# 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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# Part II:

# The jurisprudence of the Inter-American Court of Human Rights in practice

# 5 Inter-American contributions to 'post-transitional justice' in Guatemala

## 1 Introduction: the Guatemalan civil war

The domestic accountability processes explored in this chapter relate to crimes committed during a particular time and in a particular political context: that of the Guatemalan civil war (1960-1996). While it is not feasible, given the scope and particular focus of this study, to provide an exhaustive account of the history and dynamics of the Guatemalan civil war, a short introduction to it is indispensable in order to properly contextualize the accountability processes which developed after the transition to peace.

It should be noted at the outset that Guatemala is a country with a long history of political repression and dictatorships. In fact, in Guatemalan history dictatorship, whether military or civilian, has been the rule rather than the exception.[1] Thus, while the civil war certainly brought an intensification of political repression and violence, it did not constitute a radical break from history. It was, in a way, a logical extension of the political dynamics in the country, in light of the geopolitical realities of the time. Specifically, the Guatemalan civil war must be understood in the broader context of the Cold War and U.S. intervention to prevent the spread of communism in the region.[2] The start of the civil war came on the heels of a U.S.-backed coup, which took place in 1954 and ended the reign of democratically elected president Arbenz.[3] After the coup, a counterrevolutionary regime was instituted which consisted of a "coalition between the army and the

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1 The influential Guatemalan sociologist Carlos Figueroa Ibarra has argued that state terror is a structural phenomenon in Guatemala, which has been used as a 'method of domination' since colonial times. C. Figuera Ibarra, *El recurso del miedo – estado y terror en Guatemala*, (second edition, F&G Editores, 2011), p. 6.

2 *See generally* R.H. Immerman, *The CIA in Guatemala: the foreign policy of intervention* (University of Texas Press, 1982) and S.C. Schlesinger and S. Kinzer, *Bitter Fruit – the story of the American coup in Guatemala* (Harvard University Press, 2005). Susanne Jonas characterizes the Guatemalan civil war as "a "Cold War civil war" insofar as it was ideologically, politically, and militarily part of the U.S. Cold War confrontation with the Soviet Union and communist forces (real or labeled as such) in the Third World". *See* S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 17.

3 *See* S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 18-21.

economic elites".[4] The alliance of these two power blocs would remain intact throughout the civil war, with the military in control of the highest levels of government.[5] According to the UN Truth Commission instituted to investigate and report on the Guatemalan civil war, it was this 'closing of political options', along with other structural factors present in Guatemalan society like structural racism and inequality, which led to the uprising of a guerrilla movement in 1960 and the start of the civil war.[6]

The Guatemalan civil war lasted from 1960 and 1996 and is amongst the bloodiest conflicts in the region, with an estimated death toll of around 200.000, including around 40.000 forced disappearances. The UN truth commission reported that around 93% of the atrocities registered by it were attributable to the state and its armed forces.[7] The majority of the victims of human rights violations committed in the context of the war belonged to Guatemala's indigenous Maya population, including many women and children. The CEH registered 626 massacres carried out by the armed forces

4 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 17. *See also* J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998). The close relations between the military and the economic elite actually predate the civil war considerably. In fact, the professional army was created in the late 19th century to help the economic elite maintain control over the rural population. For a long time, military officers were recruited exclusively from the economic elite, while the economic elite, including all heads of state, was educated in military institutions. *See* Mikael Rask Madsen, 'Hacia la paz y la democracia en Guatemala: estrategias legales "suaves" en derechos humanos y contrainsurgencia constitucional', *Ciencias Sociales* 88:29-46 (II-2000), p. 31.

5 Some Guatemalan commentators have qualified the ties between the military and the economic elite as 'the alliance that won the war'. Martín Rodríguez Pellecer, 'Los militares y la élite: la alianza que ganó la guerra', *Plaza Publica*, 21 August 2013. This does not mean, of course, that the alliance was completely stable at all time, or that there were never any conflicts of ineterest between the economic elite and the military, or even within the military. Jennifer Schirmer has described at length the tensions between the highest circles of the military establishment and a group of right-wing extremist landowners, supported by a group of mid-level military officers calling themselves the *Oficiales de la Montaña* (Officers of the Mountain), which led to a series of coup-attempts in the late 1980s. *See* J. Schirmer, *The Guatemalan military project – a violence called democracy* (University of Pennsylvania Press, 1998), pp. 205-234. However, notwithstanding such internal tensions, the outward unity of the military and its alliance with the economic elite remained intact.

6 'Guatemala: memory of silence', Report of the Commission for Historical Clarification – conclusions and recommendations, p. 19, paras. 11-12. As Jennifer Schirmer explains, the first guerrilla groups in Guatemala were actually set up by junior military officers who were angry with the upper-echelons of the military over a variety of issues, including their decision to betray President Arbenz and support the coup against him in 1954. *See* J. Schirmer, *The Guatemalan military project – a violence called democracy* (University of Pennsylvania Press, 1998), pp. 15-16.

7 'Guatemala: memory of silence', Report of the Commission for Historical Clarification – conclusions and recommendations, p. 20 para. 15 and p. 33, para. 82.

over the course of the war, mostly targeting various Maya communities, the perpetration of which included acts of extreme cruelty.[8] Another common strategy used by the armed forces during the war was the enforced disappearance, often combined with the torture and extrajudicial execution, of people who, in whatever way, opposed the military regime, like "social and student leaders, professors, political leaders, members of religious communities and priests".[9] Like the Mayan communities, these political opponents were targeted by the armed forces as "subversives", because of their supposed relations to or support of guerrilla groups.[10]

While these violent tactics were used throughout the entire duration of the civil war, there was a particular peak in violence between 1978 and 1985, under the successive leadership of Generals Romeo Lucas García (1978-1982), Efraín Ríos Montt (1982-1983) and Oscar Mejía Victores (1983-1986).[11] During these years, the campaign of violence against the Maya population intensified to such an extent that, according to the UN truth commission, it resulted in 'acts of genocide' committed against particular Maya communities in particular regions of the country.[12] At the same time, the practice of the enforced disappearance of political opponents also intensified. As a result, many of the domestic efforts toward accountability for crimes committed during the civil war relate to the violence perpetrated during this period.

The transition(s) from military dictatorship to a democracy at least formally at peace, began in the mid-1980s and was finally concluded in 1996. The first stage of this transition entailed the adoption of a new constitution

8 Idem, paras. 86-87. As examples of the extreme cruelty with which the massacres were committed, the report lists "the killing of defenceless children, often by beating them against walls or throwing them alive into pits where the corpses of adults were later thrown; the amputation of limbs; the impaling of victims; the killing of persons by covering them in petrol and burning them alive; the extraction, in the presence of others, of the viscera of victims who were still alive; the confinement of people who had been mortally tortured, in agony for days; the opening of the wombs of pregnant women, and other similarly atrocious acts".

9 Idem, p. 34, para. 89.

10 Idem, p. 34, para. 83.

11 Idem, p. 22, para. 27 and p. 33, para. 82.

12 Idem, pp. 38-41, paras. 108-123. To be precise, the UN truth commission concluded that 'acts of genocide' were committed against the Maya-Q'anjob'al and Maya-Chuj communities in the North Huehuetenango region; the Maya-lxil comunity in the Quiché region; the Maya-Kiche' community in the Quiché region; and the Maya-Achi community in the Baja Verapaz region.

and a return to democracy in 1986.[13] The second stage entailed the adoption of a peace agreement between the Guatemalan state and the remaining guerrilla groups, as the result of a long and difficult peace process overseen by the United Nations, in which the state was represented by both the civilian government and the military High Command. The transitional justice compromise adopted as part of this peace process, however, was protested strongly by Guatemala's nascent civil society. As noted by Susanne Jonas, these protests "left no doubt that the struggle against impunity would continue well into the post war situation".[14]

The conclusion of the peace process and its transitional justice compromise mark the starting point of the process of 'post-transitional justice' which is the object of analysis in this chapter.[15] This chapter will focus on the main driving force behind post-transitional justice: the victim groups and human rights organizations which have been "fundamental from the outset" for the Guatemalan struggle against impunity.[16] Specifically, it will analyze how those groups have used recourse to the Inter-American system and the doctrines developed by it in order to bypass domestic obstacles to justice and to catalyze and (re)direct action by the domestic justice system. Section 2 will lay the groundwork for that analysis, by sketching the contours of the domestic struggle against impunity, from its starting point in the Agreement for a Firm and Lasting Peace, and the various pro- and anti-accountability constituencies constituting it. Section 3 discusses the

13 As explained by Jennifer Schirmer, the transition to constitutional democracy was in fact part of a strategic plan developed by a section of the High Command of the Guatemalan military, in order to ensure the survival and influence of the institution in the long term. This strategic plan was a response to the escalation of violence and political repression in the coutry in the late 1970s and early 1980s, which severely affected the legitimacy of the regime, both domestically and on the international level. The military carefully planned and oversaw the transition to democracy, which it envisaged as a "mixed solution", in which the civilian government outwardly represented and legitimized the state while cooperating with the military, which retained full control over all counterinsurgency operations. As a result, the abdication of formal power to a civilian government entailed a very limited loss of *de facto* power for the military. *See generally* J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998).

14 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 54.

15 The concept of 'post-transitional justice', developed by Cath Collins, seeks to explain the "persistence of the justice question" and the "periodic re-irruptions" of accountability pressure in the post-transitional period. Rather than focusing on state-driven policies adopted at the moment of transition, post-transitional justice is understood to be mainly "non-state, driven by private actors operating both "above" and "below" the state". And while "internationalized accountability action" plays an important role in post-transitional justice, it mainly operates through domestic courts. *See* C. Collins, *Post-transitional justice – human rights trials in Chile and El Salvador* (The Pennsylvania State University Press, 2010), pp. 22-27.

16 E. Martínez Barahona and M. Gutiérrez, 'Impact of the Inter-American human rights system in the fight against impunity for past crimes in El Salvador and Guatemala', in: P. Engstrom, *The Inter-American human rights system: impact beyond compliance* (Pallgrave Macmillan, 2019), p. 265.

obstacles to justice with which the post-transitional justice movement saw itself confronted. Section 4 provides a brief overview of the main results achieved by the post-transitional justice movement and the main domestic developments which made those results possible. Finally, sections 5 and 6 analyze how the Inter-American system has contributed to the work and the (modest) successes of the post-transitional justice movement. Section 5 examines the influence the organs of the Inter-American system have had through their direct interactions with domestic authorities and civil society groups, through the proceedings before the Inter-American system and judgments delivered by the IACtHR. Section 6, meanwhile, examines how domestic pro-accountability constituencies have used the doctrines developed by the IACtHR to articulate their claims to justice in terms of rights and international obligations, in order to confront some of the legal and practical obstacles erected in their path.

## 2 The struggle for post-transitional justice in Guatemala: origins and main actors

### 2.1 The Agreement for a Firm and Lasting Peace and the start of the struggle for post-transitional justice

The process leading up to the signing of a peace agreement was long and chaotic.[17] That this process would eventually culminate in a negotiated peace was never the obvious outcome. There was strong opposition to the idea of achieving peace, especially a peace negotiated with the guerrillas, within both the military and the economic elite. However, by the mid-1990s it had become clear to many in the Guatemalan establishment, most importantly to newly elected president Alvaro Arzú, that good relations with important allies such as the U.S. would depend on the accomplishment of a peace agreement with the guerrillas.[18] Accepting this reality, the Arzú government put its full weight behind the peace process, which finally culminated in the signing of the 'Agreement for a Firm and Lasting Peace'

17 For a full account of the peace process, *see* S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000). Formally, the negotiations were conducted between the state, represented by both the civilian government and the military, and the high command of the guerrillas, and overseen by the UN mission in Guatemala (MINUGUA). Informally, all manner of interests groups, including indigenous groups, women's groups, human rights groups, but also business groups, "had come to view the peace process as an arena for discussing issues that were not being addressed in the formal political arena" and were attempting to influence the negotiations in whatever way they could. S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 43-44.

18 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 50.

on 28 December 1996. An agreement described by Emily Braid and Naomi Roht-Arriaza as "less a pacted transition than an unspoken victory for the army".[19]

One of the very last issues to be decided during the peace negotiations was that of transitional justice, more particularly the scope of the amnesty law that would be enacted by parliament.[20] Earlier on in the peace process, in 1994, the parties had already agreed to set up a truth commission, under the auspices of the UN, to investigate and report on the atrocities committed during the Guatemalan civil war. At the same time, however, this agreement between the negotiating parties included specific language prohibiting the commission from "attribut[ing] responsibility to any individual in its work, recommendations and report" and stipulating that its work would not have any judicial aim or effect.[21]

The mandate provided to the truth commission gives some indication of the low level of interest among the negotiating parties in creating a legal framework that would ensure the investigation and prosecution of the severe crimes committed during the civil war. However, strong pressure from domestic civil society organizations and the extensive involvement of the United Nations in the peace process, made it difficult to simply impose a blanket amnesty for the most serious crimes. The outcome of this conundrum was a 'Law of National Reconciliation', enacted only 10 days before the signing of the final peace agreement on 18 December 1996, which provided for a transitional justice compromise that is severely limited in terms of justice.

The Law of National Reconciliation extinguishes criminal responsibility for crimes committed during the civil war by members of the insurgency (Article 2) and by members of the state forces (Articles 5 and 6).[22] The only (important) concession made on the issue of justice is that Article 8 of the Law of National Reconciliation explicitly excludes a number of crimes from its scope of application, including genocide, enforced disappearance, torture and "those crimes which are imprescriptible or which do not allow for the extinguishment of criminal responsibility, in conformity with the international treaties ratified by Guatemala". In theory at least, these crimes could be investigated and prosecuted by the Guatemalan justice system.

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19 E. Braid and N. Roht-Arriaza, 'De facto and de jure amnesty laws – the Central American case', in: F. Lessa and L.A. Payne (eds.), *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 185.

20 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 54.

21 "Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer", Oslo, 23 June 1994, available at: <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Guatemala-Charter.pdf> , last checked: 13-07-2018.

22 *See also* E. Braid and N. Roht-Ariazza, 'De facto and de jure amnesty laws – the central American case', in: F. Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 185.

The Law of National Reconciliation was immediately unpopular with human rights groups, who had started to campaign for the investigation and prosecution of some of the serious crimes committed by the military. In fact, the very first step taken by human rights groups in this struggle was to challenge the constitutionality of the Law of National Reconciliation before the Guatemalan Constitutional Court ("CC"). This challenge was unsuccessful, however. The CC upheld the law in October 1997, arguing that, because of the exception to its scope of application provided in Article 8, it "could be interpreted and applied in a way consistent with international law".[23]

The enactment and subsequent ratification by the CC of the Law of National Reconciliation made clear that the struggle against impunity would be an uphill battle for those seeking justice for the human rights violations committed during the civil war. Moreover, many worried that, notwithstanding the formal demilitarization of the Guatemalan state agreed upon during the peace process, the military would again find a way to maintain its informal position of power, which would allow the military to obstruct and undermine the struggle against impunity from behind the scenes. These concerns were confirmed in spectacular fashion not long after the peace accords were signed.

Parallel to the official UN truth commission, a second, domestic truth commission had been initiated by the *Oficina de Derechos Humanos del Arzobispado de Guatemala* (Human Rights Office of the Archdiocese of Guatemala – "ODHAG").[24] The commission was led by Bishop Juan Gerardi, who has spent several years working as a priest in the areas hardest hit by the civil war, experiencing first-hand the devastation of the Guatemalan country side. Not hindered by the same institutional constraints as the UN truth commission, the domestic truth commission produced a scathing report, based on the testimony of thousands of victims, which not only identified the crimes committed but also the perpetrators who committed them.

Only two days after this report was presented to the Guatemalan public, Bishop Gerardi was brutally murdered in his garage. His head was smashed with a brick, a method of assassination "designed to be grotesque, the message an unmistakable reminder of the worst atrocities of the war".[25] This reminder of the past served an important goal in the present. According to Jo Marie Burt, the message sent by the murder of Bishop Gerardi was that "[t]hose who have brutalized the country for decades and have never

23 E. Braid and N. Roht-Ariazza, 'De facto and de jure amnesty laws – the central American case', in: F.Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 186.

24 The truth commission set up by the ODHAG is known as the *Proyecto Interdiocesano de Recuperación de la Memoria Histórica* (Inter-diocesan project for the recuperation of historical memory – "REHMI"). For more information on this project and for access to the full report of the truth commission, *see* www.rehmi.org.gt.

25 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), p. 146.

had to answer for their crimes have made it clear that they will not tolerate any attempts to challenge the impunity that reigns in Guatemala".[26] And while two military officers were eventually condemned to lengthy prison sentences for this crime, this only happened after years of surreal investigations and proceedings characterized by destruction of evidence, the murder and disappearance of key witnesses and a bomb attack on the home of one of the judges hearing the case.[27] Moreover, the two military officers in question were convicted for executing the murder, while those involved in planning it were never touched.

As intended, the impact of the murder of Bishop Gerardi on Guatemalan society, and particularly on its human rights community, was profound. In the words of Susanne Jonas:

> "As the highest-level political assassination in recent Guatemalan history, it left the nation in a state of shock. Nothing after the assassination would be quite the same as before. Perhaps because the wounds of war were so far from being healed, it raised the specter of a return to the past. In its aftermath, many habits and behaviors engrained from thirty-six years of war reemerged, making the challenge of building (or even thinking about) a new society much more daunting than previously."[28]

In other words, the murder was a clear sign that the structures responsible for many of the crimes committed during the civil war still dominated Guatemala in the *posguerra* and could dictate the 'truth' about the war allowed to be known by the Guatemalan public. Moreover, it showed that these structures were still prepared to violently impose their will if challenged.

### 2.2 Pro-accountability constituencies: the human rights organizations driving the struggle against impunity

The origins of several of the civil society groups which have played a leading role in the struggle against impunity in Guatemala, can be trace back to the darkest days of the civil war. Several dynamics present in those days help explain how and why it was possible for organizations to form in resistance to the government at a time of intense and almost universal political repression. Firstly, there was an internal dynamic, described by Afflitto and Jesilow, in which the intensification of state violence "created cross-cutting

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26 J.M. Burt, 'Impunity and the murder of Monsignor Gerardi' (1998) 31(6) *NACLA report on the Americas*, nr.5 .

27 For a full account of the murder of bishop Gerardi and the subsequent investigation and trial, s*ee* Francisco Goldman, *The art of political murder: who killed the bishop?* (Grove Press, 2008).

28 S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 146-147.

ties – networks of survivors – and a homogenization of values among large segments of the population".[29] Whereas before this period, social mobilization had often taken place along class and/or ethnical lines,[30] the campaign of state terror unleashed the Guatemalan population in the late 1970s and 1980s affected people from different segments of the population. Large numbers of people were simultaneously searching for their disappeared family members in hospitals and morgues all over Guatemala, sharing the same pain and longing for information and (later) justice. The ties which developed between these individuals would form the basis for the social movement against impunity.[31] This dynamic is illustrated by the name of one of the oldest and most important domestic groups participating in the struggle against impunity, the *Grupo de Apoyo Mutuo* (Mutual Support Group – "GAM"), which was created in 1984.

Secondly, there was an international dynamic at play, in which the intensification of state violence and political repression in Guatemala, coincided with a growing international sensitivity to human rights issues in general, and those in the Latin American region in particular. This awareness can be credited in part to the work of new transnational human rights NGOs like Amnesty International and Human Rights Watch.[32] As word of the atrocities being committed in Guatemala reached an international audience, the country became isolated on the international level. Victims and leaders from civil society groups, on the other hand, managed to link up with and find support from the international community. This international support provided some measure of protection for those speaking up about their loved ones' disappearance of murder, as it made the reputational cost of attacking them higher.[33] Taken together, these dynamics opened up a tiny

29 F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), p. 118.

30 Afflitto and Jesilow recognize the pan-Mayan movement as an important precursor to the social movement against impunity. This movement had had some success connecting to international audiences in their campaigns concerning environmental issues and indigenous land rights. These successes "had an impact on individuals who later were attracted to the movement to end impunity", as they saw that social mobilization, and their participation in it, could make a difference in Guatemala. Indigenous activists make up an important part of the struggle against impunity in Guatemala. *See* F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), pp. 105-108.

31 F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), pp. 118-122.

32 *See* Mikael Rask Madsen, 'Hacia la paz y la democracia en Guatemala: estrategias legales "suaves" en derechos humanos y contrainsurgencia constitucional', *Ciencias Sociales* 88:29-46 (II-2000), p. 38-39. *See also* F.M. Afflitto and P. Jesilow, *The quiet revolutionaries – seeking justice in Guatemala* (University of Texas Press, 2007), pp. 103-104.

33 F.M. Afflitto and P. Jesilow, The quiet revolutionaries – seeking justice in Guatemala (University of Texas Press, 2007), p. 104.

space for a domestic human rights and anti-impunity movement to take root.[34]

From this tiny space has grown a social movement against impunity which comprises individuals from different segments of the Guatemalan population – including both rural, indigenous persons and persons from an urban, middle class background – united in different types of organizations. The backbone of this movement is still made up of the organizations founded and operated by individuals whose loved ones were killed or disappeared at the hands of the military during the war, of which the GAM is the oldest. These organizations are thus driven directly by the desire of their members to learn exactly what happened to their loved ones and to see justice done against those who killed or disappeared them. The GAM, for example, has been involved in a decades-long campaign to achieve justice for the enforced disappearance of Edgar García, the husband of one of the GAM's founding members.[35] One of the GAM's other prominent members, Aura Elena Farfán, later went on to found the *Asociación de Familiares de Detenidos-Desaparecidos de Guatemala* (the association of the family members of the detained-disappeared of Guatemala – "FAMDEGUA"), an organization which has had a fundamental role in some of the most famous and successful legal cases concerning forced disappearances in Guatemala.[36] Another important example of a victim organization important to the struggle against impunity is the *Asociación por la Justicia y Reconciliación* (Association for Justice and Reconciliation – "AJR"), a group founded by survivors of the scorched earth campaigns against the Maya Ixil population during the early 1980s. AJR was one of the driving forces behind the genocide case against Ríos Montt.

With time, such victim organizations have become more professionalized, hiring legal staff to help conduct proceedings and becoming active in cases other than those relating directly to the founders' own experiences. A prominent example of this development is the *Fundación Myrna Mack* (the Myrna Mack Foundation – "MMF"), which grew out of the personal crusade taken on by Helen Mack to see justice done for the extrajudicial

34 Mikael Rask Madsen, 'Hacia la paz y la democracia en Guatemala: estrategias legales "suaves" en derechos humanos y contrainsurgencia constitucional', *Ciencias Sociales* 88:29-46 (II-2000), p. 37-39. In fact, the movement which grew from the 1980s onwards should be seen as a second wave of human rights activism. In the 1960s a similar movement began among university students. However, this first wave had been utterly destroyed by the military in the 1970s and early 1980s and most of its leaders had been murdered or disappeared.

35 The GAM and its activism in the case of Edgar García made his widow, Nineth Montenegro, a prominent member of civil society and launched her political career. Nineth Montenegro is now a member of parliament on behalf of the party *Encuentro por Guatemala*, which she founded.

36 In particular, FAMDEGUA has represented the victims in the cases of *Choatalum* and *Dos Erres*, which will be further discussed below in paragraph 5.

execution of her sister, anthropologist Myrna Mack.[37] Today, MMF is one of the most important human rights organizations of Guatemala, which has helped other victim groups organize their own campaigns[38] and which even the government sometimes relies on for advice on matters pertaining to human rights and the justice sector.[39]

Apart from such organizations which have their roots in their members' own experiences during the war, a number of organizations have developed which specialize in the legal representation of victims in human rights cases. While such organizations do not have the same direct connection to the situations that they are litigating as the victim organizations have, they cooperate closely with the (groups of) victims that they represent. For example, following its (relatively) successful litigation in the case of the murder of Bishop Gerardi, the ODHAG has become an important center for human rights litigation within Guatemala. Another prominent example is the *Centro para la Acción Legal en Derechos Humanos* (CALDH), an NGO set up by Guatemalan lawyer Frank LaRue with the specific purpose of supporting victims of human rights violations in their struggle for justice. One of CALDH's lawyers, Edgar Pérez Archila, later went on to found an independent law firm for human rights litigation called the *Bufete Jurídico de Derechos Humanos* (Law Firm for Human Rights Litigation – "BJDDHH"). Through CALDH and BJDDHH, Edgar Pérez has represented victims in many of the Guatemalan human rights cases, both within Guatemala and before the Inter-American system.

Finally, not all organizations involved in the struggle against impunity are focused on legal work. For example, an essential contribution has been made by the *Fundación de Antropología Forense de Guatemala* (Forensic Anthropology Foundation of Guatemala – "FAFG"), established and led by the internationally renowned forensic anthropologist Fredy Peccerelli. FAFG focuses on the exhumation and identification of the remains of people who were killed during the civil war, from mass graves all over Guatemala.

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37 Myrna Mack conducted extensive research into the circumstances of indigenous communities who had become internally displaced as a result of the civil war. It is believed that this research interest is what prompted the military to have her executed on 11 September 1990. *See* IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs*), 25 November 2003, pp. 29-32. Faced with the authorities' refusal to properly investigate her sister's murder, Helen Mack, who had up to that point been a business administrator, quit her job to be able to dedicate herself completely to finding justice for her sister. *See* testimonies of Lucrecia Hernández Mack and Helen Mack Chang in IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs)*, 25 November 2003, pp. 33-39.

38 MMF has helped the relatives of the disappeared identified in the 'diario militar' (military diary) organize themselves in order to pursue justice on both the national and the international level. *See* interview F and interview K. For more information on the military diary, *see* IACtHR *Gudiel Álvarez et. al. ("Diario Militar") v. Guatemala (merits reparations and costs*), 20 November 2012.

39 For example, Helen Mack has been a member of a national commission established to advise the government on police reform, *See* MMF website, available at <http://www.myrnamack.org.gt/index.php/biografias/helenmack>

The results of the exhumations carried out by FAFG have been used as evidence in various domestic criminal trials concerning massacres and disappearances carried out during the civil war, including the genocide trial against Ríos Montt. Moreover, the exhumations have provided closure to some families, as they have allowed the identification of some of the many remains of disappeared persons scattered all over Guatemala.[40]

Over the years, a community of victims and human rights organizations has thus developed which specializes in campaigning to have justice done for serious human rights violations, especially those committed during the civil war. What should be understood about these organizations and their role in the struggle against impunity, is that their contribution goes far beyond 'just' denouncing such violations before the responsible authorities and demanding that they be investigated. These organizations also conduct investigations themselves, collecting evidence to present to the authorities so that they may be used in legal proceedings. In many cases, especially those related to the massacres perpetrated in rural regions, such organizations have been the ones to find witnesses and support them in giving their testimony. Civil society organizations have also done important work in uncovering and disclosing various documents giving insight into military operations, which have been central to proving the responsibility of military officials in court.[41] Moreover, the organizations described here represent victims throughout the proceedings, both domestically and before the Inter-American Court. In Guatemala, the victim has the option to participate extensively in criminal proceedings in human rights cases as *querellante adhesivo* (joint plaintiff), which allows them to be represented and present views throughout the proceedings and even to present evidence.[42] In this capacity, victims and their representatives have participated in almost all criminal proceedings in civil war-related cases which have been conducted in Guatemala.

In short, since the 1980s a social movement against impunity has grown in Guatemala. This movement consists of both victims organization and more technical organizations of lawyers and other professionals who sup-

40 An article in the New York Time Magazine provides a moving account of one such instance in which the family of a man who had disappeared in 1988 was given a positive identification of his mortal remains, which was found at the Creompaz military base in Cobán. S*ee* M. Jones, 'The secrets in Guatemala's bones', *The New York Times Magazine*, 30 June 2016.

41 For example, the infamous 'Military Log' ('Diario Militar'), containing the identification, date of capture and date of execution of a number of person taken prisoner by the military, has been disclosed by a U.S. NGO, the National Security Archive, cooperating with domestic groups. Moreover, domestic human rights groups, including the BJDDHH have litigated for many years to gain access to the military plans on which the scorched earth campaigns of the early 1980s were based. They finally achieved this access in 2009. Interview O.

42 The concept of the *querellante adhesivo* is codified in Article 116 of the Guatemalan code of criminal proceeding.

port victims in their struggle for justice. The work of these organizations has been absolutely vital in the struggle against impunity, as they not only push for investigation by the responsible authorities, but also investigate, collect and present evidence and represent victims in domestic and international legal proceedings.

### 2.3 Anti-accountability constituencies: the continuation of existing power structures after the war

While a social movement against impunity has thus tentatively developed in Guatemala since the 1980s, they face strong opposition from more powerful and more established sectors of Guatemalan society. Since the campaigns for justice of the social movement described above mainly concern crimes committed by the Guatemalan military, it is obvious that the members – and former members – of that institution are firmly opposed to their work. And while it could no longer have a major official role in politics, this does not mean that the individuals and networks of individuals making up the Guatemalan military could not continue to exert influence, both openly and covertly. Rather than giving up their power after the signing of the peace accords, the power-structures which developed during the war continued through unofficial channels.

The continued influence of these power-structures has been wielded, among other things, in opposition to the social movement described in the previous section. Different strategies have been employed, both openly and covertly to delegitimize and intimidate those pushing for investigation and prosecution of crimes committed by the Guatemalan military. In public, the military and their traditional allies in the oligarchy assert their interest and exercise their influence through lobby organizations. On the part of the military, there is the *Asociación de Veteranos Militares de Guatemala* (Guatemalan Veterans Association – "AVEMILGUA"). The main lobby organization of the oligarchy is known as the *Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras* (The Coordinating Committee of the Associations of Agriculture, Commerce, Industry and Finance – "CACIF").[43] The capacity of these organizations to effectively influence public opinion and political processes through media campaigns and lobbying was demonstrated early on, by their successful campaign to derail the constitutional reforms necessary to implement many of the changes agreed upon at the negotiating table, including the demilitarization

43 CACIF is in fact an umbrella organization, in which representatives of the lobby groups for each of the important sectors cooperate and coordinate their efforts. CACIF was founded in 1958 and has since become "the most powerful private sector organization in Central America". *See* Bull, Castelacci and Kasahara, *Business groups and transnational capitalism in Central America – economic and political strategies* (Palgrave Macmillan, 2014), p. 183.

of the Guatemalan state.[44] Since then, both AVEMILGUA and CACIF have been openly critical of high-profile attempts to bring high-profile 'crimes of the past' to justice.

More recently, another organization has joined their ranks and has become an influential and radical voice in the media campaigns against those seeking accountability. The *Fundación contra el Terrorismo* (Foundation against Terrorism – "FcT") was created in 2011 as an explicit reaction to investigation and prosecution of some high military officials for crimes committed during the civil war.[45] The founder and main representative of the FcT, Ricardo Méndez Ruiz, is a businessman who has never served in the military but, as the son of a former high-level military commander,[46] he has strong ties to the institution and to many individuals who hold, or have held, positions of power within the institution. In a report in Guatemalan newspaper *Prensa Libre*, the FcT was described as the "media and propaganda-arm of the Army".[47]

Lobby groups like AVEMILGUA and the FcT are the public face of Guatemala's anti-accountability constituencies, who seek to prevent the investigation and prosecution of crimes committed during the war through the media. However, the domestic fight against impunity is also opposed by more secretive groups, operating to obstruct justice through covert political influence and acts of intimidation. In 2003, the Washington Office on Latin America ("WOLA") published a report titled 'Hidden powers in post-conflict Guatemala – illegal armed groups and the forces behind them',[48] in which it described the criminal activities and acts of intimidation

44 For a full account of the failure of the implementation of the peace agreement, see S. Jonas, *Of centaurs and doves – Guatemala's peace process* (Westview Press, 2000), pp. 189-213. According to Jonas, the political forces opposing the implementation of the peace agreements were aided significantly by the half-hearted support given by the Arzú government to the agreements it had helped to bring about.

45 In an interview with the journalistic platform Plaza Publica in 2013, the founder of the FcT, Ricardo Méndez Ruíz, emphasized that his decision to create the Foundation against Terrorism was "all because of her" [former Attorney General Claudia Paz y Paz, who oversaw the investigations against military officials, HB] and that "we [the military, HB] will not let ourselves be brought like sheep to the slaughterhouse". C. Gamazo, 'El club de la balanza y la daga', *Plaza Publica*, 25-06-2013, available at <https://www.plazapublica.com.gt/content/el-club-de-la-balanza-y-la-daga>, last checked: 23-07-2018

46 Ricardo Méndez Ruiz is the son of Ricardo Méndez Ruiz Rohrmoser, the former commander of the infamous military base in Cobán and Minister of the Interior under Ríos Montt. As the son of such a high-profile military commander, Ricardo Méndez Ruiz jr. was the victim of a kidnapping at the hands of one of the guerrilla groups in 1982.

47 P.G. Vega, 'El terror como estrategia de defensa', *ElPeriódico*, 14-08-2016.

48 S.C. Peacock and M. Beltrán, Hidden Powers in post-conflict Guatemala – Illegal armed groups and the forces behind them (WOLA, 2003). This report is based in part on information gathered and reported by the UN Mission in Guatemala ("MINUGUA") and by domestic human rights organizations such as the Myrna Mack Foundation.

carried out by 'clandestine groups',[49] working at the behest of the 'hidden powers' of Guatemala. WOLA uses the term 'hidden powers' to describe "an informal, amorphous network of powerful individuals in Guatemala who use their positions and contacts in the public and private sectors both to enrich themselves from illegal activities and to protect themselves from prosecution for the crimes they commit".[50] The WOLA report made it clear that these hidden powers and clandestine groups were a legacy from the war, stating squarely that they "can be traced back to personal relationships, patterns of interaction, and structures of authority that developed during the war and continue to operate".[51] What made these networks particularly dangerous, was the fact that they had managed to infiltrate the entire post-war political system. According to WOLA:

> "A new, and particularly dangerous, distinguishing factor is the increasingly successful consolidation of political power on the part of hidden powers. Hidden powers have relationships with most of the political parties and actors in Guatemala, through campaign contributions, and through personal connections and relationships. […] [M]ost political analysts believe that the hidden powers have contacts and influence with all the major political parties, and therefore with the legislative and executive branches of government, regardless of which party is in power."[52]

The hidden powers described here have consistently wielded their influence to ensure impunity for crimes committed by their members, including crimes committed during the civil war. The clandestine groups operating at their behest have been a particularly dangerous and effective obstacle to accountability efforts on the domestic level.

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49 Idem, p. 7, defining the clandestine groups as "small groups of men, often members of specialized military units or police forces, who carry out acts of violence and intimidation" and noted that "often concealed behind the veil of common crime, the clandestine groups are believed responsible for perpetrating vicious attacks against human rights workers and others".

50 Idem, pp. 5-7.

51 Idem, pp. 13-14. Moreover, WOLA concluded that "[c]redible sources link the metamorphosis of present day hidden powers to four groups of men, sometimes inter-related, that actively participated in the counter-insurgency strategies of the Guatemalan armed forces – La Cofradía, El Sindicato, the Presidential General Staff (Estado Mayor Presidencial, EMP) and the leadership of the Civil Self-Defense Patrols (Patrullas de AutoDefensa Civil, PACs)."

52 Idem, p. 33.

## 3 The fight against impunity in Guatemala: an uphill battle

The fight against impunity for crimes committed during the Guatemalan civil war has been an uphill battle for those involved in it. Pro-accountability actors have encountered a number of legal obstacles to their work, of which the amnesty law enacted as part of the Agreement on a Firm and Lasting Peace is the most obvious example.[53] However, these legal obstacles have not been the main reason for the slow progress of domestic accountability efforts, "but rather the lack of political will to prosecute and the existence of threats, corruption, and a climate of fear that have made it difficult to hold the powerful accountable for past (or present) violations".[54] This lack of political will is the result of the enduring strength of the anti-accountability constituencies described in the previous section,[55] who have employed a variety of strategies in order to intimidate pro-accountability and obstruct their work.

One important and particularly visible strategy, are the media campaigns conducted by organizations like AVEMILGUA and FcT with the aim of delegitimizing pro-accountability actors, their work and their motivations in pursuing that work. The discourse employed in such campaigns, especially by the FcT, can be summarized into the following positions: firstly, they have maintained that there was no genocide in Guatemala ("*no hubo genocidio*")[56] and that there was never any policy on the part of the

53 These legal obstacles will be discussed in detail in Section 6.2 of this chapter.

54 E. Braid and N. Roht-Arriaza, 'De facto and de jure amnesty laws – the Central American case', in: F. Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 182.

55 *See* idem, p. 184, stating that: "the political parties and social forces that governed [Guatemala] during the height of the violations […] continue to hold a large quota of power."

56 For example, retired General and former President of Guatemala Otto Pérez Molina has stated on many different occasions, both before and after ascending to the presidency, that there was no genocide in Guatemala. *See for example* K. Weld, 'A chance for justice in Guatemala', *The New York Times*, 03-02-2013 and 'No hubo genocidio en Guatemala sostiene presidente Perez Molina', *La Nación*, 07-01-2015, available at <https://www.nacion.com/el-mundo/politica/no-hubo-genocidio-en-guatemala-sostiene-presidente-perez-molina/HYPK23SSGJFSBAVFCVIESW5X2Q/story/> , last checked: 23-07-2018. Moreover, the FcT and other representatives of both the Guatemalan military and the economic elites have maintained that concluding that there has been a genocide in Guatemala, would be destabilizing for the Guatemalan state and its economy. *See for example* C. Gamazo, '"Esto no es un juego" – entrevista a Ricardo Méndez Ruiz, presidente de la Fundación contra el Terrorismo', *Plaza Publica*, 25-06-2013, available at <https://www.plazapublica.com.gt/content/esto-no-es-un-juego>, last checked: 23-07-2018.
Moreover, one year after the judgment finding Ríos Montt guilty of genocide was delivered, the Guatemalan parliament adopted a resolution stating that genocide had never taken place in Guatemala. The resolution was proposed by a member of the *Frente Republicano de Guatemala* (Guatemalan Republican Front – "FRG"), a political party founded by Ríos Montt himself. *See* J.C. Pérez Salazar, 'Guatemala: ¿por qué el Congreso dice que no hubo genocidio?', *BBC Mundo*, 16-05-2014.

Guatemalan military to attack the civilian population. Rather, the narrative goes, the military did what was necessary to protect the country from communism and only targeted the communist guerrillas. If there were any excesses against the civilian population, these were incidental. In support of this thesis, the FcT has, for example, launched a campaign through both regular and social media titled "*La farsa del genocidio en Guatemala*" ("the sham of the genocide in Guatemala").[57] Thus, these campaigns aim to demonstrate that the crimes for which pro-accountability actors seek justice, never took place.

Secondly, and building on the previous point, opponents of the struggle against impunity repeatedly question the motives of pro-accountability actors. Since, according to their campaigns, the crimes in question never took place, pro-accountability actors cannot possibly be motivated by a genuine desire for justice. Rather, they are presented as 'leaches' and 'parasites' who seek to make money off of Guatemala's difficult past.[58] At the same time, they are also often presented as *guerrilleros* seeking revenge against the military and trying to use the courts to undo the defeat they suffered on the battlefield.[59] Taking this logic even further, the FcT has presented the Guatemalan civil society organizations involved in the struggle

57 Fundación contra el Terrorismo, 'La farsa del genocidio en Guatemala – conspiración Marxista desde la Iglesia Católica', *El Periódico*, 26 May 2013 (paid add). This reference refers to the version of the campaign which was published in the newspaper *ElPeriódico* as a paid add. A longer, bulletin-style version of the campaign was distributed through social media.

58 For one of the many examples of such discourse, *see* R. Méndez Ruiz, 'Maldito', *El Periódico*, 20-10-2015, available at <https://elperiodico.com.gt/opinion/2015/10/20/maldito/>, last checked: 23-07-2018, saying: "The hitmen of the human rights [movement, HB] were those who put together the framework for the sham of the genocide; a corrupt pack of hounds who, together with supposed indigenous leaders and foreigners such as Valerie Julliand and Alberto Brunori [respectively the representatives to Guatemala of the United Nations Development Program and the United Nations High Commissioner for Human Rights, HB] made a lifestyle out of prostituting the internal armed conflict."

59 Ricardo Méndez Ruiz regularly uses such discourse against human rights defenders in his weekly columns – first in *ElPeriódico* and later in *Siglo XXI*. For one of the many examples, *see* R. Méndez Ruiz, 'Desde la carcel, si fuese necesario', *ElPeriódico*, 17-11-2015. In this column, Méndez Ruiz responds to the Guatemalan Human Rights Ombudsman's denunciation of the FcT's media campaigns after a complaint had been filed against it by a group of human rights defenders. Here, Méndez Ruiz describes the human rights defenders who filed the complaint as "terrorists and parasites from left-wing organizations", adding that "[i]t is important to note that some of [these human rights defenders, HB] are terrorists who have, publically and together with several Muslims, burned the Israeli flag, and likely applaud in secret the recent tragedy in Paris". Later on in the same column he directly equates these human rights defenders to the *guerrilleros* active during the civil war, saying that "[d]uring two weeks in 1982 I was submitted to physical and psychological torture, during a vile kidnapping at the hands of the same terrorists who today continue to obstruct progress and freedom of expression. They did not manage to defeat me then, and they will not do so now."

against impunity as part of an international, Marxist plot[60] to discredit the Guatemalan military.[61]

To achieve maximum effect, this discourse is harnessed against particular individuals, who are personally identified and singled out for their role in the struggle against impunity. One infamous, on-line campaign of the FcT, titled "*los rostros de la infamia*" ("the faces of shame"), consists of a list of people, identified with their full names and pictures, qualifying them as "traitors of the peace" on account of their role in the investigation of high military officials, and calling on "future generations" to give these traitors their due punishment.[62] One respondent, a Guatemalan lawyer involved in human rights litigation, described being targeted by such discourse in the following way:

> "We ourselves – I imagine that you know about this – are criticized for taking on these types of cases. Even though I am doing nothing bad – it is within the legal framework of the country. I am not going outside the framework. But still they call us "judicial hitmen", they call us "*guerrilleros*", "terrorists"…. "The face of shame". [laughs] And really, what is it that we do? I cannot see how we are doing anything wrong! If I am legally representing a community which was completely destroyed and the few who managed to save themselves did so only by miracle, or if I am representing family members who have been looking for their other family member for 30 years […]… I don't see any way in which this could be agitating or much less illegal or in any way which this is destabilizing. To the contrary! […] Nevertheless, we are marked, stigmatized… "Agitators"!

60 This tendency to equate participation in the fight against impunity to terrorism or even an international conspiracy, can be understood with reference to the Thesis of National Stability, formulated by the Guatemalan military towards the end of the civil war with the intention to be carried over into peace time. For a full account of this doctrine, *see* J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998), pp. 235-257. Schirmer explains that, under the Thesis of National Stability, anyone expressing disagreement with the State and its policies would be qualified as an Opponent of the State. As Schirmer explains: "[w]ithin this mental universe, "innocent dissent" is an impossibility: activities that appear to be subjectively innocent and immune from "manipulation" […] are viewed as low-level latent tendencies that eventually and inexorably grow into insurrectionary forces […]" Schirmer adds that this logic was applied in particular to the work of human rights organizations . J. Schirmer, *The Guatemalan military project: a violence called democracy* (University of Pennsylvania Press, 1998), p. 245.

61 For example, this theory was set out at length in the the FcT's '*farsa del genocidio*' campaign, which carried as its subtitle '*Conspiración Marxista desde la Iglesia Católica*' ("A Marxist conspiracy from the Catholic Church"). *See* Fundación contra el Terrorismo, 'La farsa del genocidio en Guatemala – conspiración Marxista desde la Iglesia Católica', *El Periódico*, 26 May 2013 (paid add).

62 Fundación contra el Terrorismo, 'Los rostros de la infamia', 8 May 2013, available at < https://nosomosgenocidas.wordpress.com/2013/05/08/los-rostros-de-la-infamia/>, last checked: 23-07-2018. This campaign was denounced bythe Guatemalan human rights Ombudsman as constituting a 'discourse of hate', *see* C. Gamazo, 'PDH sanciona a Méndez Ruiz por discurso "insidioso y agresivo" y solicita investigación al MP', *Plaza Publica*, 27-08-2013.

> Or that we are becoming millionaires, that we are using the victims – these are the arguments they use – that we are receiving millions and turning ourselves into millionaires."[63]

To fully grasp the impact of such discourse, especially when targeted at particular individuals, it is important to understand that, in Guatemala, the type of stigma described above has long carried a mortal risk. Throughout the civil war, people who had been labeled '*guerrillero*' – or 'communist', 'terrorist' or 'agitator' – had often been disappeared or extrajudicially executed. The stigma and fear attached to such labels was underlined by one of the respondents, an activist from a well-known Guatemalan human rights organization. While describing her work investigating one of the most infamous massacres from the civil war, she touched on the impact the word '*guerrillero*' continued to have in the community she was working with, based on their experiences during the war. In her words:

> "So, there was a lot of fear. In [this community, HB], the army came [during the war, HB] and took away those who had been marked by the military commissioners as being *guerrilleros*. Before, the word "*guerrillero*" was… terrible! Communist or *guerrillero* was terrible! Lies were told as a result of which the people of [the community, HB] were marked as *guerrilleros*, that they collaborated with the *guerrilla*".[64]

Another respondent, who also worked with a prominent Guatemalan human rights organization, explained that, because in Guatemala the concept of human rights has long been associated with the political left, the stigma attached to the word 'communist' or 'guerrillero' had, to some extent, rubbed off on human right and human rights activists. In his words:

> "Here, in Guatemala – I don't know how it is in other countries – but here, I believe there is a very wrong interpretation of what human rights are, and that they are associated with left-wing movements. So, if you use human rights standards to resolve [conflicts, HB], you will be seen as someone from the left. And for a long time, people from the left were eliminated […]"[65]

Thus, the discourse employed by organizations such as the FcT against individuals and organizations participating in the struggle against impunity

63 Interview O.
64 Interview G.
65 Interview S.

serves not only to discredit their work, but also to let them know that they are marked[66] and risk being targeted for further action.[67]

The veiled threats made through the media against domestic pro-accountability actors are, moreover, backed up by more explicit threats, and even attacks, by the clandestine groups described in the previous section. In 2002, WOLA reported "hundreds of cases of crimes against civil society organizations and their leaders" and noted that "the number and patterns of the cases point to a systematic targeting of civil society actors and others involved in "anti-impunity initiatives" – both those who seek justice for past abuses (human rights groups, forensic experts, judges, lawyers, and witnesses) and those who denounce present-day corruption by state agents".[68] At the time when the research underlying this chapter was conducted, these threats and attacks continued to occur. As a result, some individuals and organizations have been under police protections for years or even decades and others have been forced to leave the country due to security reasons.

The situation is especially difficult for those living and working in rural areas, outside the relative protection offered by the presence of media and international organizations in the capital. This reality is illustrated by a story told by one respondent, who described the situation of a family she had worked with through a Guatemalan NGO that supports human rights defenders. As the respondent explained:

> "This man was a human rights defender and a leader of his community who was from [a rural department, HB], and one morning they killed him. He was leaving his house one morning and he was shot by some men who came on bicycles and they killed him. So this man had been… during the armed conflict he had needed to go into exile in Mexico with his family, because he was a catechist and he had always worked for the benefit of the disadvantaged, on housing and education, and during the armed conflict [this would mark one, HB] as a

66 Ricardo Méndez Ruiz himself has hinted at this in an interview with the journalistic platform Plaza Pública, saying: "We are saying: "this person did that"; because I believe that for a long time they have believed that they are covered by the cloak of anonymity. And that's not how it is. And that is the objective of our publications. That they know that we know." C. Gamazo, '"Esto no es un juego" – entrevista a Ricardo Méndez Ruiz, presidente de la Fundación contra el Terrorismo', *Plaza Publica*, 25-06-2013

67 In a report in ElPeriódico, several Guatemalan analysts and members of civil society organizations expressed their disquiet at seeing a return to strategies from the civil war being used against those participating in the struggle against impunity. P.G. Vega, 'El terror como estrategia de defensa', *ElPeriódico*, 14-08-2016. One of the respondents interviewed in the context of this case study expressed a similar concern. When asked how he saw the future of the social movement against impunity, he said the following: "Well, a bit grey. A bit grey. I believe we are seeing important setbacks – "important" is not the right word, but setbacks which are not beneficial to the country. Setback which could even lead to tendencies or policies we have seen during the armed conflict. These do not exist yet, but this is the trend." Interview O.

68 S.C. Peacock and M. Beltrán, 'Hidden Powers in post-conflict Guatemala – Illegal armed groups and the forces behind them' (WOLA, 2003), p. 3.

> communist. And, moreover, he was a catechist, and with the whole issue of liberation theology and all that, they had to leave. And on top of that, his son was disappeared by the Guatemalan military, for which it was condemned by the Inter-American Court […]
>
> So they did not return to Guatemala until the year '97, after the peace accords, and they thought that in the context of the agreement […] with all the monitoring and all… so they returned to their community and he returned to the communal work that he had always done and he again took up the issue of housing, the issue of education, together with his children […] And in 2003 they appointed him the mayor of the community and months later he was killed. His daughter […] was also a human rights defender and she participated and worked a lot on the issue of women's rights, also on the municipal level, organizing community participation and such.
>
> So, there had already been conflicts with people linked to the military, military commissioners, ex-*kaibiles* [special forces of the Guatemalan military, HB] and people on the local level, because even though the armed conflict had ended, all the power structures which had developed during the conflict persisted, especially on the local level, in a village in the middle of nowhere. So there was a conflict between these structures and the family, whom they referred to as *guerrilleros* and such. So the father is killed and in the year before that, the family had suffered a series of incidents, amongst them an ex-*kaibil* who had threatened them directly, and they reported this and the State did not protect them, it did not offer them any protective measures. So the daughter […] is faced with the fact that the family had been threatened and that the State did not protect them, even though they had reported [the threats, HB], she is faced with the murder of her father and, on top of that, in the days after the murder, armed men came to their house and they stayed in their cars in front of the house – they didn't just do this one day, but several – […] and they had to go into exile a second time."[69]

The story of this particular family highlights the continuity of the threats and attacks against those involved in social struggles, including the struggle against impunity, between the civil war and the post-transitional period. It underlines that, in hindsight, the murder of Bishop Gerardi was not a one-off event, but rather a particularly high-profile example of the treats and attacks suffered by those pushing for accountability for the crimes committed by the Guatemalan military during the civil war, with the intention of intimidating them and halting their pursuit of justice.

Finally, the threats to their own lives are not the only obstacles the pro-accountability groups face. Especially in the immediate post-war years, the lack of independence on the part of the police and the judiciary and their often hostile attitude towards victims of human rights violations[70] made

69 Interview L.

70 For example interview F, describing how the questions posed to them by police officers made victims feel like " they were the ones being investigated" and how police officers would tell the wives of men who had disappeared that their husband had probably run off with another woman.

even opening an investigation into such cases almost impossible. Even when victims were willing to approach the police to denounce the crimes committed against them or their family members, they were often faced with active obstruction by the authorities who were supposed to investigate their cases, through sabotage of the efforts to identify their disappeared loved one's remains,[71] the 'losing' of case files containing many years of procedural activities,[72] or acts of intimidation and threats against their lives and against witnesses.[73]

And when the authorities in a particular case do cooperate with victims and made headway in the investigations, this may constitute a grave risk for the judicial officers involved in these cases. In the 1990s and early 2000s, such officials would often face direct threats and attacks against their physical person. For example, in the course of the investigations regarding the extrajudicial execution of anthropologist Myrna Mack in the early 1990s, a judge and a police officer involved in the case were murdered. On top of that, 10 judges were moved to drop the case as a result of death threats against them, several judges and prosecutors fled the country.[74] More recently, prosecutors pursuing cases against military commanders for crimes committed during the civil war and judges hearing such cases have often been the target of legal action by anti-accountability actors, who have filed complaints against them and requested disciplinary actions.

In short, pro-accountability actors in Guatemala have faced a number of important legal and practical obstacles to their work. The practical obstacles, which are the result of the great power-imbalance between pro- and anti-accountability constituencies, have been the most difficult for them to overcome and pose the greatest threat to their work – and to their person. Those obstacles include media campaigns aimed to delegitimize their work and question their motivations, veiled and direct threats against their person and, sometimes, direct attacks. Since the signing of the peace accords, several pro-accountability actors have been killed or forced into exile as a result of such threats and attacks. Another important practical obstacle has been the unwillingness of judicial authorities to investigate the complaints

71 *See for example* IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 73 and p. 28 (testimony Jennifer Harbury), describing how, in the course of the investigations to uncover the fate and whereabouts of the material victim, then Attorney General Acisclo Valladares stopped an exhumation ordered by the Second Criminal Trial Judge of Retalhuleu, Guatemala on the application of human rights ombudsman Ramiro de Léon Carpio by flying in on a helicopter accompanied by 20 military men and questioning its legality.

72 *See for example* IACtHR *Bámaca-Velásquez v. Guatemala (provisional measures and monitoring of compliance with judgment)*, 27 January 2009, pp. 5-6, paras. 12-14, in which the victims' representatives describe how the Office of the Prosecutor told the material victim's sisters that the case file containing 16 years worth of procedural activity had been lost.

73 *See for example* IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs)*, 25 November 2003, para. 134.95-102.

74 J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014), pp. 40-41.

filed by pro-accountability actors, combined with the threats and attacks against officials who do pursue cases concerning crimes committed during the civil war and against the witnesses willing to testify in such cases.

## 4 Results of the domestic struggle against impunity: criminal trials for serious human rights violations committed in the context of the civil war

Notwithstanding the many obstacles described in the previous section, the domestic struggle against impunity for civil-war related crimes has yielded some results. Difficult investigations have been carried out by the Guatemalan Public Ministry, with considerable input from victim groups and human rights organizations, and some important judgments have been delivered by domestic courts. It should be noted, however, that it is difficult to obtain reliable information about these domestic proceedings and that various sources provide different information about the total number of investigations and prosecution conducted in Guatemala concerning civil-war related crimes. This section aims to provide a short overviews of the outcomes of Guatemalan accountability efforts, based on various written sources in combination with the information provided by several respondents interviewed during the research trip to Guatemala undertaken in the context of this study.

According to Elena Martínez Barahona and Martha Gutiérrez, "information about a total of 155 investigations between 1984 and 2012 is available".[75] Of course, not all of these investigations have resulted trials, let alone convictions. Martínez Barahona and Gutiérrez make mention of "30 judgments […] issued", one of which was subsequently overturned, and 17 investigations which went on for over a decade without leading to any prosecutions. A recent overview of domestic prosecutions for crimes committed in the context of the internal armed conflict provided by members of the Guatemalan congress,[76] notes that 58 convictions have been delivered by Guatemalan courts against members of the state and paramilitary forces. Thirteen others have been detained and are currently on trial, while another 49 have been officially indicted, but remain in liberty. The crimes of which they have been accused include genocide, enforced disappearances, extra-judicial executions, torture and sexual violence.

75 E. Martínez Barahona and M. Gutiérrez, 'Impact of the Inter-American human rights system in the fight against impunity for past crimes in El Salvador and Guatemala', in: P. Engstrom, *The Inter-American human rights system: impact beyond compliance* (Pallgrave Macmillan, 2019), p. 252. The authors do not specify which investigations they have included in that number. They also do not say anything about investigations after 2012.

76 This overview was presented in the Exposition of Motives accompanying Draft Law 5377-2017, which proposes a significant expansion of the amnesty provided by the Law of National Reconciliation. Draft Law 5377 will be discussed in more detail in Section 6.2.1 of this chapter.

Over the years, there has been a clear development in both the number of proceedings conducted and the types of crimes charged and defendants involved in those proceedings. In the first decade or so after the signing of the peace accords, few trials were conducted for the types of crimes of interest to this study. The most high-profile case conducted by the Guatemalan justice system before 2008, is that against several members of the Presidential General Staff (*Estado Mayor Presidencial* – "EMP") for the extrajudicial execution of the anthropologist Myrna Mack.[77] Apart from the Myrna Mack case, these first years saw trials conducted, and convictions won, for massacres in Xamán and Tululché and an extrajudicial execution in Colotenango.[78] What these proceedings had in common, is that they focused almost exclusively on low ranking soldiers or members of the *Patrullas de Autodefensa Civil* (Civil Self-defense Patrols – "PAC"), paramilitary organizations which had been active during the latter part of the civil war and which operated under the instructions of the military. The upper echelons of the state forces, however, were not touched.

This situation has changed, however, over the last decade. Since 2008, there has been a notable increase in the number of trials conducted for civil war-related crimes, with over 30 convictions won in relation to at least 10 different cases. These cases have included the infamous massacres of Plan de Sánchez, Río Negro and Dos Erres, each of which involved the killing of several hundred people. Moreover, the accused in these more recent cases have been charged not only with murder, as had been the practice in the earlier cases, but also with other crimes of a more 'international' character

77 In 1993, one member of the EMP was foud responsible as the material author of the extrajudicial execution of Myrna Mack. In 2004, another member of the EMP was found responsible for the extrajudicial execution of Myrna Mack as intellectual author. For more information on the Myrna Mack investigation, see IACtHR *Myrna Mack Chang v. Guatemala (merits reparations and costs)*, judgment of 25 November 2003. The domestic judgments in the Myrna Mack case are available through the website of the Myrna Mack foundation, http://www.myrnamack.org.gt/index.php?option=com_content&view=article&id=302&Itemid=132, last checked: 18-12-2018.

78 *See* L. Arriaza and N. Roht-Arriaza, 'social reconstruction as a local process', (2008) 2(2) *International Journal of Transitional Justice* 152-172, pp. 158-159. 14 soldiers were convicted for the high-profile massacre in Xamán, which took place in 1995, as the peace negotiations were nearing their conclusion. One military commander was convicted for his participation in a series of massacres in the Maya town of Tululché. Finally, one PAC member was convicted for the extrajudicial execution of Juan Chanay Pablo in Colotenango. However, after his conviction he was liberated from prison by a group of former PAC members, and the authorities were unable to secure his re-arrest. See also United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2000 - Guatemala* , 26 February 2001, available at: https://www.refworld.org/docid/3ae6aaa44.html, last checked: 18-12-2018.

including enforced disappearance,[79] sexual violence,[80] crimes against humanity and genocide.

Finally, the trials conducted since 2008 have been conducted not only against PAC members, military commissioners and low level soldiers, but against military and police commanders as well. The first steps in this direction included the conviction in December 2009 of a military commander for his role in the enforced disappearance of 8 people in the municipality of El Jute and the judgments, in 2011 and 2012, against 4 former *kaibiles*, members of the elite forces within the Guatemalan military, for their role in the massacre at Dos Erres. At least two high ranking police commanders have been convicted to lengthy prison sentences, one for his role in the disappearance of unionist Edgar García and one for his leadership over the crimes committed during and after the burning of the Spanish Embassy in 1980. Moreover, a number of cases initiated since 2011 have targeted the very highest levels of the Guatemalan military command, including former heads of state.[81] In 2013, former dictator Efraín Rios Montt and his Head of Military Intelligence José Mauricio Rodríguez Sánchez were brought to trial for the crime of genocide. On 10 May 2013, Ríos Montt was found guilty and convicted to 80 years imprisonment by the first instance court, while Rodríguez Sánchez was acquitted of all charges, a judgment that was subsequently annulled by the Guatemalan Constitutional Court.[82] Following the genocide trial, proceedings against military commanders from the highest echelons have continued. In 2016, the Public Ministry file formal accusation against a number of high-ranking military commanders, including the

79 The first guilty verdict for the crime of enforced disappearance was imposed in August 2009 on the military commissioner Felipe Cusanero Coj, for the disappearance of 6 people in the municipality of Choatalum. For a more detailed discussion of this judgment, *see infra* Section 6.2.2 of this chapter.

80 The focus on sexual violence has been most explicit in two recent trials: the Sepur Zarco case, in which two defendants were found guilty of sexual violence and sexual slavery against 15 indigenous women; and the Molina Theissen case, in which 4 defendants were found guilty of, among other things, rape and 'aggravated sexual abuse'.

81 *See for example* 'Guatemala: ex-armed forces chief Lopez Fuentes arrested', BBC, 18 June 2011 and 'Guatemala genocide suspect Oscar Mejía hospitalized', BBC, 26 October 2011. Several of those initially accused by the Public Ministry of participating in genocide were found unfit to stand trial, as a result of which the proceedings against them had to be suspended.

82 For a full account of this trial, *see* H. Bosdriesz and S.J. Wirken, ' An imperfect success – the Guatemalan genocide trial and the struggle against impunity for international crimes', (2014) 14(6) *International Criminal Law Review* 1067-1094. In 2017 and 2018, a retrial of this case was conducted, during which Efraín Ríos Montt died. In September 2018, the first instance court handed down a ruling in which it found that, while the Guatemalan military committed genocide and crimes against humanity against the Maya-Ixil population, it had not been proved that Rodríguez Sánchez was responsible for this genocide. He was therefore acquitted of all charges. *See* J.M. Burt and P. Estrada, 'Court finds Guatemalan military committed genocide, but acquits military intelligence chief', *International Justice Monitor*, 28 September 2018.

former head of the General Staff of the Army, Benedicto Lucas García, in relation to a large number of enforced disappearances conducted from the CREOMPAZ military base.[83] Most recently, four high-ranking commanders – including, again, Benedicto Lucas García and former Chief of Military Intelligence Manuel Antonio Callejas y Callejas have been sentenced to lengthy prison sentences in May 2018 for ordering the rape of Emma Molina Theissen and the enforced disappearance of her 14 year-old brother, Marco Antonio Molina Theissen.[84]

## 5 IACtHR contributions to the Guatemalan fight against impunity: direct interactions

Having sketched the contours of the Guatemalan fight against impunity for crimes committed in the context of the civil war, it is now possible to trace the contributions made to this struggle by the Inter-American system. This section will examine the interactions between the Inter-American system, pro-accountability constituencies and various state organs in the context of the proceedings conducted before the IACtHR concerning crimes committed in the context of the Guatemalan civil war and the judgments obtained as a result of those proceedings. More importantly, this section will analyze how those interactions have influenced the domestic struggle against impunity and the investigations and prosecutions conducted by the Guatemalan justice system. First, this section will discuss the contributions of Inter-American proceedings, through 1.) the monitoring effect these proceedings may have over domestic proceedings; and 2.) the protection they provide to those involved in the domestic struggle against impunity. Secondly, this section will discuss the contributions made by the IACtHR's judgments in relevant Guatemalan cases, through 1.) the self-executing nature of those judgments; and 2.) the account provided by these judgments of the historical context of the civil war.

### 5.1 Involving the Inter-American system in the domestic struggle against impunity

Civil society demand for investigation of serious human rights violations cannot truly be effective in their work without some sort of cooperation on the part of the state. And, as should be clear from the previous paragraphs, the authorities responsible for the investigation and prosecution of criminal cases, the Public Ministry and the judiciary, have long been averse to the

83 *See for example* J.M. Burt, 'Eight military officers to stand trial in CREOMPAZ grave crimes case', *International Justice Monitor*, 17 June 2016. At the time of writing, the proceedings remain halted as a result of a large number of appeals filed on behalf of the defendants.

84 *See for example* J.M. Burt and P. Estrada, 'Four retired senior military officers found guilty in Molina Theissen case', *International Justice Monitor*, 23 May 2018.

work demanded from them by civil society groups. As a result, the investigations civil society groups sought at the domestic level became stuck, leading them to look elsewhere for support. In many cases, they found this support through the Inter-American human rights system.

In many cases, recourse to the Inter-American system was thus a ' negative choice', a last resort for victims who had no options available to them at the domestic level.[85] As one respondent stated: "we went to the Inter-American Court because of the denial of justice".[86] But the ultimate goal always remained to have justice done at the domestic level, because "the internal struggle is here [in Guatemala]".[87] In other cases, taking the case to the Inter-American level was a more strategic move, meant to pressure the domestic authorities into action or to provide a sort of international 'supervision' for investigations being conducted at the national level.[88] In any event, none of the respondents I spoke to saw the Inter-American level as a 'final destination', but rather as a step in the ongoing struggle to achieve justice domestically.[89]

Since the 1990s the Inter-American system has dealt with a string of important cases concerning serious violations of human rights committed during the civil war. The Inter-American Court has held the state responsible for various enforced disappearances, extrajudicial executions and massacres. In all of the civil war cases against Guatemala, the Court further found that the state had violated the American Convention on Human Rights by not investigating these crimes and by not providing justice for the victims and their next of kin. As a result, it has ordered the state to provide reparations for the victims, including, without exception, the investigation of the material violations and the prosecution of those responsible for them.

After initially responding with hostility, the state gradually began to adopt a more positive attitude towards the Inter-American system. Under the Portillo presidency (2000-2004), the state first began (partially) accepting responsibility for the violations petitioners were complaining about to the Court.[90] Furthermore, a specialized body was created in the Guatemalan executive, the Presidential Human Rights Commission ("COPREDEH"),

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85 Interview F, interview G, interview K, interview M and interview T.

86 Interview F.

87 Interview F.

88 Interview K and Interview R.

89 In this context, Jeffrey Davis speaks of "unlocking the process". See J. Davis, *Seeking human rights justice in Latin America – truth, extra-territorial courts and the process of justice* (Cambridge University Press, 2014), pp. 157-175, discussing at length the involvement of the Inter-American system in Guatemala in the cases of *"diario Militar" v. Guatemala* and *Garcia and family v. Guatemala*.

90 *See for example* IACHR *Myrna Mack Chang v. Guatemala (merits reparations and costs)*, judgment of 25 November 2003. As one of my repsondents explained to me, the decision to accept state responsibility comes from "the highest level", meaning the president. Interview E.

in order to represent the state before international human rights bodies, including the Inter-American system, and to coordinate compliance with their judgments and recommendations.[91] For many years, COPREDEH has been one of the state institutions most willing to cooperate with victims and to help work towards compliance with the Inter-American Court's judgments, including the domestic investigation of the human rights violations found in those judgments.[92] Thanks, in large part, to the work of COPREDEH, the state actually began providing some of the reparations ordered by the Court, including making apologies to the victims and their next of kin for the violations committed against them by state agents.

## 5.2 Contributions through the proceedings at the Inter-American level

### *5.2.1 Monitoring of domestic proceedings*

A first way in which the Inter-American system has contributed to domestic accountability efforts certain individual cases, is through the monitoring of domestic proceedings. This monitoring, it should be noted, is not an independent function of either of the organs of the Inter-American human rights system, but can be seen as a side-effect of its work. More particularly, it is a side-effect of the prolonged involvement of the organs of the Inter-American system in domestic proceedings regarding individual cases, through the various stages in the proceedings at the Inter-American level, from the admissibility stage to the supervision of compliance phase. In all of these stages of the proceedings, the organs of the Inter-American system will check in with the progress of the domestic investigations and prosecutions and state agents will be called upon to report on their work and the concrete steps taken to allow the investigations to advance.

The effects such monitoring may have on domestic proceedings is not easily recognized if one has a more traditional, compliance-based perspective on the impact of the Inter-American system. This is illustrated by an interview I had with one particular respondent, who had been the director of COPREDEH under a previous administration. Given her position with COPREDEH and the function of that institution within the state, it is only natural that this respondent had such a compliance-based perspective. When discussing the effects of the Inter-American system on domestic investigations and prosecutions in cases of grave human rights violations, she said, referring specifically to the Edgar Fernando García case:

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91 Interview E, interview U.

92 Copredeh's role as an 'ally' to victims was given a huge impulse when Frank LaRue, a human rights lawyer and the founder of CALDH, was appointed president of copredeh under the Berger government. His successor, Ruth del Valle, also had a background in civil society.

"[T]he fact that there were trials in the case of Fernando García, that doesn't derive from the judgments of the [Inter-American, HB] Court. That started here, before that.

Q: And there was no impact of this case before the Court in the national proceedings in the case of Fernando García?

A: There was none. What happened is that the policemen were already tried – and one is a fugitive from justice – and all that was prior [to the IACtHR's judgment, HB]. In the same period of time that they were pursuing the case in the Court, they were doing other proceedings here against the intellectual authors and they were still convicted. But I believe it was so parallel that the road had already been established, everything was already done for them to be convicted. So the [IACtHR's, HB] judgment came out shortly before they were convicted here, but it didn't really change things. This is my assessment, that [the IACtHR's judgment in, HB] Fernando's case wasn't going to change things.

Q: And the fact that this case was already in the [Inter-American, HB] system, you do not believe there was, like, more pressure to [do the case at the national level, HB]?

A: In this case no, because the tribunal [which convicted the intellectual authors in the Fernando García case, HB] is a tribunal which is very committed to justice for the victims. The tribunal was presided by Yasmín Barrios, and judge Bustamante was also part of it. If it had been a different bench then I would have said that maybe it had an impact, but with these people no. I believe that for them it is about the commitment to doing justice and if the matter is presented well, I mean, if guilt is proven then they should be convicted, even if nothing had happened [on the Inter-American level, HB]."[93]

In short, the respondent considers that the Inter-American case concerning the disappearance of Edgar Fernando García could not have affected the domestic proceedings regarding the same case, because the proceedings were done in parallel. The IACtHR's judgment came out only shortly before the national court's judgment and the bench which convicted the intellectual authors of the disappearance were already committed to justice for victims and did not need to be further convinced. Underlying this statement is the idea that 1.) the impact of the Inter-American system starts with the judgment of the Inter-American Court, which the state is obliged to comply with; and 2.) this impact consists mostly of convincing those who are not committed to the investigation and prosecution of grave human rights violations that they should become so.

In stark contrast, another respondent, who works with an important Guatemalan human rights organization, described her experience with the parallel litigation of a case before the domestic system and the Inter-American system differently. In her words:

93 Interview U.

> "[W]e had a strategy based on the idea ["en el sentido y en el concepto"] that the Inter-American system is subsidiary. Our focus was always to do it [the criminal case, HB] at the national level, from the beginning we were… and the curious thing about the case is… the case did not move [at the national level, HB], it didn't advance… and each time it did not move forwards, we would put… right? And so, the national level moved. I brought [the domestic and the Inter-American cases, HB] in parallel. I brought it in parallel. The main issue was the national level, and the Inter-American level was subsidiary. So, when things were not moving here, the [Inter-American, HB] system would trigger it, and the system would pressure the national level so that this could move. At least, this was my strategy in [our case]. Even the judgment in cassation, it wasn't possible to do it until after the judgment of the Inter-American Court came out. I mean, the cassation judgment came out only after the judgment of the Inter-American Court came out.
>
> Q: Ah… right. And you think they were, like, waiting…
>
> A: Ah, of course. It is only logical. The judgment came out in December and in January the judgment at the national level came out. So yes, they are closely linked. In some way it was also… because, like, the judges who are committed in matters of human rights are few. When they feel backed up by an international body which has this legitimacy and credibility, obviously they feel protected and they are able to take the next step."[94]

Whereas the previous respondent approached the question of impact from the point of view of the state agent tasked with organizing compliance with the Inter-American Court's judgments, this respondent is speaking from the perspective of someone who was involved in the domestic proceedings from start to finish.[95] On the basis of this experience, she considers that 1.) in the case in which she had been involved, the Inter-American system had an impact exactly because the cases were brought in parallel; 2.) the impact was strongest before and directly after the IACtHR's judgment came out; and 3.) the Inter-American system had an impact through its support for actors who already had a positive attitude towards investigation and prosecution of grave violations of human rights, rather than by convincing those who would normally oppose it.

Another respondent also described an experience with parallel proceedings on the Inter-American and domestic levels in the case of the Dos Erres massacre. In his words:

> "In the Dos Erres case, which started in 1996, a complaint is brought to the Inter-American system because of the ineffectiveness of the State, its agents, in investigating the case. Not having an investigation in such a grave case, like this one

94 Interview K.

95 In fact, the proceedings in the Myrna Mack case have not been concluded entirely. Investigations are still ongoing concerning the involvement of certain intellectual authors of the crime and concerning the murder of the police investigator who had been in charge of the investigations in the Myrna Mack case in the very beginning. The respondent quoted here continues to be involved in these investigations as well.

> – where in the well alone[96] there were 162 skeletons, at a minimum! – this gives you the margin to say: there is no political will [to investigate, HB]. The Commission admits the case, it doesn't give it a prompt follow-up, but it accepts it. There is a series of meetings between the State and the petitioners, special prosecutors are appointed, there is progress in the domestic investigation and […] in 2000 the arrest warrants are ordered and a friendly settlement agreement is signed. And the State commits itself to a great number of things, but, in reality, they only provide economic compensation. President Portillo apologizes [to the victims of the Dos Erres massacre, HB], but in the investigation the case moves backwards, when it had already advanced significantly, it now starts to move backwards. So, the Constitutional Court, in what is clearly a case of grave violations of human rights, decides to suspend the proceedings, while it is decided whether or not to apply the Law of National Reconciliation, I mean, an amnesty, when this is clearly not possible or applicable. […] And this caused the proceedings to stop for 9 years, with an avalanche of motions for amparo, by now we have reached 60 amparos."[97]

Thus, according to this respondent, the proceedings before the Inter-American Commission concerning the Dos Erres massacre had a clear effect on the domestic investigation, but not as a continuous forward motion. Rather, the proceedings before the Commission produced an ebb-and-flow effect, where after an initial show of good will, the domestic proceedings became stuck once a friendly settlement agreement had been reached. The stalling of the domestic investigation caused the IACmHR to refer the case to the IACtHR. And, according to the respondent, it was through the judgment of the IACtHR, that the domestic procedural obstacles were finally cleared and the criminal case was resumed after a 9 year delay.[98] Asked whether he believed that the conviction in the domestic criminal case would have been possible without the proceedings at the Inter-American level and the judgment of the IACtHR, he said:

> "Maybe it would have happened, but not with this forcefulness, or maybe we would still have been waiting for them to arrest someone! That's why I say: they are small windows of opportunity, which create a little bit of political will in the minds of the judicial operators ["operadores the justicia"]."[99]

Again, this respondent observed, from the perspective of someone who had been involved in the Dos Erres case from the start, that the parallel nature of the proceedings on the domestic and the Inter-American level, allowed the

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96 In the Dos Erres massacre, a number of victims was killed by smashing them with a hammer and throwing them down a well. According to the testimony of survivors, this tactic was used in other massacres as well.

97 Interview O.

98 The domestic procedural obstacles keeping the Dos Erres case stuck in the Guatemalan courts were finally cleared as a result of the IACtHR's judgment, through an intervention by the Guatemalan Supreme Court. *See infra*, Section 5.3.1 of this chapter.

99 Interview O.

Inter-American system to monitor the domestic proceedings and exert pressure when it became stuck. Finally, the promise of this monitoring through parallel proceedings was recognized by a third respondent, working for one of Guatemala's oldest and most established human rights organization. His remarks on this issue came in the context of our discussion of a legal case his organization was busy preparing concerning massive human rights violations committed in the late 1970s and early 1980s. In terms of political sensitivity, the case would be comparable to the genocide case against Ríos Montt. Against this background, the respondent described his thoughts on the question whether to file a complaint with the Inter-American Commission first, and how such a complaint and the eventual proceedings at the Inter-American level could best be used in support of the domestic case. In his words:

> "There are two options, this is something we have not been able to decide yet: the option of… to do as what happened to CALDH [in the Ixil genocide case, HB], to wait until the end and, if I doesn't work out, to present a complaint [to the Inter-American Commission, HB]; or to present it in parallel to the domestic case, so that the monitoring of the Inter-American Commission falls on the proceedings. […] We have not been able to determine yet which one of the two would suit us best, we also do not want to harm ["perjudicar"] anyone, neither the Public Ministry nor any tribunal nor anything of the sort. So this is something we have to discuss, but those are the two options we are considering: to present [the complaint to the Inter-American Commission, HB] now so that it will be a parallel issue, and this will allow us to advance and to go about generating proof within this international process during the proceedings [at the national level, HB], or to wait until the end and present a complaint that way […]. In truth, I would prefer the first option, but…
>
> Q: The first was in parallel?
>
> A: That it would be parallel.
>
> Q: Because that way there would be more pressure on the state?
>
> A: Exactly […] So, that way there would be very little opportunity to…. That it would limit the state's room for political maneuvering [Original Spanish: "Les cerramos mucho la caja al estado", HB] […] But we haven't decided yet, we have to discuss it, there are things in favor and against it."[100]

In other words, the respondent leans towards the option of developing the domestic case and the Inter-American case in parallel, so as to allow the 'monitoring of the Inter-American Commission to fall on' the domestic proceedings. The respondent then described how exactly he believed that this monitoring would benefit the domestic proceedings, saying:

> "[F]irstly, it is a way of supporting the judges. If one sees that […] the tribunals are […] resolving and trying to avoid abuse of process […] and it is the state itself which is forcing them to permit it, in reality you are leaving them too vulnerable

100 Interview S.

> in the face of everything, I mean, in the face of public opinion, of the system itself, of the defense attorneys. […]
>
> So it *is* very important to have this support [for the judges, HB] which you cannot provide in another way. That's what I think. And for the judges it will not matter that we [human rights organizations, HB], are behind them, that provides them no support. However, the monitoring of the Inter-American Commission could do that. In fact, it would be to oblige the [domestic, HB] system to meet international parameters. Also, I believe it would be a way of making the case more agile. The limitation of the issue of abuse of process, well, it would provoke more agility in the proceedings […] For me […] it is a course of action that is more than viable, it is, like, what is necessary.
>
> […]
>
> I believe that it is necessary to have monitoring because you are fighting against things which are too big. […] In […] the genocide case you are really fighting the state, and so it is not possible to sustain it just like that, at the national level. To me, the *acompañamiento* of the Inter-American Commission is helpful, observing the proceedings in the context of… not as a matter of tourism, let's say, or purely academic, but in its proper legal function. So for me, this is a tool we cannot forget about. Moreover, […] it is a way to boost the [domestic legal, HB] system itself and… look, a case of this nature, if it's well done, it really helps us all, the legal profession itself, how to really litigate a case ethically and all that, which is what I believe did not happen in the Ríos Montt case. I believe that we all threw up our hands in horror every time we saw these people act this way, yet you did not see the bar association sanctioning anyone, you did not see the universities making some kind of statement on the matter, I mean, the whole system went backwards. […] For me, to have the […] Commission [present, HB] would be a guarantee that there would be progress in the case and, at a more general level, in the system."[101]

Thus, the respondent confirms what other respondents have pointed out as well: that the monitoring of the Inter-American system is most helpful as a support to those actors – the respondent mentions judges in particular – who are already committed to providing justice for grave human rights violations. In other words, the Inter-American system does not serve to sway anyone to the cause of justice. It simply helps those who are already committed to it to withstand the pressures exerted on them to abandon that cause. More specifically, the monitoring of the Inter-American system may help them to restrain anti-accountability constituencies somewhat, by limiting their space to raise political and procedural obstructions. To the respondents cited here, all of whom have extensive experience litigating human rights cases in Guatemala, this represents a considerable contribution to their work.

However, for the monitoring to have the effects described here by these respondents, there has to be something to monitor. In other words: there has to be some type of movement in the domestic investigation already, so that

101 Interview S.

the proceedings on the Inter-American level can be pursued *in parallel* to those on the domestic level. If there is no movement at all on the domestic level, it seems unlikely that the monitoring of the Inter-American system in itself will be sufficient to trigger it. In such a situation, the only thing the prolonged involvement of the Inter-American system may hope to achieve is that the case is not abandoned completely by domestic authorities. The requests for updated information on the status of the case, however irregular, keep it on the agenda of the institutions responsible for their investigation. Even if they are not taking any concrete steps forward, they cannot let the case die out either.

Moreover, the fact that cases are kept 'alive' through the monitoring of the Inter-American system may lead to results in the long term, when domestic circumstances change to become more favorable to the prosecution of grave violations of human rights. For example, one respondent discussed the domestic criminal cases concerning the Plan de Sánchez massacre, in which the organization he works for had accompanied the victims. According to this respondent, the IACtHR's judgment in the case had given a clear impulse to the domestic proceedings. When I asked how, then, he could explain the time which had passed between the IACtHR's judgment (2004) and the arrests of the accused (2011), he says that the investigations could not begin until there had been some changes within the MP. However, he still considers that the Court's judgment and the subsequent monitoring of compliance had given an impulse to the investigation, once these domestic changes had taken place.[102] Likewise, another respondent said of the domestic proceedings concerning the disappearances recorded in the Military Diary:

> "But there is also the order […] to continue the investigation on the national level.
>
> Q: And do you see any signs of compliance, that there will finally be an investigation?
>
> […]
>
> A: The truth is that the opportunity [to investigate human rights cases, HB] opened with the arrival of the current Chief Prosecutor, who started to also investigate human rights cases. But this policy [of not investigating human rights cases, HB] did not change until she arrived. And this is where the possibility to investigate opened, because here, there is also a judgment which says that the investigation at the national level in the Military Diary case should continue. […]
>
> And you will always have those people, because the state is not monolithic and it is a matter of finding those little windows through which you can operate and which allow you to continue to go forward, even though it is very slow."[103]

102 Interview Q.
103 Interview K.

In short, when cases are conducted in parallel between the Inter-American system and the domestic justice system, the Inter-American proceedings may have a monitoring effect over the domestic proceedings. In such cases, the Inter-American proceedings can be utilized by domestic pro-accountability actors to put pressure on the national authorities whenever the case becomes stuck at the national level. The spotlight of Inter-American monitoring through parallel proceedings tends to limit, to an extent, the possibilities for political and procedural maneuvering on the part of anti-accountability actors. Moreover, this monitoring can provide a form of support for judges and prosecutors who are willing to pursue politically sensitive human rights cases, but who are under intense external pressure to drop them. Finally, even if these two mechanisms do not work, the monitoring by the Inter-American system may simply prevent a case from dying out completely, so that it can be resumed once domestic circumstances change and become more conducive to investigation and prosecution.

### *5.2.2 Protection of pro-accountability actors*

There is another, more concrete way in which the proceedings before the Inter-American system have supported pro-accountability actors in Guatemala: by protecting them through the protective measures ordered by both the Inter-American Court and the Inter-American Commission. Under Article 63(2) ACHR, the Inter-American Court can order the protection of people or organizations who are connected in some way to a petition under review by the Inter-American system. The Inter-American Commission, on the other hand, can order protection measures for a much wider category of people on the basis of Article 25 of its own Rules of Procedure. As explained by one respondent, who worked in the Office of the Human Rights Ombudsman (*Procuraduría de Derechos Humanos* – "PDH") at the time the interview was conducted:

> "The protective measures are to protect people who are at risk, but it does not matter whether they participate in the cases [before the Inter-American system, HB] or not. Here, in the office of the Ombudsman, is where we make the requests to the Inter-American system. The majority of the people who are protected – judges, prosecutors, human rights defenders, journalists, people who are attacked by the powers that be – request [protection, HB] through us. […] Here, we have a special office for this. If you are at risk, you come here and they send you to the office and we ask the Inter-American Commission in Washington "look, this person is at risk" and they request information [from the state, HB]."[104]

104 Interview R.

If, on the basis of the request and the information provided by the state, the Commission concludes that the person in question is indeed at risk, then it will order the state to provide protection. This protection will normally be provided by the state security forces, more specifically the police. According to a respondent who works with a Guatemalan NGO which focuses on the protection of human rights activists:

> "I forgot to mention that the issue of the protection measures of the Commission is very important in the protection [of human rights defenders, HB]. […] We have in our files the protection measures conceded to human rights defenders who we accompany, and these are defenders who find themselves in a situation where there is a risk to their lives or to their physical integrity and where the state does not want to protect them, so a request is presented to the Commission. The Commission grants the protection measures and the state has to implement them; I mean, even though the Commission grants them, it is the state who has to provide the personnel for the measures through the police."[105]

Protection measures can be ordered on behalf of individual accountability activists and their families, and also on behalf of entire organizations. Given the tense environment in which pro-accountability activists operate in Guatemala, such requests for protection have been relatively common. Since the end of the armed conflict, practically all of the high-profile organizations and individual activists involved in the struggle for justice have requested, and received, protection measures from either the Commission or the Court. And while the measures are periodically reviewed, the protection measures will in principle remain in place until the Commission or the Court concludes that the recipient of the protection is no longer at risk, without any set limit to their duration. As a result, some activists have enjoyed police protection for years, or even decades.

The importance of these protection measures for the work of accountability activists was pointed out to me spontaneously by one respondent. This respondent is an especially high-profile activist, who has suffered threats to her life almost constantly since she began her work in the early 1990s. She mentioned this particular contribution of the Inter-American system almost casually, as an aside in the context of a different point she was making. When asked to explain why she thought that the Inter-American system had an impact on the struggle for justice in Guatemala, even though she also recognized that the state does not usually comply with the Court's judgments, she said:

> "I believe that, if the Inter-American system, the Court and the Commission, had not also been involved in human rights issues – and they have saved lives, right? Through the protective measures and the provisional measures, they have saved lives. I think this is important – but if it hadn't been for this, as I was telling you,

105 Interview L.

> it might not have been possible in the region to have… all the trials in the case of Argentina, Fujimori in Peru, Ríos Montt in Guatemala… many human rights cases were possible thanks in part to the Inter-American system."[106]

When asked to elaborate on how she thought that the Inter-American system had 'saved lives', she explained:

> "Many times, protection measures have been requested for human rights defenders at the frontlines, and really, immediately from the moment of requesting [those measures, HB], what it does is shine a light on the danger the person is in. And this helps so that, maybe, the attack which was going to happen does not take place, or that at least the attention of the defenders is focused on a person who is in danger.
>
> Q: Right. And you yourself have been the object of such measures?
>
> A: Yes, of the measures, provisional measures by the Inter-American Court to be precise.
>
> Q: Until now?
>
> A: Until the present day, yes." [107]

Thus, according to this respondent, the measures ordered by the organs of the Inter-American system have a protective effect not just through the actual police protection provided to activists, but in and of themselves, because they put a spotlight on the situation of certain activists who are particularly at risk. The attention of the Inter-American system creates an impression that the world is taking notice of what happens to these activists which, it is hoped, will dissuade their opponents from attacking them. And while it is, of course, very difficult to prove that the 'spotlight' of the Inter-American system has in fact diminished the threat against pro-accountability activists and prevented attacks against their person, the very fact that some of them *feel* protected by it and that this gives them confidence to continue their work is in itself a contribution to domestic accountability efforts.

Ironically, that feeling of being protected by the measures ordered by the Inter-American system is sometimes undermined by the concrete form this protection takes, namely being under the constant watch of one or more police-officers. In practice, what some activists seek is protection *from* the police, not by the police. In the words of the respondent quoted above:

> "Q: And do you feel protected by [these measures, HB]?
>
> A: The habit, I mean, ones inclination would be to distrust the security forces, because they were among the forces who were persecuting you… But you have, like, a counterargument, which is to say that, if something were to happen while you have protection measures, there would be a greater responsibility on

106 Interview K.
107 Interview K.

> the state[…] And what we as human rights defenders have at times requested was a "*seguridad perimetral*", exactly because of the lack of trust. […] Protection measures, but that they were at a distance, right? […] Because of the distrust against the security forces"[108]

That this respondent is not alone in her mistrust of the people appointed to guard her is confirmed by the respondent who works with PDH and, as such, has been involved in assisting activists with their requests for protection. Speaking about the fact that the police is responsible for providing the protection ordered by the organs of the Inter-American system, she said:

> "This is a problem, because these people hate the police, because they [the police, HB] could be out to kill them. So from the beginning we tell them "look, if they give you protection measures, they are going to put police officers on you"; [and they say, HB] "I don't want that". […] but now that they have two police officers by their side, these people detest it, they hate it. But after a while they feel protected because they [the police officers, HB] are taking care of them."[109]

As this respondent notes, the activists who receive police protection sometimes come around to the officers assigned for their protection, so that they do feel protected by the measures. In other cases, arrangements can be made for protection through a different state agency or for a more personalized protection scheme. This was explained by one respondent, who worked for COPREDEH at the time the interview was conducted and, as such, was involved in the coordination of state compliance with the protective measures ordered by the Inter-American system. In his words:

> "[U]pon receiving the communication [from the Commission ordering protective measures, HB], one cannot… For example, if we receive an order to protect you, we cannot just tell you: "look, we are going to send over two policemen". We have to do a risk analysis. I mean, how are we going to [protect you, HB]? […] So, this way we will determine, after the risk analysis, what protection scheme suits you best. Because in some cases, you will have to be guarded by elements of the police, no matter what. The National Police is the one who physically provides the police officers for your protection, through the Department for the Protection and Security of Persons, it is called… And in *some cases*, when the people do not have much trust in the police, we ask for protection through the "SAAS", the Secretariat for Administrative and Security Affairs of the Office of the President of the Republic. […] But the protection of the [National Police, HB] really is very good. They are trained police officers… they also provide protection for all the embassies here in Guatemala."[110]

108 Interview K.
109 Interview R.
110 Interview W.

In other words, there have been some attempts to provide activists with a protection scheme that they are comfortable with, so that they may in fact feel safer through the protection measures ordered in their favor. Furthermore, it should be noted that the state has generally complied with the orders to provide protection, so that those accountability activists who have sought protection through the Inter-American system have tended to actually receive it. This was confirmed by the respondent who worked with COPREDEH during the Pérez Molina administration (2012-2015), which had otherwise not hesitated to make its disagreements with the Inter-American system known. However, this respondent also explained that, while the government had been willing to provide protection when ordered, it had actively sought to have measures already in place lifted, especially those which had been in place for extended periods of time. In his words:

> "Of course they [the police departments who provide the protection, HB] also request that the protection measures are lifted, to put it like that. We had protection measures that we had been complying with for almost 20 years. So, the purpose for which they had been ordered no longer existed. So, we requested to have them lifted and they lifted quite a few. I believe that, at the moment there are no more than 28 [orders for protection, HB] measures. 28 or 29. And, like, 25 were lifted. From the time this administration started.
>
> […]
>
> Q: And when there are measures by the Commission or the Court, does the state always provide protection?
>
> A: Yes, always. That's why we requested to have them lifted […]. But, if our requests are denied, we have to continue to protect them."[111]

Another respondent had a slightly less favorable interpretation of the state's record of compliance with the protective measures ordered by the Inter-American system. This respondent worked with UDEFEGUA and, as such, is acutely aware of the grave situation of risk in which many of the accountability activists in Guatemala find themselves. Against this background, she did not look favorably on COPREDEH's attempts to have the measures protecting these activists lifted. When asked directly whether the state complied with these measures, she replied:

> "Yes, it does. What happens is that it also depends on the type of defender we are talking about. There are for example some defenders with regard to which the state is more inclined to provide protection. […]
>
> [B]ut then, what happens is that in the reports on the supervision of these measures which the state presents [to the Inter-American Commission HB], in some cases it has an attitude which, firstly, is really comforting, minimizing the risk the defender faces, suggesting that the protection measures cannot perpetuate indefinitely, reducing the situation of risk to persons who have suffered concrete incidents. Like if you haven't suffered at least five threats in the last six

111 Interview W.

> months it is no longer justified that you have protection measures, even though there is a situation of risk if you carry out a more contextual analysis. Then, other times they do provide protection, but only as soon as this person stops their activities as a defender, for example as soon as they stop going to gatherings, stop going to manifestations, and the person says "I am a defender and I will continues to do this". So in many cases there is a defective compliance because the protection scheme is not complied with well, and in other cases it is complied with but the state tries to do whatever possible to stop providing these measures. And in many cases it starts to use an offensive tone in its reports and we have seen this above all in this government."[112]

In other words, a government that is opposed to the investigation and prosecution of grave human rights violations may seek ways to reduce the number of accountability activists they need to protect, so as to make it more difficult for these activists to do their work. Such a government may seek to have protection measures lifted or to attach certain conditions to the protection provided by state agencies. However, even such governments have not gone so far as to refuse to provide protection to accountability activists when specifically ordered by the Inter-American system to do so.

## 5.3 Contributions of IACtHR judgments in Guatemalan cases

### *5.3.1 The self-executing nature of IACtHR judgments*

Apart from the proceedings, the IACtHR also 'interacts' with pro-accountability actors and relevant state organs through its judgments in individual cases. In some instances, these judgments have had important direct effects in the domestic investigations and prosecutions concerning the same facts. However, these direct contributions have required an intervention by the Guatemalan Supreme Court, which has mediated the direct legal effect of the IACtHR's judgments in the Guatemalan legal order.

In 2009 and 2010, the Supreme Court handed down a series of decisions in which it declared that the judgments of the IACtHR are self-executing. The first four decisions in this series were all delivered on 11 December 2009 and concerned the judgments of the Inter-American Court in the cases of *Paniagua Morales and others ("White Van") v. Guatemala*, *Villagrán Morales and others ("Niños de la Calle") v. Guatemala*, *Carpio Nicolle v. Guatemala* and *Bámaca velásquez v. Guatemala*. In these four cases, the domestic investigation and prosecution had come to a complete standstill due to the large number of amparos and other motions for protection filed by the defense. Unable to exit this procedural quagmire on its own, the Public Ministry filed a request with the Supreme Court for the execution of the IACtHR's judgments, in which the IACtHR had flagged these tactics on the part of the accused and

112 Interview L

had included specific orders to the state to remove all legal and practical obstacles to investigation and prosecution.

The Supreme Court, in turn, granted the request of the Public Ministry for execution of the sentences and declared that, in fact, these judgments are self-executing. According to the CSJ, Guatemala, as a member of the international community has recognized the jurisdiction of the Inter-American Court and is therefore bound by the ACHR to execute its sentences. Provisions of internal law cannot stand in the way of this obligation. As a result, the CSJ declared that the Guatemalan state is obligated to effectively investigate and prosecute these cases and that all internal legal obstacles standing in the way of such an investigation are null.[113] The CSJ then provided a number of very specific instructions as to how this obligation to effectively investigate should be executed, including the annulment of several judicial decisions to dismiss the charges against particular accused, which the IACtHR had determined were the result of fraudulent and unfair proceedings, and the inclusion of certain suspects in the investigations. Some months later, on 8 February 2010, the CSJ rendered a similar decision on a request for the execution of the Inter-American Court's judgment in the case of *Dos Erres*, in which it determined the self-executing nature of that judgment and ordered, amongst other things, the capture of a number of suspects and the non-applicability of the amnesty law.[114]

These decisions of the Supreme Court, relying on the previous judgments by the IACtHR, thus achieved a complete removal of all the legal obstacles impeding prosecution in a small number of cases. Moreover, the wording of these decisions suggests that the self-executing nature is shared by *all* judgments of the IACtHR, thereby expending the scope of application somewhat. However, with regard to four of the five judgments declared self-executing by the Supreme Court, the domestic investigations and prosecutions have not been able to move forward, even with all the legal obstacles cleared.

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113 CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2005/46063 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009; CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2008/63814 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009; CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2009/10170 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009; CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2008/2506 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 11 December 2009.

114 CSJ, 'Ejecución de sentencia de la Corte Interamericana de Derechos Humanos No. MP001/2006/96951 solocitada por el Ministerio Publico, fiscalía de sección, unidad de casos especiales y violación a los DD.HH., judgment of 8 February 2010.

The real-world effects of the Supreme Court decisions have been limited to the prosecutions in the *Dos Erres* case, where they have indeed played an essential role in allowing the prosecutions to move forward to trial and, eventually, conviction. As a result of the decision on the execution of the IACtHR judgment, arrests warrants against several accused, which had been suspended by the CC in 2000 awaiting a decision on the possible application of an amnesty under the Law of National Reconciliation, came back into effect. On the basis of these arrest warrants, the first arrests in the case were made shortly after. Of course, not everyone was pleased with these results. The accused arrested on the basis of the Supreme Court's decision, and eventually tried and convicted to lengthy prison-sentences, filed an appeal against it with the Constitutional Court. However, the Constitutional Court upheld the Supreme Court's decision, arguing that it was the result of a direct and explicit order of an international court whose decisions are binding on the state.[115]

Thus, through the Supreme Court's decisions declaring that its judgments are self-executing, the IACtHR has made an important direct contribution to the removal of procedural obstacles in a limited number of cases. For most of those cases, however, the effect of that decision have been limited to paper, and the domestic proceedings have not moved forward in practice. In only one case, that of the *Dos Erres* massacre, the self-executing nature of the IACtHR's judgment has had a decisive effect, as it cleared up all the procedural obstacles put in its path and allowed the Public Ministry to bring the case to trial, resulting in several high profile convictions.

### *5.3.2 The IACtHR's account of what happened during the Guatemalan civil war*

In the case law of the Inter-American system, pro-accountability actors have found support and legitimation not only for their demand that justice be done, but also for their account of what happened to them or to their loved ones and how this related to the larger context of the armed conflict. As previously discussed the dominant narrative in Guatemala concerning the civil war had long been based on a denial that the grave human rights violations described by victims and other pro-accountability activists actually took place, or that they had been part of a policy on the part of the armed forces. Against this background, official recognition provided through a judgment of an international court forms an important validation of the account of the facts as told by victims and activists. One respondent, a petitioner in a case

115 CC judgment of 18 January 2011 (Amparo en Única Instancia), Exp. 655-2010 and 656-2010. The CC id consider that, in removing all the legal obstacles to prosecution, the Supreme Court had not used the correct procedural mechanisms to do so. However, according to the CC, this does not need to affect the validity of the Supreme Court's decision. As a result, it decided to uphold the decision, but to 'redirect' its execution towards the appropriate procedural mechanisms.

against Guatemala before the IACtHR, summarized what the judgment of the Court had meant to him:

> "[W]hat we have achieved is that the state can no longer do anything. It can no longer deny anything because there is an unappealable sentence. We won. They had 8 years to appeal [by defending the case before the Court, HB] and they didn't do it. The state accepted what it did."[116]

Other victims interviewed over the course of this research have expressed similar feelings. For example, one respondent said that, while the judgment by the IACtHR in itself was not sufficient to satisfy her need for justice, she did consider it valuable that the judgment reflects and recognizes (part of) the truth about the disappearance of her family member. Now, the respondent said, the authorities can no longer maintain that she and the other petitioners were making up stories.[117] Another respondent discussed at length the importance of the IACmHR and the IACtHR as platforms for her to tell the truth about what had happened to her and to have her story validated.[118] She described the judgment of the IACtHR as "proof" that her account of the facts were truthful, as opposed to the false account spread by the Guatemalan military. Yet another respondent, a lawyer who has represented victims in several cases concerning grave human rights violations at both the domestic and the Inter-American level, explained that the recognition of what has happened to them is often an important motivation for his clients to bring their case to the Inter-American system:

> "In one way or another, any sentence which is handed down by any tribunal, be it national or international, is a form of reparation for the victims in this type of case. At least to have a serious pronouncement about the access to justice the victims are seeking, the recognition of the history that they are telling, like the verification or certification of this history, that it is not just a tale, that these are not made up situations, but that these are drastic events which took place in the history of this country and that the country itself has refused to accept them […]."
>
> […]
>
> But more than [economic reparations, HB], in terms of reparation , what they [the victims, HB] look for is that it is *recognized*, on the part of the state, that these grave violations of human rights were committed. Apart from the economic aspect, they do demand other reparations. Generally, they demand apolo-

116 Interview F.

117 Interview M.

118 Interview T. In the respondent's case, support for her account of the facts took on a special meaning. The respondent, who had been forcibly disappeared by the Guatemalan army and is one of the very few who survived the experience, had been forced by the military to publicly give a false account of her disappearance (saying that she had been "staying with friends") as a condition for her release. Once out of the hands of the army, it became very important for her to tell the real story of what had happened to her during the day days she had been missing. The respondent repeatedly connected being able to tell the truth about what happened with maintaining her mental health.

> gies from the state to the victims, they demand the dignification of the victims through monuments, through plaques, through official ceremonies where the victims are recognized for their struggle, for their desire to overcome, for the stigma that has been attached to the community of being a *comunidad guerrillera* – which generally has been the pattern for considering someone an internal enemy is saying that they supported the guerrilla, even though they included children, women and elderly. So these types of reparations are the ones that dignify the memory of the victims in some way. And sometimes the state finds it difficult to comply with these reparations, but they are simply reparations. But yes, in essence they [the victims, HB] go [to the Inter-American system, HB] seeking a recognition from the state[…]."[119]

In short, the IACtHR has supported victims' accounts of what happened to them through their own recounting of the facts of the case and through the reparations aimed at public recognition of the victims and the harm they suffered. Moreover, since the Portillo presidency (2000-2004), the state has maintained a practice of (partially) accepting responsibility for serious human rights violations in litigation before the IACtHR.[120] In these ways, the Inter-American system has contributed to the construction of an alternative narrative of the Guatemalan civil war, which challenges the dominant narrative promoted by veto-players.

It should be noted that the sources consulted in the context of this study do not clarify whether the case law of the Inter-American system has contributed to a greater *acceptance* of this alternative narrative among the general public. In fact, one respondent explained to me why she thought that the Inter-American case law, notwithstanding its great potential in this respect, has probably not been able to inform the public narrative of what happened during the armed conflict. According to this respondent:

> "[T]he disadvantage of having a case before the Inter-American Court is that only those of us who study human rights pay attention, but there isn't a wide dissemination. These cases aren't well studied. We have a marvelous collection of judgments, but only professors of human rights or students or those who litigate [study these judgments, HB].
>
> Q: And why do you think that these cases are not studied?
>
> A: Well, I believe that not even human rights [as such, HB] are disseminated, let alone the case law of the Inter-American Court. I believe this is a problem, not disseminating all of this and not finding the ways in which people could take an interest. The judgment says that some of its parts should be published, but how many people have read the publication of the judgment? […]
>
> Because I believe that the judgments of the Inter-American Court contain the history of this country, the sociology of this country, and they contain an MRI of the terrible justice system we have in this country. So there is a wealth of marvelous information and, on top of that, a way of interpreting this reality which is brilliant. So there should be a way of disseminating them which is not formal,

119 Interview O.
120 Interview F.

> because it is difficult for people to understand this [information from the judgments, HB]. […] I believe that there is, let's say, it's an elite who reads, who studies these cases. Those of us who teach classes, those of us who are students or who litigate, or people… an interested lawyer. But if the public would know all that is in these judgments that would be wonderful, because that is also a way of recovering memory and truth."[121]

However, while the lack of circulation of the Court's case law may have limited its ability to inform the general public's views of what happened during the civil war, there is a particular audience, especially relevant in the context of this research, which *is* aware of the case law and the narrative set out by it: "those who litigate" human rights cases. That is to say, the specialized judges and prosecutors involved in domestic prosecutions of grave violations of human rights. With regard to this particular audience, the respondent noted that they had been somewhat receptive to the narrative presented in the judgments of the IACtHR and that, as a result, these judgments have affected the way the facts are analyzed and presented in domestic trials concerning grave human rights violations. In the words of the respondent:

> "So I believe that the advantage of going to the Inter-American system in cases of grave human rights violations has been that it has already created, let's say, a whole base of proven facts. The whole use of documents like the truth reports. The Inter-American system has been the first to say that these documents, REHMI and Memory of Silence, produced proof. So for transitional justice this set of judgments which exists there is very important, because in the Inter-American system, for example, the national security doctrine is already something, like, run-of-the-mill [original Spanish: "común y corriente", HB], let's say they are convinced, it has been proven, it is a fact that has already been accepted. But that was thanks to the cases from there [in the Inter-American system, HB]. When they [the cases, HB] come to Guatemala, the case law of the Inter-American system is cited, which already produced proof, which has been very important.
>
> Q: In domestic cases?
>
> A: In domestic cases… it had to be proven the first time, but it helped to say that the Inter-American system had used these documents as proof. So many facts and issues proven in in the Inter-American system help us in our litigation here as a jurisprudence which is already established in the human rights system.
>
> Q: Aha. And do you have any concrete examples of concrete cases where the case law [of the Inter-American Court] was used?
>
> A: *Dos Erres*, *Plan de Sánchez*…
>
> Q: Here, in Guatemala, they used the case law [of the Inter-American Court, HB] in these two cases?
>
> A: Yes, in these trials, the Public Ministry and the *querellantes adhesivos* said: "*we already have a judgment*". That is to say: the state was already found responsible, here we are determining who were responsible as agents of the state. But in

121 Interview R.

> the context that there was already a judgment, which is very important, because it was already proven that the state and its agents violated [human rights, HB]. Now what we have to prove is…
> Q: Who was the person [responsible, HB]…
> A: Who it was, the individual."[122]

In this quote, the respondent discusses three ways in which she deems that the Inter-American case law has helped to establish, as she calls it, "a base of proven facts" on which domestic case law on the armed conflict has been able to build: 1.) domestic tribunals relying directly on IACtHR judgments as evidence that certain events, e.g. massacres, took place; 2.) domestic tribunals relying on the precedent established in IACtHR judgments for using the report of the Guatemalan truth commissions as evidence that certain events took place; and 3.) domestic courts following the example set by IACtHR judgments on how to interpret facts in light of their historical context.

The first of these three statements is supported by two other respondents, both of whom have been directly involved in domestic trials for grave human rights violations.[123] It should be noted that none of the respondents suggested that the IACtHR's judgments are a sufficient basis for judges to conclude that particular human rights violations occurred or that they were perpetrated by the state. The evidence which has been presented to this effect during trials concerning grave human rights violations in Guatemala is extensive and diverse, including forensics, witness testimony and (formerly) classified army documents. In this context, the added value of using an IACtHR as a form of supporting evidence to prove the occurrence of a particular set of facts would seem, at first glance, rather limited. However, the respondent quoted above suggests that "the context that there already was a judgment" has been used by prosecutors make it easier for judges to make such controversial factual findings. This use of the IACtHR's case law should be understood against the background of the many pressures to which judges hearing human rights cases in Guatemala are subject. As the respondent explained further on in the interview:

> "Of course, the legal backing of the order of a judge which is contained in a judgment of the Inter-American Court… and it is also pressure for the judges. If I am in "Dos Erres" or "Plán de Sánchez" in the local trial, national, domestic, if I [as a prosecutor, HB] tell them [the judges, HB] that the state was already found responsible, the judges are not going to say that there was no massacre, they already know there was a massacre. So I believe that it might even be easy for the judges. If it is already proven that there was a massacre and it is proven how it was done, all that remains is to find the individuals who were involved in it, who was in command that day, which soldiers were present at that hour. To find the individuals. For the judges… For me, [if I were] a judge, it would be

122 Interview R.
123 Interview P, Interview Q.

> super easy. If "Dos Erres" already has two judgments [from the Inter-American Court, HB] – not one, two – if I am saying that all this has happened and there is a judgment confirming this… For the judges, with all the pressure on them to absolve the soldiers, they cannot absolve because there it is. There are facts that are proven."[124]

In other words, the respondent suggests that IACtHR judgments are a 'cover' for judges when they make controversial factual findings, allowing them to legitimize these findings by reference to a higher authority. Illustrations of this phenomenon can be found in several domestic judgments in cases which have been subject of an IACtHR judgment as well, and in which those IACtHR judgments have been accepted as evidence.[125]

The second point discussed by the respondent, that the case law of the IACtHR has served as a precedent for using the truth reports as proof for the wider historical context of the Guatemalan armed conflict, was supported by two other respondents, both of whom have been closely involved in domestic prosecutions. One of them, a lawyer who has represented victims of grave human rights violations committed during the civil war in domestic proceedings, said that:

> "First and foremost, by emitting its judgments it has recognized that the truth reports are important elements which contextualize the cases, the stories, the concrete facts which are…. And that they are fully effective [original Spanish:

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124 Interview R. While the last two sentences of this quote, taken in isolation, would give the impression that the respondent is suggesting that IACtHR judgments are used to establish the responsibility of individuals for certain facts. However, when read in context of the quote in its entirety, it is clear that the respondent means that these judgments are used only to establish that certain facts took place. In fact, the judgments of the IACtHR do not discuss individual responsibility and can therefore not be used to that effect.

125 For example, the list of accepted evidence in one of the domestic judgments on the criminal responsibility of military commanders for the *Dos Erres* massacre, includes the following entry:

> "XLVII. Photocopy of the judgment of the Inter-American Court of Human Rights in the case of the Dos Erres Massacre Vs. Guatemala, dated 24 November 2009, concerning the facts related to the DOS ERRES massacre. A document which is awarded "valor probatorio" and with which it is irrefutably proven that the Guatemalan State was found responsible for not having complied with the obligation to respect the rights of the community of Las Dos Erres; which had as a result the grave violation of human rights, which a massacre is; ordering that those violations be investigated, which should be done with respect to all the presumed material and intellectual authors of the massacre. […]"

Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, 01076-2010-00003 Asistente 2°, judgment of 12 March 2012 (Dos Erres Massacre), p. 165. Similar entries can be found in other domestic judgments. *See also* Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, C-01076-2010-00003 OF. 1º, judgment of 2 August 2011 (Dos Erres massacre), p. 236 and Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, C-01069-1997-00001 OF. 3º, judgment of 2- September 2013 (Edgar Fernando García case), pp. 114-115 and p. 150

> "que tienen plena vigencia", HB] because they are documents which relate the history of the Guatemalan conflict in an objective manner."[126]

Another respondent, an activist who has worked with several important human rights organizations and who has acted as an external advisor to the Public Ministry in human rights cases, considered that, by relying on the truth reports, the IACtHR had strengthened both its own case law and the value of the truth reports as evidence in criminal cases. In his words:

> "And remember, also, that these are recommendations from the Commission for Historical Memory […] Because the [Inter-American, HB] Court also made some things coincide. It has made things coincide with the Commission for Historical Memory. You will find the decisions of the Commission for Historical Memory in the decisions of the Inter-American Commission. […] In the Molina case [*Molina Theissen v. Guatemala*, HB] they say… the order to search [for the remains of Marco Antonio Molina Theissen, HB] coincided… […] It is possible that the Court made the order to search coincide with the recommendation of the Commission [for Historical Memory, HB] […]. And this, afterwards, is taken on by [civil society] organizations, with the two foundations.
>
> […]
>
> Q: And do you believe that the fact that the Court, as an official body, has recognized these reports [REHMI and Memory of Silence, HB], do you believe that this strengthens them, to be recognized here?
>
> A: Ah, yes. Definitely. I believe that it is, like, well-designed […] What the Commission [for Historical Memory, HB] says, is that it cannot be used as proof in a trial. […] It does not have legal value in itself, but it can be used in accordance with the procedural rules of the country. So it is saying: "this is not a criminal sentence", it says that it is a report which can be used in accordance with national law.
>
> […]
>
> So a judgment [of the Inter-American Court, HB] which cites the Commission for Historical Memory strengthens itself. Let's say, the judges cover their backs since the Commission already said it. […] But also, the fact that the Commission appears in the judgment strengthens the force of the Commission in [domestic, HB] cases… It makes it official, basically, because it has been recognized in the majority of cases, I imagine… In the majority of the cases in which there is a judgment, it has been used in the majority of cases of the [Inter-American] Court. Yes, I believe that they strengthen each other, no? This is a good signal."[127]

An important example of how a domestic court has relied on Inter-American case law to legitimize the use of the truth reports as proof in a criminal case, can be found in the domestic judgment of 12 March 2012 concerning the *Dos Erres* massacre. In it, the court states the following:

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126 Interview O. It is not entirely clear whether "the system" in this quote refers directly to the Inter-American system, or to the domestic justice system fulfilling its function of "conventionality control" by implementing IACtHR judgments.

127 Interview I.

> "And this question leads to another, more precise question, which is the one which will be answered through this analysis: has sufficient proof been presented to confirm that the accused, as a member of the *kaibil* [special forces, HB] patrol, participated in the killing of 201 persons in the community of las Dos Erres? One will ask: with what proof can such a strong accusation be supported? On that subject, many reports and books have been published […]. In the judgment dated 24 November 2009, emitted by the Inter-American Court of Human Rights, in the case of Las Dos Erres Vs. Guatemala, the Court values the publication of the report Memory of Silence, which includes the massacre of Las Dos Erres, "as an effort which has contributed to the search for and determination of the truth about a period in the history of Guatemala", and adds that "the "historical truth" contained in this report does not complete or substitute the obligation of the state to establish the truth and assure the judicial determination of individual or state responsibility through legal processes". […] This judgment is a precedent to be taken into account so that compliance with human rights which have been part of the international legal obligations acquired from 27 April of 1978 onwards, the year in which Guatemala became part of the American Convention on Human Rights."[128]

It should be noted that, even though this quote starts with the question how the accused's participation in the massacre at Dos Erres can be proven, this quote is in fact from the part of the judgment describing the historical context of that massacre. Therefore, the quote does not suggest that Memory of Silence can be used as proof of the individual responsibility of the accused. In fact, this would be impossible, since the UN truth commission, which prepared the report, was explicitly forbidden to identify the individuals responsible for the human rights violations it describes. What the quote does show is that the domestic court in Dos Erres explicitly pointed to the IACtHR's case law as a precedent "to be taken into account" for relying on the Memory of Silence to establish the historical context of the case at hand.

Finally, the respondent quoted above[129] suggests that the case law of the IACtHR has inspired judges and prosecutors as to how to use certain elements of the historical context of the civil war, like the national security doctrine, in constructing cases of grave human rights violations. A proper understanding of the historical context of the Guatemalan civil war, and the place within that context of the case at hand, may help shed light on issues like the motives underlying the human rights violation in question and the circle of individuals who may carry responsibility for it. Through its case law the IACtHR has modeled such a contextual interpretation of the facts of cases presented to it and, at the same time, highlighted and clarified certain especially relevant parts of that context. This suggestion was supported by two other respondents, both of whom have been directly involved in

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128 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, 01076-2010-00003 Asistente 2°, judgment of 12 March 2012 (Dos Erres Massacre) pp. 174-175.

129 *See supra* p. 170 and fn 671.

the prosecution of such cases.[130] One of them, a prosecutor at the Public Ministry's Human Rights Unit, said that the case law of the Inter-American system was integral to the construction of cases within her unit, providing both leads for the investigation and inspiration as to how to build the prosecution's argumentation.[131]

Two respondents[132] further suggested that the IACtHR's treatment of the historical context of the Guatemalan civil war in its case law has had an impact on how judges and prosecutors have dealt with the most controversial question surrounding the civil war: whether the campaigns by the Guatemalan military can be classified as genocide. It should be noted here that there was no direct link between the domestic genocide prosecutions and the Inter-American case law, in the sense that the IACtHR has never heard a case about the military's campaigns in the Ixil triangle. Neither has the IACtHR ever specifically classified any of the other escalations of violence perpetrated by the Guatemalan state during the civil war as genocide.[133] Still, the respondent submits that the IACtHR's case law helped judges and prosecutors explain why this legal qualification could appropriately be applied to the violence against the Maya Ixil population. In the words of one of them:

> "[T]his case law [of the IACtHR, HB] is what allowed, for example that it was declared that there had been genocide in this country, I mean, that people were sentenced for genocide because this had been recognized in international case law. Because the domestic case law did not provide for that, no one before had done a genocide trial. So in this respect it was useful.
>
> Q: But this was more from the case law of the Yugoslavia Tribunal?
>
> A: Yes, but they also used all that had happened in at the international level about the massacres, about the conflict, I mean, all the facts as part of that package. It is not an isolated thing.
>
> Q: Ok. So you see a connection between the genocide case and the case law of the Court?
>
> A: I believe so.
>
> Q: Even though the genocide case was not done in response to a judgment of the Court because there wasn't one?
>
> A: No, but let's say, all the evaluations from this international case law related to the Guatemalan armed conflict were useful for the genocide trial."[134]

130 Interview P, Interview Q.

131 Interview P.

132 Interview R, Interview U.

133 In one particular instance, the IACtHR has been specifically requested to classify a series of massacres committed against the Maya Achí ethnic group in the municipality of Rabinal between 1980 and 1982 as genocide. However, the Court declined to do so, stating that due to its limited competence in this particular case, it did not have the "pertinent legal and factual elements" to make this assessment. IACtHR *Case of the Río Negro massacres v. Guatemala* (preliminary considerations, merits, reparations and costs), judgment of 4 September 2012, paras. 23-234.

134 Interview U.

In other words, while the case law of the international criminal tribunals has been important to explain what genocide is, it is silent on the Guatemalan context and on how this may fit into this international legal definition. The IACtHR, on the other hand, has provided important tools for judges and prosecutors to make this connection. How exactly the IACtHR has helped to do so was explained further by the a second respondent. When asked whether she saw any link between the Court's case law and the genocide trial, she responded:

> "A: Ah, yes.
> Q: Yes? In what way?
> A: Let's see, the massacre cases – *Dos Erres*, *Plan the Sánchez* and the other… [*Río Negro*, HB] they are cases in which the Inter-American Court couldn't say that it was genocide, but it is. They have all the elements of genocide, right? They have the killing of members of the group, they have the violence, this cruelty, the viciousness, [...] everything that happened to the children… I believe this was very important. The whole accumulation, about all the massacres, was extremely important, because the elements of genocide were proven…. Right? But on top of that, the context was proven, the racist context. The racism… in *Plan de Sánchez* the issue of racism is very well-developed. The lack of respect for cultural issues. Also important for understanding the genocide in Guatemala: the national security doctrine. Why the indigenous groups, the indigenous communities who were victims of the genocide, were declared internal enemies. These elements of the national security doctrine are extremely important, because this is the context, not only is there racism, but also the national security doctrine. This was proven in the Inter-American system. So many elements related to the facts were important. I believe that it [the Inter-American case law, HB] was the foundational phase in order to be able to build the case here. Those facts of the massacres, why they happened, were very, very important to understand… for people to understand […] why it was genocide […]."[135]

Further on in the interview, this respondent discussed one very particular aspect of the domestic court's judgment in the genocide case and the impact she thought the IACtHR's case law had on it: its analysis of the particular effects the violence against the Ixil population had had on the Ixil women. The suffering of the Ixil women, in turn, is an important aspect in the court's discussion of why the campaigns against the Ixil population constitute genocide. The respondent's insight in the reasoning of the judges on this particular topic stems from her involvement in the training the specialized judges and prosecutors receive on international criminal law. In this program the respondent had been responsible for training on issues of gender-based violence. As she explained:

135 Interview R.

> "I believe that at least the process of training the high-impact judges, which had to do with the classes we were giving them… Lawyers without Borders was giving special courses in transitional justice and I had to…
>
> Q: To the judges…
>
> A: To the specialized judges and prosecutors. […] And to the litigants. […] I always had to teach the part about gender-based violence and sexual violence. So we used the case law of the Former Yugoslavia, of Rwanda, but also that of the Inter-American Court […].
>
> […]
>
> So all the courses they had to understand international crimes, the incorporation of this sexual violence based on gender, […] part of what we worked on with them was this: that they understood that there was a specific violence that the women suffered. So in the case of Guatemala and the genocide, the elements of genocide, there was the violence against the women. For example the death of members of the group, the death of women in the massacres, the forced pregnancies, the removal of the children. But all these elements had to do with judgments that had also already been delivered by the Inter-American Court. For example, the forced displacement in Chitay [*Chitay Nech v. Guatemala*, HB][….] where the Court condemns forced displacement as such.
>
> Q: And they used it in the genocide case?
>
> A: Exactly, one of the elements of genocide is that people… thanks to the enormous violence and the terror they had to displace. But in the displacement there were human losses, material, and above all the link to their territory, their land. […] And this is important because […] the women lived the forced displacement in a distinct manner, because in the forced displacement the men travelled more lightly. [The women] went with their father, their mother, the children, the animals, the sacred objects, [they] went with a greater burden. And this made it impossible for [them] to survive, many died on the road, the conditions under which this displacement took place… And this comes largely from the forced displacement in Chitay, for example. They didn't argue it this way, but it is a wealth of arguments which came from [the *Chitay Nech* case, HB]."[136]

In short, the IACtHR's judgments have contributed to the construction of an alternative narrative of the Guatemalan civil war, challenging the dominant narrative described previously in this chapter. And while the alternative narrative provided by the IACtHR (amongst other sources) may not have reached the general public, it has been influential with one particular audience of relevance to this study: the prosecutor and judges involved in domestic cases concerning crimes committed in the context of the civil war. According to the respondents cited here, the IACtHR's judgments have been used by domestic courts as 1.) precedent establishing that certain events, like massacres, took place; 2.) precedent for the use of the truth commission's report in legal proceedings; and 3.) inpriration for the interpretation of the facts of a case in their historical context. It should be noted, moreover, that this contribution of the IACtHR's judgments is not

136 Interview R.

limited to cases which have previously been adjudicated by the IACtHR itself, but potentially extends to all domestic proceedings concerning the civil war.

## 6 Contributions of the IACtHR's doctrines to Guatemalan accountability efforts

The previous section discussed how the Inter-American system has contributed to the Guatemalan fight against impunity through its direct interactions with pro-accountability actors and relevant state organs. This section, on the other hand, will analyze how Guatemalan pro-accountability constituencies have relied on the IACtHR's wider jurisprudence relevant to the fight against impunity – thus: all the doctrines discussed in the first part of this study – in order to strengthen their own work on the domestic level. In doing so, this section will examine the domestic influence of the IACtHR's jurisprudence concerning 1.) the obligation to investigate, prosecute and punish human rights violations; and 2.) the obligation to remove legal obstacles to prosecution, including 3.) the application of the amnesty law; 4.) the operation of the principle of legality in cases of enforced disappearance; and 5.) the imprescriptibility of serious human rights violations.

### 6.1 The obligation to investigate, prosecute and punish human rights violations

The IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations has contributed to domestic accountability efforts in Guatemala, by helping to change the dynamics of the debates surrounding accountability for crimes committed in the context of the civil war. This contribution should be understood against the background, sketched extensively in the previous paragraphs, of a public debate dominated by anti-accountability constituencies. The continued prominence of (former) military commanders in Guatemalan society and public life, allowed them to brush of calls for justice for crimes perpetrated in the context of the civil war by painting anyone pushing for prosecution as ideologically suspect. The focus on the presumed motives of pro-accountability actors served to ignore the substance of these calls for justice and the veracity of their account of the human rights violations underlying them.

In this context, the Inter-American Court's judgments have provided those pushing for prosecutions with an important tool to direct the debate away from their own background and (supposed) motives and to refocus it on the state's international legal obligations. A respondent, one of Guatemala's most renowned and experienced pro-accountability activists, brought up this type of impact of the IACtHR on her work in the context of a discussion of Guatemala's poor record of compliance with the orders and decisions of the Inter-American Commission and Court. When asked

if (and how) she believed that the Inter-American system had impacted the pro-accountability struggle in Guatemala despite the lack of compliance, she responded:

> "I believe that if the Inter-American system, the Court, the Commission, had not also taken on these issues in the area of human rights… […] if it hadn't been for this, as I was telling you, it might not have been possible in the region to have… all the trials in the case of Argentina, Fujimori in Peru, Ríos Montt in Guatemala… many human rights cases were possible thanks in part to the Inter-American system. The magistrate Barrientos, may he rest in peace, what he says is that there is a responsibility, in accordance with international law, to comply with the judgments of the Inter-American Court. And this opens the doors and opens the windows for the human rights cases to really continue, because there is an international obligation for Guatemala in this respect.
>
> Q: Aha. But several governments, and this one too I believe, do not feel committed to the Inter-American system…
>
> A: Governments do what is least costly to them. […] But, in spite of this, it [the Inter-American system's involvement, HB] has positive aspects, that at least the presence of the Court has succeeded to have a national impact of a lot of discussion and openness, because it has this authority… or the legitimacy to do so. So, yes there is a weakness in that there is no compliance with judgments, but on the other hand, it has now been possible to have this type of discussions and debates, which has made that at least some cases have advanced on the national level."[137]

The latter part of the quote refers to the legitimacy of the IACtHR in demanding that serious human rights violations be investigated, a 'resource' domestic pro-accountability activists often lack in the domestic public debate. With the support of the Inter-American system, the push for prosecutions is no longer just a lobby of domestic activists, or, in the vocabulary of the veto players, 'communists'. The IACtHR, as an international court and an outsider to Guatemalan politics, cannot be as easily dismissed by accusing it of having a particular ideological agenda. This 'legitimizing' function was described by another respondent as well, who stated her belief the victims' struggle for justice had been strengthened by the support of the IACtHR and its case law, because this support legitimizes their demands.[138]

Activists attempt to legitimize their claims for justice by referring to the IACtHR's orders to provide it. As one respondent commented, in response to the question whether the IACtHR has had an influence on the way human rights cases are portrayed in the media:

> "I don't know about the media, but the truth is that it did have an impact on civil society. A couple of years ago, I believe that [civil society] did not speak… that they did not use the reference to the Court that much. Let's say, around the time the peace accord was signed, when all of this started, it maybe wasn't used

137 Interview K.
138 Interview M.

as much, but now it is. Now every human rights defender speaks of the Inter-American Court. […]
Q: And they use the judgments?
A: Yes, they are being used a lot more.
Q: Used how exactly?
A: Sometimes to build other cases.
Q: Cases before the Court?
A: Yes […] But also as arguments for their claims *here*. […]."[139]

As these respondents suggest, domestic pro-accountability activists use the case law of the IACtHR to formulate their demand for justice in terms of legal obligations. In fact, the first respondent herself references the state's legal obligation to comply with IACtHR orders to investigate grave human rights violations, as recognized by the Guatemalan Supreme Court under the leadership of César Barrientos. The argument made by her and by other pro-accountability actors using similar language is simply that the Guatemalan state, which has accepted the jurisdiction of the Inter-American system, is obliged to follow the orders of its organs. This reasoning is explained in more detail by another respondent, who described how the Supreme Court's reasoning undercut objections of anti-accountability actors against implementation of IACtHR orders:

"And among the first things which Dr Barrientos implemented, the first thing he did when he started his period as president of the Penal Chamber [of the Guatemalan Supreme Court, HB], was to implement the rule that judgments of the Inter-American Court are self-executing, based on 3 things: the principle of international law […], that international conventions and treaties in the area of human rights are signed in good faith. I mean, nobody forces me to sign and ratify a human rights convention, but rather I do it because it is my conviction that at the basis of every democracy must be the defense of human rights. This is like my public face. That is to say, I, here, in this state, respect and promote human rights. So, there is no coercion for me to sign and ratify a convention. But, on top of that, it has to do with the whole issue of reciprocity […] and above all Dr. Barrientos, in these decisions, reminds [us] that Guatemala […] has recognized the jurisdiction of the Inter-American Court […] and that, as such, it recognizes its judgments and is part of this jurisprudence. But, also, it reminds those who have always opposed these standards that Guatemala has also signed the Vienna Convention on the Law of Treaties. And there he reminds them of articles 26 and 27, that the States Parties cannot rely on its internal law in order to not comply with its international obligations. So, if Guatemala recognizes the jurisdiction of the Inter-American Court it has to comply […] "[140]

Given the Guatemalan context, formulating demands for accountability in legal terms helps those pushing for investigation and prosecution to defend themselves from the constant questioning of their integrity. By focusing on

139 Interview U.
140 Interview O.

the state's legal obligation to investigate and prosecute, they (attempt to) make the question of their motivation for seeking justice irrelevant.

Another respondent took this line of reasoning one step further and used the reference to Guatemala's legal obligations to cast doubt on the motivations of veto players resisting investigation and prosecution, as ordered by the IACtHR. In response to the question whether he thought that the lack of compliance with IACtHR orders pertaining to the obligation to investigate and prosecute had anything to do with a lack of certainty regarding their legal status, he said:

> "No. There I do not see a problem of law. […] Now, what is obligatory is obligatory, and I believe that no one can say that it is not. I have never heard anyone say that it is not.
>
> Q: Say that…
>
> A: That one does not have to comply with a judgment of the Court.
>
> Q: No one?
>
> A: No. That there is resistance to compliance? Yes. That they say: "I do not comply because this is excessive". But that they tell you that legally they are not binding, no one has said that.
>
> Q: So it is more…
>
> A: Political.
>
> Q: Ah, right.
>
> A: It is political. A judgment is a judgment, and Guatemala already accepted this jurisdiction, so there is not much to discuss.
>
> […]
>
> Q: And the government also sees it like this?
>
> A: The government has to see it like this. Now, politically there is obviously resistance, of that there is no doubt.
>
> Q: So, the lack of compliance with this aspect of the obligation to investigate is more a political issue?
>
> A: It is political, it is obviously political. As I said, I don't know anyone who maintains that legally the judgments of the Inter-American Court cannot be executed. This I have never heard. Now, that politically they tell you that the Court is partial, […] that the Court is biased… That is another thing. But legally, it is a judgment [we have] to comply with."[141]

In short, in the context of a political discourse which constantly questions the motives of pro-accountability actors to discredit their demands, the orders of the IACtHR to investigate and prosecute certain cases have provided them with the discursive tools to reframe those demands in terms of international legal obligations. Under this frame, it is not the pro-accountability movement which has to defend its motivations, but rather the anti-accountability constituencies resisting the fulfillment of Guatemala's international obligations.

141 Interview B.

And this international law-based language has not only been used by activists seeking to persuade the state to open investigations. Prosecutors involved in the investigation of grave human rights violations are also subject of attacks by veto-players questioning their impartiality and have used a similar discourse to defend themselves, and their investigations, from such attack. For example, the prosecutors involved in the genocide cases against high military officials have used references to the Inter-American Court to defend themselves against the often heard claim that these investigations served only to discredit the military and were motivated by prosecutors' political beliefs. This defense is illustrated, for example, by an excerpt from an interview with one of the prosecutors involved in the genocide investigations against former head of state Oscar Mejía Víctores. While discussing why it took so long to be able to prosecute these cases, the following exchange took place:

> "Interviewer: But, let's say, it has always been impossible to prosecute members of the military. Three years ago there were the arrest warrants from Spain, and it wasn't possible. And today, you, as the prosecutor in charge [of these investigations, HB], are taking the genocide case to court…
>
> Prosecutor: Well, it is not that I arrived as prosecutor and this is *my* policy, but rather, it is a policy of the state. Basically, the judgments of the Inter-American Court oblige the state to continue with different cases, to continue investigating the various massacres that the Inter-American Court has known and it is the obligation of the state to continue this investigation. If I wouldn't do it, it would have to be some other prosecutor who sits at this desk, because basically it is the responsibility of the state to bring these cases to trial, to clarify what really happened and, with time, to compensate the victims."[142]

It should be noted that the interviewer does not bring up the Inter-American system at any point in the interview, nor does he seem to be implying that the investigations against Mejía Víctores were motivated by the prosecutor's personal agenda. Rather, he is asking the prosecutor what has changed in the domestic context to make the investigation of genocide cases possible, where they hadn't been possible before. The prosecutor's interpretation of the question illustrates the pressure prosecutors in Guatemala are under when investigating this type of case, and their sensitivity towards any suggestion that the investigation is prompted by their own personal ideology. His response illustrates how reference to the IACtHR's case law serves as a defense against such attacks on prosecutors' integrity.

This defense has also been used by former Attorney General Claudia Paz y Paz, when confronted directly with the accusations made against her be certain segments of Guatemalan society. For example, in an interview with national television station *GuateVision*, conducted after the Constitutional

142 Interview conducted in the context of documentary film *Burden of Peace*, *see supra* Chapter 1, Section 3.3.1. Video on file with the author.

Court had decided that Paz y Paz would have to leave her post by May of 2014. In this context, the interviewer asks Paz y Paz about the resistance she faced from certain segments of society:

> "Interviewer: There are groups which have said that you are ideologically far-left and that you give priority to the prosecution of the members of the military. Is that a fair statement?
>
> Paz y Paz: Guatemala has the duty, according to its own laws but also according to international law, to prosecute grave human rights violations. And the people who committed those crimes were in public office. And the priority is with those who occupied the highest positions, because they have the greatest responsibility. By opening these cases we are paying off a debt that the Guatemalan state has with the victims, and that is why there are several judgments of the Inter-American Court saying that Guatemala has to investigate and prosecute this case. To pay off the debt we have always had, both internally and internationally."[143]

In another interview with Guatemalan television station *Canal Antigua*, also on the occasion of the Constitutional Court's decision concerning her removal from office, Paz y Paz elaborates further on this point. Again, the interviewer feels compelled to ask Paz y Paz about the attacks against her integrity:

> "Interviewer: And the argument by some is that it [the prosecution of cases of grave human rights violations, HB] is a purely political agenda. That it shouldn't be a priority. Of course homicides and violence against women is a priority. But some argue that you have your own political agenda, by which you or other organizations around you exert pressure to make sure that these cases are being prosecuted. In general, how much political pressure is being exerted by you to resolve certain cases and how much is resolved on its own?
>
> Paz y Paz: There is a pressure you do not mention, but which we cannot deny. And that is that Guatemala has signed the American Convention on Human Rights. These are not two separate legal systems, it is part of our laws. The moment they [international conventions in the area of human rights, HB] are signed, we fall under that norm […] There is an Inter-American system which checks whether we are applying the convention. There have been several judgments requiring Guatemala to resolve these cases. This happened years before I became Attorney General and it will remain this way until the state respects its obligations, both internally and internationally. We are obligated internationally to resolve these cases and arrest the perpetrators, to prosecute them and to punish them."[144]

143 Interview Claudia Paz y Paz for *GuateVision*, filmed in the context of documentary film *Burden of Peace*, see *supra* Chapter 1, Section 3.3.1. Video on file with the author.

144 Interview Claudia Paz y Paz for *Canal Antigua*, filmed in the context of documentary film *Burden of Peace*, see *supra* Chapter 1, Section 3.3.1. Video on file with the author.

In short, pro-accountability actors use references to the IACtHR's case law to emphasize Guatemala's legal obligation to investigate and prosecute civil war-related cases and, thereby, to defend the legitimacy of (demands for) such investigations and prosecutions. Such an international law-based discourse is a valuable tool in a context in which pro-accountability actors are often accused of pursuing a Marxist political agenda through the prosecution of civil war-related cases. It provides those actors with a new type of discourse, based on legal arguments, which allows them to direct the discussion away from their personal motivations and refocus it on the state's legal obligations.

### 6.2 Removing legal obstacles to prosecution

As noted previously in this chapter, the main obstacles to justice for Guatemala's 'crimes of the past' have been of a practical nature, rather than a legal nature. However, some important legal obstacles to investigation and prosecution do exist. The remainder of this section will analyze if and how the doctrines developed by the IACtHR have contributed to the removal of the (legal) obstacles encountered by those seeking justice and the construction of a normative framework more suitable to accountability for grave human rights violations.

There are two main avenues through which pro-accountability actors have attempted to achieve the removal of legal obstacles to investigation and prosecution of serious human rights violations: 1.) enactment of legislative reforms through parliament; and 2.) direct application of IACtHR doctrines by domestic courts. With regard to the first of these two possible avenues, several respondents have noted that it has been almost entirely blocked to them.[145] Overall, parliament has been unwilling to enact the legislative reforms they have been lobbying for and unimpressed by the

145 *See* interview K, describing her organizations unsuccessful efforts to lobby parliament in order to obtain a reform to the amparo law, ordered by the IACtHR in several judgents against Guatemala, to avoid it from being used as a procedural obstacle in criminal cases; Interview O, describing lobby efforts from various organizations regarding the same law; Interview R, also describing unsuccessful attempts to achieve a reform to the amparo law, and another unsuccessful effort to obtain a reform of the civil code that would treat enforced disappearance as a groud for presuming the victim's death; and Interview U, describing her organization's failed attempts to convince parliament to enact legislative measures aimed at helping the families of disappeared persons to locate their remains.

argument that these reforms have been ordered by the IACtHR.[146] However, pro-accountability actors have been somewhat more successful in their recourse to domestic courts. Through the reception of standards developed by the IACtHR, Guatemalan courts have removed some important legal obstacles to investigation and prosecution of grave human rights violations.

The willingness of Guatemalan courts to apply international standards, including those developed by the Inter-American system, is a recent phenomenon and the practice of courts in this respect is not yet fully stable. One respondent, who litigates human rights cases for a well-known Guatemalan NGO, spoke of a growing "capacity for reception" of international standards on the part of judges and provided two examples:

> "I believe that the Court has been deciding cases for a long time and only now is the case law starting to be used. Standards of the Inter-American Court which have been presented in [domestic, HB] cases as arguments for both the defense and the prosecution ["argumentos tanto de defensa como de enjuiciación"], which have been embraced by the judges. The law faculties themselves, I believe there is now a more systematic study of the judgments of the Court. I believe that this is something that we are starting to extract all the benefits from that we can extract. Of course, we are just starting. I mean, I couldn't tell you "look, the judges have these standards of interpretation". That's not how it is. You have to present it to them, you have to set it out for them, you have to explain it to them, but I believe there now is more capacity for reception on the part of judges and this you can see in judgments in individual cases, but which are very important at the level of… Take the genocide case of Ríos [Montt, HB], the consideration of the tribunal to take into account the gender-based crimes, to take into account the vulnerable situation of the victims, to take into account reparation measures.

146 One case in which legislation ordered by the IACtHR has been passed came up during the interviews: the law on access to information, which limits the possibility of relying on "state secret" to deny public access to certain documents and which had been ordered by the Court in the 2003 judgment in the case of *Myrna Mack Chang v. Guatemala*, was enacted in 2008. However, it has been argued that this was in spite of rather than because of the human rights arguments presented by pro-accountability actors. A researcher who has studied the enactment of laws on access to information in several Latin American countries concluded that "[t]he tenor of campaigns will frequently determine media responses to demands for coverage. Monotonous or contentious messages are turnoffs. For years the discourse associated with right-to-know movements in Uruguay and Guatemala revolved around human rights. Well-known public sector resistance to human rights issues discouraged greater media coverage. When the media finally took up the right-to-know banner in Guatemala, they wisely framed it as a measure that could help prevent corruption. This strategy did much to allay the fears of a potentially decisive opponent of openness-the country's armed forces." Greg Michener, 'Lessons from media coverage for the right-to-know in Latin America, published through www.freedominfo.org, 19 June 2009, last checked: 29-06-2017. Rather, this researcher suggests that the enactment of this law had been the result of a media campaign following a large corruption scandal. *See* Greg Michener, 'Freedom of information legislation and the media in Latin America', published through www.freedominfo.org, 19 May 2009, last checked: 29-06-2017.

> All these things, I read them and they seemed extremely original to me. Here, in Guatemala, I have never seen anyone make this considerations and to make them in that way, with such depth. […]
>
> There was an [claim of, HB] unconstitutionality which was presented against the article which regulates how the crime of torture is defined here in Guatemala. The unconstitutionality was presented because it went against, or the national legislation was more limited than the article of the Inter-American Convention against Torture. And the Constitutional Court ruled in their favor, taking into account the Inter-American case law. You see what I mean? Here I believe there is progress, there are results. They are starting to take into account the standards of the Inter-American Court."[147]

The second example mentioned by this respondent, the judgment concerning the definition of torture under the Guatemalan criminal code, is particularly relevant in this context, as it also included the definitive acceptance of the doctrine of the *bloque de constitucionalidad* by the Constitutional Court. In short this doctrine holds that international conventions containing human rights norms, once ratified by the state, become part of the Constitution and have direct effects in the national legal order, on par with other constitutional norms. Or, in the words of the Constitutional Court:

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147 Interview S. The growing willingness of judges to apply international standards was further specifically mentioned by two other respondents. Interview O, in response to the question what he thought had been the IACtHR's contribution to creating a context more favorable to investigation and prosecution of civil war-related crimes:

> "Let's say that the Inter-American system fulfills this function of conventionality control which is done not only through the [IACtHR's, HB] judgment, but also through the application of standards from the case law of the Court. That is to say, the use of judgments from the Inter-American Court in domestic cases, but also the grounding of resolutions in Inter-American legislation, the Inter-American Convention on Human Rights [sic], the various Inter-American conventions about torture, forced disappearance, violence against women… That is to say, how, through the judgments of the Inter-American Court, it impulses this conventionality control in all OAS member states. And the standard of their self-executing nature, what it does is that this conventionality control is starting to be applied, through the judgments emitted in the Guatemalan justice system."

Interview U, describing the use of IACtHR standards on reparations and the 'dignification' of victims in domestic proceedings:

> "Look, what people have said and what is to some extent my position from the perspective of the victims, is to establish case law for the country. In this sense it is important to us, but it is also important because until now… it started with the judgment in *Dos Erres* and it was repeated now with the genocide trial, which are the only judgments which have included a part on the dignification of the victims. The other judgments have been jail-sentences and nothing more ["condenas de cárcel y punto"]. And this is something that the case law of the Inter-American Court gives you, because it has this more integral vision with regard to the dignification of victims, the issue of historical memory… […]"

> "The *bloque de constitucionalidad* refers to those norms and principles which, although they are not part of the formal text of the Constitution, have been integrated into the Constitution through other ways and which, in turn, as such serve as measures for the control of constitutionality of laws. […]
>
> Various authors concur with the doctrinal concept of the *bloque de constitucionalidad*, pointing out that this is a group of norms which contains principles or regulations which are materially constitutional, both those contained expressly in the Fundamental Text and those existing outside of it, but which develop or complete the catalogue of fundamental rights contained in the formal Constitution. Its essential function is that of being a tool for the reception of international law, guaranteeing the coherence between internal legislation and the State's external obligations and, at the same time, serving to complement the guarantee of Human Rights in the country."[148]

Although this doctrine is enshrined in articles 44 and 46 of the Guatemalan constitution, the Constitutional Court had been inconsistent in its reliance on international standards while testing the constitutionality of domestic legislation.[149] In this important judgment, the Constitutional Court unequivocally recognized the doctrine of the *bloque de constitucionalidad* as part of Guatemalan constitutional law, clearing the way for the direct application of international human rights standards by domestic courts.[150] In later case law, the Constitutional Court has held that standards developed by the IACtHR, as the judicial body mandated to interpret the ACHR, are also part of the *bloque de constitucionalidad*, even if they are derived from cases which do not directly concern Guatemala.[151]

These important decisions by the Constitutional Court underlines the growing openness of the Guatemalan judiciary towards international law. That is not to say, however, that international standards were never applied in domestic proceedings prior to the Constitutional Court's judgment. Nor does it mean that international standards have been perfectly applied since then, particularly when they concern sensitive issues like those which are the focus of this study. The remainder of this paragraph will discuss a number of judicial decision which illustrate both the promise and the limitations of the application of Inter-American standards for removing legal obstacles to investigation and prosecution of serious human rights violations.

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148 CC, judgment of 17 July 2012 (Inconstitucionalidad General Parcial por Omisión), Exp. 1822-2011, p. 14-15.

149 Or, rather, its case law on this point had been inconsistent. Idem, p. 13.

150 In the matter at hand, this led the Constitutional Court to conclude that the definition of torture under domestic legislation is unconstitutional because it is more restrictive than the international definition. Idem, pp. 19-20. As a result, it ordered parliament to revise domestic legislation on this point, an order which parliament has so far ignored.

151 *See for example* CC, judgment of 18 December 2014 (Apelación de Sentencia de Amparo), Exp. 3340-2013, p. 16 and CC, judgment of 8 November 2016 (Inconstitucionalidad General), Exp. 3438-2016, p. 11.

### 6.2.1 Application of amnesty laws

The first, and perhaps most obvious, (potential) legal obstacle to the prosecution of crimes committed during the armed conflict is the presence of several amnesty laws, including, most importantly, the National Reconciliation Law. At first sight, the limitations to its scope of application provided in Article 8 NRL[152] would, at first sight, leave it inapplicable to practically all serious human rights violations committed during the armed conflict. However, anti-accountability actors have tried to undermine these limitations wherever possible and achieve the broadest possible amnesty. They have, for example, challenged the constitutionality of those limitations before the Constitutional Court on various occasions.[153] And since the application of the Law of National Reconciliation is evaluated on a case-by-case basis, it has fallen on the domestic courts, particularly the Constitutional Court, to uphold the limitations and prevent the amnesty law from obstructing the prosecution of grave violations of human rights.

The CC's stance on this issue has not been consistent over time and has been described as "zig-zagging back and forth with little coherence in its arguments".[154] On some occasions, especially in the early years after the signing of the peace accords, the CC has allowed amnesties to be granted in cases concerning grave violations of human rights. For example, in 2001 the CC decided that the National Reconciliation Law was applicable to various military officers accused of involvement in the massacre of *Dos Erres*.[155] On another occasion, the Constitutional Court overruled a decision to deny the application of the Law of National Reconciliation in a case concerning enforced disappearance, a crime explicitly excluded from the law's application, on technical grounds.[156]

However, in recent years the practice of domestic courts, including the Constitutional Court, has been more strict in its observance of the limitations contained in the NRL and therefore more favorable to the prosecution of grave human rights violations. In this development, domestic courts have often relied on the case law of the IACtHR in support of their refusal

152 *See supra* Section 2.1 of this chapter.

153 *See for example* CC judgment of 9 October 2012 (Inconstitucionalidad General Parcial), Exp. 4371-2011 and CC judgment of 6 August 2013 (Inconstitucionalidad en Caso Concreto), Exp. 1386-2013. Both challenges argued that the application of the limitations contained in Article 8 of the Law of National Reconciliation would violate the principle of non-retroactivity of the law, since the crimes of which they were accused had not been defined under national law at the time the facts under investigation took place. In both cases, the Constitutional Court rejected the constitutionality challenge.

154 E. Braid and N. Roht-Ariazza, 'De facto and de jure amnesty laws – the central American case', in: F.Lessa and L.A. Payne, *Amnesty in the age of human rights accountability – comparative and international perspectives* (Cambridge University Press, 2012), p. 193.

155 Idem. This decision which was taken under questionable circumstances, only a week after one of the CC judges involved in the case left the country as a result of threats made against him.

156 CC judgment of 18 June 2008 (Amparo en Única Instancia), Exp. 155-2008.

to grant amnesties. An important step in this development was taken by the Guatemalan Supreme Court in August 2012 when it upheld the court of first instance's denial of the application of the Law of National Reconciliation to a number of military officers who had been accused of participation in the *Dos Erres* massacre.[157] The CSJ held, with specific reference to the IACtHR's *Dos Erres* judgment of 2009, that the application of amnesty law is not allowed in any case which concerns grave violations of human rights.[158] Through its reception of Inter-American doctrine the CSJ thus excluded the application of amnesties for a broad category of cases, thereby preventing it from becoming an obstacle to the prosecution of grave violations of human rights.

Later case law with regard to the application of the Law of National Reconciliation, including that of the Constitutional Court, has continued in this vein. For example, the Constitutional Court has upheld the rejection of a request by Efraín Ríos Montt to apply the amnesty contained in that law to shield him from prosecution in the Ixil genocide case. In that case, Ríos Montt had been charged with participation in acts of genocide and crimes against humanity. With regard to the charges of genocide, the Constitutional Court held that the request for the application of amnesty was manifestly ill-founded given the text of the National Reconciliation Law itself.[159] With regard to the charges of crimes against humanity, the Constitutional Court held that these fall in the category of imprescriptible crimes and are therefore excluded from the law's application. In support of this argument, the CC referred to the case law of the IACtHR, specifically its judgments in the cases of *Almonacid Arellano v. Chile* and *Barrios Altos v. Peru*.[160]

While this may seem to be a consistent development towards an interpretation of domestic amnesty laws in which those laws do not impede the prosecution of grave violations of human rights, in fact developments have not been as clear-cut. While important steps forward have certainly been taken, there have also been setbacks. Unsurprisingly, the decisions by domestic courts to deny the application of the amnesty laws to protect military officers from prosecution ruffled the feathers of powerful people, including some within the Pérez Molina administration. One respondent, who worked at COPREDEH during the Pérez Molina administration,

157 CSJ decision of 8 August 2012, exp. 11-43-2012 and 1173-2012. The CSJ decision on this point is part of the cassation judgment in the criminal case against this group of officers, since one of them had submitted, as a basis for cassation, that the lower court had erred in denying the application of the Law of National Reconciliation, rendering the entire trial since that decision void.

158 CSJ decision of 8 August 2012, expedientes 11-43-2012 and 1173-2012. This reasoning was confirmed in the court's later case law, *see* CSJ decision of 10 April 2013, expedientes 1758-2012 and 1779-2012.

159 CC judgment of 18 December 2014 (Apelación de Sentencia de Amparo), Exp. 3340-2013, p. 13.

160 Idem, pp. 16-17.

explained the government's position towards the amnesty laws in the following way:

> "When the peace accords were negotiated… An amnesty was negotiated in Guatemala… And this is another problem where one can see, we do not agree with the Court. The Court, in general, says that one cannot give… that amnesties are not valid, they are not compatible with the spirit of the American Convention. But when it comes to Guatemala, at least, the Guatemalan amnesty is a bit different than the amnesties in El Salvador and Argentina. Because those in El Salvador and Argentina were self-amnesties. In contrast, ours was agreed upon through direct negotiations [under the auspices of] the United Nations and with the support of friendly governments, like those of Mexico and Norway, because that is where the conferences were held. […] So, during the negotiations they said: "Right, we are going to stop this conflict if we have an amnesty. If not, it will not stop." […]
>
> This sense was lost with later governments. That is why several trials were started, for example, for assassinations or something which elements of the military would have committed. These were not [one of, HB] the three exceptions: genocide, enforced disappearance or torture.
>
> Since the *licenciado* Arenales and president Otto Pérez signed the peace accords…. I don't know if you have seen the photo in which president Otto Pérez is signing... […] The *licenciado* Arenales was the one who went to negotiate. He went to the negotiations in Norway, he was part of the team of the state. They have had to, like, remind [everyone, HB] of what was agreed on at the negotiation table, because they said: "at that time we committed ourselves" they said "both the guerrilla and the army, the state, to the amnesty being valid. And at that time all of us agreed…" So, this is what sets the Guatemalan amnesty apart from the Salvadoran and the Argentinian ones. Those were self-amnesties, while the Guatemalan one is a [true] amnesty and it was a prerequisite for ending the armed conflict. That is why they [Arenales Forno and Pérez Molina, HB] strongly defend this position. […]
>
> But well, obviously, since judges are impartial, are autonomous, even here in Guatemala, there are some who do not care about the amnesty law. But at least, at the moment, in the hearings we have internationally we are reminding [everyone, HB] that the amnesty law is valid."

These 'reminders' seem to have had some effect. In the tense period after Ríos Montt's conviction for the crime of genocide and the CC's subsequent annulment of that conviction, the CC came out with another decision that presents a threat to the prosecution of grave human rights violations. In this decision it opened up a potential space for the application of amnesty for such violations, not on the basis of the Law of National Reconciliation, but on the basis of the older Decree Law 8-86, which had been adopted in the context of Guatemala's transition to democracy in the 1980s.

The CC decision discussed here stemmed from an amnesty request made by Ríos Montt in the context of the Ixil genocide case based on Decree Law 8-86. This request had been denied by the trial judge, arguing that Decree Law 8-86 had been replaced by the Law of National Reconciliation,

which specifically excludes its application to the crime of genocide and that, moreover, the Inter-American case law does not allow for amnesty for grave human rights violations. This decision was upheld on appeal by the Appellate Court, which prompted Ríos Montt to appeal the Appellate Court's decision with the Supreme Court. The Supreme Court, then, decided in favor of Ríos Montt, arguing that the Appellate Court had insufficiently explained its decision to uphold the trial judge's decision. Against this decision, the Public Ministry and the co-prosecutors filed an appeal with the Constitutional Court.

The CC, in turn, upheld the Supreme Court's decision, agreeing that the Appellate Court's decision had been insufficiently reasoned and explicit. [161] According to the CC:

> [T]he [Appellate Court, HB], when emitting the decision under appeal, violated the rights of [Ríos Montt, HB], since from the simple reading of the decision under appeal it is clear that the conclusions reached by the [Appellate Court] lack a factual and legal motivation, since it limited itself to transcribing Article 8 of the Law of National Reconciliation and indicating that the accused is charged with the crimes of genocide and crimes against humanity, while that which is submitted to it on appeal is the application of a norm – Decree Law 8-86 – which, according to the accused, conferred upon him certain rights with which the criminal prosecution is extinguished […] Thus, the obligation of the [Appellate Court] was to analyze every one of the arguments underlying the appeal […]."[162]

As a result, the CC upheld the Supreme Court's decision annulling the Appellate Court's decision, and ordered the latter to reconsider the matter, taking into account the CC's arguments. However, not all CC judges agreed with this outcome. In a scathing dissent, judge Gloria Porras stated that the majority's decision itself had been incorrect, ambiguous and the result of an incomplete analysis of the materials which had been the basis of the Appellate Court's decision.[163] In particular, she considered that the CC had not taken into account the reasoning underlying the original decision by the trial judge, which had already considered all the arguments brought forward by the accused on appeal, and which the Appellate Court had, by upholding it, "made its own".[164]

Moreover, judge Porras warned that, by upholding the Supreme Court's decision, the CC was impeding justice in a case concerning crimes against humanity and had "fallen back into indifference to processing and granting *amparos* as obstacles to the investigation of crimes which constitute grave

161 CC decision of 22 October 2013 (Apelacón de Sentencia de Amparo), Exp. 1523-2013 and 1543-2013.
162 Idem, p. 11.
163 Idem, p. 19.
164 Idem, p. 16.

violations of human rights", a practice against which the Inter-American Court had condemned on several occasions.[165] The truth of this warning is underlined by the fact that, following the CC's decision, it has been impossible to find judges willing to reconsider Ríos Montt's request for amnesty. According to one newspaper report, 93 judges had excused themselves from hearing the matter.[166] As a result, the question whether Ríos Montt is protected by the amnesty contained in Decree Law 8-86 remains undecided at the time of writing.

Finally, any progress made on removing the amnesty laws as an obstacle to accountability for grave human rights violations committed during the civil war is at risk of being undone as result of a bill introduced in the Guatemalan parliament in January of 2018. The bill, known as *Iniciativa de Ley 5377-2017*, proposes a considerable expansion of the scope of the Law of National Reconciliation. In effect, the new bill seeks to remove all limitations to the scope of the LNR, including the important exception for the crimes of torture, enforced disappearance and genocide, and provide the most complete amnesty for crimes committed in the context of the civil war. If the bill were to be adopted by parliament, it would not only make any future investigation and prosecution of grave human rights violations impossible, but also end all ongoing investigations and – in accordance with Article 5 of the bill – free all those individuals who have already been found guilty of such crimes. According to the authors of the bill, these drastic measures are necessary in order to recover the original intention of the Law of National Reconciliation – which, according to them, was intended to provide a general amnesty without any exceptions whatsoever -[167] and to put an end to the partial and politically motivated "persecution" carried out by the Public Ministry.[168]At the time of writing this chapter, the bill is still being debated by parliament and its fate remains uncertain.[169]

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165 Idem, p. 19.

166 'Nadie quiere resolver amnistía a Efraín Rios montt', *Prensa Libre*, 13 May 2014.

167 *See* Iniciativa de Ley 5377-2017, introduced in parliament on 25 January 2018, Exposición de Motivos, pp. 1-3. While the authors recognize that the Law of National Reconciliation, as adopted in 1996, did include certain limitations to its scope, they argue that these should be understood as a signal of good will of the Guatemalan state towards the international community, and not as representative of a true intent to exclude certain categories of perpetrators from the amnesty provided in the LNR. According to the authors, "no one, not the government, not the URNG, not the United Nations and not civil society, intended to bring to justice anyone who had participated in the counterinsurgency or in the insurgency".

168 Idem, pp. 4-7.

169 The bill passed its first vote in January 2019 and is currently awaiting a further reading and a final vote. Meanwhile, several sector of the international community have condemned the bill in the strongest terms. The IACtHR, in the context of a supervision of compliance decision in the case of Molina Theissen v. Guatemala, has ordered Guatemala to retract the bill. *See* J.M. Burt and P. Estrada, 'Amidst international pressure, Guatemala Congress does not pass amnesty bill, for now', *International Justice Monitor*, 17 March 2019.

In short, domestic courts have taken important steps towards an interpretation of the Law of National Reconciliation which is sufficiently narrow so as not to impede the investigation and prosecution of grave violations of human rights. In doing so, they have relied explicitly on the case law of the Inter-American system. However, the CC has allowed doubt to exist with regard to the applicability of the amnesty contained in Decree Law 8-86, thereby calling into question this trend towards the removal of an important legal obstacle to achieving accountability. Moreover, any progress made on the removal of amnesty as an obstacle to accountability for grave human rights violations committed during the civil war could be undone, if parliament passes the controversial bill that would expand the scope of the Law of National Reconciliation to such an extent as to provide a complete amnesty.

### *6.2.2 Enforced disappearance and the principle of legality*

Another potential legal obstacle to the investigation and prosecution of crimes committed during the civil war, is the principle of the non-retroactivity of the (criminal) law. More specifically, the principle of non-retroactivity has been used as an argument against the investigation and prosecution of one particular crime, which wasn't criminalized in Guatemala's internal legislation until shortly before the signing of the peace accords in 1996: the crime of enforced disappearance. Of course, enforced disappearance was a particularly emblematic and widespread practice during the war, with an estimated 45.000 (material) victims. It is not for nothing that it is one of three crimes explicitly excluded from the application of the amnesty provided by the Law of National Reconciliation.

Through the invocation of the principle of non-retroactivity of the (criminal) law, veto-players have attempted to block investigation and prosecution of this entire category of cases. One respondent, the director of international cases of COPREDEH during the presidency of Otto Pérez-Molina, articulated the legal argument to this effect in the following way:

> "Many of the forced disappearances are from the '80s, when the conflict was at its worst. The state… can you really say we are continuing with this behavior of maintaining the disappearance? There have been democratic governments in Guatemala, from the government of Cerezo, I believe it was in 1987. So, we already have 30 years of democratically elected governments. We have adopted a new constitution in '85. If a person was disappeared in '82…
>
> Because that is the thing with enforced disappearance… against which legal good is it directed? Against which right? It is not against [the right to] life! One could say that, obviously, that is a consequence, because they never reappeared. But the affected legal good is personal liberty, like a kidnapping, because you are detained. Forced disappearance is the illegal detention of a person by state authorities.
>
> It is not as if we have a special jail for the disappeared, where we continue to keep them. Obviously, we have to say things as they are: these people are dead! Unfortunately, someone killed them at the time. But it is not a continuous conduct

> of the state to maintain disappearances, forcibly. So, at a certain point it is unjust that they are holding new governments responsible for a forced disappearance – even after the conflict [was concluded, HB] – for continuing this conduct. Because it is not true. […] So we have certain points in which we do not agree [with the IACtHR, HB], because they are applying the Convention retroactively.
>
> […]
>
> They [the IACtHR] say that they are the first who started to regulate enforced disappearance, with the case of Velasquez Rodríguez v. Honduras. […] Guatemala defined the crime in its internal legislation in '96 and did not ratify the [Inter-American Convention on the forced disappearance of persons] until 2000. So for us, for example, we cannot apply… because you have to remember that enforced disappearance is both a crime and a violation of human rights. It has this double connotation. But one cannot retroactively apply the crime of enforced disappearance, and one cannot sentence people on the basis of crimes which did not exist at the time. This should be classified as kidnapping or illegal detention, in any case.
>
> […]
>
> And on top of that, in Guatemala we distinguish between a continuous crime and a permanent crime. […] But, for example, the crime of kidnapping, or even enforced disappearance, I am not disappearing you day after day, I disappear you one day and you do not stop suffering the effect, to put it like that, until you reappear or I let you go. […] So we have this thing where this crime, because it is permanent, cannot have changed along the way to become an enforced disappearance."[170] [Breaks added]

In short, the respondent's argument can be summarized as follows: 1.) the legal good protected by the crime of enforced disappearance is the personal liberty of the material victim, it is akin to kidnapping or illegal detention; 2.) enforced disappearance was not criminalized as such in Guatemalan legislation until 1996; 3.) because the criminal law cannot be applied retroactively, cases in which the material victim disappeared before 1996 cannot be prosecuted as enforced disappearance; 4.) these cases should be prosecuted as kidnapping or illegal detention; and 5.) enforced disappearance is not a continuous crime but a permanent crime, which means that it cannot be said to continue to be committed after its criminalization in 1996. What remains unspoken in this quote, but is relevant to point out, is that the crimes of kidnapping and illegal detention are not excluded from the application of the Law of National Reconciliation. Therefore, by accepting this logic it would become completely impossible to prosecute these cases, whether they would be classified as enforced disappearance or any other crime in the Guatemalan criminal code.

It is no wonder, then, that pro-accountability actors reject this logic. Instead, they have proposed an alternative legal argumentation, arguing that veto-players misunderstand, or misrepresent, the true nature of the crime of enforced disappearance. This argument was articulated by

170 Interview W.

a respondent who has represented victims in several cases concerning enforced disappearance, both in the domestic legal system and before the Inter-American Court. When asked explicitly to respond to the argument made by the respondent quoted above, he said:

> "[T]his is the inaccurate standard introduced by some officials […] And it is unfortunate, because what this indicates – if they say it out of conviction, because they believe that it is like this – is a complete lack of understanding of the criminal law, which is unfortunate. But more than that, it is a lack of understanding of the principles of law. Because they allege the violation of the principles of legality and the retroactivity of the criminal law, in the sense that acts committed during the internal armed conflict cannot be prosecuted, because of the fact that in Guatemala the crime of enforced disappearance was not regulated in the criminal code until the year 1996.
>
> What is ignored, on the part of my colleagues, is that enforced disappearance has a legal nature which is distinct from other crimes. Why? Because the issue of enforced disappearance, first it should be understood that it is a multi-offensive crime [original Spanish: "crimen pluriofensivo", HB]. The crime of enforced disappearance entails not only your physical disappearance, that I limit your personal liberty, but it also entails that I put at risk your physical integrity […] and your life. And I completely strip you of your legal personality and your legal [protection, HB]. […] Because, being disappeared, you, personally, can no longer exercise any legal action before the legal system of the county, either administratively or judicially […] And your family too. They have this legal uncertainty about your whereabouts, so they cannot do anything. That is the multi-offensive nature that the crime of enforced disappearance has.
>
> And from this from this derives another thing, much more important, which is that enforced disappearance has this permanent nature, which extends itself in time as long as the whereabouts of the victim are unknown. I mean, from the moment in which I capture you, illegally, I suppress you and restrict your liberty, I put your psychological and physical integrity at risk […], I strip you of your legal protection…. From this moment on, the forced disappearance is committed *day after day*, until the time your whereabouts are known. […]
>
> And as long as your whereabouts are not known, I continue to commit this crime. Because I am preventing not just you, but your family, and even the legal system of the state from knowing your whereabouts. And years can go by. Until I, who has the control over [whether your whereabouts are known, HB], die, I continue to be responsible. So this permanent nature makes this crime different. And, therefore, it is not [true] that the principle of [non-retroactivity] of the criminal law is violated, or that the principle of legality is violated. But rather that today, if I do not make it known where you are, what your location is – dead or alive – today I am still committing this crime.
>
> This is the permanent nature of the crime of enforced disappearance which should be understood. And sometimes, it is not that this is not understood, but rather that the legal standards are twisted so that the general public will say… but the standard that we cannot prosecute [enforced disappearances, HB] before 1996 is completely mistaken."[171]

171 Interview O

In short, this reasoning can be summarized as follows: 1.) the crime of enforced disappearance has a multi-offensive nature in that it affects a variety of legal goods, the restriction of personal liberty is only a part of the crime; 2.) another important part of the crime of enforced disappearance is the withholding of information about the fate and whereabouts of the material victim; 3.) this withholding of information is committed continuously, day after day, until the fate and whereabouts of the material victim is made known; 4.) in practically all cases from the armed conflict, the perpetrators have continued to hide the fate and whereabouts of the material victims after enforced disappearance was criminalized in 1996; and 5.) in such cases, classifying and prosecuting the acts as enforced disappearance therefore does not violate the principle of non-retroactivity of the criminal law. This reasoning reflects the understanding of the crime of enforced disappearance as it has been pioneered and developed by the IACtHR in its consistent case law on the issue from the *Velasquez Rodríguez* case onwards.[172]

This disagreement over the nature of the crime of enforced disappearance and its relation to the principle of non-retroactivity of the law was presented to the Constitutional Court in the first case of enforced disappearance to ever make it to trial in Guatemala, which concerned the disappearance of six people between 1982 and 1984 in the community of Choatalum. The defendant in the case, a former military commissioner named Felipe Cusanero Coj, had filed a motion of '*inconstitucionalidad en caso concreto*' to the CC. In this motion Felipe Cusanero, following the anti-accountability constituencies' legal logic as described above, argued that his prosecution for enforced disappearance was unconstitutional, because it violated the principle of non-retroactivity of the law. However, the Constitutional Court decided otherwise.

In its decision, the Constitutional Court follows the logic of the Inter-American Court. It starts by pointing out that the Guatemalan criminal code recognized the permanent nature of the crime of enforced disappearance. The CC interpreted this to mean that an enforced disappearance can continue to be committed after its criminalization, even if it commenced before that. In its words:

> "[I]t deserves to be pointed out that the permanent character with which enforced disappearance is typified in the Criminal Code is in line with that contained in the Inter-American Convention on Enforced Disappearance of Persons […]. In relation to this, the Inter-American Court of Human Rights has declared in it case law that the enforced disappearance of persons constitutes […] a crime of a permanent and continuous character, which, as it points out […]

172 *See* IACHR *Velásquez-Rodríguez v. Honduras (merits)*, judgment of 29 July 1988, para. 155. This case law of the Inter-American Court predates both the definition of enforced disappearance in the Inter-American Convention On the Enforced Disappearance of Persons of 1992 and its codification in the Guatemalan criminal code, which dates back to 1996.

> continues to be committed to this day (judgments of 29 July 1988 and 2 July 1996, handed down in relation to the cases Velásquez Rodríguez vrs. Honduras and Blake vrs. Guatemala, respectively).
>
> From that which has been described above, it can be gathered that the fact that the legislator has included the permanent character as a constitutive element of the crime of enforced disappearance does not translate in a violation of the principle of non-retroactivity enshrined in Article 15 of the Constitution of the Republic, in that the continuity inherent in that illegal conduct allows for its commission to extend itself until a moment after the beginning of the temporal scope of the validity of the statute regulating it, in spite of having originated in a moment prior to it."[173]

On this basis, the CC rejected the accused's motion and allowed the prosecution to continue, resulting in the first domestic conviction for the crime of enforced disappearance. Had the CC found otherwise, this would have been fatal not only for the case against Cusanero Coj, but for any future prosecution of cases of enforced disappearance which commenced during the armed conflict. In other words, the Constitutional Court has cleared a potential legal obstacle to the investigation and prosecution of cases of enforced disappearance from the armed conflict, by interpreting the crime of enforced disappearance in such a way that its application does not cause a conflict with the principle of non-retroactivity of the law. In doing so, the CC explicitly applies a logic taken from the case law of the IACtHR. This decision has been upheld in later case law of the Supreme Court and the Constitutional Court.[174]

### *6.2.3 Imprescriptibility of international crimes*

A third potential legal obstacle to the prosecution of crimes committed during the civil war which has been cleared through the application of standards taken from IACtHR case law, is the possible prescription of those crimes. Article 107 of the Guatemalan criminal code regulates the prescrip-

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173 CC decision of 7 July 2009 (Inconstitucionalidad en Caso Concreto), exp. 929-2008, p. 5.

174 *See for example* CC decision of 18 November 2015 (Amparo en Unica Instancia), Exp. 1923-2015. In this decision, the CC upheld the decision, and its underlying reasoning, of the Supreme Court to reject a request for cassation by Héctor Bol de la Cruz, the Chief of Police convicted for the disappearance of Edgar Fernando García. Bol de la Cruz had, again, argued that his conviction was based on a retroactive application of the crime of enforced disappearance. In its reasoning, which was upheld by the Constitutional Court, the Supreme Court also dispelled the notion, presented by the accused, that he should have been prosecuted for illegal detention rather than enforced disappearance. In dismissing this notion, the Supreme Court referred explicitly to the case law of the IACtHR and explained that the crime of enforced disappearance affects a variety of legal gods, not only the personal liberty of the material victim, and that the illegal detention is only a part of the crime of enforced disappearance. In other words, the veto-players legal arguments as to why cases which commenced during the armed conflict cannot be prosecuted as enforced disappearance have now been fully dismissed.

tion of crimes and sets the terms of prescription for different categories of crimes. According to this article, crimes which may be punished by death prescribe after 25 years, while other crimes prescribe after a period equal to their maximum prison-sentence increased by one third, with a maximum of 20 years. The article makes no exception for international crimes, which would suggest that they are subject to the same terms.

In 2016, a group of lawyers filed a motion for review of constitutionality against Article 107, claiming that the failure to include the imprescritibility of international crimes violates the international norms which form part of the *bloque de constitucionalidad*, making it unconstitutional. They argued that the imprescriptibility of international crimes is a rule of general international law, which "has been recognized by the General Assembly of the United Nations, international human rights tribunals, international criminal tribunals and the highest courts of various states, including the [Guatemalan, HB] Constitutional Court".[175] Furthermore, they argued that, while Guatemala has neither signed nor ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, its status as a rule of general international law has been recognized by the IACtHR, whose decisions are binding on Guatemala and part of the *bloque de constitucionalidad*.[176] Consequently, the claimants asked the Constitutional Court to order parliament to change the text of Article 107.

The Constitutional Court eventually did not find Article 107 to be unconstitutional and, therefore, declined to order the parliament to change it. However, this conclusion was not the result of a disagreement between the CC and the claimants on the status of rule of the imprescriptibility of international crimes as a norm of general international law. Quite to the contrary, the Constitutional Court explicitly recognized this status, a recognition which it based exclusively on the case law of the IACtHR, particularly its judgments in the cases of *Barrios Altos v. Peru*, *Tecona Estrada and others v. Bolivia* and *Almonacid Arellano v. Chili*.[177] However, the Constitutional Court argued that, since the imprescriptibility of international crimes is a norm of general international law, it is already a part of Guatemalan law and has to be applied by Guatemalan courts *ipso iure*. As a result, the CC argued, it would be contradictory to require the parliament to include it in Article 107 of the Criminal Code.[178]

175 CC judgment of 8 November 2016 (Inconstitucionalidad General), Exp. 3438-2016, pp. 1-2.In fact the claimants suggest – and the CC seems to accept, that the imprescriptibility of international crimes is an international norm with the status of *ius cogens*. However, given the imprecise use of this term in the judgment and the confusion that its use may create in the reader, I have decided, rather, to use the phrase "norm of general international law" in this text.

176 Idem, pp. 1-2.

177 Idem, pp. 14-16.

178 Idem, pp. 16-17.

In short, while rejecting the claims of the petitioners, the Constitutional Court has made it clear that the imprescriptibility of international crimes is a norm of general international law which is directly applicable in the Guatemalan legal order. As a result, prescription of the (international) crimes committed during the civil war cannot be used as an argument to block their investigation and prosecution. Again, the case law of the Inter-American system has been and essential element of the reasoning underlying this decision.

## 7 Conclusion

This chapter demonstrated that the domestic struggle against impunity for serious human rights violations committed during the Guatemalan civil war has been an uphill battle from the beginning. The transitional justice scheme put in place at the end of the armed conflict, the weakness of the country's justice system and, most importantly, the continued dominance of anti-accountability constituencies in Guatemalan society and politics, provide a hostile domestic context. Those individuals and organizations who did push for the investigation and prosecution of crimes committed by state and paramilitary forces during the conflict, lack both the resources and the social and political influence enjoyed by the anti-accountability constituencies. They are publically stigmatized as either as 'communists' or 'terrorists' seeking to retroactively win the war they lost on the battlefield through the courts, or as 'leeches' seeking financial benefits from the country's troubled past. In some cases, they have been the object of direct threats and even attacks against their person, in order to intimidate them and obstruct their efforts towards justice.

Against this background, it is all the more remarkable that some important, albeit partial and fragmented, results have been achieved by pro-accountability actors. A number of important investigations have been conducted into crimes committed by state and paramilitary forces during the armed conflict, some of which have resulted in trials and guilty verdicts against (some of) those responsible for them. And whereas these proceedings were, at first, targeted mostly at members of paramilitary forces and low-ranking soldiers, recent years have seen proceedings against military commanders, including some belonging to the upper echelons of the military command structure.

These results have been possible in large part because of domestic circumstances which have no direct relationship with the Inter-American system, most importantly the continuous pressure from victim groups and human rights organizations and a growing willingness within certain parts of the judiciary to seriously pursue cases related to the civil war. However, this chapter has identified several ways in which the work of the IACtHR has supported or amplified the work of those domestic actors. It has done so both through its direct interactions with domestic actors in the context

of individual proceedings conducted at the Inter-American level and by developing a case law that has been instrumental in the way those domestic actors have articulated and framed their demand domestically.

The proceedings conducted at the Inter-American level have, in some cases, performed an important monitoring function over the domestic proceedings concerning the same case, especially where the two sets of proceedings were conducted in parallel. Such parallel proceedings also enabled pro-accountability actors to use the Inter-American proceedings as leverage to re-energize the domestic proceedings when they appeared to become stuck. Inter-American proceedings have also supported and even protected pro-accountability actors exposed to threats and attacks, both by 'shining a spotlight' on them, making attacks against them more risky, and – more directly – by ordering their protection by the state through provisional and/or protective measures of the IACtHR and the IACmHR. The judgments delivered by the IACtHR as a result of Inter-American proceedings have, in some select cases, been instrumental in clearing procedural obstacles erected against domestic investigations and prosecutions. Moreover, these judgments have provided an alternative account of what happened during the civil war, which supports the account provided by pro-accountability actors and challenges the dominant domestic narrative. This alternative account of the facts has been especially important to domestic judges hearing cases relating to crimes committed in the context of the civil war. The IACtHR's account of the facts of the Guatemalan civil war has been useful for domestic courts as 1.) precedent establishing that certain events, like massacres, took place; 2.) precedent for the use of the truth commission's report in legal proceedings; and 3.) inspiration for the interpretation of the facts of a case in their historical context.

Finally, the doctrines developed by the IACtHR over the course of its rich case law relevant to the fight against impunity have been instrumental to the way in which Guatemalan pro-accountability actors have articulated their claims. To be precise, the IACtHR's overarching doctrine of the obligation to investigate, prosecute and punish human rights violations has allowed these domestic actors to articulate their claims in terms of rights and legal obligations. This has helped them to defend themselves from the suggestion that their struggle against impunity has been politically or financially motivated, by drawing the debate away from their own intentions and refocusing it on the legal obligations of the state. Of course, this study does not suggest that groups like AVEMILGUA or the FcT have therefore stopped attacking pro-accountability actors, but only that pro-accountability now have an answer to such attacks that has a firm basis in the case law of the IACtHR. Moreover, the IACtHR's jurisprudence has provided Guatemalan pro-accountability actors with legal arguments favoring the removal of several important legal obstacles to investigation and prosecution of civil war cases, including the application of the amnesty law to individual cases, the operation of the principle of legality in cases of enforced disappearance and the prescription of serious human rights violations. The increased

'capacity for reception' of international standards on the part of domestic courts, meanwhile, has ensured that the legal arguments formulated by pro-accountability actors have, in some cases, achieved their intended effects, so that legal obstacles to investigation and prosecution have indeed been removed.

Of course, this chapter also demonstrates the need to be realistic with regard to both the possibilities for success in the Guatemalan struggle against impunity and the IACtHR's capacity to influence those possibilities. It teaches us that the struggle against impunity in Guatemala has not been a straight path to success, that domestic actors and circumstances remain decisive for its success and that the dominant presence of anti-accountability constituencies in Guatemalan society and political life are an enormous complicating factor. The developments described in this chapter are ambiguous and the outcomes of the struggle against impunity are unstable and sensitive to changes in the political winds. However, this chapter also demonstrates that, even under these difficult circumstances, pro-accountability constituencies have achieved remarkable successes in some cases. And the Inter-American system has been an important support in their work.