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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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Summary

FURTHERING THE FIGHT AGAINST IMPUNITY IN LATIN AMERICA
*The contributions of the Inter-American Court of Human Rights
to domestic accountability processes*

This study is inspired by the question how national authorities can be motivated to advance the fight against impunity by investigating and prosecuting those responsible for mass atrocities through their domestic justice systems. Whereas international scholarship has often sought to answer such questions by looking at international criminal courts – and in particular at *the* International Criminal Court – this study proposes instead to turn our gaze beyond The Hague, towards San José and the Inter-American Court of Human Rights (IACtHR).

Since the days of the Cold War, the Inter-American human rights system has been an important ally for victims and civil society groups pushing their governments to recognize and investigate serious and systemic violations of human rights and bring the perpetrators to justice. It has thus been involved in the fight against impunity for decades. Its practical contributions to that fight remain, however, underexplored by international legal scholarship.

Building on Alexandra Huneus pioneering study on the ‘quasi-criminal jurisdiction’ of human rights courts, this study seeks to analyze how the Inter-American Court of Human Rights has contributed to the fight against impunity in Latin America by supporting domestic accountability processes. The central research questions guiding this analysis are:

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

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

Part I of this study, consisting of Chapters 2 to 4, discusses the jurisprudence developed by the IACtHR to further the international fight against impunity. The main legal tool and overarching doctrine it has developed to this effect,

is that of the state's obligation to investigate, prosecute and punish those responsible for human rights violations, first articulated by the IACtHR in its landmark judgment in the case of *Velásquez Rodríguez v. Honduras*. While none of the ACHR's provisions explicitly require states to investigate and prosecute human rights violations, the IACtHR found this obligation to be implied in several provisions, including the general obligation of states to ensure to those under their jurisdiction the free and full exercise of their rights enshrined in Article 1(1) ACHR. Moreover, *Velásquez Rodríguez* specified that the obligation to investigate, prosecute and punish human rights violations implies not only that states should put in place a legal and institutional framework conducive to such investigation and prosecution, but also that they undertake *effective* investigations whenever human rights violations do occur.

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

In the three decades since the *Velásquez Rodríguez* judgment, the IACtHR has slowly refined its jurisprudence on the obligation to investigate, prosecute and punish human rights violations ever further. Through constant confrontation with the many ways in which investigations and proceedings into such cases can be undermined and derailed, the Court has developed detailed standards addressed at several different state organs. This development has taken place along two main avenues: 1.) the obligation to remove all legal and practical obstacles maintaining impunity; and 2.) the obligation to investigate human rights violations effectively. Under the umbrella of these two dimensions of the obligation to investigate, prosecute and punish, the IACtHR has developed a number of very concrete obligations, which give practical content to the overarching obligation.

The doctrines falling under the obligation to remove all legal obstacles to investigation, prosecution and punishment of serious human rights violations are perhaps the most controversial aspect of the IACtHR's juris-

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

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

Finally, the IACtHR has developed very detailed and demanding standards in relation to the state's obligation to investigate human rights violations effectively. The IACtHR requires that the responsible authorities undertake investigations *ex officio*, impartially, with due diligence and within a reasonable time. The due diligence requirement has been interpreted by the IACtHR to include detailed standards on the collection of evidence – taken from the UN's Minnesota Protocol – and on the direction and exhaustiveness of the investigation. In relation to the latter, the IACtHR requires the domestic authorities to follow all logical lines of investigation and analyze all the relevant evidence, taking into account the wider context in which the human rights violations occurred, with an eye to identifying possible underlying structures or mechanisms. This 'contextual analysis' is especially important where there are indications of the involvement of state agents. Ultimately, an investigation with these characteristics will lead to accomplishing the goal envisaged by the IACtHR for investigations into human rights violations: identification of *all* those responsible for the underlying human rights violations – both the material and the intellectual authors – and imposing an appropriate punishment.

Part II of this study, consisting of Chapters 5 to 8, discusses the practical contributions of the Inter-American human rights system and the jurisprudence discussed above to domestic accountability efforts for grave human rights violations in Latin America. In doing so, this study rejects a 'compliance-based' approach to studying those contributions, which would take as its starting point the study of individual IACtHR judgments and state compliance with those judgments. Rather, this study analyzes contributions made by the Inter-American system through 1.) judgments delivered by the IACtHR; 2.) doctrines developed over the course of the IACtHR's case law; and 3.) the proceedings in individual cases conducted by the organs of the Inter-American system. When it comes to the domestic accountability processes under study, this study looks not only on the outcomes of such processes in terms of trials and convictions. Rather, it recognizes that trials are only one step in the 'process of justice', which often takes place over the course of decades and involves a wide host of domestic actors including 1.) human rights NGOs and victims' organizations; 2.) domestic judges and prosecutors; and 3.) domestic 'veto players'.

Concretely, Part II of this study undertakes three separate case studies to analyze the contributions of the Inter-American human rights system to accountability processes in two countries: Guatemala and Colombia. Each of the three case studies focuses on a different aspect of the fight against impunity. In relation to Guatemala, this study looks at the work of civil society groups, particularly NGOs and victim organizations, pushing for accountability for grave human rights violations committed in the context of the Guatemalan civil war. It analyzes how the work of the IAHRs has supported the often dangerous and frustrating work of domestic pro-accountability activists and these activists strategic recourse to the Inter-American system. The second case study focuses on the legislative processes conducted in Colombia towards the establishment of special mechanisms to adjudicate grave human rights violations committed in the context of the Colombian civil war. It analyzes how a host of diverse domestic actors managed to insert into these processes an awareness of interests which were not directly represented at the negotiating table: the interest of providing justice for the victims of human rights violations. The third case study focuses on the work of Colombian prosecutors tasked with the prosecution cases of grave human rights violations in the context of an ongoing armed conflict. It analyzes how the IAHRs has supported, and sometimes further complicated the work of human rights prosecutors in Colombia, by requiring them to include new avenues of research and analysis in their investigations and grapple with the wider context in which the human rights violations in question were committed.

Through the case studies, the study demonstrates that the Inter-American human rights system has in fact contributed to domestic accountability efforts. More specifically, it demonstrates contributions in relation to four distinct dimensions of domestic accountability processes in Guatemala and Colombia: 1.) *discourse* framing the demand for justice as a matter of inter-

national human rights law; 2.) domestic *narratives* of the underlying serious human rights violations and the context in which they were committed; 3.) the domestic *normative framework* for the investigation, prosecution and punishment of human rights violations; and 4.) the progress of domestic *proceedings* in relevant cases.

In relation to the first of these four 'spheres' of Inter-American influence, the case studies underline that civil society demand for justice is crucial for the success of domestic accountability processes. However, it matters greatly *how* domestic actors demand accountability and articulate their claims. In other words, the discourse employed by pro-accountability actors in support of their claims is relevant to their chances of success. The case studies demonstrate that for pro-accountability actors in Guatemala and Colombia, human rights discourse has proven an important tool, because it allows them to shift the balance of discursive power between them and anti-accountability constituencies in their favor in two ways: by connecting their demands to an established social order and by shifting to a 'language' in which they are more fluent than their counterparts. The IACtHR's extensive jurisprudence on the state's obligation to investigate, prosecute and punish human rights violations and the victims' right to justice, provides pro-accountability actors in Guatemala and Colombia with a human rights language tailored specifically to the obstacles they face when demanding justice in their domestic contexts. It is therefore an important source to which pro-accountability actors refer when they frame their claim to justice in the language of human rights. Moreover, it also provides them with a defensive rhetorical strategy when, in the extremely polarized political environments in which they operate, they find themselves under personal attack. Reference to the IACtHR and its case law serves to draw the debate away from their personal beliefs and motivations for pursuing justice and refocus it on the international legal obligations of the state.

The narrative sphere of domestic accountability processes is closely related to the discursive sphere. Both are concerned with the way people speak about accountability for serious human rights violations. However, whereas the discursive sphere relates to the way pro-accountability actors articulate their demand for accountability, the narrative sphere relates to the way the underlying human rights violations and their historical context are understood and discussed.

Both in Guatemala and in Colombia, the Inter-American human rights system has contributed considerably to the work of pro-accountability actors in challenging the dominant narrative of the respective internal armed conflicts. The proceedings conducted before the IACtHR have allowed victims to provide public testimony and have pushed the state to recognize and accept responsibility for the occurrence of particular events – i.e. massacres – that it had previously denied. Meanwhile, the IACtHR's judgments, and their interpretation of the historical context of both the Guatemalan and the Colombian internal armed conflicts, have also been important in this respect. These judgments support and deepen the

narratives promoted by pro-accountability actors and have served as an inspiration to domestic prosecutors and judges looking to perform a more contextual analysis of the grave human rights violations with which they see themselves confronted.

That the normative framework within which domestic accountability processes operate is relevant for their chances of success, does not require much explanation. Legal obstacles to investigation and prosecution created through that normative framework may undermine and derail accountability processes, even when all other ingredients for success are present. Therefore, pro-accountability actors often need to invest considerable effort into clearing such legal obstacles before any investigation and prosecution of human rights violations can be pursued successfully. All three case studies demonstrate that the IACtHR's doctrines concerning the obligation of the state to remove legal obstacles to investigation, prosecution and punishment of serious human rights violations have supported these efforts considerably. These doctrines have provided pro-accountability actors with a very specific legal vocabulary to articulate their demand to remove legal obstacles. At the same time, the legitimacy of the IACtHR as an international human rights court and the authority attached to doctrines which form part of its *jurisprudence constante*, make their arguments highly persuasive to the domestic authorities who hold the power to remove those legal obstacles for them.

Lastly, the case studies show that the IACtHR's interventions have in some cases affected the progress of individual domestic proceedings concerning serious human rights violations. Often, such contributions are indirect and dependent on successful action in one of the other three dimensions of domestic accountability processes described above. However, the case studies do demonstrate two ways in which *proceedings* at the Inter-American level may contribute directly to the progress of the domestic proceedings concerning the same facts, especially when the two sets of proceedings are conducted in parallel. Firstly, they show that the monitoring effect of the parallel proceedings on the Inter-American level can help them to push domestic proceedings forward by, on the one hand, providing an international spotlight – which limits the space for political maneuvering by anti-accountability actors – and, on the other hand, by providing leverage to pressure domestic authorities into action when their interest in the case seems to wane. Secondly, the case studies suggest that Inter-American proceedings may affect the progress of domestic proceedings by protecting those involved in them. Serious threats against the reputation or even the safety of activists, prosecutors, judges and witnesses might discourage those actors from continuing their work, which would adversely affect the progress of domestic proceedings. Inter-American proceedings help to protect pro-accountability actors from such threats in two ways: firstly, the international spotlight which these proceedings shine on pro-accountability actors makes it more costly for their opponents to attack them directly. Secondly, both the IACtHR and the IACmHR have

on many occasions ordered the state to provide police protection to pro-accountability actors.

Finally, this study analyzes *how* exactly the IACtHR's interventions contribute to the four relevant spheres of IACtHR influence. What do these interventions *do* to affect domestic processes? On the basis of the analysis conducted in the three case studies and the synthesis of those case studies in the final chapter, this study proposes that the contributions of the IAHRS to domestic accountability processes were achieved through the following five mechanisms: 1.) *translating* the demand for justice into a right to justice and an obligation to investigate, prosecute and punish serious human rights violations; 2.) *legitimizing* and depoliticizing the demand for justice; 3.) *monitoring* domestic proceedings and *prioritizing* IACtHR cases; 4.) *modelling* appropriate modes of interpretation of the facts underlying cases of human rights violations; and 5.) *protecting* pro-accountability actors.