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

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

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

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

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

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

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

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

2 The obligation to remove all legal obstacles maintaining impunity

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

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

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

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

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

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

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

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

3 Idem, para. 36.

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

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

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

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

2.2 The prohibition of amnesty provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 Idem, para. 123.

20 Idem, paras. 126-127.

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

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

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

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

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

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

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

25 *See supra* Chapter 2, Section 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33 Idem, para. 285.

34 Idem, para. 286.

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

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

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

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

35 Idem, paras. 287-292.

36 Idem, paras. 295-296.

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

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

2.3 The non-applicability of provisions on prescription

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

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

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

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

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

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

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

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

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

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

41 Idem, para. 112.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 Idem, para. 20.

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

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

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

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

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

58 Idem, paras. 82-122.

59 Idem, paras. 154-155.

60 Idem, paras. 155-156.

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

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

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

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

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

62 Idem, para. 216.

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

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

2.5 Codification of enforced disappearance as an autonomous crime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 The obligation to remove all practical obstacles maintaining impunity

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

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

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

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

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

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

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

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

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

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

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

3.1 Obligation to cooperate in the collection of evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 Obligation to punish state agents who obstruct justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3 Obligation to protect those who participate in the domestic proceedings

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

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

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

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

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

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

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

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

3.4 Obligation to seek inter-state cooperation in judicial matters

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

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

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

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

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

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

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

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

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

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

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

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

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

4 The obligation to investigate, prosecute and punish effectively

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "the question of the competence of military tribunals and their compatibility with international human rights instruments calls for a review of Colombian legislation, which it would be inappropriate to undertake in an incidental manner and at the reparations phase […]".[129]

Around the same time, the Court more explicitly refused to find military courts incompetent to hear cases of human rights violations in its judgment in the case of *Genie Lacayo v. Nicaragua*, also concerning an enforced disappearance at the hands of the military and subsequent proceedings before the military courts. Here, the Court responded to the Commission's request by saying that:

> "the fact that it involves a military court does not per se signify that the human rights guaranteed the accusing party by the Convention are being violated".[130]

However, in the decade or so following these two judgments, the Court's position on the issue has changed fundamentally. This change was preceded by a string of judgments concerning the use of military courts by the Fujimori administration in Peru to hear charges of treason against suspected members of the Shining Path guerilla movement.[131] In these cases, the right to a competent and impartial tribunal was argued in favor of the accused, who were civilians appearing before a military court, which would seem to make them irrelevant to the rule being discussed here. However, the legal findings of the Court in these cases became the basis upon which it later built its argumentation underlying the prohibition of military jurisdiction over cases of human rights violations committed by members of the Armed Forces.

When discussing the issue of military jurisdiction in the case of *Castillo Petruzzi et al. v. Peru*, the Court noted that Peru's internal legislation limited that jurisdiction served only "the purpose of maintaining order and discipline within the ranks of the armed forces" and, therefore, could only be applied to "military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances". [132] With this in mind, the Court found that:

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129 IACtHR *Caballero Delgado and Santana v. Colombia (Reparations and Costs)*, 29 January 1997, para 57.

130 IACtHR *Génie Lacayo v. Nicaragua (Merits, Reparations and Costs)*, 29 January 1997, para. 84. The Court then considered whether the proceedings before the military courts had shown any concrete indications of bias against the victim (or in favor of the accused) or of oter violations of the victims' procedura rights and found that this was not the case.

131 This string of judgments includes IACtHR *Loayza Tamayo v. Peru (Merits)*, 17 September 1997; IACtHR *Castillo Petruzzi et al. v. Peru (Merits, Reparations and Costs)*, 30 May 1999 and IACtHR *Cantoral Benavides (Merits)*, 18 August 1999.

132 IACtHR *Castillo Petruzzi et al. v. Peru (Merits, Reparations and Costs)*, 30 May 1999, para. 128.

> "When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts."[133]

Moreover, the Court held that, given that the military was "fully engaged in he counter-insurgency struggle", its courts could not be considered impartial in proceedings against individuals suspected of belonging to the opposing side in that struggle.[134] In short, the Court established that military courts cannot claim jurisdiction over individuals who do not belong to the military and that it cannot be considered as an impartial tribunal in cases against (suspected) members of the opposing side in a conflict in which the military itself is engaged.

Not long after, the Court began to apply the same logic to cases in which military courts had exercised jurisdiction over acts perpetrated not by the opposing side in a conflict, but by its own personel. The first example of this can be found in the case of *Durand and Ugarte v. Peru*, which concerned the death of two inmates in the context of an intervention by the Peruvian military to strike down a prison-riot.[135] The subsequent proceedings concerning the death of these two (and many other) inmates had been conducted by military courts. Firstly, the Court discussed whether military courts are competent to adjudicate cases such as the one at hand, where the human rights of civilians are violated by members of the military. Resuming its argument from the *Castillo Petruzzi* case, the Court held:

> "In a democratic Government of Laws the *penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests*, related to the functions assigned by law to the military forces. Consequently, *civilians must be excluded from the military jurisdiction scope* and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order.

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133 Idem.

134 Idem, para. 130.

135 The two victims in this case had been detained on suspicion of participation in guerrilla activity, without a warrant for their arrest and without being caught *in flagrante delicto*. While they were being held in the "El Frontón" prison, a riot broke out in that prison during which inmates had occupied parts of the premises. As part of its operation to strike down the riot, the military demolished a part of the installation known as the "Blue Pavilion", with inmates still inside, indiscriminately killing a large number of inmates, inclusing the two victims in this case. The Court found that, while the State had the right to defend itself and to strike down the riot, the force used by the Peruvian military in doing so was disproportionate. Moreover, there had been no thorough investigation into the facts of the case, and the proceedings conducted in connection to the situation had been conducted under the military jurisdiction. *See* IACtHR *Durand and Ugarte v. Peru (Merits)*, 16 August 2000, paras. 64-72 and 115-131.

> […] In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment *must be placed on the ordinary justice,* apart from the fact that the alleged active parties had been military or not."[136] [emphasis added]

Whereas in the case of *Castillo Petruzzi* the limited scope of the military jurisdiction in Peru had been based on an analysis of domestic law, *Durand and Ugarte* articulates it as a rule of general applicability. *Durand and Ugarte* also makes it clear that not only civilians are excluded from the scope of the military jurisdiction, but also certain categories of acts committed by members of the Armed Forces. In fact, the only cases over which the military courts can claim jurisdiction are those concerning "military felonies", which are related directly to the function of the military and which attempt against "legally protected interests of the military order". Later case law has clarified that, in order for an act to be considered a military felony, there must be a "direct and proximal relationship with the military function or with the infringement of juridical rights characteristic of the military order".[137]

More specifically, violations of human rights committed against civilians can never be considered military felonies and, therefore, can never be subject to military jurisdiction.[138] This is so for two reasons: firstly, human rights violations "can never be considered as a legitimate and acceptable means for compliance with the military mission", but rather, "are openly contrary to the duties of respect and protection of human rights".[139] Thus, there can be no direct relationship between human rights violations and the military function, since the military, as part of the state, is obliged to uphold human rights. Secondly, when military courts claim jurisdiction over human rights violations, they do so "not only with regard to the defendant, which must necessarily be a person with an active military status, but also with regard to the civil victim", whose interest in the case "transcends the sphere of the military realm, since juridical rights characteristic of the ordinary regimen are involved".[140] Thus, the weight and the nature of the rights of victims in cases concerning human rights violations – not only the

136 IACtHR *Durand and Ugarte v. Peru (Merits)*, 16 August 2000, paras. 117-118.

137 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 200 and IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, paras. 273-274..

138 Idem, para. 274.

139 Idem, para. 277. This paragraph refers specifically to enforced disappearance. However, the same logic would apply to other types of human rights violations, at the very least those which the Court considers grave violations of human rights.

140 IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, para. 275. *See also* IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 200.

material rights violated but also their procedural rights under Article 8(1) ACHR – preclude the exercise of military jurisdiction over such cases.

On the one hand, *Durand and Ugarte* thus established that military courts do not have jurisdiction over cases involving human rights violations. Moreover, the same judgment also clarified that the military courts could not be considered impartial in the case at hand. On this question, the IACtHR held that:

> "it is reasonable to consider that military court officials who acted in the leading process to investigate the events in El Frontón lacked the required independence and impartiality as stipulated in Article 8(1) of the Convention to efficiently and exhaustively investigate and punish the liable parties.
>
> […] As has been stipulated (supra para. 59), the courts that had knowledge of the facts related to these events "constitute a high Body of the Armed Institutes" and the military men who were members of these tribunals were, at the same time, members of the armed forces in active duty, a requirement to be part of military tribunals. Thus, they were unable to issue an independent and impartial judgment."[141]

In other words, when the judges and the defendant in a criminal case belong to the same institution, namely the military, the Court deems it reasonable to assume that there will be a lack of independence and impartiality of the part of the judges. Especially if the victim is an outsider to that institution, as is true in cases of human rights violations committed against civilians. This position has been upheld in later case law.[142]

Finally it should be noted that, as discussed in section X of this chapter, a lack of independence and/or impartiality of the judicial authorities involved in the proceedings constitutes, according to the IACtHR, a ground for considering those proceedings to be 'fraudulent'. This, in turn, has consequences for the ability of the judgments resulting from those proceedings to constitute *res judicata*. Combining the doctrine of fraudulent *res judicata*[143] with the IACtHR's position that military courts lack independence and impartiality in cases concerning human rights violations committed by members of the military, the logical conclusion would be that any acquittals resulting from such proceedings can be considered fraudulent. Such acquittals cannot, therefore, block the further investigation and prosecution of the

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141 IACtHR *Durand and Ugarte v. Peru (Merits)*, 16 August 2000, paras. 125-126.

142 *See for example* IACtHR *Las Palmeras v. Colombia (Merits)*, 6 December 2001, para. 53. However, the IACtHR normally starts its considerations on the issue of military jurisdiction by examining the competence of military courts to claim jurisdiction over human rights violations. Upon establishing that military courts lack that competence, it does not usually find the need to continue with an analysis of their impartiality.

143 *See supra* section 2.4 of this chapter.

underlying violations. The IACtHR confirmed this conclusion in the case of *La Cantuta v. Peru*.[144]

In short, the IACtHR's consistent case law holds that military courts are not competent to hear cases concerning human rights violations (allegedly) committed by members of the Armed Forces, nor can they be considered independent or impartial in such cases. If such cases are submitted to military jurisdiction, this represents a violation of the victims' procedural rights protected by Article 8(1) ACHR.[145] As a result, the Court also obliges states to provide victims with an effective recourse to challenge the referral of their case to the military courts. If such an effective recourse is not in place, this represents a separate violation of Article 25 ACHR.[146] Moreover, previous acquittals delivered by military courts in cases concerning human rights violations cannot produce *res judicata*, due to the lack of independence and impartiality of those courts. Such acquittals should not, therefore, be considered obstacles to the further investigation and prosecution of those cases by the ordinary criminal courts.

4.2 Due diligence

The notion of due diligence is central to the obligation to investigate and prosecute human rights violations seriously and effectively. As the Court held in the case of the *La Rochela Massacre v. Colombia*:

> "The focal point of analysis of whether the proceedings in this case were effective is whether they complied with the obligation to investigate with due diligence. This obligation requires that the body investigating a violation of human rights *use all available means to carry out all such steps and inquiries as are necessary to achieve the goal pursued within a reasonable time*."[147] [emphasis added]

144 *See* IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 154. The Court's endorsement of the position described here is somewhat implicit, but only because the domestic authorities had already disregarded the previous acquittals by the military courts of their own accord, making it unnecessary for the Court to formally decide the issue. The IACtHR did, however, reiterate its own case law on the question of fraudulent *res judicata* and signaled its approval, on that basis, of the decision of the domestic authorities.

145 *See for example* IACtHR *Las Palmeras v. Colombia (Merits)*, 6 December 2001, paras. 53-54; IACtHR *19 Tradesmen v. Colombia (Merits, Reparations and Costs)*, 5 July 2004, paras. 164-167 and 172-177; IACtHR *Almonacid Arellano et al v. Chile (Preliminary Objections, Merits, Reparation and Costs)*, 26 September 2006, paras. 130-133; and IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, paras. 270-282.

146 IACtHR *Radilla Pacheco v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 23 November 2009, paras. 290-298.

147 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 156. *See also* IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, para. 136.

In other words, the domestic judicial authorities must do everything in their power to investigate cases of human rights violations, determine the truth of what happened and identify, prosecute and punish all those responsible. This is, of course, a very broad standard, as is illustrated by the Court's judgment in the case of the *"Military Diary" v. Guatemala*, where it held that:

> "In this case, the Court concludes that the State has not conducted an investigation into the facts of this case with due diligence, because: most of the measures were aimed at obtaining information about the victims; there was an unwarranted delay in unifying the investigation; there was a lack of collaboration from the Ministry of Defense that has obstructed the progress of the investigations, and there have been serious omissions with regard to the use of the evidence in the case file."

This quote shows the number and variety of ways in which the obligation to investigate with due diligence can be violated in one single case. To some extent, then, the due diligence requirement serves as a catch-all provision, for the Court to sanction any omissions and/or lax behavior by judicial authorities. For example, the Court has relied on the due diligence requirement to hold the state responsible where its judicial authorities had not taken the necessary measures to apprehend persons whose arrest had been requested by a competent court, even though the person in question was a state agent whose location was known, or should be known, to the authorities.[148]

However, as part of this broad obligation to investigate and prosecute with due diligence, the Court has also developed a number of more specific obligations, which give concrete meaning to the concept of due diligence in relation to particular aspects of the domestic proceedings. These elements of the obligation to investigate and prosecute with due diligence concern: 1.) the collection and handling of physical evidence, especially in the early stages of the proceedings; 2.) the direction and scope of the domestic investigations; and 3.) the obligation of the judge to properly 'manage' the trial.

148 *See for example* IACtHR *Juan Humberto Sánchez v. Honduras (Preliminary Objection, Merits, Reparations and Costs)*, 26 November 2003, para. 131 and IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, para. 204. While it is clear that, in this case, the State did not do everything in its power to arrest the accused and, thereby, further the domestic proceedings, the case offers vert little guidance on how to properly conduct such proceedings in future.

4.2.1 Standards on the collection and management of forensic evidence

In cases of violations to the right to life,[149] the forensic evidence collected in the early stages of the investigation, directly after the body of the victim is discovered, is of utmost importance for the quality and success of the investigation as a whole. If the collection of evidence is not handled properly in those early stages, the possibilities for conducting an effective investigation in the long run are seriously reduced. In the words of the Court:

> "the correct management of the crime scene is the starting point for an investigation and, therefore, it is crucial in clarifying the nature, circumstances and characteristics of the crime, as well as those involved in it."[150]

In this context, the Court has held that:

> "the obligation to investigate a death means that the effort to determine the truth with all diligence must be evident as of the very first procedures."[151]

However, a review of the Court's case law shows that, in many cases, even the most basic diligence in the collection and handling of forensic evidence was not observed, due to a lack of capacity and/or will on the part of states' investigative bodies.[152] Given the central importance of the forensic evidence collected during the early stages of the investigation, the Court has not been satisfied merely to list the mistakes made by investigative bodies and find states responsible after the fact. Rather, it has imposed on the states under its jurisdiction detailed minimum standards on the collection of physical evidence and the management of the crime scene. These minimum standards are not an innovation by the Court itself, but are set out in the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and

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149 This section will refer primarily to cases of extrajudicial execution and other forms of violent death, but not enforced disappearance. The standards discussed in this section cannot be applied to cases of enforced disappearance, as the particular nature of that crime means that there usually is no body or crime scene available to collect physical evidence from.

150 IACtHR *Human Rights Defender et al. v. Guatemala (Preliminary Objections, Merits, Reparations and Costs)*, 28 August 2014, para. 209.

151 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, para. 300.

152 Examples of mistakes in the management of the crime scene and the collection of physical found in the Court's case law include: the failure to take fingerprints, discarding physical evidence already collected, incomplete or incorrect autopsy reports and even the arbitrary assignment of names to the bodies of victims. *See* IACtHR *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, 19 November 1999, para. 231; IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 166 and IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, paras. 299-333.

Summary Executions (Minnesota Protocol).[153] Whereas the Minnesota Protocol itself is a non-binding document describing best practices, the Court has made it clear that they can be seen as an elaboration of the obligation to investigate and hence non-compliance with those standards may lead to a violation of the state's obligation under the ACHR to effectively investigate and prosecute human rights violations.

The Court first referred to the Minnesota Protocol in the case of *Juan Humberto Sánchez v. Honduras*, stating:

> "This Court deems that in cases where there have been extra-legal executions the State must conduct a serious, impartial and effective investigation of what happened. In this regard, the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, or Minnesota Protocol, has set forth certain basic guidelines to conduct the respective investigations and establish whether the executions have been extra-legal, summary, and arbitrary. […]. In this case, said parameters were not fulfilled."[154]

In the quote above, the Court is still somewhat implicit about the status of the Minnesota Protocol and the guidelines articulated therein. While it does seem to use the guidelines taken from the Protocol in its analysis of the state's investigative efforts, it limits itself to noting that the Minnesota Protocol "has set forth certain guidelines", without clarifying what the relevance of these guidelines is. It was more explicit on this point in later cases. In the case of *Zambrano Vélez v. Ecuador*, the Court explained that:

> "on the grounds of the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, this Court has defined the guiding principles that should be observed when it is considered that a death may be due to extrajudicial execution. The State authorities that conduct an investigation must, inter alia, (a) identify the victim; (b) recover and preserve the probative material related to the death, in order to facilitate any

153 The UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution has recently been revised and is now called the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), available at http://www.ohchr.org/Documents/Issues/Executions/MinnesotaProtocolInvestigationPotentiallyUnlawfulDeath2016.pdf, last accessed: 01-09-2017.
As noted by Jan Hessbruegge, the Minnesota protocol, in turn, summarizes and supplements the principles concerning the investigation of violations of the right to life developed by human rights bodies, including the IACtHR, through "a process of legal cross-fertilization that reaches back to the venerable Velásquez Rodríguez judgment". J. Hessbruegge, 'Minnesota Protocol on the investigation of unlawful death gets a new life', *EJIL Talk!*, 26 May 2017, available at <https://www.ejiltalk.org/minnesota-protocol-on-the-investigation-of-unlawful-death-gets-a-new-life/>, last checked: 17-09-2018.

154 IACtHR *Juan Humberto Sánchez v. Honduras (Preliminary Objection, Merits, Reparations and Costs)*, 26 November 2003, para. 127.

> investigation; (c) identify possible witnesses and obtain their statements in relation to the death under investigation; (d) determine the cause, method, place and moment of the death, as well as any pattern or practice that could have caused the death, and (e) distinguish between natural death, accidental death, suicide and murder. In addition, it is essential to search exhaustively the scene of the crime and autopsies and analyses of human remains must be carried out rigorously by competent professionals, using the most appropriate procedures."[155]

Thus, the early stages of the investigation into a possibly unlawful death and the collection and handling of evidence, especially forensic evidence, must be guided by the basic principles and purposes listed in the quote above.[156] However, these basic principles are not the full extent of the obligations the Court has imposed on states. In the *Cotton Field* case, the Court applied much more detailed and practical standards, all of them taken from the Minnesota Protocol, concerning the way in which the responsible authorities should, 1.) manage, analyze and preserve the crime scene;[157] 2.) maintain and report on the chain of custody for each item of forensic

155 IACtHR *Zambrano Vélez et al. v. Ecuador (Merits, Reparations and Costs)*, 4 July 2007, para. 121.

156 These guidelines were listed in the original Minnesota Protocol, which was concluded in 1991. However, the revised version of the Minnesota Protocol, published in 2017, does not contain these guiding principles.

157 IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, para. 301, stating that "regarding the crime scene, the investigators must, at the very least: photograph the scene and any other physical evidence, and the body as it was found and after it has been moved; gather and conserve the samples of blood, hair, fibers, threads and other clues; examine the area to look for footprints or any other trace that could be used as evidence, and prepare a detailed report with any observations regarding the scene, the measures taken by the investigators, and the assigned storage for all the evidence collected. The obligations established by the Minnesota Protocol establish that, when investigating a crime scene, the area around the body must be closed off, and entry into it prohibited, except for the investigator and his team.".

evidence;[158] 3.) conduct and report on autopsies;[159] and 4.) identify bodies and return them to the family of the victim after a positive identification has been made.[160]

Finally, the Court has made it clear that the standards from the Minnesota Protocol are applicable to investigations into all types of violent death, not only to cases concerning extrajudicial executions.[161] This position reflects a development in the Minnesota Protocol itself, which has recently been revised and expanded. The revised version is officially known as the Minnesota Protocol on the Investigation of Potentially Unlawful Death, which reflects the expansion of the scope of the standards contained in it.

In short, the IACtHR has relied on the Minnesota Protocol to give practical content to the very broad notion of 'due diligence' when applied to the collection and handling of forensic evidence in cases concerning (potential) violations of the right to life. These standards are especially important in the first stages of the investigations, which are vital to the effectiveness of the investigations as a whole. The IACtHR's reliance on the Minnesota Protocol in this respect has made the standards included in it binding on the states under the Court's jurisdiction.

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158 Idem, para. 305, stating that "the United Nations Manual indicates that due diligence in the legal and medical investigation of a death requires maintaining the chain of custody of each item of forensic evidence. This consists in keeping a precise written record, complemented, as applicable, by photographs and other graphic elements, to document the history of the item of evidence as it passes through the hands of the different investigators responsible for the case. The chain of custody can extend beyond the trial, sentencing and conviction of the accused; given that old evidence, duly preserved, could help exonerate someone who has been convicted erroneously. The exception to the foregoing is the positively identified remains of victims, which can be returned to their families for burial, on condition that they cannot be cremated and may be exhumed for new autopsies.".

159 Idem, para. 310, stating that "the purpose of an autopsy is, at the very least, to gather information to identify the dead person, and the hour, date, cause and form of death. An autopsy must respect certain basic formal procedures, such as indicating the date and time it starts and ends, as well as the place where it is performed and the name of the official who performs it. Furthermore, inter alia, it is necessary to photograph the body comprehensively; to x-ray the body, the bag or wrappings, and then undress it and record any injuries. Any teeth that are absent, loose or damaged should be recorded, as well as any dental work, and the genital and surrounding areas examined carefully to look for signs of rape. When sexual assault or rape is suspected, oral, vaginal and rectal liquid should be preserved, as well as any foreign hair and the victim's pubic hair. In addition, the United Nations Manual indicates that the autopsy report should note the body position and condition, including whether it is warm or cold, supple or rigid; the deceased's hands should be protected, the ambient temperature noted, and any insects present collected.".

160 Idem, paras. 313-324.

161 IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, para. 135, explaining that "this Tribunal has specified the guiding principles which should be observed in an investigation when confroted with a violent death […]. With respect to what has been alleged by the State, this Tribunal has noted in various cases that these principles should be observed by the responsible authorities regardless of whether the violent death can be qualified as an 'extrajudicial execution', which is not [the type of crime, HB] under analysis in the present case". [translation by the author]

4.2.2 *The obligation to investigate exhaustively and analyze all available information*

The principle of due diligence acquires a particular meaning when understood in light of the aims of criminal investigation, as determined by the IACtHR, to identify *all* those responsible for the human rights violations under investigation. From this angle, the principle of due diligence requires states to investigate the human rights violations in question exhaustively. This means that they should, on the basis of a thorough analysis of all available information, determine logical lines of investigation aimed at identifying the full circle of possible authors, both material and intellectual. [162]

This requirement has been developed by the Court in response to the many investigative 'blind spots' with which it has been confronted over the course of its case law. In the cases heard by the Court, judicial authorities regularly make choices which do not seem to be based on any rational investigative strategy, but which seriously limit the scope of their investigations and/or their chances of success. For example, in the case of *Gutiérrez and family v. Argentina*, the IACtHR examined the domestic investigations into the murder of a police commissioner who, at the time of his death, was investigating a case which was later revealed to be part of a massive corruption scandal. However, the Court noted that this corruption case was never seriously taken into consideration as a possible motive in the investigations into the police commissioner's death.[163]

Similarly, in its judgment in the case of *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, the Court considered the investigative strategy of the Guatemalan authorities upon the appearance of an important document called the Military Diary, which provides insight into the systematic practice of enforced disappearance executed by the Guatemalan military.[164] Here, the Court commented that it was "inexplicable" that the Prosecutor's Office decided to investigate each person described in the Military Diary individually, given that "[t]he complaint based on these cases was filed following the appearance of the Diario Militar […] and this document clearly reveals facts that are related, presumably committed under a chain of command, with a coordinated and common planning and execution".[165]

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162 *See for example* IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, paras. 162-164 and IACtHR *Edgar García and family v. Guatemala (Merits, Reparations and Costs)*, 29 November 2012, paras. 148-150.

163 IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, paras. 103-104.

164 The Military Diary provides an overview of some of the individuals who had been disappeared by the Guatemalan military during the internal armed conflict. Each entry in the Diary provides a picture of one of these individuals, a list of their activities, the date of their disappearance and the date of their execution.

165 IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 247.

As a third and final example, the Court noted in its judgment in the case of *The Massacre of El Mozote and nearby Places v. El Salvador* that the judicial authorities conducting the domestic investigations into the massacre did not, at any point, consult the report of the official Truth Commission installed after the internal armed conflict. Had it done so, it would have found a list of (some of) the military units involved in the operations in the relevant area and the commanders in charge of them, which could have provided indications as to the possible authors of the massacres.[166]

In each of these examples, the result of the seemingly illogical choices of the judicial authorities in charge of the investigations has been that certain categories of people have remained outside the scope of the domestic investigations, especially (high-ranking) state agents. It is in response to such situations that the Court has obligated states to investigate human rights violations exhaustively and with the aim of identifying all those responsible, both material and intellectual authors. Concretely, this requires the judicial authorities to 1.) use all available information; 2.) follow up on all logical lines of investigation; 3.) analyze the case in its historical and political context;[167] and 4.) identify systematic patterns and structures underlying human rights violations.[168]

The first of these requirements means simply that the authorities should use all relevant information for their investigation that is reasonably available to them. As the example of the *El Mozote* case makes clear, this includes information obtained through sources other than their own investigations, like truth commission reports. Moreover, the information taken from all these sources should be combined and analyzed together to maximize their utility. For example, the Court found in the case of the *"Diario Militar"* that:

> "the absence of a joint and interrelated study of the Diario Militar, the Historical Archive of the National Police, and the statements of the victims' families, among other matters, have led to the absence of significant progress in the investigation, which has resulted in its ineffectiveness and the consequent failure to identify and punish those who, in different ways, may have participated in the said violations. The Court emphasizes that the abundant documentary evidence (the Diario Militar and Historical Archive of the National Police) in the case file has appeared by accident or through unofficial channels, and thus it has not been

166 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 256.

167 *See for example* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 91 and IACtHR *Heliodoro Protugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 153.

168 *See for example* IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 247.

> the result of a serious and diligent investigation. Nevertheless, and even given this type of evidence, the competent authorities have continued not to adopt the necessary measures to take advantage of the information contained in this evidence or to follow up on the indications that emerge from it."[169]

In other words, the authorities should not only analyze all available information in order to identify logical lines of investigation, it should also combine different sources and materials and analyze them integrally, rather than consider each item in isolation.[170]

The second requirement means that the judicial authorities should thoroughly analyze the available information with an eye to identifying possible motives and hypotheses of authorship. Moreover, the judicial authorities should be willing to follow the logical lines of investigation wherever they may lead, also, and especially, if they point to the possible involvement of state agents. In the case of *Gutiérrez and family v. Argentina* described above, the Court noted, in respons to the lack of serious examination of the police commissioner's investigation of a large corruption scandal as a possible motive for his murder, that:

> "it is not incumbent on the Court to analyze the hypotheses on authorship developed during the investigation of the events and, consequently, to determine individual responsibilities, the definition of which corresponds to the domestic criminal courts. Nevertheless, the Court has stipulated that when the "facts refer to the violent death of a person, the investigation opened must be conducted in such a way that it can ensure the appropriate analysis of the corresponding hypotheses of authorship, in particular those that infer the participation of State agents."" [171]

In this case, the Court found that a proper investigation of the motives for the murder of the police commissioner would have alerted the investigators to certain 'theories of authorship' which were not examined in the domestic proceedings. Specifically, an investigation of the motives might have pointed to the involvement of state agents who were connected to the corruption scandal being investigated by police commissioner Gutiérrez.

Likewise, the Court has found that, in cases of human rights violations committed against human rights defenders, the investigations should examine whether the work of the human rights defender in question may provide a

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169 *See* IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 256.

170 *See also* IACtHR *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, 19 November 1999, para. 233.

171 IACtHR *Gutiérrez and family v. Argentina (Merits, Reparations and Costs)*, 25 November 2013, para. 102.

motive for the commission of violations against them.[172] For example, the case of *Acosta et al. v. Nicaragua* concerned the murder of the husband of a well-known human rights defender and the subsequent investigations conducted by the domestic authorities. The Court noted that throughout the investigations the work of the victim's wife had never seriously been examined as a possible motive for his murder, which resulted in incomplete investigations.[173] In this context, the Court, while noting again that it is not its place to determine suitable hypotheses of authorship, held that:

> "in this case, due diligence should be evaluated in light of the need to determine the veracity of the accounts or hypotheses of what happened, particularly when the alleged shortcomings in the proceedings carried out by the judicial authorities have had a decisive impact on the clarification of the circumstances of the case, the legal qualification of the facts or on the final result of the proceedings. […] The Court considers that, in cases of attacks against human rights defenders, States have the obligation to ensure that justice is done impartially, timely and with due diligence, which implies an exhaustive examination of all the information in order to design and execute an investigation aiming for the due analysis of the hypotheses of authorship, by action or omission, at different levels, exploring all logical lines of investigation towards identifying those responsible."[174] [translation by the author]

Thus, the failure by the domestic authorities to follow all logical lines of investigation and examine the full circle of possible authors of the crime in question led the Court to conclude that the investigations had not been conducted with due diligence.

In order for the judicial authorities to be able to identify all relevant lines of investigation in an individual case, the Court has ordered that cases of human rights violations should not be examined 'in isolation', but should be analyzed in their proper context.[175] As the example of the *"Diario Militar"* case described above makes clear, the artificial 'individualization' of cases which form part of a wider context is sometimes used a strategy to obscure the mechanisms and structures underlying the systematic practice of human rights violations. Such a contextual analysis requires the judicial authorities to investigate cases of human rights violations together with

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172 See for example IACtHR *Human Rights Defender et al. v. Guatemala (Preliminary Objections, Merits, Reparations and Costs)*, 28 August 2014, paras. 215-225 and IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, paras. 137 and 142-146.

173 IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, paras. 137 and 146.

174 Idem, paras. 142-143.

175 *See for example* IACtHR *Edgar García and family v. Guatemala (Merits, Reparations and Costs)*, 29 November 2012, para. 150 and IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 158.

other cases with which they have a direct connection.[176] Moreover, the obligation to conduct a contextual analysis also means that the individual case should be examined in light of the larger historical and political context in which it occurred. This is especially important for the investigation of cases involving grave human rights violations, which are often (but not necessarily) committed in situations of armed conflict or as part of a policy enforced by an oppressive regime.[177]

The Court articulated the need for a contextual analysis of the individual case particularly clearly in its judgment in the case of *Manuel Cepeda Vargas v. Colombia*. The case concerned the execution of a Senator Manuel Cepeda Vargas, one of the leaders of the *Unión Patriótica* ("UP"), a political party co-founded by a number of guerrilla organizations as part of an attempt to negotiate peace in Colombia in the 1980s. The execution of the material victim was part of a campaign of threats and violence by paramilitary organizations and certain elements of the Colombian military, in which thousands of members of the UP were killed between 1985 and 1994.[178] However, the domestic investigations into the death of Senator Cepeda Vargas did not

176 *See for example* IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 162, where the Court notes that, despite the fact that the Rochela massacre and the disappearance of the 19 Tradesmen were directly connected, this relationship was not taken into account by the Office of the Attorney General, which was responsible for the domestic investigations; IACtHR *González et al ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, 16 November 2009, paras. 366-369, where the State rejected the 'individualization' of the investigations into the deaths of the victims and the State's argument that "the only common feature of the eight cases is that the bodies appeared in the same area", noting that "all the murders took place in the context of violence against women; and IACtHR *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala (Merits, Reparations and Costs)*, 20 November 2012, para. 247, where the Court found it "inexplicable" why the Prosecutor's Office decided to investigate each person found in the Military Diary individually, given that "[t]he complaint based on these cases was filed following the appearance of the Diario Militar (supra para. 166) and this document clearly reveals facts that are related, presumably committed under a chain of command, with a coordinated and common planning and execution.".

177 *See for example* IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 91, noting that "neither the habeas corpus procedure nor the criminal proceedings took into account the characteristics of the reported facts, the situation of armed conflict affecting El Salvador at the time the facts under investigation allegedly occurred, or the different situations in which people who disappeared during the armed conflict when they were children have been found"; and IACtHR *Heliodoro Protugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 153, noting that the "political context"in which the disappearance of the material victim had occurred was not taken into account throughout the domestic investigations, and that doing so could have given indiciation as to the possible involvement of military intelligence officials in the planning and execution of the crime.

178 IACtHR *Manuel Cepeda Vargas v. Colombia (Preliminary Objections, Merits, Reparations and Costs)*, 26 May 2010, paras. 74-88. As the Court notes, there is no consensus over the exact number of members of the UP killed as part of this campaign. International bodies, including the UN High Commissioner for Human Rights and the Inter-American Commission of Human Rights have estimated the number to be 1500 or even higher.

take into account this larger context of violence against members of the UP. In relation to this, the Court noted that:

> "In complex cases, the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. […]
>
> As part of the obligation to investigate extrajudicial executions such as the one perpetrated in the instant case, the State authorities must determine, by due process of law, the patterns of collaborative action and all the individuals who took part in the said violations in different ways, together with their corresponding responsibilities. It is not sufficient to be aware of the scene and material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries). This, in turn, can lead to the generation of theories and lines of investigation, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime, since they may not be sufficient. Hence, it is not a question of examining the crime in isolation, but rather of inserting it in a context that will provide the necessary elements to understand its operational structure."[179]

Thus, when examining the historical and political context in which human rights violations are committed, judicial authorities should, in particular, focus on the systematic patterns and/or structures underlying their commission. The Court first imposed this obligation in the case of the *La Rochela Massacre v. Colombia*, where it held:

> "In context of the facts of the present case, the principles of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred. In addition, the proceedings should have ensured that there were no omissions in gathering evidence or in the development of logical lines of investigation. Thus, the judicial authorities should have borne in mind the factors indicated in the preceding paragraph that denote a complex structure of individuals involved in the planning and execution of the crime, which entailed the direct participation of many individuals and the support or collaboration of others, including State agents. This organizational structure existed before the crime and persisted after it had been perpetrated, because the individuals who belong to it share common goals."[180]

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179 IACtHR *Manuel Cepeda Vargas v. Colombia (Preliminary Objections, Merits, Reparations and Costs)*, 26 May 2010, paras. 118-119.

180 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 158.

In short, the study of the historical and political context in which the human rights violations under investigation were committed will alert judicial authorities to the existence of certain power structures underlying their commission. An analysis of those power structures will, in turn, enable the investigators to identify the individuals who were part of that structure and who, therefore, carry responsibility for the commission of the human rights violations. For this reason, the Court now consistently requires states to undertake such a contextual analysis as part of the obligation to investigate human right violations with due diligence.[181] In this way the investigation will benefit from the information already available concerning the historical and political context surrounding the commission of particular human rights violations, and at the same time contribute to the further development of the 'historical truth' and the fulfillment of the public's right to know that truth.[182]

4.2.3 The judge's obligation to guide the proceedings and avoid excessive formalism

The previous two section have focused mostly on the obligations of investigators and prosecutors in domestic proceedings concerning human rights violations, since the collection, handling and analysis of evidence is primarily their responsibility. However, the Court has made it clear that judges are also bound by the obligation to conduct the proceedings with due diligence. Like all other institutions involved in the investigation and prosecution of human rights violations, judges are obligated to take all necessary measures within their power to ensure the determination of the truth and the identification and punishment of those responsible. Taking into account their role and duties, the Court has determined that:

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181 See for example IACtHR *Gomes Lund et al. (Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2010, para. 256(a); IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, para. 194; IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 257; and IACtHR *Edgar García and family v. Guatemala (Merits, Reparations and Costs)*, 29 November 2012, para. 148-150.

182 In this context, the Court emphasized in the case of the *La Rochela Massacre* that "[i]n cases of grave violations of human rights, the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. These structures should not impose legal or practical obstacles that make them illusory. The Court emphasizes that the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities." IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 195. *See also* IACtHR *Case of the Members of the village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala (Preliminary Observations, Merits, Reparations and Costs)*, 30 November 2016, para. 212.

> "as the competent authority to lead the process, the judge has the obligation to conduct it in a manner that [takes] into account the reported facts and their context so as to manage the proceedings as diligently as possible in order to determine the facts and establish the corresponding responsibilities and reparations, avoiding delays and omissions when requesting evidence."[183]

This quote illustrates that the judge has to play his role in the investigative phase of the proceedings with due diligence, so as to ensure a swift and accurate determination of the facts of the case. Moreover, the Court has determined that the due diligence principle informs the way judges should operate throughout the proceedings and, particularly, how they should confront procedural obstacles which might arise at any stage. In this context, the Court takes the position that:

> "judges, in their capacity to guide the proceedings, have the obligation to manage and prosecute judicial proceedings *in a way that does not sacrifice justice and due process of law to formalism and impunity*; otherwise, this leads to the violation of the State's international obligation of prevention and to protect human rights, and violates the right of the victim and his or her next of kin to know the truth of what happened, that those responsible are identified and punished, and to obtain the corresponding reparations."[184] [emphasis added]

The criterion formulated here by the IACtHR has been developed and applied in response to two types of procedural obstacles: 1.) insistence on 'irrational formalities' which prevent the proceedings from moving forward; and 2.) abuse of process scenarios, where the defense uses the remedies at its disposal in such a way that the proceedings are unable to proceed.

The recent judgment in the case of *Acosta et al. v. Nicaragua*, concerning the murder of the husband of a well-known lawyer and activist, provides an example of the first of these two situations. As noted in the previous section, one of the main shortcomings of the investigations into the murder was that they did not take into account the possibility that it may have been motivated by the work of the wife of the material victim. Moreover, the judge overseeing the proceedings had ordered the definitive stay of proceedings against one person investigated as a possible intellectual author of the murder, overruling the prosecutor's requested for the continuation of the investigations against him. The wife of the material victim issued an appeal against this decision, which was accepted by the judge, under the condition that the claimant would present, within 24 hours, "the paper necessary to

183 IACtHR *Serrano Cruz sisters v. El Salvador (Merits, Reparations and Costs)*, 1 March 2005, para. 88.

184 IACtHR *Suárez Peralta v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 21 May 2013, para. 93, citing IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 211.

certify the documents and send them to the superior tribunal".[185] Upon expiration of that term, the judge concluded that the appellant had failed to present "the paper or a sum equal to the costs of the photocopies."[186] As a result, the judge declared the appeal to be void and the stay of proceedings remained in force.

The IACtHR found that the procedural rule requiring the appellant to provide the paper for photocopies of the file was baseless, as it served neither legal certainty, nor the administration of justice, nor the protection of individual rights.[187] Moreover, the Court questioned the way in which the judge had applied the rule in this particular case, noting that he could have done more to prevent that this formality would obstruct the appellant's access to justice.[188] In this context, the Court held that:

> "judges, in their capacity to guide the proceedings, have the obligation to guide and direct the judicial proceedings with the aim of not sacrificing justice and due process in favor of formalism and impunity. In this case, on top of imposing an economic burden on the victim of the crime, the Court considers that this requirement constitutes a mere formality which made it impossible for Mrs. Acosta to have access to justice to challenge nothing less than the procedural act which definitively removed the possibility of investigating an hypothesis about the participation of others [than the direct perpetrators, HB] as instigators of the crime against her husband. The State did not justify why the application of this norm was reasonably necessary for the proper administration of justice."[189] [translation by the author]

In other words, the IACtHR found that the domestic judge should have disregarded the procedural rule in question, giving preference to the appellant's interests and her right to access to justice. By not doing so, the judge contributed to the lack of diligence of the judicial authorities in investigating the possible involvement of certain persons as intellectual authors of the crime committed against the material victim.[190]

Similarly, the Court has established that judges should not allow the filing of large numbers of legal actions and remedies by the defense from becoming an obstacle to the progress and eventual completion of the proceedings. It first found to this effect in its judgment in the case of *Bulacio v. Argentina*, where a barrage of "diverse legal questions and remedies" filed

185 IACtHR *Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, 25 March 2017, para. 161. At the time of writing, the Acosta judgment is only available in Spanish. The Spanish original of this phrase reads: "el papel correspondiente para certificar diligencias y remitirlas al tribunal superior". The word "papel" has the double meaning of 'paper' and 'form'. From the context described here, I gather that the text refers simply to sheets of paper.

186 Idem, para. 161.

187 Idem, para. 163.

188 Idem, paras. 164-165.

189 Idem, para. 165.

190 Idem, para. 169.

by the defense had delayed the proceedings to such an extent that they were eventually declared extinguished without ever reaching a conclusion.[191] When confronted with this state of affairs, the IACtHR held that:

> "This manner of exercising the means that the law makes available to the defense counsel has been tolerated and allowed by the intervening judiciary bodies, forgetting that their function is not exhausted by enabling due process that guarantees defense at a trial, but that they must also ensure, within a reasonable time, the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.
>
> The right to effective judicial protection therefore requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights."[192]

Based on this reasoning, the Court ordered the domestic proceedings to be reopened, overruling the domestic courts' decision to declare it extinguished. The IACtHR upheld this reasoning in several later judgments, particularly in two important judgments against Guatemala, where abuse of the 'appeal for legal protection' (*amparo*) has become a standard tool for defense lawyers to derail and delay criminal proceedings against their clients.[193] In the first of these two judgments, in the case of *Myrna Mack Chang v. Guatemala*, the Court recognized that the abuse of the amparo remedy was partly the result of problems in the legislation regulating it. However, the Court found that judges were under the obligation to apply the law in such a way that the victims' right to access to justice and the state's obligation to prosecute and punish those responsible for human rights violations would not be unduly affected. In the words of the Court:

> "In the chapter on proven facts, lack of diligence and of willingness of the courts was demonstrated, as regards moving the criminal proceeding forward to elucidate all the facts pertaining to the death of Myrna Mack Chang and to punish all those responsible. The Court will not analyze here the actions of each of the courts that lacked due diligence […] but as an example it will only refer to the use of amparo remedies, the filing and processing of which led those in charge of the criminal proceeding to incur notorious delays in the instant case. […].
>
> [T]he Court calls attention to the fact that in the criminal proceeding under discussion, *frequent filing of this remedy, although permissible according to the law, has been tolerated by the judicial authorities*. This Court deems that the domestic judge, as a competent authority to direct the proceeding, has the *duty to channel it in such a manner as to restrict the disproportionate use of actions whose effect is to delay the proceeding*. Processing of the amparo remedies together with their respective

191 IACtHR *Bulacio v. Argentina (Merits, Reparations and Costs)*, 7 September 2001, para. 113.

192 IACtHR *Bulacio v. Argentina (Merits, Reparations and Costs)*, 7 September 2001, paras. 114-115.

193 IACtHR *"Las Dos Erres" Massacre v. Guatemala (Preliminary Objection, Merits, Reparations and Costs)*, 24 November 2009, paras. 108-121.

> appeals was, in turn, conducted without complying with the legal terms, as the Guatemalan courts took on average six months to decide each one. This situation caused a paralysis of the criminal proceeding.
>
> […]
>
> In light of the above, the Court deems that the judges, who are in charge of directing the proceeding, have the duty to direct and channel the judicial proceeding with the aim of not sacrificing justice and due legal process in favor of formalism and impunity. Thus, if the authorities permit and tolerate such use of judicial remedies, they turn them into a means for those who commit the illegal act to delay and obstruct the judicial proceeding. This leads to a violation of the international obligation of the State to prevent and protect human rights and it abridges the right of the victim and the next of kin of the victim to know the truth of what happened, for all those responsible to be identified and punished, and to obtain the attendant reparations."[194]

On the surface, it would seem strange for the IACtHR to order judges to limit the use of the amparo in criminal proceedings, being the most important remedy available in much of Latin America for the protection of human rights. The Court specifically addressed this seeming paradox in its judgment in the case of the *"Las Dos Erres Massacre v. Guatemala*, stating:

> "In this case the Court notes that the provisions that regulate the appeal for legal protection, the lack of due diligence and tolerance by the courts when processing them, as well as the lack of effective judicial protection, have allowed the abusive use of the appeal as a delaying practice in the proceeding. […]
>
> In light of the above, the Court believes that the appeal for legal protection is an adequate remedy to protect individuals' human rights, since it is suitable to protect the juridical situation infringed, as it is applicable to acts of authority that imply a threat, restriction or violation of the protected rights. However, in the instant case the current structure of the appeal for legal protection in Guatemala and its inadequate use have impeded its true efficiency, as it is not capable of producing the result for which it was conceived."[195]

The IACtHR thus emphasizes the importance of the amparo remedy and its utility in protecting the rights of the defendant in criminal trials. However, the improper regulation of that remedy in domestic law – leading to frivolous and even abusive appeals by defendants in criminal trial – and a lax attitude of judges in the face of such abusive appeals, may cause it to become an instrument for the obstruction of justice, rather than an instrument for the protection of human rights. In order to prevent this from happening, the Court has imposed on judges the obligation to respond to such frivolous and abusive appeals for amparo with due diligence, meaning that they should not allow them to delay the proceedings excessively. However,

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194 IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, paras. 203-211.

195 IACtHR *"Las Dos Erres" Massacre v. Guatemala (Preliminary Objection, Merits, Reparations and Costs)*, 24 November 2009, paras. 120-121.

the Court has not yet specified how exactly judges should restrict the use of a remedy which is available to the defense by law, or how to process such appeals in a way that does not obstruct the progress of the proceedings. Rather, it has left it to domestic judges and lawmakers to figure out these 'details'.

4.3 Obligation to impose a punishment proportionate to the gravity of the crime

As described above in the introduction to this section, the punishment of those responsible for human rights violations should be, according to the Court, one of the goals in light of which it will analyze the effectiveness of domestic proceedings. At the same time, the imposition of an appropriate punishment is, in itself an essential element of the obligation to investigate, prosecute and punish human rights violations. In fact, the Court suggested early on in its case law, in its judgment concerning the *"Street Children" v. Guatemala*, the complete lack of punishment of any of those responsible for the human rights violations in question is sufficient reason to conclude that the state has violated its obligations under the ACHR.[196]

Moreover, the Court requires, as a general rule, that the punishment imposed is proportional in light of the gravity of the human rights violation in question. Even where judicial authorities have succeeded in investigating those violations, identifying those responsible and successfully prosecuting them so that they gain a conviction against them, their work can still be undone by the imposition of a disproportionally light sentence, which would make the proceedings preceding the punishment illusory – and therefore ineffective – in retrospect. In the words of the Court:

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196 IACtHR *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, 19 November 1999, para. 228, saying: "If we confront the facts in this case with the foregoing, we can observe that Guatemala conducted various judicial proceedings on the facts. However, it is clear that those responsible have not been punished, because they have not been identified or penalized by judicial decisions that have been executed. This consideration alone is enough to conclude that the State has violated Article 1.1 of the Convention, since it has not punished the perpetrators of the corresponding crimes. In this respect, there is no point in discussing whether the defendants in the domestic proceedings should be acquitted or not. What is important is that, independently of whether or not they were the perpetrators of the unlawful acts, the State should have identified and punished those who were responsible, and it did not do so."
How exactly this statement relates to the Court's now standard position that the obligation to investigate, prosecute and punish is one of means, not results, is unclear. To be sure, the Court's finding from the "Street Children" case has remained a one-off. It should also be noted that this finding was done at an early stage of the development of the Court's case law on the obligation to investigate, prosecute and punish, when carefull scrutiny of domestic proceedings had not yet become part of the Court's standard practice. As a result, the Court could only judge domestic proceedings by their lack of results. In more recent cases, the Court can often identify so many serious shortcomings in the domestic proceedings that it does not need to rely on the lack of punishment alone to motivate its finding that the State has violated its obligations under the ACHR.

> "The imposing of an appropriate punishment duly founded and proportionate to the seriousness of the facts, by the competent authority, permits verification that the sentence imposed is not arbitrary, thus ensuring that it does not become a type of *de facto* impunity."[197]

A more complete statement on the requirement of proportionality of the punishment imposed on those responsible for (grave) human rights violations can be found in the case of the *La Rochela massacre v. Colombia*, where it held that:

> "With regard to the principle of proportionality of the punishment, the Court deems it appropriate to emphasize that the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events. The punishment should be the result of a judgment issued by a judicial authority. Moreover, in identifying the appropriate punishment, the reasons for the punishment should be determined. With regard to the principle of lenity based upon the existence of an earlier more lenient law, this principle should be harmonized with the principle of proportionality of punishment, such that criminal justice does not become illusory. Every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention."[198]

All in all, the principle of proportionality, as described here by the IACtHR, would seem to require the imposition of considerable prison sentences in cases concerning grave violations of human rights. However, the Court has never provided an exact indication of – or a minimum standard for – what it would consider to be a proportionate punishment.

Moreover, while it is thus clear that the IACtHR requires the impositions of a proportional punishment, case law on this element of the overarching obligation to investigate, prosecute and punish is relatively scarce. In many of the cases heard by the Court, the lack of an appropriate punishment for human rights violations arose because of a previous defect in the investigation and/or prosecution, as a result of which the case never reached the sentencing stage. In such cases, the IACtHR therefore did not discuss the issue of appropriate punishment directly. The issue has come up in a limited number of cases, in relation to one of the following two scenarios: 1.) the imposition of an 'alternative' punishment by the sentencing judge; 2.) the

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197 *See for example* IACtHR *Manuel Cepeda Vargas v. Colombia (preliminary objection, merits, reparations and costs)*, 26 May 2010, paras. 150-153, stating – amongst other things – that: "The imposing of an appropriate punishment duly founded and proportionate to the seriousness of the facts, by the competent authority, permits verification that the sentence imposed is not arbitrary, thus ensuring that it does not become a type of de facto impunity."

198 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 196.

imposition, post-conviction, of penitentiary benefits and other 'measures intended to suppress the effects of a conviction'.

In relation to the first of these two scenarios, there is some indication in the Court's case law that it might be more flexible with regard to the requirement of the proportionality of the punishment imposed for (grave) human rights violations, where an otherwise disproportionately light punishment is the result of a compromise reached in the context of peace negotiations necessary to end an internal armed conflict. The Court first discussed such a scenario, albeit indirectly, in its judgment concerning the *La Rochela Massacre,* in relation to the legality of the possible application of the Justice and Peace Law to the facts of that case. The Justice and Peace Law, which will be discussed in depth in Chapter 6, was adopted in the context of negotiations between the Colombian government and various paramilitary groups over the latter's peaceful demobilization. An important element of that law was the granting of 'alternative punishment', consisting of 5 to 8 years of imprisonment, to paramilitaries found guilty of committing grave violations of human rights in the context of the internal armed conflict in Colombia.

While the IACtHR emphasized the importance of proportionate punishment for grave human rights violations, it stopped short of declaring the Justice and Peace Law illegal under the ACHR. Since the Justice and Peace Law had been adopted only shortly before the Court issued its judgment and had not entered into operation, the Court found that it was too early to say whether the possible future application of this law to the case under its consideration would result in impunity.[199] Thus, by not declaring the alternative punishment provided for by the Justice and Peace Law to be disproportionate *per se*, the Court seemed to suggest its willingness to accept a lighter punishment, taking into account the particular circumstances surrounding the adoption of the Justice and Peace Law.

The issue of alternative punishment resurfaced in the Court's case law in its judgment in the case of *The Massacres of El Mozote and Nearby Places v. El Salvador*. Or, rather: in a much-debated separate and concurring opinion to that judgment, co-signed by a majority of the bench. As discussed above in section 2.2 of this chapter, the legislation passed by the Salvadoran parliament following the peace negotiations which ended the internal armed conflict, provided for a full and unconditional amnesty for crimes committed during the war. As a result, the judgment itself did not consider the issue of alternative and/or reduced punishment for grave human rights violations

199 IACtHR *La Rochela Massacre v. Colombia (Merits, Reparations and Costs)*, 11 May 2007, para. 191. Rather, the Court opted to "indicate, based on its jurisprudence, some aspects of the principles, guarantees and duties that must accompany the application of the [Justice and Peace Law, HB]". As part of these 'guidelines' for the application of the Justice and Peace Law, the Court provided its statement on the need for proportionate punishment, quoted on the previous page, *see supra* fn. 463.

following a negotiated peace. However, the concurring opinion did discuss this possibility in some detail, even though it had nothing to do with the particular case under the Court's consideration.

With regard to the tension between the state's obligation under the ACHR to investigate, prosecute and punish human rights violations on the one hand and the importance of achieving a negotiated peace on the other, the concurring opinion notes that the former is an "obligation of means and forms part of the obligation to guarantee" human rights, while the latter "introduce[s] enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace".[200] In other words, the obligation to investigate, prosecute and punish grave human rights violations is not absolute, as there are other important ways of guaranteeing human rights, like negotiating an end to a situation of armed conflict.

However, this does not mean, according to the concurring opinion, that states are therefore free to disregard the obligation to investigate, prosecute and punish completely at the negotiation table. Rather:

> "States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict. But [for transitional justice measures, HB] to be valid in international law, they must abide by certain basic standards relating to what can be processed and implemented in several ways, including the role of truth and reparation."[201]

The concurring opinion then went on to specify some of the basic standards which should be taken into account in order to ensure that the obligation to investigate, prosecute and punish and the victims' right to justice are not disproportionally affected. With specific regard to the importance of (proportionate) punishment, the concurring judges noted that:

> "[i]t can be understood that this obligation [to investigate, prosecute and punish, HB] is broken down into three elements. First, the actions aimed at investigating and establishing the facts. Second, the identification of individual responsibilities. Third, the application of punishments proportionate to the gravity of the violations. Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed."[202]

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200 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 26.

201 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 27.

202 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 28.

In other words, driven by the necessity of reaching a negotiated end to a situation of armed conflict, states may compromise somewhat on the requirement of imposing a proportionate punishment, but they should guarantee, at minimum that the facts are adequately investigated and that individual responsibility for grave human rights violations is determined. Then, the concurring judges noted, even more specifically, that states can consider imposing alternative punishments. In the words of these judges:

> "in the difficult process of weighing and the complex search for this equilibrium [between negotiated peace and the demands of justice, HB], routes towards alternative or suspended sentences could be designed and implemented; but without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the "perpetrators" and those who performed functions of high command and gave the orders."[203]

Thus, where the imposition of alternative punishment and/or suspended prison sentences is necessary in order to achieve peace at the negotiation table, the concurring judges are willing to accept them. However, when granting such benefits, transitional justice measures should take into account the position of the particular accused within the hierarchy of his or her armed group and his or her willingness to contribute to uncovering the truth of what happened during the armed conflict.

The legal status of these detailed considerations from the concurring opinion, is unclear. It should be noted that they go considerably beyond anything the IACtHR has so far established in any of its judgments. It is also remarkable that the considerations have no direct relevance to the facts of the *El Mozote* case and the amnesty provisions adopted by the Salvadoran parliament. Rather, the concurring opinion is widely considered to have been written to guide the peace process between the Colombian government and the FARC guerrilla group, which had recently started at the moment the judgment was delivered. As such, it has had a considerable impact, as will be discussed in depth in Chapter 6.

The second scenario in relation to which the IACtHR has discussed the obligation to impose an appropriate – and proportionate – punishment for human rights violations directly, is that in which measures 'intended to suppress the effects of a conviction' have been granted by the executive power post-conviction. In this context, the IACtHR has generally held that states should avoid applying such measures in favor of those convicted of grave human rights violations.[204] It first discussed this scenario in some detail in

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203 IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, separate and concurring opinion by Judge Diego García-Sayán, para. 30.

204 *See for example* IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 263.

the case of the *Gómez Paquiyauri Brothers v. Peru*, which concerned the extrajudicial execution of two brothers, both minors, at the hands of the Peruvian National Police. Two of the material authors of the crime were eventually convicted and sentenced to 18 and 6 years of imprisonment. However, as the result of the application of penitentiary benefits, their imprisonment ended after 2 and 1 year(s) respectively. In response to this situation, the Court noted the following:

> "The Court will not analyze the penitentiary benefits established in Peruvian legislation nor those granted to Francisco Antezano Santillán and Ángel del Rosario Vásquez Chumo. However, without excluding any category of convicts, the Court deems that the State must carefully consider applying those benefits in cases of grave violations of human rights, as in the instant case, since granting them unduly may lead to a form of impunity."[205]

The disproportionally short term of effective imprisonment for the two material authors was one of the elements on the basis of which the Court eventually concluded that the state had violated its obligation to investigate, prosecute and punish under the ACHR. Likewise, in the case of *Cepeda Vargas v. Colombia*, the IACtHR noted the lax conditions of imprisonment of two of the material authors of the extrajudicial execution of the material victim and the substantial reduction of their prison sentence granted to them post-conviction. This combination of circumstances led the Court to conclude that the punishment of the material authors had become disproportionately light and that state had, therefore, "made an insufficient effort to prosecute and punish adequately serious human rights violations".[206]

The most obvious example of a 'measure intended to suppress the effects of a conviction' is, of course, the decision to grant pardon to a convict. Until recently, the IACtHR had not had the chance to make any direct finding on the legality under the ACHR of such a decision in favor of those convicted of committing grave human rights violations. It had, at times, noted in general that states should "refrain from resorting to amnesty, *pardon*, statute of limitations and from enacting provisions to exclude liability, as well as measures, aimed at preventing criminal prosecution or at voiding the effects of a conviction".[207] In May 2018, however, the Court delivered its first direct decision on the legality of pardons for those found guilty of

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205 IACtHR *Gómez Paquiyauri Brothers v. Peru (Merits, Reparations and Costs)*, 8 July 2004, para. 145.

206 IACtHR *Manuel Cepeda Vargas v. Colombia (preliminary objection, merits, reparations and costs)*, 26 May 2010, para. 154.

207 IACtHR *Gutiérrez Soler v. Colombia (merits, reparations and costs)*, 12 September 2005, para. 97. In other judgments, the Court did not refer explicitly to pardons, but noted that the stat should refrain from "using figures […] intended to suppress criminal prosecution or suppress the effects of a conviction". *See for example* IACtHR IACtHR *Serrano-Cruz sisters v. El Salvador (merits, reparations and costs)*, 1 March 2005, para.172 and IACtHR *Huilca Tecse v. Peru (merits, reparations and costs)*, 3 March 2005, para. 108.

grave human rights violations, which included its most elaborate discussion of the obligation to impose a proportional punishment to date.[208]

The decision concerned the highly controversial pardon 'on humanitarian grounds' granted by then president of Peru, Pedro Pablo Kuczynski, in favor of former head-of-state Alberto Fujimori, who had been convicted to 25 years imprisonment for his participation in grave human rights violations.[209] In its discussion of the decision to grant pardon to Fujimori, the IACtHR first reiterated the importance of the principle of proportional punishment in relation to "both the imposition of the punishment and its execution".[210] In this context, it stated that:

> "the international obligation to punish those responsible for grave human rights violations with a punishment that is appropriate in light of the gravity of the crimes committed, should not be unduly affected or become illusory during the execution of the sentence […]. As was indicated above […], the execution of the sentence is an integral part of the right of the victims of grave human rights violations and of their family members to have access to justice."[211] [Translation by the author]

This finding seems to indicate that, as a general rule, pardons should not be granted to those convicted of committing grave human rights violations. However, the IACtHR did not rule out entirely the possibility of granting a pardon on humanitarian grounds, even for this particular category of convicts. The Court's own case law firmly establishes that the state has a special duty of care for individuals who are deprived of liberty and, therefore, an obligation to safeguard their health and wellbeing and to ensure that the conditions of an individual's deprivation of liberty do not exceed "the level of suffering inherent in it".[212] Thus, when considering whether to grant pardon to an individual convicted of grave human rights violations, the state should balance its duty of care towards that individual with the victims' right to access to justice, and ensure that the latter is not unduly

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208 *See* IACtHR *Barrios Altos and La Cantuta v. Peru*, supervision of compliance decision, 30 May 2018. This decision is part of the IACtHR's supervision of compliance proceedings in relation to its previous judgments in *Barrios Altos* and *La Cantuta v. Peru*. The IACmHR and the victims' representatives argued that the pardon decision interfered with the state's compliance with the IACtHR's order to investigate, prosecute and punish the grave human rights violations committed in those cases and requested that the Court rule on the legality of the pardon decision under the ACHR.

209 As noted by the BBC, the pardon "was widely seen as part of a political deal". The pardon came only days after the president had avoided impeachment over a corruption scandal, thanks to the support of Peru's main opposition party, led by Alberto Fujimori's daughter, Keiko Fujimori. 'Peru court reverses ex-president Alberto Fujimori's pardon', *BBC*, 3 October 2018.

210 IACtHR *Barrios Altos and La Cantuta v. Peru*, supervision of compliance decision, 30 May 2018, p. 24, para. 46 [translation by the author].

211 Idem, p. 24, para. 47.

212 Idem, p. 25, para. 49.

affected by its decision.[213] Concretely, this means that the state should first take all other reasonable measures available to guarantee the well-being of the convict in captivity, and can only grant a pardon on humanitarian grounds as a last resort.[214] Moreover, the IACtHR held that the right of victims of grave human rights violation to have access to justice entails the right to appeal the decision to grant a pardon on humanitarian grounds and achieve judicial review of that decision, especially it is part of the discretionary power of the executive.[215] In the case at hand, the Court noted that the Peruvian constitution allowed for the possibility of judicial review of the president's decision to grant pardon to Alberto Fujimori, and that the domestic courts should undertake such a review taking into account the standards established by the IACtHR.[216]

In conclusion, the obligation to investigate, prosecute and punish entails a requirement that the punishment imposed on those responsible for human rights violations is proportionate to the gravity of their crimes. Disproportionately light punishment is regarded by the Court as a form of impunity and, therefore, a violation of the state's obligations under the ACHR and of the right of victims to have access to justice. Under normal circumstances, this principle of proportionality sees to require the imposition of prison sentences of considerable length. However, the Court has suggested, albeit indirectly, that it will be more flexible on this issue if the otherwise disproportionately light punishment is the result of peace negotiations necessary to end a situation of armed conflict. The principle of proportionate punishment also militates against granting pardon or other 'measures intended to suppress the effects of a conviction', as such measures could retroactively render the domestic proceedings illusory. The IACtHR does not entirely exclude the possibility of granting a pardon on humanitarian ground, even to those convicted of grave human rights violations, but such a decision can only be taken as a last resort and under strict conditions.

5 Conclusion

In the three decades since the *Velásquez Rodríguez* judgment, the IACtHR has slowly refined its jurisprudence on the obligation to investigate, prosecute and punish human rights violations ever further. Through constant confrontation with the many ways in which investigations and proceedings into such cases can be undermined and derailed, the Court has developed detailed standards addressed at several different state organs. This development has taken place along two main avenues: 1.) the obligation to remove

213 Idem, p. 26, para. 53.
214 Idem, pp. 25-26, paras. 50-52. The IACtHR further adds that a pardon on humanitarian grounds should always be granted 'duly' and should seek a legitimate aim.
215 Idem, pp. 26-27, paras. 54-58.
216 Idem, pp. 28-35.

all legal and practical obstacles maintaining impunity; and 2.) the obligation to investigate human rights violations effectively. Under the umbrella of these two dimensions of the obligation to investigate, prosecute and punish, the IACtHR has developed a number of very concrete obligations, which give practical content to the overarching obligation.

The doctrines falling under the obligation to remove all legal obstacles to investigation, prosecution and punishment of serious human rights violations are perhaps the most controversial aspect of the IACtHR's jurisprudence relevant to the fight against impunity. They include a number of very specific directions to the state's legislative organs – prohibiting them from adopting certain legislation (amnesty provisions), while obliging them to adopt others (specific crime definitions) – thereby limiting their freedom to regulate. Moreover, the IACtHR has also developed standards directing legislative organs and the judiciary to limit the operation of certain fundamental principles of criminal justice which aim to protect the interests of the accused, including prescription, the principle of *ne bis in idem* and the principle of legality. It should be noted, however, that these controversial standards only apply to cases of 'grave' or 'serious' human rights violations, a very limited category which – so far – only includes the crimes of enforced disappearance, extrajudicial execution and torture. In cases concerning these particular types of conduct, the gravity of the violations, the particular challenges involved in investigating and prosecuting them and the victim's right to justice all demand – according to the IACtHR – the interference with state sovereignty and the limitation to the rights of the accused.

The doctrines developed under the umbrella of the state's obligation to remove all practical obstacles maintaining impunity, on the other hand, relate to all violations of human rights. These doctrines are aimed more at the institutional context and seek to provide those responsible for conducting investigations and prosecutions of human rights violations with all the resources necessary to do their work. The doctrines elaborated by the IACtHR under this heading include the obligation of all state authorities to cooperate and assist in the collection of evidence, the obligation to punish state agents who obstruct the investigations and the obligation to protect those who participate in the proceedings. While these obligations may not be particularly problematic from a legal perspective, they do entail a considerable burden in terms of allocation of state resources.

Finally, the IACtHR has developed very detailed and demanding standards in relation to the state's obligation to investigate human rights violations effectively. Whereas the doctrines relating to the removal of practical obstacles maintaining impunity aim mostly to protect those conducting the investigations from external interferences, those relating to the effectiveness of the investigations seek to regulate the conduct of the responsible prosecutors and judges themselves. The IACtHR requires that the responsible authorities undertake investigations *ex officio*, impartially, with due diligence and within a reasonable time. The due diligence requirement has been interpreted by the IACtHR to include detailed standards on

the collection of evidence – taken from the UN's Minnesota Protocol – and on the direction and exhaustiveness of the investigation. In relation to the latter, the IACtHR requires the domestic authorities to follow all logical lines of investigation and analyze all the relevant evidence, taking into account the wider context in which the human rights violations occurred, with an eye to identifying possible underlying structures or mechanisms. This 'contextual analysis' is especially important where there are indications of the involvement of state agents. Ultimately, an investigation with these characteristics will lead to accomplishing the goal envisaged by the IACtHR for investigations into human rights violations: identification of *all* those responsible for the underlying human rights violations -both the material and the intellectual authors – and imposing an appropriate punishment.