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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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7 Inter-American contributions to the investigation and prosecution of human rights violations in Colombia

1 Introduction: Obstacles to investigation of serious human rights violation by the National Human Rights Unit of the Public Ministry

Before analyzing the contributions made by the organs of the Inter-American human rights system to the practice of the institutions involved in the investigation of grave violations of human rights, it is necessary to first explore some of the obstacles these institutions face when carrying out their work. This will help not only to better understand the work carried out by the relevant domestic institutions, but also to later analyze if (and how) the work of the Inter-American system has helped domestic institutions to overcome those obstacles.

The practical obstacles examined in this section have been identified through the interviews which form the basis of this chapter, in combination with information available from human rights reports and academic literature. On the basis of these sources, this section identifies four main obstacles, being: 1.) security concerns, especially in cases related to the armed conflict; 2.) the politically sensitive nature of the cases and its effect on the relation between the relevant domestic institutions and other state entities; 3.) lack of resources, especially human resources, in combination with heavy caseloads; and 4.) certain aspects of the internal organization and institutional culture of the relevant domestic institutions.

1.1 Armed conflict and security concerns

Perhaps the toughest and most stubborn obstacle faced by prosecutors investigating grave human rights violations in Colombia is the difficult security situation present in large parts of the country and the constant threat of violence against all those involved in the investigations. Such concerns have long been considered one of the main causes of impunity in human rights cases by domestic and international observers alike. In a systematic analysis of the performance of the National Human Rights Unit carried out by Colombian human rights think-tank DeJusticia, security concerns were identified as the obstacle to investigation of human rights cases which "carries the most weight" and which has a negative effect on

all aspects of the Unit's work.[1] Winifred Tate described the threats against and attacks on the Human Rights Unit's prosecutors as an important factor in the 'production of impunity' through state human rights agencies.[2] She noted that, between 1998 and 2001, 196 of the Unit's staff (both prosecutor and investigators) had received death threats, and 19 judicial investigators and prosecutors had been killed. Of course, these security concerns are exacerbated considerably by the situation of armed conflict and their effects are felt most in cases connected to the conflict, which make up the majority of cases under the care of the Human Rights Unit. In this context, domestic observers have noted that the armed conflict "produces a type of corruption which could be described as "corruption through fear"", because threats by armed groups against judicial officers lead the latter to neglect their duties.[3]

Judicial investigators and prosecutors are not the only ones facing threats. Potential witnesses are even more exposed to the dangers connected to the armed conflict. The chilling effect of these security concerns on witnesses' willingness to come forward with their testimony and the difficulties prosecutors experience when trying to gain access to evidence present on the ground further complicate their work.[4] And whereas the formal end of the armed conflict and demobilization of the paramilitary groups, achieved through the processes described in the previous chapter, seems to have taken some of the pressure off the staff of the Human Rights Unit, this is not true for many of the witnesses in the cases under their care. Many of the crimes investigated by the Human Rights Unit took place in rural parts of the country which have experienced the presence of various armed groups, both guerrilla and paramilitary, and in which the influence of these groups is still felt, even though they have formally ceased to exist. For example, while explaining why he had not been able to conclude his investigations into a particular massacre committed in the 1980s, one prosecutor said:

> "Another reason is that the presence of illegal armed groups is still latent in this region. The demobilization and the Justice and Peace process have reached [to a certain point, HB], but their presence continues. So, according to our reports, the people [in that region, HB] are afraid to speak up."[5]

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1 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 49, available at < https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_27.pdf?x54537>, last checked: 07-08-2018.

2 W. Tate, *Counting the dead – the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 231.

3 M. García Villegas and J.E. Revelo Rebolledo, 'Procesos de captura y resistencia en la Rama Judicial', in: C. López Hernández (ed.), *Y refundaron la patria… De cómo mafiosos y politicos reconfiguraron el Estado colombiano* (Penguin Random House Grupo Editorial, 2010), p. 461.

4 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005, p. 49.

5 Interview 15.

Another prosecutor discussed this point in more detail. Having recently come to the Human Rights Unit from a different unit, she discussed how she had been surprised by some of the working methods she had found in her new environment, and how these methods were connected to the particular type of cases human rights prosecutors have to deal with. In this context, she said:

> "And sometimes I have confronted this question. I say: right, this case was not investigated from this angle, but what would have happened if the investigation had been deepened with [the help of, HB] the communities? But later I found out why [this had not happened, HB], and that is that the security situation did not allow, for example, for prosecutors to enter the region. These investigations had been delayed for a long time, but why? Because there is no way of entering the zone, because there is no guarantee that when one enters, one can also leave. […]
>
> Q: Yes, another prosecutor explained this to us, I believe about another massacre in and he said that there still exist [….] paramilitary groups in this zone, and that people are frightened….
>
> A: And one can feel the fear. Of course. I have also been in [another region, doing another investigation, HB] and there, since the communities have a collective memory that they are building, the communities also don't deny the fact that the conflict continues. And that armed actors continue and that there is persecution and that there is fear and there is a series of encounters which, obviously if one is there a few days maybe one will not feel, but they, who are there permanently, they do feel it and this obviously inhibits them from openly participating [in the investigations, HB], because they have to go back to their zones and their families are still there. So of course there is a collective fear in these regions which of course influences the issue of whether or not the investigations can advance."[6]

1.2 Political sensitivity of cases and relationship between UDH and other state entities

The security concerns and threats against the investigators and prosecutors of the Human Rights Unit are a direct reflection of the political sensitivity of the cases under its care. These cases generally concern crimes committed by members of the state armed forces and of paramilitary groups, and many of them contain indications of collusion between these forces. As discussed in the previous chapter, these are topics of extreme political sensitivity and simply talking and publishing about them has provoked rebuke from the highest circles of government. One can imagine, therefore, that prosecutors conducting criminal investigations into such cases have not always been fully supported in their work by other state agencies, including other units

6 Interview 9.

of the Attorney General's Office.[7] One of the prosecutors interviewed in the context of this study said that, while individual prosecutors do want to investigate these sensitive cases, there is a lack of "institutional will" to investigate in many corners of the state apparatus.[8] According to this prosecutor, that lack of institutional will is reflected in the limited resources made available for the investigation of human rights cases and the obstructions prosecutors face from other state agencies on whom they have to rely for the collection of evidence.

The state armed forces, particularly, have expressed their mistrust of the work carried out by the Human Rights Unit and have, consequently, refused at times to cooperate with it. In a report from 1996, HRW details severe criticisms made against the Human Rights Unit by then-Commander of the Colombian Armed Forces, General Harold Bedoya Pizarro. Bedoya stated that the HRU had been infiltrated by the guerrilla, "an opinion echoed by many army officers interviewed by Human Rights Watch".[9] As confirmed by several of the prosecutors interviewed in the context of this study, such attitudes towards the Human Rights Unit have sometimes translated into a lack of cooperation with its investigations. For example, when speaking about the difficulties involved in the investigation of cases of *falsos positivos*[10], one prosecutor said:

> "Here, the investigation is not easy. There is always the refusal of the military to let one into their facilities. They are always making problems, threatening to file a complaint against us… […] The *Procuradoría* [agency responsible for investigating complaints of misconduct by state agents, HB] has often supported the military over the prosecutors conducting investigations and has therefore served as a tool to intimidate many investigators. […] They [the military, HB] make life

7 *See for example* D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 55, describing the problems faced by the Human Rights Unit in securing the cooperation of other Units of the Attorney General's Office in their investigations.

8 Interview 8.

9 Human Rights Watch, Colombia's killer networks – the military-paramilitary partnership and the United States (Human Rights Watch, 1996), available at < https://www.hrw.org/legacy/reports/1996/killertoc.htm>, last checked: 08-08-2018. *See also* D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 32, citing the HRW report among other sources.

10 The scandal of the *falsos positivos* (false positives) began in 2006 with the revelation that members of the State armed forces had extrajudicially executed civilians to pass them off as *guerrilleros* killed through military operations, thereby boosting the statistics of the military in the war against the insurgency. These statistics were used to show the success of Uribe's policy of Democratic Security and to justify increases in U.S. military aid. Through subsequent investigations it has been revealed that the use of *falsos positivos* was a widespread practice and that the officers involved in this practice have been rewarded with promotions. The official estimate of the number of victims of this practice currently stands at 3.000, but a new study suggest that the number may in fact be as high as 10.000. *See* J.P. Daniels, 'Colombian army killed thousands more civilians than reported, study claims', *The Guardian*, 8 May 2018.

> difficult for many investigators when they are collecting evidence, they do not allow them to access the archives… I mean, they are making a lot of problems. I mean, the most difficult thing about cases of *falsos positivos* is to gain access to military installations. Just to enter is a problem. […] The support of the military to the investigations has been zero, and in many cases they even blocked or hindered the investigations."[11]

Besides complicating the collection of evidence, another way in which the mistrust of the military towards the Human Rights Unit manifests itself, is in the conflicts of jurisdiction between the military court system and the ordinary criminal justice system in which the Human Rights Unit operates. In relation to such disputes over jurisdiction, DeJusticia has pointed out that "both parties [the military and the Human Rights Unit, HB] know that, for many reasons, the outcome of the process may change depending on the organ which eventually carries out the investigation and renders the judgment".[12]

The competition, and even outright animosity, which exists between the military court system and the Human Rights Unit is illustrated by the acquittal through the military court system of several high-ranking military officials for their alleged participation in the massacre of the *19 Tradesmen*, a decision which was severely criticized by the IACtHR in its judgment.[13] The accusations against these officials had originally been investigated by the Human Rights Unit, which had decided to request the arrest of the officials and send the case to trial. At that point, however, the case had been transferred to the military courts, which decided in favor of the defendants and

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11 Interview 13. This statement was supported by the words of another prosecutor. When asked specifically whether he had received the necessary support from other State agencies in the investigations of cases which include the participation of military officers, he said: "No, those are the cases of extrajudicial executions. In those cases it is very complicated, for example, to gain access to the military archives, it is very difficult. Above all when one shows up to perform a judicial inspection [of the military's facilities, HB] to obtain documentation, they always put up obstacles. Many times the documents are extinguished, they are lost. It is not easy." *See* Interview 12.
Yet another prosecutor described the difficulties she encountered when investigating a series of massacres carried out by paramilitaries, in which there were indications of the involvement of the military battalions stationed in the region. However, when she sought access to the archives of these battalions, she was told these archives "do not exist anymore". It turned out that the archives had been damaged by fire and flooding and "coincidentally" the archives that the prosecutor sought access to were the ones that had been damaged most. *See* Interview 8.
However a fourth prosecutor denied having personally had such experiences. He said that, while the military sometimes brought up legal arguments as to why they were not obligated to grant access to their files, they had never simply denied him access to information needed for his investigations. *See* Interview 11.

12 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 56.

13 IACtHR, *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, paras. 164-177.

ordered the proceedings to be filed.[14] One of the military judges involved in this decision, and the former Commander of the Colombian Armed Forces, General Manuel José Bonnet, later explained this decision saying that the prosecutors from the Human Rights Unit had been "inventing false arguments" against the accused officers, that they had made "twisted" and "harmful" assessments of the case and that they had displayed "a lack of seriousness", because of the "partiality" with which the case had been assumed. More generally, the General commented on the "hateful spirit with which the prosecutors from the Human Rights Unit investigate military officers".[15]

DeJusticia has noted that the competition sketched here, combined with the fact that conflicts over jurisdiction often take considerable time to resolve, has had a paralyzing effect on investigations into human rights violations committed by members of the armed forces.[16] Moreover, it noted that such disputes over jurisdiction had a 'demoralizing' effect on prosecutors from the Human Rights Unit, upon seeing their investigative work undone after the transfer of a case to the military court system.[17] Given the considerable effort and personal risk involved in investigating such cases, this demoralization carries the risk of inciting inaction on the part of prosecutors. When faced with politically sensitive cases involving high military officials, their easiest and safest course of action may be to simply let the case lie dormant in his office until one day the statute of limitations expires and the file can be closed. One prosecutor from the Human Rights Unit has described seeing the effects of such inaction by a colleague when he came to his present office and took up the investigation of a particularly infamous massacre committed in the late 1980s, in which there had been extensive collusion between military officials and paramilitary groups:

> "I came to this office in November 2008. […] But before this time, the person who arrived in this office and saw this case, [of this massacre, HB], said: "Ay, no, no, no… Let's leave this here [to the side, HB]. I don't want to get involved in this." So there was not like a… I mean, it has been difficult from the start.
>
> Q: But was it because of fear, that it was a very complicated case, so "don't bother me with this…."?
>
> A: More or less that. Let's say, a form of… not laziness, because…
>
> Q: But there had been a sort of negligence on the part of the officials?
>
> A: Of course. Yes of course. Because, at that moment in time, to investigate such a big case… And it is not like that is the only case in your caseload. On top of this one, you have a bunch of other cases which have [better chances of success, HB]. So it is very difficult to be fully committed to one case."[18]

14 Idem, paras. 169-170.

15 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 32.

16 Idem, p. 59.

17 Idem.

18 Interview 10.

In short, the politically sensitive nature of the cases under the care of the Human Rights Unit has had a negative effect on the relation between the Unit and other state agencies, especially the military. As a result, such agencies have sometimes refused to cooperate with investigations carried out by the Human Rights Unit, making it difficult for investigators to collect evidence. Moreover, the military court system has at times competed with the Human Rights Unit for jurisdiction over cases involving military officers. This situation has had a paralyzing effect on the Unit's investigations and a demoralizing effect on some prosecutors, who prefer to simply let a case 'die out' over taking effective action which might eventually damage the prosecutor or his career.

1.3 Lack of resources and heavy caseload

The last quote from the previous section points us to a third important obstacle prosecutors face in their investigations of serious human rights violations: the lack of resources made available to the Human Rights Unit combined with its heavy caseload. According to DeJusticia, the lack of resources constitutes a "cross-cutting" factor underlying the lack of progress in human rights cases, which "is potentially present in all stages of the proceedings" but has a particular effect on the investigations under the care of the Human Rights Unit.[19] The DeJusticia report provides concrete examples of situations in which investigations were hindered as a result of a lack of technical resources,[20] legal resources[21] or even a lack of office supplies.[22] However, the most important manifestation of the lack of resources is the limited number of investigators and prosecutors made available to the Human Rights Unit compared to the large number of cases under its care

19 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), pp. 46-47.

20 Idem, p. 44, describing various instances in which forensic or ballistic evidence could not be collected because the necessary technology was not available, or there was no personnel available with the expertise or training required to use that technology.

21 Idem., describing a situation in which the Human Rights Unit had wanted to seize a car, but was informed that the seized car could not be held, because their facilities did not have the insurance legally required to do so.

22 Idem, p. 43, describing a situation in which the Human Rights Unit was unable to comply with the request, made by a tribunal hearing one of the cases under its care, to provide the tribunal with a copy of the entire case file, because it did not have "required logistical means, such as paper and photocopiers, and [because] the machines we do have are out of service".

and the complicated nature and large number of both victims and perpetrators involved in each of those cases.[23]

The issue of the scarcity of (human) resources made available to the Human Rights Unit and the resulting pressure on individual prosecutors came up during several of the interviews conducted in the context of this study. One prosecutor named the lack of resources as evidence of the limited "institutional will" on the part of the state to seriously investigate human rights violations. She stated that she and her colleagues already cannot handle the complex cases under their care with the limited resources made available. Moreover, she pointed out that their caseloads are only increasing because, while the number of prosecutors in the Unit had not grown since she had been there, it does regularly receive new cases.[24]

With other prosecutors, the theme came up mainly when discussing how they prioritize cases in their caseload which are being monitored by the organs of the Inter-American system.[25] In this context, one prosecutor stated:

> "We all have so many cases… Here [in this office], for example, we are handling… about 60. […]
>
> […]
>
> These are difficult cases, because they are very old cases, so they are difficult to prove. Very difficult. And for this one has to have investigators, analysts of context… but I believe we are under construction.
>
> Q: And this prioritization, this greater attention… does it also translate to more resources for the case? More human resources, more material recourses, or…?
>
> A: No, not really. That is to say, you make do with what you have. Luckily, we have a unit of the criminal police [specialized, HB] in human rights, and in some way they have been selective in the profiles of the investigators who have been here, for many years, investigating. These are very important resources for us. Because they have experience."[26]

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23 When the Human Rights Unit was first created, it had a team of 25 prosecutors and a caseload of at least 100 cases. *See* D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), p. 22 and Human Rights Watch, Colombia's killer networks – the military-paramilitary partnership and the United States (Human Rights Watch, 1996), section V. According to DeJusticia, the number of prosecutors grew to 31 by April 2005. Writing in 2007, Winifred Tate that "thirty-five prosecutors were assigned by the Attorney General's Office to handle hundreds of the most complex human rights cases". W. Tate, *Counting the dead – the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 231.

24 Interview 8.

25 *See infra* Sections 2.1 and 2.2 of this chapter.

26 Interview 12. For the purpose of this section, the quote has been edited to focus on the issue of (lack of) resources. The full transcript contains several reflections of the prosecutor on the prioritization, within his caseload, of cases monitored by the Inter-American system. These reflections will be included below in Section 2.1 of this chapter.

Another prosecutor reflected on how she had, upon her arrival at the Human Rights Unit, tried to make a plan for herself on how to deal with the number and the complexity of the cases under her care. In her words:

> "At first, when I arrived – I came from outside the Human Rights Unit – I felt like all of the cases… When I started to look over the list and the inventory of the proceedings we were managing… well, of course many involve the serial violation of human rights, but not all of them have a judgment by the Inter-American Court to back them up.
>
> […]
>
> As you have seen, the blueprint for the *fiscalías* [prosecutor's offices, HB] in Colombia is essentially an assistant and a prosecutor. We have the support of the criminal police based on the orders we generate […] It is a very small team. With two people, what we try to do is prioritize […]
>
> […]
>
> This office[27] is miscellaneous, here we have a bit of everything: massacres from the '80s, massacres from the '90s, [cases against, HB] paramilitaries, against the military, we have *falsos positivos*, we even have the homicide committed against a prosecutor several years ago, that one is also in this office. So the efforts have to be adjusted [to fit the cases, HB]. And in this sense, the strategy has been to prioritize […]."[28]

In short, prosecutors in the Human Rights Unit face considerable obstacles in their work as a result of the large number of cases in their caseload, the complexity of those cases and the limited support each prosecutor has at their disposal.

1.4 Internal organization and culture of the Attorney General's Office

Finally, obstacles to the investigation of complicated cases of grave human rights violations also emanate from certain aspects of the internal organization and culture of the Attorney General's Office. Specifically, such investigations are hampered by two related tendencies which have long existed

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27 From the context it is clear that the word "office" ("*despacho*") as used by the respondent refers to her own office (team of one prosecutor and one investigator), not to the Human Rights Office as a whole. In other words, all the cases mentioned here are cases that the prosecutor personally has under their care.

28 Interview 9. Further on in the interview, this prosecutor addressed the issue of (the lack of) human resources again, when she spoke about how she had tried to orient her investigations towards the analysis of the context of complex crimes. Here she noted: "Having said that [all prosecutors should analyze context, HB], human resources are limited. At times, one requests an [extra, HB] investigator, one sends some order to investigate into one of the cases and there are delays in assigning an investigator, because there are very few investigators. This is a reality. Obviously, there are still less investigator who are able to construct contexts, in the sense that they have the experience, that they have the time, that they have the availability to undertake the trips that are necessary [for the analysis of contexts, HB]. So there is also an issue of human resources that has to be resolved."

within the Colombian criminal justice system, namely: 1.) the tendency to treat each criminal act as an isolated event, to be investigated separately; and 2.) the tendency of prosecutors to work individually and with minimal consultation between prosecutors.

The first of these two tendencies has been recognized by the Attorney General's Office itself, and was one of the reasons underlying the adoption of a new policy of case selection and contextual analysis, which will be discussed below in Section 3 of this chapter. In the policy document through which this policy was implemented, the Attorney General wrote that it was meant to overcome the problems resulting from the old system

> "which indicates that all crimes should be investigated at the same time and in the same way and, on top of that, as if they were isolated acts, hamper the creation of a true criminal policy which materializes in the design and implementation of strategies which make it possible to effectively fight the various criminal phenomena attributable to criminal organizations".[29]

One of the prosecutors interviewed in the context of this study described how this traditional, isolated way of investigating criminal acts had led to serious deficiencies in one of the cases under his care. As this prosecutor explained, the case involved a series of killings and massacres in the late 1980s, committed in one municipality by a paramilitary structure which dominated the area. In the original investigation, however, all these killings had been regarded individually, as if they were separate crimes with no interrelations. In the words of this prosecutor:

> "according to our Colombian legislation each fact is investigated: each fact, an investigation, each fact, an investigation…. But no macro-analysis had been done taking into account the 200 victims we may have in this case, in order to investigate the single organized power-structure which existed."[30]

And this tendency to regard cases individually, as isolated incidents, has effects not only on the investigative choices of prosecutors in concrete cases, but also on the way in which cases are divided over the prosecutors. Thus, it can easily happen that cases which are clearly related are investigated by different prosecutors, and the extent to which these prosecutors cooperate and share information amongst themselves depends on the initiative of those individual prosecutors. As one of the prosecutors, who had joined the Human Rights Unit relatively recently, noted:

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29 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012, p. 25.

30 Interview 10.

> "When I arrived here at the Human Rights Unit, I was a bit surprised to find that I had a miscellaneous caseload. I had understood that the idea was to organize the offices so that one can specialize in a theme. But the reality that one encounters is different."[31]

As a concrete example of this fragmented division of cases over the available prosecutors, the respondent discussed how she had been put in charge of the investigations into the case of the La Rochela massacre, while the investigations into the massacre of the 19 Tradesmen were handled by another prosecutor. This division of labor exists in spite of the fact that the two cases are clearly related and the Inter-American Court, in its judgment in the case of *La Rochela*, had even remarked .that the separate investigations into the two cases had affected their effectiveness.[32] When asked whether she and her colleague cooperated closely in investigating these cases, she replied:

> "We are in contact […] I had recently arrived at this office, so what I did was I went to his office and I have also done some inspections of prosecutoral documents, particularly, for example, with testimony of those who had directly participated in the La Rochela massacre. Let's say, there are strategies, the ideal would be to form a group, but [my colleague, HB] is investigating this case along with 40 other cases, just like me. So sometimes I have to be [in one region, HB], then I am [in another region, HB]… So, of course, the possibilities of meeting up with several prosecutors are minimal. When I am here [in Bogotá], we do have the proximity, we are only three offices apart, but still, his schedule is different from mine. Meeting up? We do not have a space! And this I do believe that would be… a space for prosecutors where we can discuss situations which goes beyond simply disclosing the particularities of our cases. To discuss phenomena that we observe and that appear important, the recurrence of a modus operandi for a certain region and in a particular moment. […]
>
> Now, there are training sessions and conferences and that type of thing, but to have a moment to meet up and talk openly about our cases, about these recurrences, about these situations, these phenomena… that would be important."[33]

Thus, according to this prosecutor, it is difficult for prosecutors working on similar or even directly related cases to link up. This, in turn, makes it difficult to share important information or to share experiences, which could lead prosecutors to new insights about their own cases and to new ideas on how to approach their investigations. As noted by DeJusticia, this

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31 Interview 9.

32 *See* IACtHR *La Rochela massacre v. Colombia (merits, reparations and costs)*, 11 May 2007, paras. 162-163. The case of the La Rochela massacre concerned the massacre of a judicial committee sent to investigate the previous massacre of the 19 Tradesmen by a paramilitary group in th Magdalena Medio region in the 1980s. As such, it was likely that both massacres had been carried out by the same criminal structure, and that the La Rochela massacre was an attempt by that criminal structure to ensure impunity for its crimes.

33 Interview 9.

dynamic, in which prosecutors work in isolation and important information is not shared, exists not only within the Human Rights Unit, but is even more pronounced when it comes to cooperation (or the lack thereof) across different units of the Attorney General's Office.[34] According to DeJusticia:

> "Not only is there no contact with other units whose work seems to be very relevant to that of the Human Rights Unit […], they are not even involved in the investigative process, rather there exist practices which result in the lack of awareness of the importance of this joint work, with a direct and negative effect on the investigations." [35]

Thus, important information is lost as a result of a 'traditional' approach to the investigation of human rights cases, which leads prosecutors to view related cases as separate events and to omit sharing important information and insights which could further their investigations, both within the Human Rights Unit and across different units of the Attorney General's Office.

2 Monitoring and prioritizing cases through direct interactions with the Inter-American system

This section analyzes the way in which the ongoing investigations of the Human Rights Unit into grave violations of human rights have been affected by the fact that those violations also were also the object of parallel proceedings within the Inter-American system. This section is based entirely on the interviews conducted with 8 prosecutors of the Human Rights Unit, all of whom have experience investigating both cases which do have such parallel proceedings and cases which do not. This makes it possible for them to compare between the two categories of cases and to better reflect on the effect such parallel proceedings have. However, before considering the contributions of parallel proceedings to the domestic investigation of grave human rights violations, this section will first discuss the mechanism through which these contributions are channeled: the monitoring of domestic investigations set in motion by the proceedings of the Inter-American system.

2.1 Monitoring of domestic investigations as a result of parallel proceedings by the Inter-American system

That the prosecutors involved in the domestic investigation of human rights violations subject to proceedings on the Inter-American level would experience any impact from those parallel proceedings is not self-evident.

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34 D.R. Betancourth, 'Balance crítico de la unidad de derechos humanos y DIH de la Fiscalia General de la Nación' (DeJusticia, 2005), pp. 54-55.

35 Idem.

Domestic prosecutors, after all, are not part of the proceedings on the Inter-American level, which are conducted, on the part of the state, by its representatives from the Ministry of Foreign Affairs. In fact, all the prosecutors interviewed in the context of this case study stated that they were not in direct contact with either of the organs of the Inter-American human rights system.[36] For example, when asked about his interactions with the Inter-American system, one prosecutor answered:

> "Well, in reality I have not had a direct relationship with the Inter-American Court, because the relationship of the Colombian state with the Court and all the proceedings, are through the Office of Foreign Affairs. […] So, when we need, to put it this way, to give account or when they ask us for information, this is conducted through the leadership of the Unit, the leadership of the Unit for International Affairs of the Attorney General's Office and then from the Attorney General's Office to the Ministry of Foreign Affairs. But personally I have not been in contact [with the organs of the Inter-American system, HB]."[37]

Thus, the direct interaction between the state and the Inter-American system are handled by the Ministry of Foreign Affairs[38] and the prosecutors conducting the domestic investigations are at all times several degrees removed from the Inter-American proceedings.[39] However, even if they are not directly involved in the Inter-American proceedings, all but one of the prosecutors interviewed in the context of this case study said that they did experience an increased scrutiny of their work in those cases because of the domestic monitoring undertaken in connection with the Inter-American proceedings.[40] In short, when the Inter-American system admits a case to its docket, the state is called to regularly report to the organs of the Inter-American system on the progress of the domestic investigation into the human rights violations at issue. As a result of this, the agency representing the state before the Inter-American system needs to stay continuously up to date on the state of the investigations, and will regularly request the

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36 Interviews 8, 9, 10, 11, 12, 13, 14 and 15.

37 Interview 15.

38 Interview 3, explaining that the defense of the State in proceedings before the Inter-American system had recently been mandated to a new, specialized agency, called the *Agencia para la Defensa Jurídica del Estado* (the Agency for the Legal Defense of the State). This new institution, for which this respondent works, is now responsible for the representation of the Colombian State in the contentious phase of all the proceedings at the Inter-American level. However, after the Inter-American Court has rendered its judgment, in the supervision of compliance phase of the proceedings, the Ministry of Foreign Affairs resumes its responsibility of representing the State.

39 Interview 15, explaining that he was called once to appear before the Inter-American Court, in the context of the supervision of compliance proceedings of one of the cases under his care, because the Court wanted to have the prosecutor responsible for the domestic investigations present at the hearings. However, even at that occasion, he said "one hands over ones report to the Ministry of Foreign Affairs, and those of Foreign Affairs are the ones who do the talking".

40 Interviews 9, 10, 11, 12, 13, 14 and 15.

prosecutor to report on their progress. Thus, a domestic monitoring of the investigations is set in motion, which will continue for as long as the case is under review by either of the organs of the Inter-American system.

The fact domestic prosecutors are confronted with regular requests to report on their progress, will put pressure on them to make progress.[41] This is illustrated by the answer of one of the prosecutors, when asked whether she had experienced pressure to produce results in her investigation of a case which had been the subject of a judgment by the IACtHR. Her response was:

> "Yes, of course, because they are always calling on us… "Of the Inter-American Court's judgment, what part have you complied with of the [orders given to the state]?" "Well, I've [carried out] this, I've done that, I am currently working on that, it has become blocked because of that". But yes… of course, they are always calling you to ask how you are complying with the Court's order."[42]

It is worth pointing out that the seven prosecutors who indicated having experienced the 'pressure'[43] described here, were all dealing with cases in different stages of the proceedings at the Inter-American level. While

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41 Interview 1. When asked whether she believed that the judgment of the Inter-American Court in the case of the *Disappeared persons of the Palace of Justice v. Colombia* had anything to do with the recent progress in the domestic investigations related to this case, the respondent answered:

> "I think it is a combination of several things. I mean, the judgment of the [Inter-American, HB] Court, as always, helps to expose the case, but it was also the [30th anniversary of the attack on the Palace of Justice, HB]. […] So it's a combination of various factors. But without doubt it helps that the Court has said: "look, you have to continue to investigate this case." […] The fact that an international Court is monitoring the case, that it is taking note and sees to it that it is investigated, will give a stronger impulse to the investigation."

The idea that requests for information on progress will stimulate prosecutors to make progress, was supported by another respondent, who works for the *Agencia para la Defensa Jurídica del Estado*. *See* Interview 3.

42 Interview 14.

43 While they agreed that the monitoring resulting from the parallel proceedings had an effect on their domestic investigations, several prosecutors seemed uncomfortable using the word 'pressure' to describe this effect. This could be because there is a tension between any suggestion of external pressures and the independence required by their office. *For example*, Interview 15, saying: "I mean, this "pressure" from [the Inter-American system, HB], is not pressure. It is not pressure, but compliance with a judgment. Yes, one cannot speak of "pressure", because that would be like… But rather that, to comply with this judgment, [the Inter-American system, HB] obliges us to push the proceedings forward, to keep pressing it, to keep investigating…"
See also interview 13. When asked whether he had experienced pressure from the Inter-American system to investigate a particular case under his care, this respondent answered: "No, from the Inter-American system, no. No, and the Inter-American system in general, or at least the Commission, is very respectful [of our investigations, HB]. They do everything through the regular channels of the Ministry of Foreign Affairs and all that. But of course there is pressure from public opinion."

some of them were working on cases in which had only recently been admitted to the Inter-American system and were still being examined by the Inter-American Commission, others were investigating cases in which the IACtHR's judgment had been delivered many years ago, and which are therefore subject to lengthy supervision of compliance procedures. However, all of them reported feeling the pressure of having an international body overseeing the cases they were investigating. This means that this mechanism does not depend on the official determination by the Inter-American Court that the state has failed to comply with its international obligations. It is a function of the process before the Inter-American system, rather than of the judgments resulting from that process. Thus, the pressure starts the moment the Inter-American system becomes involved, and its intensity depends on the stage of the proceedings and the energy put into it by the organs of the system. This is underscored a respondent, who was investigating an extrajudicial killing, for which Colombia has been found responsible by the IACtHR several years ago. They described the monitoring of this case in the following way:

> "Q: So, you have known the case from before there was a judgment by the [Inter-American, HB] Court?
>
> A: Yes, from before the judgment.
>
> Q: And do you consider that the fact that there is now a judgment by the Court has pushed the investigation forward in some way?
>
> A: Well, it seems to me that it pushed more before the judgment came out, because there was this pressure that the judgment would come out and that Colombia would be convicted. In that moment yes, because there were provisional measures, so this also sped [the investigation, HB] up a bit more. At that time, the state gave us more resources, it gave us more support. After the judgment, well…
>
> […]
>
> Q: And it was because of the provisional measures that things started to move?
>
> A: No, this case was already moving because of the admissibility decision [by the IACmHR, HB] and so the state has to move the process forward more in order to avoid a harsher judgment, which it received anyway […]"[44]

The interviews conducted in the context of this case study thus show that the pressure exerted by the monitoring of Inter-American cases, while not constant, can have effects throughout all the stages of the proceedings

44 Interview 14. See also interview 3, stating that he had the impression that proceedings before the IACtHR are taken more seriously by the State than those before the IACmHR, and that the judgments of the Court have a greater impact than the reports on the merits of a case by the Commission. While this statement may seem somewhat contradictory to the statement of the prosecutor cited here, it need not be. The fact that the judgments of the IACtHR carry more weight than the decisions by the IACHR also means that the State would have a greater interest in avoiding such a judgment, as suggested by the prosecutor.

before the organs of the Inter-American system. Moreover, the interviews show that the monitoring of Inter-American cases has two main effects on the domestic investigations into these cases: 1.) prosecutors prioritize these cases over the other cases in their caseload; and 2.) these cases stay at the top of their agenda for as long as the monitoring continues.

2.2 Prioritization of Inter-American cases

The prioritizing effect of the Inter-American system's involvement in Colombian cases was noted by almost all the prosecutors I interviewed in the course of my research in Colombia.[45] The requests for information prompt them to prioritize Inter-American cases over other cases, which are not subject to such a monitoring system, and push harder to achieve results in those cases. One prosecutor described this mechanism in a discussion on how the examination by the IACmHR of a massacre case had affected his domestic investigation of that case:

> "Q: Do you notice in any way that this case is [being examined by] the Inter-American system?
>
> A: Of course, of course, because the Inter-American system undertakes a monitoring [of the case], and in its turn the Human Rights division also has a monitoring system for these cases. That means that there is a prioritization [of this case] over other cases.
>
> Q: In what way does one note this prioritization?
>
> A: We all have so many cases… Here [in this office], for example, we are handling… about 60. So, this prioritization makes one pay more attention, firstly, to the cases which have been object of [a decision by the] Inter-American Court. With regard to these cases there is a constant monitoring. That is to say, we present statistics every month: "how are you doing on the case that is being monitored?" […]
>
> […]
>
> So there is a strong pressure [on the prosecutors]. But pressure in a good way, as it should be."[46]

45 Out of the 8 prosecutors I interviewed, 7 stated that they prioritized cases which were being or had been investigated by the Inter-American system. Interviews 9, 10, 11, 12, 13, 14 and 15.

46 Interview 12 .*See also* interview 10, adding that for him, it was not only the fact that he was being asked to report on Inter-American cases that made him prioritize those cases, but also the fact that he knew that the information provided by him would be the basis on which the Inter-American system would judge the actions of the Colombian State. In his words: ""[T]hese are international obligations, where the Colombian State is at stake and the Prosecutor's Office as a component of the State, well, we need to give priority to these cases. And we don't want, let's say, that our representatives arrive at a hearing, at the Commission in Washington, and have to say: no, the fact is that nothing has been done. We would look really bad."

This prioritization is thus a result of the monitoring of Inter-American cases, in combination with the large number of cases each prosecutor has under their care. Since prosecutors at the Human Rights Unit do not have sufficient resources to properly investigate all the cases under their care, they need to prioritize. And since there is a notable pressure on them to produce results in the cases which are being monitored by the Inter-American system, it is only logical that they will prioritize those cases.

In this context, the quote above also indicates that the prioritization resulting from the monitoring of Inter-American cases is limited to the level of the individual prosecutors, and does not affect the allocation of resources within the Prosecutor's Office. When asked more specifically about whether this prioritization of Inter-American cases also entailed more resources being made available for their investigation, this prosecutor answered:

> "No, not really. That is to say, you make do with what you have."[47]

Thus, while the monitoring of Inter-American cases has affected the way in which prosecutors manage their caseload (i.e. prioritization of those cases), it has not actually helped to overcome the lack of resources as an obstacle to the prosecution of grave human rights violations generally. In fact, several prosecutors described feeling conflicted over the fact that, due to their heavy caseload and the prioritization given to Inter-American cases, they may sometimes be unable to dedicate sufficient time to which are comparable in terms of the gravity of the facts. One prosecutor described her struggle with this issue in the following way:

> "In the beginning, when I arrived [at the Human Rights Division], I felt that all the cases… When I started to revise the list and the inventory of the cases that we investigate, well of course many of them include repeated violations of human rights, but not all of them have a judgment form the Inter-American Court to back them up. I feel that, independently from the judgment, the Inter-American Court and the monitoring done by the [Inter-American] system, there are of course cases which fall outside of the Court's framework for action, but which are still important. What have I tried to do? To devise a system of prioritization. […]
>
> […]
>
> In this sense the strategy has been to prioritize cases, call attention to those who have special monitoring, but the attention must always be on all. Of course, the cases of the Inter-American Court have a monitoring system which requires the prosecutor to dedicate much more time and attention to these cases, this is inevitable. The amount of information which the Office of International Affairs requests from us, what the victims' organizations [representing the victims before the Inter-American system, HB] ask of us… Many times these cases obviously oblige the prosecutor to dedicate much more time and attention to them.

47 Interview 12.

> Having said that, the advantage of having these cases is that they serve as a prism for reviewing other cases that we have and that they can eventually give us information on a particular moment in time which affects other situations our office is dealing with or even other offices." [48]

Other prosecutors described similar conflicts. For example, when asked whether he approached Inter-American cases differently than other cases, one prosecutor answered:

> "There is no difference. For me, the justice system has to be straight in every sense. […]
>
> Q: And there is no prioritization of the cases which are in the Inter-American system…?
>
> A: When they arrive [in the Inter-American system, HB] you have to give them priority because the state begins to monitor them, so you have to give them priority. But not a priority in the sense of leaving the others. No, they all proceed equally. They should proceed equally. Yes, one can give them priority because we have to expect to answer to the Inter-American Court each trimester about [compliance with its judgment]. And I, personally, am monitoring it. So yes, these people have some priority. But not so as to say that the others are abandoned and we dedicate ourselves exclusively to [Inter-American cases]. No. No. Not up to that point."[49]

Another prosecutor even warned explicitly against developing an attitude in which only cases which attract international attention are investigated. In his words:

> "[H]opefully none of the cases which rest with the Prosecutor's Office, if they do not make it to the [Inter-American, HB] Commission, [it is thought that] they don't need to be pursued. Because, unfortunately, the level of impunity which we have here is very high, but it because of the very system that we use here.
>
> […]
>
> And of course there are cases here which are very sensitive and which do not have… They don't even have victim representatives, there is nothing, but we have to investigate these cases too. But sadly they do not have the same speed that a case which is [examined by, HB] the Commission may have. It pains me to say so. But obviously they are investigated too."[50]

Thus, the lack of resources and heavy caseloads remain an important obstacle to the prosecution of grave human rights violations. While its effects have been mitigated somewhat in relation to cases which are the subject of parallel proceedings before the Inter-American system, this has, at times, come at the expense of other cases of a similar nature and gravity. The prosecutors interviewed in the context of this case study seemed to regard

48 Interview 9.
49 *See for example* Interview 11.
50 Interview 10.

this reality as mostly the result on the state's own internal policies[51] or even a lack of true dedication to solving human rights cases. However, another respondent, who is not herself a prosecutor but has represented the state in many of the cases at the Inter-American Court, put the responsibility at least partly with the Inter-American system itself. When discussing the high and, according to the respondent, sometimes unrealistic demands the system imposes on states with regard to the investigation of grave human rights violations, she said:

> "The same happened in the case of [the Mapiripán massacre]. The Court said to the state… It told it not only to investigate all the facts and all of those responsible, but also to find the remains [of the victims], which is something which is impossible to do. I mean, it would require dredging the Magdalena river! The remains will not be found! You have seen what I am talking about, and it is horrible for the families, but it is a reality that the bodies will not be found! And the Court said to the state: dedicate one prosecutor exclusively to this case. When I have 50 years of armed conflict to investigate from the past and also everything that is happening today, and you are telling me that I have to dedicate a prosecutor exclusively to this case, because it is the case that made it to the Court… It is not that this massacre is more important than others. I have many cases from the armed conflict to investigate. And this is an argument that we had to make before the Court. And in the end, the Court changed its decision and said: "ok, it's all right, it doesn't have to be a prosecutor exclusively [for this case, HB]." But when it imposed this reparation measure [at first], this had very problematic practical implications."[52]

Finally, it should be noted that nothing in this section should be taken to mean that, because of their monitoring and the resulting prioritization, Inter-American cases are thus quickly or easily resolved. They are demonstrably not. The argument here is simply that there is an added pressure to produce result in these cases and that prosecutors will often pay more attention to them than to other cases under their care. This is a relevant practical contribution to the investigation and prosecution of those individual cases, given the enormous amount of cases requiring the attention of the justice system and the overwhelming case load faced by individual prosecutors.

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51 Several prosecutors explicitly stated that they did not consider the 'pressure' to pay more attention to Inter-American cases to be a bad thing. *See for example* Interview 12, and Interview 15.
In the same vein, one prosecutor argued that the extra attention for Inter-American cases is justified, because the fact that Colombia has been found internationally responsible for those cases shows the grave failure of the justice system in those cases. *See* Interview 12.
Another prosecutor, meanwhile, emphasized that the lack of resources made available to the Human Rights Unit is a conscious choice on the part of the State, showing a lack of true dedication to human rights cases. Thus, she implies, this is not the 'fault' of the Inter-American system. *See* Interview 8 .

52 Interview 1.

For this reason, this practical effect of prioritization relevant mainly to the cases which have a direct relation to the Inter-American system and may even distract prosecutors from other cases which are equally worthy of their attention.

2.3 Keeping cases on the agenda

On top of the agenda-*setting* effect detailed above, prosecutors have also described how the involvement of the Inter-American system *keeps* these cases on the agenda for an extended period of time. Through its supervision of compliance procedure, the Inter-American Court is able to ensure that the monitoring of the domestic investigations continues until it is satisfied that the state had done everything in its power to investigate all the facts and identify all those responsible for them.

It should be noted that this contribution is especially valuable given the fact that, given the complex and politically sensitive nature of cases like those concerning the massacres and enforced disappearances committed during the internal armed conflict, prosecutors may sometimes be tempted to simply let the case 'die out' through prolonged inactivity. However, the continuing involvement of the Inter-American system makes it difficult to let the case rest. And even when the Prosecutor's Office has put in considerable efforts to solve the case, the monitoring by the Inter-American system motivates them to keep up these efforts over time.

As one prosecutor noted when discussing her investigations in the case of the *La Rochela massacre*:

> "What is the problem with these cases? It is basically the time which has passed. We are talking about a massacre which took place in 1989, 26 years ago. […] When you look at the history of the La Rochela case, the justice system has had to face many difficulties in finding the truth. From the lack of collaboration of the [paramilitaries participating in] Justice and Peace, to the denial, many times, of requests for information… So unfortunately it is also a process which tells the story of justice in Colombia. So, the impact which the Inter-American Court has, the push that it gives, the call to attention, well its makes that in any case we continue to try to reconstruct the history through these cases and to arrive, in the end, at those most responsible, which is what interests us at this moment."[53]

The prosecutor investigating the case of the *19 Tradesmen* was even more explicit on this point. When asked whether he found the pressure exerted by the Inter-American system to continue the investigation in a case predating even that of *La Rochela* unreasonable, he replied:

53 Interview 9.

> "No, no, no. To the contrary. [The system] has sought to clarify [the case] and it has made the state assume its responsibility to investigate, which is what it is doing. I mean, this pressure […] is not really pressure. It is not pressure, but compliance with a judgment. We cannot talk of pressure […] Rather, to comply with this judgment it has obliged us to push the case forward, to continue to operate, to continue to investigate… Even more so because this crime of forced disappearance, which is considered a crime against humanity rather than a [ordinary] crime, is imprescriptible. So, the process has to continue because the crime of enforced disappearance ends [only] when we find the [victim] dead or alive and we can offer the families peace of mind and we end the uncertainty of [not knowing where their family member is, HB]. So, because of this connotation of imprescriptibility we are obliged to keep the process alive, no matter how many years pass, it has to continue."[54]

The latter part of this quote hints that the impact of the Inter-American system may be broader than only the practical impact it achieves through its prolonged monitoring of specific cases, and may also have a normative dimension. The prosecutor explains that enforced disappearance is a crime against humanity and, as the Inter-American Court has consistently found in its case law, cases of this nature and gravity do not expire, meaning that there is no temporal limitation on the state's ability to investigate and prosecute such cases.

Another prosecutor also touched on this possible normative impact of the Inter-American system. When asked for a concrete example from his personal experience as a prosecutor of a step forward in one of his investigations achieved as a result of the involvement of the Inter-American system, he responded:

> "In the [case of the] massacre of Chengue. Not in this office, in another office.[55] Because [the massacre] was declared a crime against humanity, and…
>
> Q: by the [Inter-American] Commission?
>
> A; No, by the Prosecutor's Office itself. […] But in a lot of case law of the Inter-American Court it discusses that such acts should be declared crimes against humanity. Based on these decisions of the Inter-American Court, [the facts of the case of] El Chengue […] were declared a crime against humanity.
>
> Q: And this helps to…
>
> A: That [the case] does not expire."[56]

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54 Interview 15.

55 This prosecutor only recently came to the office he is working in now. In the Colombian system, each unit of the Prosecutor's Office consists of a number of *despachos* (offices), each with one prosecutor and a (small) team of analysts. Cases are assigned to a *despacho*, rather than to an individual prosecutor, and prosecutors sometimes move between *despachos*. In other words, the respondent is talking about a case he investigated when he was still in another office, not a case investigated by another prosecutor.

56 Interview 12. The decision, described here by the respondent, to declare the massacre of Chengue a crime against humanity was taken in March 2011. *See* 'Masacre de Chengue declarado delito de lesa humanidad', *El Tiempo*, 15 March 2011.

As this quote illustrates, the decisions of the Inter-American system have clarified that the massacres committed during the internal armed conflict can be qualified as crimes against humanity and, in some cases, have been the reason for prosecutors to declare them crimes against humanity. The result of such a declaration is, according to these prosecutors, that the cases do not expire.

Together, the two forms of impact described here can lead to a situation in which the state is perpetually pressured by the Inter-American system to continue to investigate certain cases, without the possibility that these cases will at some point expire. This means that the state is forced to continue to spend resources on the investigation of these cases, even though some may simply never be solved. As some respondents have noted, this would seem to be at odds with the Inter-American Court's own insistence that the obligation to investigate and prosecute is and obligation of means, not of results. This criticism has been directed especially at the Court's orders to locate the remains of victims of enforced disappearance through the investigations and deliver these to their families. In some cases, this has proved to be simply impossible. As one respondent described the state's predicament with regard to this issue:

> "We have our first case before the [Inter-American] Court, which is *Caballero Delgado and Santana* [v. Colombia]. This is a case of enforced disappearance and the case has remained open under supervision of compliance – in fact, of the 193 cases the Court [has delivered judgments on], 163 remain open because of compliance. One of these is, obviously, *Caballero Delgado and Santana*. What is the problem? That we have not been able to find the remains of these two disappeared persons. So the Court… This is part of the obligation to investigate, so the Court says: you have to find the remains, You have to find the remains. As long as you do not find the remains, I cannot close the case. For Colombia this implies something politically complicated, which is that an international judgment remains open. So what does Colombia do? It dedicates a lot of resources to undertaking exhumations to find these two bodies. So, what happens? There is only one living witness who has said a thousand different things about where the remains are […] and the state has spent millions [of Colombian pesos]… Every exhumation, each process of exhumation costs millions upon millions [of Colombian pesos], and on top of that, this is in a very difficult region, a very humid region, with a complicated security situation. So the state has done… I don't know how many, but at least 10 or 11 exhumations… all failed. And the Court continues to say: "find the remains". So what happens? This obligation, which was an obligation of means, changes into one of result, and I am spending a lot of resources which could also be invested in other exhumations, which would not fail, finding other remains of other persons, of other victims of the conflict."[57]

57 Interview 1. These criticisms were shared by other respondents. *See* Interview 3 and Interview 7.

Two of the prosecutors I interviewed gave concrete examples from their own experience of having to continue the search for the remains of disappeared persons, when it was clear to them that this search would not lead to any results. For example, the prosecutor investigating the massacre of Las Palmeras describes his search for the remains of one of the victims identified by the Inter-American Court, "alias Moíses", in the following way:

> "The only thing which remains unresolved is that up until now it has not been possible to identify "alias Moíses".
>
> Q: he is one of the victims?
>
> A: he is one of the people who have died [in the massacre] and it has not been possible to find him, which is what the supervision the Inter-American Court is doing. But identifying "alias Moíses" has not been possible.
>
> Q: And do you believe that, if it is impossible to identify this person, that it makes sense to continue with the process?
>
> A: It is futile. […] The state at least has been diligent on this point. I have undertaken various procedures, various exhumations, previous prosecutors have also done exhumations… It is difficult to get the people who were involved to say what happened. […] I have interviewed the people most involved in the case at the time, the families of the other victims who were identified […]. They say [..] that they never knew the person. […] I mean to say that they buried him but never identified him, they never knew who he was.
>
> Q: But has the body been found?
>
> A: It has not been possible to find him […] and after the 15 years it is going to be quite impossible […]
>
> Q: So the Inter-American Court is requiring the state to continue with a process which will never lead to a result?
>
> A: Of course it will not lead to results. Unless someone stands up today and says with certainty: "he was my brother". But where is the body? It has been impossible to find the body […] And several exhumations have been done.
>
> Q; So the requirements of the Court at this point are senseless?
>
> A: Unfortunately, I don't see the point in continuing [the search, HB]."[58]

The prosecutor investigating the disappearance of the 19 Tradesmen described something similar with regard to this case, where the Prosecutor's Office still continues the search for the remains of victims disappeared in the late 1980s. This prosecutor described the ongoing search for the remains of the victims as follows:

> "So, what does the Prosecutor's Office have to do? Another of the demands made by the Inter-American Court is trying to find the 19 disappeared tradesmen. So throughout all this time activities have been undertaken in search of the remains of the disappeared, which has been a very expensive process, and this work has been done throughout the whole Magdalena Medio [region], in the

58 Interview 11.

> Magdalena river, in the riverbeds, in spite of the fact that one of the surviving family members has said: "you will never find these people". Because when they were taken, they were dismembered and they were dumped in a place called the '*Paso del Mango*' in the Magdalena river, […] which it is the torrential part of the river, the strongest, with the strongest current. […] But since the Court includes this obligation to determine the whereabouts of the victims in all its decisions, the investigation of the 19 Tradesmen has gone along this route. The [victims' representatives] have even proposed, I mean, to drain the river! But this cannot be done because it would cause pollution to the environment. […] [A]nd when you look at the report from the judicial police on the activities they have undertaken […] in search of the disappeared, I mean, they have done exploration of lands, they have done excavations, they have gone through the whole region, interviews have been done with over 300 inhabitants… […] And the pressure [we experience] is that when the Inter-American Court does its supervision of compliance, we hand over the information of what has been done. That [the victims' representatives] do not like what we have done, well, that is out of our hands."[59]

Thus, according to these respondents, there have been cases in which the continued supervision of the Inter-American Court has forced the state to spend precious resources on investigations which did not, and will not, lead to results. This is especially true in some cases of enforced disappearance, where the Court has insisted that the State find the remains of victims who have been missing for decades.[60] A task which, according to these respondents, has proven absolutely impossible, despite the state's best efforts. On the one hand, the fact that prosecutors have seen themselves forced to continue investigations that they do not think will lead to results shows that the direct interventions of the organs of the Inter-American system do make an undeniable contribution to the prioritization of certain investigations over others. On the other hand, it also indicates that this contribution does not always lead to the most efficient use of state resources towards the investigation of serious human rights violations committed during the internal armed conflict.

However, the questionable effects of the Court's long-term supervision of investigations described here have been limited to individual cases of a particular type. Specifically, they seem limited to cases where the Court has insisted on finding the remains of people disappeared in particular regions of Colombia. Overall, the prosecutors were more positive in their assessment of the IACtHR's long-term monitoring of their investigations. Even the prosecutor in the case of the 19 Tradesmen, as convinced as he was that the remains of the tradesmen would never be found despite the state's sin-

59 Interview 15.

60 *See* A. Huneeus, 'Pushing states to prosecute atrocity: The Inter-American Court and positive complementarity', in: H. Klug and S. Engle Merry (eds.), *The new legal realism – studying law globally* (Cambridge University Press, 2016), pp. 234-235.

cere efforts, was unwilling to qualify the involvement of the Inter-American system as negative or unfair. Rather, he said, the Court had simply "sought to clarify" the case and had "made the state assume its responsibility" to investigate.[61]

Moreover, one prosecutor explained that in other types of cases, the supervision by the Inter-American system is still very necessary to ensure that there is any investigation to speak of. Here, the prosecutor was referring to the many cases in which the long-running investigations were not progressing as a result of a lack of institutional will to resolve the case. In his words:

> "[T]he investigation has to be exhaustive. If the investigation has been exhaustive, we can decide. Show the Inter-American system that we have done everything possible and take the decision to close the case. […]
>
> Look, there are investigations […] into deaths which, at the time, were not investigated with due diligence and which were diverted. So, today, *today*, with a minute work by prosecutors, accompanied by contextual analysts, by the judicial police, it has been possible to examine and to dig up certain pieces of evidence which no one saw 25 years ago, because there was no concern [about the case, HB] and they were not interested in investigating. Another example: the massacre of El Chengue, which was one of the worst, and also that of El Salado, because it was in the same region. There is still a lot to be investigated. Why? Because we have contented ourselves with punishing the paramilitaries, because they *talked*. You know that they talked, they confessed, so: [they were] convicted. But those who *financed* the paramilitaries, those who neglected their duties, like the Marines, they have not been touched yet! So you cannot say: this is an investigation which has been going for 20 years, let's close it, there is nothing left [to do], let's not further exhaust the [judicial system, HB]. But if you really get into the investigation, you will find elements which will allow you to reopen the investigation and to bring some people [to justice, HB]."[62]

3 Collusion, context and the obligation to conduct an exhaustive investigation

An important feature of the IACtHR's case law has been its constant practice of describing in detail not only the particular facts of the case at hand, but also the historical and political context in which these facts took place and the way in which the facts fit within that larger context. This feature has

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61 Interview 15. After the respondent had described, in detail, the Court's insistence that the State find the remains of the victims, despite the State's sincere but failed efforts to do so, he was asked if he therefore considers the Court's demands in this respect to be "unreasonable" and to unnecessarily complicate the investigations. To this question, the prosecutor responded, emphatically, that he did not. At most, the prosecutor seems to consider the demands made by the victims' representatives during the supervision of compliance hearings to be unreasonable.

62 Interview 12.

been present in the Court's jurisprudence since its very first judgment in the case of *Velásquez Rodríguez v. Honduras*,[63] albeit in embryonic form, and has only become more pronounced as the years went by and the Court's body of case law grew. It specifically recognized this practice in the case of the *La Rochela massacre v. Colombia*, saying:

> "The Court deems it relevant to point out that in all cases submitted to this body, it has required that the context be taken into consideration because the political and historical context is a determinant in element in the establishment of the legal consequences in a case. Such consequences include the nature of the violations of the Convention and the corresponding reparations. For this reason, the analysis of the events that occurred on January 18, 1989, which the State recognized, cannot be considered separately from the context in which they took place. Likewise, their legal consequences cannot be established in a vacuum, which is what would result from their decontextualization."[64]

The Court's practice of analyzing the historical and political context of human rights violations is certainly not specific to its case law against Colombia, but the country's long history of complex and systematic crime and, especially, the presence of the paramilitaries and their links to the state apparatus, give the practice a particular relevance. In cases concerning the paramilitary phenomenon, the Court's analysis of context focused largely on the issue of *connivencia* (collusion) between paramilitary groups and state agents.

That this aspect would receive special attention is logical for two reasons. Firstly, from the point of view of the IACtHR itself, the paramilitary cases concerned human rights violations committed by illegal armed groups, rather than state agents. Therefore, the responsibility of the state for these violations rests on its close ties to these armed groups and its indirect contributions to the commission of their crimes. Secondly, from the point of view of the parties appearing before the Court, the issue of *connivencia* was one of extreme political sensitivity within Colombia. This section will address the various ways in which the Inter-American system and its practice of analysis of context have impacted domestic investigations relating to the internal armed conflict and the complex criminal organizations active in it. That impact starts with exposing the existence of ties between the state and the paramilitaries, since the official denial of such ties will have a chilling effect on possible criminal investigations into the matter.

63 IACHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, paras. 147-148.
64 IACHR *La Rochela massacre v. Colombia (merits, reperations and costs)*, 11 May 2007, para. 70.

3.1 Exposing links between the state and paramilitary organizations

The first instance of the Inter-American system contributing to the public debate about the *connivencia* between state forces and armed groups came in the case of the *Trujillo massacres*, a series of killings perpetrated by paramilitaries and state agents in the municipality of Trujillo in the late 1980s and early 1990s.[65] Because of the scale and gruesomeness of the killings, which included the beheading and dismembering of the local priest, the case gained notoriety on a national level.[66] Many NGOs considered the case representative of the nature of organized crime and the state's relation to it. However, the criminal investigations into the case initiated by the state resulted in nothing but the acquittal of all those indicted for the killings, despite the detailed testimony of a paramilitary informant and collaborator, who had turned himself in to the authorities voluntarily. The state was unwilling to recognize the role of its own agents in the violence committed in Trujillo.

Frustrated with the authorities' attitude towards the case, human rights NGOs decided to "try a relatively new tactic" and take the case to

65 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), pp. 56 - 59. *See also* Centro Nacional para la Memória Histórica *Trujillo – una tragedia que no cesa* (Bogotá, 2008). According to this study by the Colombian Center for Historical Memory, the paramilitary organization responsible for the Trujillo massacres is somewhat atypical of the paramilitary phenomenon in Colombia in the late 1980s and the 1990s. This group had grown out of the Norte del Valle cartel and its goals were therefore primarily focused on drug trafficking, rather than anti-guerrilla warfare. That latter aspect of its operations only emerged because the ELN guerrilla movement, which also had an important presence in the municipality of Trujillo, became a competitor to its criminal business. It was in this context that the group linked up with elements of the State forces in order to eliminate the ELN's presence, and thereby morphed into a paramilitary group. The paramilitary group responsible for the Trujillo massacres also never became part of the AUC, even though it tried (but failed) to join that organization during the demobilization process in order to access the benefits granted by the Justice and Peace Law. For all these reasons, the Center for Historical Memory therefore insists that the paramilitary organization responsible for the Trujillo massacres was a "regional and temporary" alliance between the State and organized crime, separate from the AUC and the paramilitary groups making up the 'second generation' of the paramilitary phenomenon in Colombia. Centro Nacional para la Memória Histórica, *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp. 154-155.

66 There is no consensus as to the number of victims killed in the Trujillo massacres. According to the National Center for Historical Memory's report on the massacres, the State only recognizes 37 victims who were killed during an explosion of violence in March and April 1990, which was the subject of the investigation by the Trujillo Commission which will be described below. Victims' organizations, on the other hand, argue that this is but one episode in a situation of violence which existed in the municipality between 1986 and 1994 and which cost the lives of 245 people. Centro Nacional para la Memória Histórica, *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp.31 – 32. In an interview I had with the prosecutor who was leading the criminal investigation into the massacres at the time of the interview, he mentioned a number of 200 victims. Interview 10, prosecutor at the human rights division of the *Fiscalía General de la Nación*, Bogotá, 27 October 2015.

the Inter-American Commission in March 1992.[67] Based on the evidence presented by the NGOs bringing the case, "the [IACmHR] was prepared to rule against the government", but the government, hoping to escape the embarrassment of being called out by the Commission, proposed a friendly settlement agreement and the installation of an investigative committee for the events surrounding the Trujillo massacres. In an interview in 2002, one of the NGO representatives present at the IACmHR hearing described how he was initially disinclined to accept this proposal, but was convinced by one of the Commissioners to reconsider:

> "I said, first of all this has no legal value, so this is going to set us back four years, to the very start, so that the justice system has to start from zero and so these are four years lost, or four years of impunity won. So the chairperson ordered a lunch break. I left for lunch very confused […] Before leaving one of the Commissioners, a Chilean, came up to me and told me: "Look, you are completely right about everything you said, but I will give you some advice: don't reject this proposal so radically, from what I know this is the first time in the history of the Inter-American Commission that this type of a proposal is made. Although you are right that this will not lead anywhere, at least it will serve to give you a space for a national discussion which you will not have in any other way." And during lunch I decided to accept."[68]

The proceedings before the Commission resulted in a memorandum of understanding between the state and the NGOs involved in the case to set up a special investigative committee, consisting of both state *and* civil society representatives, which would take three months, between October 1994 and January 1995, to investigate the occurrences in Trujillo and produce a report.[69] As Winifred Tate explains, the main task of this investigative commission was not actually to *investigate* the events surrounding the mas-

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67 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 60. As the National Center for Historical Memory explains, during the first decades of its operation, the IACmHR focused its attention on the dictatorships of the Latin American continent and considered Colombia to be a beacon of democracy. This attitude started changing in the 1980s and 1990s, when the Commission made its first country visits to Colombia. The Trujillo case was one of the very first individual cases to be brought before the IACmHR by Colombian NGOs. Centro Nacional para la Memória Histórica, *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp. 281 - 285.

68 Interview with Javier Giraldo, from D. Marrero Avedaño, 'La responsabilidad moral como instrumento de impunidad (2006) *Revista Universitas* 111, p. 270, as cited in: Centro Nacional para la Memória Histórica *Trujillo – una tragedia que no cesa* (Bogotá, 2008), pp. 285 – 286.

69 IACmHR, 'Acuerdo de solución amistosa escrito en el caso 11.007 Masacre de Trujillo, tramitado ante la Comisión Interamericana de Derechos Humanos', 6 april 2016, pp. 1-2, available at http://www.eltiempo.com/contenido/politica/justicia/ARCHIVO/ARCHIVO-16556533-0.pdf, last checked: -5-09-2016. *See also* W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 60.

sacres, which had already been done extensively by various NGOs and state institutions before the case was brought to the IACmHR in the first place. Rather, it was to:

> "produce a consensus interpretation of what had happened in Trujillo. […] The commission became an environment where what was known could be spoken and debated; the main issue was not whether the State was responsible but to what extent that State responsibility could be publically reported."[70]

The report produced by the Trujillo commission, which thus represented a consensus between the state and civil society organizations, was groundbreaking in that it unequivocally recognized the responsibility of the state for and the direct participation of state agents in the massacres perpetrated by paramilitary groups in Trujillo.[71] The prosecutor responsible for the domestic investigations into the Trujillo massacre summarized the report's findings with regard to the links between state agents and organized crime in the following way:

> "[Reading from the Trujillo Commission's report:] "the commission has sufficient evidence to conclude that the Colombian state is responsible for the actions and omissions of public servants in the occurrence of the violent events in Trujillo." This is an irrefutable truth, because what can we establish through the investigations? That in effect members of the national army, in collusion or working together with private persons and drug-traffickers who financed their activities, created a paramilitary group, and that they were the ones who in this town of Trujillo and its jurisdiction assassinated whichever person did not serve their interests. All this under the complicit watch of a high-ranking commander who was [based] in a corregimiento called Andinápolis […]"[72]

The commission's conclusions were adopted by the IACmHR at its 88th session in early 1995 and formed the basis for a friendly settlement agreement between the state and the victims of the massacres. Furthermore, the commission's report moved then-President Ernesto Samper to officially recognize the state's responsibility for the massacres.[73] The importance of

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70 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 296.

71 IACmHR, 'Acuerdo de solución amistosa escrito en el caso 11.007 Masacre de Trujillo, tramitado ante la Comisión Interamericana de Derechos Humanos', 6 april 2016, pp. 2 - 3, available at http://www.eltiempo.com/contenido/politica/justicia/ARCHIVO/ARCHIVO-16556533-0.pdf, last checked: -5-09-2016.

72 Interview 10.

73 The 'regional and temporary' character of the paramilitary organization involved in the Trujillo massacres, significantly reduces the reputational costs of the State's acceptance of responsibility. It could effectively accept its responsibility in this case without thereby admitting its complicity in the AUC and the entirety of the 'second generation' paramilitary phenomenon. This situation may help explain the State's willingness to accept responsibility in the Trujillo case.

the work of the Trujillo commission, supported from the beginning by the IACmHR, is underscored by these words of the prosecutor in charge of the still on-going criminal investigations into the events:

> "[I]f it hadn't been for the commission, perhaps this case would not have had the impulse it had, especially when the state recognized that there had been human rights violations in which state agents intervened. I mean, the intervention of the commission was essential.
>
> […]
>
> All of this is to conclude […] that these situations [of violence in Trujillo] were very evident and that, in effect, it was with the intervention by the [Inter-American system] and the victims' representatives that this could become publically known. If not, I repeat, I *insist*, that this would have remained within the municipality of Trujillo […] and it wouldn't have come out."[74]

While the Trujillo commission thus prompted the state to accept its responsibility in one particular, emblematic case of large-scale violence, this did not mean that it was ready to recognize the full extent of relations between paramilitary groups and state institutions. Therefore, the efforts of human rights groups and victims' organizations to bring these relations to the public's attention continued. Given the positive experience these groups had in working with the Inter-American system in the Trujillo case they started bringing more cases before the IACmHR. This resulted in a string of cases concerning massacres committed by the paramilitaries reaching the Inter-American Court, as described in the previous chapter, starting with the case of the *19 Tradesmen v. Colombia* in July 2004.

With the case of the *19 Tradesmen*, the Inter-American Court gave its first contextual analysis of the paramilitary phenomenon in Colombia, specifically the Magdalena Medio region. Like the Trujillo commission, the Court discussed the direct relations existing between the particular paramilitary group responsible for the disappearance of the 19 tradesmen and the state security forces present in the region where it operated.[75] Moreover, it also discussed the state's role in setting up the paramilitary groups in the 1960s and the broad support given to these groups through legislation and regulations which were still in place at the time the facts of the case took place.[76]

This emphasis on the broader, more institutional ties between the state and the paramilitaries was an important contribution to the domestic debate. As one respondent from a leading human rights think-tank described the impact of the *19 Tradesmen* judgment:

> "[The IACtHR has also had] indirect symbolic [effects], for example, the percep-

74 Interview 10.

75 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 86(a) – 86(c).

76 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 84(a) – 84(h).

> tion of certain problems. For example, I believe that a very important indirect symbolic [effect], at the time […] was the fact that paramilitarism was categorized as a shared undertaking with the armed forces and coordinated by the state. This had a very important indirect symbolic impact. After the judgment of the 19 Tradesmen, […] this partially changed the social perception [of the issue of paramilitarism]… No one before had said this!"[77]

This affirmation that "no one had said" what the IACtHR had said should not be taken literally. If one reviews the judgment it becomes clear that the Court bases its findings and decisions in large part on materials which were already available at the domestic level through the investigations of the Prosecutor's Office and NGOs.[78] In fact, in its commentary to the judgment *El Tiempo* described the paramilitary groups involved in the massacre of the 19 tradesmen as the "protohistory" of the paramilitary phenomenon and said that "[i]t is a secret for no one that they emerged as the helpers of the Armed Forces in the fight against the guerrilla".[79]

However, as Winifred Tate explains, in a country like Colombia there is often a big difference between what is "known" and what can be discussed publically, and safely. Like the Trujillo commission, the contribution of the IACtHR is not so much about uncovering new facts, which it is not well placed to do, but in making certain interpretations of events acceptable. This contribution was strengthened with each new judgment recognizing *connivencia* between paramilitaries and state forces delivered by the Inter-American Court, each one chipping away at the state's narrative that its position was one of weakness in the face of, rather than collaboration with, the paramilitary groups.

3.2 Expanding the scope of domestic investigations

The IACtHR's emphasis on the context in which the paramilitaries committed their crimes and, especially, the issue of *connivencia*, did not only have an important narrative impact, it has also contributed more practically to the way in which domestic judicial institutions conduct their investigations into these types of cases. For the Court's own decisions, the recognition of the collaboration between paramilitaries and state forces had been essential for establishing state responsibility for the crimes committed by the paramilitaries. Likewise, the Court considered that, on the domestic level, the

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77 Interview 7. Similarly, another respondent stated that the issue of connivencia had not been a very visible theme before the 19 Tradesmen judgment, but that "it became very visible with the 19 Tradesmen". *See* Interview 1.

78 As Viviana Krsticevic, who had been involved in the case before the IACtHR as a representative of the victims, wrote in El Tiempo about the judgment: "The Court based its decision on the abundant testimonial, expert and documental evidence, among which, the 60.000 pages of domestic criminal investigation." Viviana Krsticevic, 'El caso the los 19 Comerciantes' (opinion article), *El Tiempo*, 3 September 2004.

79 *El Tiempo*, 'Una condena histórica', 25 July 2004.

recognition of this phenomenon should lead to a widening of the criminal responsibility for these crimes. Not only should the members of paramilitary groups be held accountable, members of the Armed Forces, including high-ranking officers, should equally be held accountable for their collaboration with these groups and their contributions to these crimes.

The necessity for domestic prosecutors to expand the scope of their investigations and include state agents as accomplices has been addressed by the IACtHR in several cases, but it was perhaps most clearly stated in the case of the *La Rochela massacre v. Colombia*. This case is the sister-case of the *19 Tradesmen*, in that it concerns the 1989 massacre of a group of judicial officers and investigators sent to the Magdalena Medio region to investigate the disappearance of the 19 tradesmen. While domestic investigation into the massacre had been initiated and some convictions had been rendered, including the conviction of one low-ranking military official, the IACtHR still found that the state had not complied with its obligation to investigate and prosecute, due in part to the fact that the scope of the investigations had been too narrow. In the words of the Court:

> "In context of the facts of the present case, the principles of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred. In addition, the proceedings should have ensured that there were no omissions in gathering evidence or in the development of logical lines of investigation. Thus, the judicial authorities should have borne in mind the factors indicated in the preceding paragraph that denote a complex structure of individuals involved in the planning and execution of the crime, which entailed the direct participation of many individuals and the support or collaboration of others, including State agents. This organizational structure existed before the crime and persisted after it had been perpetrated, because the individuals who belong to it share common goals."[80]

With specific regard to the circle of suspects which had been considered in the domestic investigations, the Court noted:

> "[T]hat the judicial authorities did not develop an investigation into the combination of probative elements that pointed to security forces, including senior military leaders. As a result, the investigations have been partially ineffective. In addition, there was a lack of diligence with regard to the development of a line of investigation, which took into account the complex structure of the perpetration of the crime […]. This failure has caused some of the investigations into the Rochela Massacre to be ineffective, particularly with regard to the investigation into the responsibility of senior military commanders in the area. In this regard, the absence of an exhaustive investigation into the operational structure of the paramilitary groups and their linkages and relationships with State agents,

80 IACHR *La Rochela massacre v. Colombia (merits, reperations and costs)*, 11 May 2007, para. 158.

> including members of the security forces, has been one of the factors that has hindered the investigation, prosecution and punishment of all those responsible. In particular, this affected the determination of possible responsibility of the commanders of the military battalions located within the area of operations of the paramilitary groups tied to the massacre."[81]

These considerations from the La Rochela judgment were reaffirmed and expanded upon in the Court's judgment in the case of *Manuel Cepeda Vargas v. Colombia*, where it said:

> In complex cases, the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. In other words, the protection of human rights should be one of the central purposes that determine how the State acts in any type of investigation. […]
>
> […] It is not sufficient to be aware of the scene and material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries). This, in turn, can lead to the generation of theories and lines of investigation, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime, since they may not be sufficient. Hence, it is not a question of examining the crime in isolation, but rather of inserting it in a context that will provide the necessary elements to understand its operational structure.[82]

Findings such as these, combined with orders to the state to investigate and identify all those responsible for the serious crimes committed by paramilitary groups, have pushed domestic prosecutors to effectively broaden their investigations. Of the 8 prosecutors I interviewed at the Human Rights Division of the National Prosecutor's Office in Bogotá, 6 stated that the Court's case law had affected their investigations in this respect.[83] For example, the prosecutor in charge of the investigations in the *Manuel Cepeda Vargas* case said:

> "When the judgments against Colombia came, like [the Mapiripán massacre], 19 Tradesmen […] and those cases, the Court gave the order to investigate, and since these judgments are against the State, one has to comply with them. So they necessarily pushed, at least to follow this line of investigation. That the

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81 IACHR *La Rochela massacre v. Colombia (merits, reperations and costs)*, 11 May 2007, para. 164.

82 IACHR, *Manuel Cepeda Vargas v. Colombia (preliminary objections, merits, reparations and costs)*, 26 May 2010, paras. 118-119.

83 Interviews 8, 9, 10, 12, 14 and 15.

> abuses were shown, and if there was responsibility, which is another matter, but it is necessary to direct the investigation towards what the Court indicates. In the case of Manuel Cepeda, here [the IACtHR] talks about having to investigate the other members of the Colombian State forces who had participated in the facts by action or omission. So, one necessarily has to take this on and follow this direction and continue the investigation as far as possible."[84]

Likewise, the prosecutor investigating the Mapiripán massacre stated:

> "The thing is that we have to look at both the material and the intellectual authors, or the authors "behind" the crimes. In the Mapiripán case, it is said that there were more than 80 persons entered the town. So we have to establish the identity of these 80 persons and link them to the investigation. And continue the process with them."[85]

As this latter statement illustrates, the demands of the Inter-American Court as to the circle of people who should be included in the investigation are high, thus complicating the work of the prosecutors considerably. However, this is not necessarily considered a bad thing. One prosecutor explicitly stated that the Court had "complicated the work of prosecutors work for the better" by forcing them to look at themes which had thus far remained outside of the investigations, specifically the inclusion of intellectual authors and the involvement of high military officials.[86] Moreover, another prosecutor pointed out that, by alerting them to certain categories of possible suspects who are still to be investigated, the Court can even help prosecutors in their work. In his words:

> ""[T[hese cases which have been brought before the Inter-American Court, and which have been the object of a judgment… which tells us: "Look, the state has been condemned for this and this. A lot is still to be investigated." Because on top of that, they give guidelines for the investigation. "You have to investigate all of this, the army remains to be investigated, the marine, the police." It gives an orientation which one can follow. As I said, it is not easy. […]
>
> Q: But it gives you an orientation. In this case, these things remain to be done…
>
> A: Yes, of course. To plan the police investigations and direct this plan towards these suggestions that the Inter-American Court is making.
>
> Q: Interesting… So, in this sense, it is a support for the work of the prosecutor?
>
> A: A formidable help."[87]

In the same vein, this prosecutor pointed out that the IACtHR does not only make demands of the prosecutors with regard to investigating contexts

84 Interview 14.
85 Interview 15.
86 Interview 8.
87 Interview 12.

and identifying suspects, but that its case law also provides an example for prosecutors of how to go about such matters. In this context, he stated:

> "[O]f course, the decisions of the Inter-American Court serve as a road map for us, because they in some way also construct a context when they make their decisions. Because they collect all this evidence that comes to the Inter-American Commission, which in its turn collects evidence from the victims, the persons who litigate before the Commission, and they construct a context and they know how to hold the state responsible, for example, for omission. If I do not have a context, how can I sentence the state for omission? So, it's important. […] For me [the Court's decisions] are vital."[88]

Another prosecutor also stressed this point, saying:

> "I believe that, for example, when one examines the history of Colombia in cycles, it is possible to find phenomena which repeat themselves. In this sense, the judgments of the Inter-American Court are important because they illustrate a particular moment and, even though they refer to facts which occurred in a particular place, one can, by reading the judgments, find that these same facts, the same *modus operandi*, also occurred in other regions around the same time. With some particularities, of course, but [the judgments] indicate that there is a common *modus operandi*, that there are common elements of victimization, that there is a particular persecution of [certain] populations, for example, and that they were done in the same way, on the basis of the same strategies. So, if one would have the time to examine the judgments one would discover that there are many recurrences and this would illustrate to some extent the routes of investigation which we as prosecutors have."[89]

Another way in which the Inter-American Court's judgments on *connivencia* and the analysis of context have helped prosecutors, is that they can be a support for prosecutors investigating links between state agents and criminal groups when they face backlash or a lack of cooperation from other state entities, particularly the military. One prosecutor repeatedly mentioned the political sensitivity of such investigations and said that, while the situation has improved somewhat over the last years, there were times when conducting such investigations would have been impossible, had it not been for the orders of the Inter-American Court, because it would have been "unsafe" for the prosecutors.[90] Apparently, the fact that the Inter-American Court explicitly orders the investigation of links between the state and paramilitary groups may, under certain circumstances, allow prosecutors to explore lines of investigation which would otherwise be too sensitive to consider. Another prosecutor, referring particularly to her investigations in the case of *Manuel Cepeda Vargas*, also touched on this point, saying:

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88 Interview 12.
89 Interview 9.
90 Interview 8.

> "This was indeed a very important [analysis of] context that the Court did, because here they generalize, they generalize the entire country, analyze [domestic] judgments, […] analyze the state […], the situation in the country… How the state security forces are [organized], how the entire persecution [of UP members] functioned and some links which existed between members of state forces and illegal groups, and they also named them […]
>
> Q: And this was important for the way…
>
> A: Yes, of course, because it [became] easier to tell them: look, not only the Prosecutor's Office is saying this, but also at the international level, in the [Inter-American] Court it is […] proven that there were… That in some circumstances there existed links between the state and some illegal groups."[91]

Finally, one prosecutor argued that the 'lessons' prosecutors learn from the case law of the IACtHR may also have effects in cases which do not have direct ties to the Inter-American system. As she expressed it:

> "So, in this sense, it can be that they instruct one as to routes of investigation which at times one does not see quite clearly [for oneself]. Of course, it is not as if one consults them every day, firstly because there is no time, and secondly because the day-to-day priorities of an office oblige one [to spend a lot of time on administrative tasks]. But apart from this, materials for study do arise [from IACtHR sentences] which supplement the training of the prosecutor. And because of this, the experience which has accumulated with the prosecutors which we have at the moment [at the human rights division] cannot be missed, it is an enormous experience in assuming and confronting these highly complicated cases. And the judgments of the Inter-American Court have contributed to this training. When one has to face a judgment in this way, in one's process and one's investigation, one has to make clear where one can find routes [of investigation], where one can find elements which may lead to those most responsible, and one has to try to comply as best as possible with the orders from these sentences. This entails, I believe, an important process of growth for each prosecutor. In this sense I believe, and of course there may be other opinions, but for me, what occurs to me at this moment is that these judgments are important in that they show also what we can do in other cases."

In short, as these interviews with prosecutors of human rights cases show, the IACtHR's case law on *connivencia* and analysis of context has pushed them to widen the scope of their investigations and the circle of possible suspects for their consideration both because of the Court's insistence that all those involved in the crimes of paramilitary groups be prosecuted and because its own case law sets an example that can serve as inspiration for prosecutors struggling to find the right way to go about such investigations. And while this effect is naturally most keenly felt in cases which have actually been the subject of proceedings before the Court, it has the potential to affect a wider range of cases.

91 Interview 14.

3.3 Developing the practice of analysis of context at the Justice and Peace tribunals

Like the prosecutors in the ordinary criminal justice system, the Justice and Peace tribunals also saw themselves confronted with challenges in the process of doing justice in cases of large-scale and systematic human rights violations. In fact, these tribunals, responsible for the adjudication of demobilized paramilitaries under the Justice and Peace Law described in the previous chapter, deal exclusively with systematic human rights violations practiced by complex criminal structures. And while the Justice and Peace tribunals are, in principle, limited to applying the Justice and Peace law, this did not stop them from looking to the case law of the Inter-American Court for inspiration on how to deal with those challenges.

One of the respondents, a judge at the Justice and Peace tribunals, described how the case law of the IACtHR has helped her and her colleagues to understand their work in terms of contributing to historical memory and, in particular, constructing the context in which the crimes they were dealing with were committed.[92] She described how the first judgment rendered by the Justice and Peace tribunals, in March 2009, had been a disappointment from the point-of-view of truth-finding, as it dealt mostly with low-level crimes like fraud, committed by a paramilitary foot soldier ("*patrullero*") nicknamed "El Loro". The facts of the case did include one emblematic murder, committed against a politician running for mayor of a community under the control of the paramilitaries, but the investigation and the resulting judgment dealt with this murder in an isolated manner, without connecting it to a larger paramilitary structure.[93] The judge explains the outcome of this judgment with reference to the fact that, before coming to the Justice and Peace tribunal, both the prosecutors and the judges had gained their professional experience in the ordinary criminal justice system,

92 Interview 5. The respondent identified this as one of the three main areas in which the IACtHR, in her experience, had influenced the work of the Justice and Peace tribunals. The other two areas she mentioned were the reparations ordered by the tribunals and the supervision of compliance of their judgments. However, since these two areas fall outside the scope of this investigation, they will not be further discussed here.

93 As domestic observers have noted, the isolated treatment of this crime was caused in part by a prior decision of the Supreme Court, which allowed the prosecutor's office to file 'partial indictments', containing only part of the facts with which the accused was to be indicted before the Justice and Peace tribunal. As a result, the procedure before the tribunal would be divided into several parts, each dealing with part of the facts, rather than dealing with all the facts of the case integrally. CCJ, 'La justicia se acerca a las víctimas: la Corte Suprema de Justicia anuló la primera sentencia de la Ley 975 en el caso del paramilitar alias "El Loro"', *boletín no. 38: serie sobre los derechos de las víctimas y la aplicación de la Ley 975*, Bogotá, 16 September 2008, available at http://www.coljuristas.org/documentos/boletines/bol_n38_975.pdf, last checked: 22 September 2016.

where it had been customary, until recently, to focus only on the concrete facts of each case and the material author of those facts.[94]

The judgment was not only ill-received by victims and civil society groups, but also by the Supreme Court, which annulled the judgment and the preceding procedure in July 2009. The main ground for this annulment was the tribunal's failure to address the context in which the individual acts discussed in the judgment were committed and thereby, according to the Supreme Court, its failure to address the crime underlying Law 975: conspiracy to commit crimes. In the words of the Supreme Court:

> "In the legal framework created by Law 975 of 2005, the criminal activities subject to attribution relate to phenomena typical to organized crime, the execution and commission of which is intensified in the context of the internal organization of each group or front. Seen from this angle, the construction of historical truth should take as a starting point the clarification the motives for which the illegal organization was formed, the chains of command, the group's *modus operandi*, its power-structure, the orders given, the criminal plans it elaborated, the criminal actions perpetrated by its members towards the systematic achievement of its goals, the reasons for victimization and the verification of the damages caused individually and collectively, so as to establish both the responsibility of the illegal armed group and that of the demobilized individual.
>
> […]
>
> From the above it is clear that the objectives of the criminal policy established in the Justice and Peace Law are geared towards massive and systematic violations of human rights, the prosecution and sentencing of which are focused on the link to an illegal armed group (conspiracy to commit crimes) and not, as has been maintained [before this Court], on individually perpetrated criminal acts, since, in that case, their investigation and prosecution would fall within the competence of the ordinary justice system.
>
> With this understanding, it is indisputable that, in contrast to ordinary criminal procedures, the judgments which are rendered under the Justice and Peace Law carry a greater argumentative burden in issues related to the examination of macro-criminal phenomena and systematic and generalized violations of human rights, also taking into account the international legal framework. As a result, the judicial officer should not only analyze the concrete case, but contextualize it within the armed conflict, identifying the patterns of violence and other actors, likely of higher rank, who are also responsible."[95]

On the basis of these considerations, the Supreme Court annulled the first instance judgment against alias 'El Loro' and ordered that, in future,

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94 Interview 5. This analysis is supported by another respondent, who was working at the Colombian office of the International Center for Transitional Justice as an analyst of the Justice and Peace system at the time the judgment against El Loro came out. The respondent said that, at first, the prosecutors and judges at the Justice and Peace tribunals approached their cases as 'normal' criminal investigations, as a result of which the first judgment dealt with only one particular case of a murder and did not clarify anything about the paramilitary phenomenon as such. *See* Interview 16.

95 Colombian Supreme Court, *proceso 31539*, judgment of 31 July 2009, pp. 5-6.

all investigations and judgments under the Justice and Peace Law should include a contextualization of the concrete facts of the case within the larger context of the armed conflict and link these facts to a paramilitary group and the accused's position within that group.[96] It then proceeded to give detailed instructions to the prosecutors and judges active in the Justice and Peace tribunals on which elements should be included in their contextualization of the facts and how to go about such contextual analysis.

In relation to these efforts of the Supreme Court to push the Justice and Peace system towards a more complete and contextualized analysis of the historical truth of the paramilitary phenomenon, the International Center for Transitional Justice has pointed out that:

> "the [Supreme Court] echoes what the Inter-American Court of Human Rights has expressed in the case of *La Rochela* in relation to the results required of the Colombian justice apparatus when it comes to the struggle against impunity. In this case, the Inter-American Court emphasized that "the satisfaction of the collective dimension of the right to truth requires the judicial determination of the most complete historical truth possible, which includes the judicial determination of patterns of collective action and of all persons who participated in various forms in said violations and their corresponding responsibility"."[97]

According to the respondent who was a judge at the Justice and Peace Tribunals, the annulment by the Supreme Court of the tribunal's first judgment came as a great shock to the system. It made it clear to the judges that they could not approach their work in the same way they had been used to approaching cases in the ordinary justice system.[98] The annulment thus prompted an important learning process for the judges, who saw themselves forced to explore more appropriate ways of confronting the type of systematic crime covered by the Justice and Peace Law and, in doing so, contributing to the uncovering of the historical truth of the armed conflict. The respondent described how, in this learning process, the judges were advised that they would never truly understand the cases they were working on unless they studied the entire context of violence in which they had taken place. They were further advised to study the judgments of the Inter-American Court dealing with the paramilitary phenomenon in Colombia as examples of how this context could be analyzed and described.[99] One concrete result of the judges' study of the Inter-American case law was the development of a set of protocols for investigating and analyzing context within the trials before the Justice and Peace tribunal.[100]

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96 Colombian Supreme Court, *proceso 31539*, judgment of 31 July 2009, pp. 11-12.

97 *El proceso penal de Justicia y Paz – compilación de autos de la Sala de Casación Penal de la Corte Suprema de Justicia*, joint publication of the International Center for Transitional Justice and the Chamber of Criminal Casation of the Colombian Supreme Court (Bogotá, 2009), p. 22.

98 Interview 5.

99 Interview 5.

100 Interview 5.

In short, the introduction of the practice of analysis of context was the result of a learning process on the part of the judges at the Justice and Peace tribunals on how to confront the paramilitary phenomenon in their case law and contribute to historical memory.[101] In this process the case law of the Inter-American Court has played an important role as an example of 'best practices'.[102] As a result of the learning process described here, analysis of context has now become a central and consistent element of the jurisprudence of the Justice and Peace tribunals. The practice has since been formalized through a 2012 amendment to the Justice and Peace Law.[103]

Just how much the Justice and Peace tribunals have embraced the analysis of context as a tool for the construction of historical memory, and just how much their use of it has been inspired by the Inter-American human rights system, is best illustrated by a recent decision of the Colombian Supreme Court. The decision was based on an appeal by the National Prosecutor's Office against a judgment delivered in October 2014 concerning the crimes committed by the Catatumbo Block of the AUC.

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101 This idea that the introduction of analysis of context by the Justice and Peace tribunal has been the result of a learning process is further supported by the tribunals' case law. One of the tribunal's judgments describes analysis of context as a "'good practice' developed by the judiciary at Justice and Peace which contributes to the construction of judicial truth in the context of the transitional process being carried out in the country". Tribunal Superior del Destrito Judicial de Bogotá – Sala de Justicia y Paz*, case no. 11-001-60-00 253-2006 810099*, judgment of 30 October 2013, para. 358.

102 The assertion that the Inter-American Court has been an important inspiration for the introduction of the practice of analysis of context is reflected in the tribunals' case law. For example, in one of the earliest judgments to include a proper analysis of context, the Justice and Peace tribunal says that: "[the Tribunal] considers that it is necessary to undertake a judicious contextualization of the violations of human rights on which it will rule below for two reasons […]. A second reason for an adequate contextualization is based on the constitutional and international obligation of the Colombian State to seek the truth of what happened in the face of grave violations of human rights. […] For these reasons, the Tribunal […] being seriously committed to the reconstruction of the truth, which is the first need of the victims and of society, and keeping in mind that according to the jurisprudence of the Inter-American Court, the judgment is the first form of reparation for the victims, presents its reconstruction of the context in which the violations of human rights took place […]." Tribunal Superior del Destrito Judicial de Bogotá – Sala de Justicia y Paz, *case no. 110016000253200782701*, judgment of 16 December 2011, paras. 175 and 185. Recent case law has been more explicit on this point. For example, in a case from 2014, the tribunal cited Inter-American case law to establish that 1.) the victims and society as a whole have a right to learn the truth of what occurred during the internal armed conflict; 2.) in certain types of cases the political and historical context is necessary to properly establish the legal consequences of the case; and 3.) the obligation to construct context and find those most responsible for systematic crimes rests on the State as a whole, which includes the judiciary. Tribunal Superior del Destrito Judicial de Medellín – Sala de Justicia y Paz, *case no. 110016000253-2006-82611*, judgment of 9 December 2014. Moreover, the Colombian Supreme Court has affirmed, in a judgment which will be further discussed below, that "[t]he analysis of context has its origins in the decisions of the Inter-American Court of Human Rights[…]".Colombian Supreme Court, *SP16258-2015, Rad. 45463*, judgment of 25 November 2015, p. 139.

103 Law 1592 of 2012, adopted on 3 December 2012.

The first-instance judgment which was the object of the appeal contains a 150-page section titled "About the context – judicial truth finding" describing the background of the Colombian civil war, the origins of the paramilitary phenomenon in general and of the AUC and its Catatumbo Block in particular, the consolidation of the Catatumbo Block, its internal structure, finances etc.[104] In this detailed analysis, the tribunal also discussed the relations between the Catatumbo Block and certain state institutions, including military intelligence and the Prosecutors Office, and business associations and the contributions of these institutions to establishing and maintaining the paramilitary group and their support to its organization.[105]

On the basis of these contributions, the tribunal found that the state institutions and business associations in question were responsible for the crimes committed by the Catatumbo Block under a theory of indirect perpetration through control of an organization.[106] As a result, the tribunal found that the National Prosecutors Office should initiate an investigation into the involvement of these partners, with an eye to establishing the criminal responsibility of individual officials for these crimes and prosecuting them in the ordinary justice system.[107] Furthermore, the tribunal ordered the state institutions identified in its judgment to undertake an internal investigation into its performance during the internal armed conflict and to make official apologies to the victims.[108]

The Prosecutor's Office objected to the conclusions the tribunal had drawn from the contextual analysis, particularly where they pertained to the criminal responsibility of institutions and individuals who were not part of the trial. It appealed the judgment before the Supreme Court, demanding that the entire section on the analysis of context would be annulled, as it was "not supported by the evidenced presented over the course of the trial and [was therefore] speculative and originated from private knowledge".[109]

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104 Tribunal Superior del Destrito Judicial de Bogotá – Sala de Justicia y Paz, *case no. 11001600253200680008 N.I. 1821*, judgment of 31 October 2014, section 4, pp. 120 – 276.

105 Idem, paras. 534 – 586.

106 Idem, paras. 544 – 575. More specifically, the tribunal argued that, allthough these institutions were not part of the paramilitary organization, they did contribute to this organization and were therefore responsible for its crimes on the basis of what it called the "hourglass theory". Under this theory, the paramilitary group (particularly its leadership) and its civilian and official partners form two parts of an hourglass, which mutually nurture and strengthen each other while working towards a common goal. According to the tribunal, the relationship between the leadership of the paramilitary group and its partners should not be conceived as a hierarchical one and the contributions of the partners was as vital to the operation of the paramilitary group as that of its commanders. As a result, the tribunal argued, the civilian and official partners of the paramilitary group can, under certain cricumstances, be considered to be among those most responsible for its crimes.

107 Idem, paras. 567 – 573.

108 Idem, paras. 574 – 575.

109 Colombian Supreme Court, *SP16258-2015, Rad. 45463*, judgment of 25 November 2015, p. 146. In its analysis of context, the tribunal had supplemented the evidence presented by the prosecutors with sociological studies and insights from previous judgments from the Justice and Peace tribunals not cited by the prosecution.

In its response to this demand, the Supreme Court discussed both the origins of the practice of analysis of context in the Inter-American human rights system and the proper role and purpose of this practice in domestic criminal proceedings. It noted that:

> "[The analysis of] context relates to a tool facilitating the right to truth, to which both the victim and society as a whole are entitled […], with an aim to bringing to light these hidden events which should be exposed to the community so that the necessary corrections may be implemented to prevent their repetition […] as well as integrating them into the historical memory as accurately as possible.
>
> The analysis of context has its origin in the decisions of the Inter-American Court of Human Rights, supported by the flexibilization of the rules on evidence in favor of the victims, offered in proceedings where (i) the State is punished rather than individuals, (ii) there is a reversal of the burden of proof and (iii) it falls on the defending state to refute the context and, thereby, its international responsibility, all of these [being] aspects which make it impossible to simply translate this test to internal criminal law, which is of an individual nature. In this sense, the Inter-American Court of Human Rights distinguishes the process for establishing State responsibility provided by that court from criminal proceedings before domestic courts […]."[110]

Thus, according to the Supreme Court, in translating the practice of analysis of context from the Inter-American system to domestic criminal proceedings, the differences between these types of proceedings have to be taken into account. Whereas an analysis of context may suffice, in the context of a case before the IACtHR, to establish state responsibility, it is not enough to establish individual responsibility in domestic proceedings, as the Justice and Peace tribunal had done. While the analysis of context is an indispensable tool in the investigation of complex and systematic criminal phenomena and in contributing to historical memory, it cannot be used as the sole basis for establishing criminal responsibility. Or, in the words of the Supreme Court, "context helps to understand, but is insufficient and inappropriate for attribution".[111]

With regard to the judgment under consideration, the Supreme Court noted that the tribunal's transgression had no effect on the findings regarding the responsibility of the accused in the case at hand, all of whom were paramilitary commanders. It was therefore not necessary to annul the entire paragraph describing context, as the Prosecutor's Office had demanded. Rather, the Supreme Court found it sufficient to declare that the paragraphs specifically addressing the criminal responsibility of state institutions and individual officials exceeded the tribunal's competence.[112]

110 Idem, p. 139.
111 Idem, p. 142.
112 Idem, p. 155.

The developments described above make a number of things clear. Firstly, analysis of context has quickly become a central element of the work of the Justice and Peace system. In the space of a couple of years, the Supreme Court has gone from ordering the Justice and Peace tribunals to analyze the crimes they are confronted with within the wider context of the paramilitary phenomenon, to correcting overzealous applications of this investigative tool. Secondly, the embrace of analysis of context by the Justice and Peace system has been inspired, to a large extent, by the case law of the Inter-American Court of Human Rights, as was confirmed by the Supreme Court in its appeals judgment in the case concerning the Catatumbo Block. Thirdly, this contribution of the Inter-American Court has inspired a change to the normative framework for the Justice and Peace trials, in the sense that analysis of context is now required by law. However, the reception of Court's doctrine on contextual analysis does not seem to be based on a sense of legal obligation on the part of the judges at the Justice and Peace tribunal or the Supreme Court. Rather, it seems that the case law of the Inter-American Court simply provided a good example for these judges on how to deal with cases concerning systematic crime patterns and complex criminal organizations.

3.4 Formalizing the practice of analysis of context in the ordinary criminal justice system

In the Justice and Peace system, the introduction of a more or less coherent practice of analysis of context was thus the result of a process of trial and error, in which the judges recognized the Inter-American case law as an example of a more productive way of dealing with the types of phenomena they saw themselves confronted with in their work. The practice was first taken up by judges and prosecutors in response to the annulment of the very first judgment produced by the Justice and Peace tribunal and was later formalized through a change in the Justice and Peace law. Likewise, prosecutors from the human rights division of the Prosecutor's Office sometimes orient themselves on the case law of the IACtHR for inspiration on how to tackle systematic patterns of human rights violations and identify all those responsible for them.

Moreover, the practice of analysis of context has been formalized in the ordinary justice system from "a more academic point of view", as one respondent expressed it,[113] as part of a new system of criminal investigation introduced through Directive 0001 of 2012,[114] published in October of that year and following the adoption of the Legal Framework for Peace

113 Interview 16.

114 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012.

described in the previous chapter. The need to introduce such a new system of criminal investigation was based on the idea that the old system "which indicates that all crimes should be investigated at the same time and in the same way and, on top of that, as if they were isolated acts, hamper the creation of a true criminal policy which materializes in the design and implementation of strategies which make it possible to effectively fight the various criminal phenomena attributable to criminal organizations".[115] Furthermore, it was believed that the old system "has led to high impunity rates, inasmuch as the economic, administrative, logistical and human resources of the National Prosecutor's Office are not strategically utilized towards the achievement of general objectives".[116] To change this situation and create a more effective system, geared especially towards the investigation and prosecution of complex criminal organizations, the Directive pursued two main strategies: firstly, the introduction of a policy of prioritization of cases, combined with the introduction of a set of objective criteria for prioritization; secondly, the investigation of prioritized cases taking into account their broader context and the creation of a special unit within the National Prosecutor's Office for the analysis of such contexts.

The main architect of the new system of criminal investigation introduced through the Directive, and especially the part pertaining to the contextual analysis of cases, was Alejandro Ramelli Arteaga, an expert in international human rights and international humanitarian law who also became the first director of the National Unit for Analysis and Contexts (UNAC).[117] Ramelli's international orientation has been an important factor in the introduction of the new system of criminal investigation and the creation of the Unit for the Analysis of Context. As one respondent, who had worked with Ramelli in the Unit for the Analysis of Context in its first years in operation, explained:

> "As you know, [the analysis of] contexts is not our original idea. Contexts were first constructed In Tokyo, Yugoslavia, Rwanda, all of those [international courts]. And the Inter-American Court, in judgments like those in the cases of *Manuel Cepeda* and *19 Tradesmen* and *Las Palmeras*, has said to the Colombian state: if you need to arrive at the investigation and prosecution of those most responsible for all of these massacres, [then] for this you need to reconstruct contexts which will bring you to understand how these criminal structures were [organized] through which they were planned, which are the concepts and requirements relevant for crimes against humanity and war crimes. So we took these experiences in order to apply them to concrete cases. […]

115 Idem, p. 25.

116 Idem, p. 26.

117 Interview 16. *See also* 'Quiénes están detrás de los grandes casos en la Fiscalía', *Semana*, 11 December 2013 and 'Renuncia fiscal que priorizó investigación de magnicidios', *El Tiempo*, 7 February 2014. The first strategy mentioned here was in fact a direct fruit of the Legal Framework for Peace, which had instructed the National Prosecutor's Office to fix criteria for the priorization of cases.

> Q: What I asked myself when I read about the [UNAC] and the [policy of] prioritization […] it reminded me of some of the things the Inter-American Court has said. If I am not mistaken it was in the case of *La Rochela*, where it said that one cannot investigate these cases as if they were isolated cases, that it has to be done in an integral way. Was this an inspiration for the policy [of prioritization and analysis of contexts], or is it a separate thing?
>
> A: Yes. This was an orientation of the Attorney General, who has this experience in the international tribunals, and, above all [Alejandro Ramelli, HB], who also is a connoisseur of international law. So, all of these experiences in the inter-American Court, the judgments of the Inter-American Court, as well as the [ICTY, HB], the *ad hoc* tribunals, served to… The Attorney General says: the only way of combatting organized crime is through the construction of contexts, through prioritization and through joining cases."[118]

The influence of this international orientation on the introduction of the new system of criminal investigation is also clear from the Directive itself, which contains an exhaustive analysis of relevant international law and practice.[119] On the basis of this analysis, the Directive argues that the new system of criminal investigation is "inspired on the practice of the international criminal tribunals" and that it "in line with international standards for the protection of human rights", especially the case law of the Inter-American Court.[120] It should be noted that the vast majority of this lengthy analysis of international law and practice focuses on the prioritization of certain cases over others as part of the new system for criminal investigation, which was evidently considered the more controversial element. With regard to the contextual analysis of crimes, the Directive limits itself to one paragraph, which notes that:

> "[T]he Inter-American Court has favored a differentiated treatment of cases depending on their complexity. In the same way as it promotes a policy of prioritization focused on the investigation of macrocriminal contexts in which systematic crimes were committed, the Court has demanded a special investigation of context for the most serious crimes committed against the [American] Convention. It has pronounced itself along these lines in the case of *Manuel Cepeda v. Colombia*, where it asserted that: "[…] in complex cases, the obligation

118 Interview 12.

119 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012, pp. 4 – 16. *See also* Interview 16. With specific regard to the impact of the Inter-American system on the adoption of the policy of analysis of context by the National Prosecutor's Office, this respondent noted that this impact is especially clear in the policy documents introducing this policy. She said that "you can see the impact [of te IACtHR] in those documents".

120 Colombian National Prosecutor's Office, Directive 0001 de 2012 "por medio de la cual de adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y gestión de aquéllos en la Fiscalía General de la Nación', 4 October 2012, p. 4.

> to investigate brings with it the duty to direct the efforts of the State apparatus towards unravelling the structures which allowed these violations to happen, their causes, their beneficiaries and their consequences, and not only [towards] discovering, prosecuting and, where appropriate, punishing the direct perpetrators.[…]""[121]

Finally, the impact of the Inter-American system on the adoption of the analysis of context as part of the new system of criminal investigation is underscored by the 'Manual for Contextual Analysis' developed for the newly created UNAC by the International Center for Transitional Justice.[122] The Manual was drafted in the context of a cooperation agreement between the ICTJ and the National Prosecutor's Office and in close cooperation with analysts and prosecutors from the UNAC. The very first sentences of the Manual's introduction read as follows:

> "According to the [IACtHR], the analysis of the historical, political and legal context is a decisive factor for achieving an adequate understanding of violations of human rights and establish the causes which, with respect to concrete cases, generate the international responsibility of States. In particular, this type of analysis makes it possible to identify and characterize complex criminal structures, their plans and modus operandi, as well as making it possible to understand the nature of complex crimes through the patterns which explain their commission. In this way, the IACtHR considers that the analysis of context is a requirement for compliance with the State's obligation to investigate with due diligence, as it determines "the following of logical lines of investigation."[123]

However, the Manual also illustrates the limits of the IACtHR's influence on the prosecutorial policy of analysis of context. While it is cited in the introduction as an argument for the adoption of such a policy, the more substantive chapters of the manual setting out the recommendations and guidelines for undertaking contextual analyses in particular cases, hardly mention the Inter-American Court's case law at all.[124] Rather, it relies on the experience of international criminal tribunals and domestic criminal systems dealing with cases of complex criminal structures to guide the work of the UNAC. This is only logical given the fact that the Inter-American Court, as the Supreme Court had already established in the context of the Justice and Peace trials, is not a criminal court and that the goals and outcomes of its proceedings are fundamentally different from those conducted in the criminal justice system. Thus, the Inter-American system's contribution to the development

121 Idem, pp. 6-7.

122 ICTJ, 'Manual de análisis contextual para la investigación penal en la Dirección Nacional de Análsis y Contextos (DINAC) de la Fiscalía General de la Nación' (ICTJ, June 2014).

123 Idem, p. 1.

124 It is cited once more in a paragraph discussing the 'importance of the method of analysis of context in the international experience', where the Manual mentions that the IACtHR undertakes a contextual analysis in each case with which it sees itself confronted. Idem, p. 36.

of the policy of contextual analysis was felt most during the earlier stages of this process, when the policy of analysis of context was first conceived and developed in Colombia,[125] rather than in its practical application.

Here, it is worth pointing out an interesting contrast between the application of the official policy of analysis of context and the practice of some of the individual prosecutors working on human rights cases, as described above in section 3.2 of this chapter. Those prosecutors stated that they did see the analyses of the IACtHR as an example from which they draw inspiration for their own investigations. This difference can perhaps be partly explained from the fact that the official policy of contextual analysis and the work of the UNAC were developed by experts and based on a more academic perspective, which includes a broad knowledge of international case law and experiences. It cannot be expected that each individual prosecutors has the same level of knowledge and international orientation. These prosecutors may not be completely up to speed on the practice of the ad hoc tribunals, which is very far removed from their own work. However, they are familiar with the IACtHR and its case law, which has explored situations very similar, and sometimes directly related, to their own work.[126]

In conclusion, it is clear that the case law of the Inter-American system on *convivencia*, the context of the paramilitary phenomenon in Colombia and, more generally, the need to analyze systematic human rights violations on the wider context in which they were perpetrated, has had an

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125 *See also* Interview 16. This respondent has worked both for the ICTJ in Colombia and for the Colombian Ministry of Justice, during the years in which the policy of contextual analysis was developed. It should be noted that this respondent's remarks were not made with specific reference to the Manual prepared by the ICTJ.

126 This disconnect between the official policy of contextual analysis of human rights violations (and DINAC, which was created as part of this policy) and the work of individual prosecutors came up several times during the interviews with prosecutors from the human rights division. In particular, two prosecutors who had worked with the DINAC before coming to the human rights division reflected at length on the lack of coordination between these two departments of the Prosecutor's Office and, more generally on the lack of clarity which seem to exist within the Prosecutor's Office about the status and utility of the work done by DINAC. *See* interview 12 and Interview 9. The latter of these two prosecutors did point out that the movement of staff between DINAC and the Human Rights Division, of which she is an example, may help to overcome this problem. Other criticisms of the practical functioning of DINAC and the policy of contextual analysis of human rights violations encountered during this study include the differences in understanding and application of the policy across government agencies (interview 16, saying that, while agencies like the Justice and Peace tribunals, the Prosecutor's Office and the Ministry of Justice may use the same "buzzwords" they don't seem to understand the underlying concepts in the same way); and the low quality of the contextual analyses produced and used by certain parts of the prosecutor's office (Interview 2, claiming that the contextual analyses produced by the prosecutors conducting cases before the Justice and Peace tribunals were of particularly poor quality, as they focused on patterns of violence (i.e. how certain crimes were committed) rather than the criminal structures underlying the crimes). However, a full exploration of these criticisms of the practical application and effectiveness of the policy of contextual analysis of human rights violations falls outside the scope of this study.

important impact on the way in which investigations into such violations are conducted in Colombia and the lines of investigation prosecutors follow. Firstly, the exposure given by the system to the links between the state and certain illegal armed groups has had important narrative effects by making the state's denial of this fact less credible and its recognition more acceptable to a broader audience. Secondly, the exposure of these links and the Court's orders to investigate state agents involved in crimes perpetrated by illegal armed groups forced prosecutors investigating Inter-American cases to widen the scope of their investigations. Thirdly, the example set by the Inter-American case law on how to perform a contextualized analysis of human rights violations inspired domestic prosecutors and judges, both in the ordinary criminal justice system and in the Justice and Peace tribunals, as to how to deal with similar patterns of violence and complex criminal structures in their own work. Fourthly, the Inter-American case law, along with the practice of the international criminal courts, inspired the formalization of the practice of analysis of context through Directive 0001 of 2012.

4 Overcoming practical obstacles and a lack of institutional will to investigate and prosecute human rights violations

As the final paragraphs of the previous section made clear, the lack of results in investigations into serious human rights violations committed during the civil war is often the result of the lack of a true (political) will to investigate such cases. Lack of political is a phenomenon which is difficult to identify and prove and therefore potentially one of the most stubborn obstacles to the successful investigation and prosecution. It can reside both with the individuals directly responsible for the investigation and prosecution, or with the wider structures in which this individual operates, as a result of which they are not given the resources, institutional support and cooperation necessary to properly do their already complex work. The lack of a wider, institutional will to investigate and prosecute is especially pronounced in cases where there is an involvement of (high-ranking) state officials. While a lack of will to investigate and prosecute is thus very difficult to address, the Inter-American system has had some important effects in this respect. These effects are mostly limited to individual cases, but there have been some wider, normative effects as well.

Overcoming a lack of political will to investigate and prosecute serious human rights violations often begins with identifying and exposing this lack of will, and, more importantly, its causes. As described above in section 3.1, the Inter-American system has made important narrative contributions by exposing links between state agents and illegal armed groups. By exposing these links, the Inter-American Court has also had certain practical effects on domestic investigations into the crimes committed by illegal armed groups. It achieved these effects not only by expanding the scope of the investigations and directing them towards the state agents involved in

these crimes, as described above in section 3.2, but also by underlining the fact that their failure thus far had often been due to the fact that the state agents responsible for them were themselves linked to the very groups they were meant to be investigating. Exposing such corruption in the investigations is an important first step towards putting them on the right track.

4.1 Taking unwilling officials off the case

One of the clearest examples of the effects of exposure of corruption in domestic investigations, is the Trujillo case and the effects the report of the Trujillo Commission had on the way in which the domestic investigations were conducted. Summarizing the failures of the domestic investigation, the Trujillo Commission's conclusions on these failures and their effects, the prosecutor currently overseeing the investigations said:

> "What happened at the time? The investigation [by the local authorities], what did it produce? All [the suspects] were absolved in 1991. So from there, when the case moved to the National Prosecutor's Office in the year 1994 and the Colombian state, represented by then-president Samper, says that human rights were indeed violated [in this case] and that there was involvement of state agents… if it hadn't been for that and for the victims' organizations, well, maybe this would not have been known and it would have stayed on a shelf, without being investigated. […]
>
> The second [conclusion from the Trujillo Commission's report] says: "The Commission has sufficient evidence to conclude that the state is responsible because its judicial bodies – about which I was speaking just now – and disciplinary bodies failed to collect relevant evidence, ruled against the procedural reality and committed other grave irregularities which impeded the identification and punishment of those responsible for the violent events in Trujillo." Quite right. At that time, which was disastrous for Colombia […] with all the violence which we were going through here, money was the most important factor. So much so, that we had to take these cases from the local jurisdiction, which in this case was Buga, or, well, Valle del Cauca. We had to take the process away form there and bring it to Bogotá, because of the corrupting powers which existed at the time, as a result of which all [the accused] had been absolved [even though] there were eyewitnesses of the events. […]"[127]

127 Interview 10. To illustrate the level of corruption in the original investigations: one of the eyewitnesses referred to in the quote was a local who had collaborated with the paramilitary group responsible for the massacres and who decided to seek protection from and testify to the local authorities when he realized he would probably also be killed because of the information he had. In his testimony, he described in detail a massacre he had witnessed and participated in, including the arrest of the victims, the torture to which they were subjected in order to get them to name other 'guerilla collaborators' and their eventual killing. However, the local authorities declared the witness mentally unfit and his testimony was disregarded entirely. Not much later, the witness was disappeared. After the presentation of the Trujillo report, weekly magazine Semana published excerpts of his testimony. *See* 'Testimonio atroz', *Semana*, 3 June 1995.

As this quote illustrates, the investigations were moved from the local prosecutor's office to the Human Rights Unit of the National Prosecutor's Office in Bogotá as a result of the Trujillo report.[128] Following the conclusions and recommendations of the Trujillo Commission, as adopted by the Inter-American Commission itself, it was recognized that the regional circumstances, particularly the lure of money and the threat of violence, made an independent investigation impossible. Therefore, the case was transferred to a prosecutor who would have the will to properly investigate the case.

After the National Prosecutor's Office took over the case, the investigations started moving forward. However, that the case had been moved to a different prosecutor did not mean that it no longer fell under the jurisdiction of the regional courts, which were still subject to the same corruptive powers which had frustrated the investigations in its earlier stages. Thus, when the National Prosecutor's Office formally filed accusations against a number of individuals for their involvement in the Trujillo massacres in 2008, the regional court hearing the case annulled the charges, a decision which was in turn annulled by the regional appeals court.[129]

Following these obstructions by the regional court and the further delays in the proceedings caused by them, the National Prosecutor's Office filed a petition with the Supreme Court requesting that the case would be moved to the jurisdiction of the regional courts in Bogotá. The petition was based on the argument that the Trujillo Commission's conclusions regarding the regional circumstances making an independent investigation impossible were still valid and that its reasons for recommending the case be transferred to the National Prosecutor's Office applied equally to the jurisdiction of the regional court.[130] The Supreme Court shared this analysis and granted the request to move the Trujillo case to the Specialized Penal Court in Bogotá.[131] Having cited both the Trujillo Commission's recommendations and the Inter-American Commission's resolution adopting these recommendations, the Supreme Court stated:

> "It is clear that the recommendations formulated by the Inter-American Commission to the Colombian state also concern the judicial branch, and it is their duty, in this case that of the Supreme Court, to ensure that those observa-

128 This causal relation was confirmed explicitly in the Supreme Court's decision to take the case out of the jurisdiction of the regional courts in Buga and transfer it to Bogotá, discussed below. Having cited the recommendations made by the Trujillo Commission and the Inter-American Commission's resolution adopting these recommendations as its own, the Supreme Court then states: "In so far as the National Prosecutor's Office is concerned, it complied with the re-allocation of the investigations into the violent events in Trujillo, and it was thus that the process registered under no. 3995 was transferred from the Regional Office in Cali to the Human Rights Division in Bogotá […]" CSJ, case no. 32002, decision of 15 July 2009, p. 10.

129 CSJ, case no. 32002, decision of 15 July 2009, pp. 2 – 3.

130 Idem, pp. 5 – 6.

131 Idem, p. 14.

> tions are complied with, especially those related to the investigation and prosecution of public servants and private individuals involved in the violent events of the Trujillo massacre, where crimes against humanity and grave violations of international humanitarian law were committed, so that in this case it becomes imperious to [make sure] that the official responsible for advancing the trial will be located outside the department Valle del Cauca, where circumstances of public order, security and tranquility will permit the normal exercise of justice […]"[132]

Thus, in the case of the Trujillo massacre, the intervention of the Inter-American Commission and its exposure of the corruption in the domestic investigations had a practical impact on overcoming a lack of will to investigate the human rights violations in question, because they caused the investigations to be taken out of the hands of judicial officers who lacked this will and transferred to officials who did have an interest in conducting proper investigations and resolving the case.

4.2 Revision of previous acquittals and the principle of ne bis in idem

Having thus successfully moved the proceedings concerning the Trujillo massacres out of the jurisdiction of the regional prosecutors and courts and into the hands of more independent officials, another obstacle presented itself: the acquittal of a number of suspects in 1991, on the basis of the corrupted investigations exposed through the Trujillo Commission's report.

Given the fact that Colombia has enshrined the principle of *ne bis in idem* in its constitution, it can be argued that this previous acquittal would make it impossible to continue the investigation and prosecution of the individuals in question, notwithstanding the fact that the acquittal was the result of corrupted proceedings. However, as discussed above in Chapter 3,[133] the Inter-American Court has consistently held that the principle of *ne bis in idem* cannot stand in the way of investigation and prosecution of serious human rights violations when it is established that the previous acquittal was the result of the state's failure to uphold its obligation to investigate and prosecute with due diligence. In such cases, the Court argues, the right of the victims to truth and justice must prevail over the rights of the accused.

This jurisprudence by the Inter-American Court has been incorporated, to an extent, into the Colombian legal order through a decision of the Constitutional Court taken in January 2003. In this decision, the Constitutional Court was called to interpret Article 220(3) of the code of criminal procedure in force at the time, which established that a motion for revision can be brought against a judgment in a criminal case, when new facts or elements of proof come to light after a conviction, which establish the

132 Idem, pp. 13 – 14.

133 *See supra* Chapter 3, Section 2.4.

innocence of the convicted person. The petition argued that it was an unfair limitation of the rights of the victims that new evidence could only lead to the acquittal of a previously convicted individual and not the other way around.[134] Thus, the question the Constitutional Court saw itself confronted with was whether the constitutional principle of *ne bis in idem* allows for an interpretation of Article 220(3) in which a motion for revision of a judgment could also be based on new evidence establishing the guilt of a previously acquitted individual.

In answering this question, the Constitutional Court considered that the principle of *ne bis in idem* is not absolute, but that it should be balanced against the rights of the victims to truth and justice. The existence of these rights of the victim was based on the case law of the Inter-American Court, particularly its judgment in the case of *Barrios Altos v. Peru*, and the Constitutional Court's previous reception of this case law.[135] And while the Constitutional Court considered that the discretion to perform this balancing exercise belonged primarily to the legislator, its results are subject to a control of constitutionality.

In its analysis of article 220(3), the Constitutional Court found that, in general terms, the legislator had not overstepped its discretion to balance the rights of the accused against the rights of the victims, but, rather, upholds the general interest of all individuals in legal certainty and the limitation of the state's *ius puniendi*. However, the Constitutional Court found it necessary to make a distinction between cases of 'normal' crimes and cases involving human rights violations and grave violations of international humanitarian law.[136] In the latter type of case, the Court considered that the state's obligation to investigate and prosecute are "much more intense" than in cases of normal crimes[137] and that, in allowing a situation of impunity to exist in such cases, the state does not only violate the rights of victims but also its international obligations.[138] As a result, the Constitutional Court concluded that the balance struck in article 220(3) of the code of criminal procedure poses a disproportionate limitation on the rights of victims in cases of human rights violations and grave violations of international humanitarian law.[139]

To resolve this situation, the Constitutional Court decided that article 220(3) of the code of criminal procedure should be interpreted in such a way as to allow for the revision of an acquittal in cases concerning violations of human rights and international humanitarian law, where the acquittal had been the result of a failure of the state to investigate and prosecute with due

134 Constitutional Court, *Sentencia C-004/03*, judgment of 20 January 2003, p. 9.
135 Idem, pp. 22 – 25.
136 Idem, p. 28.
137 Idem, p. 30
138 Idem, p. 32.
139 Idem, p. 33.

diligence.[140] In order to protect the interest of legal certainty, the fact that the acquittal is the result of such a failure on the part of the state has to have been established by a domestic court or an international body tasked with the protection of human rights. As examples of international bodies whose decisions could serve as the basis for the revision of a previous acquittal, the Court explicitly mentioned both the Inter-American Court and the Inter-American Commission.

Through this decision the Constitutional Court thus created a legal basis for the revision of acquittals of which the Inter-American Court or Commission has established that they are the result of corrupted or otherwise faulty proceedings. When the code of criminal procedure was revised through Law 906 of 2004, this interpretation of the Constitutional Court was formalized in article 192(4) of that law, which reads:

> "An action of review may proceed against final judgments under the following circumstances:
>
> […]
>
> (4) when, after a judgment concerning violations of human rights or grave violations of international humanitarian law, a severe breach of the State's obligation to seriously and impartially investigate those violations is established through the decision of an international body for the supervision and control of human rights, whose competence the Colombian State has formally accepted. In such cases it will not be necessary to prove the existence of a new fact or of proof unknown at the time of the proceedings."

The Constitutional Curt's decision is based partly on Inter-American case law concerning the right of victims of serious human rights violations to truth and justice. Other aspects of the judgment, like its emphasis on the state's obligation to investigate and prosecute serious human rights violations, are not based explicitly on Inter-American case law, but the language used in those parts clearly echoes the Inter-American Court. It is therefore submitted that Inter-American case law, through its reception by the Constitutional Court, has had a normative impact on creating a basis for revising acquittals resulting from investigations in which there was no real will to hold accountable those responsible for serious human rights violations.

Once established, this basis for revising acquittals has become an important tool for prosecutors to reopen old investigations and correct failures and corruption on the part of state officials. It has done so in several cases where such failures have been established by the Inter-American Court[141]

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140 Idem, pp. 35 – 36 and 40.

141 For example, on 6 March 2008 the Colombian Supreme Court annulled a judgment acquitting two members of the armed forces of charges relating to the disappearance of the 19 Tradesmen. *See* IACHR, *19 Tradesmen v. Colombia (supervision of compliance)*, Order of 8 July 2009, p. 12 para. 14.

or the Inter-American Commission.[142] For example, in response to a petition brought by the National Prosecutor's Office and on the basis of the Inter-American Commission's recommendations, the Supreme Court has annulled the previous acquittals in the case concerning the Trujillo massacre on 22 September 2010.[143] In doing so, the Supreme Court cleared the way to prosecuting those responsible for one of the most infamous massacres of the internal armed conflict.

5 Conclusion

This chapter demonstrated that prosecutors investigating cases of human rights violations in Colombia face a range of obstacles in their work. On the one hand, security concerns as a result of the persistent situation of violence and – until very recently – armed conflict make it difficult for prosecutors to collect evidence and gain the cooperation of witnesses. At the same time, the political sensitivity of the cases with which these prosecutors are tasked, and the involvement of state agents in many of those cases, can make it difficult to gain the cooperation of other elements of the state who would be in a better position to collect or provide evidence. Moreover, the heavy caseload these prosecutors carry, in combination with a lack of resources and an overly individualistic institutional culture within the prosecutor's office leave them stretched too thin and struggling to properly divide their time and attention.

Against this background, the prosecutors interviewed in the context of this chapter have explained how the proceedings conducted through the IAHRS and the judgments delivered by the IACtHR have helped them to make inroads into overcoming some of these obstacles. Firstly, this chapter showed that the proceedings conducted through the IAHRS set into motion a system of internal monitoring, through the foreign ministry and the

142 *See for example* Supreme Court, *Revisión no. 28012*, decision of 20 June 2012; Supreme Court, *Revisión no. 30642*, decision of 26 September 2012 and Supreme Court, *Revisión no. 28476*, decision of 31 October 2012.

143 Supreme Court, *Revisión no. 30380*, decision of 22 September 2010. In the context of this decision, the Supreme Court did consider, on the basis of Article 192(4) of Law 90 of 2004, that the Inter-American Commission, in contrast to the Inter-American Court, does not qualify as "an international body […] whose competence the Colombian State has formally accepted", because the decisions of the Inter-American Commission are not binding on the State (pp. 42-48). Therefore the recommendations of the Commission are not sufficient in themselves to allow for the revision of a final judgment. However, the substance of the Trujillo Commission's report and the Inter-American Commission's recommendations do form a sufficient basis for the Supreme Court itself to undertake a review of the prior investigations and the considerations underlying the acquittals. Through this review, the Supreme Court comes to the conclusion that the Inter-American Commission's conclusions and recommendations were correct, and that the acquittals entailed a severe breach of the State's obligation to investigate serious human rights violations (pp. 48-94). On this basis, the Supreme Court annulled the judgment.

National Prosecutor's Office. This monitoring leads prosecutors to prioritize the domestic investigations into such IAHRS cases over other cases under their care. Moreover, the monitoring as a result of IAHRS proceedings makes sure that those cases stay on the agenda, whereas other cases may lose their sense of urgency with the passing of time. In this way, IAHRS proceedings help to ensure that at least those cases receive appropriate time and attention, even if that means that other, equally serious cases may receive less attention. And while this may not be a great achievement from the point of view of the fight against impunity more broadly, it does mean that the chances that the cases within the purview of the IAHRS will progress on the domestic level may increase.

Secondly, this chapter has demonstrated how the judgments of the IACtHR have helped to expand the scope of domestic investigations in cases concerning grave and complex human rights violations. The example set by the IACtHR through its own contextual analysis of human rights violations, combined with its consistent insistence that the state should conduct exhaustive investigations in order to identify all those responsible, pushed prosecutors to look at new lines of investigation and adopt a more contextual analysis of the facts. This development can be observed not only among the prosecutors of the Human Rights Unit, but also in the case law of the Justice and Peace Tribunals. It has even led to the adoption of a national policy of contextual analysis. In this way, the IAHRS has helped prosecutors to overcome some unhelpful aspects of their traditional institutional culture.

Finally, this chapter has demonstrated that the doctrines developed by the IACtHR has allowed prosecutors to overcome the effects of a lack of political will to investigate grave human rights violations and hold state agents accountable for their participation in them. Specifically, the case law of the IACtHR in has been an important basis on which domestic courts have overturned prior acquittals of state agents, where these acquittals had been the result of seriously flawed proceedings.