of how a domestic court has relied on Inter-American case law to legitimize the use of the truth reports as proof in a criminal case, can be found in the domestic judgment of 12 March 2012 concerning the *Dos Erres* massacre. In it, the court states the following:

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126 Interview O. It is not entirely clear whether "the system" in this quote refers directly to the Inter-American system, or to the domestic justice system fulfilling its function of "conventionality control" by implementing IACtHR judgments.

127 Interview I.

> "And this question leads to another, more precise question, which is the one which will be answered through this analysis: has sufficient proof been presented to confirm that the accused, as a member of the *kaibil* [special forces, HB] patrol, participated in the killing of 201 persons in the community of las Dos Erres? One will ask: with what proof can such a strong accusation be supported? On that subject, many reports and books have been published […]. In the judgment dated 24 November 2009, emitted by the Inter-American Court of Human Rights, in the case of Las Dos Erres Vs. Guatemala, the Court values the publication of the report Memory of Silence, which includes the massacre of Las Dos Erres, "as an effort which has contributed to the search for and determination of the truth about a period in the history of Guatemala", and adds that "the "historical truth" contained in this report does not complete or substitute the obligation of the state to establish the truth and assure the judicial determination of individual or state responsibility through legal processes". […] This judgment is a precedent to be taken into account so that compliance with human rights which have been part of the international legal obligations acquired from 27 April of 1978 onwards, the year in which Guatemala became part of the American Convention on Human Rights."[128]

It should be noted that, even though this quote starts with the question how the accused's participation in the massacre at Dos Erres can be proven, this quote is in fact from the part of the judgment describing the historical context of that massacre. Therefore, the quote does not suggest that Memory of Silence can be used as proof of the individual responsibility of the accused. In fact, this would be impossible, since the UN truth commission, which prepared the report, was explicitly forbidden to identify the individuals responsible for the human rights violations it describes. What the quote does show is that the domestic court in Dos Erres explicitly pointed to the IACtHR's case law as a precedent "to be taken into account" for relying on the Memory of Silence to establish the historical context of the case at hand.

Finally, the respondent quoted above[129] suggests that the case law of the IACtHR has inspired judges and prosecutors as to how to use certain elements of the historical context of the civil war, like the national security doctrine, in constructing cases of grave human rights violations. A proper understanding of the historical context of the Guatemalan civil war, and the place within that context of the case at hand, may help shed light on issues like the motives underlying the human rights violation in question and the circle of individuals who may carry responsibility for it. Through its case law the IACtHR has modeled such a contextual interpretation of the facts of cases presented to it and, at the same time, highlighted and clarified certain especially relevant parts of that context. This suggestion was supported by two other respondents, both of whom have been directly involved in

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128 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, 01076-2010-00003 Asistente 2°, judgment of 12 March 2012 (Dos Erres Massacre) pp. 174-175.

129 *See supra* p. 170 and fn 671.

the prosecution of such cases.[130] One of them, a prosecutor at the Public Ministry's Human Rights Unit, said that the case law of the Inter-American system was integral to the construction of cases within her unit, providing both leads for the investigation and inspiration as to how to build the prosecution's argumentation.[131]

Two respondents[132] further suggested that the IACtHR's treatment of the historical context of the Guatemalan civil war in its case law has had an impact on how judges and prosecutors have dealt with the most controversial question surrounding the civil war: whether the campaigns by the Guatemalan military can be classified as genocide. It should be noted here that there was no direct link between the domestic genocide prosecutions and the Inter-American case law, in the sense that the IACtHR has never heard a case about the military's campaigns in the Ixil triangle. Neither has the IACtHR ever specifically classified any of the other escalations of violence perpetrated by the Guatemalan state during the civil war as genocide.[133] Still, the respondent submits that the IACtHR's case law helped judges and prosecutors explain why this legal qualification could appropriately be applied to the violence against the Maya Ixil population. In the words of one of them:

> "[T]his case law [of the IACtHR, HB] is what allowed, for example that it was declared that there had been genocide in this country, I mean, that people were sentenced for genocide because this had been recognized in international case law. Because the domestic case law did not provide for that, no one before had done a genocide trial. So in this respect it was useful.
>
> Q: But this was more from the case law of the Yugoslavia Tribunal?
>
> A: Yes, but they also used all that had happened in at the international level about the massacres, about the conflict, I mean, all the facts as part of that package. It is not an isolated thing.
>
> Q: Ok. So you see a connection between the genocide case and the case law of the Court?
>
> A: I believe so.
>
> Q: Even though the genocide case was not done in response to a judgment of the Court because there wasn't one?
>
> A: No, but let's say, all the evaluations from this international case law related to the Guatemalan armed conflict were useful for the genocide trial."[134]

130 Interview P, Interview Q.

131 Interview P.

132 Interview R, Interview U.

133 In one particular instance, the IACtHR has been specifically requested to classify a series of massacres committed against the Maya Achí ethnic group in the municipality of Rabinal between 1980 and 1982 as genocide. However, the Court declined to do so, stating that due to its limited competence in this particular case, it did not have the "pertinent legal and factual elements" to make this assessment. IACtHR *Case of the Río Negro massacres v. Guatemala* (preliminary considerations, merits, reparations and costs), judgment of 4 September 2012, paras. 23-234.

134 Interview U.

In other words, while the case law of the international criminal tribunals has been important to explain what genocide is, it is silent on the Guatemalan context and on how this may fit into this international legal definition. The IACtHR, on the other hand, has provided important tools for judges and prosecutors to make this connection. How exactly the IACtHR has helped to do so was explained further by the a second respondent. When asked whether she saw any link between the Court's case law and the genocide trial, she responded:

> "A: Ah, yes.
> Q: Yes? In what way?
> A: Let's see, the massacre cases – *Dos Erres*, *Plan the Sánchez* and the other… [*Río Negro*, HB] they are cases in which the Inter-American Court couldn't say that it was genocide, but it is. They have all the elements of genocide, right? They have the killing of members of the group, they have the violence, this cruelty, the viciousness, [...] everything that happened to the children… I believe this was very important. The whole accumulation, about all the massacres, was extremely important, because the elements of genocide were proven…. Right? But on top of that, the context was proven, the racist context. The racism… in *Plan de Sánchez* the issue of racism is very well-developed. The lack of respect for cultural issues. Also important for understanding the genocide in Guatemala: the national security doctrine. Why the indigenous groups, the indigenous communities who were victims of the genocide, were declared internal enemies. These elements of the national security doctrine are extremely important, because this is the context, not only is there racism, but also the national security doctrine. This was proven in the Inter-American system. So many elements related to the facts were important. I believe that it [the Inter-American case law, HB] was the foundational phase in order to be able to build the case here. Those facts of the massacres, why they happened, were very, very important to understand… for people to understand […] why it was genocide […]."[135]

Further on in the interview, this respondent discussed one very particular aspect of the domestic court's judgment in the genocide case and the impact she thought the IACtHR's case law had on it: its analysis of the particular effects the violence against the Ixil population had had on the Ixil women. The suffering of the Ixil women, in turn, is an important aspect in the court's discussion of why the campaigns against the Ixil population constitute genocide. The respondent's insight in the reasoning of the judges on this particular topic stems from her involvement in the training the specialized judges and prosecutors receive on international criminal law. In this program the respondent had been responsible for training on issues of gender-based violence. As she explained:

135 Interview R.

> "I believe that at least the process of training the high-impact judges, which had to do with the classes we were giving them… Lawyers without Borders was giving special courses in transitional justice and I had to…
>
> Q: To the judges…
>
> A: To the specialized judges and prosecutors. […] And to the litigants. […] I always had to teach the part about gender-based violence and sexual violence. So we used the case law of the Former Yugoslavia, of Rwanda, but also that of the Inter-American Court […].
>
> […]
>
> So all the courses they had to understand international crimes, the incorporation of this sexual violence based on gender, […] part of what we worked on with them was this: that they understood that there was a specific violence that the women suffered. So in the case of Guatemala and the genocide, the elements of genocide, there was the violence against the women. For example the death of members of the group, the death of women in the massacres, the forced pregnancies, the removal of the children. But all these elements had to do with judgments that had also already been delivered by the Inter-American Court. For example, the forced displacement in Chitay [*Chitay Nech v. Guatemala*, HB][….] where the Court condemns forced displacement as such.
>
> Q: And they used it in the genocide case?
>
> A: Exactly, one of the elements of genocide is that people… thanks to the enormous violence and the terror they had to displace. But in the displacement there were human losses, material, and above all the link to their territory, their land. […] And this is important because […] the women lived the forced displacement in a distinct manner, because in the forced displacement the men travelled more lightly. [The women] went with their father, their mother, the children, the animals, the sacred objects, [they] went with a greater burden. And this made it impossible for [them] to survive, many died on the road, the conditions under which this displacement took place… And this comes largely from the forced displacement in Chitay, for example. They didn't argue it this way, but it is a wealth of arguments which came from [the *Chitay Nech* case, HB]."[136]

In short, the IACtHR's judgments have contributed to the construction of an alternative narrative of the Guatemalan civil war, challenging the dominant narrative described previously in this chapter. And while the alternative narrative provided by the IACtHR (amongst other sources) may not have reached the general public, it has been influential with one particular audience of relevance to this study: the prosecutor and judges involved in domestic cases concerning crimes committed in the context of the civil war. According to the respondents cited here, the IACtHR's judgments have been used by domestic courts as 1.) precedent establishing that certain events, like massacres, took place; 2.) precedent for the use of the truth commission's report in legal proceedings; and 3.) inpriration for the interpretation of the facts of a case in their historical context. It should be noted, moreover, that this contribution of the IACtHR's judgments is not

136 Interview R.

limited to cases which have previously been adjudicated by the IACtHR itself, but potentially extends to all domestic proceedings concerning the civil war.

6 Contributions of the IACtHR's doctrines to Guatemalan accountability efforts

The previous section discussed how the Inter-American system has contributed to the Guatemalan fight against impunity through its direct interactions with pro-accountability actors and relevant state organs. This section, on the other hand, will analyze how Guatemalan pro-accountability constituencies have relied on the IACtHR's wider jurisprudence relevant to the fight against impunity – thus: all the doctrines discussed in the first part of this study – in order to strengthen their own work on the domestic level. In doing so, this section will examine the domestic influence of the IACtHR's jurisprudence concerning 1.) the obligation to investigate, prosecute and punish human rights violations; and 2.) the obligation to remove legal obstacles to prosecution, including 3.) the application of the amnesty law; 4.) the operation of the principle of legality in cases of enforced disappearance; and 5.) the imprescriptibility of serious human rights violations.

6.1 The obligation to investigate, prosecute and punish human rights violations

The IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations has contributed to domestic accountability efforts in Guatemala, by helping to change the dynamics of the debates surrounding accountability for crimes committed in the context of the civil war. This contribution should be understood against the background, sketched extensively in the previous paragraphs, of a public debate dominated by anti-accountability constituencies. The continued prominence of (former) military commanders in Guatemalan society and public life, allowed them to brush of calls for justice for crimes perpetrated in the context of the civil war by painting anyone pushing for prosecution as ideologically suspect. The focus on the presumed motives of pro-accountability actors served to ignore the substance of these calls for justice and the veracity of their account of the human rights violations underlying them.

In this context, the Inter-American Court's judgments have provided those pushing for prosecutions with an important tool to direct the debate away from their own background and (supposed) motives and to refocus it on the state's international legal obligations. A respondent, one of Guatemala's most renowned and experienced pro-accountability activists, brought up this type of impact of the IACtHR on her work in the context of a discussion of Guatemala's poor record of compliance with the orders and decisions of the Inter-American Commission and Court. When asked

if (and how) she believed that the Inter-American system had impacted the pro-accountability struggle in Guatemala despite the lack of compliance, she responded:

> "I believe that if the Inter-American system, the Court, the Commission, had not also taken on these issues in the area of human rights… […] if it hadn't been for this, as I was telling you, it might not have been possible in the region to have… all the trials in the case of Argentina, Fujimori in Peru, Ríos Montt in Guatemala… many human rights cases were possible thanks in part to the Inter-American system. The magistrate Barrientos, may he rest in peace, what he says is that there is a responsibility, in accordance with international law, to comply with the judgments of the Inter-American Court. And this opens the doors and opens the windows for the human rights cases to really continue, because there is an international obligation for Guatemala in this respect.
>
> Q: Aha. But several governments, and this one too I believe, do not feel committed to the Inter-American system…
>
> A: Governments do what is least costly to them. […] But, in spite of this, it [the Inter-American system's involvement, HB] has positive aspects, that at least the presence of the Court has succeeded to have a national impact of a lot of discussion and openness, because it has this authority… or the legitimacy to do so. So, yes there is a weakness in that there is no compliance with judgments, but on the other hand, it has now been possible to have this type of discussions and debates, which has made that at least some cases have advanced on the national level."[137]

The latter part of the quote refers to the legitimacy of the IACtHR in demanding that serious human rights violations be investigated, a 'resource' domestic pro-accountability activists often lack in the domestic public debate. With the support of the Inter-American system, the push for prosecutions is no longer just a lobby of domestic activists, or, in the vocabulary of the veto players, 'communists'. The IACtHR, as an international court and an outsider to Guatemalan politics, cannot be as easily dismissed by accusing it of having a particular ideological agenda. This 'legitimizing' function was described by another respondent as well, who stated her belief the victims' struggle for justice had been strengthened by the support of the IACtHR and its case law, because this support legitimizes their demands.[138]

Activists attempt to legitimize their claims for justice by referring to the IACtHR's orders to provide it. As one respondent commented, in response to the question whether the IACtHR has had an influence on the way human rights cases are portrayed in the media:

> "I don't know about the media, but the truth is that it did have an impact on civil society. A couple of years ago, I believe that [civil society] did not speak… that they did not use the reference to the Court that much. Let's say, around the time the peace accord was signed, when all of this started, it maybe wasn't used

137 Interview K.
138 Interview M.

as much, but now it is. Now every human rights defender speaks of the Inter-American Court. […]
Q: And they use the judgments?
A: Yes, they are being used a lot more.
Q: Used how exactly?
A: Sometimes to build other cases.
Q: Cases before the Court?
A: Yes […] But also as arguments for their claims *here*. […]."[139]

As these respondents suggest, domestic pro-accountability activists use the case law of the IACtHR to formulate their demand for justice in terms of legal obligations. In fact, the first respondent herself references the state's legal obligation to comply with IACtHR orders to investigate grave human rights violations, as recognized by the Guatemalan Supreme Court under the leadership of César Barrientos. The argument made by her and by other pro-accountability actors using similar language is simply that the Guatemalan state, which has accepted the jurisdiction of the Inter-American system, is obliged to follow the orders of its organs. This reasoning is explained in more detail by another respondent, who described how the Supreme Court's reasoning undercut objections of anti-accountability actors against implementation of IACtHR orders:

"And among the first things which Dr Barrientos implemented, the first thing he did when he started his period as president of the Penal Chamber [of the Guatemalan Supreme Court, HB], was to implement the rule that judgments of the Inter-American Court are self-executing, based on 3 things: the principle of international law […], that international conventions and treaties in the area of human rights are signed in good faith. I mean, nobody forces me to sign and ratify a human rights convention, but rather I do it because it is my conviction that at the basis of every democracy must be the defense of human rights. This is like my public face. That is to say, I, here, in this state, respect and promote human rights. So, there is no coercion for me to sign and ratify a convention. But, on top of that, it has to do with the whole issue of reciprocity […] and above all Dr. Barrientos, in these decisions, reminds [us] that Guatemala […] has recognized the jurisdiction of the Inter-American Court […] and that, as such, it recognizes its judgments and is part of this jurisprudence. But, also, it reminds those who have always opposed these standards that Guatemala has also signed the Vienna Convention on the Law of Treaties. And there he reminds them of articles 26 and 27, that the States Parties cannot rely on its internal law in order to not comply with its international obligations. So, if Guatemala recognizes the jurisdiction of the Inter-American Court it has to comply […] "[140]

Given the Guatemalan context, formulating demands for accountability in legal terms helps those pushing for investigation and prosecution to defend themselves from the constant questioning of their integrity. By focusing on

139 Interview U.
140 Interview O.

the state's legal obligation to investigate and prosecute, they (attempt to) make the question of their motivation for seeking justice irrelevant.

Another respondent took this line of reasoning one step further and used the reference to Guatemala's legal obligations to cast doubt on the motivations of veto players resisting investigation and prosecution, as ordered by the IACtHR. In response to the question whether he thought that the lack of compliance with IACtHR orders pertaining to the obligation to investigate and prosecute had anything to do with a lack of certainty regarding their legal status, he said:

> "No. There I do not see a problem of law. […] Now, what is obligatory is obligatory, and I believe that no one can say that it is not. I have never heard anyone say that it is not.
>
> Q: Say that…
>
> A: That one does not have to comply with a judgment of the Court.
>
> Q: No one?
>
> A: No. That there is resistance to compliance? Yes. That they say: "I do not comply because this is excessive". But that they tell you that legally they are not binding, no one has said that.
>
> Q: So it is more…
>
> A: Political.
>
> Q: Ah, right.
>
> A: It is political. A judgment is a judgment, and Guatemala already accepted this jurisdiction, so there is not much to discuss.
>
> […]
>
> Q: And the government also sees it like this?
>
> A: The government has to see it like this. Now, politically there is obviously resistance, of that there is no doubt.
>
> Q: So, the lack of compliance with this aspect of the obligation to investigate is more a political issue?
>
> A: It is political, it is obviously political. As I said, I don't know anyone who maintains that legally the judgments of the Inter-American Court cannot be executed. This I have never heard. Now, that politically they tell you that the Court is partial, […] that the Court is biased… That is another thing. But legally, it is a judgment [we have] to comply with."[141]

In short, in the context of a political discourse which constantly questions the motives of pro-accountability actors to discredit their demands, the orders of the IACtHR to investigate and prosecute certain cases have provided them with the discursive tools to reframe those demands in terms of international legal obligations. Under this frame, it is not the pro-accountability movement which has to defend its motivations, but rather the anti-accountability constituencies resisting the fulfillment of Guatemala's international obligations.

141 Interview B.

And this international law-based language has not only been used by activists seeking to persuade the state to open investigations. Prosecutors involved in the investigation of grave human rights violations are also subject of attacks by veto-players questioning their impartiality and have used a similar discourse to defend themselves, and their investigations, from such attack. For example, the prosecutors involved in the genocide cases against high military officials have used references to the Inter-American Court to defend themselves against the often heard claim that these investigations served only to discredit the military and were motivated by prosecutors' political beliefs. This defense is illustrated, for example, by an excerpt from an interview with one of the prosecutors involved in the genocide investigations against former head of state Oscar Mejía Víctores. While discussing why it took so long to be able to prosecute these cases, the following exchange took place:

> "Interviewer: But, let's say, it has always been impossible to prosecute members of the military. Three years ago there were the arrest warrants from Spain, and it wasn't possible. And today, you, as the prosecutor in charge [of these investigations, HB], are taking the genocide case to court…
>
> Prosecutor: Well, it is not that I arrived as prosecutor and this is *my* policy, but rather, it is a policy of the state. Basically, the judgments of the Inter-American Court oblige the state to continue with different cases, to continue investigating the various massacres that the Inter-American Court has known and it is the obligation of the state to continue this investigation. If I wouldn't do it, it would have to be some other prosecutor who sits at this desk, because basically it is the responsibility of the state to bring these cases to trial, to clarify what really happened and, with time, to compensate the victims."[142]

It should be noted that the interviewer does not bring up the Inter-American system at any point in the interview, nor does he seem to be implying that the investigations against Mejía Víctores were motivated by the prosecutor's personal agenda. Rather, he is asking the prosecutor what has changed in the domestic context to make the investigation of genocide cases possible, where they hadn't been possible before. The prosecutor's interpretation of the question illustrates the pressure prosecutors in Guatemala are under when investigating this type of case, and their sensitivity towards any suggestion that the investigation is prompted by their own personal ideology. His response illustrates how reference to the IACtHR's case law serves as a defense against such attacks on prosecutors' integrity.

This defense has also been used by former Attorney General Claudia Paz y Paz, when confronted directly with the accusations made against her be certain segments of Guatemalan society. For example, in an interview with national television station *GuateVision*, conducted after the Constitutional

142 Interview conducted in the context of documentary film *Burden of Peace*, *see supra* Chapter 1, Section 3.3.1. Video on file with the author.

Court had decided that Paz y Paz would have to leave her post by May of 2014. In this context, the interviewer asks Paz y Paz about the resistance she faced from certain segments of society:

> "Interviewer: There are groups which have said that you are ideologically far-left and that you give priority to the prosecution of the members of the military. Is that a fair statement?
>
> Paz y Paz: Guatemala has the duty, according to its own laws but also according to international law, to prosecute grave human rights violations. And the people who committed those crimes were in public office. And the priority is with those who occupied the highest positions, because they have the greatest responsibility. By opening these cases we are paying off a debt that the Guatemalan state has with the victims, and that is why there are several judgments of the Inter-American Court saying that Guatemala has to investigate and prosecute this case. To pay off the debt we have always had, both internally and internationally."[143]

In another interview with Guatemalan television station *Canal Antigua*, also on the occasion of the Constitutional Court's decision concerning her removal from office, Paz y Paz elaborates further on this point. Again, the interviewer feels compelled to ask Paz y Paz about the attacks against her integrity:

> "Interviewer: And the argument by some is that it [the prosecution of cases of grave human rights violations, HB] is a purely political agenda. That it shouldn't be a priority. Of course homicides and violence against women is a priority. But some argue that you have your own political agenda, by which you or other organizations around you exert pressure to make sure that these cases are being prosecuted. In general, how much political pressure is being exerted by you to resolve certain cases and how much is resolved on its own?
>
> Paz y Paz: There is a pressure you do not mention, but which we cannot deny. And that is that Guatemala has signed the American Convention on Human Rights. These are not two separate legal systems, it is part of our laws. The moment they [international conventions in the area of human rights, HB] are signed, we fall under that norm […] There is an Inter-American system which checks whether we are applying the convention. There have been several judgments requiring Guatemala to resolve these cases. This happened years before I became Attorney General and it will remain this way until the state respects its obligations, both internally and internationally. We are obligated internationally to resolve these cases and arrest the perpetrators, to prosecute them and to punish them."[144]

143 Interview Claudia Paz y Paz for *GuateVision*, filmed in the context of documentary film *Burden of Peace*, see *supra* Chapter 1, Section 3.3.1. Video on file with the author.

144 Interview Claudia Paz y Paz for *Canal Antigua*, filmed in the context of documentary film *Burden of Peace*, see *supra* Chapter 1, Section 3.3.1. Video on file with the author.

In short, pro-accountability actors use references to the IACtHR's case law to emphasize Guatemala's legal obligation to investigate and prosecute civil war-related cases and, thereby, to defend the legitimacy of (demands for) such investigations and prosecutions. Such an international law-based discourse is a valuable tool in a context in which pro-accountability actors are often accused of pursuing a Marxist political agenda through the prosecution of civil war-related cases. It provides those actors with a new type of discourse, based on legal arguments, which allows them to direct the discussion away from their personal motivations and refocus it on the state's legal obligations.

6.2 Removing legal obstacles to prosecution

As noted previously in this chapter, the main obstacles to justice for Guatemala's 'crimes of the past' have been of a practical nature, rather than a legal nature. However, some important legal obstacles to investigation and prosecution do exist. The remainder of this section will analyze if and how the doctrines developed by the IACtHR have contributed to the removal of the (legal) obstacles encountered by those seeking justice and the construction of a normative framework more suitable to accountability for grave human rights violations.

There are two main avenues through which pro-accountability actors have attempted to achieve the removal of legal obstacles to investigation and prosecution of serious human rights violations: 1.) enactment of legislative reforms through parliament; and 2.) direct application of IACtHR doctrines by domestic courts. With regard to the first of these two possible avenues, several respondents have noted that it has been almost entirely blocked to them.[145] Overall, parliament has been unwilling to enact the legislative reforms they have been lobbying for and unimpressed by the

145 *See* interview K, describing her organizations unsuccessful efforts to lobby parliament in order to obtain a reform to the amparo law, ordered by the IACtHR in several judgents against Guatemala, to avoid it from being used as a procedural obstacle in criminal cases; Interview O, describing lobby efforts from various organizations regarding the same law; Interview R, also describing unsuccessful attempts to achieve a reform to the amparo law, and another unsuccessful effort to obtain a reform of the civil code that would treat enforced disappearance as a groud for presuming the victim's death; and Interview U, describing her organization's failed attempts to convince parliament to enact legislative measures aimed at helping the families of disappeared persons to locate their remains.

argument that these reforms have been ordered by the IACtHR.[146] However, pro-accountability actors have been somewhat more successful in their recourse to domestic courts. Through the reception of standards developed by the IACtHR, Guatemalan courts have removed some important legal obstacles to investigation and prosecution of grave human rights violations.

The willingness of Guatemalan courts to apply international standards, including those developed by the Inter-American system, is a recent phenomenon and the practice of courts in this respect is not yet fully stable. One respondent, who litigates human rights cases for a well-known Guatemalan NGO, spoke of a growing "capacity for reception" of international standards on the part of judges and provided two examples:

> "I believe that the Court has been deciding cases for a long time and only now is the case law starting to be used. Standards of the Inter-American Court which have been presented in [domestic, HB] cases as arguments for both the defense and the prosecution ["argumentos tanto de defensa como de enjuiciación"], which have been embraced by the judges. The law faculties themselves, I believe there is now a more systematic study of the judgments of the Court. I believe that this is something that we are starting to extract all the benefits from that we can extract. Of course, we are just starting. I mean, I couldn't tell you "look, the judges have these standards of interpretation". That's not how it is. You have to present it to them, you have to set it out for them, you have to explain it to them, but I believe there now is more capacity for reception on the part of judges and this you can see in judgments in individual cases, but which are very important at the level of… Take the genocide case of Ríos [Montt, HB], the consideration of the tribunal to take into account the gender-based crimes, to take into account the vulnerable situation of the victims, to take into account reparation measures.

146 One case in which legislation ordered by the IACtHR has been passed came up during the interviews: the law on access to information, which limits the possibility of relying on "state secret" to deny public access to certain documents and which had been ordered by the Court in the 2003 judgment in the case of *Myrna Mack Chang v. Guatemala*, was enacted in 2008. However, it has been argued that this was in spite of rather than because of the human rights arguments presented by pro-accountability actors. A researcher who has studied the enactment of laws on access to information in several Latin American countries concluded that "[t]he tenor of campaigns will frequently determine media responses to demands for coverage. Monotonous or contentious messages are turnoffs. For years the discourse associated with right-to-know movements in Uruguay and Guatemala revolved around human rights. Well-known public sector resistance to human rights issues discouraged greater media coverage. When the media finally took up the right-to-know banner in Guatemala, they wisely framed it as a measure that could help prevent corruption. This strategy did much to allay the fears of a potentially decisive opponent of openness-the country's armed forces." Greg Michener, 'Lessons from media coverage for the right-to-know in Latin America, published through www.freedominfo.org, 19 June 2009, last checked: 29-06-2017. Rather, this researcher suggests that the enactment of this law had been the result of a media campaign following a large corruption scandal. *See* Greg Michener, 'Freedom of information legislation and the media in Latin America', published through www.freedominfo.org, 19 May 2009, last checked: 29-06-2017.

> All these things, I read them and they seemed extremely original to me. Here, in Guatemala, I have never seen anyone make this considerations and to make them in that way, with such depth. […]
>
> There was an [claim of, HB] unconstitutionality which was presented against the article which regulates how the crime of torture is defined here in Guatemala. The unconstitutionality was presented because it went against, or the national legislation was more limited than the article of the Inter-American Convention against Torture. And the Constitutional Court ruled in their favor, taking into account the Inter-American case law. You see what I mean? Here I believe there is progress, there are results. They are starting to take into account the standards of the Inter-American Court."[147]

The second example mentioned by this respondent, the judgment concerning the definition of torture under the Guatemalan criminal code, is particularly relevant in this context, as it also included the definitive acceptance of the doctrine of the *bloque de constitucionalidad* by the Constitutional Court. In short this doctrine holds that international conventions containing human rights norms, once ratified by the state, become part of the Constitution and have direct effects in the national legal order, on par with other constitutional norms. Or, in the words of the Constitutional Court:

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147 Interview S. The growing willingness of judges to apply international standards was further specifically mentioned by two other respondents. Interview O, in response to the question what he thought had been the IACtHR's contribution to creating a context more favorable to investigation and prosecution of civil war-related crimes:

> "Let's say that the Inter-American system fulfills this function of conventionality control which is done not only through the [IACtHR's, HB] judgment, but also through the application of standards from the case law of the Court. That is to say, the use of judgments from the Inter-American Court in domestic cases, but also the grounding of resolutions in Inter-American legislation, the Inter-American Convention on Human Rights [sic], the various Inter-American conventions about torture, forced disappearance, violence against women… That is to say, how, through the judgments of the Inter-American Court, it impulses this conventionality control in all OAS member states. And the standard of their self-executing nature, what it does is that this conventionality control is starting to be applied, through the judgments emitted in the Guatemalan justice system."

Interview U, describing the use of IACtHR standards on reparations and the 'dignification' of victims in domestic proceedings:

> "Look, what people have said and what is to some extent my position from the perspective of the victims, is to establish case law for the country. In this sense it is important to us, but it is also important because until now… it started with the judgment in *Dos Erres* and it was repeated now with the genocide trial, which are the only judgments which have included a part on the dignification of the victims. The other judgments have been jail-sentences and nothing more ["condenas de cárcel y punto"]. And this is something that the case law of the Inter-American Court gives you, because it has this more integral vision with regard to the dignification of victims, the issue of historical memory… […]"

> "The *bloque de constitucionalidad* refers to those norms and principles which, although they are not part of the formal text of the Constitution, have been integrated into the Constitution through other ways and which, in turn, as such serve as measures for the control of constitutionality of laws. […]
>
> Various authors concur with the doctrinal concept of the *bloque de constitucionalidad*, pointing out that this is a group of norms which contains principles or regulations which are materially constitutional, both those contained expressly in the Fundamental Text and those existing outside of it, but which develop or complete the catalogue of fundamental rights contained in the formal Constitution. Its essential function is that of being a tool for the reception of international law, guaranteeing the coherence between internal legislation and the State's external obligations and, at the same time, serving to complement the guarantee of Human Rights in the country."[148]

Although this doctrine is enshrined in articles 44 and 46 of the Guatemalan constitution, the Constitutional Court had been inconsistent in its reliance on international standards while testing the constitutionality of domestic legislation.[149] In this important judgment, the Constitutional Court unequivocally recognized the doctrine of the *bloque de constitucionalidad* as part of Guatemalan constitutional law, clearing the way for the direct application of international human rights standards by domestic courts.[150] In later case law, the Constitutional Court has held that standards developed by the IACtHR, as the judicial body mandated to interpret the ACHR, are also part of the *bloque de constitucionalidad*, even if they are derived from cases which do not directly concern Guatemala.[151]

These important decisions by the Constitutional Court underlines the growing openness of the Guatemalan judiciary towards international law. That is not to say, however, that international standards were never applied in domestic proceedings prior to the Constitutional Court's judgment. Nor does it mean that international standards have been perfectly applied since then, particularly when they concern sensitive issues like those which are the focus of this study. The remainder of this paragraph will discuss a number of judicial decision which illustrate both the promise and the limitations of the application of Inter-American standards for removing legal obstacles to investigation and prosecution of serious human rights violations.

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148 CC, judgment of 17 July 2012 (Inconstitucionalidad General Parcial por Omisión), Exp. 1822-2011, p. 14-15.

149 Or, rather, its case law on this point had been inconsistent. Idem, p. 13.

150 In the matter at hand, this led the Constitutional Court to conclude that the definition of torture under domestic legislation is unconstitutional because it is more restrictive than the international definition. Idem, pp. 19-20. As a result, it ordered parliament to revise domestic legislation on this point, an order which parliament has so far ignored.

151 *See for example* CC, judgment of 18 December 2014 (Apelación de Sentencia de Amparo), Exp. 3340-2013, p. 16 and CC, judgment of 8 November 2016 (Inconstitucionalidad General), Exp. 3438-2016, p. 11.

6.2.1 Application of amnesty laws

The first, and perhaps most obvious, (potential) legal obstacle to the prosecution of crimes committed during the armed conflict is the presence of several amnesty laws, including, most importantly, the National Reconciliation Law. At first sight, the limitations to its scope of application provided in Article 8 NRL[152] would, at first sight, leave it inapplicable to practically all serious human rights violations committed during the armed conflict. However, anti-accountability actors have tried to undermine these limitations wherever possible and achieve the broadest possible amnesty. They have, for example, challenged the constitutionality of those limitations before the Constitutional Court on various occasions.[153] And since the application of the Law of National Reconciliation is evaluated on a case-by-case basis, it has fallen on the domestic courts, particularly the Constitutional Court, to uphold the limitations and prevent the amnesty law from obstructing the prosecution of grave violations of human rights.

The CC's stance on this issue has not been consistent over time and has been described as "zig-zagging back and forth with little coherence in its arguments".[154] On some occasions, especially in the early years after the signing of the peace accords, the CC has allowed amnesties to be granted in cases concerning grave violations of human rights. For example, in 2001 the CC decided that the National Reconciliation Law was applicable to various military officers accused of involvement in the massacre of *Dos Erres*.[155] On another occasion, the Constitutional Court overruled a decision to deny the application of the Law of National Reconciliation in a case concerning enforced disappearance, a crime explicitly excluded from the law's application, on technical grounds.[156]

However, in recent years the practice of domestic courts, including the Constitutional Court, has been more strict in its observance of the limitations contained in the NRL and therefore more favorable to the prosecution of grave human rights violations. In this development, domestic courts have often relied on the case law of the IACtHR in support of their refusal

152 *See supra* Section 2.1 of this chapter.

153 *See for example* CC judgment of 9 October 2012 (Inconstitucionalidad General Parcial), Exp. 4371-2011 and CC judgment of 6 August 2013 (Inconstitucionalidad en Caso Concreto), Exp. 1386-2013. Both challenges argued that the application of the limitations contained in Article 8 of the Law of National Reconciliation would violate the principle of non-retroactivity of the law, since the crimes of which they were accused had not been defined under national law at the time the facts under investigation took place. In both cases, the Constitutional Court rejected the constitutionality challenge.

154 E. Braid and N. Roht-Ariazza, 'De facto and de jure amnesty laws – the central American case', in: F.Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 193.

155 Idem. This decision which was taken under questionable circumstances, only a week after one of the CC judges involved in the case left the country as a result of threats made against him.

156 CC judgment of 18 June 2008 (Amparo en Única Instancia), Exp. 155-2008.

to grant amnesties. An important step in this development was taken by the Guatemalan Supreme Court in August 2012 when it upheld the court of first instance's denial of the application of the Law of National Reconciliation to a number of military officers who had been accused of participation in the *Dos Erres* massacre.[157] The CSJ held, with specific reference to the IACtHR's *Dos Erres* judgment of 2009, that the application of amnesty law is not allowed in any case which concerns grave violations of human rights.[158] Through its reception of Inter-American doctrine the CSJ thus excluded the application of amnesties for a broad category of cases, thereby preventing it from becoming an obstacle to the prosecution of grave violations of human rights.

Later case law with regard to the application of the Law of National Reconciliation, including that of the Constitutional Court, has continued in this vein. For example, the Constitutional Court has upheld the rejection of a request by Efraín Ríos Montt to apply the amnesty contained in that law to shield him from prosecution in the Ixil genocide case. In that case, Ríos Montt had been charged with participation in acts of genocide and crimes against humanity. With regard to the charges of genocide, the Constitutional Court held that the request for the application of amnesty was manifestly ill-founded given the text of the National Reconciliation Law itself.[159] With regard to the charges of crimes against humanity, the Constitutional Court held that these fall in the category of imprescriptible crimes and are therefore excluded from the law's application. In support of this argument, the CC referred to the case law of the IACtHR, specifically its judgments in the cases of *Almonacid Arellano v. Chile* and *Barrios Altos v. Peru*.[160]

While this may seem to be a consistent development towards an interpretation of domestic amnesty laws in which those laws do not impede the prosecution of grave violations of human rights, in fact developments have not been as clear-cut. While important steps forward have certainly been taken, there have also been setbacks. Unsurprisingly, the decisions by domestic courts to deny the application of the amnesty laws to protect military officers from prosecution ruffled the feathers of powerful people, including some within the Pérez Molina administration. One respondent, who worked at COPREDEH during the Pérez Molina administration,

157 CSJ decision of 8 August 2012, exp. 11-43-2012 and 1173-2012. The CSJ decision on this point is part of the cassation judgment in the criminal case against this group of officers, since one of them had submitted, as a basis for cassation, that the lower court had erred in denying the application of the Law of National Reconciliation, rendering the entire trial since that decision void.

158 CSJ decision of 8 August 2012, expedientes 11-43-2012 and 1173-2012. This reasoning was confirmed in the court's later case law, *see* CSJ decision of 10 April 2013, expedientes 1758-2012 and 1779-2012.

159 CC judgment of 18 December 2014 (Apelación de Sentencia de Amparo), Exp. 3340-2013, p. 13.

160 Idem, pp. 16-17.

explained the government's position towards the amnesty laws in the following way:

> "When the peace accords were negotiated… An amnesty was negotiated in Guatemala… And this is another problem where one can see, we do not agree with the Court. The Court, in general, says that one cannot give… that amnesties are not valid, they are not compatible with the spirit of the American Convention. But when it comes to Guatemala, at least, the Guatemalan amnesty is a bit different than the amnesties in El Salvador and Argentina. Because those in El Salvador and Argentina were self-amnesties. In contrast, ours was agreed upon through direct negotiations [under the auspices of] the United Nations and with the support of friendly governments, like those of Mexico and Norway, because that is where the conferences were held. […] So, during the negotiations they said: "Right, we are going to stop this conflict if we have an amnesty. If not, it will not stop." […]
>
> This sense was lost with later governments. That is why several trials were started, for example, for assassinations or something which elements of the military would have committed. These were not [one of, HB] the three exceptions: genocide, enforced disappearance or torture.
>
> Since the *licenciado* Arenales and president Otto Pérez signed the peace accords…. I don't know if you have seen the photo in which president Otto Pérez is signing... […] The *licenciado* Arenales was the one who went to negotiate. He went to the negotiations in Norway, he was part of the team of the state. They have had to, like, remind [everyone, HB] of what was agreed on at the negotiation table, because they said: "at that time we committed ourselves" they said "both the guerrilla and the army, the state, to the amnesty being valid. And at that time all of us agreed…" So, this is what sets the Guatemalan amnesty apart from the Salvadoran and the Argentinian ones. Those were self-amnesties, while the Guatemalan one is a [true] amnesty and it was a prerequisite for ending the armed conflict. That is why they [Arenales Forno and Pérez Molina, HB] strongly defend this position. […]
>
> But well, obviously, since judges are impartial, are autonomous, even here in Guatemala, there are some who do not care about the amnesty law. But at least, at the moment, in the hearings we have internationally we are reminding [everyone, HB] that the amnesty law is valid."

These 'reminders' seem to have had some effect. In the tense period after Ríos Montt's conviction for the crime of genocide and the CC's subsequent annulment of that conviction, the CC came out with another decision that presents a threat to the prosecution of grave human rights violations. In this decision it opened up a potential space for the application of amnesty for such violations, not on the basis of the Law of National Reconciliation, but on the basis of the older Decree Law 8-86, which had been adopted in the context of Guatemala's transition to democracy in the 1980s.

The CC decision discussed here stemmed from an amnesty request made by Ríos Montt in the context of the Ixil genocide case based on Decree Law 8-86. This request had been denied by the trial judge, arguing that Decree Law 8-86 had been replaced by the Law of National Reconciliation,

which specifically excludes its application to the crime of genocide and that, moreover, the Inter-American case law does not allow for amnesty for grave human rights violations. This decision was upheld on appeal by the Appellate Court, which prompted Ríos Montt to appeal the Appellate Court's decision with the Supreme Court. The Supreme Court, then, decided in favor of Ríos Montt, arguing that the Appellate Court had insufficiently explained its decision to uphold the trial judge's decision. Against this decision, the Public Ministry and the co-prosecutors filed an appeal with the Constitutional Court.

The CC, in turn, upheld the Supreme Court's decision, agreeing that the Appellate Court's decision had been insufficiently reasoned and explicit. [161] According to the CC:

> [T]he [Appellate Court, HB], when emitting the decision under appeal, violated the rights of [Ríos Montt, HB], since from the simple reading of the decision under appeal it is clear that the conclusions reached by the [Appellate Court] lack a factual and legal motivation, since it limited itself to transcribing Article 8 of the Law of National Reconciliation and indicating that the accused is charged with the crimes of genocide and crimes against humanity, while that which is submitted to it on appeal is the application of a norm – Decree Law 8-86 – which, according to the accused, conferred upon him certain rights with which the criminal prosecution is extinguished […] Thus, the obligation of the [Appellate Court] was to analyze every one of the arguments underlying the appeal […]."[162]

As a result, the CC upheld the Supreme Court's decision annulling the Appellate Court's decision, and ordered the latter to reconsider the matter, taking into account the CC's arguments. However, not all CC judges agreed with this outcome. In a scathing dissent, judge Gloria Porras stated that the majority's decision itself had been incorrect, ambiguous and the result of an incomplete analysis of the materials which had been the basis of the Appellate Court's decision.[163] In particular, she considered that the CC had not taken into account the reasoning underlying the original decision by the trial judge, which had already considered all the arguments brought forward by the accused on appeal, and which the Appellate Court had, by upholding it, "made its own".[164]

Moreover, judge Porras warned that, by upholding the Supreme Court's decision, the CC was impeding justice in a case concerning crimes against humanity and had "fallen back into indifference to processing and granting *amparos* as obstacles to the investigation of crimes which constitute grave

161 CC decision of 22 October 2013 (Apelacón de Sentencia de Amparo), Exp. 1523-2013 and 1543-2013.
162 Idem, p. 11.
163 Idem, p. 19.
164 Idem, p. 16.

violations of human rights", a practice against which the Inter-American Court had condemned on several occasions.[165] The truth of this warning is underlined by the fact that, following the CC's decision, it has been impossible to find judges willing to reconsider Ríos Montt's request for amnesty. According to one newspaper report, 93 judges had excused themselves from hearing the matter.[166] As a result, the question whether Ríos Montt is protected by the amnesty contained in Decree Law 8-86 remains undecided at the time of writing.

Finally, any progress made on removing the amnesty laws as an obstacle to accountability for grave human rights violations committed during the civil war is at risk of being undone as result of a bill introduced in the Guatemalan parliament in January of 2018. The bill, known as *Iniciativa de Ley 5377-2017*, proposes a considerable expansion of the scope of the Law of National Reconciliation. In effect, the new bill seeks to remove all limitations to the scope of the LNR, including the important exception for the crimes of torture, enforced disappearance and genocide, and provide the most complete amnesty for crimes committed in the context of the civil war. If the bill were to be adopted by parliament, it would not only make any future investigation and prosecution of grave human rights violations impossible, but also end all ongoing investigations and – in accordance with Article 5 of the bill – free all those individuals who have already been found guilty of such crimes. According to the authors of the bill, these drastic measures are necessary in order to recover the original intention of the Law of National Reconciliation – which, according to them, was intended to provide a general amnesty without any exceptions whatsoever -[167] and to put an end to the partial and politically motivated "persecution" carried out by the Public Ministry.[168]At the time of writing this chapter, the bill is still being debated by parliament and its fate remains uncertain.[169]

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165 Idem, p. 19.

166 'Nadie quiere resolver amnistía a Efraín Rios montt', *Prensa Libre*, 13 May 2014.

167 *See* Iniciativa de Ley 5377-2017, introduced in parliament on 25 January 2018, Exposición de Motivos, pp. 1-3. While the authors recognize that the Law of National Reconciliation, as adopted in 1996, did include certain limitations to its scope, they argue that these should be understood as a signal of good will of the Guatemalan state towards the international community, and not as representative of a true intent to exclude certain categories of perpetrators from the amnesty provided in the LNR. According to the authors, "no one, not the government, not the URNG, not the United Nations and not civil society, intended to bring to justice anyone who had participated in the counterinsurgency or in the insurgency".

168 Idem, pp. 4-7.

169 The bill passed its first vote in January 2019 and is currently awaiting a further reading and a final vote. Meanwhile, several sector of the international community have condemned the bill in the strongest terms. The IACtHR, in the context of a supervision of compliance decision in the case of Molina Theissen v. Guatemala, has ordered Guatemala to retract the bill. *See* J.M. Burt and P. Estrada, 'Amidst international pressure, Guatemala Congress does not pass amnesty bill, for now', *International Justice Monitor*, 17 March 2019.

In short, domestic courts have taken important steps towards an interpretation of the Law of National Reconciliation which is sufficiently narrow so as not to impede the investigation and prosecution of grave violations of human rights. In doing so, they have relied explicitly on the case law of the Inter-American system. However, the CC has allowed doubt to exist with regard to the applicability of the amnesty contained in Decree Law 8-86, thereby calling into question this trend towards the removal of an important legal obstacle to achieving accountability. Moreover, any progress made on the removal of amnesty as an obstacle to accountability for grave human rights violations committed during the civil war could be undone, if parliament passes the controversial bill that would expand the scope of the Law of National Reconciliation to such an extent as to provide a complete amnesty.

6.2.2 Enforced disappearance and the principle of legality

Another potential legal obstacle to the investigation and prosecution of crimes committed during the civil war, is the principle of the non-retroactivity of the (criminal) law. More specifically, the principle of non-retroactivity has been used as an argument against the investigation and prosecution of one particular crime, which wasn't criminalized in Guatemala's internal legislation until shortly before the signing of the peace accords in 1996: the crime of enforced disappearance. Of course, enforced disappearance was a particularly emblematic and widespread practice during the war, with an estimated 45.000 (material) victims. It is not for nothing that it is one of three crimes explicitly excluded from the application of the amnesty provided by the Law of National Reconciliation.

Through the invocation of the principle of non-retroactivity of the (criminal) law, veto-players have attempted to block investigation and prosecution of this entire category of cases. One respondent, the director of international cases of COPREDEH during the presidency of Otto Pérez-Molina, articulated the legal argument to this effect in the following way:

> "Many of the forced disappearances are from the '80s, when the conflict was at its worst. The state… can you really say we are continuing with this behavior of maintaining the disappearance? There have been democratic governments in Guatemala, from the government of Cerezo, I believe it was in 1987. So, we already have 30 years of democratically elected governments. We have adopted a new constitution in '85. If a person was disappeared in '82…
>
> Because that is the thing with enforced disappearance… against which legal good is it directed? Against which right? It is not against [the right to] life! One could say that, obviously, that is a consequence, because they never reappeared. But the affected legal good is personal liberty, like a kidnapping, because you are detained. Forced disappearance is the illegal detention of a person by state authorities.
>
> It is not as if we have a special jail for the disappeared, where we continue to keep them. Obviously, we have to say things as they are: these people are dead! Unfortunately, someone killed them at the time. But it is not a continuous conduct

> of the state to maintain disappearances, forcibly. So, at a certain point it is unjust that they are holding new governments responsible for a forced disappearance – even after the conflict [was concluded, HB] – for continuing this conduct. Because it is not true. […] So we have certain points in which we do not agree [with the IACtHR, HB], because they are applying the Convention retroactively.
>
> […]
>
> They [the IACtHR] say that they are the first who started to regulate enforced disappearance, with the case of Velasquez Rodríguez v. Honduras. […] Guatemala defined the crime in its internal legislation in '96 and did not ratify the [Inter-American Convention on the forced disappearance of persons] until 2000. So for us, for example, we cannot apply… because you have to remember that enforced disappearance is both a crime and a violation of human rights. It has this double connotation. But one cannot retroactively apply the crime of enforced disappearance, and one cannot sentence people on the basis of crimes which did not exist at the time. This should be classified as kidnapping or illegal detention, in any case.
>
> […]
>
> And on top of that, in Guatemala we distinguish between a continuous crime and a permanent crime. […] But, for example, the crime of kidnapping, or even enforced disappearance, I am not disappearing you day after day, I disappear you one day and you do not stop suffering the effect, to put it like that, until you reappear or I let you go. […] So we have this thing where this crime, because it is permanent, cannot have changed along the way to become an enforced disappearance."[170] [Breaks added]

In short, the respondent's argument can be summarized as follows: 1.) the legal good protected by the crime of enforced disappearance is the personal liberty of the material victim, it is akin to kidnapping or illegal detention; 2.) enforced disappearance was not criminalized as such in Guatemalan legislation until 1996; 3.) because the criminal law cannot be applied retroactively, cases in which the material victim disappeared before 1996 cannot be prosecuted as enforced disappearance; 4.) these cases should be prosecuted as kidnapping or illegal detention; and 5.) enforced disappearance is not a continuous crime but a permanent crime, which means that it cannot be said to continue to be committed after its criminalization in 1996. What remains unspoken in this quote, but is relevant to point out, is that the crimes of kidnapping and illegal detention are not excluded from the application of the Law of National Reconciliation. Therefore, by accepting this logic it would become completely impossible to prosecute these cases, whether they would be classified as enforced disappearance or any other crime in the Guatemalan criminal code.

It is no wonder, then, that pro-accountability actors reject this logic. Instead, they have proposed an alternative legal argumentation, arguing that veto-players misunderstand, or misrepresent, the true nature of the crime of enforced disappearance. This argument was articulated by

170 Interview W.

a respondent who has represented victims in several cases concerning enforced disappearance, both in the domestic legal system and before the Inter-American Court. When asked explicitly to respond to the argument made by the respondent quoted above, he said:

> "[T]his is the inaccurate standard introduced by some officials […] And it is unfortunate, because what this indicates – if they say it out of conviction, because they believe that it is like this – is a complete lack of understanding of the criminal law, which is unfortunate. But more than that, it is a lack of understanding of the principles of law. Because they allege the violation of the principles of legality and the retroactivity of the criminal law, in the sense that acts committed during the internal armed conflict cannot be prosecuted, because of the fact that in Guatemala the crime of enforced disappearance was not regulated in the criminal code until the year 1996.
>
> What is ignored, on the part of my colleagues, is that enforced disappearance has a legal nature which is distinct from other crimes. Why? Because the issue of enforced disappearance, first it should be understood that it is a multi-offensive crime [original Spanish: "crimen pluriofensivo", HB]. The crime of enforced disappearance entails not only your physical disappearance, that I limit your personal liberty, but it also entails that I put at risk your physical integrity […] and your life. And I completely strip you of your legal personality and your legal [protection, HB]. […] Because, being disappeared, you, personally, can no longer exercise any legal action before the legal system of the county, either administratively or judicially […] And your family too. They have this legal uncertainty about your whereabouts, so they cannot do anything. That is the multi-offensive nature that the crime of enforced disappearance has.
>
> And from this from this derives another thing, much more important, which is that enforced disappearance has this permanent nature, which extends itself in time as long as the whereabouts of the victim are unknown. I mean, from the moment in which I capture you, illegally, I suppress you and restrict your liberty, I put your psychological and physical integrity at risk […], I strip you of your legal protection…. From this moment on, the forced disappearance is committed *day after day*, until the time your whereabouts are known. […]
>
> And as long as your whereabouts are not known, I continue to commit this crime. Because I am preventing not just you, but your family, and even the legal system of the state from knowing your whereabouts. And years can go by. Until I, who has the control over [whether your whereabouts are known, HB], die, I continue to be responsible. So this permanent nature makes this crime different. And, therefore, it is not [true] that the principle of [non-retroactivity] of the criminal law is violated, or that the principle of legality is violated. But rather that today, if I do not make it known where you are, what your location is – dead or alive – today I am still committing this crime.
>
> This is the permanent nature of the crime of enforced disappearance which should be understood. And sometimes, it is not that this is not understood, but rather that the legal standards are twisted so that the general public will say… but the standard that we cannot prosecute [enforced disappearances, HB] before 1996 is completely mistaken."[171]

171 Interview O

In short, this reasoning can be summarized as follows: 1.) the crime of enforced disappearance has a multi-offensive nature in that it affects a variety of legal goods, the restriction of personal liberty is only a part of the crime; 2.) another important part of the crime of enforced disappearance is the withholding of information about the fate and whereabouts of the material victim; 3.) this withholding of information is committed continuously, day after day, until the fate and whereabouts of the material victim is made known; 4.) in practically all cases from the armed conflict, the perpetrators have continued to hide the fate and whereabouts of the material victims after enforced disappearance was criminalized in 1996; and 5.) in such cases, classifying and prosecuting the acts as enforced disappearance therefore does not violate the principle of non-retroactivity of the criminal law. This reasoning reflects the understanding of the crime of enforced disappearance as it has been pioneered and developed by the IACtHR in its consistent case law on the issue from the *Velasquez Rodríguez* case onwards.[172]

This disagreement over the nature of the crime of enforced disappearance and its relation to the principle of non-retroactivity of the law was presented to the Constitutional Court in the first case of enforced disappearance to ever make it to trial in Guatemala, which concerned the disappearance of six people between 1982 and 1984 in the community of Choatalum. The defendant in the case, a former military commissioner named Felipe Cusanero Coj, had filed a motion of '*inconstitucionalidad en caso concreto*' to the CC. In this motion Felipe Cusanero, following the anti-accountability constituencies' legal logic as described above, argued that his prosecution for enforced disappearance was unconstitutional, because it violated the principle of non-retroactivity of the law. However, the Constitutional Court decided otherwise.

In its decision, the Constitutional Court follows the logic of the Inter-American Court. It starts by pointing out that the Guatemalan criminal code recognized the permanent nature of the crime of enforced disappearance. The CC interpreted this to mean that an enforced disappearance can continue to be committed after its criminalization, even if it commenced before that. In its words:

> "[I]t deserves to be pointed out that the permanent character with which enforced disappearance is typified in the Criminal Code is in line with that contained in the Inter-American Convention on Enforced Disappearance of Persons […]. In relation to this, the Inter-American Court of Human Rights has declared in it case law that the enforced disappearance of persons constitutes […] a crime of a permanent and continuous character, which, as it points out […]

172 *See* IACHR *Velásquez-Rodríguez v. Honduras (merits)*, judgment of 29 July 1988, para. 155. This case law of the Inter-American Court predates both the definition of enforced disappearance in the Inter-American Convention On the Enforced Disappearance of Persons of 1992 and its codification in the Guatemalan criminal code, which dates back to 1996.

> continues to be committed to this day (judgments of 29 July 1988 and 2 July 1996, handed down in relation to the cases Velásquez Rodríguez vrs. Honduras and Blake vrs. Guatemala, respectively).
>
> From that which has been described above, it can be gathered that the fact that the legislator has included the permanent character as a constitutive element of the crime of enforced disappearance does not translate in a violation of the principle of non-retroactivity enshrined in Article 15 of the Constitution of the Republic, in that the continuity inherent in that illegal conduct allows for its commission to extend itself until a moment after the beginning of the temporal scope of the validity of the statute regulating it, in spite of having originated in a moment prior to it."[173]

On this basis, the CC rejected the accused's motion and allowed the prosecution to continue, resulting in the first domestic conviction for the crime of enforced disappearance. Had the CC found otherwise, this would have been fatal not only for the case against Cusanero Coj, but for any future prosecution of cases of enforced disappearance which commenced during the armed conflict. In other words, the Constitutional Court has cleared a potential legal obstacle to the investigation and prosecution of cases of enforced disappearance from the armed conflict, by interpreting the crime of enforced disappearance in such a way that its application does not cause a conflict with the principle of non-retroactivity of the law. In doing so, the CC explicitly applies a logic taken from the case law of the IACtHR. This decision has been upheld in later case law of the Supreme Court and the Constitutional Court.[174]

6.2.3 Imprescriptibility of international crimes

A third potential legal obstacle to the prosecution of crimes committed during the civil war which has been cleared through the application of standards taken from IACtHR case law, is the possible prescription of those crimes. Article 107 of the Guatemalan criminal code regulates the prescrip-

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173 CC decision of 7 July 2009 (Inconstitucionalidad en Caso Concreto), exp. 929-2008, p. 5.

174 *See for example* CC decision of 18 November 2015 (Amparo en Unica Instancia), Exp. 1923-2015. In this decision, the CC upheld the decision, and its underlying reasoning, of the Supreme Court to reject a request for cassation by Héctor Bol de la Cruz, the Chief of Police convicted for the disappearance of Edgar Fernando García. Bol de la Cruz had, again, argued that his conviction was based on a retroactive application of the crime of enforced disappearance. In its reasoning, which was upheld by the Constitutional Court, the Supreme Court also dispelled the notion, presented by the accused, that he should have been prosecuted for illegal detention rather than enforced disappearance. In dismissing this notion, the Supreme Court referred explicitly to the case law of the IACtHR and explained that the crime of enforced disappearance affects a variety of legal gods, not only the personal liberty of the material victim, and that the illegal detention is only a part of the crime of enforced disappearance. In other words, the veto-players legal arguments as to why cases which commenced during the armed conflict cannot be prosecuted as enforced disappearance have now been fully dismissed.

tion of crimes and sets the terms of prescription for different categories of crimes. According to this article, crimes which may be punished by death prescribe after 25 years, while other crimes prescribe after a period equal to their maximum prison-sentence increased by one third, with a maximum of 20 years. The article makes no exception for international crimes, which would suggest that they are subject to the same terms.

In 2016, a group of lawyers filed a motion for review of constitutionality against Article 107, claiming that the failure to include the imprescritibility of international crimes violates the international norms which form part of the *bloque de constitucionalidad*, making it unconstitutional. They argued that the imprescriptibility of international crimes is a rule of general international law, which "has been recognized by the General Assembly of the United Nations, international human rights tribunals, international criminal tribunals and the highest courts of various states, including the [Guatemalan, HB] Constitutional Court".[175] Furthermore, they argued that, while Guatemala has neither signed nor ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, its status as a rule of general international law has been recognized by the IACtHR, whose decisions are binding on Guatemala and part of the *bloque de constitucionalidad*.[176] Consequently, the claimants asked the Constitutional Court to order parliament to change the text of Article 107.

The Constitutional Court eventually did not find Article 107 to be unconstitutional and, therefore, declined to order the parliament to change it. However, this conclusion was not the result of a disagreement between the CC and the claimants on the status of rule of the imprescriptibility of international crimes as a norm of general international law. Quite to the contrary, the Constitutional Court explicitly recognized this status, a recognition which it based exclusively on the case law of the IACtHR, particularly its judgments in the cases of *Barrios Altos v. Peru*, *Tecona Estrada and others v. Bolivia* and *Almonacid Arellano v. Chili*.[177] However, the Constitutional Court argued that, since the imprescriptibility of international crimes is a norm of general international law, it is already a part of Guatemalan law and has to be applied by Guatemalan courts *ipso iure*. As a result, the CC argued, it would be contradictory to require the parliament to include it in Article 107 of the Criminal Code.[178]

175 CC judgment of 8 November 2016 (Inconstitucionalidad General), Exp. 3438-2016, pp. 1-2.In fact the claimants suggest – and the CC seems to accept, that the imprescriptibility of international crimes is an international norm with the status of *ius cogens*. However, given the imprecise use of this term in the judgment and the confusion that its use may create in the reader, I have decided, rather, to use the phrase "norm of general international law" in this text.

176 Idem, pp. 1-2.

177 Idem, pp. 14-16.

178 Idem, pp. 16-17.

In short, while rejecting the claims of the petitioners, the Constitutional Court has made it clear that the imprescriptibility of international crimes is a norm of general international law which is directly applicable in the Guatemalan legal order. As a result, prescription of the (international) crimes committed during the civil war cannot be used as an argument to block their investigation and prosecution. Again, the case law of the Inter-American system has been and essential element of the reasoning underlying this decision.

7 Conclusion

This chapter demonstrated that the domestic struggle against impunity for serious human rights violations committed during the Guatemalan civil war has been an uphill battle from the beginning. The transitional justice scheme put in place at the end of the armed conflict, the weakness of the country's justice system and, most importantly, the continued dominance of anti-accountability constituencies in Guatemalan society and politics, provide a hostile domestic context. Those individuals and organizations who did push for the investigation and prosecution of crimes committed by state and paramilitary forces during the conflict, lack both the resources and the social and political influence enjoyed by the anti-accountability constituencies. They are publically stigmatized as either as 'communists' or 'terrorists' seeking to retroactively win the war they lost on the battlefield through the courts, or as 'leeches' seeking financial benefits from the country's troubled past. In some cases, they have been the object of direct threats and even attacks against their person, in order to intimidate them and obstruct their efforts towards justice.

Against this background, it is all the more remarkable that some important, albeit partial and fragmented, results have been achieved by pro-accountability actors. A number of important investigations have been conducted into crimes committed by state and paramilitary forces during the armed conflict, some of which have resulted in trials and guilty verdicts against (some of) those responsible for them. And whereas these proceedings were, at first, targeted mostly at members of paramilitary forces and low-ranking soldiers, recent years have seen proceedings against military commanders, including some belonging to the upper echelons of the military command structure.

These results have been possible in large part because of domestic circumstances which have no direct relationship with the Inter-American system, most importantly the continuous pressure from victim groups and human rights organizations and a growing willingness within certain parts of the judiciary to seriously pursue cases related to the civil war. However, this chapter has identified several ways in which the work of the IACtHR has supported or amplified the work of those domestic actors. It has done so both through its direct interactions with domestic actors in the context

of individual proceedings conducted at the Inter-American level and by developing a case law that has been instrumental in the way those domestic actors have articulated and framed their demand domestically.

The proceedings conducted at the Inter-American level have, in some cases, performed an important monitoring function over the domestic proceedings concerning the same case, especially where the two sets of proceedings were conducted in parallel. Such parallel proceedings also enabled pro-accountability actors to use the Inter-American proceedings as leverage to re-energize the domestic proceedings when they appeared to become stuck. Inter-American proceedings have also supported and even protected pro-accountability actors exposed to threats and attacks, both by 'shining a spotlight' on them, making attacks against them more risky, and – more directly – by ordering their protection by the state through provisional and/or protective measures of the IACtHR and the IACmHR. The judgments delivered by the IACtHR as a result of Inter-American proceedings have, in some select cases, been instrumental in clearing procedural obstacles erected against domestic investigations and prosecutions. Moreover, these judgments have provided an alternative account of what happened during the civil war, which supports the account provided by pro-accountability actors and challenges the dominant domestic narrative. This alternative account of the facts has been especially important to domestic judges hearing cases relating to crimes committed in the context of the civil war. The IACtHR's account of the facts of the Guatemalan civil war has been useful for domestic courts as 1.) precedent establishing that certain events, like massacres, took place; 2.) precedent for the use of the truth commission's report in legal proceedings; and 3.) inspiration for the interpretation of the facts of a case in their historical context.

Finally, the doctrines developed by the IACtHR over the course of its rich case law relevant to the fight against impunity have been instrumental to the way in which Guatemalan pro-accountability actors have articulated their claims. To be precise, the IACtHR's overarching doctrine of the obligation to investigate, prosecute and punish human rights violations has allowed these domestic actors to articulate their claims in terms of rights and legal obligations. This has helped them to defend themselves from the suggestion that their struggle against impunity has been politically or financially motivated, by drawing the debate away from their own intentions and refocusing it on the legal obligations of the state. Of course, this study does not suggest that groups like AVEMILGUA or the FcT have therefore stopped attacking pro-accountability actors, but only that pro-accountability now have an answer to such attacks that has a firm basis in the case law of the IACtHR. Moreover, the IACtHR's jurisprudence has provided Guatemalan pro-accountability actors with legal arguments favoring the removal of several important legal obstacles to investigation and prosecution of civil war cases, including the application of the amnesty law to individual cases, the operation of the principle of legality in cases of enforced disappearance and the prescription of serious human rights violations. The increased

'capacity for reception' of international standards on the part of domestic courts, meanwhile, has ensured that the legal arguments formulated by pro-accountability actors have, in some cases, achieved their intended effects, so that legal obstacles to investigation and prosecution have indeed been removed.

Of course, this chapter also demonstrates the need to be realistic with regard to both the possibilities for success in the Guatemalan struggle against impunity and the IACtHR's capacity to influence those possibilities. It teaches us that the struggle against impunity in Guatemala has not been a straight path to success, that domestic actors and circumstances remain decisive for its success and that the dominant presence of anti-accountability constituencies in Guatemalan society and political life are an enormous complicating factor. The developments described in this chapter are ambiguous and the outcomes of the struggle against impunity are unstable and sensitive to changes in the political winds. However, this chapter also demonstrates that, even under these difficult circumstances, pro-accountability constituencies have achieved remarkable successes in some cases. And the Inter-American system has been an important support in their work.

6 Inter-American contributions to the design of transitional justice mechanisms in Colombia

1 Introduction

On 30 November 2016, the Colombian Congress ratified a contentious peace agreement between the Colombian government and the FARC-EP guerilla movement, thereby officially ending the longest running internal armed conflict in the world. The peace process leading to the agreement with the FARC-EP was the second round of successful negotiations conducted in Colombia in the last two decades. Before initiating talks with the FARC-EP in 2012, the Colombian state had negotiated the demobilization of a number of paramilitary groups, organized under the umbrella of the *Autodefensas Unidas de Colombia* (United Self-defense Forces of Colombia – "AUC") between 2002 and 2006.[1] This remarkable succession of peace negotiations has put Colombia at the center of the "peace v. justice" debate in the 21st century. Throughout the peace processes, the question how much justice is required in a balanced transitional justice framework, or how much of the victims' claim to truth, justice and reparation may be sacrificed in order to achieve peace for the nation as a whole, has divided Colombian politics and society. This chapter will analyze these contentious debates about what constitutes a balanced transitional justice framework and the contribution of the Inter-American system to those debates and to the transitional justice frameworks produced by them.

In analyzing the Inter-American contributions to these complex domestic processes, this chapter will take guidance from an interesting theory formulated by Colombian scholars Rodrigo Uprimny and María Paula Saffon. While international scholarship on the "peace v. justice" dichotomy tends to emphasize the tension between the need for peace and international standards on the victims' right to justice, these scholars suggest that this is not the full extent of their relationship.[2] Based on their analysis of Colombian

1 As will be discussed below, the negotiations between the paramilitaries and the Colombian government actually cannot properly be described as a 'peace process', because the negotiating parties had never actually been at war with each other. Thus, rater than a peace process, it was a demobilization process.

2 R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 184.

experience, they propose that international standards can function as 'virtuous restrictions' on negotiations.[3] In their words:

> "[T]he relation between peace and justice may be understood not only in terms of a tension, but also as a virtuous relationship. This latter conception involves admitting that the legal norms on the issue of victims' rights may function not as obstacles to peace negotiations, but rather as virtuous restrictions capable of channeling those negotiations. The acknowledgment of this possibility is based on the assumption that the legal standards on the rights of victims constitute a minimum but inescapable legal imperative, that they have a *hard or non-negotiable core* and that, in that way, they constitute a *credible threat*."[4] [emphasis added]

One of the respondents interviewed in the context of this case study further explained this idea of human rights norms as virtuous restrictions, with a more particular emphasis on the norms developed by the Inter-American human rights system. When asked what he considered, all in all, to have been the Inter-American system's most important contribution to the Colombian peace processes, he said:

> "In Colombia I think the most important thing has been that it put, like, some virtuous limits to the parties. I mean, this is not my original idea, many people have said so. But I do believe that the big thing has been that it has managed to establish a framework for discussion which has, at least, placed the parties within one horizon, where each is situated in [different positions] but at least they have a common point of reference. And that it has set some limits which have made that they move within these limits and try to find creative ways on the domestic level to be able to respond to the international level [Spanish original: "para poder responder de manera complementaria en lo internacional"]. I think that this has been the fundamental impact of all of this. Justice and Peace was created because of this. They said: "ok, how can we incorporate these standards here so that we do not have to answer abroad later". […] It is an acceptance, not because they believe that the standard is legitimate, but simply to protect themselves. But even so, whatever may be the incentive for doing so, I believe that they do end up achieving […] that there are domestic arrangements which tackle this situation."[5]

In short, these Colombian experts believe that human rights norms, including those emanating from the Inter-American system, can 'channel' peace processes by setting limits to the parties' freedom to negotiate and serving as a common frame of reference when parties have very different ideas on the appropriate compromise between achieving peace and respecting

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3 The phrase Uprimny and Saffon use (in Spanish) is "restricciones virtuosas". The Spanish words 'virtuoso' means virtuous, in the sense of morally good. However, is also means 'virtuoso' in the sense of masterful or skilled.

4 R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 184.

5 Interview 7.

the right of victims to truth, justice and reparation. However, for human rights norms to be able to play such a guiding role in peace processes, they must be perceived by the parties as sufficiently clear and established at the international level that to be seen to disrespect these norms could pose a threat to the peace process or the sustainability of the compromise achieved through that process. In this context, Uprimny and Saffon speak of a *hard core* of international obligations, which must pose a *credible threat* to the parties and/or the peace negotiations.

Taking these perspectives to heart, the following pages will examine the different ways in which the Inter-American human rights system has impacted the two peace processes, by contributing to the perception that the international norms on the victims' right to truth, justice and reparation constituted an 'inescapable legal imperative' which, if ignored, could pose a credible threat to the sustainability of transitional justice frameworks put in place.

To be clear, this chapter does not suggest that the issue of victims' rights has been the only relevant issue at play between the negotiating parties. Other issues, including political participation of demobilized combatants and the possibility of their extradition to the U.S. to face drug-related criminal charges, were equally divisive and have likely had an important impact on the peace processes as well. However, given de topic of this research and in the interest of clarity and brevity, the chapter will focus on the question of transitional justice. Moreover, it should also be noted that this chapter focuses exclusively on the negotiations and the resulting legislative processes towards the adoption of a transitional justice framework, and not on implementation, in practice, of the laws discussed in this chapter. Those are entirely different processes, with different dynamics and involving different actors and the scope of this chapter does not allow for a full discussion of them. Finally, it should be noted that, at the time of writing this chapter, the legislative process regarding the transitional justice framework negotiated between the Colombian government and the FARC-EP had not been fully concluded. The discussion in this chapter covers the timeframe up to November 2016, when the peace agreement between the negotiating parties was formally ratified. It therefore does not cover the subsequent adoption of the legislation implementing that agreement and the various challenges of that legislation before the Constitutional Court.

The first part of this chapter – sections 2 to 5 – will focus on process towards the demobilization of the paramilitary groups and the adoption of the Justice and Peace Law, which established the transitional justice framework for it. Section 2 will introduce the domestic actors who have had a decisive role in this process, and the transitional justice framework originally proposed by the Colombian government for the demobilization of the paramilitaries. Section 3 will discuss the Justice and Peace Law as it was eventually adopted, after the government's original proposal had been withdrawn under considerable pressure from civil society. Section 4 will analyze how the Inter-American system has influenced the legislative

process towards the adoption of the Justice and Peace Law through its direct interactions with relevant domestic actors. Section 5 will analyze how the IACtHR's jurisprudence on the right to justice and the prohibition of amnesty laws has been used by domestic actors to redirect the domestic debate concerning the Justice and Peace Law, and how it has, thereby, influenced the normative content of that law.

The second part of this chapter – sections 6 to 9 – will focus on the peace process between the Colombian government and the FARC-EP. Section 6 will discuss how the domestic actors who had dominated the debate on the demobilization of the paramilitaries 'reconfigured' for the peace process with the FARC-EP and how they (re)positioned themselves on the question of transitional justice. In particular, it will provide an analysis of the Legal Framework for Peace, a constitutional amendment introduced by the government to serve as its guidelines on the issue of transitional justice in its negotiations with the FARC-EP. Section 7 will discuss the negotiations themselves and the transitional justice compromise reached between the Colombian government and the FARC-EP. Section 8 will analyze how the Inter-American system influenced the domestic debate surrounding the Legal Framework for Peace and, as a result, the peace negotiations with the FARC-EP through their direct interactions with relevant domestic actors. Finally, section 9 will examine how the IACtHR's jurisprudence has been used by the Colombian government and other domestic actors to manage the domestic (and international) debate on transitional justice and how it has, thereby, influenced the normative content of the transitional justice framework established through the negotiations with the FARC-EP.

2 The paramilitary demobilization process (2002 – 2006): actors and process

2.1 Negotiating parties: the government and the paramilitary groups

Paramilitary groups have been around in Colombia since the 1960s. They were legalized by the Colombian government in 1968 through Law 48, and grew rapidly during the 1970s and 1980s, becoming tied up with the drug trade.[6] The groups became particularly violent in the 1980s, attacking political opponents and even government officials. As a result of the latter – in combination with growing international pressure to take action against paramilitary groups – they were declared illegal in 1989.[7] However, they continued to operate and the paramilitary phenomenon was given new life (and legal mandate) in 1994 through Decree 356, creating the "convivir".

6 W. Tate, 'Paramilitaries in Colombia', (2001) 8(1) *Brown Journal of World Affairs* 163-175, pp. 164-165.

7 Idem, p. 166.

This led to the "second generation" of paramilitary organization.[8] In the 1990s, various paramilitary groups active in different parts of the Colombian territory organized themselves into a central organization, the AUC. By the time the AUC began negotiations with the government towards its demobilization in the early 21st century, it controlled considerable parts of the Colombian territory and was generating wealth through a variety of illegal trades, including the drug trade.[9]

Álvaro Uribe was elected President of Colombia in 2002, on the heels of a failed peace process between the government and the FARC-EP. The failure of the peace negotiations had left Colombia demoralized and the FARC-EP considerably strengthened. In response to this situation, Uribe ran a campaign based on the promise to provide security for the population and to confront the guerrillas through military means. This message proved so popular that he was elected in the first round with an absolute majority of the votes. Once elected, Uribe put these promises into practice through the adoption of his policy of 'democratic security',[10] which focused primarily on the build-up of Colombia's military capacity and military control over the territory.[11] Moreover, the Uribe government took the position that the security situation faced by Colombia should not be considered as one of armed conflict, but rather as that of a democratic state facing an internal terrorist threat.[12] Besides having considerable legal consequences, this rebranding of the conflict as a terrorist, and even 'narco-terrorist' threat, had the added effect of perfectly aligning the Colombian government's position with U.S. security concerns. In 2002, the U.S. government decided to further increase its already considerable military aid program to the country.[13]

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8 Idem, pp. 166-167, noting that: "Government officials maintained that the Convivirwere designed simply to provide improved intelligence and security in remote rural areas. However, this characterization was inaccurate, both in their legal definition and their conformation."

9 Idem, pp. 167-168.

10 For a more complete analysis of this policy, *see* A. Mason, 'Colombia's democratic security agenda: public order in the security tripod', (2003) 34(4) *Security Dialogue* 391-409.

11 Mason explains that, while the policy officially recognizes that democratic security requires the build-up of all state institutions, including especially those focused on the rule of law and human rights, in practice the focus was firmly on the military. A. Mason, 'Colombia's democratic security agenda: public order in the security tripod', (2003) 34(4) *Security Dialogue* 391-409, pp. 396-402. This results in the paradoxical situation that "in the name of *enhancing* democratic security, legal and human rights guarantees have actually been *restricted*". Idem, p. 401. (italics in the original text)

12 *See for example* H. Hanson and R. Romero Penna, 'The failure of Colombia's "Democratic Security"', NACLA reports, 25 September 2007, citing a 2004 BBC interview with Álvaro Uribe: ""There is no armed conflict here," says Uribe. "There was armed conflict in other countries when insurgents fought against dictatorships. Here there is no dictatorship; here there is a profound, complete democracy. What we have here is the challenge of a few terrorists.""

13 A. Mason, 'Colombia's democratic security agenda: public order in the security tripod', (2003) *Security Dialogue* 34(4), 391-409, p. 398.

While Uribe's strategy in relation to the guerrillas thus relied on confrontation through increased military capacity, he had a notably different approach to dealing with the other irregular armed forces active on Colombian territory: the paramilitary groups. Colombian paramilitary groups have long had a complex relationship to the state and its armed forces, marked more by shared interests than by confrontation. In the 1990s, Uribe – in his capacity of governor of Antioquia – had been one of the most vocal promotors of the convivir model. At the same time, however, the state vehemently denied any suggestion of the existence of direct links between its agents and the paramilitary groups and, consequently, of its responsibility for the human rights violations committed by those groups. Human rights NGOs, on the other hand, considered the ties between the state and paramilitary organizations to be one of Colombia's most important public secrets, and directed much of their efforts towards exposing this secret and having it become part of the national debate.[14] As a result, "[t]he issue of state connections to the paramilitary groups was the single most contentious issue" between NGOs and the state during the 1990s and the early 2000s.[15] It was also an issue that would play an important role in the debates about transitional justice mechanisms in the context of the demobilization of the paramilitary groups.

The preparations for the negotiations between the Uribe government and the AUC towards the latter's demobilization started in late 2002[16] and lasted until 15 July of 2003, when the government and the AUC signed the Agreement of Santa Fe de Ralito.[17] During this exploratory phase of the negotiations, the Uribe government enacted Decree 128 of 2003 granting certain benefits to members of illegal armed groups willing to demobilize.

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14 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 293. The suspicions held by these NGOs of collusion between the paramilitary groups and State forces would later be confirmed through investigations by the Justice and Peace Tribunals which were established as a result of the demobilization of the paramilitary groups. Moreover, starting in 2006 a groundbreaking investigation by the Colombian Supreme Court, known as the *parapolítica* investigation, revealed extensive links between the paramilitaries and many high-level politicians, including several from the inner circle of Álvaro Uribe. For a full account of the parapolítica investigations, *see* M. McFarland Sánchez-Moreno, *There are no dead here – a story of murder and denial in Colombia* (Hachette UK, 2018).

15 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), pp. 236 – 241.

16 In December 2002, the AUC declared a unilateral ceasefire and the government created an exploratory commission, under the guidance of the Commissioner for Peace, Luis Carlos Restrepo, to explore possibilities for reaching an agreement with the paramilitaries. *See* Final report of the High Commissioner for Peace on the AUC peace process, p. 4; *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 6 and Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 79.

17 *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 7.

As part of these benefits, the Decree, together with legislation already in place, allowed the government to grant a generalized pardon to all those members of armed groups who were not suspected of having participated in 'atrocious' crimes including, amongst other things, terrorism, kidnapping, genocide or murder.[18] However, as broad as this arrangement was, it did not cover all the paramilitaries but applied mostly to the rank-and-file. The relatively small number of paramilitaries already being investigated for their participation in grave human rights violations, or already convicted for their crimes *in absentia*, included many of the most powerful paramilitary commanders who were representing their organizations at the negotiation table. As a result, these commanders had a strong interest in seeing the legal framework regarding the possibility of granting amnesties and pardons broadened even further. Their position on the issue of transitional justice can in fact be summarized in five words: *ni un día de cárcel* (not one day in jail).[19]

The exploratory stage of the peace negotiations had been conducted behind closed doors by the government and the paramilitary commanders,[20] leaving no space for outsiders' views to influence the direction the negotiations were taking. Particularly, the victims of the crimes

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18 *See* Article 50 of the Ley 418 de 1997 'por la cual se consagran unas instrumentas para la búsqueda de convivencia, la eficacia de la justicia y se dictan otras disposiciones', as regulated in Article 13 of Decree 128 of 2003. As a result of these arrangements, the great majority of the paramilitaries who would be demobilized through the peace process the Uribe government had initiated, would be granted amnesty and would never appear before a court at all. *See* Interview 2, saying:

> "[T]he criterion was: if there are is not already an open investigation, if there has been no sentence imposed, well, then those belonging to the [paramilitary groups] can be granted amnesty or pardon. So what happens? Well, that we had a justice system in which there existed not only 99% impunity for cases that were being processed, but that there was another great number of cases which were not even known by the authorities, not the facts let alone the perpetrators. So the great majority of [the demobilized], around 14.000 members of the paramilitaries, never came to the office of a judge, they never came to court, they have never known what it means to be confronted by a judge. And they went [home, HB]."

19 *See* 'Proceso con autodefensas está en un momento crítico', *El Tiempo*, 4 March 2004, 'Salvavidas precario', *El Tiempo*, 1 April 2004. *See also* R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 171. In defending this position, the discourse employed by the paramilitary commanders was based on their assertion that they were "combatants by necessity", in the sense that their participation in the armed conflict was motivated strictly by their need to defend themselves from guerrilla aggression. Therefore, they maintained, they should be considered victims of the armed conflict, rather than offenders. As a result, what was needed was not 'vengeance', as they qualified the call for justice coming from human rights organizations and victims groups, but reconciliation and forgiveness. *See* Communication by Salvatore Mancuso, *as cited in*: Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Fundación Social, 2006), p. 75.

20 *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 7

committed by the paramilitaries were not given a place at the table, as they were not considered to be a part of the process.[21] As a result, the Santa Fe de Ralito agreement, which marked the start of the official phase of the negotiations, was heavily oriented towards the disarmament and demobilization of the paramilitary groups and the reintegration of their members into civilian life, which were the primary concerns of the government and the paramilitary commanders respectively.[22] In this agreement, the AUC and the government decided that the demobilization of the paramilitaries would be initiated before the end of the year, while the government would start developing the (legislative) actions required to reintegrate the demobilized paramilitaries into civilian life.[23] Among the actions to be undertaken by the government following this agreement, was the presentation of a draft bill to introduce the transitional justice measures agreed upon between the negotiators. This draft bill, introduced to parliament in August of 2003, became known as the *Proyecto de Alternatividad Penal* (Alternative Punishment Bill – "AP Bill").[24]

2.2 Pro-accountability constituencies: human rights organizations opposing amnesty

The start of the negotiations between the state and the paramilitaries had rattled human rights groups suspicious of the ties between these two entities, who were now ostensibly the opposing parties in a negotiation process. In the eyes of victims' organizations and human rights groups, the interrelations between the parties made the negotiations essentially a sham. In the words of one respondent, who works at one of the Colombian human rights NGOs who have played a leading role in the opposition to the paramilitary demobilization process:

> "[T]he government was practically negotiating with itself, I mean, the alliances between the military and the paramilitaries were more than obvious and evident. I mean, the Inter-American Court had already recognized this and national case law as well. So this was a process where: 'I need you to tell truths

21 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 80.

22 Agreement of Santa Fe de Ralito, Annex 5 to the High Commissioner for Peace's final report on the AUC peace process, available at http://www.acnur.org/t3/uploads/pics/2258.pdf?view=1. The recommendations made by the exploratory commission, which formed the basis for the Agreement of Santa Fe de Ralito, were oriented towards the same goals. *See* Document of Recommendations of the Exploratory Commission, June 25 of 2003, Annex 4 to the High Commissioner for Peace's final report on the AUC peace process, available at http://www.acnur.org/t3/uploads/pics/2258.pdf?view=1.

23 Agreement of Santa Fe de Ralito, Annex 5 to the High Commissioner for Peace's final report on the AUC peace process, available at http://www.acnur.org/t3/uploads/pics/2258.pdf?view=1 .

24 Proyecto Ley 85 de 2003 (Senado), Gaceta del Congreso 436, 27-08-2003.

> ("verdades"), but then again not that many, because I believe that [in the end] I am the one responsible'. Remember that the paramilitary groups were created legally by the Colombian state. There are laws and decrees that created this. […] So the alliance was more than obvious."[25]

These groups pointed out that the narrow focus on the dismantling of the paramilitaries military power through their demobilization and disarmament would leave the bases for their political and economic power intact.[26] Thus, they feared, the process would result not in the dismantling of the paramilitary groups, but rather in their legalization. Moreover, they feared that the transitional justice mechanisms proposed by the government would give rise to a "project of impunity", serving only the government and the paramilitaries and not the victims of the war or society as a whole.[27]

These shared concerns brought together a diverse group of civil society organizations, both Colombian and international, who would become the driving force behind the resistance to the transitional justice mechanisms proposed by the government in the context of the paramilitary peace process. It is important to note that the various organizations involved in this campaign did not necessarily share the same attitudes to peace processes, and the proper role of criminal justice in them, in general.[28] However, they all agreed that the AP Bill, in any case, did not represent a good balance between the interest of peace and the interest of justice.[29] Moreover, in criticizing government's proposal they employed a common language: the language of human rights, more specifically the rights of the victims of the conflict to truth, justice and reparations. As explained by one respondent:

> "[S]o here is where an incipient movement of victims of human rights [violations] emerges, *Movice* ["Movimiento Nacional de Víctimas de Crímenes de Estado" – National Movement of Victims of Crimes of the state, HB], but supported by much more established organizations with a lot of international flair, [like] the Colombian Commission of Jurists ["CCJ", HB], Sisma, the Lawyers Collective ["CAJAR", HB]. These are more technical organizations of lawyers. I believe that in Colombia there never existed a great victims' movement and that a large part

25 Interview 2. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 143, describing the views of "some influential activists" who considered that the negotiations between the paramilitaries and the government were not "real political negotiation[s] to the extent that there [were no] conflicting interests and views between the parties".

26 *See* R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 168.

27 Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University May 2011), p. 148.

28 *See* idem, pp. 144-146.

29 Idem, p. 146.

> of this discussion was channeled juridically. And it was channeled juridically through these organizations […] who had broad knowledge, many contacts, and who mastered the legal language of these standards."[30]

Colombian human rights organizations such as those mentioned here by the respondent were supported in their opposition to the demobilization of the paramilitaries. For example, Human Rights Watch ("HRW"), represented by the director of its America's division, José Miguel Vivanco, became one of the most vocal critics of the negotiations with the paramilitaries and of Uribe's human rights policies in general. Moreover, the International Crisis Group ("ICG") has monitored the demobilization of the AUC from the beginning and has shared many of the domestic NGOs concerns about it.[31] Likewise, the International Center for Transitional Justice (hereafter: "ICTJ") set up an office in Colombia in 2003 and immediately started collaborating with Colombian NGOs in their monitoring of the peace process and in making recommendations on how to improve it.[32] The involvement of such internationally recognized NGOs gave the campaign against the transitional justice mechanisms proposed in the context of the paramilitary demobilization considerable strength and international clout.

As a result of their criticism of the negotiations with the paramilitaries, and of the policy of Democratic Security more broadly, the relationship between the Uribe government and these human rights organizations quickly became strained. While human rights groups continued to question the links between state agents and paramilitary groups, Uribe in return

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30 Interview 7. The latter three organizations mentioned here by the respondent are: 1.) *Comisión Colombiana de Juristas* (The Colombian Commissions of Jurists, "CCJ"), an offshoot of the Andean Commssion of Jurists which developed into an independent NGO; 2.) *Sisma Mujer*, an organization focused on the protection of women's human rights; and 3.) *Colectivo de Abogados "José Alvear Restrepo"* (The "José Alvear Restrepo" Lawyers Collective – "CAJAR"], an activist law firm with a focus on the defense of human rights, especially those of marginalized groups and social leaders suffering persecution because of their activities. Both CCJ and CAJAR have successfully brought Colombian cases before the IACtHR.
While these three NGOs have certainly al played an important role in the processes described in this chapter, they were not the only ones. Other relevant organizations include the *Comisión Intereclesial de Justicia y Paz* (Interdenominational Commission for Justice and Peace), *The Centro de Estudios Derecho Justicia y Sociedad* (The Institute for Law, Justice and Society – "DeJusticia"), the *Fundación Social* and many more.

31 For example, in a report published in September 2003, weeks after the AP Bill was presented to parliament, ICG noted that: "it is essential that the government achieve a balance between guaranteeing the success of DR and upholding the basic principles of justice. […] While punishment for lesser crimes could include sentencing paramilitaries to social reconstruction work such as mine clearing or manual coca eradication, war crimes and crimes against humanity must be punished according to international norms." ICG, Colombia: negotiating with the paramilitaries, ICG Latin America Report No. 5, 16 September 2003, p. 29.

32 *See for example* Fundación Social and ICTJ, *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, (Fundación Social, 2004).

publically called out those human rights groups for, in his view, sympathizing with the guerrilla. For example, in a speech delivered in 2003, Uribe questioned the depth of these groups' dedications to the cause of human rights, suggesting that they only used human rights as a "political banner for certain occasions".[33] The true objectives of these "writers and schemers", he suggested, was to help the guerrilla.[34]

It is clear, then, that there would be little chance for these human rights groups to influence the development of the demobilization process – and the transitional justice mechanisms adopted its their context – by directing themselves directly to the negotiating parties. Instead, they focused their campaign on a different audience: the international community, which could put pressure on the Colombian state institutions, and, most importantly, the Colombian parliament. After all, any transitional justice mechanism the government wanted to enact to facilitate the demobilization of the paramilitary groups would first have to be adopted by parliament. Thus, outreach to parliamentarians became an important part of the campaign against the AP Bill. One important form of outreach consisted of inviting prominent parliamentarians to academic forums on transitional justice and victims' rights to help them to make "informed decisions".[35] Another way for civil society to communicate its concerns about the peace process to parliament was through the participation of several important representatives of civil society groups in the parliamentary hearings on the AP Bill.[36]

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33 *See* 'Uribe critica organizaciones de derechos humanos', *Semana*, 9 September 2003. The quotes reflected here are taken from the full transcript of Uribe's remarks published by Semana through their website, available at <https://www.semana.com/noticias/articulo/intervencion-del-presidente-alvaro-uribe-velez-durante-posesion-del-nuevo-comandante-fuerza-aerea-colombia/60507-3>, lact checked: 26-07-2018.

34 Idem. According to Semana, these remarks by Uribe came in reponse to the publication of a UNDP report critical of Uribe's handling of the armed conflict, which had publically been supported by a large number of domestic human rights NGOs.

35 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), p. 156. An important example of such an occasion is the seminar on "experiences with alternative punishment in peace processes" organized at the Autonomous University of Barcelona in February 2004, which was attended by Rafael Pardo and Luis Carlos Restrepo and at which the James LeMoyne (UN Special Representative in Colombia), Michael Frühling (the Director of the Colombian Office of the UNHCHR), José Miguel Vivanco (Human Rights Watch) and Catalina Díaz (then CCJ) presented, amongst others. *See* 'ONU pide comisión de la verdad para Colombia', *El Tiempo*, 29 February 2003 and 'Paramilitarismo se ha consolidado' (interview with José Miguel Vivanco), *El Tiempo*, 28 February 2003.

36 The first round of hearings was organized in September 2003 and included contributions by representatives of the Colombian Commission of Jurists, the *Asociación de Familiares de Desaparecidos y Detenidos* (Association of Families of Disappeared and Detained Persons, hereafter "ASFADDES"), the ICG and Michael Frühling, representative of the of the UN Office of the High Commissioner for Human Rights. A second, more elaborate round of hearings was organized between January and April of 2004. At these hearings, 17 NGO representatives and 3 victim organizations were able to give their views on the AP Bill. *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 25-26 and 36.

In short, lobbying members of parliament to include human rights norms in their considerations became an important strategy for the accountability movement to correct the transitional justice mechanisms adopted to facilitate the demobilization of paramilitary groups.

2.3 The Constitutional Court

Another significant avenue through which human rights organizations have sought to influence the transitional justice mechanisms adopted in Colombia, has been by submitting them for review of their constitutionality by the Colombian Constitutional Court. While the Constitutional Court is a relatively young institution, which was created when the current constitution was adopted in 1991, is has quickly become a well-respected judicial institution with a big impact on Colombian law and politics.[37] As one respondent explained, the 1991 constitution gave the Court the position of 'Guardian of the Constitution'.[38] This position brought with it two main tasks: 1.) revising the decisions of lower courts on complaints about the violation of individual rights; and 2.) revising the constitutionality of laws and other legislative measures upon complaints by any citizen. It is particularly through this latter function that the Constitutional Court has had a profound impact on the peace processes and the transitional justice instruments implemented in that context.

According to the respondent, the Constitutional Court has long operated with the same progressive spirit that animated the 1991 Constitution generally.[39] Compared to older, more established institutions like the Supreme Court of Justice and the Council of State, the Constitutional Court had a less formalist and more activist approach to law.[40] One area in which the activism and progressivism of the Constitutional Court has found its expression, is in its openness to and "enthusiastic" use of international

37 Alexandra Huneeus has described the Colombian Constitutional Court as "one of Latin America's most influential judicial bodies and arguably the Inter-American Court's most dynamic judicial interlocutor". A. Huneeus, 'Human rights between jurisprudence and social science', (2015) 28 *Leiden Journal of International Law* 255-266, p. 264.

38 Interview 6.

39 Interview 6.

40 According to the respondent, this progressiveness is not only a consequence of the relative youth of the Constitutional Court as an institution, but also of the fact that the first generations of judges to sit on its bench, and their clerks, were "true liberals", belonging to the movement of the *séptima papeleta*, Interview 6 (field notes only), clerk at the Constitutional Court, Bogotá, 24 November 2015. The *séptima papeleta* was a movement of progressive law students which arose in 1989 and has had a profound impact on the drafting of the new constitution. For more information on the movement of the *séptima papeleta*, *see for example* J. Lemaitre, 'Los estudiantes de la séptima papeleta', *Semana*, 6 March 2010.

human rights law in its judgments.[41] This openness has a legal basis in Article 93 of the Constitution of Colombia, which codifies the doctrine of the 'Constitutional Block' (*Bloque de Constitucionalidad*). On the basis of this doctrine, the Constitutional Court has found that the provisions of international human rights treaties signed by Colombia, such as the ACHR, are of constitutional rank within the Colombian legal order.[42] Furthermore, the Constitutional Court has also held that the judgments by international courts authorized to interpret those conventions, amongst which the Inter-American Court figures prominently, are "relevant hermeneutical criteria" for interpreting these provisions and should be taken into account when applying them.[43]

However, as explained by one respondent, who is a lawyer working with CCJ and who has been involved in CCJ's litigation before the Constitutional Court, the receptiveness of that institution is not exclusively the result of its own institutional culture. While it is certainly true that the Constitutional Court has been open to international law, it has been nudged in this direction through strategic litigation efforts by human rights organizations, inviting the Court to go ever further in its application of the constitutional block. In his words:

> "Whenever we present this type of litigation, our first task is to demonstrate that [international] standards are not just soft hermeneutical criteria, but obligations which the state has taken on internationally and that the interpretations made by the authorized organs, like the Inter-American Court, the Inter-American Commission, The Committee on Civil and Political Rights, the Human Rights Commission… these are interpretations of the obligations taken on by the Colombian state, so they should binding in the appropriation [of these obligations, HB]. So, we have achieved that the Constitutional Court has taken this line, because the jurisprudential line, if you look from the year, I don't know, '95 or '96, when these discussions began, has progressed much more [in our direction, HB]. Before they said: "well, no, it is only international conventions signed by Colombia, their content only and exclusively, and on top of that, [it is] only those which cannot be suspended in a state of emergency. […] And this has been part of the work of human rights organizations: turn the Constitutional Court

41 Interview 6. In this sense, the Colombian Constitutional Court is a prime example of the embrace of a specific a vision of (constitutional) law, often described in the literature as 'neoconstitutionalism', by many judicial institutions in the Latin American region since the late 20th century. *See generally* J. Couso, A. Huneeus and R. Sieder (eds.), *Cultures of legality: judicialization and political activism in Latin America* (CUP, 2010) and A. Huneeus, 'Constitutional lawyers and the Inter-American Court's varied authority, (2016) 79(1) *Law and Contemporary Problems* 179-207. According to Huneeus, the embrace of neoconstitutionalism by important judicial actors is one of the most important factors explaining the degree of 'authority' of the Inter-American Court in any given legal system.

42 A. Huneeus, 'Constitutional lawyers and the Inter-American Court's varied authority, (2016) 79(1) *Law and Contemporary Problems* 179-207, pp. 188-189.

43 Constitutional Court of Colombia, Sentence C-010/200 of 19 January 2000, p. 44.

> over to an more international way of looking at human rights and appropriating the standards from the case law. This is our constant struggle when we present this type of claim, when we present this type of case: seek that this dualistic criterion between international law and internal law does not exist, but rather a more monist vision, where the standards are seen as one whole, as an integral part of the Constitution. I believe that on this point it has gone very well for us. The Court has taken steps backward but [overall] I think the Constitutional Court is one of the courts which has had the most extensive jurisprudence with regard to introducing international standards."[44]

In the context of the peace processes and transitional justice, this openness to international human rights standards has been especially important has made the Constitutional court an important avenue for human rights organizations seeking to have the right of victims to truth, justice and reparation be included in the legal framework.

2.4 Starting point of the legislative process: presentation of the Alternative Punishment Draft

The government's discourse in support of the AP Bill relied heavily on notions of forgiveness and reconciliation, which it considered necessary in order to be able to bring an end to the participation of the paramilitary forces in the armed conflict. According to its full official title, the AP Bill sought to further "the reintegration of members of armed groups who effectively contribute to national peace".[45] The Statement of Motives accompanying the AP Bill provides further illustrations of rationale underlying the transitional justice compromise proposed by the government. In it, the government, represented by the Minister of Justice, wrote the following:

> "The long confrontation which bleeds dry the country and cuts short the lives of thousands of fellow citizens each year, demands at this moment a genuine determination to design legal mechanisms which will help to close the door on the horrors inherent in war, underlying a horizon which allows for the laying down of weapons by those holding them. When a peace accord does not offer to those accused of committing grave crimes the possibility to contribute their efforts to the achievement of national peace, those who have committed them will not hand in their weapons and will persist in their military campaigns, sure to include new and brutal violations of International Humanitarian Law, leaving Colombians trapped in an apparently insolvable contradiction: in order to achieve full justice we must pursue war without bounds, to defeat all enemies of democracy and bring them to justice, or we must explore audacious formulas which do not set peace against justice, formulas which allow us to overcome a thin conception of justice centered in punishment for the guilty and to access

44 Interview 2.
45 Proyecto Ley 85 de 2003 (Senado), Gaceta del Congreso 436, 27-08-2003.

> a new concept of justice which allows us to effectively overcome bloodshed and cruelty with the purpose of reinstating in full the conditions for peaceful coexistence. Formulas which permit reaching peace by reorienting the meaning of justice and the function of its application towards the strengthening of democracy."[46]

Concretely, the AP Bill proposed a considerable extension of the already broad amnesty provided for by Decree 128 of 2003. Whereas the pre-existing framework did not allow for amnesties or pardons to be granted to for 'atrocious' crimes, the AP Bill provided for the suspension of prison sentences (Article 2 AP Bill) and imposition of alternative forms of punishment (Article 11 AP Bill) for those found guilty of such crimes. Moreover, the AP Bill seemed to confirm suspicions that the negotiating parties would try to suppress any information relating to the context of the paramilitaries crimes, by allowing paramilitaries accused of committing serious crimes to seek a '*sentencia anticipada*' (plea bargain). Critics noted that such a procedure would effectively cut short the investigations conducted by the Prosecutor's Office, allowing the paramilitaries, through their testimony, to determine the record of their own crimes.[47] In the words of one respondent:

> "This is something that nowadays people don't know about and, magically, they have it in their head that the Justice and Peace Law was the proposal that the Uribe government presented to Congress and that Uribe managed to achieve in order to legalize the paramilitaries. When in reality this isn't true! Uribe's proposal was: "they all go home, they all go to Congress" [i.e. amnesty and political participation, HB]. And they lost, they had to negotiate."[48]

The presentation of the AP Bill to Congress marked the shift from the discretion which had characterized the exploratory phase of the negotiations, where the government and the paramilitaries had full control over the situation, to a more open and diverse process.[49] Here, it became clear that human rights groups' opposition to the AP Bill had not been without effect. It had alerted parliamentarians to the risk of Colombia's international isola-

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46 Idem.

47 *See for example* Gustavo Gallón, 'justicia simulada: qué pena', El Espectador 31 August 2003. This point is further elaborated in a report on the AP Bill prepared by CCJ for a conference at the Universidad Autónoma in Barcelona in February 2004, which compiles the various criticisms made against the AP Bill by CCJ in the months leading up to it. CCJ, 'Justicia simulada: una propuesta indecente', February 2004, pp. 9-12.

48 Interview 7.

49 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), p. 153.

tion if the bill would be adopted as it was.[50] As a result, a coalition against the AP Bill in its original form was starting materialize in parliament,[51] led by Senator Rafael Pardo.[52] As the legislative term progressed, this coalition increasingly put pressure on the government to strengthen the draft and include, amongst other things, minimum (prison) sentences for paramilitaries convicted for human rights violations.[53]

Needless to say, these developments in parliament rattled the paramilitaries, who in turn pressured the government to insist on the AP Bill in its original form and threatened to withdraw their support for the demobilization process.[54] As a result of this growing polarization about the AP Bill,

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50 This risk was underscored when the Colombian High Commissioner for Peace revealed that the UN had turned down the government's requests for its support for the peace process with the paramilitaries. This risk was underscored when the Colombian High Commissioner for Peace revealed that the UN had turned down the government's requests for its support for the peace process with the paramilitaries.
Moreover, 57 members of the US Congress sent an open letter to president Uribe stating that they were deeply troubled by "continuing credible reports of persistent links between members of the Colombian security forces and paramilitary terrorist organizations" and encouraged the Senate "to ensure that an eventual peace agreement with the AUC includes accountability for human rights violations". 'Letter to President Alvaro Uribe from 57 members of Congress', available at http://www.derechos.org/nizkor/colombia/doc/uscongress1.html. The letter was drafted by Tomas Lantos, member of the United States House Committee on Foreign Affairs. *See also* '56 congresistas contra alternatividad', *El Tiempo*, 25 September 2003. According to *El Tiempo* the letter was sent two days after the Colombian Commissioner for Peace, Luis Carlos Restrepo, had given a presentation on the peace process at the Wilson Center in Washington. 'Mensaje de alerta', *El Tiempo*, 26 September 2003. While *El Tiempo* asserts that there was no connection between these two occurrences, the open letter of the delegates did mention "recent public statements made by Colombia's High Commissioner for Peace Luis Carlos Restrepo".

51 '56 congresistas contra alternatividad', *El Tiempo*, 25 September 2003. *See also* 'Condiciones a la alternatividad', *El Tiempo*, 27 September 2003.

52 'No se puede perdonar todo' (interview with senator Rafael Pardo), *El Tiempo*, 5 October 2003. Pardo was a member of the governing party, and had originally been loyal to President Uribe.

53 'Piden endurecer alternatividad', *El Tiempo*, 7 October 2003. By late April 2004, the Senate Commission responsible for the AP Bill, under the leadership of Senator Pardo, even presented an updated version of the AP Bill, renamed the 'Justice and Reparation draft', which included some serious alteration to the original text. Amongst other things, this updated version included the creation of a specialized tribunal for truth, justice and reparation, and prison sentences of 5 to 10 years for those who were found guilty of serious crimes. Compared to the original AP Bill, the updated version thus reflected a radical shift in terms of its underlying rationale: its focus was no longer exclusively on the demobilization and reintegration of the paramilitaries, but gave consideration to the rights of the victims of the war as well. *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 49. *See also* 'AUC rechazan nuevo proyecto de alternatividad penal', *El Tiempo*, 15 April 2004.

54 'AUC rechazan nuevo proyecto de alternatividad penal', *El Tiempo*, 15 April 2004. According to a statement by the AUC, "the modifications to the [AP Bill] diverge from the collective sentiment in favor of peace and only reflect the interest of some sectors, which do not represent the majority opinion".

the government eventually saw itself forced to withdraw the bill altogether and restart the process during the next legislative term.[55] What should have been a mere formality, having the AP Bill approved in order to provide the paramilitaries with the amnesty they wanted, had turned into a major political battle for the government. And one that was increasingly being fought on other people's terms.

3 Transitional justice outcome: the Justice and Peace Law

In the months after the withdrawal of the AP Bill the government was pressured on all sides to make haste with presenting a new proposal for a legislative framework for the demobilization and reintegration of the paramilitaries,.[56] However, different sides had different ideas of what that legislative framework should entail. As a result, it would be 8 months before parliament would be able to start discussing new proposals for a legal framework for the demobilizations of the paramilitaries.[57] The variety of viewpoints on the proper balance between victims' rights and the exigencies of the peace process was reflected in the fact that, by February 2005, no less than 9 legislative drafts on the issue had been presented to Congress by different parliamentarians, each striking a different balance.[58] As observed by the *Fundación Social*, the international standard on the right to truth, justice and reparation:

> "became the symbol which distinguished between the more permissive drafts and those which were more restrictive. For the former, these standards were almost an international obstacle to achieving peace. For the latter, these standards were the tool for avoiding impunity and achieving a reconciliation which was not just fleeting but for the long term."[59]

The parliamentary commission responsible for studying the nine legislative projects soon accumulated them into two alternative drafts: one based on the proposal presented by the Minister of the Interior of behalf of the

55 Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 49. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), p. 155.

56 Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 73-74.

57 Idem, p. 63.

58 *See* idem, pp. 103-117, describing and comparing all 9 drafts.

59 Idem, p. 117 (translation by the autor).

government [60] and one based on the proposal one presented by parliamentarians Rafael Pardo and Gina Parody. These two drafts were the only ones which were seriously debated in parliament.[61] After some heated debates in parliament, it soon became clear that the government draft enjoyed the support of the majority of parliamentarians.[62] And so, on 22 June 2005, the last day of the legislative session, Parliament adopted the government draft, with some modifications. It was subsequently approved and signed by president Uribe as Law 975 of 2005, known as the Justice and Peace Law("JPL"), on 25 July 2005.

In terms of the protection of the victims' rights to truth and justice, the JPL presents a mixed bag. One the one hand, it is undeniable that the guarantees it provides in this area are much more robust than those originally contained in the AP Bill. For one, victims' rights are recognized throughout the law as an important aspect of the process established by the law. In this context, article 4 of the JPL provides that:

> "The process of national reconciliation to which this law will give rise should promote, in any case, the right of the victims to truth, justice and reparation and respect the right to a fair trial and judicial guarantees of the accused."

The victims' rights are further defined and explained in Articles 6 – 8 of the JPL. With regard to the right to justice, Article 6 recognizes that "the State has the obligation to carry out an effective investigation which leads to the identification, capture and sanctioning of the persons responsible for the crimes committed by the illegal armed groups […]".

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60 In fact, this proposal reflected a blend of the draft introduced by the Minister of the Interior with the draft introduced by Armando Benedetti, a parliamentarian allied with the government. In the interest of clarity, in cooperation with Luis Carlos Restrepo, the High Commissioner for Peace. *See* idem, p. 137. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), pp 160-162. As Gómez Sanchez explains, there had been a divide within the government concerning the Justice and Peace Law, resulting in the presentation of two (slightly) different drafts. The blending of these two drafts therefore represents the reconciliation between these different government positions.

61 *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 137-141. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), pp. 160-162.

62 *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 155-156 and 173. The tensions in the debate about the JPL are illustrated, for example, by the fact that parliamentarian Gustavo Petro, a member of the opposition, accused Uribe's brother of being linked to paramilitary groups and suggested that this could explain the government's reluctance to seriously investigate these groups. During the same debate, Gina Parody saw herself forced to withdraw from the plenary session after receiving abuse from the High Commissioner for Peace and a large groups of parliamentarians loyal to president Uribe (who belonged to the same party as Gina Parody). 'Gina abandonó el recinto por rechifla de los Uribistas', *El Tiempo*, 22 June 2005.

Likewise, the alternative punishment of 5 to 8 years imprisonment is granted, according to Article 3 of the JPL, as a benefit "in return for [the accused's] contribution to achieving national peace, his collaboration with justice, reparation to the victims and his adequate resocialization", rather than as a result of simply laying down his weapons, as the AP Bill had done. On top of that, the alternative punishment, as conceptualized in the JPL, is truly alternative in the sense that it is imposed alongside the 'original' or ordinary punishment, which can be as high as 40 years imprisonment. This imposition of the original punishment has an important communicative function, but also a practical one, as the application of the alternative punishment is made conditional on the convict's conformity with certain standards, like the non-repetition of the crimes for which he was convicted (Article 29).

However, the JPL lacked the necessary concrete mechanisms for ensuring the protection of these rights.[63] Specifically, it did not ensure in any way that the accused, in return for the generous benefits offered in the form of alternative punishment, would in fact cooperate fully with the investigators through their full and accurate confessions. In this context, Article 17 of the JPL only stipulated that paramilitaries who wished to benefit from the law should provide a *versión libre* (testimony) to the Prosecutor's Office, without providing for any consequences in case that testimony turns out to be false. In fact, Article 25 provided that any crimes discovered after the accused had been convicted and which had not been revealed by his testimony would also be subject to alternative punishment, and would therefore not affect the benefits received by the accused.

In short, domestic commentators have noted that the JPL contained "important statements of principle" recognizing victims' rights to truth, justice and reparation.[64] However, the JPL has simultaneously been criticized for lacking the necessary concrete mechanisms for ensuring the protection of victims' rights, especially the right to truth.[65] As the Inter-American Commission observed:

> "The adopted bill concentrates upon the mechanisms to establish individual criminal responsibility in individual cases and involves demobilized members of illegal armed groups receiving procedural benefits. However, its provisions fail to establish incentives for a full confession of the truth as to their responsibility in exchange for the generous judicial benefits received. Consequently, the

63 R. Uprimny Yepes and M.P. Saffon Sanín, '¿Al fin, ley de justicia y paz? La Ley 975 de 2006 tras el fallo de la Corte Constitucional', in: R. Uprimny Yepes, M.P. Saffon Sanón, C. Botero Moreno and E. Restrepo Saldarriaga, *¿Justicia Transicional sin transición? Verdad, justicia y reparación para Colombia* (DeJusticia, 2006), p. 202.

64 Idem.

65 Idem.

> established mechanism does not guarantee that the crimes perpetrated will be duly clarified, and therefore in many cases the facts may not be revealed and the perpetrators will remain unpunished."[66]

While the JPL thus represented a step forward from the AP Bill, and in that respect an important victory for the civil society groups who had campaigned against the latter, they were not yet satisfied with the result. In the eyes of those who had been critical of the process all along, the lack of incentives for the beneficiaries of the law to give a full account of their crimes and of the context in which they were committed formed the Achilles heel of the JPL and confirmed their long standing suspicions that the Uribe government was trying to keep the whole truth of the paramilitary phenomenon from coming out.[67] As a result of these concerns and on the basis of their close monitoring of the entire legislative process, some NGOs – including most notably the Colombian Commission of Jurists – decided to challenge the legality of the JPL before the Colombian Constitutional Court.[68]

The Constitutional Court, in a landmark judgment, decided that, while the JPL as a whole was not unconstitutional, some of its individual provisions did violate the constitutional rights of the victims of the armed conflict and should therefore be annulled. For certain other provisions it provided important interpretative guidelines, which were also aimed at the effective protection of the rights of victims. In short, this judgment, which will be discussed in more detail below in section 5.2.2. of this chapter, addressed civil society's most fundamental objections to the Justice and Peace Law.

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66 IACmHR, 'IACHR issues statement regarding the adoption of the 'Law of Justice and Peace' in Colombia, Press Release No. 26/05, 15 July 2005. Interestingly, the head of OAS' monitoring mission in Colombia, MAPP-OEA, chose to lend his support to the JPL, leading to the awkward situation of a disagreement between two MAPP-OEA and its human rights advisor, the IACmHR, on the JPL.

67 Human Rights Watch, for example, criticized the "glaring shortcomings" in the JPL in the form of its failure "to establish effective mechanisms to ensure the dismantling of these powerful, mafia-like groups" and to provide incentives for the confession or disclosure of their crimes. Other criticisms presented against the truth and justice elements established by the JPL concerned: 1.) the strict time-limits set for the investigation of the crimes committed by the paramilitaries and the formulation of charges against them; and 2.) the length of the alternative prison sentences, which many considered to be completely disproportionate in relation to the seriousness of the crimes committed by the paramilitaries. *See* HRW, 'Colombia: Sweden and the Netherlands should withdraw support for OAS mission', 22 June 2005, available at < https://www.hrw.org/news/2005/06/22/colombia-sweden-and-netherlands-should-withdraw-support-oas-mission-0>. With regard to the latter, it should be noted that the JPL allowed for the length of the alternative sentences to be shortened further by subtracting the time spent in the special 'demobilization zones' from the alternative sentence imposed (Article 31 JPL), while the circumstances in these zones were not at all comparable to the circumstances in a prison.

68 Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 165.

4 Inter-American contributions to the transitional justice framework: direct interactions

Throughout the paramilitary demobilization process, the organ of the Inter-American human rights system have sought – and found – ways to interact with the actors in that process and make known its position on the transitional justice issues at play. It first did so in the eight months hiatus between the withdrawal of the AP Bill and the introduction of the new, revised transitional justice proposals to parliament. During this critical time, while the government tried to arrive at a consensus with parliament regarding the proper balance between the interest of peace and the rights of victims to truth, justice and reparation, the Inter-American human rights system 'reached out' to the parties involved in two ways: 1.) through the IACmHR's official monitoring of the paramilitary demobilization process; and 2.) through a series of judgments delivered by the IACtHR concerning the paramilitary phenomenon in Colombia.

4.1 The Inter-American Commission's monitoring of the negotiations

In January 2004, the Organization of American States ("OAS"), of which the Inter-American human rights system forms part, had signed an agreement with the Uribe government to monitor the peace negotiations and the ongoing demobilization of the paramilitary groups.[69] As such, the OAS was expected to stay neutral in all political debates surrounding the demobilization process,[70] leaving human rights organizations worried that its presence would serve merely to legitimize the process, without any consideration for the human rights issues at play. However, after considerable pressure from human rights groups,[71] the General Assembly of the OAS, when ratifying the monitoring mission decided to include the Inter-American Commission on Human Rights in it.[72] Its role would be to advise the head of the monitoring mission on issues of human rights relating to the process. And while this is not, in itself, a strong mandate, it did provide the IACmHR the opportunity to undertake its own monitoring effort, aimed specifically at the issue of impunity and victims' rights.

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69 'OEA: verificación no da espera', *El Tiempo*, 27 January 2004. The agreement was concluded under the leadership of César Gaviria, then Secretary General of the OAS and former president of Colombia (1990-1994).

70 As Sergio Caramagna, head of the OAS monitoring mission in Colombia, said in an interview with *El Tiempo*: "There has to be a balance between the political and social decision to achieve peace and the dose of justice that Colombians deserve. What this dose should be is for you to decide. If we were to come from the outside telling you what price must be paid, we would be committing a grave error. […] We will not express opinions about legal issues and political decisions." 'OEA tendrá silla en la mesa', *El Tiempo*, 15 March 2004.

71 'Dura carta de HRW a la OEA por asumir rol en proceso con paras', *El Tiempo*, 4 February 2004.

72 'Verificación incluirá a DD.HH.', *El Tiempo*, 7 February 2004.

From the beginning, the IACmHR made clear where it stood with regard to the issue of the amnesties proposed by the government in the AP Bill. During her first visit to Colombia, in August 2004, the IACmHR's observer for the peace process said in an interview with *El Tiempo* that:

> "No-one wants impunity. The [IACmHR] has come here insisting that all crimes against human rights will be duly investigated and punished. So the function of the Commission is to ensure that the process functions, but not against any price."[73]

With regard to the position of the victims in the negotiations, she added that:

> "The victims are a central element. We cannot have only the state actors and the AUC at the table. What happens with the victims of these massacres, of the displacements, of the kidnappings, of the executions which have occurred… The Commission's reports will put the emphasis on this theme."[74]

True to her word, the reports and communications which came out of the Inter-American Commission would consistently focus on the rights of the victims of the Colombian conflict and remind the government of its international obligation to provide justice for the crimes committed against them.[75]

4.2 IACtHR judgments concerning the paramilitary phenomenon

Pressure on the government to abstain from granting amnesties to the paramilitaries emanated not only from the Inter-American Commission. On 5 July 2004 the Inter-American Court delivered its judgment in the case of the *19 Tradesmen v. Colombia*, marking the beginning of a series of six judgments dealing with crimes committed by the paramilitaries and the responsibility of the Colombian state for such crimes. Of these six judgments, four were delivered between July 2004 and July 2006,[76] a timeframe which corresponds roughly to the period in which the legal framework for the demobilization of the paramilitary groups was being designed and debated domestically.

The timing of these judgments vis-à-vis the domestic developments seems to suggest a conscious effort by the organs of the Inter-American human rights system to influence domestic debates about the legal frame-

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73 'Sin las víctimas es imposible un proceso', *El Tiempo*, 3 August 2004.

74 'Idem.

75 These reports and communications are compiled in: IACHR, 'Inter-American Commission on Human Rights follow-up on the demobilization process of the AUC in Colombia – digest of published documents (2004 – 2007)', OEA/Ser.L/V/IICIDH/INF.2/07. Some of these reports and communications will be further discussed below.

76 Apart from the *19 Tradesmen* these were: *Mapiripán massacre v. Colombia* (15 September 2005), *Pueblo Bello massacre v. Colombia* (31 January 2006) and *Ituango massacres v. Colombia* (1 July 2006). The other two judgments, *La Rochela massacre v. Colombia* and *Valle Jaramillo and others v. Colombia*, were delivered shortly after the definitive adoption of the Justice and Peace Law, on 11 May 2007 and 27 November 2008 respectively.

work for the demobilization of the paramilitary groups and the possibility of granting amnesties. Of course, the IACtHR does not itself decide when to take on a case, but is dependent on the Inter-American Commission to submit cases for its consideration. In this context, it is important to point out that in four out of these six cases, the decision to send the case to the Court had been made by the Commission between September 2003, shortly after the government had introduced the AP Bill, and 10 March 2006, shortly before the Constitutional Court decided on the constitutionality of the Justice and Peace Law.[77] Moreover, it should be noted that the Inter-American Commission was certainly aware of the legislative process which was taking place in Colombia, given its role in the OAS' monitoring of the demobilization process. It therefore seems plausible that the IACmHR understood the urgency of submitting the paramilitary massacre cases to the IACtHR at the particular time,[78] and that the IACtHR understood the particular context in which its judgments would be received.

The *19 Tradesmen* judgment was remarkable for a number of reasons: firstly, it was the first judgment to discuss the ties between the paramilitary groups and state forces, as a result of which the state was held responsible for crimes committed by the former, and it ordered the state to pay large sums in reparations to the victims of those crimes. Secondly, it discussed in detail the lack of a proper judicial response to the crimes committed by the paramilitaries and the questionable role played by the military courts in ensuring that the senior military officers accused of being involved in the crimes escaped prosecution and punishment.[79] In this context, the Court found that Colombia had violated the right to justice and an effective remedy of the next of kin of the disappeared tradesmen, reaffirming its established case law that victims of human rights violations have the right to access to (criminal) justice[80] and, on the flip side, reaffirmed the state's obligation to prevent and combat impunity "with all available legal means, because impunity leads to the chronic repetition of human rights violations and the total defenselessness of victims and their next of kin".[81] It also specifically reminded the state of the prohibition on amnesty laws for grave human rights violations.[82]

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77 The two exceptions are: *19 Tradesmen v. Colombia* (sent to the Court in 2001) and *Valle Jaramillo and others v. Colombia* (sent to the Court on 13 February 2007). It should also be noted that some of these cases had been under consideration by the Inter-American Commission since the late 1980s.

78 One respondent explained that the Commission, as the political organ of the Inter-American human rights system, sometimes has its own agenda for sending cases to the Inter-American Court. According to this respondent, the Commission's own estimation of which issues are particularly pressing at a given moment, combined with the pressure exerted by the petitioners and the NGOs representing them, can be more important for the decision to send a case to the Court than the formal rules on this issue. Interview 3.

79 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, paras. 47 – 55.

80 Idem, para. 188.

81 Idem, para. 175.

82 Idem, para. 263.

Given the domestic context at the time this judgment came out, with the AP Bill suspended and the government looking for a political compromise on the issue of amnesty, it came as a considerable blow. The official government response to the judgment was short and neutral, saying only that "[o]urs is a country of laws, and we have to respect the judgments of the Courts".[83] Internally, however, the reaction was less composed. As one respondent, who worked in the state agency responsible for defending the state before the Inter-American Court at the time the *19 Tradesmen* judgment came out, put it:

> "When this judgment came out, everything started to move , there was a… well… it impacted greatly on society, because of the issue of the collusion between paramilitaries and state agents, but also because of the [monetary reparations, HB]! Because it was a sentence of eight million dollars in compensation alone. So [the response was, HB]: 'Who is this Court? What happened? Since when do they decide guilt or innocence and, on top of that, condemn us to pay this money?'"[84]

The impact of the IACtHR's insistence on its prohibition of amnesty legislation on the parliamentary debates regarding the Justice and Peace Law will be further discussed below in section 5.1.3 of this chapter. Here, it should also be underscored that the IACtHR's discussion of the ties between the paramilitaries and the state, at the exact moment that these two parties were engaging in negotiations, put the government in an uncomfortable position.

Each of the six judgments about the paramilitary phenomenon concerned particularly notorious crimes, mostly massacres, committed by various paramilitary groups involved in the negotiations with the government. For example, the judgment in the case of the *19 Tradesmen* was followed, in September 2005, by the IACtHR's judgment in the case of the *Mapiripán massacre v. Colombia*. The case concerned a massacre committed by the AUC in July 1997 in which some 49 people were brutally tortured and murdered. The massacre was carried out under the command of some of the highest paramilitary leaders in Colombia, many of whom were representing their groups in the negotiations at the time the judgment was rendered.[85] The *Ituango massacres* judgments, meanwhile, concerned a series of massacres committed by paramilitary forces in the department of Antioquia in the 1990s, when Uribe had been governor of that department.

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83 'Presidente dice que respetará fallo', *El Tiempo*, 23 July 2004.

84 Interview 1.

85 For example, both Carlos Castaño and Salvatore Mancuso were involved in the Mapiripán massacre. Castaño even spoke proudly to the press about the massacre, boasting that it "was the greatest combat activity in all the history of the self-defense groups. We had never killed 49 members of the FARC or recovered 47 rifles. [..] There will be many more Mapiripanes […]". IACtHR *Mapiripán massacre v. Colombia (merits, reparations and costs)*, 15 September 2005, para. 96.50. With regard to Salvatore Mancuso's involvement in the massacre, *see* 'Testigo de massacre señaló a Mancuso', *El Tiempo*, 23 November 2005.

Thus, the judgments about the paramilitary phenomenon rendered by the IACtHR provided considerable support for civil societies' claims of collusion between the state and the paramilitaries, casting the negotiations between these two parties in a different light. The resulting doubts about the legitimacy of these negotiations made it costly for the Uribe government to be seen to be 'soft' on the paramilitaries, for example by providing them with favorable transitional mechanisms.

5 Inter-American contributions to the transitional justice framework: the influence of the IACtHR's jurisprudence on the right to justice and the prohibition of amnesty.

Having sketched the negotiations with the AUC and the legislative process leading up to the adoption of the Justice and Peace Law, we can now turn to the analysis of how the Inter-American human rights system has contributed to these processes. The direct interventions of the organs of the Inter-American system have already been set out above in section 3. This section, on the other hand, will analyze how the doctrines of the IACtHR on the obligation to investigate, prosecute and punish and the prohibition of amnesty laws have been used by domestic actors in order to 1.) reframe the public debate around the adoption of transitional justice mechanisms; and 2.) correct the legal framework for transitional justice.

5.1 Framing the debate on transitional justice in the context of the paramilitary demobilization process

The Inter-American human rights system has made an important contribution to the victims' rights oriented discourse employed by civil society actors in the debates concerning the appropriate transitional justice measures to be applied to the demobilized members of the AUC. As discussed in the previous paragraph, this discourse was critical to the rejection of the AP Bill and the subsequent adoption of the JPL. This paragraph will show that civil society's discourse was based primarily on international human rights norms, especially those flowing from the Inter-American system and the case law of the Inter-American Court.

5.1.1 Introducing the language of truth, justice and reparation

The rationale provided by the Uribe government for the transitional justice framework proposed by the through the AP Bill had relied heavily on notions of peace and reconciliation. This official discourse has been roundly criticized by Colombian scholars, who have argued, for example, that while it used terminology taken from restorative justice theory, there was no "clear official understanding of the meaning, requirements and applicability

of that framework".[86] Some have even gone so far as to call it an "abuse" and a "manipulation" of transitional justice discourse.[87] However, at the time the AP Bill was first introduced this discourse would have been persuasive to many, as it was rooted in the Colombian experience of previous peace negotiations with various guerilla groups, which had included full amnesties for rebels willing to lay down their weapons almost as a matter of course.[88] Furthermore, peace is enshrined in Article 22 of the Colombian constitution as a right of every citizen and a legal duty on the part of the state. In referring to the need to achieve peace through forgiveness and reconciliation, the government was therefore invoking not only a moral imperative and a particular interpretation of transitional justice, but also a legal obligation of constitutional status.

In order to challenge the AP Bill successfully, civil society organizations critical of the negotiations with the paramilitaries thus had to formulate a discourse with comparably compelling moral and legal foundations. They found their answer in the language of victims' rights and the state's international legal obligation to guarantee those rights, which had been developed by international human rights bodies, and especially the Inter-American system, since the late 1980s. The negotiations with the paramilitaries would become the occasion on which civil society groups introduced their human rights-based objections to the idea of granting amnesties under pretext of 'forgive and forget' in Colombia. One respondent, a researcher at an influential Colombian human rights think tank, described the rise of this discourse, saying:

> "[I]t was in fact because of the impact which the cases before the Inter-American Court had had – around this time 19 Tradesmen and Caballero Delgado and Santana had already come out – and also all of the discussion about truth, justice and reparation, that [pressure started to build] to design a formula to take into account the rights of the victims. […] So this is where the discussion changes completely, it changes from an idea of simply […] forgive and forget to a much more robust idea in terms of victims' rights and of the guarantee of truth, justice and reparation."[89]

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86 C. Diaz, 'Challenging impunity from below: the contested ownership of transitional justice in Colombia', in: K. McEvoy and L. McGregor, *Transitional justice from below: grassroots activism and the struggle for change* (Hart Publishing Ltd., 2008), p. 201.

87 R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 177. It is worth noting that the scholars cited here and in footnote 145 all have a background in Colombian civil society and, in that capacity, had been critical of the AP Bill from the beginning.

88 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 80.

89 Interview 7. In this quote, the respondent is referring to the process towards the adoption of the JPL more generally. As explained, at the time of the introduction of the AP Bill, the *19 Tradesmen* judgment had not yet been delivered. However, the *Caballero Delgado and Santana* judgment had been delivered, and so had other relevant case law against countries other than Colombia, like the *Barrios Altos* judgment against Peru.

A similar analysis was put forward by Catalina Diaz, a Colombian scholar and the current head of the Transitional Justice Office of the Colombian ministry of justice, when she wrote that "[t]he critique of the [AP Bill, HB] was framed in terms of the rights to truth, justice and reparations, and the violation of international law contained therein".[90] Likewise, the *Fundación Social* and the Colombian office of the ICTJ have summarized civil society's response to the AP Bill by saying that it had been "severely criticized by important sectors of the national and international community" because of fears that it would

> "give occasion to a great process of impunity, in which the principles of truth, justice and reparation derived of the international obligations of the Colombian State would be flagrantly violated".[91]

The language of truth, justice and reparation allowed the opposition to the AP Bill to argue that the peace process as it had been conducted thus far, with its one-sided focus on the interests of the paramilitaries, was excluding the legitimate interests of an important group not represented at the negotiation table: the victims of the armed conflict.[92] Moreover, the emphasis on the state's international obligations in the area of human rights also helped to counter some of the more aggressive rhetoric employed by the paramilitary commanders. The paramilitaries' first instinct in responding to this victims' rights based discourse was to intimidate those opposing the AP Bill and call into question their motives for doing so. For example, in an interview with El Tiempo in early December 2003, Carlos Castaño made (thinly) veiled threats against politicians and human rights activists campaigning against the AP Bill saying:

> "[the High Commissioner for Peace] should let us talk and he should permit that opposition delegates like Petro, Navarro and the little black woman ["la negrita"] Piedad come here, and those nay-sayers from the NGOs, like Gustavo

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90 C. Diaz, 'Challenging impunity from below: the contested ownership of transitional justice in Colombia', in: K. McEvoy and L. McGregor, *Transitional justice from below: grassroots activism and the struggle for change* (Hart Publishing Ltd., 2008), p. 202.

91 *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 1. This document is one of the most elaborate civil society responses to the AP Bill. Its drafting history, described in short in the document itself, provides an interesting insight into the coalition of domestic and international civil society groups and academics who were leading the response to the AP Bill. Idem, p. ii.

92 For example, in January 2003 the then sub-director of CCJ opened an opinion article in national newspaper *El Tiempo* on the ongoing negotiations saying "let us center the debate in the rights of the victims and in the obligation states have to ensure human rights". Carlos Rodríguez Mejía, 'Sobre las amnistías e indultos', *El Tiempo*, 14 January 2003.

> Gallón [CCJ, HB] and Alirio Uribe [CAJAR, HB]. Let all those who have doubts come so we can explain it to them."[93]

Such threats against politicians and activists campaigning against the AP Bill happened throughout the process.[94] Even in the paramilitaries' more official communications, their disdain for those campaigning for victims' rights shone through. In a joint communication issued in October 2004, several paramilitary commanders wrote:

> "We are not asking for impunity. But Colombia equally should not fall into the trap of 'humanitarian fundamentalism'. When one demands truth, justice and reparation it is necessary to put these demands into context. In effect, there is not one truth and in many cases […] it will not be possible to know it. Likewise, Justice should not be confused with vengeance, which is the spirit which one can make out in many of the 'defenders' of human rights in Colombia."[95]

Through its consistent reference to international legal standards, however, the human rights groups opposing the AP Bill sought to redirect the debate, away from their personal motivations and towards the state's international obligations. This constant reference to international human rights norms and the NGO's superior expertise on these standards, combined with their international network, made it difficult for the government, which had to be mindful of its international image, to simply brush aside their arguments by discrediting the source.

5.1.2 Articulating a hard core of international legal obligations

Human rights groups opposing the AP Bill focused their lobbying efforts primarily on parliament, which would ultimately decide the fate of the bill. In their outreach to parliamentarians, the international legal obligations at

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93 'Tribunales regionales de verdad' (interview with Carlos Castaño), *El Tiempo*, 4 December 2003. This quote is part of Castaño's argument that the peace negotiations should be reopened, now that the AP Bill had encountered problems in parliament, with participation of other sectors of Colombian society. This can be interpreted in a positive light, as allowing for a more open process with participation of victims and consideration of their rights. However, the intimidating and derogatory way in which he speaks of parliamentarians from the opposition and members of civil society shows what he envisaged this 'dialogue' to be like. As the article points out, several of those mentioned here by Castaño had previously been the object of threats by the AUC. Piedad Cordoba, a politician from the Liberal Party, had even been kidnapped by them.

94 For example, in the first stages of the parliamentary discussion of the AP Bill in September, Carlos Castaño had sent a letter to the Senate advising them to vote in favor of the bill. While the Luis Carlos Restrepo, the High Commissioner for Peace, "did not consider this message by Carlos Castaño to be a threat" he did admit that "it was a mistake of the [paramilitaries] to mention the names of some of the delegates on their webpage". 'No a chantaje de Castaño', *El Tiempo*, 17 September 2003.

95 *As cited in:* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 74.

stake in the debate surrounding the AP Bill played a particularly important role, as human rights groups tried to convince parliamentarians of the existence of a 'minimum but inescapable legal imperative' which would be violated if they decided to adopt the AP Bill as it was. For example, in a position paper on the AP Bill presented at a conference in Barcelona, which was attended by senator Rafael Pardo, CCJ noted that:

> "from a legal point of view, a peace negotiation which claims itself to be legitimate has to respect both national and international law. Both are required when it comes to the need to guarantee the rights to truth, justice and reparation."[96]

However, while the language of victims' right to truth, justice and reparation and the state's obligation to ensure those rights is incredibly valuable in opening up the debate and ensuring that the interests of victims are considered, it does not, in itself, dictate any clear limits to the state's freedom to find creative legal solutions in order to end an armed conflict. While it forces parliament to take the rights of victims into account in its deliberations, it does not dictate a particular outcome. In other words, it does not constitute a 'hard or non-negotiable core' of international legal obligations. For this, civil society had to rely on the interpretation the Inter-American Court had famously given to the right to justice in the Barrios Altos case against Peru, as containing a prohibition on amnesty laws.

Therefore, CCJ's position paper cited above continued from the states general obligation to guarantee the rights to truth, justice and reparation to its more specific obligations, saying:

> "the Inter-American Court has declared the incompatibility of laws granting amnesty and *punto final* for international crimes with the American Convention of Human Rights, of which Colombia is part."[97]

For this aspect of the discourse challenging the AP Bill the case law of the Inter-American Court was key, as it provided the only clear legal precedent thus far for the illegality of amnesty laws. The importance of the Inter-American Court's case law in this respect is illustrated by the testimony José Miguel Vivanco, director of Human Rights Watch Americas, delivered in the parliamentary hearings on the AP Bill organized in the spring of 2004. Vivanco confronted parliaments with the limits international law has established for the state's freedom to adopt amnesty laws, saying:

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96 G. Gallón Giraldo and C. Díaz Gómez, 'Justicia simulada: una propuesta indecente', *CCJ*, February 2004, p. 7.

97 Idem. For other examples of civil society groups employing this line of argumentation and relying directly on Inter-American case law, *See for example* Carlos Rodríguez Mejía, 'Sobre las amnistías e indultos', *El Tiempo*, 14 January 2003 and Fudación Social and ICTJ, *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones* (Fundación Social, 2004), pp. 18-21

> "[t]he international consensus on this matter is not simply a matter of good intentions, to be forgotten once a real situation arises. Countries are using international conventions and other legal instruments to eliminate or roll back amnesties or other judicial measures that grant actual or effective impunity.
>
> My full statement contains an extended appendix that lists these documents. Here, I would like to focus on one of those agreements, one of the most important ones: the American Convention on Human Rights.
>
> […] the Inter-American Court of Human Rights has established an impressive body of case rulings that require member states to prevent human rights violations. But there is more. The Convention also obligates states, among them Colombia, to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

The decisions of the Inter-American Court are not mere suggestions or opinions, but are binding and obligatory, given that the Colombian state long ago ratified the Convention and is bound by other instruments that are now part of international law."[98]

He then turned to the Barrios Altos judgment specifically, saying:

> "Here, I would like to refer to one of the most important recent cases that has had international impact. In this example, a ruling by the Interamerican [sic] system set up to protect human rights not only prevented impunity for a series of atrocities committed by a Latin state, but also directly addressed internal legislation designed to uphold impunity for serious human rights violations.
>
> […]
>
> The Court firmly rejected as illegal Peru's amnesty laws. Let me read you the relevant part of the decision. The Court found that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.
>
> The Court continues. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based

98 'Human Rights Watch testimony before the Peace Commission of the Colombian Senate' (English translation), 1 April 2004, available at <https://www.hrw.org/news/2004/04/01/human-rights-watch-testimony-peace-commission-colombian-senate>, p. 4.

> or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated."

The impact of the Inter-American Court's case law in articulating the hard core of the state's international obligations in regard to providing justice for the victims of the armed conflict was further amplified when the Court delivered its string of paramilitary massacre judgments, in the middle of the internal debate about the AP Bill and the JPL. Through this series of 6 judgments, delivered at the exact moment domestic debates about the legal framework for the demobilization of the paramilitaries were at a decisive stage, the Court was able to indirectly pressure the state to abandon the idea of granting amnesties. The judgments reminded parliamentarians of Colombia's obligations under the ACHR with regard to the investigation and prosecution of serious crimes committed by the paramilitaries. And its findings came accompanied by direct legal consequences: findings of state responsibility, orders to pay large sums of money in reparation to victims and orders to investigate and prosecute serious human rights violations.

While none of these cases directly concerned the legal framework being developed as a result of the negotiations between the Colombian government and the paramilitaries, the Court still found the opportunity to make its position on the issue known. For example, in the judgment in the case of the 19 Tradesmen, the first of this series of cases delivered in July 2004, the Court stated that:

> "[T]he State must abstain from using figures such as amnesty, provisions on prescription and the establishment of measures designed to eliminate responsibility, as well as measures intended to prevent criminal prosecution or suppress the effects of a conviction. [...]"[99]

The Court repeated and expanded on this position in its judgment in the case of the *Mapiripán massacre v. Colombia*, delivered in September 2005. When discussing the investigation and prosecution of the crimes committed by the paramilitaries as a form of non-pecuniary reparation, said the following:

> "Regarding this matter, the Court reiterates its *jurisprudence constante* that no domestic legal provision of law can impede compliance by a State with the obligation to investigate and punish those responsible for human rights violations. Specifically, the following are unacceptable: amnesty provisions, rules regarding extinguishment and establishment of exclusions of liability that seek to impede investigation and punishment of those responsible for grave human rights violations -such as those of the instant case, executions and forced disappearances."[100]

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99 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 263.

100 IACtHR *Mapiripán massacre v. Colombia (merits, reparations and costs)*, 15 September 2005, para. 304.

Through these statements, the Inter-American Court emphasized the applicability of its existing case law to the Colombian situation. It reminded the state that the limits it had established on states' freedom to decide how to deal with past crimes were not simply abstract notions, but were to be respected by Colombia's legislative organs in the situation at hand. In other words, the paramilitary massacre cases made clear that the hard core of Colombia's international obligations in the area of justice was indeed non-negotiable, at least in the eyes of the Inter-American Court.

5.1.3 Presenting international law as a credible threat

Finally, the Inter-American system has made an important contribution to civil society's discourse in opposition to the AP Bill by allowing it to present international law as a credible threat to the peace process with the paramilitaries. In this context, it would perhaps seem more logical to focus on the impact of the ICC and its preliminary investigation into the Colombian situation, which exposed Colombia to the possibility that, if it did not investigate and prosecute the paramilitaries itself, the ICC would intervene and do so in its place.[101] However, if one analyzes civil society's discourse closely, it is clear that the Inter-American system had a similar and parallel role in presenting international law as a credible threat to that of the ICC.

A clear example of a civil society actor using the Inter-American system in this way can be found in José Manuel Vivanco's testimony to parliament in the context of the hearings on the AP Bill. As discussed above, Vivanco used his testimony to confront parliamentarians with the hard core of Colombia's international obligations in the area of justice through his discussion of the Inter-American Court's *Barrios Altos* judgment. He then went on to describe the effects this judgment had had on the Peruvian amnesty law, and its possible implications for Colombia, in the following way:

> "Significantly, Peru accepted this ruling not only in the Barrios Altos case, but for all cases shelved because of the amnesty decrees. The Inter-American Court made it clear that this decision was generally applicable to other cases; judicial authorities have already responded by reopening cases, among them an indictment against former President Fujimori for his role in the Barrios Altos massacre.
>
> This example demonstrates that if Colombia implements a law guaranteeing impunity for individuals responsible for serious human rights violations, for example, for the individuals who planned and carried out the 1997 Mapiripán

101 Other authors have analyzed the influence of the ICC over the Colombian peace processes in depth. *See for example* A. Chehtman, 'The ICC and its normative impact on Colombia's legal system', DOMAC/16, October 2011, A. Chehtman, 'The impact of the ICC in Colombia: positive complementarity on trial', DOMAC/17, October 2011 M. Wierda, 'The local impact of a global court – assessing the impact of the International Criminal Court in situation countries' (PhD thesis, Leiden University, 2019) and R. Urueña, 'Prosecutorial politics: the ICC's influence in Colombian peace processes, 2003-2017', (2017) 111(1) *American Journal of International Law* 104-125

> massacre, the Inter-American Court will have to, to remain consistent with its previous rulings, declare this a violation of Colombia's obligations under the American Convention. Therefore, the Court will require Colombia to punish those responsible for this atrocity. And as this country s own Constitutional Court has ruled, these international decisions are of mandatory compliance."[102]

The reference to the Colombian Constitutional Court is relevant, because it demonstrates to the parliamentarians to which his testimony was addressed that domestic judicial institutions would be willing and able to implement an Inter-American judgment annulling a possible Colombian amnesty law.

Having thus discussed the Peruvian case, Vivanco then went on to discuss recent developments in Argentina, where Inter-American case law had served as a legal basis for annulling domestic amnesty legislation, even in the absence of a specific ruling by the Inter-American Court against the Argentinian state on the issue of amnesty.[103] He concluded his discussion of the Inter-American case law by pointing out that:

> "[w]hat is happening in Argentina and Peru should not be viewed here in Colombia as a possible, though unlikely future. It is the certain future if a law granting impunity or de facto impunity for crimes against humanity is passed and implemented.
>
> As you are well aware, your own Constitutional Court ruled last year that decisions by the Inter-American Commission, the Inter-American Court, and the U.N. Human Rights Committee that reveal a glaring failure on the part of the Colombian State to fulfill its obligations to investigate in a serious and impartial way human rights and international humanitarian law violations can be used to mount legal appeals within Colombia. This is possible even when a case has resulted in an acquittal."[104]

As Vivanco's testimony shows, Inter-American case law was one of the arguments that the opposition to the AP Bill used to convince parliament that the adoption of the bill would lead to repercussions on the international level and that this, in turn, would have effects on the domestic level as well. This argument was strengthened further by the Inter-American system's direct interventions in the debate through the paramilitary massacre cases and the reporting on the peace process. These interventions made it clear that the Inter-American system was paying attention to the process and that violations of its standards would not go unnoticed.

That the watchful eye of the Inter-American system and the 'threat' posed by it was felt on the domestic level, is illustrated by *El Tiempo*'s

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102 'Human Rights Watch testimony before the Peace Commission of the Colombian Senate' (English translation), 1 April 2004, available at < https://www.hrw.org/news/2004/04/01/human-rights-watch-testimony-peace-commission-colombian-senate>, p. 8.

103 Idem.

104 Idem.

commentary to the judgments delivered by the Inter-American Court in the paramilitary massacre cases. When discussing on the Court's elaborate analysis of the many failings of the Colombian justice system in response to the disappearances in the case of the *19 Tradesmen* and the Court's emphasis on the victims' right to justice and the state's obligation to combat impunity, the newspaper noted:

> "The judgment of the Inter-American Court of Human Rights against the State for the murder of 19 tradesmen [...] reveals the fragility and ineffectiveness of our judicial system and the risks to which we are exposed in the face of an international community intolerant of the impunity on which the Colombian conflict feeds."[105]

Similarly, *El Tiempo* commented on the *Mapiripán* judgment and its significance for the peace negotiations, saying that:

> "International justice just taught the Colombian State a hard lesson by condemning it for the grave actions and omissions of members of the Armed Forces who facilitated and covered up the massacre at Mapiripán […] The sentence could not have come at a worse time for the country, with the demobilization of the paramilitaries being watched closely by the international community, which follows with equal attention the fate of the Justice and Peace Law. […]
>
> Now, by orders of the hemispheric Tribunal, the national justice system will have to correct these omissions and compensate the families of the victims. Which, if done at the very beginning, would have spared Colombia the double shame of being called out in front of the world and ordered to do justice."[106]

In short, the doctrines developed by the IACtHR have been instrumental in the development of a human rights based discourse in opposition to the 'restorative justice' discourse employed by the Uribe government. These standards have helped human rights groups to bring the rights of victims to truth, justice and reparation into the conversation around the demobilization of the paramilitaries and to emphasize the state's obligation under international law to investigate and prosecute grave human rights violations. The consistent case law of the IACtHR on these issues helped anti-impunity actors to instill the message that the Colombian state was not entirely free in its choice of transitional justice mechanisms to facilitate the demobilization of the paramilitaries, as it had committed itself to international rules limiting its freedom in this respect. Moreover, the consistent case law of the IACtHR and the impact this case law had already had in other Latin American cases, in combination with the string of judgments concerning the paramilitary phenomenon in Colombia the IACtHR rendered

105 'Una condena histórica', *El Tiempo*, 25 July 2004.

106 'Mapiripán: doble verguënza', *El Tiempo*, 13 October 2005. The Justice and Peace Law was the successor of the AP Bill, which, at the time the Mapriripán judgment was rendered, had just been approved by Parliament.

between 2005 and 2007, helped anti-impunity actors to convince Colombian lawmakers that failing to respect these international standards could have negative consequences for Colombia. In doing so, these groups have been able to fundamentally reframe the national debate on transitional justice.

5.2 Contributions to the normative content of the Justice and Peace Law

It follows from the previous section that the first and perhaps most important contribution of the IACtHR's case law to the Justice and Peace Law, was that it helped bring about rejection of the AP Bill. The discourse which had inspired these parliamentarians' doubts about this Draft was built, in large part, around Inter-American case law and the standards developed therein. The hesitation on the part of an important faction of parliament forced the government to repeal the AP Bill and restart the legislative process on the basis of a new draft bill. This new draft would form the basis of the JPL as it was eventually adopted by Parliament.

However, the impact of Inter-American standards on the JPL does not end with the rejection of the AP Bill. To prevent it from meeting the same fate as the AP Bill, the government's new draft had to be seen as more respectful of the international standards invoked by civil society and the international community. Furthermore, the parliamentarians who had led the parliamentary opposition to the AP Bill presented their own draft bill, which would be discussed alongside the government's draft and which presented a slightly different view on the proper balance between peace and victims' rights. This paragraph will discuss how the drafting of the JPL was farmed in terms of Inter-American standards, how this frame translated into the substance of the law adopted by parliament and, finally, how Inter-American standards influenced the Constitutional Court's adjustments to the JPL.

5.2.1 Contributions through parliament

The change in paradigm which had taken place in Colombia in the year-and-a-half between the presentation of the AP Bill and the JPL draft becomes clear when one compares the exposition of motives accompanying the former to the one accompanying the new government draft. Whereas the AP Bill had not considered the interests of the victims or their right to truth, justice and reparation in any way, the new draft, while still focused primarily on achieving peace, recognized that "in recent years the demands of criminal justice impose the denial of the privilege of pardon or amnesty to those who have committed grave crimes".[107] It then proceeds to state that:

107 Exposición de motivos Proyecto Ley no. 211 de 2005, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), available at <http://www.fiscalia.gov.co/jyp/direccion-de-fiscalia-nacional-especializada-de-justicia-transicional/relatoria/normatividad-proceso-especial-de-justicia-y-paz/>, p. 22.

> "This draft is structured around the concepts of Truth, Justice and Reparation, giving special importance to the rights of victims. In this way, only after the demands of justice are satisfied in regards to truth and integral reparation to victims, can we think of conceding privileges to members of illegal armed groups who have demobilized and contributed – through their direct action – to the dismantling of these criminal organizations."[108]

Even if one considers this change in tone to be merely rhetorical, as some commentators do,[109] the fact that the government saw itself forced to adopt such discourse is still telling of just how much the landscape of transitional justice had changed in Colombia.

The alternative draft went much further still in its recognition of the victims' right to justice. According to the exposition of motives, the draft aimed to "promote national reconciliation and the Rule of Law" and therefore "is not simply about solving the legal problems of the members of [the paramilitary groups, HB]".[110] Furthermore, the exposition of motives includes an elaborate list of the international norms which should be taken into account in designing an appropriate legal framework for the demobilization of the paramilitaries including, but not limited to, those from the Inter-American human rights system. With regard to the victims' right to justice in particular, it says the following:

> "In the area of justice, the State has the obligation to pursue, investigate, prosecute, punish and ensure the adequate execution of the punishment of persons accused of committing grave violations of human rights or International Humanitarian Law. In effect, even if national and international law allow broad amnesties or pardons for those who have committed political crimes or minor infractions of IHRL and IHL, the fact is that for those who have committed or ordered atrocious crimes there should exist judicial processes, full investigations and adequate sanctions. Such was decided by the Inter-American Court of Human Rights in its judgment in the case of the 19 tradesmen vs. Colombia. As the Inter-American Court of Human Rights has reiterated, the obligation to investigate supposes the existence of an adequate and integral investigation which, in a reasonable time […], achieves the reconstruction of the criminal phenomena under investigation and the satisfaction of the right of the victims and of society as a whole to know the truth of what happened."[111]

The substance of the two new drafts also shows the impact of the introduction of the discourse of victims' rights and the state's obligation to investigate, prosecute and punish. Both drafts provided for the investigation and prosecution of serious human rights violations committed by the

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108 Idem, pp. 22-23

109 *See for example* R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 177.

110 Exposición de motivos Proyecto Ley no. 208 de 2005, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), p. 3.

111 Idem, pp. 4-5.

paramilitaries through specialized chambers within the existing judicial institutions.[112] And while both drafts provided for alternative punishment for paramilitaries convicted by these specialized chambers, the alternative punishments consisted of reduced prison sentences of 5 to 8 years, rather than community service.

The main difference between the two drafts was to be found in what they demand of the paramilitaries in return for the privilege of being granted this alternative punishment. The Pardo-Parody proposal required that those wishing to benefit from these mechanisms would make a full confession of their crimes and lend their full cooperation to the investigations. It also provided that the privilege of alternative punishment could be taken away in case it turned out that the person in question had provided false information to the investigators.[113] In short, this proposal included strong incentives for truth-telling. The government proposal, on the other hand, included no such incentives.[114]

Between February and June 2005 both drafts were debated in parliament. These discussions were partially framed in terms of the state's international obligations in the area of human rights and the obligation to investigate grave human right violations. A very explicit expression of the increasing recognition of these international standards in parliament was given by Gina Parody when defending her draft during one of the parliamentary debates on 22 April 2005. She argued:

> "During this debate I have heard above all two arguments. […] The second argument which I have repeatedly heard, is that peace processes previous to this one have succeeded, and that this was in large part because pardon and amnesty were granted and that this will be the first process where justice will be applied, as if applying justice were a sacrifice that society would have to make rather than an obligation of the State in the face of those who have committed crimes against humanity.
>
> Both arguments are partially false. […] the second [is false] because, even if this is the first process in which justice will be applied, this is not a sacrifice of society, it is an obligation of the Colombian State, which for a long time has been signing international treaties which oblige us to apply justice in those cases and against those persons who have committed crimes against humanity, which is the case with the members of these illegal armed groups.
>
> This indicates that we in Colombia have ceded sovereignty […] for example to the Inter-American Court of Human Rights as of 1985 and this Court can […] repeal laws, which has just happened in Peru in the case of Barrios Altos, and it can demand that the Colombian State reopens the investigations. We have also ceded sovereignty to the International Criminal Court, which is more recent and which we all know.

112 *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 137-141.

113 *See* idem, pp. 137-141.

114 Idem.

> […]
> So what we are doing here is not trying to comply with whatever the NGOs say, that is not what we are doing. What we are doing here is complying with International standards to which the Colombian State is bound. Complying with these standards does not mean that we are doing what the NGOs are telling us to do, which is the argument I have heard, but it is complying with the obligations of the Colombian State."[115]

This quote illustrates how international human rights law was used in the parliamentary debates, by those parliamentarians favoring the investigation and prosecution of crimes committed by the paramilitaries, to legitimize their position, emphasizing that it rested not only on civil society discourse, but on the legal obligations undertaken by the state. At the same time, it shows how the presence of international institutions such as the Inter-American Court and the ICC is used as a 'threat' to pressure the state to move in the direction of investigation and prosecution.

When it comes to the acceptance of international human rights standards and their relevance to the demobilization of the paramilitaries, a more restrictive point of view was expressed by the sponsor of the government's draft law, Mario Uribe. On 8 March 2005, during the parliamentary debates of his draft law, he said:

> "Today a much more attentive attitude is required with regard to the treatment which the most serious crimes should receive in the context of peace processes. The global consciousness requires us to put into play the so-called international norms in three basic axes: the right to know what has occurred, the right to justice and the right to reparation. The international consciousness rejects the so-called […] laws of full stop ("*punto final*") and the use of the mechanism of amnesty.
> […]
> About the theme of these International standards, mister President, we could discuss later, if necessary, what their true legal nature is, what their origin is and how they can guide us in this discussion and, down the road, in the decisions we take, to the point that the [draft] that we approve here will be in accordance with the currents of human rights law and international humanitarian law and, in general, with the solutions which are given to these problems in the [wider] world, warning that, mister President, the study that I have conducted has led to the conclusion that in these matters Colombia will have to lead the way for the international community."[116]

While not as welcoming of international standards as the sponsors of the alternative JPL Draft, this quote nevertheless illustrates the at least rhetorical acceptance by the Uribe government of the human rights standards concerning victims' rights and the fight against impunity. The sponsors

115 G. Parody during parliamentary debates over the JPL, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), pp. 183-184.

116 M. Uribe during parliamentary debates over the JPL, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), pp. 98-99.

of the government's JPL Draft recognize that international human rights standards set certain limits to the state's leeway in concluding peace agreements, and that the adoption of anything resembling a full amnesty is no longer an option. In order to preserve the largest possible flexibility for itself within these standards, the sponsors of the government's JPL Draft highlighted perceived gaps, arguing that international standards offered no clear guidance on the particular issues Colombia was facing.

Eventually, the more restrictive position embodied in the government's JPL Draft prevailed in parliament, which led to the adoption of that draft with its lack of strong incentives towards truth-telling. However, this fact does not negate the contributions made by the standards developed by the IACtHR on the state's obligation to investigate, prosecute and punish have contributed to parliament's considerations in adopting the JPL , as shown by the quotes above. Even if the language of the victims' right to truth, justice and reparation and the prohibition of amnesty was accepted instrumentally, it still represents a major shift away from the government's original proposal and the complete lack of recognition of international standards on truth and justice embodied in it. The JPL as originally adopted by parliament, for all its limitations, did provided for the possibility of investigating and prosecution of paramilitary commanders for the serious human rights violations committed under their orders.

5.2.2 Contributions through the Constitutional Court

Finally, it should be noted that the normative content of the JPL as it was eventually put into practice, was not determined exclusively by Parliament. The case law of the Colombian Constitutional Court has left a significant mark on the final shape of transitional justice mechanisms adopted in the context of the Colombian peace processes of the 21st century, starting with the JPL. And the case law of the Colombia Constitutional Court, in turn, is marked considerably by the case law of the Inter-American Court on the state's obligation to investigate and prosecute and the victims' rights to truth, justice and reparation. This section explores the first steps taken by the Constitutional Court in consolidating its now consistent case law on transitional justice issues, the relevance to that case law of standards developed by the Inter-American Court and the result of that case law in shaping the normative content of the JPL.

5.2.2.1 The reception of the victim's constitutional right to truth and justice

The Constitutional Court's case law on victims' rights to truth, justice and reparation and the reception of Inter-American standards on the issue, actually started some years before the JPL was presented to the Court. In January 2003, just as the Uribe government was starting its negotiations with the paramilitary groups, the Constitutional Court delivered its deci-

sion C-004/03,[117] which concerned the precise meaning of the principle of *ne bis in idem* under the Colombian criminal code.[118] In the context of transitional justice it is relevant to note that the complainant had argued that the principle of *ne bis in idem*, as formulated in the Colombian criminal code, violated the rights of the victims in criminal proceedings to truth and justice. These rights, however, were not explicitly recognized under the Colombian constitution or criminal code. In analyzing this complaint, the Constitutional Court thus had to analyze whether victims were indeed entitled to these rights. On this issue, the Court stated the following:

> "In the last two years, and in large part taking into account the evolution of the international standards on the issue, the Court modified its doctrine on the rights of victims in criminal proceedings. In this sense, the most authoritative international doctrine and case law on human rights has concluded that the rights of victims exceed the area of compensation and include the right to truth and justice being done in their concrete case. In this respect, the judgment of 14 March 2001 of the Inter-American Court of Human Rights in the case of Barrios Altos […] is of particular importance, in which this court decided that the Peruvian amnesty laws were contrary to the [ACHR] and that the State was responsible for violating the right of the victims to know the truth and obtain justice […]"[119]

This statement was followed by an exploration of the first steps the Constitutional Court had already taken in its case law of the previous two years towards the recognition of these rights of victims. This led the Court to the conclusion that there could be "no doubt" as to the recognition and importance of victims' rights in the Colombian legal order.[120] The Constitutional Court also connected these rights of victims to the obligation on the part of the state to investigate, prosecute and punish human rights violations. In the words of the Court:

> "As is obvious, these rights of victims correspond to certain obligations of the State, since, if the victims have the right not only to be compensated but also to know what happened and that justice is done, then the State has the corresponding obligation to seriously investigate the criminal acts. The more social harm the criminal act has done, the more intense this state obligation is. For this reason, the state obligation acquires particular force en cases of violations of human rights. Because of this, the Inter-American Court has noted – and this Constitutional Court shares its reasoning ["con criterios que esta Corte prohíja"] – that persons affected by acts which violate human rights have the right that the State

117 Constitutional Court of Colombia, Sentence C-004/03 of 20 January 2003.
118 For a discussion of the implications of this important decision for criminal procedure, *see infra* Chapter 7, Section 4.2.
119 Constitutional Court of Colombia, Sentence C-004/03 of 20 January 2003, p. 22.
120 Idem, p. 24.

> investigates these acts, punishes those responsible and reestablishes, as much as possible, their rights."[121]

In short, by January 2003 the Constitutional Court had accepted both the victims' right to truth and justice and the state's obligation to investigate, prosecute and punish human rights violations, as norms of constitutional rank. This determination rested completely on the case law of the Inter-American Court, which was considered as authoritative within the Colombian legal order through the doctrine of the Constitutional Block.

5.2.2.2 Constitutionality of the Justice and Peace Law

Thus, by the time the JPL was adopted and CCJ presented its complaint against it to the Constitutional Court,[122] CCJ was able to build its legal argumentation around their assertion that the transitional justice compromise achieved in the JPL represented a violation of a norm of constitutional status. One respondent, a lawyer working with CCJ, described the central arguments underlying his organization's complaint against the JPL and their basis in international human rights standards in the following way:

> "So, against this background of a law [the JPL, HB] which was adverse, let's say, to the interests of victims, we presented a legal action of unconstitutionality, a complaint. […] There were about 48 provisions in [the JPL], where, basically, the central argument was that the law, as a whole, was not directed at guaranteeing neither truth, nor justice, nor reparation. And for this, our main instruments were international human rights standards. I will address the instruments we used most: the Joinet principles to combat impunity of the United Nations and then the different judgments [of the Inter-American Court; HB] for different themes. For example, the judgment of the 19 Tradesmen helped us to argue the whole issue of the state's international obligation to investigate, prosecute and punish violations of human rights and to say basically… what it told us is that these investigations should be serious […] . And we used this standard to address […] the whole issue of amnesty which we had found. For us, [we regarded the JPL as] a veiled amnesty or pardon, and because of this for example the standard from Barrios Altos helped us very much to construct this argument. […]
>
> So we presented our complaint. Like I said, I believe that around 70 or 60% of the arguments contained in the complaint […] were taken from international standards, and most of all Inter-American standards, on truth, justice and reparation."[123]

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121 Idem, p. 24. The Constitutional Court refers to the Inter-American Court's judgment in the case of *Velásquez Rodríguez v. Honduras*, from which it proceeds to cite at length.

122 In fact, CCJ was only one of several NGOs which decided to challenge the legality of the JPL before the Colombian Constitutional Court. However, in the interest of clarity and brevity, this text will limit itself to CCJ's complaint, resulting in the Constitutional Court's sentence C-370/06, which is generally considered to be the most important judgment concerning the JPL.

123 Interview 2.

Indeed, in its decision on CCJ's complaint, issued on 18 May 2006, the Constitutional Court described the tensions underlying the JPL as a "conflict between different constitutional rights", being the right to peace and the victims' rights to truth and justice.[124] In establishing the constitutional status of the right to peace, the Constitutional Court could rely directly on the Constitution which, in Article 22, explicitly recognizes the right to peace as "a right and a binding obligation [of the State]". However, for establishing the constitutional status and the scope of the right to truth and justice, the Court again relied on international law and on its own previous case law.[125] Most prominently, the Constitutional Court's exploration of the rights to truth and justice includes a 22-page summary of the case law of the IACtHR on the matter.[126] With regard to the legal relevance of the Inter-American Court's case law, the Constitutional Court stated:

> "The Court particularly emphasizes that the above conclusions come from the Judgments of an International Tribunal whose competence has been accepted by Colombia. Article 93 [the *Bloque de Constitucionalidad*, HB] prescribes that the rights and obligations laid down this Constitution are interpreted in conformity with the international treaties on human rights ratified by Colombia. Now then, if an international treaty that is binding on Colombia and refers to rights and obligations enshrined in the Constitution provides for the existence of an organ authorized to interpret it, such as is the case for example with the Inter-American Court of Human Rights, created by the American Convention on Human Rights, its case law is relevant for the interpretation of those rights in de internal order."[127]

Having thus recognized the victim's right to truth and justice as a constitutional right, the Constitutional Court then goes on to determine whether the JPL represents an accurate balance between the different constitutional rights at play. Judgment C-370/06 addresses CCJ's central arguments against the JPL, namely: 1.) that it creates a "system of impunity" because its various provisions taken together constitute a "veiled pardon" or amnesty;[128] and 2.) more concretely, that the lack of effective mechanisms ensuring full cooperation and full confessions by the paramilitaries in return for the benefit of alternative punishment constituted a violation of the victims' rights to truth and justice.[129] While these were not the only arguments presented by CCJ and discussed by the Court, this text will, in the interest of clarity and brevity, limit itself to these two.

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124 Constitutional Court of Colombia, Sentence C-370/06 of 18 May 2006, para. VI.5.3 - VI.5.4.

125 Idem, para. VI.4.3 – VI.4.9. Apart from the Inter-American Court's case law, other sources of international law recognizing the victims' right to truth and justice discussed by the Constitutional Court are the reports issued on the issue by the Inter-American Commission and the Joinet Principles of the United Nations.

126 Idem, para. VI.4.4 – VI.4.6.

127 Idem, para. VI.4.6.

128 Idem, para. 1.2.1.1 - 1.2.1.9.

129 Idem, para. 1.2.1.4 and 1.2.5.

With regard to the complainant's argument that the law in its totality represented a veiled amnesty or pardon, the Constitutional Court is short and clear: it observes that the JPL neither provides for the termination of the legal proceedings as such, nor for the dismissal of the punishment for the crimes committed by the paramilitaries.[130] As a result, according to the Constitutional Court, the law does not provide its beneficiaries with an amnesty or pardon and it does not establish a system of impunity.

Rather than a veiled amnesty or pardon, the Constitutional Court considers the judicial mechanisms created by the JPL to represent a "conflict between different constitutional rights", as described in the previous paragraph.[131] The Constitutional Court, therefore, goes on to consider whether the legislator, in designing the judicial mechanisms in the JPL, adequately balanced these rights against the right to peace recognized in Article 22 of the Constitution.[132] The Court notes that the freedom the legislator enjoys in performing this balancing exercise, while considerable, is not absolute. Rather, it is subject to the limits set by constitutional and international law.[133] Concretely, the legislator should take care that none of the rights in question are disproportionally affected and that their "essential core" is respected at all times.[134] In the words of the Court:

> "[I]n a constitutional state like Colombia, the minimum protection of this structure of rights cannot be disregarded under any circumstance. In other words, the public powers are not authorized to disregard these rights in name of another legal good or constitutional value, since these form the limit to the creative powers of Congress, to the administration by the government and to judicial interpretation."[135]

This is no different in a situation, like the one at hand, where the law in question is the result of a process of negotiation to end an armed conflict. Although the Constitutional Court recognizes that such a transitional context carries with it an inherent tension between the right to peace and the victims' rights to truth and justice,[136] it notes that even negotiation processes should "respect certain minimum norms" and that "these minimum norms, recognized […] in international provisions which have freely and sovereignly been incorporated into domestic law, bind the state to comply with a series of inalienable obligations related to the satisfaction of the rights of victims of human rights violations".[137]

On the basis of this analysis, the Constitutional Court eventually came

130 Idem, para. VI.3.3.3.
131 Idem, para. VI.5.3 - VI.5.4.
132 Idem, para. VI.5.4 – VI.5.5.
133 Idem, para. VI.4.2.5 and VI.5.2.
134 Idem, para. VI.5.14 – VI.5.15.
135 Idem, para. VI.6.2.2.1.7.11.
136 Idem, para. VI.4.2.5.
137 Idem, para. VI.6.2.2.1.7.3.

to the conclusion that the lack of mechanisms ensuring the paramilitaries' full confessions and their full cooperation in establishing the truth of their crimes in exchange for the application of alternative punishment, violates the essential core of the victims' rights to truth and justice.[138] In particular, the fact that covering up and even providing false information about their crimes and the circumstances under which they were committed did not affect the benefits enjoyed by the paramilitaries under the JPL disproportionally affects victims' rights.[139] In the words of the Constitutional Court:

> "[I]n accordance with the provisions of the *Bloque de Constitucionalidad*, secrecy, silence or lies about the crimes committed cannot be the basis for a process of negotiation which meets the Constitution. However, a genuine and reliable account of the facts, accompanied by serious and exhaustive investigations and the recognition of the dignity of the victims can be the basis of a process of negotiation in which it is even accepted constitutionally to waive the imposition or full application of the punishment established by ordinary criminal law, including for crimes considered to be of the highest gravity by all humankind."[140]

As a result, the Constitutional Court has made some important adjustments to the JPL by: 1.) interpreting Article 17 of the JPL to mean that the free testimony given by those seeking the benefits provided by the JPL should be a "full and truthful" account of the facts; 2.) declaring the unconstitutionality of the paragraph of Article 25 JPL which provided that crimes not confessed by the paramilitaries but brought to light through subsequent investigations would also benefit from the application of alternative punishments; and 3.) interpreting Article 29 JPL to mean that the application of the alternative punishment would be revoked in case subsequent investigations would reveal that a person enjoying benefits under the JPL had, in his free testimony, remained silent about his participation in crimes committed by his organization.[141]

In short, international human rights norms, especially those developed through the case law of the Inter-American Court, have had an important normative impact on the transitional justice compromise laid down in the Justice and Peace Law. Firstly, these norms were an important consideration underlying the rejection of the government's original proposal, the AP Bill, by parliament. Secondly, these norms shaped the government's new draft for the JPL and the discussions about this draft in parliament, which resulted in the adoption of a law which recognizes victims' rights and the state's obligation to investigate, prosecute and punish human rights violations in principle. Thirdly, these norms formed the legal basis for the

138 Idem, para. VI.6.2.2.1.7.14 – VI.6.2.2.1.7.24.
139 Idem, para. VI.6.2.2.1.7.15.
140 Idem, para. VI.6.2.2.1.7.11.
141 Idem, para. VI.6.2.2.1.7.25 – VI.6.2.2.1.7.27.

Constitutional Court's recognition of the victim's right to truth and justice as a constitutional right and, consequently, for the adjustments made to the JPL by the Constitutional Court in order to include effective mechanisms for the protection of these rights.

6 The peace process with the FARC (2011 – 2016): actors and process

Some years after the process towards the demobilization of the paramilitaries had been concluded, the Colombian government entered into a second round of negotiations, which was meant to end the internal armed conflict once and for all. In 2012, the government started negotiations with the FARC-EP, Colombia's largest and oldest guerilla movement. These negotiations would eventually lead to the conclusion of a final peace accord between the two parties on 23 June 2016, thereby ending the world's longest-running armed conflict.[142]

The negotiations with the FARC-EP were made possible, amongst other things, by the fact that, after completing his second term, Uribe had to step down as President of Colombia. He was succeeded in office by his former Minister of Defense, Juan Manuel Santos. While Santos had been viewed by many as the candidate who would continue Uribe's policies, it did not take long after his installation as President for the policy-differences between Santos and his former political leader to become apparent. And these differences were particularly stark when it came to their approach to dealing with the guerrilla groups. Whereas Uribe considered the guerrilla groups simply as terrorist groups which should be eliminated by military force, Santos was open to a negotiated end to what he considered an internal armed conflict. As a result of these opposing views, Uribe quickly became Santos' main political adversary throughout the latter's two-term presidency, and the most vocal critic of the peace negotiations with the FARC-EP.[143]

The remainder of this chapter will analyze how IACtHR's standards on the obligation to investigate, prosecute and punish and the prohibition of amnesty laws have shaped the peace process between the Colombian government and the FARC-EP. To this end, the following sections 7 and 8 will first give an overview of the peace process and the actors involved, with a special focus on the direct interaction between the Inter-American system

142 While the peace accord with the FARC-EP has been treated by much of the press as bringing an end to the armed conflict, this is in fact not entirely true as the FARC-EP was not the only guerrilla movement still active in the country. However, since the FARC-EP was by far the largest guerilla group it is expected that the smaller organizations would quickly join the peace after a final peace agreement had been reached between the government and the FARC-EP. Indeed, formal peace negotiations between the government and the ELN, one of the smaller guerrilla groups still active in Colombia, started in 2016.

143 For some background on (early stages of) the rivalry between Uribe and Santos, *see* 'Santos v. Uribe', *The Economist*, 7 April 2012.

and the peace process as well as the outcome – in terms of transitional justice mechanisms – of the peace process. Then, section 9 will consider the contributions of the Inter-American system and the standards developed by it to both the peace process and its outcome.

6.1 The negotiating parties: the Santos government and the FARC-EP

The peace negotiations which are the focus of the remainder of this chapter were conducted between the Santos government and the high-command of the FARC-EP guerrilla movement. It was thus clear from the start that these negotiations were conducted between adversaries, looking to overcome real differences of perspective and conflicting interests in order to end the armed hostilities between them. The FARC-EP was one of the first guerrilla movements to be established in the context of the internal armed conflict and had been at war against the state since the 1960s. Santos, in his previous capacity of Minister of Defense under Uribe, had been responsible for the military attacks carried out against the FARC-EP. At the very start of his own presidency, Santos had also approved a military operation in which some of the highest commanders of the FARC-EP had been killed.[144] Moreover, Santos, a representative of an established family of the (urban) Colombian elite, personally embodied much of what the FARC-EP had been created to fight. Yet, despite these major political and personal differences, the preparations for possible future peace negotiations with the FARC-EP started almost immediately and formed the defining topic of the first years of Santos' presidency.[145]

One of the major issues requiring preparation, was that of transitional justice. The experience of the negotiations with the paramilitaries had showed the existing constitutional framework for peace negotiations and the demobilization of armed groups to be insufficient in the face of domestic and international demands for recognition of the rights of victims, including their right to justice. Meanwhile, the compromise carved out by the JPL and the Constitutional Court's case law, while more respectful of international standards, represented an *ad hoc* solution designed in response

144 'Top FARC leader 'Mono Jojoy' dead', *InSight Crime*, 1 November 2010, available at <https://www.insightcrime.org/news/analysis/top-farc-leader-mono-jojoy-dead/> , last checked: 31-07-2018.

145 While still unknown to the larger public, the Government had almost immediately started reaching out to the FARC-EP with the intent to initiate peace negotiations and end the civil war. *See* N.C. Sánchez and R. Uprimny Yepes, 'El marco jurídico para la paz: ¿Cheque en blanco o camisa de fuerza para las negociaciones de paz?', in: R. Uprimny Yepes, L.M. Sánchez Duque and N.C. Sánchez León, *Justicia para la paz – crímenes atroces, derecho a la justicia y paz negociada* (DeJusticia, 2014), p. 168, saying that "[t]ime has proven that the discussion [of the Legal Framework for Peace] was not hypothetical or based simply on the hope of a negotiated end to the conflict. It was motivated by the initial rapprochement between the national government and the FARC guerrilla group which public opinion was not aware of." (translation by the author)

to a very specific set of circumstances and it remained unclear what "the relation between the different legal instruments [is] and also […] what their contribution is to the end goal of transitional justice in Colombia […]".[146]

This lack of an integral strategy, and the resulting lack of clarity about the status of the justice mechanisms to come out of possible future negotiations, were feared to have a chilling effect on the guerrillas' willingness to enter into such negotiations in the first place. As one domestic observer paraphrased the government's concerns in this respect:

> "Well, if one day a negotiation starts with the guerrillas there are two circumstances which would prevent us from starting. Because we don't have a starting point. The first is the question of: How can we guarantee a level of certainty that what is negotiated will also be complied with, if we see all that has happened […] with the paramilitaries? – the guerrilla will say: 'Ps! They let down the "paras", who were their friends, so why would they keep their word to us?!'"[147]

In this sense, the Santos government had thus learned the lesson from the peace process with the paramilitaries, who, in the government's eyes, could "claim, with reason, that the conditions on the basis of which they demobilized were not complied with and who threaten to leave the peace process as a result of the absolute lack of legal certainty".[148] The Exposition of Motives of the Legal Framework for Peace explains that:

> "[t]he only way to open the door to a future peace process which will lead to the demobilization of the guerrillas is that there exists a legal framework for transitional justice which is sufficiently solid to truly live up to the principle of legitimate expectations".[149]

Thus, before starting negotiations with the FARC-EP, the government considered it necessary to update the legislation relevant to the demobilization of armed groups and the investigation and prosecution of their members, in order to create the "true strategy of transitional justice" the country had so far lacked.[150] Of course, such a transitional justice strategy, when drawn too tight, can also exert a chilling effect on future peace negotiations. Especially since it was widely expected that the FARC-EP would demand a full amnesty in return for laying down their weapons. Therefore, the government faced the difficult task of designing a legal framework which would allow for the flexibility necessary to negotiate peace with the *guerrillas* while, at the same time, remaining respectful of international standards on

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146 Exposition of motives to the LFP Bill, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 2.

147 Interview 7.

148 Exposition of motives for the LFP Bill, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 4-5.

149 Idem, p. 4-5.

150 Idem, p. 3.

victims' rights and the obligation to investigate and prosecute human rights violations committed in the context of the armed conflict.

6.2 Starting point of the negotiation process: the Legal Framework for Peace

The government's first step towards squaring the circle described above was taken with the presentation of the official draft for the '*Marco Jurídico para la Paz*' (The Legal Framework for Peace – "LFP") on 13 September 2013.[151] This draft proposed an amendment to the Constitution in order to create a constitutional basis for any transitional justice mechanisms to come out of possible future peace negotiations with guerrilla groups. More specifically, the draft proposed to add a new transitory article (Article 66) to the Constitution which, in accordance with the bill's official title, "establishes legal instruments of transitional justice" and thereby gives content to the right to peace, as enshrined in Article 22 of the Constitution.[152]

The bill for the Legal Framework for Peace received considerable support from Congress and, as a result, was passed within one legislative term. In June of 2012, the Legal Framework for Peace Bill was adopted as Legislative Act 01 of 2012. The transitory article added to the Constitution through this Legislative Act reads as follows:

> "The instruments of transitional Justice shall be of an exceptional nature and shall have as their main goal to facilitate the end of the armed conflict and the establishment of a stable and lasting peace, with guarantees of non-repetition and safety for all Colombians; and they shall *establish, as much as possible, the rights of the victims to truth, justice and reparation*. A statutory law shall be able to authorize that, in the framework of a peace agreement, a differentiated treatment is given to the various illegal armed groups which have been part of the internal armed conflict and also to State agents in relation to their participation in the latter.
>
> Through a statutory law, *instruments of transitional justice of a judicial or an extrajudicial character* shall be established which will *allow guaranteeing the State's obligations to investigate and punish*. In any case, mechanisms of an extrajudicial

151 *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011. While the bill was not officially drafted by the government, the senator who initiated it, Roy Barreras, was a member of the governing party and the text of the draft had been pre-accorded by the government. It had been presented to the President in August 2011, several weeks before it was presented to Congress. 'Ley que crea marco jurídico para proceso de paz, cerca del Congreso', *El Tiempo*, 10 August 2011. When reporting on the presentation of the bill to parliament, *El Tiempo* wrote: "One of the most remarkable aspects of this bill is that, while it is not an initiative of the Government, the text was agreed on by the Government. In fact, some recommendations formulated by members of the Executive were included in the text." 'Radicado en la Cámara el Nuevo marco jurídico para la paz', *El Tiempo*, 13 September 2011.

152 *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011.

character will be applied towards the clarification of the truth and reparation for the victims.

A law should create a Truth Commission and define its object, composition, powers and functions. The mandate of the commission can include formulating recommendations for the application of the instruments of transitional justice, including the criteria of [case] selection.

Both the *standards of prioritization and of case selection* are inherent to the instruments of transitional justice. The Attorney General shall determine the criteria of prioritization for the execution of penal action. *Without prejudice to the State's general obligation to investigate and punish grave violations of Human Rights and of International Humanitarian Law* in the framework of transitional justice, the Congress of the Republic, on the initiative of the National Government, shall, by statutory law, be able to determine the criteria of selection which will allow to *center efforts in the criminal investigation of those most responsible for all crimes which have the character of crimes against humanity, genocide and war crimes committed systematically*; establish the cases, requirements and conditions from which would follow the suspension of the execution of a sentence, *alternative sentences and special modalities of execution of and compliance with sentences;* and authorize the conditional renouncement of criminal prosecution of all cases not selected. The statutory law shall take into account the gravity and representativeness of cases when determining the criteria of selection." [emphasis added]

Besides simply creating a legal basis for future transitional justice mechanisms, the content of this new transitory article established an outline for the government's preferred approach to transitional justice. On the one hand, it makes repeated reference to the victims' rights to truth justice and reparation and the state's international obligation to investigate, prosecute and punish human rights violations. At the same time, however, it includes two mechanisms which can be seen as limitations to the state's compliance with that obligation: 1.) the mechanism of case selection, which allows the state to focus its investigations and prosecutions on the individuals it considers 'most responsible' for the commission of international crimes; and 2.)

the possibility of imposing 'alternative sanctions' for crimes committed in the context of the armed conflict.[153]

The Legal Framework for Peace was thus seen as an important indication of its position going into future negotiations with the FARC-EP, which indeed started shortly after its adoption in august of 2012. In fact, it was seen by some as the government's 'opening bid' towards the FARC-EP in those negotiations. At the same time, as will be discussed in detail in Section 9.1.1 of this chapter, the government was careful to always ground its approach to transitional justice in international standards concerning the state's obligation to investigate, prosecute and punish human rights violations. As one respondent explained:

> "The Legal Framework for Peace was, partly, the government's opening bid, not negotiated with the guerrillas. […] And the bid is: "I will face the fight on the international level, because this is our interpretation of the standards. And this is already difficult. This way I will already have [CCJ] messing with me and [HRW] bothering me […] But you guys have to understand that further than this we cannot go, that we have gone as far as we can. That there has to be investigation, prosecution and punishment of those most responsible. That's the minimum. We cannot go further than this because you can see how problematic this already is.""[154]

6.3 Pro-accountability constituencies and the peace negotiations with the FARC-EP

As the previous quote indicates, the swift adoption of the Legal Framework for Peace should not be taken as an indication that there was no opposi-

153 The parliamentary documents related to the adoption of the Legal Framework for Peace show that the possibility of imposing alternative sanctions was not art of the original draft bill, but was introduced during the debates in parliament. It first appears in the list of changes proposed for the first Senate debate in the second round of debates concerning the LFP. *See* 'Informe de ponencia para primer debate en segunda vuelta al proyecto de acto legislativo 14 de 2011 Senado, 094 de 2011 Cámara', Gaceta del Congreso (Senado y Cámara) no. 287, 30 May 2012, para. 10(e). By that time, the draft had already been the topic of several debates in both the House of Representatives and the Senate, and had already been approved in the first round of voting. However, earlier drafts did establish that "the Congress of the Republic […] can by law determine criteria for section and prioritization […], establish in which cases to proceed with the suspension of the execution of the sentence; and authorize the renunciation of criminal prosecution in cases not selected". *See* 'Informe de conciliación al Proyecto de Acto Legislativo 14 de 2011 Senado, 094 de 2011 de Cámara', Gaceta del Congreso no. 965, 13 December 2011. It is not entirely clear that the 'suspension of the execution of the sentence' mentioned here is equal to the possibility of imposing alternative sanctions. It could also be interpreted as a solution for cases in which a sentence is already imposed, but which would fall outside of the category of cases selected for investigation and prosecution.
The parliamentary documents do not show that the introduction of the possibility of imposing alternative punishment was the result of an extensive debate in parliament or that it was met with much opposition.

154 Interview 7.

tion against it. While the majority of parliament supported the transitional justice approach proposed by the Santos government, a vocal minority of parliamentarians loyal to Uribe did not. And neither did part of the national and international NGO community. However, in contrast to its unified rejection of Uribe's AP Bill several years earlier, the response of civil society to the Legal Framework for Peace and to Santos' transitional justice approach was marked by internal ideological division.

The divisions among civil society organizations about the Legal Framework for Peace became clear already during the drafting of the bill, as the drafters had made an effort to gain civil society's input on the draft bill and thereby to ensure their support for it.[155] One respondent, who works at a human rights organizations, described his own participation in the drafting of the Legal Framework for Peace in the following words:

> "There were discussions. There were discussions. Maybe not that extended, because [the development of the LFP, HB] was very fast, with little room for maneuver, so we did not have […] the massive consultations that we had with the Victims' Law. But I was in several meetings where they tried to open discussions and where there were receptive people, […], who tried to be pluralistic and look for an opening. Then there was [another senator involved in the drafting of the LFP Bill, HB], who mostly led the discussion and was a bit more closed. But I do believe that there was discussion and, from the beginning, opposition."[156]

As this quote indicates, the hearings had not been able to get everyone on board. Some civil society organizations did not share the drafters' interpretation of transitional justice and the requirements posed by international law. Therefore, they opposed the Legal Framework for Peace. As the respondent expressed it, when asked if the Legal Framework for Peace enjoyed the support of human right organizations:

> "Well, it had ours, it's safe to say. […] But there was a lot of backlash. The Colombian Commission of Jurists was against it, it challenged the Legal Framework for Peace in the courts. But there were also supporters within civil society. Colombian civil society is very broad. Extremely diverse. With regard to this theme, I think there are NGOs which are oriented more towards peace, the construction of peace and culture of peace and this type of thing, and other are oriented more towards justice, which are the more legalistic NGOs. There are some which lean

155 In a public hearing organized shortly after the introduction of the LFP Bill in parliament, the author of the bill, Roy Barreras, emphasized that during the drafting process several roundtables had been organized to gain the input of civil society organizations. *See* 'Informe de ponencia para primer debate al Proyecto de acto legislativo 94 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 716, 26 September 2011. Moreover, several public hearing were organized during the parliamentary debates about the bill, during which representatives of civil society organizations were invited to provide their input on the bill to the members of parliament. *See* ponencia primer debate and ponencia tercer debate, gaceta no. 901, 28/11/2011.

156 Interview 7.

> more in this direction, and others which lean more in that direction. For example, the NGOs who supported the Legal Framework for Peace are more in this direction [peace, HB], and those who opposed it are more in that direction [justice, HB]. Because of this, the petitioners [who challenged the LFP before the Constitutional Court, HB] were the Colombian Commission of Jurists, the Lawyers' Collective, the Interdenominational Commission for Justice and Peace etcetera. And others were in favor [of the LFP, HB], like the *Movimiento para la Paz*, *Paz y Reconciliación*, the *Corporación Nuevo Arco Iris*, the ICTJ. And there are others who are more in the middle. I would say we have been more in the middle."[157]

Given the political (and emotional) sensitivity of the issues involved in the debates surrounding the Legal Framework for Peace, the opposing viewpoints among civil society groups sometimes resulted in hostility and mutual accusations. The respondent described the criticisms he has received from his peers within civil society as a result of the position he has taken on the issue as follows:

> "I have learned that, here, when one tries to find a balance, you are disliked by all. There are some who call me a "humanitarian punitivist", the ones who are on this side [peace]. Because they say that, in the end, we are vindictive, we like penalty and punishment, but that we put on a humanitarian front, so that we don't feel bad about ourselves. And others call me an "architect of impunity", because in the end [they believe that, HB] what we are doing is forging impunity, creating a structure of impunity."[158]

The schism between the more justice oriented and the more peace oriented groups was not limited to Colombian civil society. The big international NGOs active in Colombia were equally divided on the LFP draft. Whereas HRW has been one of the most vocal and consistent critics of the project,[159] even going so far as publicly calling it the 'illegal framework for peace',[160] both the International Crisis Group and the ICTJ spoke out in its defense.[161]

The disagreement among such leading NGOs over the Legal Framework for Peace shows that, while not representing an international consensus, the government's approach to transitional justice is grounded in an interpretation of international legal standards which appeals to at least part of the inter-

157 Interview 7.

158 Interview 7.

159 *See for example* 'Guerrilleros en cárceles no son presos políticos: Human Rights Watch', *El Tiempo*, 9 April 2012; 'Marco para la Paz favorece impunidad de crímenes atroces: HRW', *El Tiempo*, 2 May 2012; 'Dura respuesta de HRW al gobierno sobre Marco Jurídico para la Paz', *El Tiempo*, 8 May 2012; 'Este es un marco antijurídico para la paz' (opinion article written by José Miguel Vivanco), *El Tiempo*, 15 May 2012; 'Críticas de HRW a cambios en marco para la paz', *El Tiempo*, 1 June 2012 and 'Nuevo cambio en marco para la paz expande a la impunidad, dice HRW', *El Tiempo*, 13 June 2012.

160 'Este es un marco antijurídico para la paz' (opinion article written by José Miguel Vivanco), *El Tiempo*, 15 May 2012

161 'Marco para la Paz no viola derecho internacional', *El Tiempo*, 13 May 2012 and 'Espaldarazo internacional a marco jurídico para paz', *El Tiempo*, 12 May 2012.

national community. In other words, it laid bare pre-existing disagreements within that community over the correct balance between peace and justice. This schism would persist after the adoption of the Legal Framework for Peace and mark the opposition to the government's transitional justice approach throughout the peace process, with organizations such as CCJ and HRW leading that opposition from the human rights community. Paradoxically, these NGOs were joined in their opposition by their long-time antagonist Álvaro Uribe, who opposed the peace process with the FARC-EP on principle.[162]

7 The negotiations and their transitional justice outcome: the Special Jurisdiction for Peace

On 26 August 2012, shortly after parliament had adopted the Legal Framework for peace, the government and the FARC-EP signed a general agreement marking the start of a process of negotiation in order to reach a conclusion to the armed conflict between the two parties.[163] This process has been long and complicated and concerned a broad agenda of issues, including politically sensitive ones such as land reform, political participation of the FARC-EP and illegal drugs. However, out of all the issues on the agenda of the negotiators, the issue of the rights of victims, including the application of transitional measures, was generally considered to be one of the most sensitive. So much so that when President Santos announced in September 2015 that an agreement had been reached on this point, this was taken to mean that the signing of the final Peace Accords would soon follow. And indeed, on 23 June 2016, the Santos government and the high command of the FARC-EP signed the final peace accord in Havana. Given

162 One respondent jokingly described this 'coalition' as a group of 'unlikely friends'. Interview 7. In reality, HRW's and CCJ's opposition to the government's transitional justice approach was based on entirely different considerations than that of Álvaro Uribe and his political allies, as will be described in detail below in Section 9.1.2 of this chapter. In fact, a close analysis of the arguments presented by HRW and CCJ shows that important differences existed even between these two organizations in their reasons for opposing the Legal Framework for Peace and the government's transitional justice approach. This is underlined by the fact that CCJ abandoned its opposition after the publication of the Transitional Justice Agreement between the government and the FARC-EP, while HRW remained critical throughout the process.

163 'Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera', available at <https://www.mesadeconversaciones.com.co/sites/default/files/AcuerdoGeneralTerminacionConflicto.pdf> The FARC-EP is not the only armed group still active in Colombia. The other main group, the ELN was initially not part of the peace negotiations in Havana, but started its own negotiation process with the government in March of 2016, when a final agreement between the FARC-EP and the government seemed close. 'Con el ELN "serán conversaciones arduas"', *El Tiempo*, 30 March 2016. However, in the interest of clarity and brevity, this paragraph will focus on the negotiation between the government and the FARC-EP. Consequently, whenever the paragraph speaks of 'the peace negotiations' or 'the guerrillas' it should be understood to refer to the FARC-EP and the negotiations with that organization.

the focus of this study, this paragraph will limit its analysis of the negotiations between the FARC-EP and the government to the issue of victims' rights and transitional justice.

However, if the LFP was indeed an opening bid on the part of the government, it was initially firmly rejected by the guerrillas. In the first press conference in which the government and the FARC together explained their decision to enter into peace negotiations, organized in Oslo in October 2012, FARC commander Iván Márquez addressed the transitional justice framework created by the government in the following way:

> "[T]he so-called legal instruments of transitional justice, which aim to turn the victims into the victimizers, cannot be more than an insult. […] We are not the cause of but the answer to the violence of the state, which is the one who should submit itself to a legal framework so that it may answer for its atrocities and its crimes against humanity […] Those who should confess the truth and make reparations to the victims are the victimizers entrenched in the illegitimate institutions of the state. We are a belligerent force […] and we are motivated by the conviction that Peace is the way, but not the peace of the defeated, but peace with social justice."[164]

Thus, the government saw itself confronted with the difficult task of negotiating with a counterpart which was unwilling to compromise on the issue of justice, while at the same time satisfying its domestic and international critics that they were serious about preventing impunity and satisfying the victims' rights to truth, justice and reparation. An interesting measure taken by the negotiating parties to overcome the impasse caused by their competing interests in the area of transitional justice, was to appoint, in July 2015, a special commission of advisors to hammer out an agreement on the issue. This special commission consisted of 6 people, mostly lawyers, 3 of them selected by the government and 3 selected by the FARC. Crucially, however, none of them were directly related to either the government or

164 A video of Iván Márquez' intervention at the press conference is available on youtube (NTN24 channel), https://www.youtube.com/watch?v=oPXQXKhQZ7g, last checked 15/06/2016, at 26:20-28:12. It is possible that this rejection of the LFP can partly be explained not by its substance, but by the fact that it was designed unilaterally by the government. Thus, accepting this unilateral standard could have been interpreted as a sign that the FARC was 'submitting itself' to the conditions laid down by the government, an impression it was intent on avoiding. *See* interview 1, explaining the FARC's position on this topic in the following words: "[T]he FARC itself is against the Legal Framework for Peace. […] it has been against everything which has been proposed by the government, because it is unilateral. […] [T]hey want an agreement signed by them, so that it does not seem that the State is imposing it on them. […] The FARC absolutely rejects any notion that might suggest that they are being submitted to justice. And if they themselves are agreeing to certain things, well, then they are not being submitted."
In this interpretation, the initial rejection of the LFP did not so much reflect the FARC's unwillingness to accept any type of transitional measures as its (political) interest in having the transitional justice framework designed through bilateral agreement, to avoid the impression that it was accepting defeat.

the FARC and all of them had a particular expertise in international (human rights) law. It seems fair to assume that this move was intended, in part, to satisfy the international community and domestic critics that the transitional justice agreement was meant not only to serve the narrow interests of the negotiating parties, but would seriously take into account international human rights standards. As one respondent explained:

> "For this specific issue of justice, the President delegated to three lawyers, namely Juan Carlos Henao, Douglas Cassel and Manuel José Cepeda. […] These are three very good lawyers, famous in the country. And, while they are close to the government, they also have a general recognition in the academic community. And this ensures that there would be a sense of calm about who were working on this issue. […] Juan Carlos Henao is the rector of the *Universidad Externado de Colombia*. Manuel José Cepeda was a judge on the Constitutional Court for a long time […] And Douglas Cassel, on the other hand, is an academic. He did stir up some controversy, because he even sued the state [before the Inter-American Court, HB] in the case of [the Santo Domingo Massacre, HB]."[165]

The appointment by the government of such independent experts communicates the government's efforts to make sure the relevant legal norms on transitional justice are respected in the negotiation process. Likewise, the FARC appointed three legal experts who were not part of their organization. Their appointees were Álvaro Leyva, a Colombian politician from the Conservative Party with a broad experience in mediating between the Colombian government and various guerrilla groups; Enrique Santiago, a Spanish lawyer and activist who had been part of the team of lawyers who tried to bring former Chilean dictator Augusto Pinochet to trial;[166] and Diego Martínez, the director of the Colombian NGO *Comité Permanente de los Derechos Humanos*. That the FARC would leave the negotiations over an issue as sensitive as the justice scheme to which they themselves would be submitted to a group of civilians, as close as they may have been to their organization, is a significant step, as underscored by the profound wonder one respondent expressed over this fact. In his words:

> "I will never be able to explain, although others may correct me on this, but I will never be able to explain for myself how civilians who had never participated in the FARC ended up deciding the justice agreement. The requirement for the group of lawyers, the "3 and 3" […] was that they had an affinity with human rights. […] But the point is that all three are civilians! They were never under arms! Justice for the FARC ended up being decided by civilians, who were not

165 Interview 1. The controversy stirred up by Douglas Cassel is illustrated by an opinion article published in *El Tiempo*, in which a commentator likened his appointment by the State to negotiate the issue of transitional justice with the FARC to "calling on the forward player of the other team to serve as goalkeeper in ours". 'Y los del otro' (opinion article by María Isabel Rueda), *El Tiempo*, 2 August 2015.

166 *See* 'Este es el abogado español que asesora a las FARC', *El Tiempo*, 28 July 2015.

> part of [the FARC]. I will never be able to understand this. For me this is super paradoxical! And on top of that… I have been in the military, doing my military service, and I understand the natural hatred that members of the military have towards civilians. This idea that "they do not understand us!" And in the end some civilians decide on their fate? For me this is unfathomable."[167]

Even if this decision to let independent legal experts negotiate the justice agreement had been entirely strategic and aimed only to sooth the concerns of domestic and international critics, it was bound to affect the terms under which the negotiations would be carried out.

The Victims' Agreement between the Colombian government and the FARC was announced on 23 September 2015 and its content was published in full through the governments' website on 15 December of the same year. The 63-page document sets out a complicated system, called the Integral System of Truth, Justice, Reparation and Non-Repetition. The system will consist of five parts, namely 1.) a Truth Commission; 2.) a Special Unit for the Search for Disappeared Persons; 3.) the Special Jurisdiction for Peace; 4.) integral reparation measures; and 5.) guarantees of non-repetition.[168] Since a full analysis of this Integral System is beyond the scope of this study, this paragraph will focus on the Special Jurisdiction for Peace and aims to provide a general overview thereof.

Like the Legal Framework for Peace, the part of the Victims' Agreement dedicated to the Special Jurisdiction for Peace recognizes plainly and fully the right of the victims to justice and the obligation of the state to investigate, prosecute and punish. At the same time, however, it emphasizes the need to achieve peace and the state's obligations in this respect.[169] Tellingly, the discussion of the element of justice starts with a quote from the separate opinion to the *El Mozote* case of the Inter-American Court, in which the judges state that "international human rights law should consider peace to be a right and the State as obligated to achieve it".[170] The Agreement then describes the objectives of the Special Jurisdiction for Peace as:

> "satisfying the victims' right to justice, providing truth to Colombian society, protecting the rights of the victims, contributing to the achievement of a stable and lasting peace and adopting decisions which provide full legal certainty to those who have participated directly or indirectly in the internal armed conflict with respect to acts committed in that context and which constitute grave infractions of international humanitarian law and grave violations of human rights."[171]

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167 Interview 7.

168 'Acuerdo sobre las Víctimas', Joint Draft 15.12.2015, avalaibe at https://www.mesadeconversaciones.com.co/sites/default/files/borrador-conjunto-acuerdo-sobre-las-victimas-del-conflicto-1450190262.pdf, last checked 17 June 2016, pp. 6-7.

169 *See for example* Idem, pp. 24-25, paras. 17-22.

170 Idem, p. 21.

171 Idem, p. 21.

To solve the puzzle posed by the need to balance peace and justice, the Victims' Agreement proposes a system based on four basic pillars, which are 1.) an amnesty law for crimes of lesser gravity; 2.) prosecution of those responsible of crimes deemed unsuitable for amnesties; 3.) incentives for truth-telling by the accused; and 4.) the possibility of alternative sanctions. And while the Special Jurisdiction for Peace, as proposed in the agreement, shares several characteristic of both the Legal Framework for Peace and the Justice and Peace Law, it also differs from both those systems in several respects.

In short, the Victims' Agreement proposes that, once a final peace agreement is signed and the armed groups have demobilized, the state shall grant the members of these armed groups "the broadest possible" amnesty.[172] However, it also stipulates a number of crimes for which amnesties cannot be granted, namely crimes against humanity, genocide, war crimes, taking of hostages and other severe deprivations of liberty, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, abduction of minors, forced displacement and recruitment of child soldiers.[173]

All demobilized members of armed groups shall contribute to truth-finding and accept responsibility for their crimes, either collectively or individually, before a special Chamber for Recognition of Truth and Responsibility.[174] If, on the basis of this testimony or any the evidence already present in various state agencies or contributed by victims and human rights organizations, there is any indication that a particular demobilized person has participated in any of the crimes listed above, they will be tried by the Tribunal for Peace. The Tribunal for Peace will apply one of two different procedures:[175] 1.) a procedure for the cases in which the accused

172 Idem, p. 25, para. 23.
173 Idem, p. 25, para. 25 and p. 28, para. 40.
174 Idem, p. 30, para. 47.
175 Idem, p. 29, para. 45.

has already made a full confession and recognized his responsibility before the Chamber of Recognition of Truth and Responsibility; or 2.) a procedure for case in which the accused has not made a full confession to accepted his responsibility. The former may lead to the imposition of an alternative punishment of between 5 and 8 years, which will be restorative in nature and include effective restriction of liberty but not imprisonment.[176] In cases in which the accused has not made a full confession before the Chamber, but does so to the Tribunal for Peace before a judgment has been delivered, the Tribunal may impose an alternative prison sentence of between 5 and 8 years. In cases in which the accused does not make a full confession and/or denies responsibility throughout the proceedings, the Tribunal may, if the accused is found guilty, impose a prison sentence of between 15 and 20 years.[177]

Having painted the Special Jurisdiction for Peace in these very broad strokes, it is important to note that it is stricter than the Legal Framework for Peace in two ways. Firstly, the category of crimes which cannot be subjected to amnesties is broader than in the LFP. Apart from crimes against humanity and war crimes, a number of other types of crimes are exempted from amnesties as well. These types of crimes are among those most often perpetrated in the context of the Colombian armed conflict. Secondly, the Victims' Agreement does not share the LFP's focus on 'those most responsible' for serious crimes, but establishes that all those who are deemed responsible for those crimes must be investigated and prosecuted before the Tribunal for Peace, no matter their rank. Finally, it should be noted that, in contrast to the Justice and Peace Tribunals under the JPL, the Tribunal for Peace will have jurisdiction over participants on all sides of the armed conflict. Whereas much of the focus in the domestic and international press has been on the investigation and prosecution of *guerrilleros* through the Special Jurisdiction for Peace, this mechanism will also be competent to investigate and prosecute state agents accused of committing serious crimes and even civilians who have contributed in some form to the commission of such crimes.

8 Inter-American contributions to the FARC peace process: direct interactions

As it had done during the drafting of the JPL, the Inter-American Court made known its thoughts on the government's approach to transitional justice going into the negotiations with the FARC-EP. Since there were no

176 Idem, pp. 39-40, para. 60.
177 Idem, p. 40, para. 60.

cases in its docket that allowed it to address the issue directly,[178] it did so in a case against El Salvador and without ever mentioning Colombia explicitly. The IACtHR's judgment in the case of *The massacre of El Mozote and nearby places v. El Salvador* (hereafter: "*El Mozote*") was delivered in October 2012, some months after the adoption of the Legal Framework for Peace and the start of the official negotiations. And while the timing of this judgment may very well have been a coincidence,[179] it did profoundly impact subsequent discussions on transitional justice in Colombia.

In the case of *El Mozote*, the Court discussed an amnesty law passed by El Salvador in the early 1990s. What made this case so relevant to the discussion of the LFP in Colombia is the fact that, in the IACtHR's owns words "contrary to the cases examined previously by this Court, the instant case deal[ed] with a general amnesty law that relates to acts committed in the context of an internal armed conflict"[180] and that was adopted in the context of a negotiated transition from war to peace. In other words, the factual circumstances surrounding the adoption of the Salvadoran amnesty law were similar to those faced by Colombia.

The content of the IACtHR's judgment in the case of *El Mozote* and of the accompanying separate opinion has been discussed in depth in Chapter 3 of this study, in Sections 2.2 and 4.3 respectively. Taken together, the judgment and the separate opinion seemed to indicate a willingness on the part of the IACtHR to allow (slightly) more flexibility with regard to the investigation, prosecution and punishment of grave human rights violations in the particular context of a negotiated end to an armed conflict. In relation to the question of amnesty, the judgment held that states are prohibited from granting amnesties for any international crimes – rather than any grave human rights violations[181] – committed in the context of the armed conflict. The separate opinion, meanwhile, indicated the acceptance by the IACtHR of some of the more controversial aspects of the Legal Framework for Peace, including the possibility of alternative punishment.

Whereas the Inter-American Court thus suggested its willingness to accept a conceptual change in light of the special and complex set of circumstances facing Colombia, the Inter-American Commission has not been so

178 The Court delivered two judgments against Colombia in the roughly 2 years during which the Legal Framework for Peace was being debated and adopted in Colombia: IACtHR *Vélez Restrepo and family v. Colombia (preliminary objection, merits, reparations and costs)*, 3 September 2012 and IACtHR, *Santo Domingo massacre (preliminary objections, merits and reparations)*, 30 November 2012. However, the facts of these two cases offered the Court no starting points for addressing the LFP.

179 The case was submitted to the Court by the Commission in March 2011, months before the LFP draft was presented to parliament. *See* IACtHR *Massacre of El Mozote and nearby places v. El Salvador (merits, reparations and costs)*, 25 October 2012, para. 1.

180 IACtHR *Massacre of El Mozote and nearby places v. El Salvador (merits, reparations and costs)*, 25 October 2012, para. 284.

181 The distinction between these two concepts has been discussed above in Chapter 2, Section 4

flexible. In a country report on Colombia, published in December 2013 and titled 'Truth, Justice and Reparation', the Commission took issue with the LFP and the mechanism of case selection in particular.[182] With regard to the LFP as a whole, the Commission noted that its "approach, design, and provisions of the Legal Framework for Peace mark a conceptual change" which "provoke[s] a series of human rights concerns".[183] It objected especially to the mechanisms of case selection and the renouncement of the criminal investigation of cases not selected, which it considered to constitute and amnesty of sorts. In the Commission's words:

> "the Commission notes with concern that the Legal Framework For Peace contemplates the possibility of renouncing the investigation of the serious human rights and IHL violations not selected, which would lead to impunity. Taking into consideration that the duty to investigate and prosecute cases of serious human rights violations cannot be waived, the mechanisms for selecting and the absence of investigation of those cases would be incompatible with the obligations of the State."[184] (footnotes omitted)

The Commission drew this conclusion in spite of the objection of the state that such a finding would have "very serious implications for the peace process" and that it would go against the Inter-American Court's own findings in the case of *El Mozote*.[185] In response to this latter objection, the Commission denied the applicability of the precedent to the Colombian situation[186] and reiterated its own "*jurisprudence constante* to the effect that the state is still obligated to investigate […] the serious human rights violations committed during the armed conflict".[187] What's more, it noted that the Inter-American Court, in its interpretation of the relevant provisions of International Humanitarian Law, had relied on a report by the ICRC, of which the Commission concluded that it did not address states' obligations under human rights law.[188] In drawing these conclusions, the Commission suggested that it disagreed with the more lenient position taken by the Court in the case of *El Mozote* and the accompanying separate opinion. However, the next section

182 IACmHR, Country report Colombia – truth, Justice and reparation, OEA/Ser.L/V/II.Doc.49/13, 31 December 2013, paras. 333-356. The entire report is almost 500 pages long and discusses a wide variety of topics. The issue of the LFP is discussed in the chapter on Colombia's 'Constitutional and legal framework', in which it discusses a number of recent legal reforms, including the reforms to the JPL and the reform of military jurisdiction. However, for the purpose of this text, I will limit myself to discussing the Commission's remarks on the LFP.

183 Idem, para. 353.

184 Idem, para. 354.

185 Idem, para. 355.

186 Idem, paras. 259-273.

187 Idem, para. 273.

188 Idem, paras. 265-269.

will demonstrate that it was the Inter-American Court's position, not that of the Commission, which would end up having a profound impact on the peace process with the FARC and the domestic debates surrounding it.

9 Inter-American contributions to the peace process: influence of the IACtHR's case law on the right to justice and the prohibition of amnesty

9.1 Framing the debate on transitional justice

The dynamics of the debate surrounding the peace negotiations with the FARC and the associated transitional justice mechanisms played out rather differently than those in the debate surrounding the adoption of the JPL. The difficult and hard-fought road to the JPL had taught the new government a number of lessons, both practical and political, which it sought to apply upon entering into a new process of negotiation.

One very important lesson the government had learned from the adoption of the JPL, was that it must in any case take into account, or be seen to take into account, the rights of victims to truth, justice and reparation. Furthermore, the government had learned that a full amnesty for serious human rights violations would no longer be accepted, neither by domestic civil society nor by the international community. It should be noted that, at no time during the legislative process surrounding the LFP or the negotiations with the FARC, did the government openly question these basic limitations to its negotiation space. They had become the common ground between the government and human rights groups, or a shared vocabulary in which the debate on transitional justice was to be conducted.

The extent to which victims' rights had become part of a shared vocabulary is illustrated by the Statement of Motives accompanying the LFP draft when it was first introduced to parliament. In it, the drafters noted that Colombia was hoping to achieve a transition from war to peace and that such a type of transition

> "demands to weigh together with the satisfaction of the victims' rights to truth, justice and reparation, which are fundamental in any type of transition, other considerations particular to this type of transition, like the effective reintegration of ex-combatants into society, the [security situation, HB] within the territory and, in general, guarantees of non-repetition."[189]

What is striking about this wording is that it represents a complete reversal, at least rhetorically, of the government's discourse as it had been at the start of the negotiations with the paramilitaries: that process had taken

189 Exposition of motives belonging to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 3.

reintegration as its starting point, to which the notion of victims' rights had, through a vigorous campaign by civil society groups and the intervention of the Constitutional Court, served as a 'correction'. Here, however, the drafters present respect for victims' rights as the general rule in transitional situations and reintegration as a secondary consideration, flowing from the particularities of the Colombian context.

At the same time, the drafters of the LFP were careful to point out that the proposed law was not an amnesty law and that it did not entail pardons.[190] On the contrary, they maintained that the LFP aimed to prevent impunity and that the state would "uphold its inalienable obligation to investigate and punish the most serious crimes committed during the conflict."[191] The disagreement between the government and those opposing the transitional justice measures proposed by it on the issue of amnesty remained limited to the question whether those measures amounted to a *de facto* amnesty or not.[192] However, both sides agreed that amnesty laws for serious human rights violations were not an option.[193]

Given this starting point, this paragraph will discuss how both sides in the debate surrounding the transitional justice measures adopted in the context of the peace process between Colombia and the FARC employed a discourse based on respect for international human rights norms, especially those established by the Inter-American system, and how both sides presented their own, competing interpretations of the case law of the Inter-American system and its applicability in the Colombian context. Finally, this section shall discuss the Inter-American Court's 'intervention' in this debate through its judgment in the case of the *Massacre of El Mozote and nearby places v. El Salvador*.

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190 'Ley que crea marco jurídico para procesos de paz, cerca del Congreso', *El Tiempo*, 10 August 2011.

191 ''Marco Jurídico para la Paz rompe la impunidad', asegura Roy Barreras' (interview with Roy Barreras), *El Tiempo*, 13 December 2011.

192 *See for example* 'Gobierno responde a HRW tras críticas al Marco Legal para la Paz', *El Tiempo*, 4 May 2012 and "El marco para la paz no es amnistía ni indulto" (interview with Federico Renjifo), *El Tiempo*, 20 May 2012.

193 In an opinion article written for a media outlet aimed at legal professionals and published in September 2016, shortly before the referendum on the peace agreement between the FARC and the government, two researchers from human rights think-tank DeJusticia, which has generally been supportive of the Santos governments transitional justice proposals, summarized the state of the transitional justice debate in Colombia thusly: "In Colombia, we have advanced [towards] some fundamental consensus: no one now defends a peace with complete 'forgive and forget', as was done in Spain, but also no one defends that we should apply the normal punishments from the criminal code, as is there were no peace process. On the one hand, the agreement does not provide full impunity, because international crimes are excluded from amnesty and pardon. […]" Diana Isabel Güiza Gómez and Rodrigo Uprimny Yepes, '¿Un acuerdo de impunidad?', *Ámbito Jurídico*, 19 September 2016, available at http://www.dejusticia.org/#!/actividad/3258, last checked: 18 November 2016.

9.1.1 *The discourse of the Santos government: reinterpreting the hard core of human rights obligations*

The discourse of the Santos government on transitional justice was designed to signal respect for international and, especially, Inter-American standards on the obligation to investigate, prosecute and punish. Simultaneously, however, the government was seeking within these standards the flexibility required in order to conduct peace negotiations with any hope of success. As one respondent explained:

> "The fundamental idea behind the Legal Framework for Peace […] was to find ways, within the interpretation of the accepted standards, to move the peace process forward. If you look, for example, at the exposition of motives [accompanying the LFP draft], it refers to the case law of the [Inter-American Court, HB]. And it is not confrontational. The government does not say: 'we cannot comply with it', or: 'it is wrong'. It says: 'this case law is very good, but what happens is… there are gaps, there is uncertainty. And because of that, we think that the best way to interpret it is *this* way'."[194]

In short, the government's discourse in support of the transitional justice measures was based on a distinction between two possible interpretations of international standards regarding the duty to investigate and prosecute human rights violations: the 'maximalist tradition' on the one hand, and the 'transitional justice tradition' on the other.[195] According to the government's conceptualization, the maximalist tradition was characterized by an insistence that *all* human rights violations should be fully investigated and prosecuted under *all* circumstances.[196] The transitional justice tradition, on the other hand, the victims' right to truth and justice should be balanced against other important values and principles, especially the need to achieve peace. According to this tradition, the government argued, the state's obligation to investigate and prosecute human rights violations should be assessed differently in the context of a transition from war to peace, than in a situation of 'normalcy' or in a transition from dictatorship to democracy.[197]

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194 Interview 7.

195 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4. This argument is repeated almost integrally and further developed in later documents, especially 'Informe de ponencia para primer debate al proyecto de Acto Legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 901, 28 November 2011 and 'Informe de ponencia para primer debate al proyecto de Acto Legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 948, 7 December 2011.

196 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4.1.

197 Idem, section 4.2.

The government recognized up front that most of the Inter-American case law on the duty to prosecute and the prohibition of amnesty can be categorized as belonging to the maximalist tradition.[198] However, it argued that this case law was developed to respond to factual situations which were very different from the Colombian transitional context. In this context, the Exposition of Motives to the LFP draft says:

> "In the case of Colombia we should ask ourselves: what type of transition are we talking about? We are clearly not dealing with a transition from an authoritarian regime to a liberal democracy, the type which has constituted the paradigm for and the basis of the international doctrine of transitional justice. […]"[199] (emphasis added)

The reference to 'international doctrine' in this quote should be understood as responding primarily to the Latin-American experience with transitions and transitional justice and the Inter-American doctrine developed on the basis of this experience. As explained in Chapter 2 of this thesis, the regional experience was marked especially by the dictatorships of the 1970s and 1980s. In later documents, the government further develops this argumentation with a particular focus on the Inter-American Court's case law, saying:

> "in all relevant cases these obligations [to investigate and prosecute human rights violations] have been interpreted and assessed in situations of normalcy, as will be further explained below.
>
> […]
>
> In fact, so far, the Inter-American Court has not known any case in which a State has presented it a serious and coherent strategy of transitional justice which includes judicial and non-judicial mechanisms which are directed towards the achievement of a stable and durable peace and which at the same time allow the victims' rights to truth, justice and reparation to be satisfied."[200]

One respondent, who works with a Colombian human rights think-tank which has generally taken a favorable position on the Legal Framework for Peace, summarized this aspect of the government's discourse in the following way:

> "[T]hey are saying that [we] are in a factual situation which does not correspond to the standard […] I believe that they are partly right. The idea is to say: "sure, the [Inter-American] Court has ruled on all these cases of impunity [which took place, HB] under conditions which were completely different from those in

198 Idem, section 4.1.

199 Exposition of motives to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, pp. 2-3.

200 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4.2.

> Colombia, so the standard cannot apply in the same way". And I believe this is a reasonable discussion, generally speaking […] Nowadays, many *transicionalistas* criticize the fact that these standards were created, in large part, for a context of vertical violence and not horizontal violence, where the [perpetrators] were from the state, like in the case of the dictatorships. For cases of dictatorship and not of conflict. And there are differences between the violence in a conflict and that in a dictatorship, so why is the standard the same? Moreover, the fact is that many of the cases were decided on [by the Inter-American Court] when peace had already been achieved. *Almonacid Arellano* was decided 30 years after Pinochet had left power. The transition had already taken place! In contrast, [Colombia] would be the first case in which the Court would be deciding *during* the [transitional] process. And because of this the need for peace […] would be much more urgent in this case, so there would be more interests to weigh than in the other cases."[201]

The consequence of this line of argumentation by the drafters is that, insofar as the Inter-American case law does oblige states to undertake criminal investigations into *all* serious human rights violations, this case law was developed in response to cases which are relevantly different from the Colombian situation, and should thus not be applied to Colombia. In the word of the respondent quoted above:

> "So, technically the [Inter-American] Court […] has never confronted a case like the Colombian case. There are some standards which can help us in trying to construct a legal rule, but the point is that there is no legal rule for a situation like this yet." [202]

Furthermore, the government made sure to point out that the Inter-American Court's case law offered some support for believing that it would be more flexible with regard to transitional justice mechanisms adopted in a context of serious peace negotiations. In the words of the drafters of the Legal Framework for Peace:

> "[T]he case law of the Inter-American Court has supported judicial and non-judicial transitional justice mechanisms, and, therefore, has accepted that the standards pertaining to the right to justice are interpreted differently in such contexts [of transition from war to peace]. In this way, the IACtHR has recognized the importance of transitional justice processes for the protection of the rights to truth, justice and reparation. […] [W]ith regard to the Colombian situation, it has recognized that the country should have the opportunity to implement transitional justice mechanisms in such a way that it adequately recognizes the right of victims (*La Rochela v. Colombia*). In the same way, the Court does not prohibit penal benefits (for example, alternative punishment) especially in the context of transitional justice. Equally, its jurisprudence does not prohibit that

201 Interview 7.
202 Interview 7.

> non-judicial mechanisms are used to comply with international standards of investigation and punishment. […] [I]n the few cases in which the Court has assessed transitional justice mechanisms which do not imply a violation of the prohibition of self-amnesty (especially the Colombian Justice and Peace Law) it has concluded that these mechanisms are not per se contrary to the obligations derived from the American Convention on Human Rights."[203]

The government thus proposed a more flexible, transitional justice oriented interpretation of the international obligation to investigate and prosecute human rights violations as the most suitable approach for the Colombian situation and argued that this approach was in line with the case law of the Inter-American Court. It warned that:

> "the risk of committing ourselves to the maximalist tradition is that, in the interest of progressively protecting the rights of victims in an absolute way, we may end up perpetuating the armed conflict, thereby eliminating any possibility of peace and condemning Colombian society to the repetition of violent acts."[204]

Concretely, the 'transitional justice approach' proposed by the government through the LFP Bill rested on its estimation that international law does not stipulate that, in a situation of transition from war to peace, the obligation to investigate human rights violations can only be satisfied through judicial mechanisms. As the Exposition of Motives to the LFP Bill notes:

> "[I]t is important to emphasize that there does not exist any international obligation which prohibits that the obligations to investigate and sanction are guaranteed through non-judicial instruments. The American Convention [on Human Rights] does not explicitly include the obligations to investigate and sanction. In its development of articles 1(1), 2, 8 and 25, the Inter-American Court of Human Rights has reiterated that States have the obligation to investigate, prosecute and punish, the obligation to adopt internal provisions in order to respect and ensure the rights protected by the Convention and the obligation to combat impunity with all possible means. However, it is clear that the satisfaction of these obligations does not imply that the means to do so are strictly judicial."[205]

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203 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4.2.

204 'Informe de ponencia segundo debate al Proyecto de acto legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 901, 28 November 2011, section 3(c). This argument is reminiscent of the language employed by the Uribe government in the Statement of Motives to the AP Bill, cited above in Section 2.4 of this chapter. However, whereas that Statement of Motives relied exclusively on vague notions of forgiveness and reconciliation, the drafters of the LFP draft were careful to ground their rejection of the 'maximalist tradition' in an exploration of international (case) law and practice.

205 Exposition of motives belonging to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 6.

In this interpretation, the state therefore has the discretion to select only a (small) number of cases for criminal investigation and prosecution, as long as all other cases are investigated and sanctioned through non-judicial mechanisms. The drafters found support for their views in international law. Specifically, the Exposition of Motives refers to article 17 of the Rome Statute and points out that it:

> "establishes that the Court […] will find the inadmissibility of a case when: a.) the matter is the object of an investigation or prosecution by a State which has jurisdiction over it […]. In this sense, a complete non-judicial investigation would generate the inadmissibility of a case before the International Criminal Court."[206] (emphasis in the original)

Using admissibility before the ICC as a stand-in for determining legality of alternative processes under international law, the drafters thus argued that a serious investigation of a non-judicial character would be sufficient to satisfy international standards. Moreover, the drafters also took into account the case law of the IACtHR and, again, presented its own interpretation of it. As explained by one respondent, who has acted as agent of the state in several cases before the Inter-American Court and who has had an advisory role in the drafting of the LFP:

> "With regard to grave violations, as you know, the [Inter-American] Court has not defined specifically what 'grave violations' means. We have had several discussion at the Inter-American Court about this topic. […] In all its judgments on transitional justice in transitions from dictatorship to democracy, from *Barrios Altos* onwards, the Court has effectively said to investigate, prosecute and punish grave human rights violations. More or less. Because, if you look carefully, for example in *Almonacid Arellano*, the Court uses at least twelve different formulations of the obligation to investigate, prosecute and punish. So at one point is says to investigate, prosecute and punish crimes against humanity, at another point is says to investigate, prosecute and punish serious violation of human rights, then it says grave violations, then is says just violations. So the case law on the issue is not absolutely coherent, not even within one and the same case.[…] Based on this analysis of the case law, the Legal Framework for Peace was redacted to respect this interpretation that the Court says means international crimes."[207]

206 Idem.

207 Interview 1. In this context, the respondent also referred to a discussion between the State and the Inter-American Court on the term 'grave violations' in the case of *Vélez Restrepo v. Colombia*, in which "we discussed what 'grave violations of human rights' are, to show that what had happened in this case was not a grave violation, and the Court agreed with us". *See* IACtHR, *Vélez Restrepo and family v. Colombia (preliminary objection, merits, reparations and costs)*, 3 September 2012, paras. 279-285.

The drafters further argued that the transitional justice solution presented in the LFP draft, particularly the instrument of case selection, would in fact help to better serve the international community's stated goal of preventing impunity. In the words of the drafters, the instruments contained in the LFP project were "more than anything, strategies in the fight against impunity."[208] In making this argument, the drafters presented the issue of case selection as a lesson learned from previous experience, which "responds directly to the crisis of the model of transitional justice implemented in the country",[209] i.e. the Justice and Peace Law. As the drafters point out the JPL had, by late 2011, only produced four judgments, of which only one was final.[210] As an explanation for this lack of results, the Exposition of Motives points to the investigative strategy promoted by the JPL. In its words:

> "it is important to point out that the current investigative focus does not allow the [Prosecutor's Office] to concentrate its efforts and resources on the cases of the "most responsible", as is the international practice, nor in clarifying patterns and regional contexts of the operations of the different actors in the conflict, but rather promotes the investigation of individual and isolated acts."[211]

This lack of strategy, then, leads to "greater impunity" by spending finite resources on the investigation of cases "without taking into account [their] importance for the clarification of the truth and reparation for victims".[212] In contrast, the LFP draft would allow for "positive selection" of the most representative cases and for focusing the efforts and resources of the criminal justice system on "those most responsible" for the crimes committed in the context of the civil war.[213] In the words of the drafters:

> "To change this [current] focus it is necessary to concentrate efforts and resources in the cases of the "most responsible" and to clarify the system of macro-criminality in which these cases occurred, as is the international practice. The Inter-American Court of Human Rights itself has affirmed, in cases like *Manuel Cepeda v. Colombia*, that systematic violations should be investigated taking into account their context and with a strategy which allows exposing the criminal structures behind the crimes."[214]

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208 'Informe de ponencia para primer debate al Proyecto de acto legislativo 94 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 716, 26 September 2011.

209 Exposition of motives to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 3.

210 Idem.

211 Idem.

212 Idem, p. 6.

213 'Informe de ponencia segundo debate al Proyecto de acto legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 901, 28 November 2011, section 4(c).

214 Idem.

Finally, the government used the perceived ambiguity in the international standards including the case law of the Inter-American Court, to argue that international law is silent on the issue of alternative punishment for serious human rights violations. While this aspect of the Legal Framework for Peace had (originally) not been as hotly debated as the mechanism of case selection, it was addressed in one of the final parliamentary debates on the bill. When confronted with critical questions on the issue of alternative punishment by Senator Juan Carlos Vélez, a senator from the government party with close ties to Álvaro Uribe, the sponsor of the bill responded in the following words:

> "The truth is that the international norms oblige states to […] investigate, prosecute and punish grave violations of human rights; investigate, prosecute and punish, which is what this framework allows [us to do]. But there exists no precise obligation that the sanction or punishment should be one way or the other. About the form of execution of the punishment there is no international obligation, among other things, because of it would exist there would be no way, not in Colombia or in any other country, to construct norms tailored to our reality and this would, of course, hinder peace in the entire world." [215]

In sum, the transitional justice solution presented in the LFP draft does not discount international legal standards, including especially Inter-American doctrine, but is based on the drafters' own, more flexible interpretation of those norms. In their view, the more controversial elements of the LFP, like the instrument of case selection, do not violate these norms, because 1.) international standards do not require that all human rights violations are investigated and prosecuted through the criminal justice system; 2.) in so far as they do, these norms do not apply to the Colombian situation, because they are developed in response to situations which are relevantly different from the Colombian situation; 3.) case selection will help the State to better satisfy the main goals underlying the international norms in question, namely the fight against impunity and the victims' right to truth, justice and reparations; and 4.) international law is silent on the issue of alternative punishment. As one respondent observes in relation to this line of argumentation:

> "As you see, this is a completely different legal argumentation than if the state would have been confrontational and had said: "no, this cannot be, the Court has no reason to [become involved]" or "it has a punitivist vision" […] No. It is a vision that is respectful of the [IACtHR's case law, HB] but simply says: "here we have no applicable standard". So, because of this, the dialogue between the Court and the state is different."[216]

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215 'Acta de plenaria 56 de 14 Junio de 2012 Senado', Gaceta del Congreso no. 575, 31 August 2012, p. 14.

216 Interview 7.

9.1.2 Opposition to the transitional justice approach

The Santos government's proposed transitional justice measures have encountered serious opposition, both from civil society and from political opponents. The civil society campaign against the LFP and, later, the transitional justice agreement with the FARC never reached the level of intensity as the one against the AP Bill, due to the profound disagreement between various civil society groups about the legitimacy of the measures proposed by the government. However, a number of prominent domestic and international NGOs did voice their objections to these measures throughout the process towards the adoption of the LFP and the following negotiations between the government and the FARC leadership. And while the international and domestic NGOs seemed to have slightly different priorities in their opposition to the government's transitional justice plans, they all presented their objections in terms of international human rights norms, and especially those developed by the Inter-American system.

The most prominent international NGO opposing transitional justice plans of the Santos government has been Human Rights Watch, which has consistently and vocally opposed to these plans from the early stages of the LFP process up to the referendum on the transitional justice agreement with the FARC. Its objections to the LFP draft were summarized in a letter HRW sent to Congress and to the President, which was published in its entirety in national newspaper *El Tiempo*. Firstly, it argued that the mechanism of case selection is "clearly contrary to the legal obligation undertaken by Colombia under international law to investigate, prosecute and punish all those who bear responsibility for crimes against humanity and other grave violations of human rights" which "the Inter-American Court of Human Rights has established […] in numerous judgments, which are binding on Colombia".[217] Secondly, HRW notes that the extrajudicial mechanisms proposed in the LFP draft for the investigation of 'not-selected cases' cannot replace criminal investigation and prosecution as means towards satisfying the state's international obligations. Referring again to the Inter-American Court, it says:

> "In several of its decisions the Inter-American Court has noted the necessity of realizing criminal investigations […] 'Extrajudicial' investigations do not fulfill this requirement, since, due to their nature, they are not oriented towards ensuring the "capture, prosecution and conviction" of all those responsible. The Inter-American Court has noted that truth commissions cannot substitute the criminal

217 'Carta de Human Rights Watch al Presidente y Congreso', *El Tiempo*, 2 May 2012. In this context, the letter also refers to the ICCPR and the decisions of the Human Rights Committee. It further speculates that the inclusion of the case selection element "could be a misguided attempt to emulate the operative policies of the ICC's Office of the Prosecutor […] which focuses on the prosecution of those who bears the greatest responsibility for crimes falling within its jurisdiction. This policy is not based on the scope of the international obligation […] but reflects the nature of the Court as an international tribunal, which complements national criminal justice systems but does not substitute them."

> investigation of grave human rights violations. As it recently stated in a decision against Brazil, "the information such a commission may eventually collect cannot substitute the obligation of the State to establish the truth and ensure the judicial determination of individual responsibility through criminal trials.""[218]

Thirdly, HRW has argued that the possibility of granting alternative sanctions in cases of serious human rights violations, which was included in the LFP, would violate international standards.[219] Here, HRW argued that the state has the obligation to impose sanctions on those found responsible for grave human rights violations, and these sanctions should be proportional to the violations in question. In its words:

> "In accordance with International law, Colombia has the legal obligation to impose punishment for violations of human rights and this should be proportional to the gravity of the abuse committed. In this context, the Inter-American Court has held that "there exists an international normative framework which establishes that crimes which can be categorized as grave violations of human rights should entail adequate punishment in relation to the gravity of those violations"."[220]

Of the domestic NGOs critical of the transitional justice measures proposed by the Santos government, the most prominent has been the CCJ. As it had previously done with the Justice and Peace Law, CCJ even took the initiative to challenge the constitutionality of the LFP before the Constitutional Court. Its objections to the LFP were based mainly on the mechanism of case selection. As one respondent, who works with CCJ and was involved in its litigation against the LFP, explained its central objection:

> "What we have said […] is: the criteria of prioritization and selection should be severely limited, because it cannot be that this will be our standard, that the maximum we will be able to do is investigate those most responsible for the most serious crimes. Rather, it should be reverse: the minimum of what we will do is investigate those most responsible and the most serious crimes and beyond that, we will see. […] This was our main criticism, in that we consider that the obligation to investigate, prosecute and punish human rights violations which are not the most serious crimes committed by those most responsible, was being violated. Because the concept of 'the most serious crimes' leaves out a very big category of crimes which may not be the most serious, but which may be representative [for the Colombian situation], like for example […] forced displacement, which is one of the crimes which has occurred most structurally in the Colombian armed conflict."[221]

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218 Idem.

219 *See for example* idem and HRW, 'Human Rights Watch analysis of Colombia-FARC agreement', 21 December 2015, available at https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement, last checked 15 November 2016.

220 'Carta de Human Rights Watch al Presidente y Congreso', *El Tiempo*, 2 May 2012.

221 Interview 2.

While HRW and CCJ were thus both very critical of the LFP and its mechanism of case selection, this quote reveals an interesting difference in the basis of their criticism and their use of international norms to articulate their criticism. Whereas HRW seems most concerned with the integrity of the international standards on investigation and prosecution of human rights violations and Colombia's failure to fully live up to these standards, CCJ seems more concerned about the particular consequences of the government's approach to these standards might have in the Colombian context. This can perhaps be explained from the fact that HRW has a horizon which is much broader than Colombia and is concerned about the precedent Colombia might set for future peace negotiations. CCJ, on the other hand, is focused first and foremost on its own domestic context is less interested in the effects the peace process might have on other situations or on the integrity of the international norms as such. Thus, while CCJ instrumentalizes international norms to argue for transitional justice measures which will do justice to the domestic context, HRW has a more absolute approach to international norms and argues that the Colombian case should fully comply with, and thereby reaffirm, the international standard.

This difference in orientation between HRW and CCJ is also evident in the fact that, whereas HRW has remained consistently critical of the transitional justice mechanisms adopted throughout the peace process,[222] CCJ changed its position when the transitional justice agreement between the government and the FARC was published.[223] As the quote above makes clear, CCJ's main objection to the LFP had been the inclusion of the mechanism of case selection, which CCJ considered to be too restrictive. Since this mechanism was no longer present in the transitional justice agreement, CCJ was able to embrace this agreement. In an article in Colombian newspaper El Espectador, Gustavo Gallón, co-founder and director of CCJ, praised the transitional justice agreement, saying that:

> "Far from being a distraction to evade justice (as had been feared), the agreement between the government and the FARC about the creation of a special jurisdiction for peace is an instrument to overcome impunity [for violations of] human rights and humanitarian law in the country, which is 99.99%."[224]

Apparently, CCJ did not share HRW's objections to alternative punishment, which it seemed to consider justified as a necessary tool towards achieving a peace agreement with the FARC. Moreover, one of the main grounds for CCJ's support for the transitional justice agreement was the fact explicitly

222 *See for example* HRW, 'Agreeing to impunity', 22 December 2015, available at <https://www.hrw.org/news/2015/12/22/colombia-agreeing-impunity>, last checked: 19/06/2016.

223 *See for example* Gustavo Gallón, 'Un valioso acuerdo contra la impunidad', *El Espectador*, 1 October 2015 and Gustavo Gallón, 'Un acuerdo ponderado', *El Espectador*, 23 December 2015.

224 Gustavo Gallón, 'Un valioso acuerdo contra la impunidad', *El Espectador*, 1 October 2015.

extended the application of the special jurisdiction for peace not only to the FARC and its leadership, but to all actors in the armed conflict, including members of the armed forces and even civilians funding or supporting either the guerrillas or paramilitary groups.[225] HRW, on the other hand, considered this broad reach to be one of the main weaknesses of the transitional justice agreement.[226] In HRW's argumentation, full investigation and prosecution of all those involved in the armed conflict constituted the norm. And while some divergence from this norm could perhaps be legitimate in light of the need to convince the FARC to agree to a peace accord, this divergence should not include actors other than the FARC. CCJ, on the other hand, seemed to take as a starting point the factual domestic situation of almost complete impunity of high military officials and powerful civilians for their role in the abuses committed during the armed conflict. Against this background, any investigation and prosecution of their crimes would be preferable to no investigation and prosecution.

Finally, the transitional justice measures proposed by the Santos government also met with political opposition on the domestic level, led former president Uribe. Unhappy with the new president's seeming leniency on the guerrillas, Uribe and his followers started a fierce campaign against the LFP, calling it an "law of amnesty for terrorism" [227] and a "road to impunity".[228] In their words, offering benefits to an enemy in exchange for its demobilization is "what a country defeated by terrorist aggression would do".[229] Uribe and his followers have consistently argued that, while the Colombia needs peace, it would have to be a peace without impunity for FARC members.

While the discourse of the political opposition to the LFP and, later, the SJP was thus framed the language of the fight against impunity, it does not seem to be based on Colombia's general obligation to prevent impunity for human rights violations under international law. Rather, Uribe's discourse relied on the more political argument that Colombia could not allow impunity for one particular group, namely the 'terrorists' of the FARC. The political nature of this argument is further illustrated by Uribe's professed disgust that the transitional justice agreement proposed to include members of the armed forces in the special jurisdiction for peace. In his view, this

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225 Gustavo Gallón, 'Un valioso acuerdo contra la impunidad', *El Espectador*, 1 October 2015..

226 'Carta de Human Rights Watch al Presidente y Congreso', *El Tiempo*, 2 May 2012; HRW, 'Human Rights Watch analysis of Colombia-FARC agreement', 21 December 2015, available at https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement, last checked 15 November 2016 and HRW, 'Colombia peace deal's promise, and flaws', 27 September 2016, available at https://www.hrw.org/news/2016/09/27/colombia-peace-deals-promise-and-flaws, last checked 15 November 2016.

227 'Campaña contra Marco Jurídico para la Paz', *El Tiempo*, 15 March 2012.

228 ''Marco para la paz es un camino de impunidad': Álvaro Uribe', *El Tiempo*, 10 April 2012.

229 'Militares retirados reviven polémica con Santos por la paz', *El Tiempo*, 17 June 2012. In fact, this quote comes from an open letter signed by a Group of retired officers about the MJP, which was shared (and supported) by Uribe through his Twitter account.

would equate the 'heroes' in the armed forces, who had risked their lives to defend their country, with the 'terrorists' of the FARC. Moreover, human rights groups have pointed out the inconsistency of Uribe's demand of 'peace without impunity' for the FARC, as compared to the AP Bill presented by his own government in the context of the demobilization of the paramilitaries and the discourse employed in support of it.[230] However, due to the polarization of the political debate surrounding the peace process this argument failed to resonate with many opponents of the transitional justice approach presented by Santos.

9.1.3 The contribution of the El Mozote judgment

It is clear, then, that the Inter-American Court's case law influenced both the Santos government's transitional justice discourse and the response of (part of) civil society to that discourse. Whereas the Santos government claimed that the IACtHR left some flexibility to state's to compromise on the issue of justice in a context of a negotiated transition from war to peace, its opponents maintained the opposite, basing themselves on the strict standards the Court had developed in its case law against other states. The 'intervention' of the Court in this debate through its judgment in the case of *El Mozote v. El Salvador*, which it published in October 2012, was perceived as validating the government's claims on the issue, thereby giving a considerable boost to its discourse and further shaping the Colombian debate on transitional justice.

As discussed above in section 8 of this chapter, the Court found the Salvadoran amnesty law to be in violation of the ACHR. However, the judgment does seem to support the argument, consistently made by the Santos government in its transitional justice discourse, that the specific context of a transition from war to peace merit a more flexible approach to the strict rules developed by the Inter-American system regarding the obligation to investigate and prosecute and the prohibition of amnesty legislation. Moreover, even more than the judgment itself, the supporters of the government's transitional justice approach saw their positions validated by a separate (concurring) opinion drafted by the President of the Court, Diego García-Sayán and cosigned by four other judges. In other words: by a majority of the bench. In this separate opinion, judge García-Sayán acknowledges that

230 *See for example* Rodrigo Uprimny Yepes, 'El Uribismo, la paz y la impunidad', *El Espectador*, 27 July 2004, available at http://www.dejusticia.org/#!/actividad/2255, last checked: 18 November 2016. Even HRW, despite its own vigorous opposition to the transitional justice proposals of the Santos government, expressed its profound discomfort in sharing this position with Uribe. *See* José Miguel Vivanco and Juan Pappier, 'Álvaro Uribe: Colombia peace deal's unwelcome critic', *The Miami Herald*, 15 August 2016, available at <https://www.hrw.org/news/2016/08/16/colombia-peace-deals-unwelcome-critic>, last checked: 18 November 2016.

> "in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances […] it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of others disproportionally."[231]

Taking this as a starting point, the separate opinion then seeks to give some guidelines to states wishing to undertake such a balancing exercise. In doing so, it addresses issues which have no direct relevance to the case of *El Mozote*, which concerns an amnesty law which had been adopted decades earlier. Therefore, the phrase "certain transitional situations" referred to in the separate opinion was widely understood to mean Colombia.

The guidelines provided by the separate opinion on how to balance the various obligations in time of transitions include the following elements: 1.) the need for an integral approach to transitional justice which includes both judicial and non-judicial mechanisms;[232] 2.) the prioritization of the investigation and prosecution of the most serious cases, especially war crimes and crimes against humanity;[233] 3.) the possibility that cases not concerning war crimes and crimes against humanity are dealt with through "other mechanisms";[234] and 4.) the possibility of applying "alternative or suspended sentences", depending on the suspect's willingness to acknowledge responsibility and contribute to truth-finding. With regard to this latter element, the dissenting opinion said that:

> "It can be understood that this State obligation is broken down into three elements. First, the actions aimed at investigating and establishing the facts. Second, the identification of individual responsibilities. Third, the application of punishments proportionate to the gravity of the violations. Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed.
>
> […]
>
> Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened."[235]

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231 IACtHR *Massacre of El Mozote and nearby places v. El Salvador (merits, reparations and costs)*, 25 October 2012, Separate and concurring opinion of Judge García-Sayán, para. 38.

232 Idem, para. 22.

233 Idem, para. 24 and 29.

234 Idem, para. 29.

235 Idem, para. 28 and 30. In

The guidelines described here coincide, to a large extent, with the transitional justice approach proposed by the Santos government through the Legal Framework for Peace and throughout the peace process with the FARC. And while a separate opinion is not binding and cannot be said to express the position of the IACtHR as such, it does seem to suggest a level of support within the Court for the state's endeavors to ensure peace through negotiations.

Overall, the *El Mozote* judgment and the accompanying separate opinion were interpreted as an important validation of the Santos government's transitional justice approach. As one respondent, who had been involved in the drafting of the LFP, described her interpretation of the judgment:

> "And the Court in its judgment – because here we often discuss the separate opinion of judge García-Sayán, but more than the separate opinion we have to see if the judgment differentiates the case law or not. It is my position – and in fact the one which the Constitutional Court ended up taking in its decision concerning [the LFP] – firstly that it indeed differentiated, because it used international humanitarian law […] and said: "look, in the context of these transitions from armed conflict to peace the obligation is to investigate, prosecute and punish international crimes. […] Furthermore, it appeared that it opened the door a bit more for states to have a larger margin of discretion when it comes to deciding amnesties, pardon and penal benefits in cases of transitions from conflict to peace. It is based on this analysis of the jurisprudence that [the LFP] has been drafted, exactly to respect this interpretation saying that the Court says [to investigate and prosecute, HB] international crimes."[236]

As noted in this quote, the *El Mozote* judgment would, in the months directly following its publication, have an important impact on the case before the Colombian Constitutional Court concerning the constitutionality of the LFP, as will be further discussed below in section 9.2.2. Furthermore, throughout the negotiations with the FARC the Santos government has used the judgment and separate opinion to defend its transitional justice compromises from critics saying that these compromises did not live up to international standards in the investigation and prosecution of human rights violations.[237] In this context, the leader of the government's negotiation team in Havana, Humberto de la Calle, called the *El Mozote* judgment "an important beacon of hope" that international human rights law did not have to form an obstacle to peace and that international institutions would respect the transitional justice outcomes of the negotiations with the FARC.[238] Similarly, in an opinion article in *El Tiempo* a Colombian scholar supportive of the government's transitional justice approach used the judg-

236 Interview 1.

237 Interview 16, saying that the government used the *El Mozote* judgment and, especially, the separate opinion "to further its case".

238 'De la Calle ve fórmula para blindar justicia transicional', *El Tiempo*, 25 February 2015.

ment and the separate opinion to push back against "some analysts" who believed that international law set "absolute limits" on the state's freedom to negotiate peace. In this context he pointed to the separate opinion's clarifications with regard to both the state's freedom to adopt amnesty provisions for come crimes and the possibility to impose alternative sanctions.[239] In other words, the *El Mozote* judgment was used to ward off criticism of the government's transitional justice approach, especially where this criticism was based on arguments concerning the supposed illegality of this approach under international law.

9.2 Contributions to the normative content of the transitional justice mechanisms adopted in the context of the peace process

As in the case of the JPL, Inter-American standards on the obligation to investigate, prosecute and punish human rights violations have also had an important normative impact on the transitional justice compromise achieved in the Legal Framework for Peace. The government's discourse accompanying the introduction of its original draft for the LFP had been aimed at promoting a particular approach towards transitional justice, based on its own analysis of Inter-American standards on the issue. While the LFP draft certainly explored the outer edges of the Inter-American doctrine on the state's obligation to investigate, prosecute and punish, it was careful to remain within the boundaries set by it, or to at least be able to make a credible argument to this effect. The draft was based on a thorough and detailed knowledge of those Inter-American standards, making it difficult for its opponents to argue that the government's approach to transitional justice would put it at risk of violating the core of international standards on transitional justice.

9.2.1 Contributions to negotiations leading to the Special Jurisdiction for Peace

Compared to the Justice and Peace Law and the Legal Framework for Peace, the Transitional Justice Agreement is more difficult to analyze because of the relative scarcity of sources. Contrary to the JPL and the LFP, the Transitional Justice Agreement has not been developed through a formal process and has therefore left no paper trail. Moreover, negotiation processes are inherently non-transparent, which makes it difficult for the press to report on them beyond the tightly controlled information provided by the parties themselves. As a result, this paragraph relies mostly on interviews with certain respondents who have closely followed the negotiations from the beginning, and have, in one case, even been present in Havana for some

239 Francisco Barbosa, 'El proceso de paz y sus límites in el derecho internacional' (opinion article), *El Tiempo*, 16 March 2015. *See also* Francisco Barbosa, 'Una idea para destrabar la discusión de justicia en el proceso de paz' (opinion article), *El Tiempo*, 8 May 2015.

parts of them. The scarcity of sources necessarily makes the conclusions on this point more tentative than those regarding the other transitional justice instruments.

The limited sources available seem to indicate that the standards developed by the Inter-American system have, to an extent, functioned as a framework for the discussions on transitional justice between the government and the FARC at the negotiation table in Havana. That Inter-American standards would shape the government's positions in Havana is logical in light of the legislative process described in the previous paragraph. Having just developed its transitional justice approach, formalized in the LFP and designed to explore the outer limits of Inter-American doctrine while respecting its core, it seems obvious that this is the approach the government was planning to follow during the negotiations. Through its development of the LFP the government had 'tested the waters' and could now credibly maintain to have found an approach that would enjoy the support of the international community and (most of) civil society. It also had an impression of the aspects of its approach that could be considered controversial. The challenge, now, was to convince the FARC to convince the FARC of this transitional justice perspective.

The FARC, meanwhile, entered the negotiations unwilling to accept responsibility for the violence committed during the civil war and unwilling to accept criminal investigation and prosecution of FARC members. In convincing the FARC that some level of justice for grave crimes committed by both sides of the conflict was necessary, one respondent suggested that international law, including the Inter-American human rights system, played an important part. When asked whether she thought the case law of the Inter-American Court had had an impact on the negotiations between the government and the FARC, this respondent, who had been present in Havana during part of the negotiations and had advised the government on the issue of transitional justice, said:

> "Yes, without a doubt. That is to say, both the issue of the International Criminal Court and also the issue of the case law of the Inter-American system allow the government to explain to the FARC that today we are no longer in the same situation in which we were in the 1980s, when several countries in the Southern Cone could dole out amnesties, pardons, without any restriction. That in this day and age, international law […] does not allow for agreements which will generate impunity for international crimes. And this is important because it allows precisely for an agreement like the justice agreement. Because in a way it is also a [lesson] for the FARC, to tell them: 'it is not that, because in other peace processes such agreements were reached, that we can do the same.' [….]Yes, the case law of the Inter-American Court helps in this respect."[240]

240 Interview 1.

In accordance with this quote, the Inter-American Court's case law, among other international standards, helped the government to explain to the FARC that there is a hard core of international obligations which the state cannot discard, even if it wants to. This analysis is shared by another respondent, who sees an "enormous impact of the international community, both the ICC and the Inter-American system" on the negotiations between the government and the FARC through "the fact that it has been declared that some conducts cannot be subjected to amnesty".[241] Finally, a third respondent, who has worked Transitional Justice department of the Ministry of Justice during the negotiations, similarly allowed that the detailed and established case law of the Inter-American Court has guided the negotiations to some extent.[242] The government's reliance on international legal standards may have also helped to convince the FARC that the state's unwillingness to grant amnesty was not motivated purely by political considerations or a lust for revenge.

Furthermore, the respondent who had been present at some of the negotiations in Havana explained that the government used international institutions, including the Inter-American Court, to convince the FARC that these international norms presented a credible threat to them. That even if the state would give them the amnesty they want, international institutions could take it away again. Paraphrasing this argument, she said:

> "'[W]e will not have amnesties and there is no way that we can, because international law will annul them immediately. Even If we agree on them politically, even if the people ratify them through a referendum […], well, the International Criminal Court or the Inter-American Court will come and annul this agreement, and then all of the legal certainty you thought you had will be gone completely.' So this helps to achieve progress in the justice agreement and to get the FARC to agree on some level of submission to justice."[243]

In other words, the guidance offered to the negotiations by the Inter-American Court's case law is not necessarily the result of a true internalization of Inter-American norms by the parties. According to the respondent quoted here, the considerations for the FARC to accept these norms were strategic in nature and aimed at defending itself from outside intervention. And this strategic reasoning in relation to international law is not unique to the FARC. Another respondent described hearing similar considerations with certain members of the military, who would also be subjected to the transitional justice instruments established in the justice agreement. These

241 Interview 7.

242 Interview 16. This respondent attributed the 'guidance' provided by the Inter-American Court's case law mainly to the fact that the government's lawyers and negotiators were constantly trying to stay within the boundaries set by this case law, while at the same time being aware of its 'loopholes'.

243 Interview 1.

members of the military had learned from the experience of their colleagues in the region that a national amnesty could not offer them protection if it did not stand up to scrutiny by the international courts. In the words of the respondent:

> "I believe the idea of definitive closure is essential. I believe that they have the feeling that in this day and age […] if they do not come to a more substantive agreement at the [negotiation] table, in 15 years, or in 5, or whenever it may be, but they will come after them. Because I heard this a lot among soldiers, that there is a great fear and that is to turn into another Argentina. That in 10 years, 15 years, they will have to answer [for their crimes], when they are already old… I believe that the idea to reach a final agreement, which protects them in some way, has been essential."[244]

In short, according to the respondents cited here, the Inter-American Court's case law has had guided the negotiations between the Colombian government and the FARC and impacted their transitional justice outcomes, because 1.) they helped the government to articulate a hard core of international obligations to the FARC, which had to be respected regardless of the government's own position; and 2.) they helped the government to argue that these international norms posed a threat to legal certainty of those who had participated in the armed conflict in case the parties would bilaterally decide to grant amnesty for their crimes.

This very tentative conclusion is further supported by two practical arguments drawn from the context of the negotiations. Firstly, the fact that the special committee of experts, which had been responsible for negotiating the Transitional Justice Agreement, consisted of legal experts and included experts in Inter-American human rights law. These individuals are trained to think in terms of legal obligations and, especially, the obligations flowing from the Inter-American system and were selected for the job precisely because of that training. As a result, the committee of '3 and 3', as it had become known, formed a fertile breeding ground for reception of Inter-American doctrine and, simultaneously, would know on which points this doctrine could be applied with more flexibility. Secondly, the fact that the transitional justice compromise eventually achieved between the government and the FARC seems to respect the boundaries defined in the Inter-American Court's *El Mozote* judgment and the accompanying separate opinion. Specifically, the Special Jurisdiction for Peace 1.) recognizes the victims' rights to truth and justice; 2.) does not allow amnesty for international crimes; 3.) provides for the full investigation and prosecution of all crimes which cannot be subject to amnesty; 4.) makes the imposition of alternative punishment conditional on the suspect's full participation in the investigation; and 5.) therefore compensates the compromise on justice, in the form

244 Interview 7.

of alternative punishment, with a truth-finding 'bonus'. All of these points were discussed, in the *El Mozote* judgment and its accompanying separate opinion, as parameters for an acceptable justice strategy in the specific context of negotiated transitions from war to peace.

9.2.2 The Constitutional Court's review of the government's transitional justice approach

Both the Legal Framework for Peace and the Special jurisdiction for Peace have been challenged before the Constitutional Court. As before, it was the civil society group CCJ which brought this legal action against the LFP, especially the mechanism of case selection enshrined in it, arguing that it violated the victims' right to justice and the state's obligation to investigate, prosecute and punish all human rights violations. And, as before, the Constitutional Court relied extensively on Inter-American case law in its interpretation of the Constitution and in its analysis of the LFP's constitutionality.

9.2.2.1 Reception of the right to truth and justice as a fundamental pillar of the Constitution

In its decision on the constitutionality of the Justice and Peace Law, discussed above in Section 5.2.2 of this chapter, the Constitutional Court had already firmly established the victims' right to truth and justice and the state's obligation to investigate, prosecute and punish human rights violations as norms of constitutional rank. In the context of the peace process with the FARC, the Constitutional Court took this case law even further, when it decided on the constitutionality of the LFP. In challenging its constitutionality, CCJ faced an additional and considerable hurdle in that the legislative act implementing the LFP constituted an amendment to the Constitution. As a result, it was not sufficient to simply argue the LFP's incompatibility with the Constitution. As one of the lawyers involved in drafting CCJ's complaint against the LFP explained:

> "[O]ne cannot say that [the LFP] contradicted the Constitution, because it was amending the Constitution. In this sense, a constitutional amendment [necessarily] contradicts the Constitution. So, one has to start by arguing, in the Colombian case, that this was not a modification of the Constitution, but a substitution of the Constitution."[245]

In accordance with the doctrine of constitutional replacement developed by the Constitutional Court, the legislator has the power to amend the Constitution, but not to substitute it by altering its basic features, or the "elements

245 Interview 2.

which define the identity of the Constitution".[246] Thus, in order for the Constitutional Court to find the LFP unconstitutional, CCJ had to argue that it touched on one of the basic features of the Colombian Constitution. In the words of the respondent cited above:

> "[…] So how is the Constitution being substituted? So, as the substituted element we identified precisely the obligation to investigate, prosecute and punish all grave violations of human rights, not only some."[247]

In short, CCJ argued that the obligation to investigate, prosecute and punish human rights violations forms one of the basic pillars of the Constitution and that the mechanism of case selection, by altering the scope of this obligation, substituted the Constitution itself.[248] In making this argument, CCJ relied extensively on international human rights law and, especially, the case law of the Inter-American Court.[249] As one respondent, who has been involved in the drafting of the LFP and was therefore on the other side in the case before the Constitutional Court, summarized CCJ's argument:

> "The central element [of the Constitution] which they said was being substituted was exactly the obligation to investigate, prosecute and punish. And their entire argument was centered around the case law of the Inter-American system. Because of you look closely, the domestic case law has not developed this obligation at all, and of the international courts, the one that has really focused on developing it, has been the Inter-American Court."[250]

The Constitutional Court eventually rejected CCJ's claim of unconstitutionality. However, it did so in a way that left much of CCJ's argument regarding the content and status of the obligation to investigate and prosecute intact.[251] Most importantly, the Constitutional Court, on the basis on a

246 C. Bernal, 'Unconstitutional constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the constitutional replacement doctrine', (2013) 11(2) *I•CON* 339-357, p. 343.

247 Interview 2.

248 CCJ, 'Demanda de inconstitucionalidad contra el Acto Legislativo 01 de 2012 (parcial)', available at <http://www.coljuristas.org/documentos/documento.php?grupo=3&id_doc=350>, p. 3-4.

249 *See* idem, p. 7- 25. *See also* Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, pp. 51-56.

250 Interview 1.

251 In this context, the respondent who had been involved in CCJ's legal action against the LFP remarked: "In the [Constitutional Court's] judgment [concerning the constitutionality of the LFP] I would distinguish between the decision itself, whether they say what is unconstitutional and what is not unconstitutional, and the motivation, where it presents its argument. In the motivation accepts 70 or 80% of our arguments. It says very important things, for example, about the binding nature of international human rights instruments." Interview 2.

lengthy analysis of the IACtHR's case law,[252] agreed with CCJ that the obligation to investigate and prosecute all human right violations forms a fundamental pillar of the Colombian Constitution.[253] In doing so, it therefore took its own precedent from its judgment on the constitutionality of the JPL one step further: not only does the obligation to investigate and prosecute, as developed by the Inter-American Court, form part of the Constitution, it is also one of the fundamental pillars of the Colombian Constitutional order. As a result, the Colombian state is legally obliged to take these principles into account when seeking a negotiated end to an armed conflict and afford them the same consideration as the constitutionally enshrined right to peace. As pointed out by one respondent, this approach to transitional justice has now become part of the Constitutional Court's settled case law, which will make it extremely difficult to overturn.[254]

9.2.2.2 The constitutionality of the Legal Framework for Peace

The Constitutional Court's judgment thus recognized that both the obligation to investigate, prosecute and punish human rights violations and the right to peace form fundamental pillars of the Colombian constitution. Faced with two constitutional norms of the same status, the Constitutional Court could not, in the words of one respondent "eliminate one norm against the other, but [had] to balance" them against each other.[255] Thus, the Constitutional Court concluded that the obligation to investigate, prosecute and punish can "be subject to limitations through a balancing exercise, if these result in greater winnings in terms of other constitutional principles, like the achievement of peace and the construction of the truth in a context of conflict."[256]

After careful consideration, the Constitutional Court came to the conclusion that the mechanism of case selection, as enshrined in the Legal framework for Peace, constituted a proper balance between the two fundamental pillars of the Constitution at play. This finding was based on the twofold argumentation that 1.) the mechanism was meant to help the state to design a more intelligent prosecutorial strategy, focusing on the most serious crimes and those most responsible for them, and thereby to help to ensure that justice is done more effectively;[257] and 2.) it respects the minimum rule that international crimes will be investigated, prosecuted and punished.

The influence of the IACtHR's *El Mozote* judgment is clearly present in the Constitutional Court's reasoning regarding the constitutionality of the LFP, as it had been throughout the proceedings. It should be noted that CCJ

252 Constitutional Court of Colombia, Sentence C-579/13, 28 August 2013, pp. 265-285. This analysis included the judgment in the case of *El Mozote v. El Salvador*, which the Inter-American Court had delivered not long before.
253 Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, p. 335.
254 Interview 6.
255 Interview 2.
256 Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, p. 339.
257 Idem, pp. 340-342 and 347.

presented its complaint against the LFP on 18 December 2012, shortly after the Inter-American Court had delivered its judgment. As a result, the hearings organized in the context of CCJ's complaint against the LFP were dominated by this judgment and its possible implications for Colombia. A report from the national newspaper *El Tiempo* presented the *El Mozote* judgment as the "north star" guiding the hearings and pointed out that "almost all interventions were based on this text".[258] For example, the government's High Commissioner for Peace, speaking in defense of the LFP, did not deny either the applicability of the obligation to investigate, prosecute and punish nor its status as a central pillar of the Constitution. Rather, he relied, again, on the special circumstances faced by Colombia and the need to balance the obligation to investigate and prosecute against the obligation to seek peace, saying:

> "Behind this complaint there is a whole perspective which I think is very respectable coming from a human rights organization, but which is a perspective for a state which is at peace. And we, honorable magistrates, are not at peace. We are seeking precisely the end of conflict and the transition to peace. As the judges of the Inter-American Court recently so rightly said, in an exceptional situation like an armed conflict, one has to find mechanisms equally as exceptional to respond to the victims."[259]

The Constitutional Court also expressly relied on the *El Mozote* judgment in making the argument that the state is required to, as a minimum, investigate and prosecute international crimes. In this context, the Court considered that the rule providing that international crimes should be investigated, prosecuted and punished constitutes a:

> "further development of the obligation to guarantee [human rights, HB] in the context of an internal armed conflict, in which, as the Inter-American Court of Human Rights noted in the case of the *El Mozote massacre v. El Salvador*, exist particular and more flexible rules which imply that the obligation to guarantee [human rights] can be complied with if it is ensured that, as a minimum, [international crimes, HB] are tried.".[260]

In other words, the Inter-American Court's judgment in the case of *El Mozote* led the Constitutional Court to recognize a new 'hard core' of international obligations, specific to situations of (negotiated) transition from war to peace. Under such circumstances, the minimum rule is that international crimes should be investigated, prosecuted and punished.

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258 Camilo González Posso, 'Mozotes: la clave de Justicia y Paz', *El Tiempo*, 1 August 2013.

259 Intervention of the High Commissioner for Peace, Sergio Jaramillo, in the public hearing about the Legal Framework for Peace before the Constitutional Court of Colombia, Bogotá, 25 July 2013, available at http://www.altocomisionadoparalapaz.gov.co/desarrollos-legistlativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/discurso_gobierno_y_jefe_delegacion.pdf.

260 Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, p. 344.

10 Conclusion

This chapter demonstrated that the successive peace negotiations which have been conducted in Colombia since the start of the 21st century have been profoundly affected by the jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish human rights violations, and by the prohibition of amnesty provisions which is an element of that overarching obligation. Through the interventions of a host of actors – including domestic and international NGOs, domestic courts and the organs of the Inter-American human rights system itself – these standards have helped to shape the domestic debate on transitional justice and the "peace v. justice" dilemma and, thereby, to redirect legislative processes concerning the adoption of transitional justice mechanisms. In relation to the peace process between the Colombian government and the FARC-EP, it is arguable that these norms also demarcated, to some extent, the discussions between the negotiating parties themselves. As a result, the standards established in the IACtHR's jurisprudence have shaped, albeit indirectly, the outcome of these domestic processes, i.e. the transitional justice mechanisms adopted in Colombia. Perhaps even more fundamentally, through these processes the obligation to investigate, prosecute and punish human rights violations, as developed by the IACtHR, has become accepted as a part of the Colombian constitutional order – and even as a fundamental pillar of that order.

During the first round of the peace processes, when the government was negotiating with the paramilitary organizations to achieve their demobilization, the IACtHR's jurisprudence contributed to the domestic debate on transitional justice in several ways. Firstly, it helped to introduce the language of the victim's right to truth, justice and reparation into a debate which, up to that point, had been determined almost exclusively by the interests of the negotiating parties. Secondly, it helped to establish that there are certain minimum standards for the type of transitional justice mechanisms that can be adopted in the context of peace negotiations – most importantly, that there shall be no amnesties for grave human rights violations. Thirdly, reference to international legal standards such as those developed by the IACtHR helped to amplify the thus far marginalized voice of domestic human rights organizations and made them less vulnerable to the accusation that they pursued justice against the paramilitaries because they sympathized with the guerrilla. Finally, the example of how the IACtHR's jurisprudence had affected transitional justice in other countries, the monitoring – direct and indirect – of the paramilitary demobilization process by the organs of the Inter-American system and, later, the interventions of the Colombian Constitutional Court, helped to establish it as a credible threat to the negotiating parties which, if ignored, could seriously derail the agreement they had reached between themselves. Supported in this way by the IACtHR's jurisprudence, domestic accountability actors were eventually able to connect with certain segments of parliament in order to redirect the legislative process towards greater accountability for grave human rights

violations. Concretely, they succeeded in having the AP Bill be retracted and in introducing truth, justice and reparation as relevant parameters in the discussion of new legislative proposals. Finally, the IACtHR's case law also formed an important basis for the Constitutional Court's intervention in the legislative process, which resulted in stronger guarantees of truth and justice in the Justice and Peace Law.

During the second round of peace processes, when the government negotiated a peace agreement with the FARC-EP, the IACtHR's jurisprudence likewise played an important role in shaping the domestic debates, but the dynamics of those debates were rather different. Having learned from previous experience, the government now took control of the transitional justice debate from the beginning by developing its own position based on a careful analysis of Inter-American standards. In doing so, the government reinterpreted the 'hard core' of Inter-American standards to better suit its agenda, by focusing on what it perceived to be the gaps and loopholes in those standards. Specifically, the government's interpretation of Inter-American standards on transitional justice led it to the conclusion that 1.) the prohibition of amnesty provisions relates only to international crimes; 2.) the IACtHR allows – or should allow – more flexibility with respect to the obligation to investigate, prosecute and punish in the particular context of peace negotiations; 3.) in such situations, the obligation to investigate, prosecute and punish allows for the imposition of alternative punishment. This interpretation of the relevant standards resonated with important segments of domestic and international civil society and – it would appear from the *El Mozote* case – of the IACtHR. On the basis of this carefully constructed position, the government was able to secure the swift adoption of the Legal Framework for Peace – its 'opening bid' in the negotiations with the FARC-EP – by parliament and its approval by the Constitutional Court. In relation to the negotiations themselves, several respondents expressed a belief that jurisprudence of the IACtHR on the prohibition of amnesty did help the government persuade the FARC-EP that it was impossible to obtain the full amnesty sought by it. As a result, the transitional justice agreement eventually achieved between the government and the FARC-EP stays within the limits set by the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations – as understood by the Colombian government.

The important contributions of the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish to the processes described in this chapter have been mostly indirect, in the sense that they rely on the mobilization of domestic actors and their willingness to receive and apply it. NGOs, both domestic and international, with expertise in human rights and extensive knowledge of the Inter-American system and its case law have played an important role in redirecting the domestic transitional justice debate and introducing international legal standards on the obligation to investigate, prosecute and punish human rights violations. Likewise, the presence of a well-respected Constitutional Court with an openness

to international law and knowledge of Inter-American standards, made it possible for these standards to be received into the domestic legal system and accepted as part of the constitutional order. However, the organs of the Inter-American system have not relied solely on the work of domestic actors for its standards to be able to contribute to the Colombian transitional justice debate and the concrete mechanisms adopted as a result of that debate. At times, it has taken a more proactive role and sought to exert its influence directly. The Inter-American Commission has done so through its official role in monitoring the paramilitary demobilization process and through the country reports it compiles on Colombia. The Inter-American Court, meanwhile, has at times 'intervened' in the domestic legislative processes towards the adoption of transitional justice mechanisms by delivering relevant and/or sensitive judgments at key moments for domestic decision making. In this way, its judgments in cases like the *19 Tradesmen* and *El Mozote* have been able to have an impact far beyond the facts to which they relate.

7 Inter-American contributions to the investigation and prosecution of human rights violations in Colombia

1 Introduction: Obstacles to investigation of serious human rights violation by the National Human Rights Unit of the Public Ministry

Before analyzing the contributions made by the organs of the Inter-American human rights system to the practice of the institutions involved in the investigation of grave violations of human rights, it is necessary to first explore some of the obstacles these institutions face when carrying out their work. This will help not only to better understand the work carried out by the relevant domestic institutions, but also to later analyze if (and how) the work of the Inter-American system has helped domestic institutions to overcome those obstacles.

The practical obstacles examined in this section have been identified through the interviews which form the basis of this chapter, in combination with information available from human rights reports and academic literature. On the basis of these sources, this section identifies four main obstacles, being: 1.) security concerns, especially in cases related to the armed conflict; 2.) the politically sensitive nature of the cases and its effect on the relation between the relevant domestic institutions and other state entities; 3.) lack of resources, especially human resources, in combination with heavy caseloads; and 4.) certain aspects of the internal organization and institutional culture of the relevant domestic institutions.

1.1 Armed conflict and security concerns

Perhaps the toughest and most stubborn obstacle faced by prosecutors investigating grave human rights violations in Colombia is the difficult security situation present in large parts of the country and the constant threat of violence against all those involved in the investigations. Such concerns have long been considered one of the main causes of impunity in human rights cases by domestic and international observers alike. In a systematic analysis of the performance of the National Human Rights Unit carried out by Colombian human rights think-tank DeJusticia, security concerns were identified as the obstacle to investigation of human rights cases which "carries the most weight" and which has a negative effect on

all aspects of the Unit's work.[1] Winifred Tate described the threats against and attacks on the Human Rights Unit's prosecutors as an important factor in the 'production of impunity' through state human rights agencies.[2] She noted that, between 1998 and 2001, 196 of the Unit's staff (both prosecutor and investigators) had received death threats, and 19 judicial investigators and prosecutors had been killed. Of course, these security concerns are exacerbated considerably by the situation of armed conflict and their effects are felt most in cases connected to the conflict, which make up the majority of cases under the care of the Human Rights Unit. In this context, domestic observers have noted that the armed conflict "produces a type of corruption which could be described as "corruption through fear"", because threats by armed groups against judicial officers lead the latter to neglect their duties.[3]

Judicial investigators and prosecutors are not the only ones facing threats. Potential witnesses are even more exposed to the dangers connected to the armed conflict. The chilling effect of these security concerns on witnesses' willingness to come forward with their testimony and the difficulties prosecutors experience when trying to gain access to evidence present on the ground further complicate their work.[4] And whereas the formal end of the armed conflict and demobilization of the paramilitary groups, achieved through the processes described in the previous chapter, seems to have taken some of the pressure off the staff of the Human Rights Unit, this is not true for many of the witnesses in the cases under their care. Many of the crimes investigated by the Human Rights Unit took place in rural parts of the country which have experienced the presence of various armed groups, both guerrilla and paramilitary, and in which the influence of these groups is still felt, even though they have formally ceased to exist. For example, while explaining why he had not been able to conclude his investigations into a particular massacre committed in the 1980s, one prosecutor said:

> "Another reason is that the presence of illegal armed groups is still latent in this region. The demobilization and the Justice and Peace process have reached [to a certain point, HB], but their presence continues. So, according to our reports, the people [in that region, HB] are afraid to speak up."[5]

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1 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 49, available at < https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_27.pdf?x54537>, last checked: 07-08-2018.

2 W. Tate, *Counting the dead – the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 231.

3 M. García Villegas and J.E. Revelo Rebolledo, 'Procesos de captura y resistencia en la Rama Judicial', in: C. López Hernández (ed.), *Y refundaron la patria… De cómo mafiosos y politicos reconfiguraron el Estado colombiano* (Penguin Random House Grupo Editorial, 2010), p. 461.

4 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005, p. 49.

5 Interview 15.

Another prosecutor discussed this point in more detail. Having recently come to the Human Rights Unit from a different unit, she discussed how she had been surprised by some of the working methods she had found in her new environment, and how these methods were connected to the particular type of cases human rights prosecutors have to deal with. In this context, she said:

> "And sometimes I have confronted this question. I say: right, this case was not investigated from this angle, but what would have happened if the investigation had been deepened with [the help of, HB] the communities? But later I found out why [this had not happened, HB], and that is that the security situation did not allow, for example, for prosecutors to enter the region. These investigations had been delayed for a long time, but why? Because there is no way of entering the zone, because there is no guarantee that when one enters, one can also leave. […]
>
> Q: Yes, another prosecutor explained this to us, I believe about another massacre in and he said that there still exist [….] paramilitary groups in this zone, and that people are frightened….
>
> A: And one can feel the fear. Of course. I have also been in [another region, doing another investigation, HB] and there, since the communities have a collective memory that they are building, the communities also don't deny the fact that the conflict continues. And that armed actors continue and that there is persecution and that there is fear and there is a series of encounters which, obviously if one is there a few days maybe one will not feel, but they, who are there permanently, they do feel it and this obviously inhibits them from openly participating [in the investigations, HB], because they have to go back to their zones and their families are still there. So of course there is a collective fear in these regions which of course influences the issue of whether or not the investigations can advance."[6]

1.2 Political sensitivity of cases and relationship between UDH and other state entities

The security concerns and threats against the investigators and prosecutors of the Human Rights Unit are a direct reflection of the political sensitivity of the cases under its care. These cases generally concern crimes committed by members of the state armed forces and of paramilitary groups, and many of them contain indications of collusion between these forces. As discussed in the previous chapter, these are topics of extreme political sensitivity and simply talking and publishing about them has provoked rebuke from the highest circles of government. One can imagine, therefore, that prosecutors conducting criminal investigations into such cases have not always been fully supported in their work by other state agencies, including other units

6 Interview 9.

of the Attorney General's Office.[7] One of the prosecutors interviewed in the context of this study said that, while individual prosecutors do want to investigate these sensitive cases, there is a lack of "institutional will" to investigate in many corners of the state apparatus.[8] According to this prosecutor, that lack of institutional will is reflected in the limited resources made available for the investigation of human rights cases and the obstructions prosecutors face from other state agencies on whom they have to rely for the collection of evidence.

The state armed forces, particularly, have expressed their mistrust of the work carried out by the Human Rights Unit and have, consequently, refused at times to cooperate with it. In a report from 1996, HRW details severe criticisms made against the Human Rights Unit by then-Commander of the Colombian Armed Forces, General Harold Bedoya Pizarro. Bedoya stated that the HRU had been infiltrated by the guerrilla, "an opinion echoed by many army officers interviewed by Human Rights Watch".[9] As confirmed by several of the prosecutors interviewed in the context of this study, such attitudes towards the Human Rights Unit have sometimes translated into a lack of cooperation with its investigations. For example, when speaking about the difficulties involved in the investigation of cases of *falsos positivos*[10], one prosecutor said:

> "Here, the investigation is not easy. There is always the refusal of the military to let one into their facilities. They are always making problems, threatening to file a complaint against us… […] The *Procuradoría* [agency responsible for investigating complaints of misconduct by state agents, HB] has often supported the military over the prosecutors conducting investigations and has therefore served as a tool to intimidate many investigators. […] They [the military, HB] make life

7 *See for example* D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 55, describing the problems faced by the Human Rights Unit in securing the cooperation of other Units of the Attorney General's Office in their investigations.

8 Interview 8.

9 Human Rights Watch, Colombia's killer networks – the military-paramilitary partnership and the United States (Human Rights Watch, 1996), available at < https://www.hrw.org/legacy/reports/1996/killertoc.htm>, last checked: 08-08-2018. *See also* D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 32, citing the HRW report among other sources.

10 The scandal of the *falsos positivos* (false positives) began in 2006 with the revelation that members of the State armed forces had extrajudicially executed civilians to pass them off as *guerrilleros* killed through military operations, thereby boosting the statistics of the military in the war against the insurgency. These statistics were used to show the success of Uribe's policy of Democratic Security and to justify increases in U.S. military aid. Through subsequent investigations it has been revealed that the use of *falsos positivos* was a widespread practice and that the officers involved in this practice have been rewarded with promotions. The official estimate of the number of victims of this practice currently stands at 3.000, but a new study suggest that the number may in fact be as high as 10.000. *See* J.P. Daniels, 'Colombian army killed thousands more civilians than reported, study claims', *The Guardian*, 8 May 2018.

> difficult for many investigators when they are collecting evidence, they do not allow them to access the archives… I mean, they are making a lot of problems. I mean, the most difficult thing about cases of *falsos positivos* is to gain access to military installations. Just to enter is a problem. […] The support of the military to the investigations has been zero, and in many cases they even blocked or hindered the investigations."[11]

Besides complicating the collection of evidence, another way in which the mistrust of the military towards the Human Rights Unit manifests itself, is in the conflicts of jurisdiction between the military court system and the ordinary criminal justice system in which the Human Rights Unit operates. In relation to such disputes over jurisdiction, DeJusticia has pointed out that "both parties [the military and the Human Rights Unit, HB] know that, for many reasons, the outcome of the process may change depending on the organ which eventually carries out the investigation and renders the judgment".[12]

The competition, and even outright animosity, which exists between the military court system and the Human Rights Unit is illustrated by the acquittal through the military court system of several high-ranking military officials for their alleged participation in the massacre of the *19 Tradesmen*, a decision which was severely criticized by the IACtHR in its judgment.[13] The accusations against these officials had originally been investigated by the Human Rights Unit, which had decided to request the arrest of the officials and send the case to trial. At that point, however, the case had been transferred to the military courts, which decided in favor of the defendants and

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11 Interview 13. This statement was supported by the words of another prosecutor. When asked specifically whether he had received the necessary support from other State agencies in the investigations of cases which include the participation of military officers, he said: "No, those are the cases of extrajudicial executions. In those cases it is very complicated, for example, to gain access to the military archives, it is very difficult. Above all when one shows up to perform a judicial inspection [of the military's facilities, HB] to obtain documentation, they always put up obstacles. Many times the documents are extinguished, they are lost. It is not easy." *See* Interview 12.
Yet another prosecutor described the difficulties she encountered when investigating a series of massacres carried out by paramilitaries, in which there were indications of the involvement of the military battalions stationed in the region. However, when she sought access to the archives of these battalions, she was told these archives "do not exist anymore". It turned out that the archives had been damaged by fire and flooding and "coincidentally" the archives that the prosecutor sought access to were the ones that had been damaged most. *See* Interview 8.
However a fourth prosecutor denied having personally had such experiences. He said that, while the military sometimes brought up legal arguments as to why they were not obligated to grant access to their files, they had never simply denied him access to information needed for his investigations. *See* Interview 11.

12 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 56.

13 IACtHR, *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, paras. 164-177.

ordered the proceedings to be filed.[14] One of the military judges involved in this decision, and the former Commander of the Colombian Armed Forces, General Manuel José Bonnet, later explained this decision saying that the prosecutors from the Human Rights Unit had been "inventing false arguments" against the accused officers, that they had made "twisted" and "harmful" assessments of the case and that they had displayed "a lack of seriousness", because of the "partiality" with which the case had been assumed. More generally, the General commented on the "hateful spirit with which the prosecutors from the Human Rights Unit investigate military officers".[15]

DeJusticia has noted that the competition sketched here, combined with the fact that conflicts over jurisdiction often take considerable time to resolve, has had a paralyzing effect on investigations into human rights violations committed by members of the armed forces.[16] Moreover, it noted that such disputes over jurisdiction had a 'demoralizing' effect on prosecutors from the Human Rights Unit, upon seeing their investigative work undone after the transfer of a case to the military court system.[17] Given the considerable effort and personal risk involved in investigating such cases, this demoralization carries the risk of inciting inaction on the part of prosecutors. When faced with politically sensitive cases involving high military officials, their easiest and safest course of action may be to simply let the case lie dormant in his office until one day the statute of limitations expires and the file can be closed. One prosecutor from the Human Rights Unit has described seeing the effects of such inaction by a colleague when he came to his present office and took up the investigation of a particularly infamous massacre committed in the late 1980s, in which there had been extensive collusion between military officials and paramilitary groups:

> "I came to this office in November 2008. […] But before this time, the person who arrived in this office and saw this case, [of this massacre, HB], said: "Ay, no, no, no… Let's leave this here [to the side, HB]. I don't want to get involved in this." So there was not like a… I mean, it has been difficult from the start.
>
> Q: But was it because of fear, that it was a very complicated case, so "don't bother me with this…."?
>
> A: More or less that. Let's say, a form of… not laziness, because…
>
> Q: But there had been a sort of negligence on the part of the officials?
>
> A: Of course. Yes of course. Because, at that moment in time, to investigate such a big case… And it is not like that is the only case in your caseload. On top of this one, you have a bunch of other cases which have [better chances of success, HB]. So it is very difficult to be fully committed to one case."[18]

14 Idem, paras. 169-170.

15 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 32.

16 Idem, p. 59.

17 Idem.

18 Interview 10.

In short, the politically sensitive nature of the cases under the care of the Human Rights Unit has had a negative effect on the relation between the Unit and other state agencies, especially the military. As a result, such agencies have sometimes refused to cooperate with investigations carried out by the Human Rights Unit, making it difficult for investigators to collect evidence. Moreover, the military court system has at times competed with the Human Rights Unit for jurisdiction over cases involving military officers. This situation has had a paralyzing effect on the Unit's investigations and a demoralizing effect on some prosecutors, who prefer to simply let a case 'die out' over taking effective action which might eventually damage the prosecutor or his career.

1.3 Lack of resources and heavy caseload

The last quote from the previous section points us to a third important obstacle prosecutors face in their investigations of serious human rights violations: the lack of resources made available to the Human Rights Unit combined with its heavy caseload. According to DeJusticia, the lack of resources constitutes a "cross-cutting" factor underlying the lack of progress in human rights cases, which "is potentially present in all stages of the proceedings" but has a particular effect on the investigations under the care of the Human Rights Unit.[19] The DeJusticia report provides concrete examples of situations in which investigations were hindered as a result of a lack of technical resources,[20] legal resources[21] or even a lack of office supplies.[22] However, the most important manifestation of the lack of resources is the limited number of investigators and prosecutors made available to the Human Rights Unit compared to the large number of cases under its care

19 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), pp. 46-47.

20 Idem, p. 44, describing various instances in which forensic or ballistic evidence could not be collected because the necessary technology was not available, or there was no personnel available with the expertise or training required to use that technology.

21 Idem., describing a situation in which the Human Rights Unit had wanted to seize a car, but was informed that the seized car could not be held, because their facilities did not have the insurance legally required to do so.

22 Idem, p. 43, describing a situation in which the Human Rights Unit was unable to comply with the request, made by a tribunal hearing one of the cases under its care, to provide the tribunal with a copy of the entire case file, because it did not have "required logistical means, such as paper and photocopiers, and [because] the machines we do have are out of service".

and the complicated nature and large number of both victims and perpetrators involved in each of those cases.[23]

The issue of the scarcity of (human) resources made available to the Human Rights Unit and the resulting pressure on individual prosecutors came up during several of the interviews conducted in the context of this study. One prosecutor named the lack of resources as evidence of the limited "institutional will" on the part of the state to seriously investigate human rights violations. She stated that she and her colleagues already cannot handle the complex cases under their care with the limited resources made available. Moreover, she pointed out that their caseloads are only increasing because, while the number of prosecutors in the Unit had not grown since she had been there, it does regularly receive new cases.[24]

With other prosecutors, the theme came up mainly when discussing how they prioritize cases in their caseload which are being monitored by the organs of the Inter-American system.[25] In this context, one prosecutor stated:

> "We all have so many cases… Here [in this office], for example, we are handling… about 60. […]
>
> […]
>
> These are difficult cases, because they are very old cases, so they are difficult to prove. Very difficult. And for this one has to have investigators, analysts of context… but I believe we are under construction.
>
> Q: And this prioritization, this greater attention… does it also translate to more resources for the case? More human resources, more material recourses, or…?
>
> A: No, not really. That is to say, you make do with what you have. Luckily, we have a unit of the criminal police [specialized, HB] in human rights, and in some way they have been selective in the profiles of the investigators who have been here, for many years, investigating. These are very important resources for us. Because they have experience."[26]

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23 When the Human Rights Unit was first created, it had a team of 25 prosecutors and a caseload of at least 100 cases. *See* D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 22 and Human Rights Watch, Colombia's killer networks – the military-paramilitary partnership and the United States (Human Rights Watch, 1996), section V. According to DeJusticia, the number of prosecutors grew to 31 by April 2005. Writing in 2007, Winifred Tate that "thirty-five prosecutors were assigned by the Attorney General's Office to handle hundreds of the most complex human rights cases". W. Tate, *Counting the dead – the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 231.

24 Interview 8.

25 *See infra* Sections 2.1 and 2.2 of this chapter.

26 Interview 12. For the purpose of this section, the quote has been edited to focus on the issue of (lack of) resources. The full transcript contains several reflections of the prosecutor on the prioritization, within his caseload, of cases monitored by the Inter-American system. These reflections will be included below in Section 2.1 of this chapter.

Another prosecutor reflected on how she had, upon her arrival at the Human Rights Unit, tried to make a plan for herself on how to deal with the number and the complexity of the cases under her care. In her words:

> "At first, when I arrived – I came from outside the Human Rights Unit – I felt like all of the cases… When I started to look over the list and the inventory of the proceedings we were managing… well, of course many involve the serial violation of human rights, but not all of them have a judgment by the Inter-American Court to back them up.
>
> […]
>
> As you have seen, the blueprint for the *fiscalías* [prosecutor's offices, HB] in Colombia is essentially an assistant and a prosecutor. We have the support of the criminal police based on the orders we generate […] It is a very small team. With two people, what we try to do is prioritize […]
>
> […]
>
> This office[27] is miscellaneous, here we have a bit of everything: massacres from the '80s, massacres from the '90s, [cases against, HB] paramilitaries, against the military, we have *falsos positivos*, we even have the homicide committed against a prosecutor several years ago, that one is also in this office. So the efforts have to be adjusted [to fit the cases, HB]. And in this sense, the strategy has been to prioritize […]."[28]

In short, prosecutors in the Human Rights Unit face considerable obstacles in their work as a result of the large number of cases in their caseload, the complexity of those cases and the limited support each prosecutor has at their disposal.

1.4 Internal organization and culture of the Attorney General's Office

Finally, obstacles to the investigation of complicated cases of grave human rights violations also emanate from certain aspects of the internal organization and culture of the Attorney General's Office. Specifically, such investigations are hampered by two related tendencies which have long existed

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27 From the context it is clear that the word "office" ("*despacho*") as used by the respondent refers to her own office (team of one prosecutor and one investigator), not to the Human Rights Office as a whole. In other words, all the cases mentioned here are cases that the prosecutor personally has under their care.

28 Interview 9. Further on in the interview, this prosecutor addressed the issue of (the lack of) human resources again, when she spoke about how she had tried to orient her investigations towards the analysis of the context of complex crimes. Here she noted: "Having said that [all prosecutors should analyze context, HB], human resources are limited. At times, one requests an [extra, HB] investigator, one sends some order to investigate into one of the cases and there are delays in assigning an investigator, because there are very few investigators. This is a reality. Obviously, there are still less investigator who are able to construct contexts, in the sense that they have the experience, that they have the time, that they have the availability to undertake the trips that are necessary [for the analysis of contexts, HB]. So there is also an issue of human resources that has to be resolved."

within the Colombian criminal justice system, namely: 1.) the tendency to treat each criminal act as an isolated event, to be investigated separately; and 2.) the tendency of prosecutors to work individually and with minimal consultation between prosecutors.

The first of these two tendencies has been recognized by the Attorney General's Office itself, and was one of the reasons underlying the adoption of a new policy of case selection and contextual analysis, which will be discussed below in Section 3 of this chapter. In the policy document through which this policy was implemented, the Attorney General wrote that it was meant to overcome the problems resulting from the old system

> "which indicates that all crimes should be investigated at the same time and in the same way and, on top of that, as if they were isolated acts, hamper the creation of a true criminal policy which materializes in the design and implementation of strategies which make it possible to effectively fight the various criminal phenomena attributable to criminal organizations".[29]

One of the prosecutors interviewed in the context of this study described how this traditional, isolated way of investigating criminal acts had led to serious deficiencies in one of the cases under his care. As this prosecutor explained, the case involved a series of killings and massacres in the late 1980s, committed in one municipality by a paramilitary structure which dominated the area. In the original investigation, however, all these killings had been regarded individually, as if they were separate crimes with no interrelations. In the words of this prosecutor:

> "according to our Colombian legislation each fact is investigated: each fact, an investigation, each fact, an investigation…. But no macro-analysis had been done taking into account the 200 victims we may have in this case, in order to investigate the single organized power-structure which existed."[30]

And this tendency to regard cases individually, as isolated incidents, has effects not only on the investigative choices of prosecutors in concrete cases, but also on the way in which cases are divided over the prosecutors. Thus, it can easily happen that cases which are clearly related are investigated by different prosecutors, and the extent to which these prosecutors cooperate and share information amongst themselves depends on the initiative of those individual prosecutors. As one of the prosecutors, who had joined the Human Rights Unit relatively recently, noted:

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29 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012, p. 25.

30 Interview 10.

> "When I arrived here at the Human Rights Unit, I was a bit surprised to find that I had a miscellaneous caseload. I had understood that the idea was to organize the offices so that one can specialize in a theme. But the reality that one encounters is different."[31]

As a concrete example of this fragmented division of cases over the available prosecutors, the respondent discussed how she had been put in charge of the investigations into the case of the La Rochela massacre, while the investigations into the massacre of the 19 Tradesmen were handled by another prosecutor. This division of labor exists in spite of the fact that the two cases are clearly related and the Inter-American Court, in its judgment in the case of *La Rochela*, had even remarked .that the separate investigations into the two cases had affected their effectiveness.[32] When asked whether she and her colleague cooperated closely in investigating these cases, she replied:

> "We are in contact […] I had recently arrived at this office, so what I did was I went to his office and I have also done some inspections of prosecutoral documents, particularly, for example, with testimony of those who had directly participated in the La Rochela massacre. Let's say, there are strategies, the ideal would be to form a group, but [my colleague, HB] is investigating this case along with 40 other cases, just like me. So sometimes I have to be [in one region, HB], then I am [in another region, HB]… So, of course, the possibilities of meeting up with several prosecutors are minimal. When I am here [in Bogotá], we do have the proximity, we are only three offices apart, but still, his schedule is different from mine. Meeting up? We do not have a space! And this I do believe that would be… a space for prosecutors where we can discuss situations which goes beyond simply disclosing the particularities of our cases. To discuss phenomena that we observe and that appear important, the recurrence of a modus operandi for a certain region and in a particular moment. […]
>
> Now, there are training sessions and conferences and that type of thing, but to have a moment to meet up and talk openly about our cases, about these recurrences, about these situations, these phenomena… that would be important."[33]

Thus, according to this prosecutor, it is difficult for prosecutors working on similar or even directly related cases to link up. This, in turn, makes it difficult to share important information or to share experiences, which could lead prosecutors to new insights about their own cases and to new ideas on how to approach their investigations. As noted by DeJusticia, this

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31 Interview 9.

32 *See* IACtHR *La Rochela massacre v. Colombia (merits, reparations and costs)*, 11 May 2007, paras. 162-163. The case of the La Rochela massacre concerned the massacre of a judicial committee sent to investigate the previous massacre of the 19 Tradesmen by a paramilitary group in th Magdalena Medio region in the 1980s. As such, it was likely that both massacres had been carried out by the same criminal structure, and that the La Rochela massacre was an attempt by that criminal structure to ensure impunity for its crimes.

33 Interview 9.

dynamic, in which prosecutors work in isolation and important information is not shared, exists not only within the Human Rights Unit, but is even more pronounced when it comes to cooperation (or the lack thereof) across different units of the Attorney General's Office.[34] According to DeJusticia:

> "Not only is there no contact with other units whose work seems to be very relevant to that of the Human Rights Unit […], they are not even involved in the investigative process, rather there exist practices which result in the lack of awareness of the importance of this joint work, with a direct and negative effect on the investigations." [35]

Thus, important information is lost as a result of a 'traditional' approach to the investigation of human rights cases, which leads prosecutors to view related cases as separate events and to omit sharing important information and insights which could further their investigations, both within the Human Rights Unit and across different units of the Attorney General's Office.

2 Monitoring and prioritizing cases through direct interactions with the Inter-American system

This section analyzes the way in which the ongoing investigations of the Human Rights Unit into grave violations of human rights have been affected by the fact that those violations also were also the object of parallel proceedings within the Inter-American system. This section is based entirely on the interviews conducted with 8 prosecutors of the Human Rights Unit, all of whom have experience investigating both cases which do have such parallel proceedings and cases which do not. This makes it possible for them to compare between the two categories of cases and to better reflect on the effect such parallel proceedings have. However, before considering the contributions of parallel proceedings to the domestic investigation of grave human rights violations, this section will first discuss the mechanism through which these contributions are channeled: the monitoring of domestic investigations set in motion by the proceedings of the Inter-American system.

2.1 Monitoring of domestic investigations as a result of parallel proceedings by the Inter-American system

That the prosecutors involved in the domestic investigation of human rights violations subject to proceedings on the Inter-American level would experience any impact from those parallel proceedings is not self-evident.

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34 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), pp. 54-55.

35 Idem.

Domestic prosecutors, after all, are not part of the proceedings on the Inter-American level, which are conducted, on the part of the state, by its representatives from the Ministry of Foreign Affairs. In fact, all the prosecutors interviewed in the context of this case study stated that they were not in direct contact with either of the organs of the Inter-American human rights system.[36] For example, when asked about his interactions with the Inter-American system, one prosecutor answered:

> "Well, in reality I have not had a direct relationship with the Inter-American Court, because the relationship of the Colombian state with the Court and all the proceedings, are through the Office of Foreign Affairs. […] So, when we need, to put it this way, to give account or when they ask us for information, this is conducted through the leadership of the Unit, the leadership of the Unit for International Affairs of the Attorney General's Office and then from the Attorney General's Office to the Ministry of Foreign Affairs. But personally I have not been in contact [with the organs of the Inter-American system, HB]."[37]

Thus, the direct interaction between the state and the Inter-American system are handled by the Ministry of Foreign Affairs[38] and the prosecutors conducting the domestic investigations are at all times several degrees removed from the Inter-American proceedings.[39] However, even if they are not directly involved in the Inter-American proceedings, all but one of the prosecutors interviewed in the context of this case study said that they did experience an increased scrutiny of their work in those cases because of the domestic monitoring undertaken in connection with the Inter-American proceedings.[40] In short, when the Inter-American system admits a case to its docket, the state is called to regularly report to the organs of the Inter-American system on the progress of the domestic investigation into the human rights violations at issue. As a result of this, the agency representing the state before the Inter-American system needs to stay continuously up to date on the state of the investigations, and will regularly request the

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36 Interviews 8, 9, 10, 11, 12, 13, 14 and 15.

37 Interview 15.

38 Interview 3, explaining that the defense of the State in proceedings before the Inter-American system had recently been mandated to a new, specialized agency, called the *Agencia para la Defensa Jurídica del Estado* (the Agency for the Legal Defense of the State). This new institution, for which this respondent works, is now responsible for the representation of the Colombian State in the contentious phase of all the proceedings at the Inter-American level. However, after the Inter-American Court has rendered its judgment, in the supervision of compliance phase of the proceedings, the Ministry of Foreign Affairs resumes its responsibility of representing the State.

39 Interview 15, explaining that he was called once to appear before the Inter-American Court, in the context of the supervision of compliance proceedings of one of the cases under his care, because the Court wanted to have the prosecutor responsible for the domestic investigations present at the hearings. However, even at that occasion, he said "one hands over ones report to the Ministry of Foreign Affairs, and those of Foreign Affairs are the ones who do the talking".

40 Interviews 9, 10, 11, 12, 13, 14 and 15.

prosecutor to report on their progress. Thus, a domestic monitoring of the investigations is set in motion, which will continue for as long as the case is under review by either of the organs of the Inter-American system.

The fact domestic prosecutors are confronted with regular requests to report on their progress, will put pressure on them to make progress.[41] This is illustrated by the answer of one of the prosecutors, when asked whether she had experienced pressure to produce results in her investigation of a case which had been the subject of a judgment by the IACtHR. Her response was:

> "Yes, of course, because they are always calling on us… "Of the Inter-American Court's judgment, what part have you complied with of the [orders given to the state]?" "Well, I've [carried out] this, I've done that, I am currently working on that, it has become blocked because of that". But yes… of course, they are always calling you to ask how you are complying with the Court's order."[42]

It is worth pointing out that the seven prosecutors who indicated having experienced the 'pressure'[43] described here, were all dealing with cases in different stages of the proceedings at the Inter-American level. While

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41 Interview 1. When asked whether she believed that the judgment of the Inter-American Court in the case of the *Disappeared persons of the Palace of Justice v. Colombia* had anything to do with the recent progress in the domestic investigations related to this case, the respondent answered:

> "I think it is a combination of several things. I mean, the judgment of the [Inter-American, HB] Court, as always, helps to expose the case, but it was also the [30th anniversary of the attack on the Palace of Justice, HB]. […] So it's a combination of various factors. But without doubt it helps that the Court has said: "look, you have to continue to investigate this case." […] The fact that an international Court is monitoring the case, that it is taking note and sees to it that it is investigated, will give a stronger impulse to the investigation."

The idea that requests for information on progress will stimulate prosecutors to make progress, was supported by another respondent, who works for the *Agencia para la Defensa Jurídica del Estado*. *See* Interview 3.

42 Interview 14.

43 While they agreed that the monitoring resulting from the parallel proceedings had an effect on their domestic investigations, several prosecutors seemed uncomfortable using the word 'pressure' to describe this effect. This could be because there is a tension between any suggestion of external pressures and the independence required by their office. *For example*, Interview 15, saying: "I mean, this "pressure" from [the Inter-American system, HB], is not pressure. It is not pressure, but compliance with a judgment. Yes, one cannot speak of "pressure", because that would be like… But rather that, to comply with this judgment, [the Inter-American system, HB] obliges us to push the proceedings forward, to keep pressing it, to keep investigating…"
See also interview 13. When asked whether he had experienced pressure from the Inter-American system to investigate a particular case under his care, this respondent answered: "No, from the Inter-American system, no. No, and the Inter-American system in general, or at least the Commission, is very respectful [of our investigations, HB]. They do everything through the regular channels of the Ministry of Foreign Affairs and all that. But of course there is pressure from public opinion."

some of them were working on cases in which had only recently been admitted to the Inter-American system and were still being examined by the Inter-American Commission, others were investigating cases in which the IACtHR's judgment had been delivered many years ago, and which are therefore subject to lengthy supervision of compliance procedures. However, all of them reported feeling the pressure of having an international body overseeing the cases they were investigating. This means that this mechanism does not depend on the official determination by the Inter-American Court that the state has failed to comply with its international obligations. It is a function of the process before the Inter-American system, rather than of the judgments resulting from that process. Thus, the pressure starts the moment the Inter-American system becomes involved, and its intensity depends on the stage of the proceedings and the energy put into it by the organs of the system. This is underscored a respondent, who was investigating an extrajudicial killing, for which Colombia has been found responsible by the IACtHR several years ago. They described the monitoring of this case in the following way:

> "Q: So, you have known the case from before there was a judgment by the [Inter-American, HB] Court?
>
> A: Yes, from before the judgment.
>
> Q: And do you consider that the fact that there is now a judgment by the Court has pushed the investigation forward in some way?
>
> A: Well, it seems to me that it pushed more before the judgment came out, because there was this pressure that the judgment would come out and that Colombia would be convicted. In that moment yes, because there were provisional measures, so this also sped [the investigation, HB] up a bit more. At that time, the state gave us more resources, it gave us more support. After the judgment, well…
>
> […]
>
> Q: And it was because of the provisional measures that things started to move?
>
> A: No, this case was already moving because of the admissibility decision [by the IACmHR, HB] and so the state has to move the process forward more in order to avoid a harsher judgment, which it received anyway […]"[44]

The interviews conducted in the context of this case study thus show that the pressure exerted by the monitoring of Inter-American cases, while not constant, can have effects throughout all the stages of the proceedings

44 Interview 14. See also interview 3, stating that he had the impression that proceedings before the IACtHR are taken more seriously by the State than those before the IACmHR, and that the judgments of the Court have a greater impact than the reports on the merits of a case by the Commission. While this statement may seem somewhat contradictory to the statement of the prosecutor cited here, it need not be. The fact that the judgments of the IACtHR carry more weight than the decisions by the IACHR also means that the State would have a greater interest in avoiding such a judgment, as suggested by the prosecutor.

before the organs of the Inter-American system. Moreover, the interviews show that the monitoring of Inter-American cases has two main effects on the domestic investigations into these cases: 1.) prosecutors prioritize these cases over the other cases in their caseload; and 2.) these cases stay at the top of their agenda for as long as the monitoring continues.

2.2 Prioritization of Inter-American cases

The prioritizing effect of the Inter-American system's involvement in Colombian cases was noted by almost all the prosecutors I interviewed in the course of my research in Colombia.[45] The requests for information prompt them to prioritize Inter-American cases over other cases, which are not subject to such a monitoring system, and push harder to achieve results in those cases. One prosecutor described this mechanism in a discussion on how the examination by the IACmHR of a massacre case had affected his domestic investigation of that case:

> "Q: Do you notice in any way that this case is [being examined by] the Inter-American system?
>
> A: Of course, of course, because the Inter-American system undertakes a monitoring [of the case], and in its turn the Human Rights division also has a monitoring system for these cases. That means that there is a prioritization [of this case] over other cases.
>
> Q: In what way does one note this prioritization?
>
> A: We all have so many cases… Here [in this office], for example, we are handling… about 60. So, this prioritization makes one pay more attention, firstly, to the cases which have been object of [a decision by the] Inter-American Court. With regard to these cases there is a constant monitoring. That is to say, we present statistics every month: "how are you doing on the case that is being monitored?" […]
>
> […]
>
> So there is a strong pressure [on the prosecutors]. But pressure in a good way, as it should be."[46]

45 Out of the 8 prosecutors I interviewed, 7 stated that they prioritized cases which were being or had been investigated by the Inter-American system. Interviews 9, 10, 11, 12, 13, 14 and 15.

46 Interview 12 .*See also* interview 10, adding that for him, it was not only the fact that he was being asked to report on Inter-American cases that made him prioritize those cases, but also the fact that he knew that the information provided by him would be the basis on which the Inter-American system would judge the actions of the Colombian State. In his words: ""[T]hese are international obligations, where the Colombian State is at stake and the Prosecutor's Office as a component of the State, well, we need to give priority to these cases. And we don't want, let's say, that our representatives arrive at a hearing, at the Commission in Washington, and have to say: no, the fact is that nothing has been done. We would look really bad."

This prioritization is thus a result of the monitoring of Inter-American cases, in combination with the large number of cases each prosecutor has under their care. Since prosecutors at the Human Rights Unit do not have sufficient resources to properly investigate all the cases under their care, they need to prioritize. And since there is a notable pressure on them to produce results in the cases which are being monitored by the Inter-American system, it is only logical that they will prioritize those cases.

In this context, the quote above also indicates that the prioritization resulting from the monitoring of Inter-American cases is limited to the level of the individual prosecutors, and does not affect the allocation of resources within the Prosecutor's Office. When asked more specifically about whether this prioritization of Inter-American cases also entailed more resources being made available for their investigation, this prosecutor answered:

> "No, not really. That is to say, you make do with what you have."[47]

Thus, while the monitoring of Inter-American cases has affected the way in which prosecutors manage their caseload (i.e. prioritization of those cases), it has not actually helped to overcome the lack of resources as an obstacle to the prosecution of grave human rights violations generally. In fact, several prosecutors described feeling conflicted over the fact that, due to their heavy caseload and the prioritization given to Inter-American cases, they may sometimes be unable to dedicate sufficient time to which are comparable in terms of the gravity of the facts. One prosecutor described her struggle with this issue in the following way:

> "In the beginning, when I arrived [at the Human Rights Division], I felt that all the cases… When I started to revise the list and the inventory of the cases that we investigate, well of course many of them include repeated violations of human rights, but not all of them have a judgment form the Inter-American Court to back them up. I feel that, independently from the judgment, the Inter-American Court and the monitoring done by the [Inter-American] system, there are of course cases which fall outside of the Court's framework for action, but which are still important. What have I tried to do? To devise a system of prioritization. […]
>
> […]
>
> In this sense the strategy has been to prioritize cases, call attention to those who have special monitoring, but the attention must always be on all. Of course, the cases of the Inter-American Court have a monitoring system which requires the prosecutor to dedicate much more time and attention to these cases, this is inevitable. The amount of information which the Office of International Affairs requests from us, what the victims' organizations [representing the victims before the Inter-American system, HB] ask of us… Many times these cases obviously oblige the prosecutor to dedicate much more time and attention to them.

47 Interview 12.

> Having said that, the advantage of having these cases is that they serve as a prism for reviewing other cases that we have and that they can eventually give us information on a particular moment in time which affects other situations our office is dealing with or even other offices." [48]

Other prosecutors described similar conflicts. For example, when asked whether he approached Inter-American cases differently than other cases, one prosecutor answered:

> "There is no difference. For me, the justice system has to be straight in every sense. […]
>
> Q: And there is no prioritization of the cases which are in the Inter-American system…?
>
> A: When they arrive [in the Inter-American system, HB] you have to give them priority because the state begins to monitor them, so you have to give them priority. But not a priority in the sense of leaving the others. No, they all proceed equally. They should proceed equally. Yes, one can give them priority because we have to expect to answer to the Inter-American Court each trimester about [compliance with its judgment]. And I, personally, am monitoring it. So yes, these people have some priority. But not so as to say that the others are abandoned and we dedicate ourselves exclusively to [Inter-American cases]. No. No. Not up to that point."[49]

Another prosecutor even warned explicitly against developing an attitude in which only cases which attract international attention are investigated. In his words:

> "[H]opefully none of the cases which rest with the Prosecutor's Office, if they do not make it to the [Inter-American, HB] Commission, [it is thought that] they don't need to be pursued. Because, unfortunately, the level of impunity which we have here is very high, but it because of the very system that we use here.
>
> […]
>
> And of course there are cases here which are very sensitive and which do not have… They don't even have victim representatives, there is nothing, but we have to investigate these cases too. But sadly they do not have the same speed that a case which is [examined by, HB] the Commission may have. It pains me to say so. But obviously they are investigated too."[50]

Thus, the lack of resources and heavy caseloads remain an important obstacle to the prosecution of grave human rights violations. While its effects have been mitigated somewhat in relation to cases which are the subject of parallel proceedings before the Inter-American system, this has, at times, come at the expense of other cases of a similar nature and gravity. The prosecutors interviewed in the context of this case study seemed to regard

48 Interview 9.
49 *See for example* Interview 11.
50 Interview 10.

this reality as mostly the result on the state's own internal policies[51] or even a lack of true dedication to solving human rights cases. However, another respondent, who is not herself a prosecutor but has represented the state in many of the cases at the Inter-American Court, put the responsibility at least partly with the Inter-American system itself. When discussing the high and, according to the respondent, sometimes unrealistic demands the system imposes on states with regard to the investigation of grave human rights violations, she said:

> "The same happened in the case of [the Mapiripán massacre]. The Court said to the state… It told it not only to investigate all the facts and all of those responsible, but also to find the remains [of the victims], which is something which is impossible to do. I mean, it would require dredging the Magdalena river! The remains will not be found! You have seen what I am talking about, and it is horrible for the families, but it is a reality that the bodies will not be found! And the Court said to the state: dedicate one prosecutor exclusively to this case. When I have 50 years of armed conflict to investigate from the past and also everything that is happening today, and you are telling me that I have to dedicate a prosecutor exclusively to this case, because it is the case that made it to the Court… It is not that this massacre is more important than others. I have many cases from the armed conflict to investigate. And this is an argument that we had to make before the Court. And in the end, the Court changed its decision and said: "ok, it's all right, it doesn't have to be a prosecutor exclusively [for this case, HB]." But when it imposed this reparation measure [at first], this had very problematic practical implications."[52]

Finally, it should be noted that nothing in this section should be taken to mean that, because of their monitoring and the resulting prioritization, Inter-American cases are thus quickly or easily resolved. They are demonstrably not. The argument here is simply that there is an added pressure to produce result in these cases and that prosecutors will often pay more attention to them than to other cases under their care. This is a relevant practical contribution to the investigation and prosecution of those individual cases, given the enormous amount of cases requiring the attention of the justice system and the overwhelming case load faced by individual prosecutors.

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51 Several prosecutors explicitly stated that they did not consider the 'pressure' to pay more attention to Inter-American cases to be a bad thing. *See for example* Interview 12, and Interview 15.
In the same vein, one prosecutor argued that the extra attention for Inter-American cases is justified, because the fact that Colombia has been found internationally responsible for those cases shows the grave failure of the justice system in those cases. *See* Interview 12.
Another prosecutor, meanwhile, emphasized that the lack of resources made available to the Human Rights Unit is a conscious choice on the part of the State, showing a lack of true dedication to human rights cases. Thus, she implies, this is not the 'fault' of the Inter-American system. *See* Interview 8 .

52 Interview 1.

For this reason, this practical effect of prioritization relevant mainly to the cases which have a direct relation to the Inter-American system and may even distract prosecutors from other cases which are equally worthy of their attention.

2.3 Keeping cases on the agenda

On top of the agenda-*setting* effect detailed above, prosecutors have also described how the involvement of the Inter-American system *keeps* these cases on the agenda for an extended period of time. Through its supervision of compliance procedure, the Inter-American Court is able to ensure that the monitoring of the domestic investigations continues until it is satisfied that the state had done everything in its power to investigate all the facts and identify all those responsible for them.

It should be noted that this contribution is especially valuable given the fact that, given the complex and politically sensitive nature of cases like those concerning the massacres and enforced disappearances committed during the internal armed conflict, prosecutors may sometimes be tempted to simply let the case 'die out' through prolonged inactivity. However, the continuing involvement of the Inter-American system makes it difficult to let the case rest. And even when the Prosecutor's Office has put in considerable efforts to solve the case, the monitoring by the Inter-American system motivates them to keep up these efforts over time.

As one prosecutor noted when discussing her investigations in the case of the *La Rochela massacre*:

> "What is the problem with these cases? It is basically the time which has passed. We are talking about a massacre which took place in 1989, 26 years ago. […] When you look at the history of the La Rochela case, the justice system has had to face many difficulties in finding the truth. From the lack of collaboration of the [paramilitaries participating in] Justice and Peace, to the denial, many times, of requests for information… So unfortunately it is also a process which tells the story of justice in Colombia. So, the impact which the Inter-American Court has, the push that it gives, the call to attention, well its makes that in any case we continue to try to reconstruct the history through these cases and to arrive, in the end, at those most responsible, which is what interests us at this moment."[53]

The prosecutor investigating the case of the *19 Tradesmen* was even more explicit on this point. When asked whether he found the pressure exerted by the Inter-American system to continue the investigation in a case predating even that of *La Rochela* unreasonable, he replied:

53 Interview 9.

> "No, no, no. To the contrary. [The system] has sought to clarify [the case] and it has made the state assume its responsibility to investigate, which is what it is doing. I mean, this pressure […] is not really pressure. It is not pressure, but compliance with a judgment. We cannot talk of pressure […] Rather, to comply with this judgment it has obliged us to push the case forward, to continue to operate, to continue to investigate… Even more so because this crime of forced disappearance, which is considered a crime against humanity rather than a [ordinary] crime, is imprescriptible. So, the process has to continue because the crime of enforced disappearance ends [only] when we find the [victim] dead or alive and we can offer the families peace of mind and we end the uncertainty of [not knowing where their family member is, HB]. So, because of this connotation of imprescriptibility we are obliged to keep the process alive, no matter how many years pass, it has to continue."[54]

The latter part of this quote hints that the impact of the Inter-American system may be broader than only the practical impact it achieves through its prolonged monitoring of specific cases, and may also have a normative dimension. The prosecutor explains that enforced disappearance is a crime against humanity and, as the Inter-American Court has consistently found in its case law, cases of this nature and gravity do not expire, meaning that there is no temporal limitation on the state's ability to investigate and prosecute such cases.

Another prosecutor also touched on this possible normative impact of the Inter-American system. When asked for a concrete example from his personal experience as a prosecutor of a step forward in one of his investigations achieved as a result of the involvement of the Inter-American system, he responded:

> "In the [case of the] massacre of Chengue. Not in this office, in another office.[55] Because [the massacre] was declared a crime against humanity, and…
>
> Q: by the [Inter-American] Commission?
>
> A; No, by the Prosecutor's Office itself. […] But in a lot of case law of the Inter-American Court it discusses that such acts should be declared crimes against humanity. Based on these decisions of the Inter-American Court, [the facts of the case of] El Chengue […] were declared a crime against humanity.
>
> Q: And this helps to…
>
> A: That [the case] does not expire."[56]

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54 Interview 15.

55 This prosecutor only recently came to the office he is working in now. In the Colombian system, each unit of the Prosecutor's Office consists of a number of *despachos* (offices), each with one prosecutor and a (small) team of analysts. Cases are assigned to a *despacho*, rather than to an individual prosecutor, and prosecutors sometimes move between *despachos*. In other words, the respondent is talking about a case he investigated when he was still in another office, not a case investigated by another prosecutor.

56 Interview 12. The decision, described here by the respondent, to declare the massacre of Chengue a crime against humanity was taken in March 2011. *See* 'Masacre de Chengue declarado delito de lesa humanidad', *El Tiempo*, 15 March 2011.

As this quote illustrates, the decisions of the Inter-American system have clarified that the massacres committed during the internal armed conflict can be qualified as crimes against humanity and, in some cases, have been the reason for prosecutors to declare them crimes against humanity. The result of such a declaration is, according to these prosecutors, that the cases do not expire.

Together, the two forms of impact described here can lead to a situation in which the state is perpetually pressured by the Inter-American system to continue to investigate certain cases, without the possibility that these cases will at some point expire. This means that the state is forced to continue to spend resources on the investigation of these cases, even though some may simply never be solved. As some respondents have noted, this would seem to be at odds with the Inter-American Court's own insistence that the obligation to investigate and prosecute is and obligation of means, not of results. This criticism has been directed especially at the Court's orders to locate the remains of victims of enforced disappearance through the investigations and deliver these to their families. In some cases, this has proved to be simply impossible. As one respondent described the state's predicament with regard to this issue:

> "We have our first case before the [Inter-American] Court, which is *Caballero Delgado and Santana* [v. Colombia]. This is a case of enforced disappearance and the case has remained open under supervision of compliance – in fact, of the 193 cases the Court [has delivered judgments on], 163 remain open because of compliance. One of these is, obviously, *Caballero Delgado and Santana*. What is the problem? That we have not been able to find the remains of these two disappeared persons. So the Court… This is part of the obligation to investigate, so the Court says: you have to find the remains, You have to find the remains. As long as you do not find the remains, I cannot close the case. For Colombia this implies something politically complicated, which is that an international judgment remains open. So what does Colombia do? It dedicates a lot of resources to undertaking exhumations to find these two bodies. So, what happens? There is only one living witness who has said a thousand different things about where the remains are […] and the state has spent millions [of Colombian pesos]… Every exhumation, each process of exhumation costs millions upon millions [of Colombian pesos], and on top of that, this is in a very difficult region, a very humid region, with a complicated security situation. So the state has done… I don't know how many, but at least 10 or 11 exhumations… all failed. And the Court continues to say: "find the remains". So what happens? This obligation, which was an obligation of means, changes into one of result, and I am spending a lot of resources which could also be invested in other exhumations, which would not fail, finding other remains of other persons, of other victims of the conflict."[57]

57 Interview 1. These criticisms were shared by other respondents. *See* Interview 3 and Interview 7.

Two of the prosecutors I interviewed gave concrete examples from their own experience of having to continue the search for the remains of disappeared persons, when it was clear to them that this search would not lead to any results. For example, the prosecutor investigating the massacre of Las Palmeras describes his search for the remains of one of the victims identified by the Inter-American Court, "alias Moíses", in the following way:

> "The only thing which remains unresolved is that up until now it has not been possible to identify "alias Moíses".
>
> Q: he is one of the victims?
>
> A: he is one of the people who have died [in the massacre] and it has not been possible to find him, which is what the supervision the Inter-American Court is doing. But identifying "alias Moíses" has not been possible.
>
> Q: And do you believe that, if it is impossible to identify this person, that it makes sense to continue with the process?
>
> A: It is futile. […] The state at least has been diligent on this point. I have undertaken various procedures, various exhumations, previous prosecutors have also done exhumations… It is difficult to get the people who were involved to say what happened. […] I have interviewed the people most involved in the case at the time, the families of the other victims who were identified […]. They say [..] that they never knew the person. […] I mean to say that they buried him but never identified him, they never knew who he was.
>
> Q: But has the body been found?
>
> A: It has not been possible to find him […] and after the 15 years it is going to be quite impossible […]
>
> Q: So the Inter-American Court is requiring the state to continue with a process which will never lead to a result?
>
> A: Of course it will not lead to results. Unless someone stands up today and says with certainty: "he was my brother". But where is the body? It has been impossible to find the body […] And several exhumations have been done.
>
> Q; So the requirements of the Court at this point are senseless?
>
> A: Unfortunately, I don't see the point in continuing [the search, HB]."[58]

The prosecutor investigating the disappearance of the 19 Tradesmen described something similar with regard to this case, where the Prosecutor's Office still continues the search for the remains of victims disappeared in the late 1980s. This prosecutor described the ongoing search for the remains of the victims as follows:

> "So, what does the Prosecutor's Office have to do? Another of the demands made by the Inter-American Court is trying to find the 19 disappeared tradesmen. So throughout all this time activities have been undertaken in search of the remains of the disappeared, which has been a very expensive process, and this work has been done throughout the whole Magdalena Medio [region], in the

58 Interview 11.

> Magdalena river, in the riverbeds, in spite of the fact that one of the surviving family members has said: "you will never find these people". Because when they were taken, they were dismembered and they were dumped in a place called the '*Paso del Mango*' in the Magdalena river, […] which it is the torrential part of the river, the strongest, with the strongest current. […] But since the Court includes this obligation to determine the whereabouts of the victims in all its decisions, the investigation of the 19 Tradesmen has gone along this route. The [victims' representatives] have even proposed, I mean, to drain the river! But this cannot be done because it would cause pollution to the environment. […] [A]nd when you look at the report from the judicial police on the activities they have undertaken […] in search of the disappeared, I mean, they have done exploration of lands, they have done excavations, they have gone through the whole region, interviews have been done with over 300 inhabitants… […] And the pressure [we experience] is that when the Inter-American Court does its supervision of compliance, we hand over the information of what has been done. That [the victims' representatives] do not like what we have done, well, that is out of our hands."[59]

Thus, according to these respondents, there have been cases in which the continued supervision of the Inter-American Court has forced the state to spend precious resources on investigations which did not, and will not, lead to results. This is especially true in some cases of enforced disappearance, where the Court has insisted that the State find the remains of victims who have been missing for decades.[60] A task which, according to these respondents, has proven absolutely impossible, despite the state's best efforts. On the one hand, the fact that prosecutors have seen themselves forced to continue investigations that they do not think will lead to results shows that the direct interventions of the organs of the Inter-American system do make an undeniable contribution to the prioritization of certain investigations over others. On the other hand, it also indicates that this contribution does not always lead to the most efficient use of state resources towards the investigation of serious human rights violations committed during the internal armed conflict.

However, the questionable effects of the Court's long-term supervision of investigations described here have been limited to individual cases of a particular type. Specifically, they seem limited to cases where the Court has insisted on finding the remains of people disappeared in particular regions of Colombia. Overall, the prosecutors were more positive in their assessment of the IACtHR's long-term monitoring of their investigations. Even the prosecutor in the case of the 19 Tradesmen, as convinced as he was that the remains of the tradesmen would never be found despite the state's sin-

59 Interview 15.

60 *See* A. Huneeus, 'Pushing states to prosecute atrocity: The Inter-American Court and positive complementarity', in: H. Klug and S. Engle Merry (eds.), *The new legal realism – studying law globally* (Cambridge University Press, 2016), pp. 234-235.

cere efforts, was unwilling to qualify the involvement of the Inter-American system as negative or unfair. Rather, he said, the Court had simply "sought to clarify" the case and had "made the state assume its responsibility" to investigate.[61]

Moreover, one prosecutor explained that in other types of cases, the supervision by the Inter-American system is still very necessary to ensure that there is any investigation to speak of. Here, the prosecutor was referring to the many cases in which the long-running investigations were not progressing as a result of a lack of institutional will to resolve the case. In his words:

> "[T]he investigation has to be exhaustive. If the investigation has been exhaustive, we can decide. Show the Inter-American system that we have done everything possible and take the decision to close the case. […]
>
> Look, there are investigations […] into deaths which, at the time, were not investigated with due diligence and which were diverted. So, today, *today*, with a minute work by prosecutors, accompanied by contextual analysts, by the judicial police, it has been possible to examine and to dig up certain pieces of evidence which no one saw 25 years ago, because there was no concern [about the case, HB] and they were not interested in investigating. Another example: the massacre of El Chengue, which was one of the worst, and also that of El Salado, because it was in the same region. There is still a lot to be investigated. Why? Because we have contented ourselves with punishing the paramilitaries, because they *talked*. You know that they talked, they confessed, so: [they were] convicted. But those who *financed* the paramilitaries, those who neglected their duties, like the Marines, they have not been touched yet! So you cannot say: this is an investigation which has been going for 20 years, let's close it, there is nothing left [to do], let's not further exhaust the [judicial system, HB]. But if you really get into the investigation, you will find elements which will allow you to reopen the investigation and to bring some people [to justice, HB]."[62]

3 Collusion, context and the obligation to conduct an exhaustive investigation

An important feature of the IACtHR's case law has been its constant practice of describing in detail not only the particular facts of the case at hand, but also the historical and political context in which these facts took place and the way in which the facts fit within that larger context. This feature has

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61 Interview 15. After the respondent had described, in detail, the Court's insistence that the State find the remains of the victims, despite the State's sincere but failed efforts to do so, he was asked if he therefore considers the Court's demands in this respect to be "unreasonable" and to unnecessarily complicate the investigations. To this question, the prosecutor responded, emphatically, that he did not. At most, the prosecutor seems to consider the demands made by the victims' representatives during the supervision of compliance hearings to be unreasonable.

62 Interview 12.

been present in the Court's jurisprudence since its very first judgment in the case of *Velásquez Rodríguez v. Honduras*,[63] albeit in embryonic form, and has only become more pronounced as the years went by and the Court's body of case law grew. It specifically recognized this practice in the case of the *La Rochela massacre v. Colombia*, saying:

> "The Court deems it relevant to point out that in all cases submitted to this body, it has required that the context be taken into consideration because the political and historical context is a determinant in element in the establishment of the legal consequences in a case. Such consequences include the nature of the violations of the Convention and the corresponding reparations. For this reason, the analysis of the events that occurred on January 18, 1989, which the State recognized, cannot be considered separately from the context in which they took place. Likewise, their legal consequences cannot be established in a vacuum, which is what would result from their decontextualization."[64]

The Court's practice of analyzing the historical and political context of human rights violations is certainly not specific to its case law against Colombia, but the country's long history of complex and systematic crime and, especially, the presence of the paramilitaries and their links to the state apparatus, give the practice a particular relevance. In cases concerning the paramilitary phenomenon, the Court's analysis of context focused largely on the issue of *connivencia* (collusion) between paramilitary groups and state agents.

That this aspect would receive special attention is logical for two reasons. Firstly, from the point of view of the IACtHR itself, the paramilitary cases concerned human rights violations committed by illegal armed groups, rather than state agents. Therefore, the responsibility of the state for these violations rests on its close ties to these armed groups and its indirect contributions to the commission of their crimes. Secondly, from the point of view of the parties appearing before the Court, the issue of *connivencia* was one of extreme political sensitivity within Colombia. This section will address the various ways in which the Inter-American system and its practice of analysis of context have impacted domestic investigations relating to the internal armed conflict and the complex criminal organizations active in it. That impact starts with exposing the existence of ties between the state and the paramilitaries, since the official denial of such ties will have a chilling effect on possible criminal investigations into the matter.

63 IACHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, paras. 147-148.
64 IACHR *La Rochela massacre v. Colombia (merits, reperations and costs)*, 11 May 2007, para. 70.

3.1 Exposing links between the state and paramilitary organizations

The first instance of the Inter-American system contributing to the public debate about the *connivencia* between state forces and armed groups came in the case of the *Trujillo massacres*, a series of killings perpetrated by paramilitaries and state agents in the municipality of Trujillo in the late 1980s and early 1990s.[65] Because of the scale and gruesomeness of the killings, which included the beheading and dismembering of the local priest, the case gained notoriety on a national level.[66] Many NGOs considered the case representative of the nature of organized crime and the state's relation to it. However, the criminal investigations into the case initiated by the state resulted in nothing but the acquittal of all those indicted for the killings, despite the detailed testimony of a paramilitary informant and collaborator, who had turned himself in to the authorities voluntarily. The state was unwilling to recognize the role of its own agents in the violence committed in Trujillo.

Frustrated with the authorities' attitude towards the case, human rights NGOs decided to "try a relatively new tactic" and take the case to

65 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), pp. 56 - 59. *See also* Centro Nacional para la Memória Histórica *Trujillo – una tragedia que no cesa* (Bogotá, 2008). According to this study by the Colombian Center for Historical Memory, the paramilitary organization responsible for the Trujillo massacres is somewhat atypical of the paramilitary phenomenon in Colombia in the late 1980s and the 1990s. This group had grown out of the Norte del Valle cartel and its goals were therefore primarily focused on drug trafficking, rather than anti-guerrilla warfare. That latter aspect of its operations only emerged because the ELN guerrilla movement, which also had an important presence in the municipality of Trujillo, became a competitor to its criminal business. It was in this context that the group linked up with elements of the State forces in order to eliminate the ELN's presence, and thereby morphed into a paramilitary group. The paramilitary group responsible for the Trujillo massacres also never became part of the AUC, even though it tried (but failed) to join that organization during the demobilization process in order to access the benefits granted by the Justice and Peace Law. For all these reasons, the Center for Historical Memory therefore insists that the paramilitary organization responsible for the Trujillo massacres was a "regional and temporary" alliance between the State and organized crime, separate from the AUC and the paramilitary groups making up the 'second generation' of the paramilitary phenomenon in Colombia. Centro Nacional para la Memória Histórica, *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp. 154-155.

66 There is no consensus as to the number of victims killed in the Trujillo massacres. According to the National Center for Historical Memory's report on the massacres, the State only recognizes 37 victims who were killed during an explosion of violence in March and April 1990, which was the subject of the investigation by the Trujillo Commission which will be described below. Victims' organizations, on the other hand, argue that this is but one episode in a situation of violence which existed in the municipality between 1986 and 1994 and which cost the lives of 245 people. Centro Nacional para la Memória Histórica, *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp.31 – 32. In an interview I had with the prosecutor who was leading the criminal investigation into the massacres at the time of the interview, he mentioned a number of 200 victims. Interview 10, prosecutor at the human rights division of the *Fiscalía General de la Nación*, Bogotá, 27 October 2015.

the Inter-American Commission in March 1992.[67] Based on the evidence presented by the NGOs bringing the case, "the [IACmHR] was prepared to rule against the government", but the government, hoping to escape the embarrassment of being called out by the Commission, proposed a friendly settlement agreement and the installation of an investigative committee for the events surrounding the Trujillo massacres. In an interview in 2002, one of the NGO representatives present at the IACmHR hearing described how he was initially disinclined to accept this proposal, but was convinced by one of the Commissioners to reconsider:

> "I said, first of all this has no legal value, so this is going to set us back four years, to the very start, so that the justice system has to start from zero and so these are four years lost, or four years of impunity won. So the chairperson ordered a lunch break. I left for lunch very confused […] Before leaving one of the Commissioners, a Chilean, came up to me and told me: "Look, you are completely right about everything you said, but I will give you some advice: don't reject this proposal so radically, from what I know this is the first time in the history of the Inter-American Commission that this type of a proposal is made. Although you are right that this will not lead anywhere, at least it will serve to give you a space for a national discussion which you will not have in any other way." And during lunch I decided to accept."[68]

The proceedings before the Commission resulted in a memorandum of understanding between the state and the NGOs involved in the case to set up a special investigative committee, consisting of both state *and* civil society representatives, which would take three months, between October 1994 and January 1995, to investigate the occurrences in Trujillo and produce a report.[69] As Winifred Tate explains, the main task of this investigative commission was not actually to *investigate* the events surrounding the mas-

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67 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 60. As the National Center for Historical Memory explains, during the first decades of its operation, the IACmHR focused its attention on the dictatorships of the Latin American continent and considered Colombia to be a beacon of democracy. This attitude started changing in the 1980s and 1990s, when the Commission made its first country visits to Colombia. The Trujillo case was one of the very first individual cases to be brought before the IACmHR by Colombian NGOs. Centro Nacional para la Memória Histórica, *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp. 281 - 285.

68 Interview with Javier Giraldo, from D. Marrero Avedaño, 'La responsabilidad moral como instrumento de impunidad (2006) *Revista Universitas* 111, p. 270, as cited in: Centro Nacional para la Memória Histórica *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp. 285 – 286.

69 IACmHR, 'Acuerdo de solución amistosa escrito en el caso 11.007 Masacre de Trujillo, tramitado ante la Comisión Interamericana de Derechos Humanos', 6 april 2016, pp. 1-2, available at http://www.eltiempo.com/contenido/politica/justicia/ARCHIVO/ARCHIVO-16556533-0.pdf, last checked: -5-09-2016. *See also* W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 60.

sacres, which had already been done extensively by various NGOs and state institutions before the case was brought to the IACmHR in the first place. Rather, it was to:

> "produce a consensus interpretation of what had happened in Trujillo. […] The commission became an environment where what was known could be spoken and debated; the main issue was not whether the State was responsible but to what extent that State responsibility could be publically reported."[70]

The report produced by the Trujillo commission, which thus represented a consensus between the state and civil society organizations, was groundbreaking in that it unequivocally recognized the responsibility of the state for and the direct participation of state agents in the massacres perpetrated by paramilitary groups in Trujillo.[71] The prosecutor responsible for the domestic investigations into the Trujillo massacre summarized the report's findings with regard to the links between state agents and organized crime in the following way:

> "[Reading from the Trujillo Commission's report:] "the commission has sufficient evidence to conclude that the Colombian state is responsible for the actions and omissions of public servants in the occurrence of the violent events in Trujillo." This is an irrefutable truth, because what can we establish through the investigations? That in effect members of the national army, in collusion or working together with private persons and drug-traffickers who financed their activities, created a paramilitary group, and that they were the ones who in this town of Trujillo and its jurisdiction assassinated whichever person did not serve their interests. All this under the complicit watch of a high-ranking commander who was [based] in a corregimiento called Andinápolis […]"[72]

The commission's conclusions were adopted by the IACmHR at its 88th session in early 1995 and formed the basis for a friendly settlement agreement between the state and the victims of the massacres. Furthermore, the commission's report moved then-President Ernesto Samper to officially recognize the state's responsibility for the massacres.[73] The importance of

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70 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 296.

71 IACmHR, 'Acuerdo de solución amistosa escrito en el caso 11.007 Masacre de Trujillo, tramitado ante la Comisión Interamericana de Derechos Humanos', 6 april 2016, pp. 2 - 3, available at http://www.eltiempo.com/contenido/politica/justicia/ARCHIVO/ARCHIVO-16556533-0.pdf, last checked: -5-09-2016.

72 Interview 10.

73 The 'regional and temporary' character of the paramilitary organization involved in the Trujillo massacres, significantly reduces the reputational costs of the State's acceptance of responsibility. It could effectively accept its responsibility in this case without thereby admitting its complicity in the AUC and the entirety of the 'second generation' paramilitary phenomenon. This situation may help explain the State's willingness to accept responsibility in the Trujillo case.

the work of the Trujillo commission, supported from the beginning by the IACmHR, is underscored by these words of the prosecutor in charge of the still on-going criminal investigations into the events:

> "[I]f it hadn't been for the commission, perhaps this case would not have had the impulse it had, especially when the state recognized that there had been human rights violations in which state agents intervened. I mean, the intervention of the commission was essential.
>
> […]
>
> All of this is to conclude […] that these situations [of violence in Trujillo] were very evident and that, in effect, it was with the intervention by the [Inter-American system] and the victims' representatives that this could become publically known. If not, I repeat, I *insist*, that this would have remained within the municipality of Trujillo […] and it wouldn't have come out."[74]

While the Trujillo commission thus prompted the state to accept its responsibility in one particular, emblematic case of large-scale violence, this did not mean that it was ready to recognize the full extent of relations between paramilitary groups and state institutions. Therefore, the efforts of human rights groups and victims' organizations to bring these relations to the public's attention continued. Given the positive experience these groups had in working with the Inter-American system in the Trujillo case they started bringing more cases before the IACmHR. This resulted in a string of cases concerning massacres committed by the paramilitaries reaching the Inter-American Court, as described in the previous chapter, starting with the case of the *19 Tradesmen v. Colombia* in July 2004.

With the case of the *19 Tradesmen*, the Inter-American Court gave its first contextual analysis of the paramilitary phenomenon in Colombia, specifically the Magdalena Medio region. Like the Trujillo commission, the Court discussed the direct relations existing between the particular paramilitary group responsible for the disappearance of the 19 tradesmen and the state security forces present in the region where it operated.[75] Moreover, it also discussed the state's role in setting up the paramilitary groups in the 1960s and the broad support given to these groups through legislation and regulations which were still in place at the time the facts of the case took place.[76]

This emphasis on the broader, more institutional ties between the state and the paramilitaries was an important contribution to the domestic debate. As one respondent from a leading human rights think-tank described the impact of the *19 Tradesmen* judgment:

> "[The IACtHR has also had] indirect symbolic [effects], for example, the percep-

74 Interview 10.

75 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 86(a) – 86(c).

76 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 84(a) – 84(h).

> tion of certain problems. For example, I believe that a very important indirect symbolic [effect], at the time […] was the fact that paramilitarism was categorized as a shared undertaking with the armed forces and coordinated by the state. This had a very important indirect symbolic impact. After the judgment of the 19 Tradesmen, […] this partially changed the social perception [of the issue of paramilitarism]… No one before had said this!"[77]

This affirmation that "no one had said" what the IACtHR had said should not be taken literally. If one reviews the judgment it becomes clear that the Court bases its findings and decisions in large part on materials which were already available at the domestic level through the investigations of the Prosecutor's Office and NGOs.[78] In fact, in its commentary to the judgment *El Tiempo* described the paramilitary groups involved in the massacre of the 19 tradesmen as the "protohistory" of the paramilitary phenomenon and said that "[i]t is a secret for no one that they emerged as the helpers of the Armed Forces in the fight against the guerrilla".[79]

However, as Winifred Tate explains, in a country like Colombia there is often a big difference between what is "known" and what can be discussed publically, and safely. Like the Trujillo commission, the contribution of the IACtHR is not so much about uncovering new facts, which it is not well placed to do, but in making certain interpretations of events acceptable. This contribution was strengthened with each new judgment recognizing *connivencia* between paramilitaries and state forces delivered by the Inter-American Court, each one chipping away at the state's narrative that its position was one of weakness in the face of, rather than collaboration with, the paramilitary groups.

3.2 Expanding the scope of domestic investigations

The IACtHR's emphasis on the context in which the paramilitaries committed their crimes and, especially, the issue of *connivencia*, did not only have an important narrative impact, it has also contributed more practically to the way in which domestic judicial institutions conduct their investigations into these types of cases. For the Court's own decisions, the recognition of the collaboration between paramilitaries and state forces had been essential for establishing state responsibility for the crimes committed by the paramilitaries. Likewise, the Court considered that, on the domestic level, the

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77 Interview 7. Similarly, another respondent stated that the issue of connivencia had not been a very visible theme before the 19 Tradesmen judgment, but that "it became very visible with the 19 Tradesmen". *See* Interview 1.

78 As Viviana Krsticevic, who had been involved in the case before the IACtHR as a representative of the victims, wrote in El Tiempo about the judgment: "The Court based its decision on the abundant testimonial, expert and documental evidence, among which, the 60.000 pages of domestic criminal investigation." Viviana Krsticevic, 'El caso the los 19 Comerciantes' (opinion article), *El Tiempo*, 3 September 2004.

79 *El Tiempo*, 'Una condena histórica', 25 July 2004.

recognition of this phenomenon should lead to a widening of the criminal responsibility for these crimes. Not only should the members of paramilitary groups be held accountable, members of the Armed Forces, including high-ranking officers, should equally be held accountable for their collaboration with these groups and their contributions to these crimes.

The necessity for domestic prosecutors to expand the scope of their investigations and include state agents as accomplices has been addressed by the IACtHR in several cases, but it was perhaps most clearly stated in the case of the *La Rochela massacre v. Colombia*. This case is the sister-case of the *19 Tradesmen*, in that it concerns the 1989 massacre of a group of judicial officers and investigators sent to the Magdalena Medio region to investigate the disappearance of the 19 tradesmen. While domestic investigation into the massacre had been initiated and some convictions had been rendered, including the conviction of one low-ranking military official, the IACtHR still found that the state had not complied with its obligation to investigate and prosecute, due in part to the fact that the scope of the investigations had been too narrow. In the words of the Court:

> "In context of the facts of the present case, the principles of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred. In addition, the proceedings should have ensured that there were no omissions in gathering evidence or in the development of logical lines of investigation. Thus, the judicial authorities should have borne in mind the factors indicated in the preceding paragraph that denote a complex structure of individuals involved in the planning and execution of the crime, which entailed the direct participation of many individuals and the support or collaboration of others, including State agents. This organizational structure existed before the crime and persisted after it had been perpetrated, because the individuals who belong to it share common goals."[80]

With specific regard to the circle of suspects which had been considered in the domestic investigations, the Court noted:

> "[T]hat the judicial authorities did not develop an investigation into the combination of probative elements that pointed to security forces, including senior military leaders. As a result, the investigations have been partially ineffective. In addition, there was a lack of diligence with regard to the development of a line of investigation, which took into account the complex structure of the perpetration of the crime […]. This failure has caused some of the investigations into the Rochela Massacre to be ineffective, particularly with regard to the investigation into the responsibility of senior military commanders in the area. In this regard, the absence of an exhaustive investigation into the operational structure of the paramilitary groups and their linkages and relationships with State agents,

80 IACHR *La Rochela massacre v. Colombia (merits, reperations and costs)*, 11 May 2007, para. 158.

> including members of the security forces, has been one of the factors that has hindered the investigation, prosecution and punishment of all those responsible. In particular, this affected the determination of possible responsibility of the commanders of the military battalions located within the area of operations of the paramilitary groups tied to the massacre."[81]

These considerations from the La Rochela judgment were reaffirmed and expanded upon in the Court's judgment in the case of *Manuel Cepeda Vargas v. Colombia*, where it said:

> In complex cases, the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. In other words, the protection of human rights should be one of the central purposes that determine how the State acts in any type of investigation. […]
>
> […] It is not sufficient to be aware of the scene and material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries). This, in turn, can lead to the generation of theories and lines of investigation, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime, since they may not be sufficient. Hence, it is not a question of examining the crime in isolation, but rather of inserting it in a context that will provide the necessary elements to understand its operational structure.[82]

Findings such as these, combined with orders to the state to investigate and identify all those responsible for the serious crimes committed by paramilitary groups, have pushed domestic prosecutors to effectively broaden their investigations. Of the 8 prosecutors I interviewed at the Human Rights Division of the National Prosecutor's Office in Bogotá, 6 stated that the Court's case law had affected their investigations in this respect.[83] For example, the prosecutor in charge of the investigations in the *Manuel Cepeda Vargas* case said:

> "When the judgments against Colombia came, like [the Mapiripán massacre], 19 Tradesmen […] and those cases, the Court gave the order to investigate, and since these judgments are against the State, one has to comply with them. So they necessarily pushed, at least to follow this line of investigation. That the

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81 IACHR *La Rochela massacre v. Colombia (merits, reperations and costs)*, 11 May 2007, para. 164.

82 IACHR, *Manuel Cepeda Vargas v. Colombia (preliminary objections, merits, reparations and costs)*, 26 May 2010, paras. 118-119.

83 Interviews 8, 9, 10, 12, 14 and 15.

> abuses were shown, and if there was responsibility, which is another matter, but it is necessary to direct the investigation towards what the Court indicates. In the case of Manuel Cepeda, here [the IACtHR] talks about having to investigate the other members of the Colombian State forces who had participated in the facts by action or omission. So, one necessarily has to take this on and follow this direction and continue the investigation as far as possible."[84]

Likewise, the prosecutor investigating the Mapiripán massacre stated:

> "The thing is that we have to look at both the material and the intellectual authors, or the authors "behind" the crimes. In the Mapiripán case, it is said that there were more than 80 persons entered the town. So we have to establish the identity of these 80 persons and link them to the investigation. And continue the process with them."[85]

As this latter statement illustrates, the demands of the Inter-American Court as to the circle of people who should be included in the investigation are high, thus complicating the work of the prosecutors considerably. However, this is not necessarily considered a bad thing. One prosecutor explicitly stated that the Court had "complicated the work of prosecutors work for the better" by forcing them to look at themes which had thus far remained outside of the investigations, specifically the inclusion of intellectual authors and the involvement of high military officials.[86] Moreover, another prosecutor pointed out that, by alerting them to certain categories of possible suspects who are still to be investigated, the Court can even help prosecutors in their work. In his words:

> ""[T[hese cases which have been brought before the Inter-American Court, and which have been the object of a judgment… which tells us: "Look, the state has been condemned for this and this. A lot is still to be investigated." Because on top of that, they give guidelines for the investigation. "You have to investigate all of this, the army remains to be investigated, the marine, the police." It gives an orientation which one can follow. As I said, it is not easy. […]
>
> Q: But it gives you an orientation. In this case, these things remain to be done…
>
> A: Yes, of course. To plan the police investigations and direct this plan towards these suggestions that the Inter-American Court is making.
>
> Q: Interesting… So, in this sense, it is a support for the work of the prosecutor?
>
> A: A formidable help."[87]

In the same vein, this prosecutor pointed out that the IACtHR does not only make demands of the prosecutors with regard to investigating contexts

84 Interview 14.
85 Interview 15.
86 Interview 8.
87 Interview 12.

and identifying suspects, but that its case law also provides an example for prosecutors of how to go about such matters. In this context, he stated:

> "[O]f course, the decisions of the Inter-American Court serve as a road map for us, because they in some way also construct a context when they make their decisions. Because they collect all this evidence that comes to the Inter-American Commission, which in its turn collects evidence from the victims, the persons who litigate before the Commission, and they construct a context and they know how to hold the state responsible, for example, for omission. If I do not have a context, how can I sentence the state for omission? So, it's important. […] For me [the Court's decisions] are vital."[88]

Another prosecutor also stressed this point, saying:

> "I believe that, for example, when one examines the history of Colombia in cycles, it is possible to find phenomena which repeat themselves. In this sense, the judgments of the Inter-American Court are important because they illustrate a particular moment and, even though they refer to facts which occurred in a particular place, one can, by reading the judgments, find that these same facts, the same *modus operandi*, also occurred in other regions around the same time. With some particularities, of course, but [the judgments] indicate that there is a common *modus operandi*, that there are common elements of victimization, that there is a particular persecution of [certain] populations, for example, and that they were done in the same way, on the basis of the same strategies. So, if one would have the time to examine the judgments one would discover that there are many recurrences and this would illustrate to some extent the routes of investigation which we as prosecutors have."[89]

Another way in which the Inter-American Court's judgments on *connivencia* and the analysis of context have helped prosecutors, is that they can be a support for prosecutors investigating links between state agents and criminal groups when they face backlash or a lack of cooperation from other state entities, particularly the military. One prosecutor repeatedly mentioned the political sensitivity of such investigations and said that, while the situation has improved somewhat over the last years, there were times when conducting such investigations would have been impossible, had it not been for the orders of the Inter-American Court, because it would have been "unsafe" for the prosecutors.[90] Apparently, the fact that the Inter-American Court explicitly orders the investigation of links between the state and paramilitary groups may, under certain circumstances, allow prosecutors to explore lines of investigation which would otherwise be too sensitive to consider. Another prosecutor, referring particularly to her investigations in the case of *Manuel Cepeda Vargas*, also touched on this point, saying:

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88 Interview 12.
89 Interview 9.
90 Interview 8.

> "This was indeed a very important [analysis of] context that the Court did, because here they generalize, they generalize the entire country, analyze [domestic] judgments, […] analyze the state […], the situation in the country… How the state security forces are [organized], how the entire persecution [of UP members] functioned and some links which existed between members of state forces and illegal groups, and they also named them […]
>
> Q: And this was important for the way…
>
> A: Yes, of course, because it [became] easier to tell them: look, not only the Prosecutor's Office is saying this, but also at the international level, in the [Inter-American] Court it is […] proven that there were… That in some circumstances there existed links between the state and some illegal groups."[91]

Finally, one prosecutor argued that the 'lessons' prosecutors learn from the case law of the IACtHR may also have effects in cases which do not have direct ties to the Inter-American system. As she expressed it:

> "So, in this sense, it can be that they instruct one as to routes of investigation which at times one does not see quite clearly [for oneself]. Of course, it is not as if one consults them every day, firstly because there is no time, and secondly because the day-to-day priorities of an office oblige one [to spend a lot of time on administrative tasks]. But apart from this, materials for study do arise [from IACtHR sentences] which supplement the training of the prosecutor. And because of this, the experience which has accumulated with the prosecutors which we have at the moment [at the human rights division] cannot be missed, it is an enormous experience in assuming and confronting these highly complicated cases. And the judgments of the Inter-American Court have contributed to this training. When one has to face a judgment in this way, in one's process and one's investigation, one has to make clear where one can find routes [of investigation], where one can find elements which may lead to those most responsible, and one has to try to comply as best as possible with the orders from these sentences. This entails, I believe, an important process of growth for each prosecutor. In this sense I believe, and of course there may be other opinions, but for me, what occurs to me at this moment is that these judgments are important in that they show also what we can do in other cases."

In short, as these interviews with prosecutors of human rights cases show, the IACtHR's case law on *connivencia* and analysis of context has pushed them to widen the scope of their investigations and the circle of possible suspects for their consideration both because of the Court's insistence that all those involved in the crimes of paramilitary groups be prosecuted and because its own case law sets an example that can serve as inspiration for prosecutors struggling to find the right way to go about such investigations. And while this effect is naturally most keenly felt in cases which have actually been the subject of proceedings before the Court, it has the potential to affect a wider range of cases.

91 Interview 14.

3.3 Developing the practice of analysis of context at the Justice and Peace tribunals

Like the prosecutors in the ordinary criminal justice system, the Justice and Peace tribunals also saw themselves confronted with challenges in the process of doing justice in cases of large-scale and systematic human rights violations. In fact, these tribunals, responsible for the adjudication of demobilized paramilitaries under the Justice and Peace Law described in the previous chapter, deal exclusively with systematic human rights violations practiced by complex criminal structures. And while the Justice and Peace tribunals are, in principle, limited to applying the Justice and Peace law, this did not stop them from looking to the case law of the Inter-American Court for inspiration on how to deal with those challenges.

One of the respondents, a judge at the Justice and Peace tribunals, described how the case law of the IACtHR has helped her and her colleagues to understand their work in terms of contributing to historical memory and, in particular, constructing the context in which the crimes they were dealing with were committed.[92] She described how the first judgment rendered by the Justice and Peace tribunals, in March 2009, had been a disappointment from the point-of-view of truth-finding, as it dealt mostly with low-level crimes like fraud, committed by a paramilitary foot soldier ("*patrullero*") nicknamed "El Loro". The facts of the case did include one emblematic murder, committed against a politician running for mayor of a community under the control of the paramilitaries, but the investigation and the resulting judgment dealt with this murder in an isolated manner, without connecting it to a larger paramilitary structure.[93] The judge explains the outcome of this judgment with reference to the fact that, before coming to the Justice and Peace tribunal, both the prosecutors and the judges had gained their professional experience in the ordinary criminal justice system,

92 Interview 5. The respondent identified this as one of the three main areas in which the IACtHR, in her experience, had influenced the work of the Justice and Peace tribunals. The other two areas she mentioned were the reparations ordered by the tribunals and the supervision of compliance of their judgments. However, since these two areas fall outside the scope of this investigation, they will not be further discussed here.

93 As domestic observers have noted, the isolated treatment of this crime was caused in part by a prior decision of the Supreme Court, which allowed the prosecutor's office to file 'partial indictments', containing only part of the facts with which the accused was to be indicted before the Justice and Peace tribunal. As a result, the procedure before the tribunal would be divided into several parts, each dealing with part of the facts, rather than dealing with all the facts of the case integrally. CCJ, 'La justicia se acerca a las víctimas: la Corte Suprema de Justicia anuló la primera sentencia de la Ley 975 en el caso del paramilitar alias "El Loro"', *boletín no. 38: serie sobre los derechos de las víctimas y la aplicación de la Ley 975*, Bogotá, 16 September 2008, available at http://www.coljuristas.org/documentos/boletines/bol_n38_975.pdf, last checked: 22 September 2016.

where it had been customary, until recently, to focus only on the concrete facts of each case and the material author of those facts.[94]

The judgment was not only ill-received by victims and civil society groups, but also by the Supreme Court, which annulled the judgment and the preceding procedure in July 2009. The main ground for this annulment was the tribunal's failure to address the context in which the individual acts discussed in the judgment were committed and thereby, according to the Supreme Court, its failure to address the crime underlying Law 975: conspiracy to commit crimes. In the words of the Supreme Court:

> "In the legal framework created by Law 975 of 2005, the criminal activities subject to attribution relate to phenomena typical to organized crime, the execution and commission of which is intensified in the context of the internal organization of each group or front. Seen from this angle, the construction of historical truth should take as a starting point the clarification the motives for which the illegal organization was formed, the chains of command, the group's *modus operandi*, its power-structure, the orders given, the criminal plans it elaborated, the criminal actions perpetrated by its members towards the systematic achievement of its goals, the reasons for victimization and the verification of the damages caused individually and collectively, so as to establish both the responsibility of the illegal armed group and that of the demobilized individual.
>
> […]
>
> From the above it is clear that the objectives of the criminal policy established in the Justice and Peace Law are geared towards massive and systematic violations of human rights, the prosecution and sentencing of which are focused on the link to an illegal armed group (conspiracy to commit crimes) and not, as has been maintained [before this Court], on individually perpetrated criminal acts, since, in that case, their investigation and prosecution would fall within the competence of the ordinary justice system.
>
> With this understanding, it is indisputable that, in contrast to ordinary criminal procedures, the judgments which are rendered under the Justice and Peace Law carry a greater argumentative burden in issues related to the examination of macro-criminal phenomena and systematic and generalized violations of human rights, also taking into account the international legal framework. As a result, the judicial officer should not only analyze the concrete case, but contextualize it within the armed conflict, identifying the patterns of violence and other actors, likely of higher rank, who are also responsible."[95]

On the basis of these considerations, the Supreme Court annulled the first instance judgment against alias 'El Loro' and ordered that, in future,

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94 Interview 5. This analysis is supported by another respondent, who was working at the Colombian office of the International Center for Transitional Justice as an analyst of the Justice and Peace system at the time the judgment against El Loro came out. The respondent said that, at first, the prosecutors and judges at the Justice and Peace tribunals approached their cases as 'normal' criminal investigations, as a result of which the first judgment dealt with only one particular case of a murder and did not clarify anything about the paramilitary phenomenon as such. *See* Interview 16.

95 Colombian Supreme Court, *proceso 31539*, judgment of 31 July 2009, pp. 5-6.

all investigations and judgments under the Justice and Peace Law should include a contextualization of the concrete facts of the case within the larger context of the armed conflict and link these facts to a paramilitary group and the accused's position within that group.[96] It then proceeded to give detailed instructions to the prosecutors and judges active in the Justice and Peace tribunals on which elements should be included in their contextualization of the facts and how to go about such contextual analysis.

In relation to these efforts of the Supreme Court to push the Justice and Peace system towards a more complete and contextualized analysis of the historical truth of the paramilitary phenomenon, the International Center for Transitional Justice has pointed out that:

> "the [Supreme Court] echoes what the Inter-American Court of Human Rights has expressed in the case of *La Rochela* in relation to the results required of the Colombian justice apparatus when it comes to the struggle against impunity. In this case, the Inter-American Court emphasized that "the satisfaction of the collective dimension of the right to truth requires the judicial determination of the most complete historical truth possible, which includes the judicial determination of patterns of collective action and of all persons who participated in various forms in said violations and their corresponding responsibility"."[97]

According to the respondent who was a judge at the Justice and Peace Tribunals, the annulment by the Supreme Court of the tribunal's first judgment came as a great shock to the system. It made it clear to the judges that they could not approach their work in the same way they had been used to approaching cases in the ordinary justice system.[98] The annulment thus prompted an important learning process for the judges, who saw themselves forced to explore more appropriate ways of confronting the type of systematic crime covered by the Justice and Peace Law and, in doing so, contributing to the uncovering of the historical truth of the armed conflict. The respondent described how, in this learning process, the judges were advised that they would never truly understand the cases they were working on unless they studied the entire context of violence in which they had taken place. They were further advised to study the judgments of the Inter-American Court dealing with the paramilitary phenomenon in Colombia as examples of how this context could be analyzed and described.[99] One concrete result of the judges' study of the Inter-American case law was the development of a set of protocols for investigating and analyzing context within the trials before the Justice and Peace tribunal.[100]

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96 Colombian Supreme Court, *proceso 31539*, judgment of 31 July 2009, pp. 11-12.

97 *El proceso penal de Justicia y Paz – compilación de autos de la Sala de Casación Penal de la Corte Suprema de Justicia*, joint publication of the International Center for Transitional Justice and the Chamber of Criminal Casation of the Colombian Supreme Court (Bogotá, 2009), p. 22.

98 Interview 5.

99 Interview 5.

100 Interview 5.

In short, the introduction of the practice of analysis of context was the result of a learning process on the part of the judges at the Justice and Peace tribunals on how to confront the paramilitary phenomenon in their case law and contribute to historical memory.[101] In this process the case law of the Inter-American Court has played an important role as an example of 'best practices'.[102] As a result of the learning process described here, analysis of context has now become a central and consistent element of the jurisprudence of the Justice and Peace tribunals. The practice has since been formalized through a 2012 amendment to the Justice and Peace Law.[103]

Just how much the Justice and Peace tribunals have embraced the analysis of context as a tool for the construction of historical memory, and just how much their use of it has been inspired by the Inter-American human rights system, is best illustrated by a recent decision of the Colombian Supreme Court. The decision was based on an appeal by the National Prosecutor's Office against a judgment delivered in October 2014 concerning the crimes committed by the Catatumbo Block of the AUC.

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101 This idea that the introduction of analysis of context by the Justice and Peace tribunal has been the result of a learning process is further supported by the tribunals' case law. One of the tribunal's judgments describes analysis of context as a "'good practice' developed by the judiciary at Justice and Peace which contributes to the construction of judicial truth in the context of the transitional process being carried out in the country". Tribunal Superior del Destrito Judicial de Bogotá – Sala de Justicia y Paz*, case no. 11-001-60-00 253-2006 810099*, judgment of 30 October 2013, para. 358.

102 The assertion that the Inter-American Court has been an important inspiration for the introduction of the practice of analysis of context is reflected in the tribunals' case law. For example, in one of the earliest judgments to include a proper analysis of context, the Justice and Peace tribunal says that: "[the Tribunal] considers that it is necessary to undertake a judicious contextualization of the violations of human rights on which it will rule below for two reasons […]. A second reason for an adequate contextualization is based on the constitutional and international obligation of the Colombian State to seek the truth of what happened in the face of grave violations of human rights. […] For these reasons, the Tribunal […] being seriously committed to the reconstruction of the truth, which is the first need of the victims and of society, and keeping in mind that according to the jurisprudence of the Inter-American Court, the judgment is the first form of reparation for the victims, presents its reconstruction of the context in which the violations of human rights took place […]." Tribunal Superior del Destrito Judicial de Bogotá – Sala de Justicia y Paz, *case no. 110016000253200782701*, judgment of 16 December 2011, paras. 175 and 185. Recent case law has been more explicit on this point. For example, in a case from 2014, the tribunal cited Inter-American case law to establish that 1.) the victims and society as a whole have a right to learn the truth of what occurred during the internal armed conflict; 2.) in certain types of cases the political and historical context is necessary to properly establish the legal consequences of the case; and 3.) the obligation to construct context and find those most responsible for systematic crimes rests on the State as a whole, which includes the judiciary. Tribunal Superior del Destrito Judicial de Medellín – Sala de Justicia y Paz, *case no. 110016000253-2006-82611*, judgment of 9 December 2014. Moreover, the Colombian Supreme Court has affirmed, in a judgment which will be further discussed below, that "[t]he analysis of context has its origins in the decisions of the Inter-American Court of Human Rights[…]".Colombian Supreme Court, *SP16258-2015, Rad. 45463*, judgment of 25 November 2015, p. 139.

103 Law 1592 of 2012, adopted on 3 December 2012.

The first-instance judgment which was the object of the appeal contains a 150-page section titled "About the context – judicial truth finding" describing the background of the Colombian civil war, the origins of the paramilitary phenomenon in general and of the AUC and its Catatumbo Block in particular, the consolidation of the Catatumbo Block, its internal structure, finances etc.[104] In this detailed analysis, the tribunal also discussed the relations between the Catatumbo Block and certain state institutions, including military intelligence and the Prosecutors Office, and business associations and the contributions of these institutions to establishing and maintaining the paramilitary group and their support to its organization.[105]

On the basis of these contributions, the tribunal found that the state institutions and business associations in question were responsible for the crimes committed by the Catatumbo Block under a theory of indirect perpetration through control of an organization.[106] As a result, the tribunal found that the National Prosecutors Office should initiate an investigation into the involvement of these partners, with an eye to establishing the criminal responsibility of individual officials for these crimes and prosecuting them in the ordinary justice system.[107] Furthermore, the tribunal ordered the state institutions identified in its judgment to undertake an internal investigation into its performance during the internal armed conflict and to make official apologies to the victims.[108]

The Prosecutor's Office objected to the conclusions the tribunal had drawn from the contextual analysis, particularly where they pertained to the criminal responsibility of institutions and individuals who were not part of the trial. It appealed the judgment before the Supreme Court, demanding that the entire section on the analysis of context would be annulled, as it was "not supported by the evidenced presented over the course of the trial and [was therefore] speculative and originated from private knowledge".[109]

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104 Tribunal Superior del Destrito Judicial de Bogotá – Sala de Justicia y Paz, *case no. 11001600253200680008 N.I. 1821*, judgment of 31 October 2014, section 4, pp. 120 – 276.

105 Idem, paras. 534 – 586.

106 Idem, paras. 544 – 575. More specifically, the tribunal argued that, allthough these institutions were not part of the paramilitary organization, they did contribute to this organization and were therefore responsible for its crimes on the basis of what it called the "hourglass theory". Under this theory, the paramilitary group (particularly its leadership) and its civilian and official partners form two parts of an hourglass, which mutually nurture and strengthen each other while working towards a common goal. According to the tribunal, the relationship between the leadership of the paramilitary group and its partners should not be conceived as a hierarchical one and the contributions of the partners was as vital to the operation of the paramilitary group as that of its commanders. As a result, the tribunal argued, the civilian and official partners of the paramilitary group can, under certain cricumstances, be considered to be among those most responsible for its crimes.

107 Idem, paras. 567 – 573.

108 Idem, paras. 574 – 575.

109 Colombian Supreme Court, *SP16258-2015, Rad. 45463*, judgment of 25 November 2015, p. 146. In its analysis of context, the tribunal had supplemented the evidence presented by the prosecutors with sociological studies and insights from previous judgments from the Justice and Peace tribunals not cited by the prosecution.

In its response to this demand, the Supreme Court discussed both the origins of the practice of analysis of context in the Inter-American human rights system and the proper role and purpose of this practice in domestic criminal proceedings. It noted that:

> "[The analysis of] context relates to a tool facilitating the right to truth, to which both the victim and society as a whole are entitled […], with an aim to bringing to light these hidden events which should be exposed to the community so that the necessary corrections may be implemented to prevent their repetition […] as well as integrating them into the historical memory as accurately as possible.
>
> The analysis of context has its origin in the decisions of the Inter-American Court of Human Rights, supported by the flexibilization of the rules on evidence in favor of the victims, offered in proceedings where (i) the State is punished rather than individuals, (ii) there is a reversal of the burden of proof and (iii) it falls on the defending state to refute the context and, thereby, its international responsibility, all of these [being] aspects which make it impossible to simply translate this test to internal criminal law, which is of an individual nature. In this sense, the Inter-American Court of Human Rights distinguishes the process for establishing State responsibility provided by that court from criminal proceedings before domestic courts […]."[110]

Thus, according to the Supreme Court, in translating the practice of analysis of context from the Inter-American system to domestic criminal proceedings, the differences between these types of proceedings have to be taken into account. Whereas an analysis of context may suffice, in the context of a case before the IACtHR, to establish state responsibility, it is not enough to establish individual responsibility in domestic proceedings, as the Justice and Peace tribunal had done. While the analysis of context is an indispensable tool in the investigation of complex and systematic criminal phenomena and in contributing to historical memory, it cannot be used as the sole basis for establishing criminal responsibility. Or, in the words of the Supreme Court, "context helps to understand, but is insufficient and inappropriate for attribution".[111]

With regard to the judgment under consideration, the Supreme Court noted that the tribunal's transgression had no effect on the findings regarding the responsibility of the accused in the case at hand, all of whom were paramilitary commanders. It was therefore not necessary to annul the entire paragraph describing context, as the Prosecutor's Office had demanded. Rather, the Supreme Court found it sufficient to declare that the paragraphs specifically addressing the criminal responsibility of state institutions and individual officials exceeded the tribunal's competence.[112]

110 Idem, p. 139.
111 Idem, p. 142.
112 Idem, p. 155.

The developments described above make a number of things clear. Firstly, analysis of context has quickly become a central element of the work of the Justice and Peace system. In the space of a couple of years, the Supreme Court has gone from ordering the Justice and Peace tribunals to analyze the crimes they are confronted with within the wider context of the paramilitary phenomenon, to correcting overzealous applications of this investigative tool. Secondly, the embrace of analysis of context by the Justice and Peace system has been inspired, to a large extent, by the case law of the Inter-American Court of Human Rights, as was confirmed by the Supreme Court in its appeals judgment in the case concerning the Catatumbo Block. Thirdly, this contribution of the Inter-American Court has inspired a change to the normative framework for the Justice and Peace trials, in the sense that analysis of context is now required by law. However, the reception of Court's doctrine on contextual analysis does not seem to be based on a sense of legal obligation on the part of the judges at the Justice and Peace tribunal or the Supreme Court. Rather, it seems that the case law of the Inter-American Court simply provided a good example for these judges on how to deal with cases concerning systematic crime patterns and complex criminal organizations.

3.4 Formalizing the practice of analysis of context in the ordinary criminal justice system

In the Justice and Peace system, the introduction of a more or less coherent practice of analysis of context was thus the result of a process of trial and error, in which the judges recognized the Inter-American case law as an example of a more productive way of dealing with the types of phenomena they saw themselves confronted with in their work. The practice was first taken up by judges and prosecutors in response to the annulment of the very first judgment produced by the Justice and Peace tribunal and was later formalized through a change in the Justice and Peace law. Likewise, prosecutors from the human rights division of the Prosecutor's Office sometimes orient themselves on the case law of the IACtHR for inspiration on how to tackle systematic patterns of human rights violations and identify all those responsible for them.

Moreover, the practice of analysis of context has been formalized in the ordinary justice system from "a more academic point of view", as one respondent expressed it,[113] as part of a new system of criminal investigation introduced through Directive 0001 of 2012,[114] published in October of that year and following the adoption of the Legal Framework for Peace

113 Interview 16.

114 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012.

described in the previous chapter. The need to introduce such a new system of criminal investigation was based on the idea that the old system "which indicates that all crimes should be investigated at the same time and in the same way and, on top of that, as if they were isolated acts, hamper the creation of a true criminal policy which materializes in the design and implementation of strategies which make it possible to effectively fight the various criminal phenomena attributable to criminal organizations".[115] Furthermore, it was believed that the old system "has led to high impunity rates, inasmuch as the economic, administrative, logistical and human resources of the National Prosecutor's Office are not strategically utilized towards the achievement of general objectives".[116] To change this situation and create a more effective system, geared especially towards the investigation and prosecution of complex criminal organizations, the Directive pursued two main strategies: firstly, the introduction of a policy of prioritization of cases, combined with the introduction of a set of objective criteria for prioritization; secondly, the investigation of prioritized cases taking into account their broader context and the creation of a special unit within the National Prosecutor's Office for the analysis of such contexts.

The main architect of the new system of criminal investigation introduced through the Directive, and especially the part pertaining to the contextual analysis of cases, was Alejandro Ramelli Arteaga, an expert in international human rights and international humanitarian law who also became the first director of the National Unit for Analysis and Contexts (UNAC).[117] Ramelli's international orientation has been an important factor in the introduction of the new system of criminal investigation and the creation of the Unit for the Analysis of Context. As one respondent, who had worked with Ramelli in the Unit for the Analysis of Context in its first years in operation, explained:

> "As you know, [the analysis of] contexts is not our original idea. Contexts were first constructed In Tokyo, Yugoslavia, Rwanda, all of those [international courts]. And the Inter-American Court, in judgments like those in the cases of *Manuel Cepeda* and *19 Tradesmen* and *Las Palmeras*, has said to the Colombian state: if you need to arrive at the investigation and prosecution of those most responsible for all of these massacres, [then] for this you need to reconstruct contexts which will bring you to understand how these criminal structures were [organized] through which they were planned, which are the concepts and requirements relevant for crimes against humanity and war crimes. So we took these experiences in order to apply them to concrete cases. […]

115 Idem, p. 25.

116 Idem, p. 26.

117 Interview 16. *See also* 'Quiénes están detrás de los grandes casos en la Fiscalía', *Semana*, 11 December 2013 and 'Renuncia fiscal que priorizó investigación de magnicidios', *El Tiempo*, 7 February 2014. The first strategy mentioned here was in fact a direct fruit of the Legal Framework for Peace, which had instructed the National Prosecutor's Office to fix criteria for the priorization of cases.

> Q: What I asked myself when I read about the [UNAC] and the [policy of] prioritization […] it reminded me of some of the things the Inter-American Court has said. If I am not mistaken it was in the case of *La Rochela*, where it said that one cannot investigate these cases as if they were isolated cases, that it has to be done in an integral way. Was this an inspiration for the policy [of prioritization and analysis of contexts], or is it a separate thing?
>
> A: Yes. This was an orientation of the Attorney General, who has this experience in the international tribunals, and, above all [Alejandro Ramelli, HB], who also is a connoisseur of international law. So, all of these experiences in the inter-American Court, the judgments of the Inter-American Court, as well as the [ICTY, HB], the *ad hoc* tribunals, served to… The Attorney General says: the only way of combatting organized crime is through the construction of contexts, through prioritization and through joining cases."[118]

The influence of this international orientation on the introduction of the new system of criminal investigation is also clear from the Directive itself, which contains an exhaustive analysis of relevant international law and practice.[119] On the basis of this analysis, the Directive argues that the new system of criminal investigation is "inspired on the practice of the international criminal tribunals" and that it "in line with international standards for the protection of human rights", especially the case law of the Inter-American Court.[120] It should be noted that the vast majority of this lengthy analysis of international law and practice focuses on the prioritization of certain cases over others as part of the new system for criminal investigation, which was evidently considered the more controversial element. With regard to the contextual analysis of crimes, the Directive limits itself to one paragraph, which notes that:

> "[T]he Inter-American Court has favored a differentiated treatment of cases depending on their complexity. In the same way as it promotes a policy of prioritization focused on the investigation of macrocriminal contexts in which systematic crimes were committed, the Court has demanded a special investigation of context for the most serious crimes committed against the [American] Convention. It has pronounced itself along these lines in the case of *Manuel Cepeda v. Colombia*, where it asserted that: "[…] in complex cases, the obligation

118 Interview 12.

119 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012, pp. 4 – 16. *See also* Interview 16. With specific regard to the impact of the Inter-American system on the adoption of the policy of analysis of context by the National Prosecutor's Office, this respondent noted that this impact is especially clear in the policy documents introducing this policy. She said that "you can see the impact [of te IACtHR] in those documents".

120 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012, p. 4.

> to investigate brings with it the duty to direct the efforts of the State apparatus towards unravelling the structures which allowed these violations to happen, their causes, their beneficiaries and their consequences, and not only [towards] discovering, prosecuting and, where appropriate, punishing the direct perpetrators.[…]""[121]

Finally, the impact of the Inter-American system on the adoption of the analysis of context as part of the new system of criminal investigation is underscored by the 'Manual for Contextual Analysis' developed for the newly created UNAC by the International Center for Transitional Justice.[122] The Manual was drafted in the context of a cooperation agreement between the ICTJ and the National Prosecutor's Office and in close cooperation with analysts and prosecutors from the UNAC. The very first sentences of the Manual's introduction read as follows:

> "According to the [IACtHR], the analysis of the historical, political and legal context is a decisive factor for achieving an adequate understanding of violations of human rights and establish the causes which, with respect to concrete cases, generate the international responsibility of States. In particular, this type of analysis makes it possible to identify and characterize complex criminal structures, their plans and modus operandi, as well as making it possible to understand the nature of complex crimes through the patterns which explain their commission. In this way, the IACtHR considers that the analysis of context is a requirement for compliance with the State's obligation to investigate with due diligence, as it determines "the following of logical lines of investigation."[123]

However, the Manual also illustrates the limits of the IACtHR's influence on the prosecutorial policy of analysis of context. While it is cited in the introduction as an argument for the adoption of such a policy, the more substantive chapters of the manual setting out the recommendations and guidelines for undertaking contextual analyses in particular cases, hardly mention the Inter-American Court's case law at all.[124] Rather, it relies on the experience of international criminal tribunals and domestic criminal systems dealing with cases of complex criminal structures to guide the work of the UNAC. This is only logical given the fact that the Inter-American Court, as the Supreme Court had already established in the context of the Justice and Peace trials, is not a criminal court and that the goals and outcomes of its proceedings are fundamentally different from those conducted in the criminal justice system. Thus, the Inter-American system's contribution to the development

121 Idem, pp. 6-7.

122 ICTJ, 'Manual de análisis contextual para la investigación penal en la Dirección Nacional de Análsis y Contextos (DINAC) de la Fiscalía General de la Nación' (ICTJ, June 2014).

123 Idem, p. 1.

124 It is cited once more in a paragraph discussing the 'importance of the method of analysis of context in the international experience', where the Manual mentions that the IACtHR undertakes a contextual analysis in each case with which it sees itself confronted. Idem, p. 36.

of the policy of contextual analysis was felt most during the earlier stages of this process, when the policy of analysis of context was first conceived and developed in Colombia,[125] rather than in its practical application.

Here, it is worth pointing out an interesting contrast between the application of the official policy of analysis of context and the practice of some of the individual prosecutors working on human rights cases, as described above in section 3.2 of this chapter. Those prosecutors stated that they did see the analyses of the IACtHR as an example from which they draw inspiration for their own investigations. This difference can perhaps be partly explained from the fact that the official policy of contextual analysis and the work of the UNAC were developed by experts and based on a more academic perspective, which includes a broad knowledge of international case law and experiences. It cannot be expected that each individual prosecutors has the same level of knowledge and international orientation. These prosecutors may not be completely up to speed on the practice of the ad hoc tribunals, which is very far removed from their own work. However, they are familiar with the IACtHR and its case law, which has explored situations very similar, and sometimes directly related, to their own work.[126]

In conclusion, it is clear that the case law of the Inter-American system on *connivencia*, the context of the paramilitary phenomenon in Colombia and, more generally, the need to analyze systematic human rights violations on the wider context in which they were perpetrated, has had an

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125 *See also* Interview 16. This respondent has worked both for the ICTJ in Colombia and for the Colombian Ministry of Justice, during the years in which the policy of contextual analysis was developed. It should be noted that this respondent's remarks were not made with specific reference to the Manual prepared by the ICTJ.

126 This disconnect between the official policy of contextual analysis of human rights violations (and DINAC, which was created as part of this policy) and the work of individual prosecutors came up several times during the interviews with prosecutors from the human rights division. In particular, two prosecutors who had worked with the DINAC before coming to the human rights division reflected at length on the lack of coordination between these two departments of the Prosecutor's Office and, more generally on the lack of clarity which seem to exist within the Prosecutor's Office about the status and utility of the work done by DINAC. *See* interview 12 and Interview 9. The latter of these two prosecutors did point out that the movement of staff between DINAC and the Human Rights Division, of which she is an example, may help to overcome this problem. Other criticisms of the practical functioning of DINAC and the policy of contextual analysis of human rights violations encountered during this study include the differences in understanding and application of the policy across government agencies (interview 16, saying that, while agencies like the Justice and Peace tribunals, the Prosecutor's Office and the Ministry of Justice may use the same "buzzwords" they don't seem to understand the underlying concepts in the same way); and the low quality of the contextual analyses produced and used by certain parts of the prosecutor's office (Interview 2, claiming that the contextual analyses produced by the prosecutors conducting cases before the Justice and Peace tribunals were of particularly poor quality, as they focused on patterns of violence (i.e. how certain crimes were committed) rather than the criminal structures underlying the crimes). However, a full exploration of these criticisms of the practical application and effectiveness of the policy of contextual analysis of human rights violations falls outside the scope of this study.

important impact on the way in which investigations into such violations are conducted in Colombia and the lines of investigation prosecutors follow. Firstly, the exposure given by the system to the links between the state and certain illegal armed groups has had important narrative effects by making the state's denial of this fact less credible and its recognition more acceptable to a broader audience. Secondly, the exposure of these links and the Court's orders to investigate state agents involved in crimes perpetrated by illegal armed groups forced prosecutors investigating Inter-American cases to widen the scope of their investigations. Thirdly, the example set by the Inter-American case law on how to perform a contextualized analysis of human rights violations inspired domestic prosecutors and judges, both in the ordinary criminal justice system and in the Justice and Peace tribunals, as to how to deal with similar patterns of violence and complex criminal structures in their own work. Fourthly, the Inter-American case law, along with the practice of the international criminal courts, inspired the formalization of the practice of analysis of context through Directive 0001 of 2012.

4 Overcoming practical obstacles and a lack of institutional will to investigate and prosecute human rights violations

As the final paragraphs of the previous section made clear, the lack of results in investigations into serious human rights violations committed during the civil war is often the result of the lack of a true (political) will to investigate such cases. Lack of political is a phenomenon which is difficult to identify and prove and therefore potentially one of the most stubborn obstacles to the successful investigation and prosecution. It can reside both with the individuals directly responsible for the investigation and prosecution, or with the wider structures in which this individual operates, as a result of which they are not given the resources, institutional support and cooperation necessary to properly do their already complex work. The lack of a wider, institutional will to investigate and prosecute is especially pronounced in cases where there is an involvement of (high-ranking) state officials. While a lack of will to investigate and prosecute is thus very difficult to address, the Inter-American system has had some important effects in this respect. These effects are mostly limited to individual cases, but there have been some wider, normative effects as well.

Overcoming a lack of political will to investigate and prosecute serious human rights violations often begins with identifying and exposing this lack of will, and, more importantly, its causes. As described above in section 3.1, the Inter-American system has made important narrative contributions by exposing links between state agents and illegal armed groups. By exposing these links, the Inter-American Court has also had certain practical effects on domestic investigations into the crimes committed by illegal armed groups. It achieved these effects not only by expanding the scope of the investigations and directing them towards the state agents involved in

these crimes, as described above in section 3.2, but also by underlining the fact that their failure thus far had often been due to the fact that the state agents responsible for them were themselves linked to the very groups they were meant to be investigating. Exposing such corruption in the investigations is an important first step towards putting them on the right track.

4.1 Taking unwilling officials off the case

One of the clearest examples of the effects of exposure of corruption in domestic investigations, is the Trujillo case and the effects the report of the Trujillo Commission had on the way in which the domestic investigations were conducted. Summarizing the failures of the domestic investigation, the Trujillo Commission's conclusions on these failures and their effects, the prosecutor currently overseeing the investigations said:

> "What happened at the time? The investigation [by the local authorities], what did it produce? All [the suspects] were absolved in 1991. So from there, when the case moved to the National Prosecutor's Office in the year 1994 and the Colombian state, represented by then-president Samper, says that human rights were indeed violated [in this case] and that there was involvement of state agents… if it hadn't been for that and for the victims' organizations, well, maybe this would not have been known and it would have stayed on a shelf, without being investigated. […]
>
> The second [conclusion from the Trujillo Commission's report] says: "The Commission has sufficient evidence to conclude that the state is responsible because its judicial bodies – about which I was speaking just now – and disciplinary bodies failed to collect relevant evidence, ruled against the procedural reality and committed other grave irregularities which impeded the identification and punishment of those responsible for the violent events in Trujillo." Quite right. At that time, which was disastrous for Colombia […] with all the violence which we were going through here, money was the most important factor. So much so, that we had to take these cases from the local jurisdiction, which in this case was Buga, or, well, Valle del Cauca. We had to take the process away form there and bring it to Bogotá, because of the corrupting powers which existed at the time, as a result of which all [the accused] had been absolved [even though] there were eyewitnesses of the events. […]"[127]

127 Interview 10. To illustrate the level of corruption in the original investigations: one of the eyewitnesses referred to in the quote was a local who had collaborated with the paramilitary group responsible for the massacres and who decided to seek protection from and testify to the local authorities when he realized he would probably also be killed because of the information he had. In his testimony, he described in detail a massacre he had witnessed and participated in, including the arrest of the victims, the torture to which they were subjected in order to get them to name other 'guerilla collaborators' and their eventual killing. However, the local authorities declared the witness mentally unfit and his testimony was disregarded entirely. Not much later, the witness was disappeared. After the presentation of the Trujillo report, weekly magazine Semana published excerpts of his testimony. *See* 'Testimonio atroz', *Semana*, 3 June 1995.

As this quote illustrates, the investigations were moved from the local prosecutor's office to the Human Rights Unit of the National Prosecutor's Office in Bogotá as a result of the Trujillo report.[128] Following the conclusions and recommendations of the Trujillo Commission, as adopted by the Inter-American Commission itself, it was recognized that the regional circumstances, particularly the lure of money and the threat of violence, made an independent investigation impossible. Therefore, the case was transferred to a prosecutor who would have the will to properly investigate the case.

After the National Prosecutor's Office took over the case, the investigations started moving forward. However, that the case had been moved to a different prosecutor did not mean that it no longer fell under the jurisdiction of the regional courts, which were still subject to the same corruptive powers which had frustrated the investigations in its earlier stages. Thus, when the National Prosecutor's Office formally filed accusations against a number of individuals for their involvement in the Trujillo massacres in 2008, the regional court hearing the case annulled the charges, a decision which was in turn annulled by the regional appeals court.[129]

Following these obstructions by the regional court and the further delays in the proceedings caused by them, the National Prosecutor's Office filed a petition with the Supreme Court requesting that the case would be moved to the jurisdiction of the regional courts in Bogotá. The petition was based on the argument that the Trujillo Commission's conclusions regarding the regional circumstances making an independent investigation impossible were still valid and that its reasons for recommending the case be transferred to the National Prosecutor's Office applied equally to the jurisdiction of the regional court.[130] The Supreme Court shared this analysis and granted the request to move the Trujillo case to the Specialized Penal Court in Bogotá.[131] Having cited both the Trujillo Commission's recommendations and the Inter-American Commission's resolution adopting these recommendations, the Supreme Court stated:

> "It is clear that the recommendations formulated by the Inter-American Commission to the Colombian state also concern the judicial branch, and it is their duty, in this case that of the Supreme Court, to ensure that those observa-

128 This causal relation was confirmed explicitly in the Supreme Court's decision to take the case out of the jurisdiction of the regional courts in Buga and transfer it to Bogotá, discussed below. Having cited the recommendations made by the Trujillo Commission and the Inter-American Commission's resolution adopting these recommendations as its own, the Supreme Court then states: "In so far as the National Prosecutor's Office is concerned, it complied with the re-allocation of the investigations into the violent events in Trujillo, and it was thus that the process registered under no. 3995 was transferred from the Regional Office in Cali to the Human Rights Division in Bogotá […]" CSJ, case no. 32002, decision of 15 July 2009, p. 10.

129 CSJ, case no. 32002, decision of 15 July 2009, pp. 2 – 3.

130 Idem, pp. 5 – 6.

131 Idem, p. 14.

> tions are complied with, especially those related to the investigation and prosecution of public servants and private individuals involved in the violent events of the Trujillo massacre, where crimes against humanity and grave violations of international humanitarian law were committed, so that in this case it becomes imperious to [make sure] that the official responsible for advancing the trial will be located outside the department Valle del Cauca, where circumstances of public order, security and tranquility will permit the normal exercise of justice […]"[132]

Thus, in the case of the Trujillo massacre, the intervention of the Inter-American Commission and its exposure of the corruption in the domestic investigations had a practical impact on overcoming a lack of will to investigate the human rights violations in question, because they caused the investigations to be taken out of the hands of judicial officers who lacked this will and transferred to officials who did have an interest in conducting proper investigations and resolving the case.

4.2 Revision of previous acquittals and the principle of ne bis in idem

Having thus successfully moved the proceedings concerning the Trujillo massacres out of the jurisdiction of the regional prosecutors and courts and into the hands of more independent officials, another obstacle presented itself: the acquittal of a number of suspects in 1991, on the basis of the corrupted investigations exposed through the Trujillo Commission's report.

Given the fact that Colombia has enshrined the principle of *ne bis in idem* in its constitution, it can be argued that this previous acquittal would make it impossible to continue the investigation and prosecution of the individuals in question, notwithstanding the fact that the acquittal was the result of corrupted proceedings. However, as discussed above in Chapter 3,[133] the Inter-American Court has consistently held that the principle of *ne bis in idem* cannot stand in the way of investigation and prosecution of serious human rights violations when it is established that the previous acquittal was the result of the state's failure to uphold its obligation to investigate and prosecute with due diligence. In such cases, the Court argues, the right of the victims to truth and justice must prevail over the rights of the accused.

This jurisprudence by the Inter-American Court has been incorporated, to an extent, into the Colombian legal order through a decision of the Constitutional Court taken in January 2003. In this decision, the Constitutional Court was called to interpret Article 220(3) of the code of criminal procedure in force at the time, which established that a motion for revision can be brought against a judgment in a criminal case, when new facts or elements of proof come to light after a conviction, which establish the

132 Idem, pp. 13 – 14.

133 *See supra* Chapter 3, Section 2.4.

innocence of the convicted person. The petition argued that it was an unfair limitation of the rights of the victims that new evidence could only lead to the acquittal of a previously convicted individual and not the other way around.[134] Thus, the question the Constitutional Court saw itself confronted with was whether the constitutional principle of *ne bis in idem* allows for an interpretation of Article 220(3) in which a motion for revision of a judgment could also be based on new evidence establishing the guilt of a previously acquitted individual.

In answering this question, the Constitutional Court considered that the principle of *ne bis in idem* is not absolute, but that it should be balanced against the rights of the victims to truth and justice. The existence of these rights of the victim was based on the case law of the Inter-American Court, particularly its judgment in the case of *Barrios Altos v. Peru*, and the Constitutional Court's previous reception of this case law.[135] And while the Constitutional Court considered that the discretion to perform this balancing exercise belonged primarily to the legislator, its results are subject to a control of constitutionality.

In its analysis of article 220(3), the Constitutional Court found that, in general terms, the legislator had not overstepped its discretion to balance the rights of the accused against the rights of the victims, but, rather, upholds the general interest of all individuals in legal certainty and the limitation of the state's *ius puniendi*. However, the Constitutional Court found it necessary to make a distinction between cases of 'normal' crimes and cases involving human rights violations and grave violations of international humanitarian law.[136] In the latter type of case, the Court considered that the state's obligation to investigate and prosecute are "much more intense" than in cases of normal crimes[137] and that, in allowing a situation of impunity to exist in such cases, the state does not only violate the rights of victims but also its international obligations.[138] As a result, the Constitutional Court concluded that the balance struck in article 220(3) of the code of criminal procedure poses a disproportionate limitation on the rights of victims in cases of human rights violations and grave violations of international humanitarian law.[139]

To resolve this situation, the Constitutional Court decided that article 220(3) of the code of criminal procedure should be interpreted in such a way as to allow for the revision of an acquittal in cases concerning violations of human rights and international humanitarian law, where the acquittal had been the result of a failure of the state to investigate and prosecute with due

134 Constitutional Court, *Sentencia C-004/03*, judgment of 20 January 2003, p. 9.
135 Idem, pp. 22 – 25.
136 Idem, p. 28.
137 Idem, p. 30
138 Idem, p. 32.
139 Idem, p. 33.

diligence.[140] In order to protect the interest of legal certainty, the fact that the acquittal is the result of such a failure on the part of the state has to have been established by a domestic court or an international body tasked with the protection of human rights. As examples of international bodies whose decisions could serve as the basis for the revision of a previous acquittal, the Court explicitly mentioned both the Inter-American Court and the Inter-American Commission.

Through this decision the Constitutional Court thus created a legal basis for the revision of acquittals of which the Inter-American Court or Commission has established that they are the result of corrupted or otherwise faulty proceedings. When the code of criminal procedure was revised through Law 906 of 2004, this interpretation of the Constitutional Court was formalized in article 192(4) of that law, which reads:

> "An action of review may proceed against final judgments under the following circumstances:
>
> […]
>
> (4) when, after a judgment concerning violations of human rights or grave violations of international humanitarian law, a severe breach of the State's obligation to seriously and impartially investigate those violations is established through the decision of an international body for the supervision and control of human rights, whose competence the Colombian State has formally accepted. In such cases it will not be necessary to prove the existence of a new fact or of proof unknown at the time of the proceedings."

The Constitutional Curt's decision is based partly on Inter-American case law concerning the right of victims of serious human rights violations to truth and justice. Other aspects of the judgment, like its emphasis on the state's obligation to investigate and prosecute serious human rights violations, are not based explicitly on Inter-American case law, but the language used in those parts clearly echoes the Inter-American Court. It is therefore submitted that Inter-American case law, through its reception by the Constitutional Court, has had a normative impact on creating a basis for revising acquittals resulting from investigations in which there was no real will to hold accountable those responsible for serious human rights violations.

Once established, this basis for revising acquittals has become an important tool for prosecutors to reopen old investigations and correct failures and corruption on the part of state officials. It has done so in several cases where such failures have been established by the Inter-American Court[141]

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140 Idem, pp. 35 – 36 and 40.

141 For example, on 6 March 2008 the Colombian Supreme Court annulled a judgment acquitting two members of the armed forces of charges relating to the disappearance of the 19 Tradesmen. *See* IACHR, *19 Tradesmen v. Colombia (supervision of compliance)*, Order of 8 July 2009, p. 12 para. 14.

or the Inter-American Commission.[142] For example, in response to a petition brought by the National Prosecutor's Office and on the basis of the Inter-American Commission's recommendations, the Supreme Court has annulled the previous acquittals in the case concerning the Trujillo massacre on 22 September 2010.[143] In doing so, the Supreme Court cleared the way to prosecuting those responsible for one of the most infamous massacres of the internal armed conflict.

5 Conclusion

This chapter demonstrated that prosecutors investigating cases of human rights violations in Colombia face a range of obstacles in their work. On the one hand, security concerns as a result of the persistent situation of violence and – until very recently – armed conflict make it difficult for prosecutors to collect evidence and gain the cooperation of witnesses. At the same time, the political sensitivity of the cases with which these prosecutors are tasked, and the involvement of state agents in many of those cases, can make it difficult to gain the cooperation of other elements of the state who would be in a better position to collect or provide evidence. Moreover, the heavy caseload these prosecutors carry, in combination with a lack of resources and an overly individualistic institutional culture within the prosecutor's office leave them stretched too thin and struggling to properly divide their time and attention.

Against this background, the prosecutors interviewed in the context of this chapter have explained how the proceedings conducted through the IAHRS and the judgments delivered by the IACtHR have helped them to make inroads into overcoming some of these obstacles. Firstly, this chapter showed that the proceedings conducted through the IAHRS set into motion a system of internal monitoring, through the foreign ministry and the

142 *See for example* Supreme Court, *Revisión no. 28012*, decision of 20 June 2012; Supreme Court, *Revisión no. 30642*, decision of 26 September 2012 and Supreme Court, *Revisión no. 28476*, decision of 31 October 2012.

143 Supreme Court, *Revisión no. 30380*, decision of 22 September 2010. In the context of this decision, the Supreme Court did consider, on the basis of Article 192(4) of Law 90 of 2004, that the Inter-American Commission, in contrast to the Inter-American Court, does not qualify as "an international body […] whose competence the Colombian State has formally accepted", because the decisions of the Inter-American Commission are not binding on the State (pp. 42-48). Therefore the recommendations of the Commission are not sufficient in themselves to allow for the revision of a final judgment. However, the substance of the Trujillo Commission's report and the Inter-American Commission's recommendations do form a sufficient basis for the Supreme Court itself to undertake a review of the prior investigations and the considerations underlying the acquittals. Through this review, the Supreme Court comes to the conclusion that the Inter-American Commission's conclusions and recommendations were correct, and that the acquittals entailed a severe breach of the State's obligation to investigate serious human rights violations (pp. 48-94). On this basis, the Supreme Court annulled the judgment.

National Prosecutor's Office. This monitoring leads prosecutors to prioritize the domestic investigations into such IAHRS cases over other cases under their care. Moreover, the monitoring as a result of IAHRS proceedings makes sure that those cases stay on the agenda, whereas other cases may lose their sense of urgency with the passing of time. In this way, IAHRS proceedings help to ensure that at least those cases receive appropriate time and attention, even if that means that other, equally serious cases may receive less attention. And while this may not be a great achievement from the point of view of the fight against impunity more broadly, it does mean that the chances that the cases within the purview of the IAHRS will progress on the domestic level may increase.

Secondly, this chapter has demonstrated how the judgments of the IACtHR have helped to expand the scope of domestic investigations in cases concerning grave and complex human rights violations. The example set by the IACtHR through its own contextual analysis of human rights violations, combined with its consistent insistence that the state should conduct exhaustive investigations in order to identify all those responsible, pushed prosecutors to look at new lines of investigation and adopt a more contextual analysis of the facts. This development can be observed not only among the prosecutors of the Human Rights Unit, but also in the case law of the Justice and Peace Tribunals. It has even led to the adoption of a national policy of contextual analysis. In this way, the IAHRS has helped prosecutors to overcome some unhelpful aspects of their traditional institutional culture.

Finally, this chapter has demonstrated that the doctrines developed by the IACtHR has allowed prosecutors to overcome the effects of a lack of political will to investigate grave human rights violations and hold state agents accountable for their participation in them. Specifically, the case law of the IACtHR in has been an important basis on which domestic courts have overturned prior acquittals of state agents, where these acquittals had been the result of seriously flawed proceedings.

8 The contributions of the Inter-American human rights system to domestic struggles for accountability: a synthesis of the case studies

1 Introduction

The previous three chapters have analyzed the contributions of the Inter-American human rights system, with a focus on the IACtHR, to three different domestic accountability processes. Chapter 5 examined the IACtHR's contribution to the work of pro-accountability constituencies – i.e. victim groups and human rights organizations – in Guatemala, pursuing justice in a relatively small number of cases emblematic for the larger patterns of violence during the civil war. Chapter 6 analyzed the contributions of the IACtHR to a series of legislative processes through which Colombia has sought to enact a transitional justice framework which balances the need to achieve a negotiated end to a long-running armed conflict with the need to respect the right of victims to truth and justice. Finally, chapter 7 examined the IACtHR's contributions to the work of the prosecutors in Colombia's National Human Rights Unit, who are responsible for the investigation and prosecution of serious human rights violations in practice.

The accountability processes discussed in these three chapters are very different in nature. However, in each of these processes, this study has identified a number of important contributions of the IACtHR to the work of relevant domestic actors. And while, as was stated clearly in the introduction, this study does not pursue a structured comparison between the different cases, it is possible at this point to synthesize and reflect further on the nature of the IACtHR's contributions identified through the case studies. In doing so, this chapter attempts to draw lessons from the particular processes observed and analyzed in those case studies which may inform how we conceive the IAHRS' influence more broadly. Of course, since these lessons are drawn from very particular situation, they can make no claim to completeness. It is very possible that the IAHRS has influenced accountability processes in many other places and many other ways as well. This chapter only summarizes what I have been able to observe in the particular contexts analyzed in this study. Moreover, because these lessons are taken from particular contexts, there is no guarantee that the mechanisms described here will operate in the same way under different circumstances. However, these lessons may broaden and deepen our understanding of the way in which the IAHRS can influence – and has influenced – domestic accountability processes in some instances.

Rather than simply list the various ways in which the IACtHR has contributed to domestic accountability processes, this chapter seeks to answer

three questions: 1.) which of the IACtHR's 'interventions' in domestic accountability processes have contributed to the work of domestic actors? ("contribution of"); 2.) to which aspects of domestic accountability processes have these interventions contributed? ("contribution to"); 3.) through which mechanisms have the IACtHR's interventions in domestic accountability processes been able to make those contributions? ("contribution through")

The answer to the first of these three questions is partly predetermined by the design of this study. Since this study focuses on the IAHRS' judicial function, the case studies have analyzed only on the parts of its operations which are directly connected to that function. Moreover, as indicated in the introduction to this study, one of the assumptions guiding the analysis in this study has been that the Inter-American system, in execution of its judicial function, 'interacts' with domestic accountability processes through three dimensions of its work: 1.) through the proceedings it conducts in individual cases; 2.) through the individual judgments in which those proceeding result; and 3.) through the doctrines it develops over the course of its case law. These three types of interactions, or 'interventions', have structured the way in which the case studies have been presented in this text. What the case studies have demonstrated, is that the IAHRS has made important contributions to domestic accountability processes through all three of these types of 'interventions'. On this basis, this chapter will now discuss the aspects of domestic accountability processes to which the IACtHR's interventions have been able to contribute – in other words: their spheres of influence – and the mechanisms through which they have done so.

2 Contribution to? – spheres of IAHRS influence

Through the detailed examinations of three domestic accountability processes, and taking into account their political and social context, the previous three chapters have been able to identify a number of different examples of concrete contributions made to those processes by the Inter-American system. Upon closer inspection, it becomes clear that each of those examples catalogued in the case studies has contributed to one of four dimensions of the domestic accountability processes under examination. These four dimensions, the spheres of Inter-American influence on domestic accountability processes, are: 1.) the domestic *discourse* concerning the need to provide justice for victims of serious human rights violations; 2.) the domestic *narrative* of the underlying human rights violations; 3.) the *normative framework* for investigation and prosecution of serious human rights violations; and 4.) the progress of concrete domestic *proceedings* concerning serious human rights violations.

Of these four spheres of influence, the normative framework and domestic proceedings are, from a lawyer's perspective at least, perhaps the most familiar and obvious. Previous studies concerning the domestic impact of international criminal proceedings have therefore largely focused

on those two domestic spheres. However, the case studies conducted in the previous three chapters suggest that the contributions of the IACtHR to domestic discourse and narrative have been especially relevant. Moreover, the case studies also suggest that contributions to the domestic normative framework are often achieved after – and even through – changes in the discourse of pro-accountability actors. This section will analyze each of these four domestic spheres in more detail. It will examine how the concrete contributions of the IAHRS identified in the case studies have affected these domestic spheres and how they have, thereby, brought to the overall goal of achieving (criminal) accountability for serious human rights violations closer.

2.1 Discourse

The case studies clearly demonstrate that much of the work involved in the domestic struggle against impunity for serious human rights violations takes place outside the courtroom and is performed by actors who are not part of the criminal justice system. In Guatemala, domestic investigations and prosecutions were only undertaken after long and intense campaigning by pro-accountability actors from civil society – i.e. victim groups and human rights organizations – and required sustained campaigning by those actors to be brought to a conclusion. In Colombia, mechanisms aimed to respect the victims' right to truth and justice were included in the transitional justice framework for the demobilization of the AUC only after human rights groups had made these rights part of the national debate. Thus, the case studies underline that civil society demand for justice is crucial for the success of domestic accountability processes.

In this context, however, it matters greatly *how* domestic actors demand accountability. It matters how they articulate their claims of how and why they want the state to respond to serious human rights violations. In other words, the discourse employed by pro-accountability actors in support of their claims is relevant to their chances of success. Those chances will remain slim, to be sure, but they will be slightly higher if their claims are supported by an effective discourse. In the words of Alison Brysk: "there are no formulas for social change, only rhetorical strategies for improving the odds".[1] Brysk herself has detailed one such rhetorical strategy, which

1 A. Brysk, *Speaking rights to power – constructing political will* (Oxford University Press, 2013), p. 10. The idea that discourse is relevant to the possibility of social change, is based on the postmodernist understanding that "[d]iscourses are not only social products, they have fundamental social effects. They are modes of power." D. Harraway, *Primate visions: gender, race and nature in the world of modern science* (Routledge, 1989), p. 289, as cited in: A. Brysk, '"Hearts and minds": bringing symbolic politics back in', (1995) 27(4) *Polity* 559-585, p. 566.

she calls "speaking rights to power".[2] In short, her argument holds that, for a number of reasons which are beyond the scope of discussion in this section, framing "local problems in terms of globally legitimate norms" is a particularly effective form of information politics,[3] especially for those who do not have ready access to the traditional sources of hard-power in their domestic context. In this sense, speaking rights to power is a "weapon of the weak", or a form of "communicative counter-hegemony".[4]

In both case studies, anti-accountability constituencies have attempted to discredit and marginalize those pursuing justice for serious human rights violations. They have been labeled 'communists' or 'terrorists' (Guatemala) or 'friends of terrorists' (Colombia). This discourse paints the call for justice as an attack on the state which is inspired either by ideological motivations (seeking to win the war through the courts) or by the desire to profit financially from the country's troubles by claiming compensation. Against this background, human rights discourse has proven an effective weapon for pro-accountability actors, because it allows them to shift the balance of discursive power between them and anti-accountability constituencies in their favor in two ways: by connecting their demands to an established social order and by shifting to a 'language' in which they are more fluent than their counterparts. This is so, because the victim groups and human rights organizations pursuing justice for serious human rights violations tend to be more fluent in the language of human rights than anti-accountability constituencies, who are often from sectors of society which have tended to view human rights law with suspicion. Moreover, those groups, being close to the traditional sources of state power and dominant in domestic public discourse, had no need for a 'weapon of the weak', such as a human rights-based discourse. Thus, when pro-accountability actors frame their demand for justice in human rights language, anti-accountability actors generally have not been able to answer those claims successfully using the same language.

As we have seen in chapters 5 and 6, this dynamic may increase the chances of success of domestic accountability processes, when pro-accountability actors' human rights based discourse manages to capture the attention of the judges, prosecutors and legislators who ultimately determine the outcome of domestic accountability processes. For those actors, acting in an official capacity and occupying a particular place within the domestic legal order, human rights language has a particular resonance, making it difficult to simply dismiss human rights-based arguments as politically or ideologically motivated.

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2 *See generally* A. Brysk, *Speaking rights to power – constructing political will* (Oxford University Press, 2013).

3 Idem, p. 8. See also idem, p. 15, explaining that: "[s]peaking rights to power means gaining attention, then empathy, and then evoking a powerful norm that persuades power-holders, allies, or fellow-sufferers to mobilize."

4 Idem, pp. 10 and 16.

Chapter 6 of this study illustrates that dynamic especially well. As the chapter demonstrates, human rights organization favoring accountability were able to significantly disrupt and redirect the legislative process towards the adoption of (what would eventually become) the Justice and Peace Law through their employment of a discourse based on the rights of victims to truth and justice and the absolute prohibition of amnesty provisions. This discourse resonated with, first, an important minority of parliamentarians and, later, with the Colombian Constitutional Court, who recognized this discourse as legitimate and based on a set of norms binding to the Colombian state. Anti-accountability constituencies and state officials responsible for the demobilization of the paramilitaries, who had committed to a discourse based on the need for peace and reconciliation, were unable to counter civil society's arguments on their merit or with reference to a similar set of norms. As a result, they have had to accept considerable changes to the transitional justice framework they had originally proposed. In the peace process with the FARC-EP, this dynamic played out rather differently. Before starting the negotiation process, the Santos administration – which had at least a practical interest in lowering the standard of justice demanded by human rights organizations – spent considerable time and effort on developing its own discourse human rights-based discourse on transitional justice. This made it difficult for human rights organizations to effectively challenge the state's transitional justice approach with reference to human rights standards and, thereby, to capture the attention of possible allies within the state apparatus in the same way as they had done in relation to the JPL.

This theory of speaking rights to power thus helps to explain why the pro-accountability actors from civil society, who are relatively marginalized and much further removed from the state and from traditional sources of power than anti-accountability constituencies, have employed a human rights-based discourse and how this has, at times, helped them to move domestic accountability processes forward. However, when pro-accountability actors attempt to speak rights to power, it is clear that they will need to be able to demonstrate that their claim, i.e. justice for victims of serious human rights violations, is indeed a matter of human rights. This, of course, is where the Inter-American system comes in. Chapters 2 and 3 of this study have demonstrated that the IACtHR has been a pioneer in framing the struggle against impunity as a human rights issue. It was the first human rights institution to recognize that state have a positive obligation under international human rights law to investigate, prosecute and punish human rights violations. It remains, so far, the only human rights institution to unequivocally recognize that victims of human rights violations have a right to justice. Chapters 5 and 6, in turn, demonstrated that the Inter-American system is the main source to which pro-accountability actors refer

when they frame their claim to justice in the language of human rights.[5] Thus, without the jurisprudence of the IACtHR, it would be difficult for pro-accountability actors to make this claim and to speak rights to power, in order to increase their chances of actually achieving justice.

The jurisprudence of the IACtHR does not only provide pro-accountability actors a legal authority for demanding justice as a matter of human rights law, it also provides them with a whole catalogue of more specific obligations on the state, tailored to the realities of overcoming entrenched impunity in the region, all of which can similarly be argued to be demanded by human rights law. Thus, pro-accountability actors can, for example, authoritatively claim that there is an unqualified prohibition of amnesty provisions under Inter-American human rights law. And as we have seen in chapter 6 of this study, they have done so with some success. Chapter 6 has also demonstrated that, in order for a rights-based discourse to be successful, it is important that the right in question can be presented as clear and unequivocal, belonging to the hard core of human rights law, and, therefore, as representing a credible threat to domestic authorities when they do not properly respect and ensure that right.

Moreover, chapter 5, in particular, has demonstrated that speaking (Inter-American) human rights to power works not only as an offensive strategy – in order to amplify pro-accountability actors' claims for justice – but also as a defensive strategy. In the extremely polarized political environment of Guatemala, the argument that investigation and prosecution of serious human rights violations is explicitly required by the IACtHR is employed by both civil society actors and prosecutors, when they find themselves under attack from anti-accountability actors. Reference to the IACtHR and its case law serves to draw the debate away from their personal beliefs and motivations for pursuing justice and refocus it on the international legal obligations of the state. As such, it helps those actors to reduce the reputational damage done by such personalized attacks to their campaigns for justice or to the investigations they are conducting.

2.2 Narrative

The narrative dimension of domestic accountability processes is closely related to the discursive dimension described above. Both are concerned with the way people speak about accountability for serious human rights violations. The difference is that, while the discursive dimension relates to the way pro-accountability actors articulate their demand for accountability, the narrative dimension relates to the way the underlying human rights

5 *See also* P. Engstrom and P. Low, 'Mobilizing the Inter-American human rights system: regional litigation and domestic human rights impact in Latin America', in: P. Engstrom (ed.), *The Inter-American human rights system: impact beyond compliance* (Palgrave MacMillan, 2018), recognizing the IAHRS' potential for providing "symbolic and discursive tools to frame political demands in terms of regional human rights standards".

violations and their historical context are understood and discussed. The narrative dimension is of great relevance to domestic accountability processes, because the way in which the underlying human rights violations, and – particularly – the role of both the state and of those demanding justice in those violations are understood, may affect both the public's expectations with regard to justice and the willingness of relevant state actors to pursue and provide it. Therefore, the work of civil society actors demanding justice for serious human rights violations includes promoting a particular narrative of those violations, which highlights not only their occurrence, but also the context of their occurrence and the role of the state in it. As observed by Winifred Tate:

> "human rights activism is an effort to bring certain public secrets into the public transcript [the dominant narrative, HB], to make what is known but denied part of the general discussions about the nature and cause of violence and possible solutions".[6]

Thus, domestic accountability processes are often accompanied by a clash between the competing narratives of underlying human rights violations promoted by pro- and anti-accountability constituencies.[7] This is underlined all three case studies conducted in the context of this study. In Guatemala, the most important narrative clash concerned the question whether, in the context of the internal armed conflict, the Guatemalan military had committed genocide against certain indigenous groups. Anti-accountability constituencies, having long promoted a narrative in which the military only used violence against armed insurgent groups in order to protect the country from communism, emphatically deny that a genocide has ever taken place in Guatemala. Pro-accountability constituencies, on the other hand, argue that the military has simply used the pretext of counterinsurgency to commit atrocities on a large scale against political dissenters and against the indigenous population. In Colombia, meanwhile, one of the central controversies with regard to the armed conflict concerns the question of the relationship between the state and paramilitary organizations. Pro-accountability actors have long suspected that the state has covered up the true extent of the collusion between state forces and paramilitary groups, in order to avoid accountability for the state agents involved in crimes committed by the paramilitaries. According to the narrative they promote,

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6 W. Tate, *Counting the dead – the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 293.

7 In this context, Alison Brysk speaks of "canon and counter-hegemony". In her view, canonical narratives provide "the framework of received wisdom, universally transmitted by storytelling, which shapes how ordinary people talk about politics". Counter-hegemonic narratives, meanwhile, challenge the canon by proposing "a reversal of a canonical narrative, attachment of new characters to an existing narrative, or self-representation by marginalized members of society". A. Brysk, '"Hearts and minds": bringing symbolic politics back in', (1995) 27(4) *Polity* 559-585, pp. 572-573.

the state cooperated extensively with paramilitary commanders, and some even believe that the paramilitaries were enlisted by the state to do its dirty work for it in the war against the guerrillas. However, the dominant narrative regarding the civil war and the state's role in it, promoted by anti-accountability constituencies, paints the state as passive, unable to control either the guerrillas or the paramilitaries.

Both in Guatemala and in Colombia, the Inter-American human rights system has contributed considerably to the work of pro-accountability actors in challenging the dominant narrative of the respective internal armed conflicts. According to Jeffrey Davis, the IAHRS has been "an exceptional vehicle for allowing the victims' story to come out through testimony, for enshrining it in the judicial record, for testing and admitting evidence and for establishing the truth".[8] The three case studies demonstrate the truth of that statement for their respective contexts. Both states have, for example, recognized, in the course of certain proceedings at the Inter-American level, the occurrence of particular events – i.e. massacres – that had previously been denied by them and accepted state responsibility for those events. The example of the Trujillo commission, discussed in detail in chapter 7, is illustrative in this context. The fact that the Colombian state accepted responsibility for a massacre committed by a paramilitary group, has helped pro-accountability actors to demonstrate the close ties which existed between paramilitary groups and state forces.

The IACtHR's judgments, and their interpretation of the historical context of both the Guatemalan and the Colombian internal armed conflicts, have also been important in this respect. In those judgments, the IACtHR provides a thorough account of the facts of the case at hand and, moreover, it situates those facts in the historical context of the armed conflicts in which they took place. In relation to Guatemala, the IACtHR's judgments concerning massacres committed against indigenous populations, including the *Plán de Sánchez* and *Río Negro* cases, shed light on the scorched earth campaigns conducted by the Guatemalan military in rural areas in the 1970s and 1980s, on the national security doctrine which formed the basis for these campaigns and on the racism which constituted a fundamental element of that doctrine. In relation to Colombia, the string of IACtHR judgments concerning the paramilitary phenomenon, delivered at a crucial moment in the paramilitary demobilization process, underlined the state policies which allowed for the creation of the paramilitary groups and the collusion between those groups and state forces. All of these judgments supported and deepened the narratives promoted by pro-accountability actors of the serious human rights violations for which they demand justice.

Finally, while it is likely that the IACtHR's account of the Guatemalan and Colombian armed conflicts and the serious human rights violations committed during those conflicts has not reached the general public, the

8 J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014), p. 207

case studies demonstrate that it has reached at least some members of one particular audience which is fundamental to the success of domestic accountability processes: the prosecutors and judges involved in human rights cases. Chapters 5 and 7 of this study show that the IACtHR's account of the facts in its judgments and the way in which it has interpreted those facts in light of their historical context, has contributed significantly to the way judges and prosecutors have dealt with those facts in at least some individual cases. In Guatemala, the judgments of the IACtHR have supported judges in finding that certain controversial events, especially massacres and enforced disappearances, took place and were executed with the involvement of the state's armed forces. Moreover, they also provided a precedent for the use of the reports of the Guatemalan truth commissions as evidence in a legal case. Finally, the IACtHR's interpretation of the facts of the massacre cases in light of their historical context, has helped domestic judges to understand the scorched earth campaigns against indigenous groups as part of a genocide. In this sense, one of the respondents cited in Chapter 5 of this study described the Guatemalan massacre cases before the IACtHR, particularly *Plan de Sánchez*, as a 'foundational phase' for the domestic genocide case against Ríos Montt. In Colombia, the IACtHR's judgments concerning the paramilitary phenomenon have not only exposed links between paramilitary groups and state forces, they have also inspired prosecutors of the National Human Rights Unit to expand the scope of their investigations and investigate the full circle of those responsible for paramilitary crimes, including certain state agents. They have done so, on the one hand, through the direct orders from the IACtHR contained in them to conduct an exhaustive investigation and identify all those responsible for the human rights violations at issue. One the other hand, they have also performed a more pedagogic function, in that the IACtHR's own contextual analyses have served as an inspiration for domestic prosecutors seeking to do the same. A similar dynamic has been observed in the Justice and Peace Tribunals. The practice of contextual analysis of human rights cases has eventually become formalized through Directive 0001 of 2012, which requires contextual analysis for complex cases and creates a special unit within the Public Ministry to assist with such analysis.

2.3 Normative framework

That the normative framework within which domestic accountability processes operate is relevant for their chances of success, does not require much explanation. Of course, a normative framework conducive to investigation and prosecution of serious human rights violations does not in itself ensure that accountability processes will ultimately be successful. All three case studies underline that the successful investigation and prosecution of such complex and politically sensitive cases requires much more than only an appropriate legal framework. However, legal obstacles to investigation and prosecution created through that normative framework may undermine and

derail accountability processes, even when all other ingredients for success are present. Therefore, pro-accountability actors often need to invest considerable effort into clearing such legal obstacles before any investigation and prosecution of human rights violations can be pursued successfully.

All three case studies demonstrate that the IACtHR's doctrines concerning the obligation of the state to remove legal obstacles to investigation, prosecution and punishment of serious human rights violations, discussed in detail in Chapter 3 of this study, have contributed to the removal (or prevention) of such obstacles in Guatemala and Colombia. These doctrines have provided pro-accountability actors with a very specific legal vocabulary to articulate their demand to remove legal obstacles. At the same time, the legitimacy of the IACtHR as an international human rights court and the authority attached to doctrines which form part of its *jurisprudence constante*, make their arguments highly persuasive to the domestic authorities who hold the power to remove those legal obstacles for them. The fullest illustration of this contribution of the IACtHR's doctrines is provided in Chapter 6 of this study, which is dedicated in its entirety to Colombian struggles to prevent the erection of an insurmountable legal obstacle to the investigation, prosecution and punishment of serious human rights violations committed in the context of the internal armed conflict in the form of amnesty legislation. The chapter demonstrates not only the IACtHR's important contribution to the discourse surrounding these processes, but also how reference to the IACtHR's doctrine on the obligation to investigate and prosecute and the prohibition of amnesty provisions helped to persuade certain domestic authorities of the merit of their discourse. Ultimately, the reception of IACtHR doctrines by relevant state actors – including, particularly, the Constitutional Court – has redirected the course of domestic legislative processes and thereby influenced the normative content of the transitional justice frameworks adopted through them. As a result, the domestic legal obstacles are now limited mainly to the 'punishment' part of the obligation to investigate, prosecute and punish serious human rights violations.

Chapter 5, meanwhile, demonstrates that the IACtHR's doctrines on the state's obligation to remove legal obstacles had also made some – limited and unstable – contributions to the normative framework for investigation and prosecution of serious human rights violations in Guatemala. Firstly, the IACtHR's doctrine on the prohibition of amnesty provisions has provided the basis on which Guatemalan courts, first the Supreme Court and later the Constitutional Court, have excluded cases of serious human right violations from the scope of applicability of the Law of National Reconciliation. As a result, this law would no longer form an obstacle to the investigation and prosecution of most of the crimes committed by the Guatemalan armed forces during the internal armed conflict. However, recent indications of backtracking on the part of the Constitutional Court and the even more recent introduction of a Draft Bill to override this domestic jurisprudence by expanding the scope of the Law of National Reconciliation, put this progress – and the IACtHR's contribution to it – at risk. Secondly, two

important decisions by the Guatemalan Constitutional Court have ensured the domestic reception of the IACtHR's doctrines on the imprescriptibility of serious human rights violations and the continuous nature of the crime of enforced disappearance, thereby removing two further domestic legal obstacles to investigation and prosecution of such violations.

2.4 Progress of domestic proceedings

Finally, the case studies show that the IAHRS' interventions have in some cases affected the progress of individual domestic proceedings concerning serious human rights violations. In many ways, this is the most obvious sphere of influence of Inter-American interventions in domestic accountability processes. When the IACtHR delivers a judgment ordering a state to investigate, prosecute and punish certain human rights violations, we would expect this to have some effect on the progress of the domestic proceedings concerning those violations. In fact, if one were to approach the case studies from a compliance-based perspective, this would be the only dimension of the domestic accountability process of interest.

Upon closer inspection it becomes clear, however, that many of the IAHRS' contributions to the progress of domestic proceedings are dependent on successful action in one of the other three dimensions of domestic accountability processes described above. For example, if the doctrines developed by the IACtHR contribute to the removal of a legal obstacle in the form of – say – an amnesty provision, they thereby also contribute to the progress of proceedings which would otherwise have been blocked by that amnesty provision. Similarly, when IACtHR judgments contribute to the promotion of a narrative of serious human rights violations which requires an expansion of the scope of domestic investigations, it thereby also affects the progress of those investigations. Since these indirect contributions of the IAHRS to the progress of domestic proceedings have already been covered in the preceding sections, they will not be further discussed here.

However, the case studies have also demonstrated several more direct IAHRS contributions to the progress of domestic proceedings. Firstly, Chapter 5 demonstrates that *proceedings* at the Inter-American level may contribute to the progress to the progress of the domestic proceedings concerning the same facts, especially when the two sets of proceedings are conducted in parallel. Pro-accountability activists in Guatemala indicated that the monitoring effect of the parallel proceedings on the Inter-American level can help them to push domestic proceedings forward in two ways: they provide an international spotlight, which limits the space for political maneuvering by anti-accountability actors and they provide leverage to pressure domestic authorities into action when their interest in the case seems to wane. Similarly, prosecutors at the National Human Rights Unit of the Colombian Public Ministry also described the effects of the IACtHR's monitoring on their ongoing investigations in Chapter 7. According to these prosecutors, the constant requests for information about cases which were

directly related to IACtHR proceedings, made them prioritize those cases over other, similarly grave cases. Moreover, the prolonged involvement of the IACtHR ensures that these cases remain on the agenda indefinitely and are not allowed to simply peter out.

Secondly, Chapter 5 suggests that Inter-American proceedings may affect the progress of domestic proceedings by protecting those involved in them. Serious threats against the reputation or even the safety of activists, prosecutors, judges and witnessed might discourage those actors from continuing their work, which would adversely affect the progress of domestic proceedings. As suggested by Chapter 5, Inter-American proceedings help to protect pro-accountability actors from such threats in two ways: firstly, the international spotlight which these proceedings shine on pro-accountability actors makes it more costly for their opponents to attack them directly. Secondly, both the IACtHR and the IACmHR have on many occasions ordered the state to provide police protection to pro-accountability actors. Even when pro-accountability actors do not particularly trust the police and enjoy its protection, they are aware that the additional spotlight such police protection shines on them would make attacking them a very costly undertaking.

Thirdly, Chapter 5 demonstrates that, in one particular case – that of the *Dos Erres* massacre – an IACtHR *judgment* has had a direct impact on the progress of the domestic proceedings concerning that case. Thanks to the IACtHR's judgment in *Dos Erres* and a subsequent decision by the Guatemalan Supreme Court declaring that judgment directly enforceable, domestic prosecutors were able to clear all the procedural obstacles which had prevented the domestic proceedings from progressing to trial. However, this contribution of the IACtHR is very case-specific and has not been repeated for other proceedings analyzed in the case studies.

3 Contribution through? Mechanisms underlying the IACtHR's contributions to domestic accountability processes

So far, this chapter has addressed both the interventions which have been the 'source' of the IAHRS' contributions to domestic accountability efforts (contribution of) and the dimensions of those domestic processes to which these interventions have managed to contribute (contribution to). What remains to be analyzed, however, is *how* exactly those interventions contribute to the four relevant dimensions of domestic processes. What do these interventions *do* to affect domestic processes? The 'missing link' between the source of the IAHRS' contributions and their domestic object, are the mechanisms *through* which these contributions take place. Unlike the domestic spheres of IAHRS influence, the mechanisms underlying the IAHRS' contributions to practice cannot be directly observed through empirical analysis. They do not, therefore, follow directly from the empirical observations described in Chapters 5 to 7, but have to be deduced from

them through a further interpretative leap. As a result, the mechanisms identified in this section should be understood as propositions – grounded in the researcher's interpretation of the domestic effects observed through the case studies – and in need of confirmation through further research.

On that basis, this section introduces five mechanisms understood by the researcher to have been responsible for producing the IAHRS' contributions to domestic accountability processes in Guatemala and Colombia. In the case studies conducted a part of this research, the IAHRS has contributed to domestic accountability processes by 1.) *translating* the demand for justice to a right to justice; 2.) *legitimizing* and depoliticizing demands for justice (and those demanding justice); 3.) *monitoring* domestic proceedings and prioritizing certain cases; 4.) *modelling* appropriate modes of interpretation and contextual analysis; and 5.) *protecting* pro-accountability actors.

3.1 Translating

Through the doctrines it developed over the course of its jurisprudence – starting with the *Velásquez Rodríguez* judgment and continuing to this day – the IACtHR has translated civil society's desire and demand for justice into a right to justice. At the same time, it has imposed upon the states under its jurisdiction a legally binding obligation to provide justice to victims through the investigation, prosecution and punishment of human rights violations. The case studies – and their synthesis in this chapter – have demonstrated that their ability to frame their demands in a vocabulary of international human rights has been crucial to pro-accountability actors' success in the discursive sphere, especially since they are generally far more conversant in this vocabulary than their domestic opponents. Thus, through its development of this international human rights vocabulary the IACtHR has made a fundamental contribution to domestic accountability processes.

Moreover, as discussed in Chapter 3 of this study, the IACtHR has further translated this general obligation to investigate, prosecute and punish human rights violations into a plethora of more concrete obligations. These more concrete obligations have been tailored specifically to overcoming the situation of entrenched impunity present in many of the states under its jurisdiction, and certainly in the two states examined in the context of this study. The case studies have demonstrated how these concrete obligations have contributed to the discourse of domestic pro-accountability actors and, ultimately, to the removal of legal obstacles and the creation of a normative framework conducive to investigation and prosecution of serious human rights violations.

Finally, it should be noted that the IACtHR is not the only source of international human rights 'language' and doctrines in the area of anti-impunity. As discussed in Chapter 2 of this study, the IACtHR's case law is part of a broader international (legal) movement against impunity, which includes the jurisprudence of other international courts and influential soft-law documents developed by the UN. In fact, as demonstrated in

Chapter 3 of this study, the IACtHR's own doctrines have sometimes been inspired and guided by standards developed in other international contexts, including the jurisprudence of the ECtHR, soft-law documents like the UN Principles to Combat Impunity and the Minnesota Protocol and treaties like the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. In such instances, the IACtHR has translated diffuse international standards – the status and bindingness of which can be debated – to legal doctrines of direct applicability in the states under its jurisdiction.

In short, the doctrines developed by the IACtHR in the area of anti-impunity have contributed to both the discursive and the normative dimensions of domestic accountability processes in Guatemala and Colombia, through their translation of civil society demand into legal standards of direct applicability in the national legal order.

3.2 Legitimizing and depoliticizing

As illustrated at length in all three case studies, domestic pro-accountability actors are often isolated and marginalized in the domestic social and political contexts analyzed in this study. Anti-accountability constituencies, on the other hand, generally belong to established sectors of society and are close to the sources of state power. As a result, the playing field on which these two constituencies clash with each other over the question of accountability for serious human rights violations is uneven and skewed towards those who oppose it. And while this power-imbalance affects all aspects of domestic accountability processes, its effects are most visible in their more public aspects, i.e. the discursive and narrative spheres.

The case studies show that pro-accountability actors, their demands for justice and their narrative of the human rights violations for which they demand justice are routinely delegitimized as motivated by revenge, left-wing ideology and/or financial interests. In this context, the judgments of the IACtHR, and their orders to the state to investigate, prosecute and punish human rights violations, contribute to the discursive dimension of domestic accountability processes in two ways: firstly, they make it possible for pro-accountability actors to locate the source of the demand for justice outside themselves. Thus, the demand for justice comes not from a marginalized group of local activists, but from a higher authority in the form of an international human rights court which enjoys considerable legitimacy in the region. Secondly, the reference to IACtHR judgments ordering the state to investigate and prosecute human rights violations help pro-accountability activists to draw the debate away from their personal motivations and towards the legal obligations of the state. And while such IACtHR-based discourse may perhaps not resonate very strongly with the general public, it is particularly persuasive to the domestic prosecutors and judges involved in domestic proceedings concerning serious human rights violations.

Through the same mechanism, the IACtHR's judgments may affect the narrative dimensions of domestic accountability processes. A narrative of the Colombian or Guatemalan internal armed conflict which paints the state itself as complicit in the most serious violations of human rights imaginable and holds some of the most powerful members of society personally responsible for those violations might not be particularly persuasive when it is promoted by an 'ideogically suspect' group of activists. This perception might change, however, when that narrative is supported by an international court.

In short, the IACtHR's doctrines and its judgments in particular cases have contributed to the discursive and narrative dimensions of domestic accountability processes through their legitimation and depolitization of the demands and narratives promoted by pro-accountability actors.

3.3 Monitoring

That Inter-American proceedings contribute to the progress of (parallel) domestic proceedings through their monitoring of the latter, was pointed out explicitly by various respondents in Chapters 5 and 7.[9] Therefore, its discussion here will be brief. It suffices to point out that this mechanism functions in three possible ways: firstly, Inter-American monitoring of domestic proceedings, and the international spotlight entailed therein, may limit the possibilities for political maneuvering to frustrate those proceedings and provides pro-accountability actors with leverage to pressure state authorities when proceedings become stuck. Secondly, monitoring by the Inter-American system brings with it a continuous demand to update the system on the progress of domestic proceedings, which may lead prosecutors to prioritize those cases over others. Thirdly, the monitoring of domestic proceedings by the Inter-American system will ensure that those proceedings remain a priority for the responsible prosecutors, and are not allowed to simply simmer out.

In short, proceedings in individual cases before the organs of the IAHRS have contributed to the progress of their domestic counterparts through the monitoring effects produced by those Inter-American proceedings.

3.4 Modelling

The IACtHR's judgments, and their account of the commission of serious human rights violations in the context of the Guatemalan and Colombian armed conflicts, have contributed to the narrative dimension of the respec-

9 *See also* J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014), pp. 209-211, suggesting that the judges of the IACtHR are aware of this monitoring mechanism and that they therefore "frequently ask victims, advocate and state representatives what the court could order to remove obstacles and push human rights cases through domestic courts".

tive domestic accountability efforts. These judgments have helped to expose certain public secrets – the commission of genocidal acts in the rural areas of Guatemala, the collusion between paramilitary groups and the Colombian state forces – and bring them into the dominant narrative. Moreover, the IACtHR's judgments about these phenomena *model* a certain way of interpreting the facts of a case in light of the historical context in which they were committed. And, as demonstrated in Chapters 5 and 7 of this study, domestic judges and prosecutors have taken inspiration from this example set by the IACtHR's judgments. This, in turn, has had important effects on the narratives of the Guatemalan armed conflict presented in certain judgments delivered on the national level and on the scope of the investigations conducted by prosecutors at the Colombian National Human Rights Unit and on the lines of investigation explored by them.

It should be noted that this willingness of domestic judges and prosecutors to learn from the example set by the IACtHR in this respect cannot be explained through a legal logic. There is no obligation or expectation on domestic judges to follow the IACtHR's interpretation of facts, as its mandate is limited to the interpretation of the provisions of the ACHR. Rather, their willingness to learn and take inspiration from the IACtHR seems to be based on the perception that the IACtHR represents a professional example worthy of imitation and that its methods are particularly appropriate for dealing with complex cases involving structural human rights violations.

In short, the judgments of the IACtHR have contributed to the narrative dimension of domestic accountability processes and the scope of domestic proceedings, through their modelling of an appropriate technique for interpreting the facts of a case in their historical and political context.

3.5 Protecting

Inter-American proceedings contribute to the progress of domestic proceedings through their protection of pro-accountability actors and other participants in those proceedings. Protection of pro-accountability actors is achieved both through the 'spotlight' which Inter-American proceedings shine on those actors and the threats they experience domestically and, more directly, through the protective measures which both the IACmHR and the IACtHR regularly order in their favor. This mechanism was identified explicitly by respondents and has been discussed in some detail in Chapter 5 and in section 2.4 of this chapter. In order to avoid unnecessary repetition, it will not be further discussed here.

In short, proceedings within the IAHRS and its protective measures have contributed to the progress of domestic proceedings by protecting pro-accountability actors.

4 In sum

The case studies have analyzed the contributions made to domestic accountability processes by three distinct IAHRS 'interventions': 1.) *proceedings* conducted by the IAHRS in individual cases; 2.) the *judgments* produced by the IACtHR as a result of those proceedings; and 3.) the *doctrines* developed by the IACtHR over the course of its case law. Through the case studies we have been able to observe that all three of these interventions have in fact contributed to domestic accountability efforts.

More specifically, through the case studies contributions of these three interventions have been observed in relation to four distinct dimensions of domestic accountability processes in Guatemala and Colombia: 1.) *discourse* framing the demand for justice as a matter of international human rights law; 2.) domestic *narratives* of the underlying serious human rights violations and the context in which they were committed; 3.) the domestic *normative framework* for the investigation, prosecution and punishment of human rights violations; and 4.) the progress of domestic *proceedings* in relevant cases.

On the basis of the analysis conducted in the three case studies and the synthesis of those case studies provided in this chapter, it is proposed that the contributions of the IAHRS to these four dimensions of domestic accountability processes were achieved through the following five mechanisms: 1.) *translating* the demand for justice into a right to justice and an obligation to investigate, prosecute and punish serious human rights violations; 2.) *legitimizing* and depoliticizing the demand for justice; 3.) *monitoring* domestic proceedings and *prioritizing* IACtHR cases; 4.) *modelling* appropriate modes of interpretation of the facts underlying cases of human rights violations; and 5.) *protecting* pro-accountability actors.

Summary

Furthering the fight against impunity in Latin America
The contributions of the Inter-American Court of Human Rights to domestic accountability processes

This study is inspired by the question how national authorities can be motivated to advance the fight against impunity by investigating and prosecuting those responsible for mass atrocities through their domestic justice systems. Whereas international scholarship has often sought to answer such questions by looking at international criminal courts – and in particular at *the* International Criminal Court – this study proposes instead to turn our gaze beyond The Hague, towards San José and the Inter-American Court of Human Rights (IACtHR).

Since the days of the Cold War, the Inter-American human rights system has been an important ally for victims and civil society groups pushing their governments to recognize and investigate serious and systemic violations of human rights and bring the perpetrators to justice. It has thus been involved in the fight against impunity for decades. Its practical contributions to that fight remain, however, underexplored by international legal scholarship.

Building on Alexandra Huneeus pioneering study on the 'quasi-criminal jurisdiction' of human rights courts, this study seeks to analyze how the Inter-American Court of has contributed to the fight against impunity in Latin America by supporting domestic accountability processes. The central research questions guiding this analysis are:

1. How has the Inter-American human rights system, especially the Inter-American Court of Human Rights, contributed to the development of legal doctrines and techniques to advance the fight against impunity?
2. How have these doctrines and techniques, and the work of the Inter-American system more broadly, aided the work of the relevant actors in domestic accountability processes?

These two questions examine different dimensions of the Inter-American contribution to the fight against impunity. They also pertain to different disciplines. The first question is primarily a legal question, which focuses on the legal obligations on states in the context of the fight against impunity developed over the course of the IACtHR's case law. The second question, on the other hand, is an empirical, socio-legal question, which focuses on the practical contributions of the Inter-American system to domestic accountability processes. As a result, this study is divided into two parts.

Part I of this study, consisting of Chapters 2 to 4, discusses the jurisprudence developed by the IACtHR to further to international fight against impunity. The main legal tool and overarching doctrine it has developed to this effect,

is that of the state's obligation to investigate, prosecute and punish those responsible for human rights violations, first articulated by the IACtHR in its landmark judgment in the case of *Velásquez Rodríguez v. Honduras*. While none of the ACHR's provisions explicitly require states to investigate and prosecute human rights violations, the IACtHR found this obligation to be implied in several provisions, including the general obligation of states to ensure to those under their jurisdiction the free and full exercise of their rights enshrined in Article 1(1) ACHR. Moreover, *Velásquez Rodríguez* specified that the obligation to investigate, prosecute and punish human rights violations implies not only that states should put in place a legal and institutional framework conducive to such investigation and prosecution, but also that they undertake *effective* investigations whenever human rights violations do occur.

The positive obligation to investigate, prosecute and punish human rights violations recognized in the *Velásquez Rodríguez* judgment is based primarily on a rationale of general prevention. In other words: on the need to protect society as a whole from the further commission of human rights violations. In its later case law, however the IACtHR has slowly moved towards a more remedial – or victim-oriented – rationale for this obligation, which recognizes that the investigation and prosecution of human rights violations serves not only a public interest, but also that of the individual victims of the underlying violation. This remedial rationale led the IACtHR first to order the investigation and prosecution of human rights violations as a measure of reparation for the victims in the case of *El Amparo v. Venezuela*. In the late 1990s, the IACtHR ultimately recognized the victim's right to justice under Articles 8(1) and 25 ACHR, which entails the victim's right to have any violation of their rights investigated and those responsible prosecuted and, if appropriate, punished. However, far from replacing the obligation to investigate and punish, the victim's right to justice and its underlying remedial rationale exist next to it, and the two doctrines mutually reinforce each other.

In the three decades since the *Velásquez Rodríguez* judgment, the IACtHR has slowly refined its jurisprudence on the obligation to investigate, prosecute and punish human rights violations ever further. Through constant confrontation with the many ways in which investigations and proceedings into such cases can be undermined and derailed, the Court has developed detailed standards addressed at several different state organs. This development has taken place along two main avenues: 1.) the obligation to remove all legal and practical obstacles maintaining impunity; and 2.) the obligation to investigate human rights violations effectively. Under the umbrella of these two dimensions of the obligation to investigate, prosecute and punish, the IACtHR has developed a number of very concrete obligations, which give practical content to the overarching obligation.

The doctrines falling under the obligation to remove all legal obstacles to investigation, prosecution and punishment of serious human rights violations are perhaps the most controversial aspect of the IACtHR's juris-

prudence relevant to the fight against impunity. They include a number of very specific directions to the state's legislative organs – prohibiting them from adopting certain legislation (amnesty provisions), while obliging them to adopt others (specific crime definitions) – thereby limiting their freedom to regulate. Moreover, the IACtHR has also developed standards directing legislative organs and the judiciary to limit the operation of certain fundamental principles of criminal justice which aim to protect the interests of the accused, including prescription, the principle of *ne bis in idem* and the principle of legality. It should be noted, however, that these controversial standards only apply to cases of 'grave' or 'serious' human rights violations, a very limited category which – so far – only includes the crimes of enforced disappearance, extrajudicial execution and torture. In cases concerning these particular types of conduct, the gravity of the violations, the particular challenges involved in investigating and prosecuting them and the victim's right to justice all demand – according to the IACtHR – the interference with state sovereignty and the limitation to the rights of the accused.

The doctrines developed under the umbrella of the state's obligation to remove all practical obstacles maintaining impunity, on the other hand, relate to all violations of human rights. These doctrines are aimed more at the institutional context and seek to provide those responsible for conducting investigations and prosecutions of human rights violations with all the resources necessary to do their work. The doctrines elaborated by the IACtHR under this heading include the obligation of all state authorities to cooperate and assist in the collection of evidence, the obligation to punish state agents who obstruct the investigations and the obligation to protect those who participate in the proceedings. While these obligations may not be particularly problematic from a legal perspective, they do entail a considerable burden in terms of allocation of state resources.

Finally, the IACtHR has developed very detailed and demanding standards in relation to the state's obligation to investigate human rights violations effectively. The IACtHR requires that the responsible authorities undertake investigations *ex officio*, impartially, with due diligence and within a reasonable time. The due diligence requirement has been interpreted by the IACtHR to include detailed standards on the collection of evidence – taken from the UN's Minnesota Protocol – and on the direction and exhaustiveness of the investigation. In relation to the latter, the IACtHR requires the domestic authorities to follow all logical lines of investigation and analyze all the relevant evidence, taking into account the wider context in which the human rights violations occurred, with an eye to identifying possible underlying structures or mechanisms. This 'contextual analysis' is especially important where there are indications of the involvement of state agents. Ultimately, an investigation with these characteristics will lead to accomplishing the goal envisaged by the IACtHR for investigations into human rights violations: identification of *all* those responsible for the underlying human rights violations – both the material and the intellectual authors – and imposing an appropriate punishment.

Part II of this study, consisting of Chapters 5 to 8, discusses the practical contributions of the Inter-American human rights system and the jurisprudence discussed above to domestic accountability efforts for grave human rights violations in Latin America. In doing so, this study rejects a 'compliance-based' approach to studying those contributions, which would take as its starting point the study of individual IACtHR judgments and state compliance with those judgments. Rather, this study analyzes contributions made by the Inter-American system through 1.) judgments delivered by the IACtHR; 2.) doctrines developed over the course of the IACtHR's case law; and 3.) the proceedings in individual cases conducted by the organs of the Inter-American system. When it comes to the domestic accountability processes under study, this study looks not only on the outcomes of such processes in terms of trials and convictions. Rather, it recognizes that trials are only one step in the 'process of justice', which often takes place over the course of decades and involves a wide host of domestic actors including 1.) human rights NGOs and victims' organizations; 2.) domestic judges and prosecutors; and 3.) domestic 'veto players'.

Concretely, Part II of this study undertakes three separate case studies to analyze the contributions of the Inter-American human rights system to accountability processes in two countries: Guatemala and Colombia. Each of the three case studies focuses on a different aspect of the fight against impunity. In relation to Guatemala, this study looks at the work of civil society groups, particularly NGOs and victim organizations, pushing for accountability for grave human rights violations committed in the context of the Guatemalan civil war. It analyzes how the work of the IAHRS has supported the often dangerous and frustrating work of domestic pro-accountability activists and these activists strategic recourse to the Inter-American system. The second case study focuses on the legislative processes conducted in Colombia towards the establishment of special mechanisms to adjudicate grave human rights violations committed in the context of the Colombian civil war. It analyzes how a host of diverse domestic actors managed to insert into these processes an awareness of interests which were not directly represented at the negotiating table: the interest of providing justice for the victims of human rights violations. The third case study focuses on the work of Colombian prosecutors tasked with the prosecution cases of grave human rights violations in the context of an ongoing armed conflict. It analyzes how the IAHRS has supported, and sometimes further complicated the work of human rights prosecutors in Colombia, by requiring them to include new avenues of research and analysis in their investigations and grapple with the wider context in which the human rights violations in question were committed.

Through the case studies, the study demonstrates that the Inter-American human rights system has in fact contributed to domestic accountability efforts. More specifically, it demonstrates contributions in relation to four distinct dimensions of domestic accountability processes in Guatemala and Colombia: 1.) *discourse* framing the demand for justice as a matter of inter-

national human rights law; 2.) domestic *narratives* of the underlying serious human rights violations and the context in which they were committed; 3.) the domestic *normative framework* for the investigation, prosecution and punishment of human rights violations; and 4.) the progress of domestic *proceedings* in relevant cases.

In relation to the first of these four 'spheres' of Inter-American influence, the case studies underline that civil society demand for justice is crucial for the success of domestic accountability processes. However, it matters greatly *how* domestic actors demand accountability and articulate their claims. In other words, the discourse employed by pro-accountability actors in support of their claims is relevant to their chances of success. The case studies demonstrate that for pro-accountability actors in Guatemala and Colombia, human rights discourse has proven an important tool, because it allows them to shift the balance of discursive power between them and anti-accountability constituencies in their favor in two ways: by connecting their demands to an established social order and by shifting to a 'language' in which they are more fluent than their counterparts. The IACtHR's extensive jurisprudence on the state's obligation to investigate, prosecute and punish human rights violations and the victims' right to justice, provides pro-accountability actors in Guatemala and Colombia with a human rights language tailored specifically to the obstacles they face when demanding justice in their domestic contexts. It is therefore an important source to which pro-accountability actors refer when they frame their claim to justice in the language of human rights. Moreover, it also provides them with a defensive rhetorical strategy when, in the extremely polarized political environments in which they operate, they find themselves under personal attack. Reference to the IACtHR and its case law serves to draw the debate away from their personal beliefs and motivations for pursuing justice and refocus it on the international legal obligations of the state.

The narrative sphere of domestic accountability processes is closely related to the discursive sphere. Both are concerned with the way people speak about accountability for serious human rights violations. However, whereas the discursive sphere relates to the way pro-accountability actors articulate their demand for accountability, the narrative sphere relates to the way the underlying human rights violations and their historical context are understood and discussed.

Both in Guatemala and in Colombia, the Inter-American human rights system has contributed considerably to the work of pro-accountability actors in challenging the dominant narrative of the respective internal armed conflicts. The proceedings conducted before the IACtHR have allowed victims to provide public testimony and have pushed the state to recognize and accept responsibility for the occurrence of particular events – i.e. massacres – that it had previously denied. Meanwhile, the IACtHR's judgments, and their interpretation of the historical context of both the Guatemalan and the Colombian internal armed conflicts, have also been important in this respect. These judgments support and deepen the

narratives promoted by pro-accountability actors and have served as an inspiration to domestic prosecutors and judges looking to perform a more contextual analysis of the grave human rights violations with which they see themselves confronted.

That the normative framework within which domestic accountability processes operate is relevant for their chances of success, does not require much explanation. Legal obstacles to investigation and prosecution created through that normative framework may undermine and derail accountability processes, even when all other ingredients for success are present. Therefore, pro-accountability actors often need to invest considerable effort into clearing such legal obstacles before any investigation and prosecution of human rights violations can be pursued successfully. All three case studies demonstrate that the IACtHR's doctrines concerning the obligation of the state to remove legal obstacles to investigation, prosecution and punishment of serious human rights violations have supported these efforts considerably. These doctrines have provided pro-accountability actors with a very specific legal vocabulary to articulate their demand to remove legal obstacles. At the same time, the legitimacy of the IACtHR as an international human rights court and the authority attached to doctrines which form part of its *jurisprudence constante*, make their arguments highly persuasive to the domestic authorities who hold the power to remove those legal obstacles for them.

Lastly, the case studies show that the IACtHR's interventions have in some cases affected the progress of individual domestic proceedings concerning serious human rights violations. Often, such contributions are indirect and dependent on successful action in one of the other three dimensions of domestic accountability processes described above. However, the case studies do demonstrate two ways in which *proceedings* at the Inter-American level may contribute directly to the progress to the progress of the domestic proceedings concerning the same facts, especially when the two sets of proceedings are conducted in parallel. Firstly, they show that the monitoring effect of the parallel proceedings on the Inter-American level can help them to push domestic proceedings forward by, on the one hand, providing an international spotlight – which limits the space for political maneuvering by anti-accountability actors – and, on the other hand, by providing leverage to pressure domestic authorities into action when their interest in the case seems to wane. Secondly, the case studies suggest that Inter-American proceedings may affect the progress of domestic proceedings by protecting those involved in them. Serious threats against the reputation or even the safety of activists, prosecutors, judges and witnessed might discourage those actors from continuing their work, which would adversely affect the progress of domestic proceedings. Inter-American proceedings help to protect pro-accountability actors from such threats in two ways: firstly, the international spotlight which these proceedings shine on pro-accountability actors makes it more costly for their opponents to attack them directly. Secondly, both the IACtHR and the IACmHR have

on many occasions ordered the state to provide police protection to pro-accountability actors.

Finally, this study analyzes *how* exactly the IACtHR's interventions contribute to the four relevant spheres of IACtHR influence. What do these interventions *do* to affect domestic processes? On the basis of the analysis conducted in the three case studies and the synthesis of those case studies in the final chapter, this study proposes that the contributions of the IAHRS to domestic accountability processes were achieved through the following five mechanisms: 1.) *translating* the demand for justice into a right to justice and an obligation to investigate, prosecute and punish serious human rights violations; 2.) *legitimizing* and depoliticizing the demand for justice; 3.) *monitoring* domestic proceedings and *prioritizing* IACtHR cases; 4.) *modelling* appropriate modes of interpretation of the facts underlying cases of human rights violations; and 5.) *protecting* pro-accountability actors.

Samenvatting (Dutch Summary)

De strijd tegen straffeloosheid in Latijns-Amerika
De bijdragen van het Inter-Amerikaans Hof voor de Rechten van de Mens aan de nationale berechting van ernstige mensenrechtenschendingen

Dit onderzoek is ingegeven door de vraag hoe staten kunnen worden aangespoord om de strijd tegen de straffeloosheid bevorderen door grootschalig geweld te onderzoeken en vervolgen via hun nationale strafrechtelijke systemen. Waar de literatuur dit soort vragen vaak heeft proberen te beantwoorden door te kijken naar het werk van internationale strafhoven – meer specifiek: naar *het* Internationaal Strafhof – verlegt dit onderzoek de blik van Den Haag naar San José en naar het Inter-Amerikaans Hof voor de Rechten van de Mens (IAHRM).

Al sinds de koude oorlog is het Inter-Amerikaans mensenrechtensysteem een belangrijke bondgenoot voor slachtoffers en organisaties uit het maatschappelijk middenveld die proberen hun overheden zo ver te brengen systematische mensenrechtenschendingen te erkennen en te onderzoeken en om de schuldigen te berechten. Het is daarmee al decennia onderdeel van de strijd tegen de straffeloosheid. Toch blijven de praktische bijdragen van het Inter-Amerikaans systeem aan deze strijd nog altijd onderbelicht in de internationale academische literatuur.

Deze studie bouwt voor op de vooruitstrevende studie van Alexandra Huneeus over de 'quasi-strafrechtelijke' functie van mensenrechtenhoven en heeft tot doel te analyseren hoe het IAHRM heeft bijgedragen aan de strijd tegen de straffeloosheid in Latijns-Amerika door het ondersteunen van nationale bewegingen richting berechting van ernstige mensenrechtenschendingen. De onderzoeksvragen die sturing geven aan deze analyse luiden als volgt:

1. Hoe heeft het Inter-Amerikaans mensenrechtensysteem, en in het bijzonder het IAHRM, bijgedragen aan de ontwikkeling van juridische doctrines en technieken ter bevordering van de strijd tegen de straffeloosheid?
2. Hoe hebben deze doctrines en technieken – en het werk van het Inter-Amerikaans systeem meer in het algemeen – bijgedragen aan het werk van relevante actoren in nationale processen richting de berechting van ernstige mensenrechtenschendingen?

Deze twee vragen richten zich op twee verschillende dimensies van de Inter-Amerikaanse bijdrage aan de strijd tegen de straffeloosheid. Ze behoren ook tot twee verschillende wetenschappelijke disciplines. De eerste vraag is primair een juridische vraag, die zich richt op de door het IAHRM ontwikkelde juridische verplichtingen van staten in de context van de strijd tegen de straffeloosheid. De tweede vraag daarentegen, is een empirische,

rechtssociologische vraag, die zich richt op de praktische bijdrage van het Inter-Amerikaans systeem aan de nationale berechting van ernstige mensenrechtenschendingen. In lijn met deze vaststelling, is deze studie onderverdeeld in twee delen.

Deel I van deze studie, dat bestaat uit de hoofdstukken 2 tot en met 4, bespreekt de jurisprudentie die het IAHRM heeft ontwikkeld ter bevordering van de internationale strijd tegen de straffeloosheid. De belangrijkste, overkoepelende doctrine die het IAHRM heeft ontwikkeld met betrekking tot dit onderwerp, is die van de verplichting tot het onderzoeken, vervolgen en bestraffen van mensenrechtenschendingen. Deze verplichting werd door het IAHRM verwoord in zijn eerste, beroemde uitspraak in de zaak *Velásquez Rodríguez t. Honduras*. Hoewel geen van de bepalingen van het Amerikaans Verdrag voor de Rechten van de Mens (AVRM) expliciet een verplichting tot vervolging van mensenrechtenschendingen oplegt aan de Staten-Partijen, overweegt het Hof dat deze verplichting impliciet is in verschillende bepalingen, waaronder de algemene verplichting van staten om ervoor zorg te dragen dat personen onder hun rechtsmacht hun rechten vrij en volledig kunnen uitoefenen, zoals neergelegd in Artikel 1(1) AVRM. Daarnaast bepaalt het Hof in *Velásquez Rodríguez* dat de verplichting tot het onderzoeken, vervolgen en straffen van mensenrechtenschendingen niet alleen inhoudt dat staten een juridisch en institutioneel kader moeten scheppen voor dergelijke optreden, maar ook dat zij *effectief* onderzoek moeten doen naar concrete gevallen van mensenrechtenschendingen.

De positieve verplichting tot het onderzoeken, vervolgen en bestraffen van mensenrechtenschendingen die het IAHRM erkent in *Velásquez Rodríguez*, is gestoeld op de grondslag van algemene preventie. Met andere woorden: de noodzaak om de maatschappij als geheel te beschermen tegen verdere mensenrechtenschendingen. In latere uitspraken is het IAHRM echter opgeschoven in de richting van de grondslag van herstel voor slachtoffers. Deze 'slachtoffer-georiënteerde' redenering gaat ervan uit dat het onderzoeken en vervolgen van mensenrechtenschendingen niet alleen een publiek belang dient, maar ook het belang van de individuele slachtoffers van de mensenrechtenschendingen in kwestie. Op basis van deze herstelredenering heeft het IAHRM in de zaak *El Amparo t. Venezuela* de staat opgedragen mensenrechtenschendingen te vervolgen als een maatregel ter genoegdoening voor de slachtoffers. In de late jaren '90 heeft het IAHRM uiteindelijk het 'recht op berechting' van de slachtoffers van mensenrechtenschendingen erkend. Dit recht, geworteld in Artikelen 8(1) en 25 AVRM, houdt in dat slachtoffers een juridisch beschermde aanspraak hebben op strafrechtelijk onderzoek naar de schending van hun mensenrechten en de vervolging en, indien toepasselijk, bestraffing van de schuldigen. Hierbij moet worden opgemerkt dat dit 'recht op berechting' en de positieve verplichting van de staat tot het onderzoeken, vervolgen en bestraffen van mensenrechtenschendingen elkaar niet doorkruisen, maar naast elkaar bestaan en elkaar versterken.

In de drie decennia sinds de *Velásquez Rodríguez* uitspraak heeft het

IAHRM zijn jurisprudentie over de verplichting tot het onderzoeken, vervolgen en bestraffen van mensenrechtenschendingen langzaam steeds verder verfijnd. Door constante confrontatie met de vele verschillende manieren waarop onderzoek en vervolging van dergelijke zaken kunnen worden ondermijnd en omgebogen, heeft het Hof gedetailleerde standaarden ontwikkeld gericht aan de verschillende organen van de staat die een rol spelen in deze procedures. De ontwikkeling van deze standaarden heeft zich afgespeeld langs twee belangrijke lijnen: 1.) de verplichting om alle juridische en praktische obstakels te verwijderen die straffeloosheid in stand houden; en 2.) de verplichting om mensenrechtenschendingen *effectief* te onderzoeken. Onder de paraplu van deze twee dimensies heeft het IAHRM een aantal zeer concrete leerstukken ontwikkeld, die een praktische invulling geven aan de overkoepelende verplichting tot het onderzoeken, vervolgen en bestraffen van mensenrechtenschendingen.

De leerstukken die vallen onder de verplichting tot het verwijderen van de juridische obstakels voor onderzoek en berechting van mensenrechtenschendingen zijn misschien wel het meest omstreden aspect van de jurisprudentie van het IAHRM met betrekking tot de strijd tegen straffeloosheid. Zij bevatten een aantal zeer specifieke instructies aan de wetgevende organen van de staat, die hen, enerzijds, verbieden om bepaalde typen wetgeving aan te nemen (bijvoorbeeld amnestie wetgeving), en, anderzijds, gebieden om andere typen wetgeving door te voeren (bijvoorbeeld specifieke definities van strafbare feiten). Met andere woorden, deze leerstukken beperken de bewegingsruimte van de wetgevende macht. Bovendien heeft het IAHRM ook bepaalde leerstukken ontwikkeld die de werking beperken van een aantal fundamentele strafrechtelijke beginselen die erop gericht zijn de rechten van de verdachte te beschermen, waaronder de verjaring van misdrijven en de beginselen van *ne bis in idem* en legaliteit. Hierbij moet echter worden opgemerkt dat deze controversiële leerstukken alleen van toepassing zijn in zaken betreffende 'ernstige' mensenrechtenschendingen, een beperkte categorie waaronder – tot op heden – alleen de misdrijven gedwongen verdwijning, extrajudiciële executie en marteling vallen. Waar het deze specifieke typen handelingen betreft, rechtvaardigen – volgens het IAHRM – de ernst van de schendingen, de uitdagingen die het onderzoeken en vervolgen daarvan met zich brengt en het recht van de slachtoffers op berechting gezamenlijk deze beperking van de soevereiniteit en de rechten van de verdachte.

De leerstukken die het IAHRM heeft ontwikkeld onder de noemer van de verplichting tot het verwijderen van praktische obstakels die straffeloosheid in stand houden, daarentegen, gelden voor alle mensenrechtenschendingen. Deze leerstukken zijn meer gericht op de institutionele ruimte en beogen om degenen die verantwoordelijk zijn voor het onderzoeken en berechten van mensenrechtenschendingen te voorzien van alle middelen die noodzakelijk zijn voor het uitvoeren van deze taak. Dit omvat de verplichting van alle organen van de staat om samen te werken en elkaar te ondersteunen bij het verzamelen van bewijsmiddelen, de verplichting om

vertegenwoordigers van de staat die de onderzoeken en procedures obstrueren te bestraffen en de verplichting om deelnemers aan deze procedures (bijvoorbeeld getuigen, rechercheurs, officieren van justitie en rechters) te beschermen. Hoewel deze verplichtingen juridisch gezien niet bijzonder problematisch zijn, brengen zij wel een aanzienlijke last mee voor de staat in termen van de toewijzing van (financiële) middelen.

Tenslotte heeft het IAHRM ook zeer gedetailleerde standaarden ontwikkeld met betrekking tot verplichting van de staat om mensenrechtenschendingen *effectief* te beschermen. Het Hof vereist dat de verantwoordelijke autoriteiten het onderzoek naar mensenrechtenschendingen *ex officio* op zich nemen en dat zij dit onderzoek onafhankelijk, zorgvuldig en binnen een redelijke termijn uitvoeren. In de interpretatie van het IAHRM brengt het vereiste van zorgvuldigheid specifieke standaarden met zich mee in relatie tot de wijze van bewijsgaring – welke zijn ontleend aan het Minnesota Protocol van de VN – en in relatie tot de richting en de volledigheid van het onderzoek. Met betrekking tot dat laatste, vereist het Hof dat de nationale autoriteiten alle logische onderzoekslijnen volgen en al het relevante bewijs analyseren in het licht van de bredere context waarin de mensenrechtenschendingen zijn gepleegd in ogenschouw nemen, met als doel om eventuele onderliggende structuren of mechanismen te identificeren. Een dergelijke 'gecontextualiseerde analyse' is in het bijzonder belangrijk wanneer er aanwijzingen zijn voor de betrokkenheid van vertegenwoordigers van de staat bij de mensenrechtenschendingen in kwestie. Een onderzoek met deze kenmerken zal – als het goed is – leiden tot het doel dat het IAHRM voor ogen staat bij het onderzoeken van mensenrechtenschendingen: de identificatie van *alle* verantwoordelijken – zowel de materiële als de intellectuele daders – en het opleggen van een passende straf.

Deel II van deze studie, dat bestaat uit Hoofdstukken 5 tot en met 8, bespreekt de praktische bijdrage van het Inter-Amerikaans mensenrechtensysteem en de hierboven besproken jurisprudentie aan de nationale berechting van ernstige mensenrechtenschendingen in Latijns Amerika. Hierbij wordt de bijdrage van het IAHRM expliciet niet gelijk gesteld aan de naleving van diens individuele uitspraken door de direct betrokken staten. In plaats daarvan kiest deze studie een breder uitgangspunt en analyseert de bijdrage van het Inter-Amerikaans systeem door middel van: 1.) uitspraken van het IAHRM; 2.) de leerstukken ontwikkeld in de jurisprudentie van het IAHRM; en 3.) de procedures in concrete zaken bij de Inter-Amerikaanse Commissie en het IAHRM. Met betrekking tot de relevante nationale processen richt deze studie zich niet uitsluitend uitkomsten van deze processen in de vorm van juridische procedures en veroordelingen. In plaats daarvan erkent deze studie dat juridische procedures slechts één stap zijn in het 'proces van gerechtigheid', dat zich vaak afspeelt gedurende meerdere decennia en waarbij een veelheid aan nationale actoren betrokken zijn, waaronder: 1.) mensenrechten- en slachtofferorganisaties; 2.) officieren van justitie en (nationale) rechters; en 3.) nationale '*veto-players*'.

Concreet omvat deel II van deze studie drie verschillende *case studies*, die de bijdrage analyseren van het IAHRM aan nationale berechting van ernstige mensenrechtenschendingen in twee landen: Guatemala en Colombia. Elk van deze drie *case studies* richt zich op een verschillend aspect van de strijd tegen de straffeloosheid. In relatie tot Guatemala, onderzoekt deze studie het werk van mensenrechten- en slachtofferorganisaties die zich inzetten voor de berechting via het nationale strafrechtsysteem van ernstige mensenrechtenschendingen gepleegd in de context van de Guatemalteekse burgeroorlog. Dit hoofdstuk analyseert hoe het Inter-Amerikaans systeem het vaak gevaarlijke en frustrerende werk van deze groepen ondersteunt en hoe deze groepen het Inter-Amerikaans systeem daartoe strategisch inzetten. De tweede *case study* kijkt naar het wetgevingsproces dat zich heeft afgespeeld in de context van het Colombiaanse vredesproces rondom de creatie van speciale transitionele mechanismen voor de berechting van ernstige mensenrechtenschendingen gepleegd tijdens de burgeroorlog. Dit hoofdstuk analyseert hoe lokale actoren de jurisprudentie van het IAHRM hebben ingezet om het nationale debat *en* het vredesproces te verrijken met een discours gebaseerd op het recht van slachtoffers op berechting van deze mensenrechtenschendingen. De derde *case study* richt zich op het werk van Colombiaanse officieren van justitie die tot taak hebben ernstige mensenrechtenschendingen te berechten in het 'normale' strafrechtsysteem. Dit hoofdstuk analyseert hoe het Inter-Amerikaans systeem het werk van deze officieren heeft ondersteund – en soms heeft gecompliceerd – door van hen te eisen om nieuwe lijnen van onderzoek en analyse te hanteren en om zich rekenschap te geven van de bredere context waarin de misdrijven die zij onderzoeken zijn gepleegd.

Via deze *case studies* toont dit onderzoek aan dat het Inter-Amerikaans mensenrechtensysteem inderdaad heeft bijgedragen aan de nationale berechting van ernstige mensenrechtenschendingen. Meer specifiek toont het aan dat deze bijdragen te vinden zijn in vier verschillende dimensies van de nationale processen in Guatemala en Colombia. Met andere woorden illustreert de studie vier 'sferen van invloed' van het Inter-Amerikaans systeem, te weten: 1.) het *discours* waarin nationale actoren hun roep om gerechtigheid over het voetlicht brengen; 2.) het *narratief* waarin nationale actoren de onderliggende mensenrechtenschendingen, en de context waarin deze zijn gepleegd, plaatsen; 3.) het nationale *normatieve kader* voor het onderzoek en de berechting van ernstige mensenrechtenschendingen; en 4.) de voortgang van *nationale procedures* met betrekking tot relevante cases.

Met betrekking tot de eerste van deze vier 'invloedssferen' illustreren de *case studies* duidelijk dat de roep vanuit het maatschappelijk middenveld om gerechtigheid een cruciale drijvende kracht is achter de nationale berechting van ernstige mensenrechtenschendingen. Het is in deze context echter heel belangrijk *hoe* het maatschappelijk middenveld deze roep articuleert. De case studies tonen dat lokale actoren in Guatemala en Colombia de jurisprudentie van het IAHRM gebruiken om hun eisen te verwoorden in termen van internationaal recht en de juridische verplichtingen van de

staat, waardoor zij het nationale debat over dit onderwerp (iets) hebben kunnen verschuiven in hun voordeel. De uitgebreide jurisprudentie van het IAHRM op het gebied van de strijd tegen de straffeloosheid, biedt deze lokale actoren een discours dat precies is afgesteld op hun situatie en op de obstakels waar zij op nationaal niveau tegenaan lopen. Daarnaast verbindt de jurisprudentie van het IAHRM de eisen van lokale actoren aan een geaccepteerde juridische autoriteit, waardoor het hen bescherming biedt tegen de op de persoon gerichte retorische aanvallen waaraan zij blootstaan in hun tot op het bot gepolitiseerde nationale context.

De narratieve dimensie van de relevante nationale processen is nauw verbonden met de discursieve sfeer; in beide gevallen gaat het om de wijze waarop wordt gesproken over (gerechtigheid voor) ernstige mensenrechtenschendingen. Maar waar 'discours' ziet op de wijze waarop het maatschappelijk middenveld de roep om gerechtigheid uitdrukt, ziet het 'narratief' of de manier waarop deze groepen de onderliggende mensenrechtenschendingen – en de historische en politieke context daarvan – begrijpen en bespreken. Zowel in Guatemala als in Colombia heeft het Inter-Amerikaans systeem lokale actoren geholpen om het dominante, door de overheid gesteunde narratief van de respectievelijke burgeroorlogen te betwisten. In het kader van procedures voor het Inter-Amerikaans systeem hebben de slachtoffers van ernstige mensenrechtenschendingen publiekelijk hun versie van de zaak kunnen vertellen – een kans die zij op nationaal niveau vaak niet krijgen. Daarnaast hebben de betrokken staten in het kader van deze procedures soms internationale verantwoordelijkheid geaccepteerd voor gebeurtenissen – bijvoorbeeld moordpartijen – die zij voorheen altijd publiekelijk ontkend hadden. Behalve de procedures binnen het Inter-Amerikaans systeem, hebben ook de uitspraken van het IAHRM in individuele zaken een belangrijke bijdrage geleverd aan de narratieve dimensie van de nationale processen in kwestie. Deze uitspraken, en de daarin vervatte gecontextualiseerde analyse, ondersteunen en verdiepen het door slachtoffers en mensenrechtenorganisaties gepresenteerde 'alternatieve verhaal' van de beide burgeroorlogen. Daarnaast vormen deze uitspraken ook een bron van inspiratie voor officieren van justitie en rechters bij het uitvoeren van hun eigen gecontextualiseerde analyses van de mensenrechtenschendingen waarmee zij zich geconfronteerd zien.

Dat het normatieve kader voor de berechting van ernstige mensenrechtenschendingen relevant is voor de kans op succes van dergelijke berechtingen, is evident. Juridische obstakels als amnestiewetgeving kunnen nationale processen ondermijnen en doen ontsporen, zelfs als voor het overige alle ingrediënten voor succes aanwezig zijn. Lokale actoren zijn daardoor vaak gedwongen veel tijd en moeite te steken in het uit de weg ruimen van dergelijke obstakels, voordat überhaupt met onderzoek en berechting kan worden begonnen. Alle drie de *case studies* tonen aan dat de leerstukken van het IAHRM betreffende de plicht van de staat om juridische obstakels voor de berechting van mensenrechtenschendingen te verwijderen, hen hierbij tot steun zijn geweest. De jurisprudentie van het

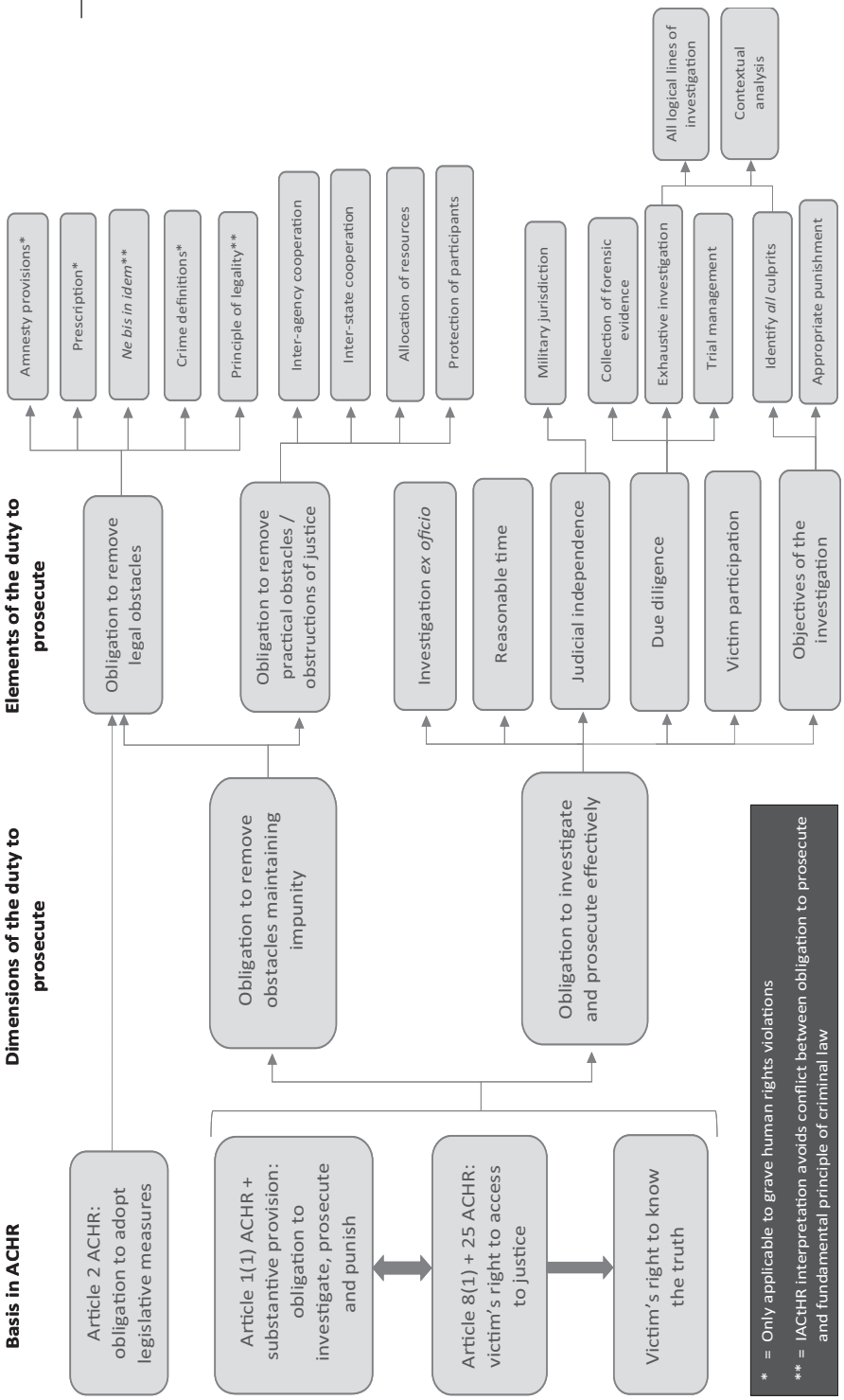
IAHRM biedt juridische argumenten op basis waarvan lokale activisten de verwijdering van juridische obstakels, waaronder amnestiewetten, hebben bepleit. Tegelijkertijd is deze jurisprudentie ook een basis geweest waarop relevante nationale autoriteiten ertoe over zijn gegaan om deze obstakels daadwerkelijk te verwijderen.

Ten slotte tonen de *case studies* aan dat het Inter-Amerikaans systeem in sommige gevallen ook een bijdrage heeft geleverd aan de praktische voortgang van relevante nationale procedures. Vaak zijn de bijdragen aan de voortgang van procedures indirect en afhankelijk van een succesvolle bijdrage aan één van de andere relevante dimensies van de nationale berechting, zoals hierboven omschreven. Maar de *case studies* laten zien dat de procedures bij het Inter-Amerikaans systeem ook op meer directe wijze kunnen bijdragen aan de voortgang van procedures op nationaal niveau, in het bijzonder wanneer deze twee procedures parallel aan elkaar worden gevoerd. Ten eerste gaat van een parallelle procedure op Inter-Amerikaans niveau een 'monitoring effect' uit, dat nationale procedures voort kan stuwen. Enerzijds brengen deze procedures een internationale 'spotlight' met zich mee, die de ruimte voor politieke inmenging in de nationale procedures (iets) verkleint. Anderzijds kunnen lokale actoren via de parallelle Inter-Amerikaanse procedures druk uitoefenen op nationale autoriteiten, wanneer deze hun interesse in de zaak lijken te verliezen. Ten tweede kunnen Inter-Amerikaanse procedures nationale procedures ondersteunen door het beschermen van personen die daarin een drijvende rol hebben. De serieuze dreiging waaraan lokale activisten, officieren van justitie, rechters en getuigen blootstaan beïnvloeden de voortgang van nationale processen negatief. De Inter-Amerikaanse procedures kunnen deze actoren op twee manieren in bescherming nemen: enerzijds, door de internationale aandacht die deze procedures genereren voor bepaalde, kwetsbare nationale actoren, waardoor het voor hun vijanden 'kostbaarder' wordt hen aan te vallen. Anderzijds heeft het Inter-Amerikaans systeem in veel gevallen de staat opdracht gegeven om kwetsbare lokale actoren politiebescherming te bieden.

Op basis van de jurisprudentieanalyse in Deel I en de case studies in Deel II, toont dit onderzoek dus aan dat drie verschillende 'interventies' van het Inter-Amerikaans systeem (uitspraken, doctrines en procedures) een bijdrage hebben geleverd aan vier verschillende dimensies (discours, narratief, normatief kader en procedures) van de nationale berechting van mensenrechtenschendingen. De laatste vraag die deze studie analyseert, is *via welke mechanismen* deze bijdrage precies tot stand komt. Wat *doen* deze interventies waardoor zij de relevante dimensies van nationale berechting beïnvloeden? Op basis van de analyse in de *case studies* en de synthese in het laatste hoofdstuk, poneert deze studie dat het Inter-Amerikaans mensenrechtensysteem heeft bijgedragen aan de nationale berechting van ernstige mensenrechtenschendingen doordat het: 1.) de roep om gerechtigheid *vertaalt* in een recht van slachtoffers op gerechtigheid en een plicht van de staat tot het onderzoeken, vervolgen en bestraffen van mensenrechtenschen-

dingen; 2.) de roep om gerechtigheid op deze manier *legitimeert* en depolitiseert; 3.) het, in individuele gevallen, leidt tot *monitoring* van nationale procedures en *prioritering* van bepaalde procedures boven anderen; 4.) een *voorbeeld biedt* van relevante en passende methoden voor de interpretatie van mensenrechtenschendingen in hun bredere historische en politieke context; en 5.) lokale actoren in de berechting van ernstige mensenrechtenschendingen *beschermt*.

Annex 1 – Schematic overview ACtHR doctrines



Annex 2 – Interviews: Guatemala case study

- Interview A
  Lawyer, formerly at COPREDEH.
  Date: 5 May 2014
  Location: Guatemala City
  Record: Field notes

- Interview B
  Lawyer (private practice) with expertise in constitutional law.
  Date: 21 March 2014
  Location: Guatemala City
  Record: Audio and transcript

- Interview C
  Lawyer at the UN Office of the High Commissioner for Human Rights in Guatemala.
  Date: 29 April 2014
  Location: Guatemala City
  Record: Field notes and interview report

- Interview D
  Trial judge in criminal cases.
  Date: 26 April 2014
  Location: Guatemala City
  Record: Field notes and interview report

- Interview E:
  Lawyer at the Office of the Human Rights Ombudsman.
  Date: 21 March 2014
  Location: Guatemala City
  Record: Audio and transcript

- Interview F:
  Victim and pro-accountability activist.
  Date: 1 April 2014
  Location: Guatemala City
  Record: Audio and transcript

– Interview G:
Victim and pro-accountability activist.
Date: 7 April 2014
Location: Guatemala City
Record: Audio and transcript

– Interview H:
Lawyer at a Guatemalan NGO.
Date: 1 May 2014
Location: Guatemala City
Record: Interview report

– Interview I:
Lawyer and pro-accountability activist.
Date: 27 March 2014
Location: Guatemala City
Record: Audio and transcript

– Interview J:
Trial judge in criminal cases.
Date: 26 April 2014
Location: Guatemala City
Record: Field notes and interview report

– Interview K:
Victim and pro-accountability activist.
Date: 4 April 2014
Location: Guatemala City
Record: Audio and transcripts

– Interview L:
Lawyer at a Guatemalan NGO.
Date: 28 March 2014
Location: Guatemala City
Record: Audio and transcript

– Interview M:
Victim and pro-accountability activist.
Date: 5 April 2014
Location: Skype interview
Record: Interview report

– Interview N:
Academic and human rights specialist.
Date: 22 March 2014
Location: Skype interview
Record: Interview report

– Interview O:
Lawyer (private practice) specialized in human rights cases.
Date: 12 April 2014
Location: Guatemala City
Record: Audio, transcript and field notes

– Interview P:
Lawyer at the Guatemalan Public Ministry.
Date: 30 April 2014
Location: Guatemala City
Record: Interview report

– Interview Q:
Lawyer at a Guatemalan NGO.
Date: 24 April 2014
Location: Guatemala City
Record: Interview report

– Interview R:
Academic and lawyer at the Office of the Human Rights Ombudsman.
Date: 19 March 2014
Location: Guatemala City
Record: Audio, transcript and interview report

– Interview S:
Lawyer at a Guatemalan NGO.
Date: 2 April 2014
Location: Guatemala City
Record: Audio and transcript

– Interview T:
Victim and pro-accountability activist.
Date: 8 November 2013
Location: The Hague, the Netherlands
Record: Field notes and interview report

– Interview U:
Human rights expert at the at the Office of the Human Rights Ombudsman.
Date: 14 March 2014
Location: Guatemala City
Record: Audio, transcript and interview report

– Interview V:
Interim director of the *Escuela de Estudios Judiciales* of the *Organismo Judicial*.
Date: 12 May 2014
Location: Guatemala City
Record: Field notes

– Interview W:
Lawyer at COPREDEH.
Date: 9 April 2014
Location: Guatemala City
Record: Audio and transcript

Annex 3 – Interviews: Colombia case studies

- Interview 1:
  Academic and human rights expert.
  Date: 23 November 2015
  Location: Chía, Colombia
  Record: Audio and transcript

- Interview 2:
  Lawyer at a Colombian NGO with expertise in constitutional litigation. During the last part of the interviewed, we were joined by a colleague of the respondent, with expertise in human rights litigation.
  Date: 9 October 2015
  Location: Bogotá, Colombia
  Record: Audio, transcript and interview report

- Interview 3:
  Lawyer at the *Agencia de la Defensa Jurídica del Estado*.
  Date: 11 November 2015
  Location: Bogotá, Colombia
  Record: Interview report

- Interview 4:
  Head of the Unit of Specialized Prosecutors of the *Fiscalía General de la Nación*.
  Date: 1 October 2015
  Location: Bogotá, Colombia
  Record: Interview report

- Interview 5:
  Judge at the Justice and Peace Tribunal in Bogotá, Colombia.
  Date: 9 November 2015
  Location: Bogotá, Colombia
  Record: Interview report

- Interview 6:
  Clerk at the Colombian Constitutional Court.
  Date: 24 November 2015
  Location: Bogotá, Colombia
  Record: Interview report

– Interview 7:
Researcher at a Colombian human rights think tank.
Date: 26 October 2015
Location: Bogotá, Colombia
Record: Audio, transcript and interview report

– Interview 8:
Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
Date: 27 October 2015
Location: Bogotá, Colombia
Record: Interview report

– Interview 9:
Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
Date: 18 November 2015
Location: Bogotá, Colombia
Record: Audio, transcript and interview report

– Interview 10:
Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
Date: 27 October 2015
Location: Bogotá, Colombia
Record: Audio and transcript

– Interview 11:
Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
Date: 27 October 2015
Location: Bogotá, Colombia
Record: Audio and transcript

– Interview 12:
Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
Date: 27 October 2015
Location: Bogotá, Colombia
Record: Audio and transcript

– Interview 13:
Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
Date: 27 October 2015
Location: Bogotá, Colombia
Record: Audio and transcript

– Interview 14:
Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
Date: 27 October 2015
Location: Bogotá, Colombia
Record: Audio and transcript

– Interview 15:
  Prosecutor at the Human Rights Unit of the *Fiscalía General de la Nación*.
  Date: 27 October 2015
  Location: Bogotá, Colombia
  Record: Audio and transcript

– Interview 16:
  Academic, expert in criminal law and transitional justice.
  Date: 20 June 2016
  Location: Amsterdam, the Netherlands
  Record: Interview report

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Curriculum Vitae

Hanna Bosdriesz was born on the 12th of August 1985 in Amsterdam, the Netherlands. She graduated from the *Vossius Gymnasium* in Amsterdam in 2003. She obtained her Bachelor's degree in law (Honoursbachelor Program, *cum laude*) and her Master's degree in International and European Law at the University of Amsterdam. During her studies, Hanna worked as a research assistant to professor J.A. Peters (UvA, constitutional law) and did internships with Amsterdam-based law firm *Prakken d'Oliveira* and the International Criminal Tribunal for the Former Yugoslavia. She also volunteered with the *Stichting Rechtswinkel Amsterdam* (Amsterdam legal aid center) and the NGO Niños de Guatemala.

After she graduated in early 2011, Hanna Bosdriesz worked as a junior researcher & lecturer at the Department of Constitutional and Administrative law at Leiden University. Between 2012 and 2018, she was affiliated with the Grotius Center for International Legal Studies as a PhD candidate. After concluding her PhD manuscript, Hanna joined the Department of International Affairs and Legal Assistance in Criminal Matters of the Dutch Ministry of Justice and Security in 2019.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2018 and 2019:

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