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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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.