

Number 18, year 6, December 2013

Aportes **DPLF**

Magazine of the Due Process of Law Foundation (DPLF)



**Current challenges
in seeking justice
for serious crimes
of the past**



In 2013, several important trials took place for crimes committed during the dictatorships in Latin America. These trials showed us, on one hand, that the investigation and punishment of those acts remain unfinished tasks in the region, and on the other hand, that national courts have become the new leaders in the fight against impunity. The central role of the victims and the organizations that support them must be given due recognition. At the same time, the genocide conviction of Efraín Ríos Montt in Guatemala and the decisions in the cases concerning extrajudicial executions at Barrios Altos and La Cantuta in Peru show us that, amid ups and downs, prosecutors and judges are willing to render independent decisions and use international law as a complement to domestic law in addressing the legal issues raised by the investigation and punishment of these types of crimes.

In order to bring attention to this evolution in judicial systems with respect to the serious crimes of the past, DPLF has conducted new research on Latin American case law over the past two years. The result is volume II of the *Digest of Latin American Jurisprudence on International Crimes*. This updated work examines new emblematic decisions, highlighting the debates that have arisen in constitutional and criminal law contexts and the innovative legal alternatives that have been created to deal with challenges such as the passage of time in evidence gathering and the high number of victims. The author of both volumes of the digest, Professor Ximena Medellín, shares her thoughts on these topics in this issue of *Aportes*.

As we will see in this issue, court cases involving acts of the past do not reflect the same degree of progress in every country, and in some places there have been significant setbacks. In the articles, well-known experts from the region take us from Guatemala to Argentina, reporting on the continuing challenges to transitional justice. Naomi Roht-Arriaza, professor of law at the University of California Hastings College of the Law and chair of DPLF's Board of Directors, writes about the impact of the trial of Ríos Montt. Professor Juan Pablo Albán of San Francisco University in Quito discusses the efforts to bring cases from Ecuador's Truth Commission to trial. Leonardo Hidaka reviews the issues faced in the trials from the dictatorship in Brazil; Carlos Rivera, of the Instituto de Defensa Legal in Lima, analyzes the significance of the trial of the perpetrators of the Barrios Altos massacre; and Gastón Chillier and Lorena Balardini, of the Centro de Estudios Legales y Sociales in Buenos Aires, share the recent advances in Argentina concerning sex crimes committed during the dictatorship. With regard to Colombia, the only country in Latin America with an ongoing armed conflict, we include articles that provide different perspectives on the scope and potential limits of the duty to prosecute grave human rights violations in the context of a possible peace process.

Although they present inconsistencies and reflect the structural weaknesses of national institutions, the cases examined in this edition of the journal are notable for various reasons. Not least, they represent an example for other regions of the world that are transitioning from anti-democratic regimes and debating the role of national justice in the prosecution and punishment of those responsible for grave human rights violations in the past.

We hope that these reflections are useful and, as always, we are grateful for any comments.

Katya Salazar
Executive Director
Due Process of Law Foundation

In this Issue

Reflections on international law and transitional justice

- P. 1** Toward the Consolidation of Justice for International Crimes in Latin America: From Constitutional Debate to Criminal Cases
Ximena Medellín
- P. 8** Transitional Justice and Violations of Economic, Social, and Cultural Rights
Clara Sandoval
- P. 10** The wheels of international criminal justice grind slowly for Hissène Habre
Max du Plessis
- P. 13** Transitional justice has a new United Nations thematic rapporteurship
Team DPLF

Truth and justice processes in Latin America

Argentina

- P. 15** New Challenges in the Process of Justice for Crimes against Humanity in Argentina: Civilian Complicity and Crimes against Sexual Integrity
Gastón Chillier and Lorena Balardini

Brazil

- P. 18** Accountability for Gross Human Rights Violations in Brazil: The Araguaia Case and Its Repercussions
Leonardo Jun Ferreira Hidaka

Chile

- P. 22** Human Rights Trials in Chile 15 Years after the Pinochet Case
Cath Collins

Colombia

- P. 26** Transitional Justice and the Peace Process in Colombia
Rodrigo Uprimny, Luz María Sánchez, and Nelson Camilo Sánchez
- P. 28** A Legal Framework for Peace with Justice in Colombia
Gustavo Gallón

- P. 30** Is There an Institutional Policy in Colombia that Acknowledges the Memory of the Victims of the Conflict?
Camila de Gamboa

Ecuador

- P. 33** From the Truth Commission to Criminal Justice in Ecuador: Still a Long Way to Go
César Duque
- P. 35** Unfinished Reconciliation: The Process of Bringing Cases from Ecuador's Truth Commission to Court
Juan Pablo Albán

El Salvador

- P. 38** Challenges to justice in El Salvador: Is the Amnesty Law an obstacle to the prosecution of acts committed during the armed conflict?
Leonor Arteaga

Guatemala

- P. 42** The Trial of Ríos Montt
Naomi Roht-Arriaza
- P. 44** Impact of the genocide trial on the Guatemalan justice system
Marco Antonio Canteo

Peru

- P. 49** Transitional Justice in Post-Conflict Peru: Progress and Setbacks in Accountability Efforts
Jo-Marie Burt

- P. 55** Barrios Altos: The Failed Attempt to Reverse Justice
Carlos Rivera

Uruguay

- P. 58** Procedural Rights and the Obligation to Investigate and, Where Appropriate, Prosecute and Punish the Perpetrators of International Crimes: The Example of Uruguay
Jorge Errandonea

Judicial independence and pre-trial detention

- P. 63** Pre-trial Detention and Legal Culture
Luis Pásara

Toward the Consolidation of Justice for International Crimes in Latin America: From Constitutional Debate to Criminal Cases

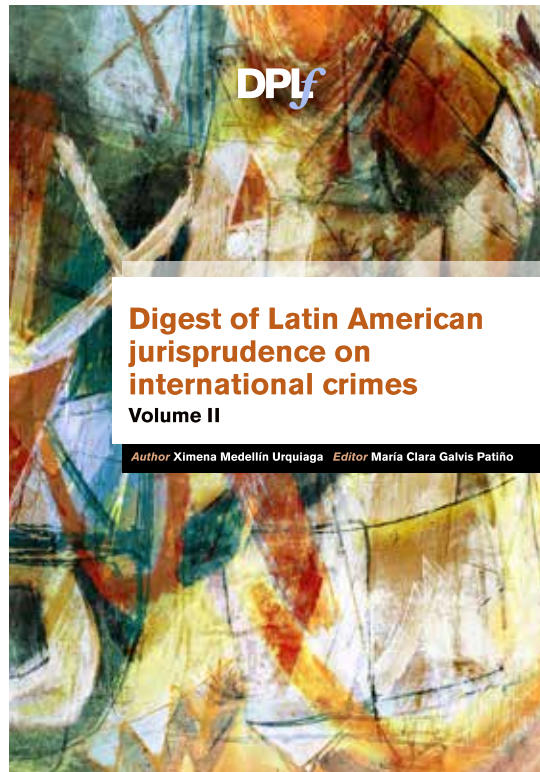
Ximena Medellín

Associate professor and researcher in the Centro de Investigación y Docencia Económicas, División de Estudios Jurídicos (CIDE, Center for Research and Teaching in Economics, Legal Studies Division) in Mexico City.

For more than five years, a team of consultants and contributors convened by the Due Process of Law Foundation (DPLF) has been working intensely to compile, analyze, and systematize judgments from Latin American courts that address issues that are particularly relevant to the national prosecution of international crimes. The main objective of our work has been to create a simple and accessible tool that facilitates the work of judges, prosecutors, and litigants involved in these types of trials and also serves as a starting point for the academic discussion of these issues. To date, this project has produced two volumes that together constitute the *Digest of Latin American Jurisprudence on International Crimes*.

Given the impact that this digest has had on the practice of national litigants, both in Latin America and in countries outside the region, there is no doubt that our main objective has been met. But beyond these specific outcomes, the ongoing analysis of national court decisions has provided our team with interesting insights into one of the most important issues in the transition from dictatorial or totalitarian regimes to substantive democracies: the processes of criminal justice and of the fight against impunity.

In this regard, one of the most salient aspects of the evolution of Latin American justice is the transfer of these debates from the constitutional realm to criminal trials. This entails the effective exercise, in many cases, of constitutional oversight of the



rules and actions of the criminal courts, when the specific national procedural models permit. Even more importantly, it requires the creation of successful constitutional case law to pave the way for the criminal prosecution of individual perpetrators. Toward this end, the first volume of the *Digest of Latin American Jurisprudence on International Crimes* contained a significant number of decisions that dealt with issues ranging from the debate of constitutional and international human rights provisions, for example, to the validity of amnesty laws, the applicability of statutes of limitations, or even the absence of the offenses from the national criminal statutes at the time the crimes were committed. The second volume of the digest includes a greater number

of criminal judgments, which are the direct result of the pathway opened up by the constitutional judgments.

Beyond just the numbers, the transition toward criminal cases—as opposed to the use of constitutional remedies—also seems to have led to the strengthening of certain technical and argumentative capacities essential to the effective prosecution of macro-criminal phenomena at the national level. Much could be said about this subject; nevertheless, bearing in mind the brevity of this commentary, we will focus on three aspects of particular interest, derived from the study of the judgments included in volume II of the *Digest of Latin American Jurisprudence on International Crimes*. They are (a) the growing use of statuto-

rily defined offenses that are different from those on which the cases traditionally focused; (b) the consolidation of theories of imputation used to determine the responsibility, as perpetrators, of high-ranking military and civilian leaders; and (c) the development of procedural and evidentiary strategies that reflect the inherent nature of the crimes.

With regard to the first aspect, the most notable proceedings are those that have used specifically defined offenses that correspond precisely to the criminal conduct at issue. The best examples of these types of decisions are those that find individual responsibility for the specific crime of forced disappearance rather than resorting to legal concepts such as kidnapping, abuse of authority, unlawful deprivation of liberty, and so on.

This new approach to criminal prosecution has been made possible by the development of solid legal arguments in which the national courts have responded to the issues apparently raised by the principle of legality in those cases where the offense charged was not covered under national criminal law at the time the crimes were committed. It is worth revisiting here, albeit briefly, the two most interesting and successful lines of argument. The first refers expressly to continuous or permanent crimes: in such cases, it would not be possible to allege retroactive enforcement of criminal law because the criminal conduct is continuing to occur at the moment when the specific statutory definition of the offense is incorporated into national criminal law. The second line of argument, based specifically on Article 15 of the International Covenant on Civil and Political Rights,¹ holds that the principle of legality encompasses both national and international laws. Therefore, if at the time of the events, the conduct in question was clearly prohibited by conventional international law, or even by customary international law, there would be no retroactive enforcement of the criminal law, in a broad sense.

Alongside these new arguments, other decisions from Latin American courts seem also to indicate a level of sophistication in the way in which the judicial systems are approaching the prosecution of crimes committed during the dictatorships

Latin American case law on international crimes has also led, as previously mentioned, to a strengthening of certain theories of imputation that make it possible to establish the individual responsibility of the most senior civilian, political, and military leaders, whether they are State or non-State actors.

or the armed conflicts that have taken place in the region, by bringing cases based on crimes such as the forced recruitment of minors, forced displacement, or rape. This entails not just a mere expansion of the substantive bases for criminal prosecution but also an awareness of the real dimensions of the criminal conduct. That is, when the defendant is charged, for example, with the commission of a sex crime—rather than other crimes such as torture or

assault and battery—the judicial process will provide the opportunity to more reliably recover the experience of the victims and reveal a more complete truth to society.

Together with this evolution, Latin American case law on international crimes has also led, as previously mentioned, to a strengthening of certain theories of imputation that make it possible to establish the individual responsibility of the most senior civilian, political, and military leaders, whether they are State or non-State actors. Notable among these theories are simple co-perpetration (*coautoría simple*), co-perpetration by virtue of failing to act in compliance with a legal duty (*coautoría impropia*), and successive co-perpetration (*coautoría sucesiva*), as well as perpetration-by-means through an organized apparatus of power (*autoría mediata a través de aparatos organizados de poder*).

More specifically, in some of the judgments handed down in recent years by different Latin American courts, high-ranking civilian officials who were acting within the framework of military dictatorships, including a foreign minister, have been convicted as direct co-perpetrators. Similarly, there have been successful prosecutions of military and police personnel—as co-perpetrators by virtue of failing to act in compliance with a legal duty or co-perpetrators by omission—for crimes committed by paramilitary groups or militias. This has been accomplished without the need to prove the institutional connection between the direct perpetrators and those considered co-perpetrators.

Although an in-depth treatment of this issue is beyond the scope of this brief article, it is important to take a moment to underscore the parallels between the Latin American judgments on individual responsibility and the corresponding decisions of the International Criminal Court (ICC). In a significant redefinition of the legal bases for individual responsibility in the Rome Statute, the ICC has closely approached the doctrines that the Latin American courts have been developing. These parallels are particularly important when we consider the complexity

¹ In contrast to other international human rights treaties, Article 15.1 of the ICCPR contains a very particular formulation of the principle of legality, establishing that “No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.”

of the arguments involved in prosecuting these types of crimes. The possibility of establishing a more direct “jurisprudential dialogue” in international criminal law—just as this dialogue has been developing in the national constitutional courts and international human rights courts—will undoubtedly lead to a strengthening of the capacities, both national and international, needed to deal with these cases.

Indeed, this is one of the most important lessons that the Latin American experience can provide to the general debate about the fight against impunity. Unquestionably, a State’s ability and willingness to prosecute those responsible for international crimes means having at least some degree of political openness, as well as minimum conditions of judicial independence and certainty. Nevertheless, none of this will be sufficient if those responsible for conducting these complex investigations and processes lack the necessary technical bases to put forward arguments that reflect the specific characteristics of the offenses.

These considerations bring us to the final aspect of recent developments in Latin American case law: the adaptability of the procedural or evidentiary strategies developed over the past few years by various actors in the region. Without a doubt, a full recounting of the accumulated experience on this issue warrants a detailed study in itself. However, in this simple commentary we will limit ourselves to a brief mention of some of the most interesting aspects.

First of all, the consolidation of criminal cases or proceedings should be noted. In many Latin American countries, prosecutors have decided to file their cases in the form of “mega-cases.” This prosecution strategy not only reflects criteria of judicial economy but also stems from the very nature of the crimes. As emphasized in multiple national and international judgments, the perpetration of these crimes requires the interaction of a plurality of actors, who establish different types and degrees of relationship with each other. Following this logic, the joint prosecution of various individuals enables the prosecution to

Even the best procedural strategies will be ineffectual if they fail to take account of another element crucial to the success of national prosecutions of international crimes: the production and weighing of the evidence.

present a view closer to the historical truth of the facts, revealing the complex system by which the acts in question were perpetrated (or their perpetration was facilitated).

However, even the best procedural strategies will be ineffectual if they fail to take account of another element crucial to the success of national prosecutions of international crimes: the production and weigh-

ing of the evidence. As with other aspects of these trials, the legal practitioners must adjust their own traditional notions of evidence to reflect the inherent characteristics of international crimes. The clandestinity that tends to surround their perpetration, as well as the reluctance of key actors to cooperate with investigations, have highlighted the need to use circumstantial evidence, including presumptions, indicia, reports from investigation commissions (national and international), and expert witness testimony or reports on a wide variety of subjects. Similarly, those involved in these cases must pay particular attention to the testimony of the victims themselves, of their next-of-kin, and even of individuals who do not necessarily have direct knowledge of the facts. All this must be done bearing in mind that such testimony can have significant discrepancies, owing to the passage of time or the psychological effects of the criminal experience on the individuals affected.

The viability of proceedings based on this type of evidence depends, first of all, on the weight given to it by judges, as well as on the narrative that is created through the continuous corroboration of the facts that each piece of evidence can establish. Of course, this does not mean that these cases should fail to observe evidentiary burdens or standards for the determination of individual criminal responsibility, inasmuch as these standards guarantee the right to the presumption of innocence. Respect for this right, and for all other aspects of due process, is essential if the criminal trials for the commission of international crimes are to be legitimate and understood as true processes of justice that can allow the victims and society as a whole to move forward. ■



Please send comments and possible contributions for this publication to info@dplf.org.

Digest of Latin American Jurisprudence on International Crimes, Volume II

The second volume of the *Digest of Latin American Jurisprudence on International Crimes* is an update to the first volume, published by the Due Process of Law Foundation (DPLF) in 2010. Together these two volumes, written by Professor Ximena Medellín in coordination with DPLF, provide a groundbreaking analysis and systematization of judicial decisions from national courts in a number of Latin American countries that approach the criminal prosecution of international crimes from the perspective of international law.

The judgments included in the second volume reflect important developments in Latin American jurisprudence on issues that have heretofore been examined almost exclusively in the case law of the international courts. Volume II includes a more extensive treatment of the theories of imputation—particularly co-perpetration and perpetration-by-means—and more specific discussions about the elements of the crimes. This volume also contains judgments dealing with issues that had not previously been addressed by the courts in the region, such as the commission of sex crimes, forced displacement, and the recruitment or conscription of minors.

By helping to disseminate emblematic judgments from Latin American courts, DPLF is contributing to the development and con-

solidation of new legal arguments and advancing academic debate on the possibilities for obtaining justice for the crimes committed in horrific times in the history of various countries in the Americas.

Volume II of the digest was launched in El Salvador on August 16, 2013, at a forum entitled “Challenges in the Prosecution of International Crimes: The Role of the Courts in Latin America.” The event was organized in cooperation with the Supreme Court of Justice of El Salvador and the Fundación de Estudios para la Aplicación del Derecho (FESPAD, Foundation for the Study of the Application of the Law). Experts Naomi Roht-Arriaza, chair of DPLF’s Board of Directors, and Ximena Medellín, author of the digest, spoke about the principles and theories of international law that have been applied in different courts throughout the hemisphere to address legal obstacles to the prosecution of international crimes committed during wars or periods of repression, such as amnesties or statutes of limitations. In El Salvador, the digests were also shared with judges, prosecutors, and members of civil society through workshops and discussion groups.

Ximena Medellín (CIDE), presenting the *Digest of Latin American Jurisprudence on International Crimes, Volume II*, at a public forum in El Salvador.



Naomi Roht-Arriaza, DPLF president (center), at a workshop with Salvadoran judges.



Left to right: Carlos Rivera, Instituto de Defensa Legal (IDL), Ximena Medellín (CIDE), and Leonor Arteaga, Senior Program Officer (DPLF).



Back row, left to right: Leonor Arteaga (DPLF), Ezequiel Ocampo (CIDE), Ximena Medellin (CIDE), Jo-Marie Burt (WOLA), and Abraham Abrego (FESPAD)

IACHR hearing and discussion group on the role of Latin American courts in the investigation and punishment of serious human rights violations

On November 1, 2013, DPLF and several other organizations took part in a hearing convened by the Inter-American Commission on Human Rights (IACHR) during its 149th session. The hearing was held at the request of the participating organizations, which also included the Fundación de Estudios para la Aplicación del Derecho (FESPAD, Foundation for the Study of the Application of the Law) in El Salvador; the Instituto de Defensa Legal (IDL, Legal Defense Institute) in Peru; the Centro de Investigación y Docencia Económicas (CIDE, Center for Research and Teaching in Economics) in Mexico; the Myrna Mack Foundation in Guatemala; and the Human Rights Center of the School of Law at Diego Portales University in Chile.

The participating organizations informed the IACHR of persistent weaknesses in the criminal justice systems that are inconsistent with the States' duty to prosecute those crimes and combat impunity, in spite of the fact that most of the region has made progress in doing away with amnesty laws.

At the hearing, the organizations also presented a report detailing the progress, obstacles, and continuing challenges in the prosecution of serious human rights violations by the judicial systems of Guatemala, El Salvador, Argentina, Peru, and Chile. We asked the IACHR to foster or strengthen dialogue with the States, and in particular with the judiciaries, so that these pending cases will be effectively investigated and prosecuted. We also asked the Commission to consider drafting a report that systematizes the case law of the inter-American human rights system pertaining to due diligence in the investigation of these acts and best practices developed by the national justice systems in investigating and prosecuting them.

The information submitted was based on the two volumes of research published by DPLF in the *Digest of Latin American Jurisprudence on International Crimes*, as well as on additional research conducted by the other organizations and on their litigation experience.

It was reported to the IACHR during the hearing that, on one hand, there has been notable progress over the last decade in Latin America in overcoming the legal obstacles to justice (such as amnesties), as well as in the prosecution and punishment of those responsible for crimes committed during armed conflicts or military dictatorships, thanks to constitutional court decisions that paved the way for criminal court judgments. On the other hand, these advances vary significantly from country to country and have sometimes occurred in tandem with setbacks. Such is the case in Peru, with the attempted reduction in the sentences of the perpetrators of the Barrios Altos massacre. In Guatemala, a setback occurred in the genocide case against Ríos Montt when the Constitutional Court handed down a judgment that could allow for the application of the 1986 Amnesty Law—in spite of the fact that this law was repealed by the subsequent Amnesty Law of 1996, which expressly prohibits its application to those crimes.

Earlier, on Thursday, October 31, DPLF and the Washington Office on Latin America (WOLA) held a discussion group with regional experts on the topic of “**Latin American Courts: Putting an End to the Impunity of the Past?**” Participants examined the role that the national criminal justice systems have played and the impact of international law in the fight against impunity in light of ongoing cases in El Salvador, Peru, and Argentina.

Transitional Justice and Violations of Economic, Social, and Cultural Rights

Clara Sandoval

Senior lecturer at the School of Law, University of Essex, UK. Director of the Essex Transitional Justice Network, and a member of the Human Rights Centre at the university

The field of transitional justice has for the most part addressed violations of civil and political rights, such as the rights to life, to humane treatment, and to personal liberty. During the last decade, however, important figures have called for broadening the definition to include violations of economic, social, and cultural rights (ESCR). Louise Arbour, then United Nations High Commissioner for Human Rights, pointed in this direction in 2006 in a seminal piece entitled “Economic and Social Justice for Societies in Transition.” Transitional justice, she wrote, must seek to “assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that pre-dated the conflict and caused or contributed to it.”¹

Arbour’s call resonated within the United Nations. In 2010 the UN Secretary-General released a guidance note on the United Nations approach to transitional justice, stating that the UN should “strive to ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights, including economic, social and cultural rights.”² This docu-

Should transitional justice deal with violations of ESCR? And are transitional justice mechanisms an adequate means to deal with these violations? The need to address these questions and to firmly link transitional justice with economic, social, and cultural rights became clear in the context of the Arab Spring.

ment changed the scope of transitional justice and in so doing forced practitioners, academics, and stakeholders to come to terms with the new approach. In particular, this enlargement of transitional justice has put two questions on the table. Should transitional justice deal with violations of ESCR? And are transitional justice mechanisms an adequate means to deal with these violations?

The need to address these questions and to firmly link transitional justice with economic, social, and

cultural rights became clear in the context of the Arab Spring. In Tunisia, for example, an underlying cause of the revolution was the growing unemployment in the country, along with pervasive corruption. Mohamed Bouazizi set fire to himself after Tunisian authorities seized his fruit stall, the only means of survival for his family of eight. The Arab Spring also reminds us that while corruption and economic crimes can cause violations of ESCR, they are a different, albeit related, concept.

Should transitional justice deal with violations of ESCR?

Since transitional justice is a field that has emerged through practice, it can change, so long as those transformations do not endanger its overriding purpose: “to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”³ Transitional justice has already changed over the years. For example, not much used to be said about torture or sexual violence, or about reparations

¹ Louise Arbour, “Economic and Social Justice for Societies in Transition,” speech delivered at the Second Annual Transitional Justice Lecture hosted by New York University School of Law and International Center for Transitional Justice, October 25, 2006. Reprinted in *NYU Journal of International Law and Politics* 40, no. 1 (2007): 1–27.

² UN Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (New York: United Nations, 2010), p. 7.

³ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, S/2004/616 (New York: United Nations, 2004), para. 8.

for victims. Today, these are part and parcel of transitional justice. If violations of ESCR are large-scale abuses that took place in the context of repression or conflict, any mechanism called transitional must address them. This does not mean that these mechanisms can be expected to end poverty or ensure the fulfillment of economic, social, and cultural rights. It simply means that their mandates allow them to address ESCR violations. In so doing, they can trigger small but important changes that contribute to the respect, protection, and fulfillment of these rights in relation to victims and future generations.

The East Timor truth commission (CAVR), examining the Indonesian occupation of East Timor from 1975 to 1999, reported that 84,200 of the estimated 102,800 deaths related to the conflict were caused by hunger and illness.⁴ It is not possible to turn a blind eye to systematic violations of the rights to health or to an adequate standard of living when these accounted for most of the fatalities during the occupation. Transitional justice must deal with such violations, even if it is unable to remedy the poverty and destitution of surviving victims.

Indeed, all victims of large-scale violations need to be recognized as such. Creating hierarchies of harm or prioritizing some victims over others without reasonable grounds only impedes accountability, justice, and reconciliation. This argument is particularly powerful from a gender perspective. If the majority of surviving victims of conflict and repression are women, transitional justice should address their harm, which is related, although not exclusively, to deprivations of their economic and social rights.

If the legacy of all large-scale violations is not dealt with, then reconstruction of the truth will only be partial. This makes it difficult to identify all perpetrators of the violations, to design adequate guarantees of nonrepetition, and to carry out institutional reform to tackle the causes of the violations. In such a scenario, an important aim of transitional justice, namely to prevent future violations, will be diminished.

If violations of ESCR are large-scale abuses that took place in the context of repression or conflict, any mechanism called transitional must address them.

Are transitional justice mechanisms adequate for dealing with those violations?

Transitional justice mechanisms include truth commissions and other truth mechanisms, courts and noncriminal tribunals, reparations programs, and institutional reform measures. Typically, these are weak

institutions, both politically and economically. Nonetheless, the questions to ask are whether they are inherently adequate for dealing with ESCR violations, whether operators have the skills needed to do so, and how best to carry out this task. While they vary in their mandates, truth and reconciliation commissions (TRCs) seek to discover the truth of what happened, often taking into account the causes and consequences of conflict or repression. In principle, they are equipped to look into violations of ESCR that happened on a large scale, and some TRCs have interpreted their mandates in this way. For example, CAVR in East Timor included a chapter on violations of economic and social rights in its final report.⁵ The Historical Clarification Commission (CEH) in Guatemala dealt with cultural rights.⁶ Newer TRCs such as the Kenyan truth commission have also addressed these violations.⁷

Courts are more limited than TRCs in dealing with ESCR violations, given procedural issues (admissibility and jurisdiction, among others), but these constraints do not mean they can do nothing. Indeed, even if criminal tribunals do not have jurisdiction over violations of economic and social rights, they are able to adjudicate on crimes against humanity, war crimes, or genocide, any of which can occur when people are deprived of minimum standards of living. For example, in the Kupreškić case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia considered that persecution as a crime against humanity could result from violations of ESCR when such violations happen in a discriminatory, gross, and blatant manner. In this case, the rights to education, housing, and health were at stake.⁸

⁴ Commission for Reception, Truth and Reconciliation in East Timor, *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste* (Dili, East Timor: CAVR), part 6, para. 8.

⁵ *Ibid.*, chap. 7.9.

⁶ Comisión para el Esclarecimiento Histórico, *Guatemala: Memoria del Silencio*, vol. 3 (Guatemala City: F&G Editores, 1999), chap. 2, paras. 503–601.

⁷ *Truth, Justice and Reconciliation Commission of Kenya, Final Report* (Nairobi: TJRC, 2013), vol. I, p. viii, and vol. IIB.

⁸ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment, January 14, 2000, paras. 615(c) and 616–27.

As for noncriminal tribunals, the work of regional and domestic courts such as the Inter-American Court of Human Rights, the Human Rights Chamber for Bosnia and Herzegovina, and the Colombian Constitutional Court illustrates their potential for dealing with violations of ESCR that occurred during conflict or repression.⁹

Whether reparations are an adequate means to deal with these violations depends in part on the way they are designed—the extent to which they incorporate gender perspective, consultation, information, outreach, empowerment, and other such features. It also depends on the forms of reparation that are used to redress the harm. Over the years, reparations have been applied mainly in relation to violations of civil and political rights, although this process has given rise indirectly to corrective justice measures that arguably have helped ensure economic, social, and/or cultural rights. Nevertheless, examples of direct reparations for ESCR violations do exist. One is the Programa de Exonerados Políticos (Program for the Political Dismissed) in Chile, which compensated those who lost their jobs and social security benefits for political reasons during Pinochet's dictatorship.¹⁰

Guarantees of nonrepetition and institutional reform measures (also linked to reparations) can address the root causes of ESCR violations.

Guarantees of nonrepetition and institutional reform measures (also linked to reparations) can address the root causes of ESCR violations. While they are the least used and least explored of the transitional justice measures, even in relation to violations of civil and political rights, they are also crucial. When used to address violations of ESCR, they can facilitate synergies and links between tran-

sitional justice mechanisms, on the one hand, and development and poverty eradication programs, on the other. More work in this area is urgently needed.

While all transitional justice mechanisms can potentially play a role in dealing with ESCR violations, a major problem is that those charged with implementing these mechanisms lack expertise and, sometimes, interest in using transitional justice to address this broader spectrum of rights.

Conclusions

Transitional justice mechanisms can appropriately be used to deal with violations of economic, social, and cultural rights that happened on a large scale and as part of conflict or repression. While their potential to address these violations varies, there are examples of good practices. Nevertheless, the change of paradigm—the widening of the field of transitional justice to include ESCR, and the use of transitional mechanisms to remedy such violations—continues to face resistance and will take time to be firmly accepted.

Important developments internationally and regionally are helping to advance this change. The entry into force in May 2013 of an optional protocol to the International Covenant on Economic, Social and Cultural Rights established complaint and inquiry mechanisms for the Covenant. Also new in 2013 is a Unit on Economic, Social, and Cultural Rights of the Inter-American Commission on Human Rights. These mechanisms should help bridge constituencies that so far have worked separately and facilitate transitional justice work in relation to violations of ESCR. ■

⁹ Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment of November 19, 2004, Series C, No. 116, para. 81; *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of September 15, 2005, Series C, No. 134, paras. 96.30–96.67; *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 1, 2006, Series C, No. 148, paras. 125–80. Human Rights Chamber for Bosnia and Herzegovina, *Kličković et al. v. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and Republika Srpska*, CH/02/8923, Judgment of January 10, 2003, para. 15; *Šećerbegović et al. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, CH/98/706, Judgment of April 7, 2000; *Mitrović v. the Federation of Bosnia and Herzegovina*, CH/98/948, Judgment of September 6, 2002, para. 54; *MJ v. Republika Srpska*, Case No. CH/96/28, Judgment of November 7, 1997, paras. 6–11. Colombian Constitutional Court, T-025/04, opinion of the Court delivered by Judge Manuel José Cepeda, January 22, 2004, section 9; T-045/10, opinion of the Court delivered by Judge Maria Victoria Calle, February 2, 2010.

¹⁰ National Congress of Chile, Law 19.234, August 12, 1993.



Please send comments and possible contributions for this publication to info@dplf.org.

The wheels of international criminal justice grind slowly for Hissène Habré

Max du Plessis

Max du Plessis is a research associate at the Transnational Threats and International Crime Division, ISS Pretoria, and University of KwaZulu-Natal

Hissène Habré was the president of Chad from 1982 until he was deposed in 1990. He has been living in exile in Senegal since 1990. He was indicted there in 2000 and is under house arrest under the close watch of elite Senegalese armed forces. During more than two decades of exile, Habré has seen numerous parties seeking justice for his alleged crimes against humanity, torture and war crimes in Chad while in office, with recourse sought in a multitude of regional, national and international tribunals. Senegal has to date, however, not tried or extradited Habré to face the charges against him.¹

Matters culminated in a decision of the International Court of Justice (ICJ) in The Hague. In its 20 July 2012 decision, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the ICJ ruled on Belgium's application to end a long dispute with Senegal over Senegal's duties in respect of Habré and the crimes he is accused of committing.



Habré is accused of thousands of political killings and systematic torture when he ruled Chad, from 1982 to 1990. He has been living since then in exile in Senegal, where he was indicted in 2000. Habré is also wanted by Belgium on charges of crimes against humanity, war crimes, and torture.

After years of stalling by Senegal, the new government of President Macky Sall finally opened a path

to justice for Habré's victims.

On August 22, 2012, Senegal and the African Union (AU) signed an agreement to establish a special court in the Senegalese justice system with African judges appointed by the AU presiding over his trial and any appeals.

The agreement came on the heels of a landmark ruling by the International Court of Justice on July 20, 2012 ordering Senegal to bring Habré to justice "without further delay" either by prosecuting him domestically or extraditing him for trial.

On February 8, 2013 the Extraordinary African Chambers were inaugurated in Dakar. On July 2, 2013 Hissène Habré is charged with crimes against humanity, torture and war crimes by the Extraordinary African Chambers and placed in pre-trial detention.

Photo courtesy of the Institute for Security Studies

Belgium's application against Senegal highlights many pressing issues around the interpretation and application of the international law and policy relating to human rights abuses, the fight against impunity and the enforcement of international criminal norms. It also highlights questions more generally about commitment to the international legal order, and compliance with decisions of the ICJ.

Believing that Senegal was flouting its legal obligations, Belgium approached the ICJ in February 2009 to order that Habré be either tried or extradited by Senegal. The central feature of the case was the question under international law concerning Senegal's 'obli-

gation to prosecute or extradite Habré, the former President of Chad (1982–1990), for the commission of serious international crimes, including crimes of torture and crimes against humanity'. The ICJ ordered that Senegal must, without further delay, submit the Habré case to its competent authorities for the purpose of prosecution, if it does not extradite him.

In response to this judgment, Senegal and the African Union (AU) have agreed on a way to prosecute Habré. This has now led to the creation of the *Chambres Africaines Extraordinaires* – a completely unique domestic court in Senegal created with specific jurisdiction over international crimes committed in Chad between 7 June 1982 and 1 December 1990 (the pe-

¹ This article was first published in *ISS Today* and can be accessed at: <http://www.issafrica.org/iss-today/the-wheels-of-international-criminal-justice-grind-slowly-for-hissene-habre>.

riod during which Habré is alleged to have committed his crimes). Early indications are that the country plans to bring Habré before this court officially in 2014.

This is a promising, albeit late, start. It heralds an important moment in the struggle to hold human rights abusers accountable under international criminal law. It is also a significant indicator of Africa's commitment to the international legal regime, and of Senegal's commitment to the rule of law as embodied in the ICJ's judgment. All too often a simplistic and cynical view is peddled (particularly by Western states) about Africa's commitment to international norms. While there is much about the Habré saga to raise questions over Senegal's fealty to the obligations imposed by international law, sight should not be lost of the fact that it submitted to the jurisdiction of the ICJ for the peaceful resolution of a controversial question of interest to the entire world community. And now, on the back of the ICJ's decision, the Senegalese government, under the watchful eye of the AU, is taking concrete steps to implement the court's order.

Compare this case with the record of the United States (US) before the ICJ. The US had previously accepted the court's compulsory jurisdiction (upon its creation in 1946). But in 1986, following the ICJ's judgment in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), the US withdrew its acceptance because the judgment called on the US to 'cease and to refrain' from the 'unlawful use of force' against the government of Nicaragua. The ICJ ruled (with only the American judge dissenting) that the US was 'in breach of its obligation under the Treaty of Friendship with Nicaragua not to use force against Nicaragua' and ordered the US to pay war reparations.

More recently, in 2005, the US withdrew from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes. The Optional Protocol provides for jurisdiction in the ICJ when any state party to the Vienna Convention on Consular Relations seeks to sue

Believing that Senegal was flouting its legal obligations, Belgium approached the ICJ in February 2009 to order that Habré be either tried or extradited by Senegal.

another state party for violating it. The US had just lost two cases in the ICJ arising out of situations in which US police had failed to observe consular access for arrested foreign nationals. The withdrawal was a response to those decisions.

Or consider Israel's conduct before the ICJ, recalling the decision by the United Nations General Assembly of 8 December 2003 at its Tenth Emergency Special Session to submit the question of the legality of Israel's wall or barrier in the Occupied Palestinian Territory for an advisory opinion. While Israel did not participate in the oral hearings in the ICJ, it chose to submit written submissions. And, taking into account that the General Assembly had granted Palestine a special status as observer and that it had co-sponsored the draft resolution requesting the advisory opinion, Palestine was permitted to submit a written statement on the question – and to present oral submissions before the court. The court heard from a number of states and two international organizations during oral hearings in February 2004. It delivered its advisory opinion on 9 July 2004, finding that Israel was in breach of international law in its construction of the separation wall. Israel has scorned the ICJ's decision, and the wall continues to be built to this day.

Of course Senegal's efforts to comply with the ICJ's decision have just begun, and they will be closely scrutinized. For now, this saga teaches at least two lessons. The first is that tenacity pays off in the fight against impunity, and that eventually, with its wheels grinding slowly, international criminal justice can be done through states acting in concert with one another to bring tyrants to book. The second is that Africa remains (for better or worse) a testing ground for so many of the important developments in international law more generally, and international criminal law in particular. And, promisingly for the rule of law on the continent, at the very least Senegal has demonstrated that it will abide by decisions of the ICJ, even when the court rules against it. ■



Please send comments and possible contributions for this publication to info@dplf.org.

Transitional justice has a new United Nations thematic rapporteurship

Team DPLF



Pablo de Greiff. UN Photo/Amanda Voisard

On September 29, 2011, the United Nations Human Rights Council created the **Office of the Special Rapporteur on the promotion of truth, justice, reparations, and guarantees of non-recurrence** by means of Resolution 18/7, and appointed **Pablo de Greiff**, a Colombian national and well-known expert in the field, to a three-year term as the first Rapporteur.

In the resolution creating this special procedure¹, the Council underscored the importance of a comprehensive approach that encompasses the four elements of the mandate of the Office of the Rapporteur (truth, justice, reparations and guarantee of non-recurrence) and:

“...incorporating the full range of judicial and non-judicial measures, including...individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials, or an appropriately conceived combination thereof...” in order to “...ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law.”

Date of Creation	September 29, 2011 (18 th Session, Resolution A/HRC/ RES/18/7)
Name of Rapporteur	Pablo de Greiff
Date appointed	March 23, 2012 (19th Session) May 1, 2012 (beginning of term as Rapporteur)

Mandate (duties)

The Special Rapporteur develops his or her mandate through 13 assigned duties:

1. Providing technical assistance or advisory services on the issues pertaining to the mandate;
2. Gathering relevant information on national legal frameworks, practices, and experiences, such as truth and reconciliation commissions and other mechanisms to address human rights violations and serious violations of international humanitarian law;
3. Studying trends, developments, and challenges and making recommendations thereon;
4. Identifying, exchanging, and promoting good practices and lessons learned;
5. Establishing a regular dialogue and cooperating with governments, international and regional organizations, national human rights institutions, and non-governmental organizations, as well as relevant United Nations bodies and mechanisms;
6. Making recommendations on judicial and non-judicial measures when designing and implementing strategies, policies, and measures;
7. Undertaking a study, in cooperation with states and relevant United Nations bodies and mechanisms, international and regional organizations, national human rights institutions, and non-governmental organizations on the ways to tackle the issues pertaining to the mandate;
8. Conducting country visits;
9. Participating in relevant international conferences and events;
10. Raising awareness of the value of a systematic and coherent approach to dealing with gross violations of human rights and serious violations of international humanitarian law;
11. Integrating a gender perspective; and
12. Integrating a victim-centered perspective.
13. Working close coordination with the office of the United Nations High Commissioner for Human Rights and with other special procedures of the Human Rights Council.

Annual Report²

On August 9, 2012, the Special Rapporteur presented his annual report (A/HRC/21/46) to the Human Rights Council. After listing the activities undertaken, he discussed the scope of his mandate and the strategies used for its implementation, and made the following observations:

- It was important to take a comprehensive approach to gross violations of human rights and serious violations of international humanitarian law. This approach to questions of truth, justice, reparations, and guarantees of non-recurrence can make a distinctive contribution to the realization of a broad catalogue of rights.
- The four elements under the mandate rest on established rights and obligations and are meant to give expression to them. They are not simply a matter of empathy, charity, or expedience.
- It is essential to stem the tendency on the part of some states to trade off one measure against others.
- The four measures under the mandate must assist in the pursuit of two intermediate goals – providing recognition to victims and fostering trust – and two final goals – contributing to reconciliation and strengthening the rule of law. It is fundamental that the victim be recognized as the holder of rights.
- The measures under the mandate seek to contribute to both trust between individuals and the individual's trust in state institutions. Trust involves the expectation of shared normative commitment. Both recognition and trust are preconditions and consequences of justice.
- Reconciliation is, at a minimum, the condition under which individuals can again trust one another as equal rights holders.
- The rule of law must be understood in a way that supports an understanding of its ultimate aim – promoting a just social order – and the more particular aims pursued by transitional justice measures, including recognition, trust, and reconciliation.
- The concept of the rule of law also includes the conditions under which individuals and civil society at large are guaranteed meaningful participation in processes of law-making, through which they can give content to the notion of justice.

Visits

Countries visited and report on visits:

- Tunisia (November 2012):
“Report of the Special Rapporteur on the promotion of truth, justice, reparations, and guarantees of non-recurrence, Mission to Tunisia” (July 2013)
- Uruguay (October 2013)
“Preliminary observations of the Special Rapporteur on the promotion of truth, justice, reparations, and guarantees of non-recurrence at the conclusion of his official visit to the Eastern Republic of Uruguay” (October 2013)

Scheduled visits:

- Spain (January 2014)

Requests for visits

- Brazil
- Côte d'Ivoire
- Democratic Republic of the Congo
- Guatemala
- Guinea
- Indonesia
- Nepal
- Rwanda

¹ The Special Rapporteurs are part of the “special procedures,” mechanisms established by the Human Rights Council to examine, supervise, advise, and report publicly on human rights situations in specific countries or territories, known as “country mandates,” or key topics of human rights violations at the international level, known as “thematic mandates.” The special procedures mandate-holders perform their duties in a personal capacity and are not financially compensated for their work. Their independent status is essential to their being able to discharge their duties with absolute impartiality. For more information, see: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>.

² Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/21/46, 9 August 2011, paras. 60–69. Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf.

Argentina

New Challenges in the Process of Justice for Crimes against Humanity in Argentina: Civilian Complicity and Crimes against Sexual Integrity

Gastón Chillier and Lorena Balardini

Executive director of the Centro de Estudios Legales y Sociales (CELS, Center for Legal and Social Studies) in Buenos Aires, Argentina. Lorena Balardini is coordinator of the Research Department of CELS.

The current process of justice for the serious human rights violations committed during the last military dictatorship in Argentina (1976–1983) began in 2001 with the initial nullification of the amnesty laws that were enacted in the 1980s.

Significant progress has been made in recent years, including the creation of a prosecution unit for the coordination and monitoring of cases involving human rights violations committed during the period of State terrorism.¹ In addition, Order 1/12 of the National Criminal Cassation Chamber establishes technical rules to expedite complicated cases and improve the treatment of witnesses.²

To date, 2,088 people have been charged with these offenses. In the 95 judgments handed down as of May 2013, 386 individuals were convicted and 34 were acquitted.³ Recently, the investigations have been diversified and expanded. The new areas of inquiry include, on one hand, the reconstruction of the complicity of civilians with the Armed Forces and the Security Forces, and on the other hand, the responsibility of the ideologues and agents of repression for crimes against sexual integrity in the context of clandestine detention. This broadening of the scope of investigation brings with it new challenges, including the need to make the most recent investigations compatible with all of the pending cases still awaiting trial (over 72 percent of the active cases).

Civilian complicity with crimes of State terrorism

Corporate complicity is one of the areas in which the most progress has been made. Different investigations demonstrate the close connection between the policy of repression and the economic policies established during the dictatorship. This is reflected both in the benefits that various economic groups obtained and in specific actions taken by the heads of different companies to facilitate the kidnapping and torture of their employees.

One example that illustrates this forward movement in the process is the November 2012 indictment of Carlos Pedro Blaquier, owner of the Ledesma sugar refinery, as an accomplice to the unlawful deprivation of liberty of 29 individuals. Three of the victims were trade union leaders with close ties to the sugar refinery's employees. The remaining 26 disappeared on the "Night of the Blackout" (Noche del Apagón) in the Province of Jujuy.⁴ Other notable cases include the request for the investigation of Vicente Massot, publisher of the newspaper *La Nueva Provincia* of Bahía Blanca, as the instigator of a campaign of disinformation and propaganda that provided the conditions for the acts of repression that took place in the area.⁵ Additionally, Ford Motor

¹ The new prosecution unit was established in 2007. Since its creation, and especially since 2008, it has conducted exhaustive work implementing the legal strategies to organize trials throughout the country. See CELS, *Derechos Humanos en Argentina: Informe 2012* (Buenos Aires: Siglo XXI, 2012).

² See National Criminal Cassation Chamber, Order 1/12, and Raúl Arco-mano, "Una guía para agilizar los juicios," *Miradas al Sur*, Year 5, no. 198 (March 4, 2012).

³ Data released by CELS, updated as of May 15, 2013. For further information, see "Estadísticas" on the CELS website, <http://www.cels.org.ar/blogs/estadisticas/>.

⁴ Between July 20 and 27, 1976, electrical power was cut off several times in the area of Libertador General San Martín, in Jujuy Province. During these outages, which were done at night, some 400 people were kidnapped. According to the testimony obtained during the investigation, the Ledesma Company provided personnel and vehicles for the detentions. See Ludmila Catela da Silva, *No habrá flores en la tumba del pasado: La experiencia de reconstrucción del mundo de los familiares de desaparecidos* (La Plata, Argentina: Ediciones Al Margen, 2001).

⁵ *La Nueva Provincia* published reports of nonexistent "waves of terrorist acts" and of "combat operations" that in fact were summary executions. In its coverage, members of the opposition were depicted as foreign, strange, crazy, and contrary to "the Argentine lifestyle." In the court's opinion, the



The former *Escuela de Mecánica de la Armada* in Buenos was one of the main political prisoner detention and torture centers during the dictatorship. Photo: © AP

Company executives were investigated and subsequently prosecuted for their participation in the kidnapping and torture of 25 former employees during the last military dictatorship.⁶

The investigation of the economic sector's complicity with the dictatorship reveals other interesting findings. More than 130 financiers and businessmen were kidnapped and tortured, according to a recent report published by the National Securities Commission (CNV). Eleven of them remain disappeared. During the dictatorship, the CNV facilitated the sale of factories under duress. This led to the concentration of ownership and of the market in the hands of a few economic groups and to the draining of companies that belonged to individuals accused of being "subversives." Many of the Commission's officials also attended torture sessions at clandestine centers.⁷

Investigation of the complicity of members of the judiciary with the dictatorship is also on the agenda. The trials have involved ongoing testimony condemning the passivity of judges with respect to the writs of *habeas corpus* filed to seek the whereabouts of victims of forced disappearance. There have also been accounts of cases in which judges and prosecutors actively participated in other crimes such as torture, child stealing, and property theft.⁸ Nevertheless, the judiciary has been reluctant to adjudicate its

newspaper directors' dealings with the Armed Forces went beyond the operational level and indicate complicity with the authorities of the Army's V Corps. The request for investigation, from May 2013, was dismissed by a federal trial court judge. The prosecutors appealed the decision, but the higher court has yet to issue its ruling.

⁶ See "Fueron procesados tres directivos de Ford," *Página 12*, May 21, 2013.

⁷ See "La trama financiera de la última dictadura," *Página 12*, March 24, 2013, p. 12.

⁸ For example, Judge Otilio Romano was prosecuted for his participation in 103 cases of unlawful deprivation of liberty and torture between 1975 and 1983, when he was a prosecutor. Romano fled to Chile during the trial for his dismissal from office. In February 2012, he was detained by Interpol, and the Supreme Court of Chile must now decide on his extradition.

own crimes: to date, only one judge has been convicted,⁹ while 11 are on trial and criminal complaints have been filed against six others. As for the prosecutors, three are on trial and three are the subject of criminal complaints.

Sexual violence as part of the systematic plan of extermination

Rape and sexual abuse was perpetrated systematically and was an extensive and differentiated practice. The independent prosecution of these crimes in recent years reflects a fundamental advance insofar as it acknowledges that sexual violence at the clandestine centers was part of the general plan to destroy and degrade the subjectivity of individuals and was not, therefore, a matter of isolated situations. It is thus understood that the rape offenses committed are crimes against humanity, and as such are not subject to a statute of limitation. This acknowledgement stems from the development of concepts and standards on gender-based justice by international tribunals such as International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court, all of whose statutes include rape as a crime against humanity.

Sexual violence was invisible in the initial post-dictatorship testimonies. The narratives of witnesses focused on identifying individuals who remained disappeared, in line with the design and orientation of the criminal prosecution (the best example being the Trial of the Juntas). Accordingly, the witnesses' own ordeals—including sexual violence—were put on a back burner. Although it was technically possible to prosecute these crimes during the periods of impunity, it is in the recent stage of reopening cases that the survivors have addressed their own cases and the facts surrounding them with greater frequency.¹⁰

There are several obstacles to bringing these cases to court, including the pervasive sexism and gender discrimination in the

⁹ Former federal judge Víctor Hermes Brusa was sentenced to 21 years in prison in December 2009.

¹⁰ Lorena Balardini, Ana Oberlin, and Laura Sobredo, "Violencia de género y abusos sexuales en centros clandestinos de detención: Un aporte a la comprensión de la experiencia argentina," in *Hacer Justicia: Nuevos debates sobre el juzgamiento de los crímenes de lesa humanidad en Argentina* (Buenos Aires: Siglo XXI, 2011).

judiciary; the lack of sensitization among practitioners in the legal system; and issues related to evidence, the nature of crimes against humanity, and the understanding of criminal participation and responsibility. When witnesses provide statements, they are generally not asked whether they were victims of sexual violence during their detention; instead they are asked about other crimes.

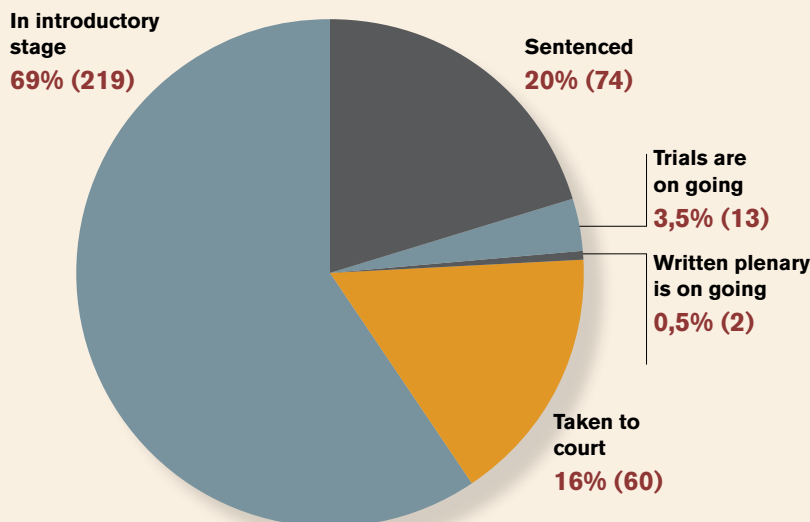
Nevertheless, there have been significant judgments and decisions in the last few years, such as the 2010 conviction of Gregorio Molina in Mar del Plata as the direct perpetrator of rape—the first such conviction in the country. Another important case is the prosecution of Jorge Rafael Videla (now deceased) and nine other defendants accused of being “necessary participants” in sexual offenses committed as part of Operation Independence. In this case, there are two points to underscore: the case deals with events prior to 1976, and some acts were perpetrated in the homes of area residents, where women were subjected to forms of sexual slavery and servitude. Other examples are the 2012 conviction of Musa Azar and three other defendants for commanding others to commit crimes of sexual assault and rape, and two trials underway in Tucumán and Buenos Aires (“mega-case” Headquarters II and Arsenal II, and ESMA III), in which military chiefs are being prosecuted for these offenses.

Closing words

Along with the processes underway in other Latin American countries, the Argentine justice process is at the forefront of a shift toward accountability for the crimes against humanity committed in the region in the recent past. Indeed, it is one of the most significant examples of transitional justice in the twenty-first century. It demonstrates, moreover, that Latin America is not just a continent from which others can learn formulas for repression and conflict; rather, the region is also a contemporary forum for disputes, debates, promising advances, and troubling setbacks for truth, justice, reparations, and memory with respect to these serious human rights violations.

Based on the points noted above, we can conclude this article by asking about the scope of the process: how far can such investigations go? The conviction of civilian officials and priests and the prosecution of businessmen and judges offer some clues. The answer seems to be that adjudication extends to wherever the systematic nature of human rights violations can be proven. The limits are not necessarily set by time, but are imposed by the historical processes that delineate the direction and the terrain that must be encompassed by justice. ■

Statistics on trials for crimes against humanity in Argentina



Available at: <http://www.cels.org.ar/wpblogs/estadisticas/>

References: This pie chart includes the different procedural stages that a criminal case goes through under the Argentine justice system.

1. **Introductory stage:** this is the first stage that a case goes through. A judge is responsible for carrying out a written investigation of the case.
2. **Taken to court:** this occurs once the written investigation is completed; the judge then declares the investigation completed and delivers the findings to the corresponding oral tribunal.
3. **Trial:** also known as the debate stage, this is the final stage of the process, where oral hearings are held by an oral tribunal. This is the stage where the accused are sentenced or cleared.

Some crimes against humanity cases are still being processed under the country's old criminal system, which was all written. The stages under this system are:

1. **Summary:** equivalent to the introductory stage.
2. **Plenary:** equivalent to the trial or debate stage but without oral arguments.

Sources for this chart belong to the Centro de Estudios Legales y Sociales (CELS), and are based on media reports and judicial resolutions up to August 2012.

Accountability for Gross Human Rights Violations in Brazil: The Araguaia Case and Its Repercussions

Leonardo Jun Ferreira Hidaka

Project manager at Brazil's National Truth Commission and a former human rights specialist at the Inter-American Commission on Human Rights of the Organization of American States

On November 24, 2010, the Inter-American Court of Human Rights issued its landmark judgment in the case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. This ruling invalidated Law 6.683/79, known as the Brazilian Amnesty Law, insofar as it had been applied to impede the investigation and prosecution of gross human rights violations, such as enforced disappearances and extrajudicial executions by Brazilian military agents. The case had been submitted to the Court by the Inter-American Commission on Human Rights (IACHR) on March 26, 2009, because "the State did not carry out a criminal investigation so as to prosecute and punish the persons responsible for the enforced disappearance of 70 victims and the extrajudicial execution of Maria Lúcia Petit da Silva," among other reasons.² Specifically, the Court unanimously declared in its judgment:

The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious



Photo: courtesy of James N. Green, Brown University

human rights violations are not compatible with the American Convention [on Human Rights], lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil.³

Consequently, the Inter-American Court ordered that the Brazilian State "conduct, within the ordinary jurisdiction, the criminal investigation of the facts of the present case in order to ascertain them, determine those criminally responsible, and effectively apply the punishment and consequences which the law dictates."⁴ This decision was groundbreaking because it was the first time that the inter-American human rights system had condemned the 1979 Brazilian Amnesty Law. Nevertheless, the ruling was by no means a novelty in the inter-American system; on the contrary, it built upon previous decisions issued by both the Inter-American Commission and the Inter-American Court regarding other countries, including Argentina, Uruguay, Peru, and Chile, among others.⁵ In those countries, significant strides

¹ The author would like to thank the federal prosecutors from Belém (Ubiratan Cazetta and Felício Pontes Jr.), Marabá (Mara Elisa de Oliveira), and São Paulo (Marlon Weichert) for their collaboration and the information provided on the topics discussed in this article. The opinions expressed in this article are the author's and do not necessarily reflect the views of the National Truth Commission, the Ministry of Interior, or the Brazilian government.

² Inter-American Court of Human Rights, *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2010, para. 2.

³ *Ibid.*, para. 325.3.

⁴ *Ibid.*, para. 325.9.

⁵ See, for example, IACHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311 (Argentina), Report No. 28/92, October 2, 1992; Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375 (Uruguay), Report

have already been made in the effort to investigate, prosecute, and punish gross human rights violations during past authoritarian regimes, notably in Argentina and Chile, and more recently in Peru and Uruguay, where former presidents Alberto Fujimori and Juan María Bordaberry, respectively, have been convicted for gross human rights violations.⁶

Brazil, on the other hand, is “the only country in the Southern Cone that did not follow similar procedures to investigate the human rights abuses that occurred during its dictatorship, even though it has officially acknowledged, through Law 9.140/95, the State’s responsibility for the reported deaths and disappearances.”⁷ Even worse, after the IACHR submitted its application related to the Araguaia case to the Inter-American Court, the Brazilian Federal Supreme Court (Supremo Tribunal Federal, STF) issued a judgment on April 29, 2010, in which it confirmed the validity, from the perspective of the Brazilian Constitution, of the Amnesty Law. This judgment was the result of an “Action for Non-compliance with a Fundamental Principle” (Argüição de Descumprimento de Preceito Fundamental) and is known as ADPF No. 153.⁸

Brazil, on the other hand, is “the only country in the Southern Cone that did not follow similar procedures to investigate the human rights abuses that occurred during its dictatorship, even though it has officially acknowledged, through Law 9.140/95, the State’s responsibility for the reported deaths and disappearances.” Even worse, after the IACHR submitted its application related to the Araguaia case to the Inter-American Court, the Brazilian Federal Supreme Court (Supremo Tribunal Federal, STF) issued a judgment on April 29, 2010, in which it confirmed the validity, from the perspective of the Brazilian Constitution, of the Amnesty Law.

The scenario was indeed gloomy three years ago. Then, the Inter-American Court issued its judgment in the Araguaia case, as noted above, and further stated that the control of conventionality was not exercised by the competent authorities of the State, but rather, the decision of the Federal Supreme Court confirmed the validity of the interpretation of the Amnesty Law without considering the international obligations of Brazil derived from international law, particularly [the American Convention on Human Rights].⁹

The situation started to change. Suddenly, impunity was no longer deemed absolute by either victims or perpetrators. Victims and human rights advocates could not help but ask, “Has Brazil’s moment for justice arrived?”

One year later, on November 18, 2011, the National Truth Commission (Comissão Nacional da Verdade) was created by Law 12.528 and tasked with examining and clarifying gross human rights violations.¹⁰ It must be noted that the creation of a truth commission was a specific request by the representatives of the victims in the Araguaia case to the Inter-American Court.¹¹ In that regard, the Court stressed that “the activities and information that this Commission will eventually obtain do not substitute [for] the obligation of the State to establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedures.”¹²

Less than two years after the Araguaia judgment, in March and July 2012, the Office of the Federal Public Prosecutor (Ministério Público Federal, MPF) presented two criminal indictments regarding enforced disappearances related to the case. Military officers Sebastião Curió Rodrigues de Moura and Lício Augusto Ribeiro Maciel are being criminally charged with the enforced disappearance of six victims included in the Inter-American Court’s judgment in *Guerrilha do Araguaia*. To date, there

No. 29/92, October 2, 1992; Case 10.843 (Chile), Report No. 36/96, October 15, 1996; Case 11.505 and others (Chile), Report 25/98, April 7, 1998; Case 11.317 (Peru), Report No. 20/99, February 23, 1999; Cases 10.815, 10.905, 10.981, 10.995, 11.042, and 11.136 (Peru), Report No. 55/99, April 13, 1999; Case 10.480 (El Salvador), Report No. 1/99, January 27, 1999; and Case 11.378 (Haiti), Report No. 8/00, February 22, 2000. Also see Inter-American Court of Human Rights, *Case of Barrios Altos v Peru*, Merits, Judgment of March 14, 2001, and *Case of Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 26, 2006.

⁶ See, for example, Due Process of Law Foundation (DPLF), *Digest of Latin American Jurisprudence on International Crimes*, vol. 1 (Washington, DC: DPLF, 2010); Naomi Roht-Arriaza, “Impunidad en América Latina: Recientes avances y obstáculos,” *Aportes DPLF*, no. 13, Year 3, June 2010; and a hearing before the IACHR, “Impunity for gross human rights violations in the Americas,” November 1, 2013 (online video available at <https://www.youtube.com/watch?v=9WyGpblgQMI&noredirect=1>).

⁷ Comissão Especial sobre Mortos e Desaparecidos Políticos, *Direito à Memória e à Verdade* [Right to Memory and Truth] (Brasília: Secretaria Especial dos Direitos Humanos, 2007), p. 21. Law No. 9.140/95 established that “for all legal purposes, the people who participated, or were accused of participating, in political activities during the period from September 2, 1961, to October 5, 1988, and who for that reason were detained by public agents and have been disappeared since then without any further information about them, are recognized as dead” (Article 1).

⁸ ADPF No. 153 was filed in October 2008 by the Brazilian Bar Association

(Ordem dos Advogados do Brasil), which requested the STF to provide an interpretation of the Amnesty Law that would be in conformity with the Brazilian Constitution.

⁹ *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 2, para. 177.

¹⁰ Law 12.528, Article 1. The actual installation of the National Truth Commission took place on May 16, 2012; therefore its two-year mandate will end on May 16, 2014, according to Law 12.528, Article 11.

¹¹ *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 2, para. 294.

¹² *Ibid.*, para. 297 (emphasis added).

are only four criminal actions related to gross human rights violations perpetrated by State agents during the 1964–1985 dictatorship.¹³

The first criminal procedure (No. 0001162-79.2012.4.01.3901) charges Sebastião Curió Rodrigues de Moura with the enforced disappearance of Maria Célia Corrêa, Hélio Luiz Navarro de Magalhães, Daniel Ribeiro Callado, Antônio de Pádua Costa, and Telma Regina Cordeiro Corrêa, all of whom are victims in the Araguaia case. According to the indictment, eyewitnesses confirm that these five people were captured by the Brazilian Army and were seen alive in the custody of military officers. They all remain disappeared to this date.¹⁴

The second criminal procedure (No. 0004334-29.2012.4.01.3901) charges Lício Augusto Ribeiro Maciel with the enforced disappearance of Divino Ferreira de Souza, who is a victim in the Araguaia case. According to the indictment, eyewitnesses confirm that this person was captured by the Brazilian Army and was seen alive in the custody of military officers. He remains disappeared to this date.¹⁵

The two other criminal procedures underway refer to the enforced disappearances of Edgar de Aquino Duarte and Hirohaki Torigoe, who were arbitrarily detained at the most notorious and infamous torture center of the Brazilian dictatorship, known as DOI-CODI, in São Paulo. In both of these cases, the DOI-CODI commander, Carlos Alberto Brilhante Ustra, is charged with enforced disappearance of persons.¹⁶

The control of conventionality was not exercised by the competent authorities of the State, but rather, the decision of the Federal Supreme Court confirmed the validity of the interpretation of the Amnesty Law without considering the international obligations of Brazil derived from international law, particularly [the American Convention on Human Rights]

So, is it possible to finally see justice on the Brazilian horizon? Maybe. Initial steps have been taken, mostly thanks to the tenacity of victims' families and the courage of a handful of federal prosecutors, but serious challenges remain. First of all, there is the question of political will (or lack thereof) of State authorities with regard to compliance with the judgment in the Araguaia case, particularly with respect to the interpretation of the Amnesty Law in conformity with Brazil's international human rights obligations.¹⁷ Just as

important, the lack of full compliance may also reflect a lack of understanding on the part of Brazilian authorities, including those of the judiciary, regarding international human rights law and Brazil's related obligations.¹⁸ It is no coincidence that the MPF, upon presenting the first two criminal indictments related to the Araguaia case, included an introductory note that explained, first and foremost, the relation of those criminal actions with the Inter-American Court's judgment and the resulting international treaty obligations.¹⁹

¹³ In both these indictments, the MPF identified the crime as "kidnapping" (*sequestro*), since the Brazilian Criminal Code does not include the crime of enforced disappearance. In this regard, the Inter-American Court determined that "Brazil must adopt the necessary measures to codify the crime of enforced disappearance of persons in conformity with the Inter-American standards" (*Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 2, para. 287). Brazil also has yet to ratify the Inter-American Convention on the Prevention and Punishment of Forced Disappearance of Persons. The lack of codification of enforced disappearances in Brazil creates additional legal hurdles, since the currently used denominations—kidnapping or "concealing a corpse" (*ocultação de cadáver*)—are inadequate. They do not reflect the special seriousness of the crime, nor do they necessarily recognize the legal nature of the offense.

¹⁴ The indictment is available at http://www.prpa.mpf.mp.br/news/2012/Denuncia_Guerrilha_Araguaia_versao_divulgacao.PDF%20-%20Adobe%20Acrob.pdf. See also <http://www.prpa.mpf.mp.br/news/2012/mpf-denuncia-curio-por-sequestros-na-guerrilha-do-araguaia>.

¹⁵ The indictment is available at <http://goo.gl/tBWmq>.

¹⁶ In criminal action No. 0011580-69.2012.4.03.6181, Carlos Alberto Brilhante Ustra, Alcides Singillo, and Carlos Alberto Augusto are charged with "kidnapping" Edgar de Aquino Duarte. The criminal action was initiated on October 23, 2012, and prosecution witnesses were heard on December

9, 10, and 11, 2013. In criminal action No. 0004823-25.2013.4.03.6181, the indictment was presented on April 29, 2013, charging Carlos Alberto Brilhante Ustra and Alcides Singillo with "concealing the corpse" of Hirohaki Torigoe. Two other indictments were presented by the MPF, regarding the enforced disappearances of Aluizio Palhano and Mário Alves de Souza Vieira, but they were rejected on May 22, 2012, and June 5, 2013, respectively. For a more detailed description of all six criminal procedures, see http://noticias.pgr.mpf.br/noticias/noticias-do-site/copy_of_pdfs/Resumo_acoes_ditadura.pdf.

¹⁷ Executive and judicial branch authorities publicly declared opposite positions regarding the judgment upon its notification. The sharpest example of disagreement was the different positions taken by Paulo Vannuchi, then minister of human rights, and Nelson Jobim, then minister of defense. See, in this regard, <http://www.sdh.gov.br/importacao/2010/12/15-dez-2010-condenacao-na-oea-pode-levar-stf-a-rever-decisao-sobre-anistia-a-agentes-de-estado-avalia-vannuchi> and <http://operamundi.uol.com.br/conteudo/noticias/8278/conteudo+opera.shtml>. See also <http://www.brasildefato.com.br/content/senten%C3%A7a-da-oea-contra-brasil-completa-um-anos-sem-ser-cumprida> and <http://ultimosegundo.ig.com.br/politica/uniao+reafirma+decisao+do+stf+sobre+lei+da+anistia/n1597033770745.html>.

¹⁸ This can be literally demonstrated by the STF decision on ADPF No. 153 itself, due to the content of the written opinions in favor of confirming the validity of the Brazilian Amnesty Law. See also, in this regard, <http://www.conjur.com.br/2010-dez-15/sentencia-corte-interamericana-nao-anula-decisao-supremo> and <http://www.estadao.com.br/noticias/nacional,stf-defende-lei-da-anistia-apos-decisao-sobre-araguaia,654094,0.htm>.

¹⁹ See Introductory Note (Cota Introdutória), Section 1, available at <http://goo.gl/tBWmq>. See also http://www.prpa.mpf.mp.br/news/2012/Cota_Introdutoria.PDF/view.

There also are complex, yet surmountable, legal questions regarding judicial accountability for past abuses that have arisen and will continue to arise in the course of these initial attempts to prosecute gross human rights violations in Brazil. The MPF has diligently identified some of these legal issues and



Photo: courtesy of James N. Green, Brown University

addressed them in its indictments. They include non-applicability of statutes of limitation; non-applicability of the Amnesty Law to the crime of enforced disappearance; the continuous nature of enforced disappearances; classification of enforced disappearances as crimes against humanity; exclusion of military jurisdiction; and exclusion of due obedience as a defense when the order is manifestly illicit or criminal.²⁰

Nonetheless, the path toward ending impunity might continue to be slow and tortuous for victims. The first criminal indictment against Sebastião Curió Rodrigues de Moura was initially rejected by a federal judge on the basis of the Brazilian Amnesty Law; however, upon appeal,²¹ that decision was reconsidered and the criminal action was initiated on August 29, 2012, along with the action against Lício Augusto Ribeiro Maciel.²² The first defendant then filed a writ of *habeas corpus* (HC 0068063-92.2012.4.01.0000/PA) and managed to obtain an injunction to temporarily suspend the proceedings. According to the information received, on November 18, 2013, the Federal Regional Tribunal (TRF) of the 1st Region examined said *habeas corpus*, and by a 2-to-1 decision the criminal action against Sebastião Curió Rodrigues de Moura has been halted.²³

This judgment might be appealed by the MPF before both the Supreme Court of Justice (Superior Tribunal de Justiça) and the STF. According to the publicly announced strategy of the

MPF with regard to transitional justice, it can be expected that the decision to halt the criminal action will be appealed.²⁴

Meanwhile, Brazil's lack of full compliance with the Inter-American Court's judgment in the Araguaia case has produced (and may continue to produce) new international deci-

sions that challenge the validity of the Brazilian Amnesty Law. On November 8, 2012, the IACHR declared the admissibility of a claim regarding the death by torture of Vladimir Herzog. The petition alleges that Herzog was arbitrarily detained, tortured, and killed by DOI-CODI agents on October 25, 1975, in São Paulo, because of his activity as a journalist. This case once again demonstrates the ongoing impunity for gross human rights violations, which continues to this day because of the Brazilian Amnesty Law and its incompatibility with the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture.²⁵ Since the Inter-American Court concluded, in *Guerrilha do Araguaia*, that "the provisions of the Brazilian Amnesty Law that impede the investigation and punishment of serious human rights violations [cannot] have equal or similar impact regarding other cases of serious human rights violations enshrined in the American Convention that occurred in Brazil," it is safe to predict what the merits decision regarding the Vladimir Herzog case will determine.

The question that remains now is: "How will the STF decide new challenges against the Brazilian Amnesty Law?" It is a well-known fact that the current composition of the STF includes a majority of judges (six out of 11) who did not take part in the decision regarding ADPF No. 153. Is it finally time for justice in Brazil? ■

²⁰ See Introductory Note (Cota Introdutória), Sections 2, 2.1, 2.2, 3, and 4, available at <http://goo.gl/tBWmq>. See also http://www.prpa.mpf.mp.br/news/2012/Cota_Introdutoria.PDF/view.

²¹ See http://noticias.pgr.mpf.mp.br/noticias/noticias-do-site/copy_of_criminal/mpf-recorre-para-abrir-processo-criminal-contr-curio and <http://www.prpa.mpf.mp.br/news/2012/mpf-vai-recorrer-pela-condenacao-de-curio>.

²² See <http://www.conjur.com.br/2012-ago-31/juiza-federal-aceita-denuncia-militares-combateram-guerrilha>.

²³ The author received information indicating that, as regards the other criminal action related to the Araguaia case, defendant Lício Augusto Ribeiro Maciel also recently filed a writ of *habeas corpus* (HC 0066237-94.2013.4.01.0000/PA) with a view to halting the criminal action against him, on November 5, 2013.

²⁴ The MPF created within its structure a Working Group on Transitional Justice in November 2011, in order to comply with the Inter-American Court's judgment in *Guerrilha do Araguaia* with regard to the duty of the State to prosecute gross human rights violations perpetrated during the military dictatorship. According to the information available, these efforts could result in dozens of prosecution attempts (see http://noticias.pgr.mpf.mp.br/noticias/noticias-do-site/copy_of_criminal/trabalho-do-mpf-para-punir-crimes-da-ditadura-e-reconhecido-em-premio-innovare-1).

²⁵ See IACHR, Petition 859-09, *Vladimir Herzog et al.* (Brazil), Report No. 80/12, Admissibility, November 8, 2012.

Human Rights Trials in Chile 15 Years after the Pinochet Case

Cath Collins

Cath Collins is director of the Observatorio de Derechos Humanos of the Universidad Diego Portales, Santiago, Chile, and professor of transitional justice at the University of Ulster, Northern Ireland.

The year 2013 marks significant anniversaries in Chile. September 11 is the 40th anniversary of the right-wing military coup of 1973, while October 16 is the 15th anniversary of the British government's detention of former dictator Augusto Pinochet.

A less well known but equally important 15-year milestone was reached in January 2013. Two domestic criminal complaints against Pinochet, brought in January 1998, marked the beginning of what is now an extensive universe of legal cases for dictatorship-era crimes.¹ Specially designated Appeals Court judges are investigating approximately 1,300 criminal cases and a number of civil claims for extrajudicial execution, disappearance, and torture committed between 1973 and 1990.² More than 75 percent of Chile's acknowledged total of 3,216 dead or forcibly disappeared victims have now had their cases investigated. However, the same is true of only a tiny proportion of the 38,254 recognized survivors of political imprisonment and torture.³

This article is based on an analysis produced by the Human Rights Observatory of the Universidad Diego Portales (UDP), an interdisciplinary social science project that has worked since 2008 to map Chile's new truth, justice, and memory landscape. The Observatory works with relatives' associations, human rights organizations, lawyers, journalists, and investigators to make the justice process more accessible. It engages with



state agencies and uses freedom of information legislation to publish case data along with an online case search tool. The project has brought together users and operators of the formal justice system to discuss witness treatment, forensic processes, and police investigative techniques. Workshops have been held around the country to discuss reparations and debate the 2011 truth commission.⁴

The Observatory's team of young interdisciplinary researchers has linked up with two nongovernmental organizations, Centro de Estudios Legales y Sociales (CELS) in Argentina and the Human Rights Trials in Peru Project.⁵ Over the past five years, team members have presented their work in Brazil, Argentina, and Paraguay, as well as further afield.⁶ The Observatory has also received visitors from Peru, Paraguay, Uruguay, Guatemala, and Colombia to exchange information about transitional justice processes. Its quarterly bulletin reports transitional justice news from the Southern Cone of Latin America and beyond.⁷

¹ The two complaints were brought by Communist Party president Gladys Marín and by relatives of victims of the Caravan of Death killings.

² Civil claims can be incorporated into a criminal case or brought separately, and they can be brought against the state or against individual perpetrators. These permutations make it impossible to give an accurate running total.

³ Only about 35 survivors have brought cases for torture.

⁴ The Valech Commission, held in 2004, accredited individual survivors of political imprisonment and torture. In 2011 a classificatory commission added names to this list and to the list of dead and disappeared victims produced in 1991 by the Chilean National Commission on Truth and Reconciliation, known as the Rettig Commission.

⁵ See <http://www.cels.org.ar/wpblogs> and <http://rightsp Peru.net>, respectively.

⁶ Researchers include Cath Collins, Juan Pablo Delgado, Karinna Fernández, Florencia González, Boris Hau, Jennifer Herbst, Rodrigo Hernández, and Paulina Zamorano.

⁷ The Human Rights Observatory produces news reports, case data, bulletins, a summary of human rights case jurisprudence, and a manual of legal terminology. See the Observatory website at <http://www.icso.cl/observatorio-derechos-humanos> (all subsequent references to the "Observatory website" are to the page on Boletines y Publicaciones/Bulletins and Other Publications). Also see the Universidad Diego Portales annual human rights report at <http://www.derechoshumanos.udp.cl/archivo/in->

Background to Chile's current human rights trials

The current active phase of investigations in Chile is built on a long history of legal activism. Chile's human rights defenders have used the courts since 1973 to search for the disappeared and denounce state terror. However, early efforts met with stony silence from courts institutionally beholden to the regime. No state agent was ever found guilty of a crime of repression, and military courts preemptively applied a 1978 self-amnesty law.⁸ Legal activism created a paper trail but could not demolish the wall of impunity.

Chile's 1990 transition to electoral democracy was highly controlled by the outgoing regime. Pinochet remained at the head of the army, senior civil servants and judges had tenure, and agents of state terror crimes continued to be shielded by the 1978 amnesty. The first center-left government worked within these limits. It established a National Commission on Truth and Reconciliation (known as the Rettig Commission) and awarded some reparations, but without reopening the justice question.

Between 1990 and 1998 there were isolated breakthroughs, including the successful prosecution of former secret police chief Manuel Contreras.⁹ These prosecutions obtained evidence that boosted efforts by a dwindling group of relatives, activists, lawyers, and journalists to keep justice demands alive. An embryonic detective brigade was formed to investigate human rights crimes. Detectives collected testimony from returning exiles and engineered the expulsion from Brazil of former torturer Osvaldo Romo, who was subsequently jailed. But justice efforts were still sporadic, focused on disappearances, and not backed by the state. The only state initiative was a continuation of the 1991 Rettig Commission, mandated to locate the disappeared but not to prosecute those responsible.

Chile now has about 20 specially assigned judges, and its special detective force has become an official Human Rights Brigade. The state forensic service has developed specialized identification expertise and has introduced protocols to improve dealings with torture survivors.

1998: A decisive year for justice

In January 1998 there were few indications of impending change. Domestic cases against Pinochet were brought mainly as a symbolic gesture, to protest his imminent retirement from the Army and his entry into the Senate, completed in March of that year. Quietly, however, the prevailing winds were shifting. The complaints in Spain that would turn into the "Pinochet case" had been

lodged in 1996, and Chilean witnesses had travelled to testify. Judicial reform in Chile had loosened the grip of the *Pinocheta* old guard. By the time the bombshell of Pinochet's London arrest hit in October, the first domestic complaints against him had been ruled admissible in Chile.

During the 500 days of legal and diplomatic tumult that followed, over 300 additional complaints were registered. After Pinochet's return to Chile in March 2000, these cases and existing ones were distributed among a handful of specially designated investigating magistrates. This case universe survived Pinochet's death in 2006 to grow into today's substantial investigative activity.

Chile now has about 20 specially assigned judges, and its special detective force has become an official Human Rights Brigade.¹⁰ The state forensic service has developed specialized identification expertise and has introduced protocols to improve dealings with torture survivors. The state legal initiative mentioned above, the Human Rights Program, initially conceived of as a follow-up to Rettig, has expanded and become more active.¹¹ In 2011, both this program and the courts began to initiate cases *ex officio*, rather than waiting for relatives or survivors to do so. For the first time, the Chilean state at least partially fulfilled its international duties to prosecute and punish serious violations.

Advances and limitations

Chile's present justice scenario is a significant improvement over the virtual impunity that prevailed before 1998. Former regime agents have been prosecuted and punished for some of the worst repressive crimes of the dictatorship period, as the

forme-anual/ (Spanish only).

⁸ The law (Decreto Ley 2.182 of 1978) covered all politically motivated crimes committed before April 1978, the period when most state killings took place. Crimes from the 1980s were not formally covered, but investigations of this period were falsified or simply never pursued.

⁹ These prosecutions exploited specific exceptions built into the amnesty or took up 1980s cases that fell outside the law's remit. Other cases produced breakthrough verdicts in lower courts but were overturned at the Supreme Court level. See *Jurisprudential Milestones in Human Rights Cases: Chile 1990–2013*, on the Observatory website.

¹⁰ See the Policía de Investigaciones de Chile website, <http://www.investigaciones.cl>.

¹¹ See the website of the Chilean government's Programa de Derechos Humanos, <http://www.ddhh.gov.cl>.

legal obstacle of amnesty has been overcome or sidestepped in various stages. First came the prosecution of 1980s crimes that fall outside the amnesty's limited temporal reach of 1973 to 1978. Second, it was successfully argued that the post-1978 "portion" of ongoing crimes (those that began before 1978 and continued afterward) was also not covered by the amnesty. Third, it was determined that all crimes qualifying as war crimes or crimes against humanity must, in any case, be excluded from a properly interpreted domestic amnesty.

Statutes of limitation have been overcome as well: in some cases by invoking the existence of early legal complaints, many shelved but never fully closed by military courts during the dictatorship, and in other cases by arguing the ongoing, "incomplete" nature of the crime of kidnapping. More recently, the same international law stipulations as for amnesty have been used. Accordingly, the inapplicability of domestic amnesty to war crimes and crimes against humanity is now generally recognized, and kidnapping is treated as an ongoing crime. The remains of dozens of victims of forced disappearance have been located¹² and almost 300 perpetrators have been convicted, with a third serving prison time. High-profile cases opened, reopened, or finally resolved include those of folk singer Víctor Jara, former president Eduardo Frei Montalva, deposed president Salvador Allende, and Nobel Prize-winning poet Pablo Neruda.¹³

Some examples of best practice have evolved that could offer lessons applicable to other settings. These include the gathering by case judge Alejandro Solís of an innovative multidisciplinary team, including a social worker and forensic scientists, to cooperate with relatives in sensitive cases of identification of remains. Another is the police unit, steered in its formative years by detectives Sandro Gaete and Abel Lizama, whose accumulation of expertise in resolving sensitive cases led military prosecutors to ask the unit to undertake investigations of present-day abuses. Yet another is the farsighted decision by incoming forensic service director Dr. Patricio Bustos to over-

Statutes of limitation have been overcome as well: in some cases by invoking the existence of early legal complaints, many shelved but never fully closed by military courts during the dictatorship, and in other cases by arguing the ongoing, "incomplete" nature of the crime of kidnapping.

haul the human rights identification department in ways that would also equip it for complex disaster relief and earthquake operations. This has helped overcome both internal and public resistance to resources being "diverted" to human rights at the expense of other areas.

Regarding the effect of trials, public opinion surveys suggest that a majority of Chileans now acknowledge and repudiate past violations, accept the need for trials, and are beginning to recalibrate their views

of the Pinochet regime, although it is difficult to disentangle the relative contributions of trials and of other truth and memory initiatives to these shifts in opinion.¹⁴ In terms of future-oriented legislation and guarantees of nonrepetition, a Crimes against Humanity statute was passed in 2009. The country now has a Museum of Memory and Human Rights (privately directed but state-funded) and a national Human Rights Institute with a forward-looking brief.

There are, however, serious limitations to the progress made. In the legal sphere, the attitudes of individual judges still determine case outcomes. While all cases have proved protracted, certain judges seem to drag out investigations indefinitely. Insufficient attention is paid to the enervating and occasionally traumatic effect on survivors and witnesses of being called repeatedly to testify in closed session, and in close proximity to perpetrators, about the same set of events.¹⁵

Survivors of political imprisonment and torture have been left aside. They are not entitled to representation by the state's legal program, and the judicial branch does not even count their cases in its designated human rights caseload. Torture cases brought by survivors have produced only a single confirmed custodial sentence, of 100 days. Civil claims were recently declared subject to statutes of limitation, and reparations programs have been dogged by politically motivated controversy.¹⁶

¹² For details, see "Listado de personas víctimas de violaciones a los derechos humanos identificadas por el Servicio Médico Legal," on the Servicio Médico Legal website, <http://www.sml.cl>.

¹³ The 2012 investigation into Allende's death finally upheld the prevailing view that he had committed suicide. Forensic reinvestigations of Neruda's death are still under way.

¹⁴ See work by the UDP published on the Observatory website; by the National Human Rights Institute (<http://www.indh.cl>); and by political scientist Carlos Huneeus (<http://www.cerc.cl>).

¹⁵ By contrast, Argentina has introduced witness-generated protocols and video testimony to ameliorate these effects. See *Resumen de seminario: Trato de testigos en causas DDHH: La experiencia Argentina*, report of a joint seminar by the Observatory and CELS Argentina with justice system operators, available on the Observatory website.

¹⁶ The García Lucero case, currently awaiting a verdict from the Inter-American Court of Human Rights, challenges the sufficiency of Chilean reparations practice.

There is a pervasive sense that some judges, like many political authorities, remain reluctant to seek significant punishment for perpetrators and prefer to avoid proportionate sentencing. Two-thirds of convicted defendants in death and disappearance cases receive non-custodial sentences,¹⁷ using a figure known as “half prescription,” even though the courts acknowledged that that prescription is inapplicable. Other perpetrators have been quietly granted early release, a practice that Observatory research helped uncover in 2011, spurring legal and legislative challenges to it. Acknowledgment of basic international legal principles, including the supra-constitutional status of international law, is partial and precarious, resting on a narrow majority vote in the Supreme Court. The 1978 blanket self-amnesty is still in force, with changes to date solely interpretive. The political right periodically attempts to dust off the law,¹⁸ while Chile stubbornly refuses to comply with an adverse Inter-American Court ruling requiring legislative modification of the amnesty.¹⁹

Broader social attitudes about human rights in general remain stubbornly illiberal. Although the right-wing presidency that began in 2010 did not usher in the end of accountability, as many had feared, the current administration has certainly tolerated revisionist claims from a dwindling group of far-right

On balance, Chile's active phase of justice since 1998, although certainly welcome in dismantling the most indefensible remnants of dictatorship-era impunity, still feels like too little, too late for many relatives and survivors.

diehards.²⁰ Leading right-wing politicians still occasionally stray off message, denying the existence or systematic nature of past violations.²¹ The content and tenor of official commemorations of this year's remaining anniversaries will be crucial for assessing the real legacy and probable future shape of the justice debate in Chile.

On balance, Chile's active phase of justice since 1998, although certainly welcome in dismantling the most indefensible remnants of dicta-

torship-era impunity, still feels like too little, too late for many relatives and survivors. Moreover, violent policing of recent student-led protests and indigenous activism has shown that there is still a long way to go in constructing a solid, rights-aware, and rights-respecting culture. A growing concern is recent police practice in relation to contemporary indigenous activism and student street protests. The application of Pinochet-era anti-terrorism laws to Mapuche activists charged with crimes against property has provoked violent raids and intimidation of indigenous communities; with four young men shot dead by police between 2002 and 2009. Recent student protests in Santiago have seen public order crackdowns betraying a lack of the most basic awareness of rights-compliant policing. One emerging practice, dubbed “express disappearance,” sees young demonstrators picked off the street and driven around the city outskirts in closed police vehicles for hours at a time, without formal acknowledgement or registration of their detention.

At the Observatory we hope that we have made a modest contribution to debate about these issues with our work over the past five years. ■

¹⁷ See *Manual de Leyes Relevantes* on the Observatory website for an explanation of the figure. The application was at least temporarily discontinued in early 2013 after a change in personnel on the criminal bench of the Supreme Court.

¹⁸ Most recently in June 2013. See Boletín 22 on the Observatory website.

¹⁹ Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, September 26, 2006. Subsequent draft bills have been withdrawn or consigned to legislative limbo. Boletín 6422-07, “Establece ley interpretativa,” dated March 31, 2009, has been pending before a Senate commission since June 2011. Boletín 3959-07, “Interpreta el Artículo 93 del Código Penal,” dated August 30, 2005, has been in Senate second reading since June 2008.

²⁰ In 2012, events held in prominent Santiago venues honored imprisoned murderer and torturer Miguel Krassnoff and Pinochet himself. These public commemorations provoked pitched battles between protesters and police. One positive outcome was the subsequent electoral defeat of the local mayor who had backed the Krassnoff event. See “Verdad, Justicia y Memoria” in *Informe Anual sobre Derechos Humanos en Chile 2012* (Centro de Derechos Humanos, UDP), www.derechoshumanos.udp.cl.

²¹ Most recently senatorial candidate José Antonio Kast, in a newspaper interview in June 2013.



Please send comments and possible contributions for this publication to info@dplf.org.

Transitional Justice and the Peace Process in Colombia

Rodrigo Uprimny, Luz María Sánchez, and Nelson Camilo Sánchez

Rodrigo Uprimny is the director and Luz María Sánchez and Nelson Camilo Sánchez are researchers at Dejusticia (Centro de Estudios de Derecho, Justicia y Sociedad / Center for the Study of Law, Justice, and Society) in Bogotá, Colombia.

The measures that the Colombian State and society must take to democratically overcome the armed conflict are multiple and complex. They include processes of democratic transformation in the use and ownership of land, the opening of real forums for political and civic participation, the effective satisfaction of the rights of millions of victims, and the reintegration of several thousand combatants into society—among other measures.

Colombia also faces the paradoxical situation of having to deal with the implementation of several transitional justice measures that have been in effect for nearly 10 years now, while it simultaneously negotiates and designs another set of measures to facilitate peace negotiations with the guerrillas of the FARC (Revolutionary Armed Forces of Colombia), the largest and oldest guerrilla group in the country.

These negotiations have given rise to numerous misgivings. Beyond the inherent mistrust involved in such polarized conflict situations, various legal questions have been raised about the talks. These include, in particular, the legal formula that should be applied to the future demobilized guerrillas and the mechanisms for democratic endorsement of the accords. This article focuses on the first question, beginning with five issues we consider central to the discussion.

Peace process and accountability

A process designed to end an armed conflict through political negotiation must necessarily include mechanisms of accountability for the crimes committed within the framework of the conflict and for satisfaction of the victims' rights. This is not only because the conditions for negotiating the end of the conflict have changed over the past 20 years, but also because the existence of these mechanisms lays the foundation for the effective advance of the transition to a society that is more democratic and respectful of rights.

The duty to investigate, prosecute, and punish is not absolute

This process of accountability and satisfaction of victims' rights includes the duty of the State to investigate, prosecute, and punish. Nevertheless, this right cannot be made absolute. Rather, it must be weighed against other equally relevant rights, such as the right to attain peace, and it must also be weighed against factual limitations and an analysis of which alternatives can most effectively satisfy the rights of the victims. In this respect, a regulatory framework for peace in the current context cannot use the standards for transitions from war to peace from 20 years ago as its reference point; nor would it be advisable to use the standards pertaining to the scope of the duty to investigate and punish under normal conditions, or the standards established for transitions from dictatorship to democracy. The processes designed to overcome an armed conflict involve conditions and limitations that are different from the latter two scenarios, and therefore we cannot simply draw parallels between the standards without taking account of their particular characteristics.

For this reason, the current Legal Framework for Peace appropriately focuses on establishing selection and prioritization criteria that make it possible to concentrate efforts on the investigation and punishment of those most responsible for the most serious and representative crimes; to allow for alternative penalties; and to combine this with nonjudicial mechanisms of accountability and the safeguarding of rights. Nevertheless, there are at least three points of controversy: the scope of the selection criteria, their compatibility with international law, and the imposition of alternative penalties.

Definition of selection criteria

Selection seems inevitable in peace processes of the size and duration of Colombia's. Therefore, the best way to safeguard the victims' rights is not to reject selection altogether but rather to define the criteria for its application in such a way that the expectations of truth, justice, and reparation are satisfied to the highest degree possible. Accordingly, the law to be debated in Congress should



Please send comments and possible contributions for this publication to info@dplf.org.

be geared toward three criteria. First, the cases selected must contribute to the safeguarding of the rights of the victims whose cases are not selected. The initial approach of choosing the most representative cases is useful, but it is also necessary to select those perpetrators (regardless of rank) who, for example, can provide the most information about the general actions of the group and who can best aid in the dismantling of the organizations. Second, the selection criteria must be sensitive to the vulnerable condition of the victims and should therefore include differential approaches that take into account gender identity, race, age, ethnicity, and sexual orientation, among others. Third, it is necessary to clearly define the manner in which the victims whose cases are not selected will be compensated for their losses through other transitional mechanisms.

A well-chosen selection is compatible with international law

The effective implementation of a selection program that at least takes account of the above-specified criteria would be compatible with the international standards against impunity. This is suggested by the most recent international instruments and decisions, which tend to define specific standards in scenarios involving transitions from war to peace. Examples include the recent judgment handed down by the Inter-American Court of Human rights in the *El Mozote* case, as well as the Chicago Principles on Post-Conflict Justice.

The need for a minimum prison sentence for those most responsible

The last point of debate concerns the use of sentencing alternatives to prison. The Legal Framework for Peace allows for the imposition of alternative penalties or suspended sentences in cases that have been investigated and gone to trial. Accordingly, it would even be possible that the individuals most responsible for the most serious and representative crimes would not spend a single day in prison. However, although the imposition of alternative penalties may be allowed for those who are not key perpetrators, there should be a measure of punishment involving effective prison time for those who bear the greatest responsibility.

At the legal level, this minimum punishment for those most responsible would bring the regulatory framework into line with the international standards against impunity, thus enabling the process to withstand international scrutiny. From a philosophical point of view, specifically with regard to current thinking about the purposes of punishment, a minimum of retribution is necessary to affirm the values negated by serious human rights violations. And in practical terms, this approach provides greater protection to the peace process, not only with respect to its international acceptability

but also—and especially—in the domestic context.

A minimum punishment is also advisable in view of any claims of possible unequal treatment among the different actors involved in the conflict. We must not forget that, as opposed to the justice and peace process with the paramilitaries, the current process with the FARC—which could also open the door to a process with the ELN (National Liberation Army) in the near future—brings us closer to a real transition to peace. The decisions on the legal status of the guerrillas must be made within the framework of a comprehensive solution that considers both the situation of the different perpetrators and that of all the victims, together with the demands for a real and full transition.

Two issues inevitably come up in relation to this necessary balance. The first is that in the justice and peace process with the paramilitaries, which is still underway, a minimum prison sentence was prescribed for those convicted of heinous crimes. The second is that the Legal Framework for Peace provides for the inclusion of members of the military in the transitional justice mechanisms, and military personnel—including those in detention for cases of “false positives”—have in fact begun submitting applications in that respect.

With respect to the paramilitaries, the reasons for potentially unequal treatment have to do with the counter-systemic nature of the guerrillas as opposed to the pro-systemic nature of the paramilitaries. The other difference is that, historically, more court cases have been brought against the guerrillas than against the paramilitaries; there exist, at minimum, final court judgments pertaining to all the members of the FARC secretariat. Moreover, precisely because of the counter-systemic nature of the guerrillas, the “criminal law of the enemy,” in which procedural safeguards are either limited or not recognized, has been used against them, at some times more intensely than at other times, and with some geographic differences. In the cases of the paramilitaries, on the other hand, there has been a greater tendency toward impunity. These differences make it necessary to consider that certain differentiated treatments could be legitimate.

Finally, there are powerful reasons to take issue with the inclusion of members of the military in transitional justice mechanisms. The lowering of the punitive standards in transitional contexts is justified mainly insofar as it offers an incentive to lay down arms and permanently dismantle unlawful armed organizations. In the case of military personnel, this would entail the acknowledgement, if not of the existence of a policy oriented toward the commission of heinous crimes, of the existence of some groups festering within the military forces. As a result, the condition for accessing benefits would be the dismantling of those structures through a process of purging. If only individual responsibility exists or is recognized—the “rotten apples” argument—then there is no justification for allowing the military forces to be covered by the transitional mechanisms. ■

A Legal Framework for Peace with Justice in Colombia

Gustavo Gallón Giraldo

Director of the *Comisión Colombiana de Juristas* (Colombian Commission of Jurists) in Bogotá, Colombia¹

The lawsuit filed by the Colombian Commission of Jurists challenging the constitutional amendment known as the Legal Framework for Peace, which will be argued today, Thursday [July 25, 2013], before the Constitutional Court, is meant to support the peace process. The rights of the victims of the armed conflict must be properly protected. Otherwise, in addition to committing a grave injustice, we risk endangering the stability of peace and prompting an intensification of the violence.

This constitutional amendment authorizes the waiver of criminal prosecution of human rights violations and serious violations of humanitarian law—something that is not permitted by the Constitution, international law, or common sense. Under the amendment, not all of those responsible for such violations would be investigated and prosecuted, but only those with the greatest responsibility, and only for those acts that have been committed systematically and that constitute war crimes, genocide, or crimes against humanity. Cases of forced disappearance, massacre, kidnapping, rape, torture, or forced displacement not committed systematically would not be selected, investigated by the courts, or prosecuted.

Additionally, the Framework establishes a curious state of emergency. While Article 2 of the Constitution states that the authorities are responsible for protecting the rights of all persons residing in Colombia, the Legal Framework, designed as a transition article, states that the authorities are not obligated to protect the rights of all persons [in certain circumstances]. Thus, we have two Constitutions in effect at the same time: the one (containing



Article 2) that can be put on display to prove that we are a democratic country, and the one containing the Legal Framework for Peace, which states that the validity of permanent Article 2 of the Constitution can be temporarily suspended.

This is the same distorted mentality that governed the administration of the Colombian State prior to the 1991 Constitution, which is why the framers of the Constitution took pains to regulate states of emergency. A transition article cannot

violate provisions such as those established in the Constitution itself to prevent the abuse of states of emergency.

Peace cannot be based on mutual forgiveness among combatants. The victims are the ones who, in the final analysis, can give legitimacy to a peace agreement. A society that allows human rights violations unquestionably committed in the past to go unpunished cannot inspire the necessary confidence that the State will take action to address violations that may be committed in the future. A society of mutual trust cannot be built on this uncertainty.

Peace must begin with the acknowledgement of the harm caused to civilian victims by all of the warring parties; with a genuine apology; and with the forceful and resolute offer of reparations and the reconstruction of the country by the armed actors. This is the path laid out by the Colombian Constitution, by international human rights treaties, and by good sense, to lead us to the building of the more fair and egalitarian society we deserve. ■

¹ This text was originally published as an opinion column by the author in the Colombian newspaper *El Espectador* on July 25, 2013.



Gustavo Gallón in a public audience at the Constitutional Court of Colombia, in July 2013. Photo: © Poder Ciudadano

CCJ filed an unconstitutionality action challenging Article 1 of Legislative Act 01 of 2012, known as the Legal Framework for Peace. The action alleged the framework's incompatibility with "the pillar originally established by the 1991 Constitution, according to which *it is the duty of the State to guarantee the rights of all persons residing in Colombia and, therefore, to properly investigate and prosecute all grave human rights violations and gross violations of international humanitarian law committed within its jurisdiction*". This incompatibility arises from the fact that the framework allows the state to investigate only those most responsible for human rights violations, and only for those acts that constitute systematically committed war crimes.

Judgment of the Constitutional Court of Colombia

On August 28, 2013, the Constitutional Court of Colombia handed down its judgment C-579/13 on the Legal Framework for Peace, the full text of which was published in December 2013. In official statement No. 38, the court reported that "the establishment of a transitional justice framework to achieve a stable and lasting peace does not replace structural, defining elements of the Constitution," and it declared Article 1(4) of Legislative Act 01 of 2012 *constitutional* on the following basis:

“First, the Court found that although the action challenged the phrases “most,” “committed systematically,” and “all of,” contained in paragraph 4 of Article 1, they are closely linked to a comprehensive system of transitional justice, and as such it was necessary to rule on the paragraph in its entirety.

The Court determined that there is a fundamental pillar of the Constitution that consists of the duty under a social and democratic rule of law to respect, protect, and guarantee the rights of society and of the victims. Given this mandate, there is an obligation to: (i) prevent their infringement; (ii) protect them effectively; (iii) guarantee reparations and truth; and (iv) investigate, prosecute, and if appropriate, punish serious violations of human rights and international humanitarian law.

It confirmed that the changes introduced by the challenged Legislative Act were based on the assumption that transitional justice measures are necessary in order to achieve a stable and lasting peace. Accordingly, it held that the following were valid: (i) the creation of **selection** and **prioritization** criteria that make it possible to concentrate efforts on the criminal investigation of those most responsible for crimes against humanity, genocide, or war crimes committed systematically; (ii) the conditional waiver of criminal prosecution; and (iii) the conditional suspension of execution of the sentence, as well as the imposition of alternative sentences, extrajudicial penalties, or special forms of sentence completion.

The Court had to determine whether the elements of transitional justice introduced by the Legal Framework for Peace were incompatible with the essential requirement to respect, protect, and guarantee the rights of society and of the victims, and it had to verify whether the change entailed replacing the Constitution or any of its fundamental principles.

The Plenary Chamber began this analysis by acknowledging the need to weigh different principles and values, such as peace and reconciliation, against the victims' rights to truth, justice, reparations, and the guarantee of non-repetition. The Court found that it is legitimate to adopt transitional justice measures like the selection and prioritization mechanisms in order to achieve a stable and lasting peace.

The Court was of the opinion that these measures make it possible to modify the strategy of “**case-by-case**” prosecution, traditionally used in the ordinary justice system, and instead to use a system that allows for serious rights violations to be grouped together in “**mega-trials**” against those who bear maximum responsibility. This, in turn, makes it possible to comply more efficiently with the duty to protect the rights of the victims of the conflict.”

* Paragraph 4 of Article 1 of Legislative Act 01 of 2012 stipulates that “[...] Both **prioritization** and **selection** criteria are inherent in the instruments of transitional justice. The Prosecutor General of Colombia will determine criteria for the prioritization of prosecutions. Without prejudice to the general duty of the State to investigate and punish serious violations of human rights and international humanitarian law, in the framework of transitional justice, the Congress of the Republic, at the initiative of the National Government, may, by means of a special law regulating constitutional rights [*ley estatutaria*], determine selection criteria that facilitate the concentration of efforts on the criminal investigation of those most responsible for all crimes committed systematically and alleged to be crimes against humanity, genocide, or war crimes; ascertain the cases, requirements, and conditions under which it would be appropriate to suspend execution of the sentence; ascertain the cases in which it is appropriate to impose extrajudicial penalties, alternative sentences, or special forms of execution and completion of the sentence; and authorize the conditional waiver of prosecution of all of the cases not selected. The special law will take account of the seriousness and representative nature of the cases in order to determine the selection criteria [...]”.

Is There an Institutional Policy in Colombia that Acknowledges the Memory of the Victims of the Conflict?

Camila de Gamboa

Attorney, professor at the School of Law and chair of the
Legal Theory Department at the Universidad del Rosario in Bogota, Colombia¹

In this article I ask the question: Is there an institutional policy in Colombia that acknowledges the memory of the victims of the conflict? To answer it, I will divide the article into three sections. First, I discuss the significance of memory today in societies where there are massive and usually systematic human rights violations. Second, I analyze the elements that should be included in a policy that acknowledges the memory of the victims in societies that want to transition to a peace that is democratic and respectful of human rights. Third, I examine whether the institutional designs put forward within the framework of transitional justice in Colombia, beginning with the Justice and Peace Law of 2005, can really be considered a coherent policy of memory benefitting the victims of the conflict.

The significance of memory in societies marked by political violence

Memory is a process whereby individuals and groups construct narratives about the past that provide a basis for their own identity in the present. Without memory, it would be impossible to have a sense of who we are in the world and the direction in which we want to orient our life plans. Although memory, strictly speaking, is individual, it is always socially situated. According to Maurice Halbwachs, individual memory is structured within the context of the groups to which a person belongs, such as family, social class, religion, and nation. Memory is also constructed through cultural symbols and practices like traditions, rituals, monuments, and so on; this group of elements creates a social memory that helps weave together individual and

collective identities.² We may thus consider collective memory to be not a collection of individual remembrances, but rather the shared memories of the group.

Accordingly, it is clear that memory is never neutral, but is always fraught with intention. From this perspective, the selection of memories is an act of will, because accounts of the past are colored by intentions and interests concerning what to transmit from the past, and how, and for what purposes. Various States, institutions, social groups, and political parties want to transmit various accounts of the past—and have the power to do so—and this past shapes our social and political identity, just as our own feelings do.

The tyrannies of the twentieth century—and of the twenty-first—have attempted to control memory in all spheres of public and private life. They do so through the nullification of the past and the invention of narratives that aim to completely transform the identities of peoples and construct a single vision that serves their purposes.

It was after the Second World War and the horror of the Holocaust that a new humanitarian awareness began to develop, rooted in the discourse of human rights. What we now know as transitional justice also began to take shape during this period. With this humanitarian discourse, the victim began to figure prominently in the moral, political, and legal world. When the victim is at the center of our reflections, memory acquires another meaning. To remember becomes a right of the victim.

Having referred to memory, I must also mention history as an essential concept in thinking about societies marked by massive and systematic violations of human rights. History, generally speaking, is a record that serves to keep memory alive, and although it does not have a monopoly on memory, it does have the status of a scientific practice that selects and interprets the traces of the past according to criteria provided by the discipline.³ In

¹ This text is part of research entitled “¿Cómo representar el sufrimiento de las víctimas en conflictos violentos para evitar su repetición?” (How to represent the suffering of the victims in violent conflicts in order to prevent their repetition?), which forms part of the project “Los residuos del mal en las sociedades posttotalitarias: Respuestas desde una política democrática” (The remains of evil in post-totalitarian societies: Responses from a democratic policy), reference FFI2012-31635, funded by the Spanish Ministry of Economy and Competitiveness.

² Maurice Halbwachs, *Los marcos sociales de la memoria* (Barcelona: Anthropos, 2004).

³ Alberto Rosa, Guglielmo Bellelli, and David Bakhurst, eds., *Memoria colectiva e identidad nacional* (Madrid: Biblioteca Nueva, 2000), pp. 350–53.

contexts of violence, history has the task of being critical, as it has often been placed in the service of power and has been used to build a collective memory that justifies the violence against the victims or ignores the injustices committed against them.

The policy of memory and historical memory

Before addressing the policy of memory, I am going to refer briefly to two matters: (a) the current view of the social sciences on the relationship between history and memory; and (b) the current tasks of history and memory in societies marked by violence.

With respect to the former, I will begin with a thought from Félix Reátegui about the relationship between history and memory in the social sciences.⁴ Although history and memory are essential to understanding the succession of events in time, history aims to “construct a theory of objective continuity,” whereas in memory, the past is a narrative built on the identity of the members of the group. Thus, to have an individual or collective social memory does not mean that the group has historical awareness in the sense that it has incorporated a systematicity that helps specify the narratives derived from memory. History, indeed, can enable a social memory to become a *historical memory*, in which a systematic reconstruction of the past establishes “the connections among acts, institutions, and cultures in temporal succession,” without excluding specific accounts from this history.⁵

The second matter is related to the tasks of history and memory in societies marked by violence. The analysis to date shows that the humanitarian awareness that arose after the Holocaust has produced a radical transformation of the practice of the historian who wants to represent with a sense of justice the horrors of repressive regimes, civil wars, or violent internal conflicts. It has also transformed the exercise of the victims’ memories. Although these narratives had always existed, they had been excluded by the dominant culture,⁶ whereas now those representations are installed in public spaces with the intent to criticize hegemonic and official views of memory and to seek justice.

A policy of memory in societies where serious human rights violations have been committed has to be institutional, and it has to perform the task of acknowledging the victims. It therefore has to gather the initiatives of memory produced by the social groups affected by the violence. Such a policy must also promote, through government initiatives, forums where those who have suffered the terror caused by repressive regimes and/or by other social and political actors can find a favorable environment, in judicial or investigative venues, in which to provide testimony about what happened. In this task, the official initiatives of memory have to offer a historical framework, that is, a particular view of historical memory which, by investigating the context, allows citizens to understand how and why the horrors of violence were committed,⁷ the type of crimes that this led to, and the different groups that were harmed (ethnic or religious groups, women and children, LGBTI population, etc.). These reflections must be guided by the principles of the rule of law and inclusive, plural, and participatory democracy. This ensures the formation of a critical history and not a history that justifies or excludes the memory of the victims or that denies or justifies the responsibility and barbarity of the perpetrators.

In order for a policy of memory to accomplish its aims, it must be broadly applied, and there must be coordination between all of the public and private institutions committed to its development. In this regard, I return to Pablo de Greiff’s distinction between a reparations program and mere efforts related to reparation.⁸ The latter refers to isolated political decisions that attempt to respond to the victims with some measures of reparation, whereas a reparations program is a State policy with a comprehensive and coherent institutional design. In this regard, a policy of memory must be a generalized program and not simply haphazard efforts by some government agencies and public servants that lack the power or the ability to carry out a broad policy.⁹

Analysis of the policy of memory in Colombia

In this section I examine whether the institutional designs put forward by the State within the framework of transitional jus-

⁴ See Félix Reátegui, review of *Clío y Mnemósine: Estudios sobre historia, memoria y pasado reciente*, by Liliana Regalado de Hurtado, in *Memoria: Revista sobre Cultura, Democracia y Derechos Humanos*, no. 1 (Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú, 2007), pp. 117–24.

⁵ *Ibid.*, pp. 122–23.

⁶ Iris Marion Young finds that the dominant culture attempts to impose its experiences, values, aims, and achievements upon society as if they belonged to all of society, and generally manages to do so, since it controls society’s means of interpretation and communication. From this perspective, the experiences of other groups are devalued and considered deviations from the standards of the dominant culture. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), p. 59. Félix Reátegui expresses similar thoughts on Latin American elites based on Ángel Rama’s *La Ciudad Letrada*, from which a cultural viewpoint that excludes other social classes is created. Reátegui, review of *Clío y Mnemósine*, *supra* note 4, p. 26.

⁷ The fact that a research investigation reports on an atrocity does not mean that there is an absolute understanding of what happened.

⁸ Pablo de Greiff, “Los esfuerzos de las reparaciones en una perspectiva internacional: El aporte de la compensación al logro de la justicia imperfecta,” *Revista de Estudios Socio- Jurídicos*, vol. 7, special issue on transitional justice (Bogotá: Universidad del Rosario, 2005).

⁹ In reflecting on the undertakings of a policy of memory, I do not refer specifically to the mechanisms for carrying it out, but I think that they include all the tools of transitional justice that can be used to learn about the past, such as criminal trials that produce a version of the truth about what happened to the victims, truth commissions, and institutional research on the causes of violence.

tice, based on the Justice and Peace Law, really form a coherent policy of memory benefitting the victims of the conflict.

The concept of memory is recognized under Colombian law and specifically regulated in the Justice and Peace Law (Law 975 of 2005), in the Law to Pay Tribute to the Victims of Forced Disappearance (Law 1408 of 2010), and in the Victims and Land Restitution Law (Law 1448 of 2011).

In the Justice and Peace Law, memory is a form of symbolic reparation to the victims and to the community. Toward this end, the law provides explicitly for the preservation of historical memory, which is established as a duty of the State. The law creates a National Commission for Reparation and Reconciliation, whose functions include presenting a public report on the reasons for the emergence and development of unlawful armed groups. The Commission in turn established a Historical Memory Department, later known as the Historical Memory Group, made up of prominent researchers with intellectual and operational autonomy.¹⁰ This task involved setting certain guidelines for the research. For example, the truth was considered not just an epistemological matter but also a social good, and therefore the victims had to take part in the process of constructing the truth. It was also deemed necessary to establish the ways in which the armed groups operated, the spatio-temporal distribution of the violations, the patterns of victimization, and the social and individual impacts of those violations, among other things. The Memory Group chose approximately 15 emblematic cases of violent acts with a view to illustrating processes and trends reflected in those violations.

The Law to Pay Tribute to the Victims of Forced Disappearance, in addition to regulating the creation of places called “sanctuaries of memory,” explicitly enshrines the right to memory. Although it does not define it, it does state that to commemorate the historical memory of the victims of forced disappearance, public and private establishments and national, departmental, and municipal authorities must organize activities such as conferences, forums, and workshops to reflect on the right to memory, life, and respect for human rights. This law also specifies that the media should disseminate that memory.

The Victims and Land Restitution Law regulates the issue exhaustively. Memory is developed in the chapter on measures of satisfaction, understood as “actions tending to reestablish the dignity of the victims and disseminate the truth about what occurred” (Article 139). This law reiterates the idea of symbolic reparation and the State’s duty of memory. Additionally, it declares a national day of memory for the victims and creates a Historical Memory Center. This State entity began operating in 2012

and took over the activities and functions previously performed by the Historical Memory Group formed under the Justice and Peace Law. The Center has a set of very important and extensive duties related to memory, including the design of a memory museum and the administration of the human rights and historical memory program (Articles 145 and 148). The law assigns several activities to the Center that it must coordinate with other State institutions in order to disseminate the outcomes of its research. Decree 2244 of 2011 entrusted the Center with another function: to administer the “agreements to contribute to truth and historical memory,” which allow demobilized combatants not implicated in the commission of serious crimes to resolve their legal status by contributing to the truth.¹¹

Bearing in mind that the Center has only been in operation for a year, I will outline some preliminary considerations relating to the central question posed above: Is there an institutional policy in Colombia that acknowledges the memory of the victims of the conflict? In principle, and in particular with Law 1448 of 2011, there is a significant effort to acknowledge memory as a key element in the Colombian transitional justice process in accordance with international standards. Nevertheless, there are major challenges to implementation that are still not clear. The Office of the Attorney General of Colombia¹² notes that the budget allocated to the Center is insufficient for the performance of its duties. The Attorney General’s Office additionally asserts that the duty of memory must become a long-term policy within the framework of a public policy that is “conducive to the achievement of human rights and democracy.” This leads me back to the idea with which I concluded the second section: the distinction between a comprehensive memory program and some efforts to comply with the duty of memory. If the Center is not given resources, and if the policy is not implemented across all State institutions, it will be more difficult to acknowledge and satisfy the victims’ right to individual and collective memory.

Finally, we must briefly note three essential facts concerning the execution of the policy: first, that the measures are being taken in a society that is in the midst of a conflict; second, that the regulatory model of transitional justice adopted in Colombia has been quite inefficient; and third, that another unlawful armed actor, the FARC (Revolutionary Armed Forces of Colombia), could reach a peace agreement with the government—in which case the work of the Center would become even more challenging and complex, especially if there are plans to create a truth commission in accordance with the legislative framework for peace. ■

¹⁰ Office of the Assistant Attorney General for Preventive Action on Human Rights and Ethnic Affairs, Group for Comprehensive Reparations to Victims of Violence, *El deber estatal de memoria* (Bogotá: Office of the Attorney General, 2012), p. 17.

¹¹ According to the Office of the Attorney General, 24,843 demobilized combatants had applied for participation in this process by the end of 2011. *Ibid.*, p.15.

¹² The Office of the Attorney General of Colombia has a constitutional mandate (Article 277) to monitor compliance with the Constitution, laws, and court decisions, and to protect human rights.

From the Truth Commission to Criminal Justice in Ecuador: Still a Long Way to Go

César Duque

Counsel to the Comisión Ecuánica de Derechos Humanos (CEDHU, Ecumenical Human Rights Commission) in Quito, Ecuador

In 2007 the Ecuadorian government issued an executive order creating a Truth Commission to investigate human rights violations that occurred between 1984 and 2008.¹

The Commission reviewed human rights cases stretching across three decades and concluded that during the government of León Febres Cordero, from 1984 to 1988, the security forces pursued a counterinsurgency strategy to fight against the armed opposition group known as ¡Alfaro Vive, Carajo! It found that enforced disappearances, extrajudicial executions, torture, and ill treatment were systematic and widespread during this time.

In 2010 the Truth Commission issued its final report, which documented 118 cases involving 456 victims. These were categorized into six types of human rights violations that were the focus of the investigation: there were 269 victims of illegal deprivation of liberty, 365 of torture, 86 of sexual violence, 17 of enforced disappearance, 68 of extrajudicial execution, and 26 of attempted killings. The report also identified 460 alleged perpetrators, most of them members of the National Police and the Armed Forces. It further noted that the use of pseudonyms, illegal detention and torture facilities within police or military buildings, and safe houses, among other practices, betrayed a clear intent to leave no trace of those materially and intellectually responsible for these actions, in order to exempt State agents from responsibility and



ensure impunity. The Truth Commission made 155 specific recommendations regarding appropriate measures of reparation, restitution, rehabilitation, compensation, and guarantees of nonrepetition.

The report was submitted to the Public Prosecutor's Office, the entity with a constitutional duty to institute public criminal proceedings on behalf of the State. The Office established a Specialized Unit for the Truth Commission, consisting of prosecutors trained in human rights, to investigate the crimes.

The prosecutors opened preliminary investigations into cases documented by the Commission, collected

testimony and documents, and visited the locations where the alleged crimes took place. But due to the failure of inquiries to yield any results, as well as problems leading to the replacement of several prosecutors, the Specialized Unit underwent an overhaul in March 2012. It was replaced by the Directorate of the Truth Commission and Human Rights, which coordinates, supports, and investigates cases concerning serious human rights violations and crimes against humanity across the country.

Three years after the Truth Commission submitted its final report to the Public Prosecutor's Office, the first case concerning serious human rights violations committed in 1998 was prosecuted. The case involved the illegal arrest, detention, and torture of José Lema Pérez, Edwin Javier Punguil Ramírez, Washington Danilo Bolaños Caza, Evelyn de los Ángeles Suntaxi Andrade, and Luis Armando Pusda Ruano. These crimes were committed by National Police officers Segundo Pedro Urgiles Ávila and Luis Antonio Núñez Congrains. Following the arraignment hearing, the First Criminal Guarantees Judge of Pichincha began a pre-

¹ Executive Order No. 305 of May 3, 2007, was signed by economist Rafael Correa, president of the Republic of Ecuador, and published in Official Registry No. 87 on May 18, 2007.

liminary investigation and ordered the pre-trial detention of the two alleged perpetrators, who are currently retired from active military service.

On October 1, 2013, for the first time the Public Prosecutor's Office charged 10 senior Army and National Police officials for crimes against humanity in relation to abuses suffered by Luis Vaca, Susana Cajas, and Javier Jarrín. The military detained the victims in Esmeraldas on November 10, 1985, covered their heads, and secretly took them to a military base outside Quito, where they were held incommunicado and questioned under torture, including electric shocks and sexual violence. Two weeks later, Javier Jarrín and Susana Cajas were left in a field with their hands tied, and after a few minutes they were arrested again by the police. Luis Vaca remained disappeared for three years, until his release in 1988. During that period, the authorities deleted Vaca's vital registration data from the Civil Registry, which made searching for him even more difficult for his family. Luis Vaca had a brother who was a military official and who "almost by accident" discovered the place where Luis was being held incommunicado; soon after this discovery, Luis Vaca's brother was killed, presumably as a result of having learned this information. Vaca's wife, who was pregnant at the time, was also arbitrarily detained and gave birth in custody.

During the arraignment hearing, which was held at the Supreme Court of Ecuador because of the privileges enjoyed by the accused officials, the Prosecutor's Office charged the 10 senior officials with the illegal detention, torture, sexual violence, and enforced disappearances of Javier Jarrín, Susana Cajas, and Luis Vaca. The trial judge began a preliminary investigation and ordered the pre-trial detention of (ret.) Army General Luis Piñeiros, (ret.) Police Chief Edgar Vaca Vinuesa, both of whom remain at large in the United States, and (ret.) Colonel Fernando Ron Villamarín. The judge granted house arrest to (ret.) Army Division General Jorge Asanza Acaiturri, (ret.) Army Division General Manuel Delgado Alvear, (ret.) Army Division General Nelson Enrique Gómez, (ret.) Colonel Juan Viteri Vivanco, (ret.) Colonel Mario Apolo Williams, and (ret.) Colonel Guillermo Rodríguez Yaguachi. Retired Army Division General Carlos Jarrín Jarrín was not detained, due to his ill health, but he was barred from leaving the country; he has since died.

In addition, in October 2013, the National Assembly passed a victims' law.² This recognizes the responsibility of the State for violations perpetrated by government agents in cases documen-

ted by the Truth Commission, and guarantees victims' right to truth, justice, and comprehensive reparations by the State, as well as the guarantee of nonrepetition of abuses. The text was partially vetoed by the Executive. One of the objections requires that the perpetrators of the abuses be fully identified before any reparation is granted to the victims. At the time of writing in late 2013, the presidential veto was pending before the National Assembly, which may accept the veto or ratify the original bill.

By adopting this law the State has acknowledged its responsibility for human rights violations. However, it is unfortunate that only those violations documented by the Truth Commission are recognized, with no consideration of the many cases that were not investigated by the Commission. Moreover, the State has assumed liability for human rights violations in only a limited window of time, as the law disregards and excludes all events that took place before October 4, 1983, or after December 31, 2008. These constraints will leave many victims and families without any State recognition or chance of redress. It is also troubling that the government's veto proposes to grant redress only when the perpetrators have been fully identified. This ignores the fact that the obligation to remedy abuses arises when it is demonstrated that human rights violations are attributable to the State and not when the criminal perpetrator has been identified. Moreover, it would virtually prevent any kind of redress, given the slow pace of criminal justice procedures and the probability that an investigation will not lead to the identification of all responsible parties.

It has been more than three years since the Truth Commission issued its final report documenting 118 cases of human rights violations. In that time only two cases have reached the courts, each case lasting about a year and a half. At this pace, when can we expect all cases of abuses to be prosecuted? Will there come a time when all victims and Ecuadorian society in general will learn the truth about what happened and who was responsible?

Since the events took place and since the Public Prosecutor's Office took over the cases, too much time has passed without the State taking steps to ensure justice, truth, and reparations to all victims whose cases were documented by the Truth Commission and their families. The time has come for those responsible to be sanctioned in proportion to the seriousness of the offences and to provide reparations to the hundreds of victims whose rights have been violated. ■

² The "Bill for the Reparation of Victims and the Prosecution of Serious Human Rights Violations Committed in Ecuador between October 4, 1983, and December 31, 2008" was passed by the National Assembly on October 1, 2013. On November 1, 2013, the law was partially vetoed by the government.



Please send comments and possible contributions for this publication to info@dplf.org.

Unfinished Reconciliation: The Process of Bringing Cases from Ecuador's Truth Commission to Court

Juan Pablo Albán

Professor of law at San Francisco University in Quito and director of the university's Free Law Clinic, which represents several victims from the cases included in the report of Ecuador's Truth Commission

Little is known internationally about the results of the investigations conducted by the Ecuadorian Truth Commission, which concluded its work and delivered its final report three years ago, in 2010.¹ Indeed, little is known within the country about the complex task undertaken by the Office of the Attorney General after the publication of the Commission's report. Even the victims mentioned in the report know very little about why, three years later, only one of the 118 cases included in the final report has gone to trial,² and charges have only been filed in another four.³

Although it unfolded on a much smaller scale than in other countries in the region, the political macro-criminality of the State



also affected Ecuador during the 1980s—although some maintain that it began even earlier.⁴ These actions were carried out by supposedly “democratic” governments, ostensibly to save the country from the “threat” that a different ideology could take root.

This State-sponsored violence has been largely forgotten by the international community and even by most of Ecuadorian society, in part

because it was less extensive than the violence in other countries of the region. Another reason is that it was not carried out against a significant sector of the population, but instead targeted a group of “rebellious” and “communist” youths.⁵ At the end of the day, the actions of the government of “national reconstruction”—

¹ The Truth Commission was created by Executive Decree on May 3, 2007. Its mandate included establishing the facts surrounding the process, acts, and responsibilities for the State violence and human rights violations that occurred between 1984 and 2008, as well as to propose initiatives designed to provide reparations to the victims and to guarantee nonrepetition. It must be made clear that the Commission did not have judicial powers and therefore did not assume the duties of the Office of the Attorney General of Ecuador or of the Judiciary. The Commission's five-volume final report, “*Sin verdad no hay justicia*”: Informe final de la Comisión de la Verdad (hereafter, **Truth Commission Final Report**), was released in May 2010.

² Truth Commission **Final Report**, Case C100, File No. 313194, concerning the extrajudicial execution of a high school student by the police while he took part in a demonstration on the campus of the University of Cuenca in January 2002.

³ Truth Commission **Final Report**, Case C90, File No. 222315, José Luis Lema et al., concerning the arbitrary and illegal detention of five youths, and the torture of three of them, by personnel from the homicides brigade of the Crime Investigation Office in September 1998; Cases C22 and C23, Files No. 231010 and No. 323172, Luis Vaca, Susana Cajas, and Francisco Jarrín, concerning the arbitrary and illegal detention of three activist youths from Alfaró Vive Carajo (AVC), their torture and concealment for up to two years at military installations, by combined military and police intelligence personnel in November 1985; and Case C103, File No. 816090, Genry Aguilar et al., concerning a police operation conducted at a pharmacy in the city of Guayaquil, which ended in the extrajudicial execution of eight people, the forced disappearance of three, and the torture of at least one, in November 2003.

⁴ A recent documentary, directed by Manuel Sarmiento, about the death of President Jaime Roldós Aguilera reminded Ecuadorians of the sad events of November 6, 1961, when the students of Guayaquil took to the streets in protest against the government, and the army responded with bayonets. The true number of casualties is unknown to this day. It would appear that the event was a turning point in the history of our country, in the sense that it somehow paved the way for the State-sponsored abuses that took place over the following decades.

⁵ In the 1980s, student-based, socialist-inspired subversive movements began to emerge in Ecuador, advocating a social transformation that would have to be attained, if necessary, by armed force. The most notable of those movements was Alfaró Vive Carajo (AVC). From the beginning, the Ecuadorian authorities classified the group as subversive and asserted that it was a threat that had to be eradicated at all costs—an aim that was supposedly reached through the “iron fist” policies of President León Febres Cordero (1984–1988). On this point, see Nicolás Febres Cordero et al., *León ¡vivió por ti!* (Quito: Cevallos Editora, 2011). See also the Truth Commission **Final Report**, vol. 2, p. 255ff.

criminal or not—saved us from becoming another Colombia or another Peru.

The government established, with in our law enforcement and armed forces, specialized units and extermination squads to combat “terrorism.”⁶ We Ecuadorians have reflected very little upon the long-term effects of this strategy. Nevertheless, a review of the list of perpetrators of human rights violations committed during the period investigated by the Truth Commission shows that for nearly a quarter century the same sinister characters, with certain instrumental additions, were behind appalling crimes—even when the “terrorist threat” had already been eliminated.

Cosmetic changes were made in certain organizations: for example, the investigative police force changed its name from SIC (*Servicio de Investigaciones Criminales*, or Criminal Intelligence Service) to OID (*Oficina de Investigaciones del Delito*, or Crime Investigation Office). But these changes did not amount to a true purge of the entities responsible for the human rights violations documented in the report. Nor was that aim accomplished by the rotations to new command posts of the military and police officials implicated or suspected of having carried out repression. The inevitable occurred: the bad habits acquired during the 1980s were retained and to a certain extent persisted even three decades later.

It was essential, then, that we confront our past, learn the truth of what had taken place—no matter how painful—and above all, give the perpetrators and the forgotten victims of state repression a decisive response: there will be zero tolerance.

Efforts toward this aim began with the establishment of the Truth Commission through a presidential decree. However, that “truth” remains incomplete so long as administrative and criminal justice measures are not taken to put an end to the ongoing violation of the right to judicial protection of the victims and their relatives, to redress their pain and suffering through public disclosure of what happened, and to prevent similar violations. These measures must take account of the fact that, as the Inter-American Court of Human Rights has stated, “impunity fosters chronic recidivism of human rights violations, and total [defenselessness] of victims and their relatives,”⁷ and that,

It was essential, then, that we confront our past, learn the truth of what had taken place—no matter how painful—and above all, give the perpetrators and the forgotten victims of state repression a decisive response: there will be zero tolerance.

in the opinion of the United Nations special rapporteur on extrajudicial, summary or arbitrary executions, impunity “continues to be the principal cause of the perpetuation and encouragement of violations of human rights.”⁸

The Truth Commission is to be lauded for its efforts to compile information on human rights violations and propose reparations mea-

asures. But it must be noted that, although its work covered a significant portion of the total number of cases that occurred, it did not facilitate the investigation of crimes committed by State agents or the complete identification and punishment of the perpetrators, precisely because it was not an entity with judicial power and authority. For this reason, the Ecuadorian State continues to violate the right of the surviving victims and of relatives of the deceased victims to effective judicial protection, every day that this cycle of violence is not closed, precisely because those responsible have not been prosecuted and punished.

On this point, former Inter-American Court president Pedro Nikken has maintained that “the establishment of a truth commission is a plausible instrument at a political peace negotiating table during an internal conflict, as a first step and, perhaps, the most tangible contribution that can be made in such a scenario to fight against impunity. [Nevertheless], the establishment of the truth must not prevent the courts from prosecuting and punishing those responsible, outside the context of a political negotiation.”⁹

Although the Truth Commission’s report constitutes sufficient *notitia criminis* to open criminal investigations into the human rights violations it documents, the enthusiasm of organized civil society and of the victims themselves was diminished after its publication, when they discovered that the lack of specific preparation and—let’s be frank—lack of interest on the part of the prosecutors tasked with conducting the investigations in 2010 would be just the first of several setbacks in the process of finally obtaining justice.

It is clear that human rights issues were not a priority on the agenda of the then attorney general. Insufficient resources were allocated for such a complicated task. Moreover, the prosecutors originally assigned to the Truth Commission Unit (as the team

⁶ These included the SIC 10, an anti-subversive office that operated clandestinely for purposes of exterminating members of AVC and other political-military organizations, as well as the National Intelligence School Group, the Quito Counterintelligence Command, the Flying Squads (*Escuadrones Volantes*) created in 1985, and others.

⁷ Inter-American Court of Human Rights, *Case of Loayza Tamayo*, Reparations (art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Series C, No. 42, para. 170.

⁸ United Nations General Assembly, *Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, by Bacre Waly Ndiaye, Doc. A/51/457, October 7, 1996, para. 75.

⁹ Pedro Nikken, “El manejo del pasado y la cuestión de la impunidad en la solución de los conflictos armados de El Salvador y Guatemala,” in *Liber Amicorum: Héctor Fix-Zamudio*, vol. 1 (San José, Costa Rica: Secretariat of the Inter-American Court of Human Rights, 1998), p. 167.

was called at that time) lacked the specialized legal training to assume this job, and in fact were just hearing for the first time about concepts such as crimes against humanity, grave human rights violations, and the inapplicability of statutes of limitation.

Within this group of people, a few enthusiasts decided on their own to organize training workshops, hold consultations with national experts, and prepare themselves for the major endeavor ahead of them. They were trying to reconstruct history—with almost no evidence and with a total lack of cooperation from the State bodies to which the possible perpetrators belong or belonged, with the victims' fear of potential retaliation for their participation in the process, and, above all, with a lack of conviction on the part of their own colleagues. In the meantime, a significant segment of our society questioned the usefulness of taking this step so long after the fact, when the wounds of State abuses had seemed to have healed.

Fortunately, the arrival of a new attorney general in mid-2011 brought renewed momentum to the cases in the Truth Commission's report. In March 2012, the unit in charge of their investigation—which had previously been subordinated to other administrative structures within the Office of the Attorney General—became the Truth Commission and Human Rights Department, reporting directly to the Office of the Attorney General. The personnel assigned to that office have undergone an exhaustive training program on general international law, human rights, international criminal law, and models of transitional justice, taught by Ecuadorian and foreign academics. Although the group is constantly criticized for a supposedly slow pace, the reputation of its work reflects its deep convictions with respect to the need to obtain justice for the abuses of the past.

Nevertheless, we have still not arrived at the ideal scenario. We now have a group of prosecutors prepared for and committed to this work. However, our judges—because of the legal education we attorneys receive in this country, based more on learning the laws than on learning the law as a science—still have difficulty understanding that beyond the validity of principles such as legality or favorability, which are cornerstones of the criminal justice system, in certain circumstances the passage of time, the following of superior orders, the absence from national laws of specific criminal offenses, and the resulting direct invocation of international offenses cannot be obstacles to the prosecution and punishment of those responsible for certain human rights violations. Our judges feel uncertain, and it is obvious that they fear committing injustices. It is also clear that some of them still harbor the reverential fear that our society felt for years toward those who unleashed the atrocities described in the pages of the Truth Commission's report.

Our society does not seem quite ready, either. Public opinion has been divided between those who look favorably upon the prospect of truth, justice, and reparations, and those who

prefer to keep the “ghosts” of the past buried, precisely to prevent further political deterioration and polarization in our country.

In addition, as with nearly all important human rights issues, the investigation of these cases has not been without political implications. Everyone has an opinion, everyone demands something, everyone complains, and few cooperate. There is a very serious risk that the politicization of these cases could end up undermining the legitimacy of the effort. We must therefore, as a society, reflect upon the advisability of maintaining objectivity in the investigations and independence and impartiality in the decisions, so that the outcome will not look like the product of a specific political situation but rather like true reconciliation with our unresolved past.

In the midst of this situation are the victims, some of whom are so tired of waiting for justice that they simply no longer take part in the preliminary investigations that were opened in 113 of the 118 cases contained in the report. Others, so thrilled by the small steps that have been taken, find the limitations inherent in these processes incomprehensible and become frustrated because more attention is paid to other cases than to theirs—when the fact of the matter is that a poorly conducted or hastily processed investigation would yield catastrophic results, not only in their case but in all of them. They are rattled by the media frenzy and the public attempts by the perpetrators and their attorneys to discredit them, and by the promises that the prosecutor's office and those of us involved in their defense try to keep, but cannot always.

On balance, the process of prosecuting the cases from the Truth Commission's report clearly has more ups than downs, but we still have a long road ahead. Our prosecutor's office will have to pick up the pace, because the frustrations of the victims and of society increase with every passing day. Our judges will have to undergo the same learning process that our prosecutors did, accepting with humility that they cannot know everything and learning about what they do not know. Our society will have to become accustomed to the notion that we cannot turn the page without obtaining justice, because we would be condemning ourselves to repeat over and over again a part of our history that we would prefer to forget. Our political class will have to understand the difference between working for a just cause and interfering in someone else's cause. The victims will have to arm themselves with patience and persistence in the struggle for justice, trusting that it will eventually come and that their dignity will be restored. We must all remain hopeful. The few cases that have gone to court suggest that we have now reached the awareness that the State has the right and the obligation to prevent and combat impunity, because the complete and public revelation of the truth is the first requirement of justice. ■

Challenges to justice in El Salvador: Is the Amnesty Law an obstacle to the prosecution of acts committed during the armed conflict?

Leonor Arteaga

Senior Program Officer for Transitional Justice at DPLF

In much of the region, the amnesty laws that blocked the paths to justice for the acts of the past have been rendered invalid by court decisions applying international law or complying with judgments of the Inter-American Court of Human Rights. Nevertheless, El Salvador's Amnesty Law continues to remain in force, although it is increasingly unjustified, in legal and historic terms, in a regional context in which the crimes committed during periods of State repression and terror are being prosecuted with increasing frequency.

This resistance to accountability is not surprising: El Salvador is a country that has been for a long time characterized by overwhelming impunity entrenched within the justice system. One of the most emblematic expressions of this post-war impunity¹ has been the *General Amnesty Law for the Consolidation of Peace*,² known as the Amnesty Law. According to its text, the most serious human rights crimes committed during the armed conflict³ that beset the country during the 1980s and



beginning of the '90s are pardoned by decree.

Following the enactment of the Amnesty Law in 1993, various United Nations human rights protection bodies urged the Salvadoran State to amend or even repeal it,⁴ because it clearly prevented the victims of serious human rights violations from obtaining justice and redress. For its part, the Inter-American Commission on Human Rights was emphatic in finding it incompatible with the American Convention on Human Rights, and in particular with the duty to enact domestic law provisions, the obligation to investigate, prosecute, and punish, and the right to the truth.⁵ More recently, in the

less than twenty." The same Law establishes that convicted persons must be granted immediate release, and that the cases of defendants on trial must be dismissed with prejudice; in the case of persons who have not yet been prosecuted, the decree provides that "at any time at which charges are brought against them for crimes included in this amnesty, they may assert the defense of the termination of the right to bring a criminal action and request dismissal with prejudice."

¹ El Salvador experienced an internal armed conflict from 1980 to 1991, which ended with the *Peace Accords* between the government and the guerrillas, signed in January 1992 under the auspices of the United Nations.

² General Amnesty Law for the Consolidation of Peace [*Ley de Amnistía General para la Consolidación de la Paz*] Legislative Decree No. 486, published on March 22, 1993.

³ The above-cited Law decreed an amnesty that was "broad, absolute, and unconditional, for all persons who, in any way, may have taken part in the commission of political crimes, common crimes related thereto, and common crimes committed prior to January 1, 1992, by a number of persons no

⁴ These bodies include the Human Rights Committee, the Working Group on Enforced or Involuntary Disappearances and the Committee against Torture. See: UN Human Rights Committee, Concluding Observations, El Salvador, Doc. CCPR/C/79/Add.34, April 18, 1994, Human Rights Committee, Concluding Observations, El Salvador, Doc. CCPR/CO/78/SLV, August 22, 2003 & Human Rights Committee, Concluding Observations, El Salvador, Doc. CCPR/C/SLV/CO/6, November 18, 2010; Report of the Working Group on Enforced or Involuntary Disappearances, Mission to El Salvador, U.N. Doc. A/HRC/7/2/Add.2, October 26, 2007 & Concluding Observations of the Committee against Torture with respect to El Salvador, U.N. Doc. CAT/C/SLV/CO/2, December 9, 2009.

⁵ IACHR, Report No. 1/99, Case 10.480, Lucio Parada Cea et al., January 27, 1999, paras. 111-116; Report No. 136/99, Case 10.480, Ignacio Ellacuría,

judgment of the case of El Mozote,⁶ the Inter-American Court of Human Rights examined the application of the Amnesty Law in relation to the criminal investigation into the massacres. It founds that the law was null and void, and ordered the State to take the necessary measures to ensure that the amnesty would not continue to block criminal prosecutions. The Court held that:

[G]iven their evident incompatibility with the American Convention, the provisions of the Law of General Amnesty for the Consolidation of Peace that prevent the investigation and punishment of the grave human rights violations that were perpetrated in this case lack legal effects and, consequently, cannot continue to represent an obstacle to the investigation of the facts of this case and the identification, prosecution and punishment of those responsible, and they cannot have the same or a similar impact in other cases of grave violations of the human rights recognized in the American Convention that may have occurred during the armed conflict in El Salvador.⁷

At the domestic level, the Office of the Ombudsman (Procuraduría para la Defensa de los Derechos Humanos)⁸ called the law contrary to the constitution and the international obligations of the State, saying that it “derogated” the victims’ rights to the truth and to an adequate judicial remedy. In 2000,⁹ in a decision handed down by its Constitutional Chamber, the Supreme Court of Justice held that the Amnesty Law should be applicable “only in those cases in which the aforementioned pardon does not impede protection in terms of the preservation and defense of the rights of the victims or their relatives, in other words, in those

Although this judgment did not declare the Amnesty Law unconstitutional, it did leave the door open for its non-application in cases involving fundamental rights.

cases involving crimes whose investigation does not aim to redress [the violation of] a fundamental right,” and left it up to the judges to determine its applicability on a case-by-case basis.

Although this judgment did not declare the Amnesty Law unconstitutional, it did leave the door open for its non-application in cases involving fundamental rights.¹⁰ From that point forward, amnesty could be argued in the courts and the judges had the authority to not reject it. Notwithstanding

the importance of this decision,¹¹ which opened a new chapter for the prosecution of the perpetrators of serious human rights violations, there have been no serious efforts—by either the Office of the Attorney General of El Salvador or the judges of the criminal courts¹² to make headway in the investigation and punishment

¹⁰ See: Ombudsman’s Report, p. 62, citing Salvadoran jurist Carlos Rafael Urquilla, who stated with respect to this issue: “what the Constitutional Chamber is saying is that the amnesty can be valid if, and only if, it is not applied to an act that constitutes a human rights violation and that, in any case, the amnesty cannot be a lawful and valid obstacle that deprives the victims of human rights violations, or their next-of-kin, of a proper criminal proceeding that allows for the investigation of the act, the conviction and sentencing of those responsible, and the offer of satisfactory reparations... (...) The determination of whether an act meets the above conditions must be made by the judges in a well-reasoned decision that must be issued as a writ of inapplicability [*auto de inaplicabilidad*] of Article 1 of [the Amnesty Law], based on the precedent set forth in the judgment examined herein.”

¹¹ See: Ombudsman’s Report, p. 70. The Office of the Ombudsman at the same time called this decision into question in the following terms: “notwithstanding such advantages, this Office of the Ombudsman regrets that the protection of constitutional justice has not had, in the opinion of the judges, sufficient reach to declare the unconstitutionality of a law that, as has already been said, completely derogates the rights to truth, justice, and reparation of the victims of aberrant crimes such as the massacres of peasants, extrajudicial executions, forced disappearances, torture, and the systematic murder of public servants,” and because the Constitutional Chamber omitted to mention the concept of statutes of limitations. This omission also led to the use of that concept as an instrument of impunity, regardless of whether amnesty is applied. A clear example of this occurred in the case against the masterminds of the massacre of six Jesuit priests and two associates in 1989, in which, after the above-cited judgment, the respective judge ruled that amnesty was inapplicable—the only case of inapplicability to date—but refused to investigate the alleged criminals under the argument that the statute of limitations had expired.

¹² Following the return to peace—and even during the war—the victims, represented by human rights organizations, filed complaints before the criminal courts of acts that could be classified as serious human rights violations or international crimes, such as forced disappearance, murder, and torture. They did so even prior to 1998. Subsequently, after the judicial reform toward an accusatory system, the complaints were submitted to the Office of the Attorney General of El Salvador to investigate the facts and bring the appropriate criminal actions. According to information gathered by Salvadoran organizations and the Office of the Ombudsman, in spite of

S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos and Celina Mariceth Ramos, December 22, 1999, paras. 197-232.

⁶ I/A Court H.R., *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 264.

⁷ I/A Court H.R., *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 264, para. 296.

⁸ Report of the Office of the Ombudsman with respect to impunity in the case of the arbitrary executions of Ignacio Ellacuría, S. J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Amando López, S.J.; Segundo Montes, S.J.; Juan Ramón Moreno, S.J.; Elba Julia Ramos, and Celina Mariceth Ramos, October 30, 2002 (hereinafter, the Ombudsman’s Report).

⁹ Constitutional Chamber of the Supreme Court of Justice, Judgment on Constitutionality, September 26, 2000, case files 24-97 & 21-98.

of these crimes in the cases that have already been brought before them, or to open new cases on the government's initiative. In El Salvador, not one single person has been indicted—let alone tried or convicted—for acts committed during the armed conflict. This systematic denial of justice is attributable more to judicial inertia and the willingness of the authorities responsible for the investigation and punishment of crimes to cover up for the perpetrators than to the Amnesty Law, the validity of which, moreover, is clearly subject to dispute under domestic and international law.¹³ And it is because during the last two decades following the armed conflict, the Salvadoran governments (at least officially until 2009¹⁴) and sectors such as the military and private business, have shrugged off any responsibility for the crimes committed. They have unremittingly defended the Amnesty Law, being of the opinion that it was a pillar of the peace process,¹⁵ and asserting on this false premise that the law was

This systematic denial of justice is attributable more to judicial inertia and the willingness of the authorities responsible for the investigation and punishment of crimes to cover up for the perpetrators than to the Amnesty Law, the validity of which, moreover, is clearly subject to dispute under domestic and international law.

indispensable for national reconciliation. This oft-repeated official message created a climate of silence and intimidation—and in some cases, of tacit complicity—that closed off nearly every space for the discussion of the law and its effects. The official discourse pervaded the judiciary with particular force, instilling the idea of impunity as the only possible response in light of the power of the perpetrators.¹⁶

Another door now seems to be opening: in March 2013, a group of human rights organizations filed a new lawsuit before the Constitutional Chamber of the Supreme Court of Justice requesting that the Court re-examine the Amnesty Law's consistency with the constitution. The case was admit-

the insistence and cooperation of the victims, these cases remained open for years at their initial phases without any type of procedural activity, and in some cases they were shelved without the investigation into the perpetrators having been concluded. Regarding the lack of efficacy in the investigation and punishment of crimes from the armed conflict, see, e.g.: "La impunidad en El Salvador: tragedia del pasado y del presente." Report presented to the IACHR at the 131st session, on March 12, 2008, by the Comisión de Trabajo en Derechos Humanos Pro Memoria Histórica de El Salvador (Pro-Historical Memory Commission) and the Center for Justice and International Law (CEJIL). See also: I/A Court H.R., *Case of Contreras et al.* Merits, Reparations and Costs. Judgment of August 31, 2011. Series C No. 232, paras. 145 *et seq.*

¹³ Regarding the main criteria of the Latin American case law that rejects the application of amnesty laws for the prosecution of international crimes, which in turn takes account of the standards of the inter-American human rights system, see: Ximena Medellín, *Digest of Latin American Jurisprudence on International Crimes, Due Process of Law Foundation*, 2009, p. 273, available at: <http://www.dplf.org/uploads/1271715939.pdf>

¹⁴ In November 2009, within the framework of the case of *Contreras, et al.*, the Salvadoran State admitted the commission of the practice of forced disappearance and acknowledged its responsibility, including the lack of effectiveness in the investigations, and it agreed to conduct them more diligently. This State position was broadly affirmed by the President of the Republic, Mauricio Funes Cartagena, in January 2010, on the 18th anniversary of the Peace Accords. On this occasion he acknowledged the responsibility of the State of El Salvador, and specifically of the Armed Forces, for serious human rights violations such as massacres, extrajudicial executions, torture, disappearance, and sex crimes, committed against the civilian population during the armed conflict, and for those acts he apologized to the victims and to the Salvadoran people on behalf of the State.

¹⁵ I/A Court H.R., *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 264, paras. 291 & 292. The Inter-American Court categorically affirmed that the Amnesty Law was not an integral part of the Peace

Accords and that, rather, it violated one of its major objectives, i.e., putting an end to impunity: "291. However, on March 20, 1993, five days after the presentation of the Report of the Truth Commission, the Legislative Assembly of the Republic of El Salvador enacted the 'Law of General Amnesty for the Consolidation of Peace,' which extended the benefit of amnesty to the persons referred to in Article 6 of the National Reconciliation Law; namely, 'those persons who, according to the Truth Commission, participated in grave human rights violations that have occurred since January 1, 1980.'" In other words, a general and absolute amnesty was granted which extended the possibility of preventing the criminal investigation and the determination of liability of those individuals who had taken part as perpetrators, masterminds and accomplices in the commission of serious human rights violations and grave breaches of international humanitarian law during the internal armed conflict, including those exemplary cases established by the Truth Commission. In short, it set aside the non-applicability of the amnesty in these situations that had been agreed by the parties to the Peace Accords and established in the National Reconciliation Law. In addition, beneficiaries of the amnesty included not only individuals whose cases were pending but also those who had not yet been prosecuted and those who had already been convicted, and in all cases, civil liability was extinguished. / "292. Consequently, it is evident that the *ratio legis* of the Law of General Amnesty for the Consolidation of Peace was to render ineffectual Chapter I ('Armed Forces'), section 5 ('End to impunity'), of the Peace Accord of January 16, 1992, and, in this way, [pardon and leave unpunished] all the grave crimes perpetrated against international law during the internal armed conflict, even though the Truth Commission had determined that they should be investigated and punished. Thus, the enactment of the Law of General Amnesty for the Consolidation of Peace explicitly contradicted what the parties to the armed conflict themselves had established in the Peace Accord that determined the end of the hostilities."

¹⁶ In this regard, the Inter-American Court takes account of the opinion of the IACHR, that "(...) judges, prosecutors and other authorities were abiding by the general understanding that the Amnesty Law excluded the possibility of establishing the criminal responsibility of the perpetrators of human rights violations during the armed conflict." I/A Court H.R., *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 264, para. 281.

ted in September 2013¹⁷ and a final decision was still pending at the time of this writing. Given that the current Constitutional Chamber has handed down some groundbreaking judgments,¹⁸ the decision is expected to broaden the scope of the 2000 precedent, declaring the general unconstitutionality of the law and vacating the cases in which it has been applied, in view of El Salvador's international human rights obligations and the relevant international law and jurisprudence. This mere possibility has awakened the most reactionary sectors, who have availed themselves of the amnesty—more symbolically than legally—to prevent the trial and punishment of those responsible for the most atrocious crimes in the history of El Salvador. They continue to assert that its repeal would jeopardize peace,¹⁹ disregarding the fact that in every country where amnesty laws have been abolished, democracy has been strengthened.

Similarly, the Catholic Church's abrupt closure of the historical legal office of the Archdiocese of San Salvador a few days before the Constitutional Chamber's decision to hear the case reinforces that there is still a long way to go to before a social and political consensus is reached on the need for peace with justice. In the opinion of many, the Catholic Church was pressured by sectors fearful that a constitutional judgment, by rendering the amnesty law null and void, would open the door to trials against

The scenario in light of an imminent decision by the Constitutional Chamber on the Amnesty Law—together with the precedent from 2000—should pave the way for renewed discussions not only about its scope by also about the impending challenges even in the event of a ruling that renders the effects of the law permanently null and void.

high-ranking military leaders.²⁰ The office's historical records could be a key component of proving criminal liability in such cases.

The scenario in light of an imminent decision by the Constitutional Chamber on the Amnesty Law—together with the precedent from 2000—should pave the way for renewed discussions not only about its scope by also about the impending challenges even in the event of a

ruling that renders the effects of the law permanently null and void. These situations have arisen in countries such as Argentina, Chile, and Peru, which, after invalidating their respective amnesty laws, were faced with endless complex criminal and procedural law challenges regarding criminal prosecution policies and the processing of cases. Problem issues included statutes of limitation, the absence of definitions of these crimes in the criminal codes (or their inclusion subsequent to the acts in question), evidentiary complexities related to the passage of time, the participation of the victims, and the handling of historical records. In those countries, many of these obstacles have been overcome by a healthy dose of political will and specialized technical capabilities.

Civil society in El Salvador today, especially the victims' representatives, as well as academia and the international community, must continue contributing to and pressing for a national accountability process. Above all, the time has come for the judges and prosecutors themselves to take seriously their role as guarantors of rights²¹ and take the lead on the path to justice for the crimes of the past that for so long has been denied. ■

¹⁷ Admissibility Judgment, Constitutional Chamber of the Supreme Court of Justice, September 20, 2013, case file 40-2013, available at: http://www.observatoriojudicial.org.sv/attachments/article/6984/Inc._44-2013_Ley_de_amnist%C3%ADa.pdf.

¹⁸ For more information about the role of the Constitutional Chamber of the Supreme Court of Justice and the conflict with other branches of government because of its judgments, see the Due Process of Law Foundation's press release: "DPLF expresses concern about governance crisis in El Salvador due to the refusal of the Legislative Assembly to respect the rulings of the Constitutional Chamber." Available at: <http://dplf.org/es/news/dplf-expresa-preocupacion-sobre-tesis-de-gobernabilidad-en-el-salvador>.

¹⁹ See: statements of former Salvadoran presidents Alfredo Cristiani and Armando Calderón Sol, and former guerrilla member and signatory to the Peace Accords, Joaquín Villalobos, as examples of reactions against rendering the Amnesty Law null and void at: <http://www.laprensagrafica.com/2013/09/23/calderon-y-cristiani-cautos-ante-amnistia> y <http://www.prensaescrita.com/adiario.php?codigo=AME&pagina=http://www.elmundo.com.sv>

²⁰ See the position of the Due Process of Law Foundation and other organizations regarding this event, available at: <http://dplf.org/es/news/dplf-y-organizaciones-aliadas-emiten-carta-sobre-el-cierre-de-tutela-legal>

²¹ In exercise of the *control of conformity* that is binding for "all the State's powers and organs as a whole", every judge and prosecutor has the obligation to "ensure that this law never again represents an obstacle to the investigation (...) or to the identification, prosecution and eventual punishment of those responsible for these events and other similar grave human rights violations that occurred during the armed conflict in El Salvador". Court H.R., *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 264, para. 319.



Please send comments and possible contributions for this publication to info@dplf.org.

The Trial of Ríos Montt

Naomi Roht-Arriaza

Professor of law at University of California Hastings College of the Law

On May 10, 2013, a trial court in Guatemala found former president Efraín Ríos Montt guilty of genocide and war crimes under Guatemalan law and sentenced him to a total of 80 years in prison. His military intelligence chief, José Mauricio Rodríguez Sánchez, was acquitted. The three-judge panel of Yassmin Barrios (the chief and spokesperson), Pablo Xitumul, and Patricia Bustamante presided over a two-month trial that featured more than 100 eyewitnesses and 50 experts. The defendants were tried for crimes committed in the northern Quiché area of Guatemala against the indigenous Ixil Maya people during 1982–83, the height of Guatemala’s 30-year armed conflict. The May 10 decision represents the first time that a former head of state has been convicted of genocide in a national, as opposed to international, court.

Unfortunately, barely 10 days after the conviction, the Constitutional Court ordered the conviction annulled and the proceedings set back to the stage before closing arguments. The procedural grounds for this order are factually shaky and legally obscure, as pointed out by two strong dissents to the 3–2 decision. As of this writing in summer 2013, the three trial court judges who issued the conviction have withdrawn, leaving the case in the hands of a different panel of judges who have, for now, postponed any proceedings until at least 2014. It is unclear whether, and under what circumstances, the trial will ever resume.

The long road to a trial began in 2001, when the Center for Human Rights Legal Action (CALDH) in Guatemala City, acting on behalf of victims’ associations, brought a complaint



Former president Efraín Ríos Montt, now 86 years old, is on trial for genocide and crimes against humanity, along with his chief of military justice, José Mauricio Rodríguez Sánchez. This is the first ever national court trial for genocide of a former head of state in Latin America.

Photo: © Johan Ordonez/AFP/Getty Images

against several members of the army high command for alleged violations during the period in question. The case went nowhere for years, but eventually several things happened to make a trial seem more possible. A new, committed attorney general was appointed, with a background in international criminal law; a case in Spain sketched out some of the expert and witness testimony and allowed for the production of key evidence; and Ríos Montt’s long-standing parliamentary immunity expired in early 2012. Of course, this was not the first time the genocide charge had been raised: the Commission for Historical Clarification’s 1999 report talks about “acts of genocide.” But that report was not based on public testimonies.

The trial of Ríos Montt and Rodríguez Sánchez began on March 19, 2013. In some ways, it was legally

more straightforward than other trials involving past international crimes. The charges against the two former military leaders are based on the Guatemalan penal code. Since at least 1973, the penal code has contained provisions on genocide (article 376) and “crimes against obligations to humanity” (article 378). Although the latter sounds like crimes against humanity, its text actually implements Guatemala’s obligations under the 1949 Geneva Conventions. Because these provisions have long been part of Guatemalan law, the trial raised no issues of the application of retrospective law; this set it apart from other Latin American prosecutions where only common crimes like murder and kidnapping existed in the penal code at the time the crimes were committed. Guatemala’s 1996 amnesty law specifically exempts genocide and other international crimes, and although Ríos

Montt tried to claim that he was covered by an earlier amnesty law, the courts so far have rejected that argument. And the case was filed in 2001, just within the 20-year statute of limitations for genocide.

Reaching a verdict

It is never easy to try genocide, and this case was no exception. The prosecution's strategy relied on a combination of military documents and reports, eyewitnesses, and experts, including dozens of forensics experts who had conducted exhumations of graves in Quiché. Nearly 100 eyewitnesses and survivors testified to repeated patterns of gruesome massacres, mass rape, torture, destruction, and persecution throughout the region, patterns that could not have been the result of independent decisions by low-ranking officials. In a day of dramatic testimony, 10 women, their names withheld and their faces covered with their shawls, told of repeated rape in their communities and sexual slavery at military bases.

Experts submitted written reports and gave presentations on the forensic evidence gathered in multiple exhumations; on the history and politics of racism that caused the army high command to see all Ixiles as the "internal enemy"; on the command structure and campaign plans of the military; on statistical evidence that showed that an individual was eight times more likely to be killed by the army in that time and place if they were Ixil Maya than if they were not; on the inhumane conditions of life caused by forced displacement and persecution; on the nature of gender-related crimes, and much more. In all, close to 50 experts testified for the prosecution, which also presented film, taken in 1982 by US filmmaker Pamela Yates, of Ríos Montt himself affirming that he had complete control over the army. All this evidence was extensively reproduced in the verdict of May 10, 2013. The verdict, if nothing else, paints a multifaceted and dramatic picture of what happened in the area during those years and why. It was the first time that this evidence was heard in public, and it was widely disseminated on the Internet and on radio.

Defense counsel argued that there was no genocide because the intent was to destroy a political and military enemy,



General Efrin Ríos Montt (center), at a press conference in Guatemala City on March 23, 1982, after having overthrown the government of General Fernando Romero Lucas García.

Photo: © AP Photo

not an ethnic group, and the army had acted to protect, not harm, the civilian population. There were no written orders to attack civilians, and the military plans that had been presented showed no such orders. Massacres were lamentable "excesses" of war and had been committed by both sides, they claimed, so it was unfair to try only one. And in any case, the defense insisted, there was no proof that either defendant personally ordered, supervised, or implemented the massacres, or even was in an operational position where he could have ordered them.

On the next to last day of trial, Ríos Montt himself took the stand for 45 minutes to make the case that he was a mere politician who

had few military responsibilities as head of state. He refused to utter any words of regret or even to acknowledge the suffering of the victims.

The May 10 verdict contains some legally significant points. The prosecution's theory of the case, which the trial court accepted, was that there was intent to destroy, in part, the Ixil Maya people—that part of the group that refused to submit to army domination. The Ixil Maya were easily characterized as an ethnic group, as they speak their own language (many testified in Ixil), have their own territory, and maintain their own customs. The prosecution presented evidence that they were killed, wounded, and subjected to unbearable conditions of life, and that their children were transferred to another group—all acts constituting genocide. On the key question of specific intent to destroy the group, the prosecution argued (and the court found) that in its zeal to eradicate leftist guerrillas from the area, and given a backdrop of racism and suspicion against all indigenous people and against the Ixiles in particular, the army defined the entire Ixil people as an "internal enemy" to be subdued or destroyed. While the motive may have been counterinsurgency, the intent was genocidal.

The verdict highlights the testimony about rape, sexual violence, and sexual slavery as key evidence of genocide, since these crimes could not have occurred in the course of combat. It also pays specific and detailed attention to how forced displacement can, under certain circumstances, constitute geno-

cide, and to evidence of psychological harm to victims and their communities. The judges found that Ríos Montt was guilty of creating the overall military plans that were then carried out under his command. They also found him responsible because he knew of the atrocities and had the ability to stop them or punish those responsible, but chose not to do so. He was also convicted of inhumane acts against civilian populations, one of the forms of “crimes against duties to humanity.”

Rodríguez Sánchez was acquitted because the court found insufficient evidence that he had been able to order, or stop, the actions of military commanders. The prosecution argued that Rodríguez had chosen the targets for subsequent operations, defining the Ixiles as an “internal enemy” even though he was not in command of troops. However, the judges were apparently swayed by evidence from the prosecution’s own military expert, who found that the chief of intelligence was not within the chain of operational command; the judges therefore concluded that there was not enough linking him to the crimes.

In a subsequent hearing and decision, the court ordered a number of reparations measures, including an official apology (which President Pérez Molina agreed to), school curricular reform, and memorials. However, representatives of Ixil communities were not successful in convincing the court to order return of lands stolen from them during the genocide.

The Constitutional Court annuls the sentence

On May 20, 2013, the Constitutional Court ordered the sentences annulled and said that the trial must restart from the point where it stood on April 19. The order came after multiple defense attempts to derail the proceedings through dozens of motions and protests, many of them apparently manufactured just to throw sand in the gears of the proceedings. The majority in the 3–2 Constitutional Court decision held that the trial court had not properly carried out earlier instructions to suspend the trial. According to these judges, although the trial court did order the suspension, it did so on its own motion and not explicitly in response to a Constitutional Court ruling; moreover, the trial court had not followed the proper procedure to hear a recusal motion by one of Ríos Montt’s lawyers. The two dissenting judges pointed out that there was

While the verdict and sentence may have been legally annulled, the witness testimony, and the judges’ detailed and careful evaluation of the evidence, will remain as a landmark moment in Guatemala’s long and continuing struggle against impunity.

no harm, much less a due process problem, because the defense lawyers had already obtained the relief sought. They also found that since a verdict had already been issued, the proper recourse for alleged improprieties was through the appeals process, not through annulment. One of the dissenting judges stated openly that the whole issue of recusal had been improperly invented by the defense in order to

impede the trial and verdict.

The Constitutional Court ordered a lower court to annul the sentence, but it took a few days to put together a panel of judges who would do so. After 59 judges declined to take part in the annulment, three judges finally agreed, and sent the file back to the trial court. At that point, it became unsustainable for the original panel of trial judges to keep the case. How were they supposed to rehear defense evidence when they had already issued a verdict? The original judges withdrew from the case.

The new panel of judges announced that there was no room on their calendar to hear the case until 2014. Even then, it is unclear how they will be able to “restart” a trial without hearing all the evidence, which would require all the witnesses and experts to testify again. Many witnesses will not want to do so, having lost all faith in the credibility of the justice system after the outcome at the Constitutional Court. Although the Constitutional Court had earlier expressed concern about the “retraumatization” of witnesses forced to testify again, their decisions have forced exactly that result. In addition, defense lawyers are likely to again raise a host of recusal motions, objections to evidence, and complaints about anything they can think of. So the most likely outcome is that the trial will not “restart,” and the existing sentence will be the only one coming out of the courts. And at least for the foreseeable future, both defendants will remain in legal limbo, without a final determination of guilt or innocence. Ríos Montt, after a single night in jail, has been returned to house arrest.

Legally, then, the case demonstrates both the potential and the limitations of national trials for international crimes, and of Guatemala’s decades of judicial and legal reform. While Judges Barrios, Xitumul, and Bustamante were capable of running a complex trial efficiently and fairly, they were unable, in the end, to overcome the concerted efforts to derail the process. While

the penal code and criminal procedure code seemed to make it possible to charge the defendants with international crimes, the continuing abuse of the writ of *amparo* that has bedeviled all the cases involving powerful defendants created a major obstacle. And the Constitutional Court arguably exceeded its jurisdictional mandate, improperly deciding questions that the appeals courts should have considered on direct, not collateral, appeal—and was able to get away with it.

The politics of genocide and the tie to current issues

As the trial progressed, even former military figures and conservative politicians seemed to agree that atrocities had been committed, and indeed had been committed by the military (though they claimed that the guerrillas were also responsible). This represents a step forward in the country's political discourse. However, for a number of former government officials, while a conviction for war crimes would have been acceptable, a genocide conviction was not. Their perception was that despite the gravity of war crimes, a genocide conviction would be far worse, signaling that the military had carried out attacks based on ethnic characteristics shared by a majority of the population. Were a genocide conviction allowed to stand, Guatemala would become a pariah state.

For some of the victims' groups, on the other hand, it was crucial that the conviction be for genocide. A genocide conviction would establish beyond doubt that what happened to them was part of a deliberate, overall plan, representing in some sense a continuation of 500 years of conquest, dispossession, and oppression.

The shrill nature of opposition to the trial demonstrated that the long-standing racism and discrimination against indigenous Guatemalans that made genocide possible in the 1980s was still alive and well. A shadowy group of former military officers launched sharp attacks on nongovernmen-



Young woman and her child at a refugee camp in Santiago El Vertice, Mexico in 1982. The camp was one of several established to protect the Mayan communities fleeing the war in Guatemala.

Photo: © P.W. Hamilton/AP Photo

tal organizations and international agencies, whom they accused of being troublemakers and guerrilla collaborators (along with European and US governments and the Catholic Church). Once the verdict was issued, the Chamber of Commerce, Industry and Agriculture added its voice to the denunciations. In a press statement on May 11, they demanded that the verdict be annulled, because in their view there was no genocide; moreover, the trial suffered from due process violations and was a product of international pressure. Many observers credit pressure from the private sector with influencing the Constitutional Court to order the annulment.

The political right and the private sector also linked the consequences of a genocide conviction to the current struggles of indigenous communities. Indigenous people increasingly are demanding prior consultation and consent for large projects affecting their com-

munities, especially mines and hydroelectric dams. The same shadowy organization that attacked the trial, calling itself the Foundation against Terrorism, also put out newspaper supplements denouncing supporters of anti-mining and land defense organizations. During the trial, several communities (albeit none in the Ixil region) that were protesting the environmental and social consequences of mining projects were put under a state of exception, and a number of anti-mining activists have been killed since March. Advocates expressed hope that a genocide conviction might help deter further violence from security forces or private goon squads in regions with tensions around mining and dam construction. It would also have the effect of encouraging judges to uphold the law and would empower communities to defend their rights. Thus, perhaps one of the most important effects of this trial has been to make clear the links between impunity for past crimes and the danger of new crimes as a reaction to the struggles of today.

Copies of the May 10 verdict and sentence are being widely circulated throughout the country, especially in the Ixil region. A caravan of supporters ceremonially presented copies to the indigenous authorities of the three Ixil municipalities in June 2013. Editions for use in schools are being prepared.

While the verdict and sentence may have been legally annulled, the witness testimony, and the judges' detailed and careful evaluation of the evidence, will remain as a landmark moment in Guatemala's long and continuing struggle against impunity. ■

EVENT ON GENOCIDE TRIAL

Challenges to the prosecution of international crimes in national courts since the genocide trial of Efraín Ríos Montt in Guatemala

On May 14, 2013, DPLF, WOLA, and the American Society of International Law (ASIL) held an event to report on the most recent developments in the genocide trial of the former president of Guatemala, the main obstacles that victims were facing, and the essential role of the national courts in the prosecution of international crimes, as well as their significance in the strengthening of the justice system and the rule of law.

In a discussion moderated by DPLF's executive director, Katya Salazar, the attorney general of Guatemala, Claudia Paz y Paz, explained the role that the Attorney General's Office has had in establishing the basis for the criminal charges. She reiterated her confidence that the case will shed light on the truth and allow justice to be served. Experts Naomi Roht-Arriaza and Jo-Marie Burt provided the audience with a detailed discussion of this complex case, which is the first genocide trial against a former president in a national court, and shared their analysis of its meaning for Guatemala and the region. They underscored the importance of witness testimony, especially that of the women from the Maya Ixil indigenous community, who had never before been heard by a court. The panelists condemned the climate of pressure that threatens the independence of the court hearing the case and emphasized the need for the international community to remain attentive and monitor the developments in this case.

Efraín Ríos Montt, *de facto* president from 1982 to 1983, and José Mauricio Rodríguez Sánchez, his military intelligence chief du-



Left to right: Katya Salazar, Naomi Roht-Arriaza, and Jo-Marie Burt.

ring that period, were accused of the genocide of at least 1,800 Maya Ixil indigenous people during 1982 and 1983. In a long and tangled process, on May 10, 2013, Ríos Montt was found guilty and sentenced to 80 years in prison. Just a week after this historic judgment, however, on May 20, the Constitutional Court overturned the conviction and ordered the trial to restart at the beginning of the oral proceedings phase. This constitutional decision and the multiple pending appeals raise new questions about the course of the case. A new trial has been set for 2015.

Impact of the genocide trial on the Guatemalan justice system

Marco Antonio Canteo

Guatemalan attorney, specializes in judicial reform processes and security

Although institutional weakness is a long-standing issue in Guatemala, 36 years of internal armed conflict only exacerbated this problem, which has profoundly affected the justice system. The Peace Agreements reached in 1996 between insurgent groups and the government addressed this reality, noting that “one of the major structural weaknesses of the Guatemalan State stems from the system of administration of justice.”¹

Such institutional weakness has two highly visible aspects: the lack of judicial independence and the continued presence of illegal groups and clandestine security structures (*cuercos ilegales y aparatos clandestinos de seguridad*, or CIACS). Both contribute to high levels of impunity in Guatemala. The lack of judicial independence and the operations of the CIACS have become evident in the course of attempts to prosecute “untouchable” individuals who are protected by economic or political interests.

The reforms adopted as a result of the Peace Agreements, while important, were not enough to overcome the significant structural deficiencies in the justice system. These reforms took place at three levels: legislative amendments, new institutions, and changes to the internal structure of several institutions. But many were not adequately implemented through a mechanism that could consolidate changes, measure results, and adapt the reforms based on needs of the sector.

With regard to judicial independence, although the reforms affected the three levels mentioned above, they failed to put in place the necessary mechanisms to ensure a robust justice system. After approximately 15 years of reform, four main weaknesses persist:

1. Lack of judicial independence in relation to other branches of government and powerful sectors, resulting largely

from a system of judicial appointment by nominating commissions and by the legislature.

2. Lack of independence of the Constitutional Court, as the mechanism for appointing its members is overtly political and is not part of the judiciary.²
3. Lack of internal independence of the judiciary, arising largely from the existence of a “judicial career”³ for trial judges and the concentration of administrative and judicial functions by Supreme Court justices, especially those related to the judicial career and the reappointment of judges.
4. Lack of judicial stability and security of tenure, as judges and justices are appointed for five-year terms under the Constitution.

In spite of these problems, and unlike other countries where international tribunals have been set up, Guatemala entrusted the prosecution of serious human rights violations from the past to its justice system. This represented a significant challenge, as fulfilling this task effectively required structural changes, including the creation of an independent judiciary and dismantling of illegal structures.

Given this situation in the justice system, then how is it that two convictions for enforced disappearances during the armed conflict were rendered and two high-ranking military officials were prosecuted for genocide and crimes against humanity in the last five years? In my opinion, four concurrent circumstances can explain and respond to this question.

First, the training of judges and prosecutors in the investigation of human rights violations has strengthened the capacity of justice operators and has increased awareness of the importance of prosecuting those crimes as a means of advancing the rule of law.

¹ Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society, entered into between the Government of Guatemala and the National Revolutionary Unit of Guatemala (Acuerdo sobre Fortalecimiento del Poder Civil y Función del Ejército en una Sociedad Democrática, entre el gobierno de Guatemala y la Unidad Revolucionaria Nacional Guatemalteca), Mexico, September 19, 1996, sec. III(8).

² Article 269 of the Political Constitution of Guatemala provides that the Constitutional Court is made up of five justices and five designated substitutes. Each of the following bodies appoints one judge to serve on the Constitutional Court: the Supreme Court of Justice, the Congress of the Republic, the President of the Republic as representative of the Council of Ministers, the University of San Carlos, and the Bar Association (Colegio de Abogados).

³ The Judicial Career Law (Ley de la Carrera Judicial) was adopted in 1999 by Executive Order 41-99.

Second, organizations of victims of the armed conflict have carried out important work for more than 10 years. They have accompanied victims and sought justice under adverse conditions.

Third, changes implemented in the Public Ministry (the public prosecutor's office) over the last five years have strengthened its resources and capabilities and have enabled the investigation of human rights abuses to move forward. These changes were led by human rights groups in civil society and by the International Commission against Impunity in Guatemala (Comisión Internacional contra la Impunidad, CICIG), which achieved greater transparency in the appointment of the attorney general, who heads the Public Ministry.

Fourth, former head of State Efraín Ríos Montt lost his political privileges when the immunity against prosecution he had enjoyed for three legislative periods expired. At the same time, "his" party lost the support it had received a decade ago, when it ruled the country.

The genocide trial of Ríos Montt and his military intelligence chief, José Mauricio Rodríguez Sánchez, took place in the spring of 2013. It tested the justice system, making it possible to assess whether the reforms had been sufficient for the system to conduct and conclude a trial of this magnitude. The trial served to evaluate the judiciary's independence from other branches of government or powerful sectors. It also tested whether the judiciary has the resources and capabilities needed to reduce or eliminate the influence of clandestine structures and the capacity to investigate, interpret, and enforce the law as a source of legitimacy for the entire society.

In short, the genocide trial offered a comprehensive picture of the justice system and laid bare the serious weaknesses that must be overcome in order to end systematic impunity. The trial uncovered:

1. Significant flaws in the justice system and its lack of independence. The government, former public officials, and business elites openly exercised undue influence to determine the outcome of the trial. They denied that genocide had occurred and publicly called on the Constitutional Court to annul the trial, which eventually happened. Significantly, this decision was issued by a Court that is not part of the judiciary and whose members are appointed based on political criteria, with little regard for their competence.
2. Extensive use and abuse of procedural motions without any oversight, both in the ordinary court system and in the Constitutional Court, in the latter by way of constitutional appeal (*recurso de amparo*). In this regard, the joint plaintiff (Centro para la Acción Legal en Derechos Humanos, CALDH) reported that in 2012 alone the defense attorneys for Ríos Montt and Rodríguez Sánchez filed 92 challenges and, during the trial, 24 constitutional appeals.

3. The lack of analysis of aspects of substantive law at trials, such as identifying the elements of crimes, establishing whether or not a crime has been committed, and identifying the perpetrators, participants in the crime, and perpetrators-by-means, especially with regard to the facts at issue, in order to ascertain whether the crimes were perpetrated by means of control over an organized apparatus of power.⁴
4. Historic exclusion from the justice system of indigenous groups, in this case the Ixil Maya people, who were subjected to serious rights violations during the armed conflict.

Looking forward, the genocide trial has had a great impact on the functioning of the Guatemalan justice system, particularly for current and future cases involving human rights violations.

First, the Constitutional Court's decision to annul the verdict⁵ also endorsed the dilatory maneuvers of the defense attorneys, who abused procedural motions to prevent the trial from continuing and acted unethically by continuously challenging the court, both within and outside the courtroom.

Second, the annulment has further undermined judicial independence, providing clear evidence that judicial decisions are significantly influenced by dominant social and political forces, which have usurped the judiciary's fundamental and exclusive role of establishing liability.

Third, a message has been sent that the justice system is incapable of prosecuting powerful individuals despite an overwhelming body of evidence that indicates they were involved in the most heinous crimes.

Finally, the trial has had a profound social and political impact, polarizing the society over claims of genocide and allegations that the Public Ministry showed ideological bias in its prosecution of crimes committed during the armed conflict.

These impacts will have direct consequences for the future appointment of justices and a new attorney general in 2014, and subsequently for the election of members of the Constitutional Court. Conservative, military, and other powerful sectors will most likely try to co-opt the justice sector.

For civil society, which has acquired extensive auditing capabilities, the challenge will be to continue to demand transparency, competence, and professional excellence in the future appointment of justice officials. ■



Please send comments and possible contributions for this publication to info@dplf.org.

⁴ The Guatemalan Criminal Code does not clearly distinguish the perpetrator of a crime from the perpetrator-by-means, or criminal mastermind.

⁵ Ríos Montt case (court files 1904-2013), May 20, 2013, and reasoned opinions. http://www.cc.gob.gt/index.php?option=com_content&view=article&id=925&Itemid=130.

Transitional Justice in Post-Conflict Peru: Progress and Setbacks in Accountability Efforts

Jo-Marie Burt

Associate professor of political science at George Mason University in Fairfax, Virginia, where she is also director of Latin American studies and co-director of the Center for Global Studies. As a senior fellow at the Washington Office on Latin America (WOLA), she works on transitional justice issues and has been an observer to the Fujimori and Ríos Montt trials. She is currently directing a research project on human rights prosecutions in Peru.

In April 2009, a special chamber of the Peruvian Supreme Court found former president Alberto Fujimori guilty of crimes against humanity and sentenced him to 25 years in prison. The conviction was upheld on appeal later that year. The Fujimori trial and conviction were widely viewed as a watershed in domestic efforts to obtain truth and justice for state-sponsored crimes committed in the context of Peru's internal armed conflict (1980–2000). The “justice cascade” notwithstanding, it is still rare to see criminal prosecutions of former government officials for human rights violations.¹ It is even less common to see such prosecutions conducted by domestic tribunals.² In post-conflict Peru, the successful conviction of a former head of state in an impartial and transparent process was seen as a crucial step in the consolidation of an emerging system to investigate and prosecute human rights crimes.

Four years after the conclusion of the Fujimori trial, however, empirical research into Peru's domestic human rights prose-



cutions reveals a dramatic inversion of past successes in the country's transitional justice process.³ There have been several efforts to impose amnesty laws, and Peru's human rights prosecution efforts have suffered setbacks. Beyond the Fujimori case, a minuscule number of cases have been brought to trial, and in recent years human rights defenders have questioned a number of rulings, many of which have resulted in acquittals based on what they charge are legally suspect arguments. At the same time, there have been vicious campaigns to intimidate and discredit human rights lawyers, nongovernmental organizations

¹ On the justice cascade, see Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton Press, 2011). On trials against former heads of state, see Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (New York: Cambridge University Press, 2009).

² More commonly such prosecutions are conducted by international tribunals, such as the international criminal tribunals for the former Yugoslavia and Rwanda or the International Criminal Court, or by hybrid tribunals, such as the Special Court for Sierra Leone or the Extraordinary Chambers in the Courts of Cambodia.

³ In close collaboration with Peruvian human rights organizations, the author began collecting data about ongoing cases in order to better grasp the scope and extent of human rights trials in post-conflict Peru. The Human Rights Trials in Peru Project seeks to develop actionable information about human rights investigations and prosecutions in Peru. A website featuring the project's findings and publications can be viewed here: <http://rightsperu.net/>. The project's partners include the Coordinadora Nacional de Derechos Humanos, Peru's umbrella human rights organization, as well as several NGOs that litigate human rights cases, including Asociación Pro Derechos Humanos (APRODEH); Instituto de Defensa Legal (IDL); Comisión de Derechos Humanos (COMISEDH); Paz y Esperanza; Comisión Episcopal de Acción Social (CEAS); Fundación EcuMénica para la Paz (FEDEPAZ); Estudio para la Defensa de los Derechos de la Mujer (DEMUS); Asociación para el Desarrollo Humano “Runamasinchipaq” (ADEHR); Asociación Nacional de Familiares de Secuestrados, Detenidos y Desaparecidos del Perú (ANFASEP); and Derechos Humanos Sin Fronteras, among others. The project was made possible by the generous support of the Latin American Studies Association “Otros Saberes” initiative and the Latin America Program of the Open Society Foundations.

(NGOs), and judicial operators involved in human rights prosecutions. High-ranking government officials, retired military officers, and conservative politicians have accused human rights lawyers, prosecutors, and judges of “persecuting” the armed forces, politicizing justice, and manipulating victims for political or financial ends.

In its final report published in 2003, the CVR called for the prosecution of grave human rights violations and the creation of a specialized legal system to investigate them. To that end, CVR handed 47 cases to the Public Ministry and Judiciary for criminal prosecution.

The Peruvian Precedent

In 1980, as Peru made a transition to democratic government after more than a decade of military rule, the Shining Path launched a rural insurgency designed to topple the state and impose Communist rule. Government forces deployed massive and often arbitrary violence to combat the insurgents, resulting in massive violations of human rights. An estimated 69,000 Peruvians perished in the conflict, including some 15,000 who were forcibly disappeared.⁴ The government of Alberto Fujimori (1990–2000) came to power in the midst of massive economic crisis and spiraling violence. In 1992, with the backing of the armed forces, he carried out a “self-coup” in which he suspended the Constitution, dissolved Congress, and took over the Judiciary. This began a period of authoritarian rule in which a decline in political violence was accompanied by a systematic campaign of repression and human rights abuses against perceived government opponents.

During the conflict period, human rights organizations, survivors, and relatives of victims pressed tirelessly and in the face of great danger to bring to justice those responsible for human rights abuses.⁵ The norm, however, was impunity for state agents accused of committing abuses.⁶ After the collapse of the Fujimori regime in late 2000, the interim government of Valentín Paniagua (2000–2001) created the Peruvian Truth Commission, which was renamed the Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación, CVR) by Alejandro Toledo after he won the presidency in 2001.⁷

⁴ According to the Truth and Reconciliation Commission, the Shining Path insurgent movement was responsible for approximately 54 percent of deaths due to violence—the largest percentage—while state security forces were responsible for approximately 34 percent.

⁵ Coletta Youngers, *Violencia política y la sociedad civil en el Perú* (Lima: Instituto de Estudios Peruanos, 2003).

⁶ During the period of conflict, virtually all cases of human rights violations brought before the Peruvian courts were transferred to military courts, where those implicated were set free or given minimal administrative sanctions.

⁷ For an analysis of the CVR, see Eduardo González Cueva, “The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity,” in

The Peruvian CVR adopted a comprehensive view of transitional justice resting on three pillars: truth-seeking to determine the extent of political violence and human rights violations during the internal armed conflict; individual criminal trials, to the extent possible, to hold perpetrators of grave human rights violations accountable for their acts and to combat impunity; and meaningful reparations for victims.⁸

In its final report published in 2003, the CVR called for the prosecution of grave human rights violations and the creation of a specialized legal system to investigate them.⁹ To that end, CVR handed 47 cases to the Public Ministry and Judiciary for criminal prosecution. Since the majority of Shining Path crimes had already been adjudicated, most of these cases involve state agents who had, up until then, enjoyed total impunity.¹⁰

By late 2004 and early 2005, special units were set up in the Public Ministry to investigate human rights cases, while the National Terrorism Court was reconstituted as the National Criminal Court (*Sala Penal Nacional*, SPN) and charged with adjudicating cases of human rights violations, crimes against humanity, and terrorism.¹¹ The SPN handed down its first con-

Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice, edited by Naomi Roht-Arriaza and Javier Mariezcurrena (New York: Cambridge University Press, 2006), 70–93. Also see Lisa J. Laplante and Kimberly Theidon, “Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru,” *Human Rights Quarterly* 29, no. 1 (2007): 228–50.

⁸ The activism of the human rights community was central to the CVR’s adoption of a comprehensive model of transitional justice. Other factors came into play as well. First, the March 2001 ruling by the Inter-American Court of Human Rights in the Barrios Altos case nullified the 1995 amnesty laws that had previously prevented prosecutions in human rights cases. This not only removed a key obstacle to retributive justice in Peru; it also asserted a definitive obligation of the state to investigate, prosecute, and punish grave human rights violations. Second, a 1999 videotape released in April 2001 showed military leaders—including the new “democratic” military leadership—declaring their loyalty to the 1992 coup and the 1995 amnesty laws. To mitigate the resulting scandal, the armed forces issued a public statement apologizing for its past support of the Fujimori regime and pronouncing its support for the creation of a truth commission. The military was thus in no position to impose conditions of any kind on Peru’s truth commission as it took shape in the following months, particularly with regard to the issue of criminal prosecutions of past human rights violations. See Jo-Marie Burt, “Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Grave Violations of Human Rights,” *International Journal of Transitional Justice* 3, no. 3 (2009): 384–405.

⁹ Comisión de la Verdad y Reconciliación, *Informe Final* (Lima, 2003), <http://cverdad.org.pe/ifinal/>.

¹⁰ Many of the cases against Shining Path leaders prosecuted during the Fujimori era had to be retried, since they were found to have violated due process procedures.

¹¹ Some cases involving crimes of the Fujimori-Montesinos period, such as

viction against state agents for human rights violations in 2006, when four police officers were sentenced to 15 to 16 years for the forced disappearance of the Catholic University student Ernesto Castillo Páez, who was abducted on October 21, 1990, by government forces.¹² The Court accepted the CVR's findings that forced disappearance was part of a systematic and widespread pattern of human rights violations committed

by the Peruvian State during the internal armed conflict. The Court also determined that this and similar crimes in which the body has not yet been found constitute continuing crimes and hence are not subject to statutes of limitations.¹³

A number of other cases have since been successfully prosecuted, such as the 1991 forced disappearance of the municipal authorities from Chuschi (Ayacucho) and the 1988 murder of journalist Hugo Bustíos. Several former military officers, including the former head of the National Intelligence Service (SIN), army general Julio Salazar Monroe, have been convicted for the 1992 disappearance and murder of nine students and a professor from La Cantuta University. Eighteen members of the Colina Group, including close Fujimori allies General Nicolás Hermoza Ríos, the former army chief, and Vladimiro Montesinos, Fujimori's security adviser and former *de facto* head of the SIN, were sentenced in 2010 to 15 to 25 years for the Barrios Altos massacre.

Accountability beyond Fujimori: Progress and Setbacks

These gains notwithstanding, problems became evident early on in the transitional justice process. Some of these were mundane but very real capacity issues. There was simply not enough manpower or resources to investigate the deluge of denunciations before the Public Ministry. Cases lumbered through the Judiciary at a snail's pace, and the specialized system set up to ensure that human rights cases would be handled quickly, by judicial operators with specialized training to handle such sensitive cases, was slow-

The Court also determined that this and similar crimes in which the body has not yet been found constitute continuing crimes and hence are not subject to statutes of limitations.

ly dismembered, continuing to exist in name only. And it soon became evident that advances in accountability efforts had unleashed a virulent backlash among sectors of the armed forces and conservative politicians and elites who shared a common interest in restoring impunity.

The Public Ministry (Ministerio Público, MP) is charged with investigating crimes and issuing indictments. While the CVR recommend-

ed 47 cases for criminal investigation and prosecution, by 2013 the MP reported that it had received 2,880 denunciations of human rights violations committed during the internal armed conflict. Only a fraction of these, around 5 percent, have led to formal indictments; even fewer, around 2 percent, have made it to public trial. A significant number of the cases on file—1,349, or 47 percent—remain in the preliminary and intermediate phases of investigation, where many of them have languished for years.¹⁴

Meanwhile, investigations have been closed in nearly half (1,374, or 48 percent) of the cases.¹⁵ State prosecutors claim this is due primarily to lack of evidence (most of the cases are between 20 and 30 years old) or to the inability of prosecutors to obtain official information from military and other government offices that would help them identify the perpetrators.¹⁶ Military and government officials have refused to collaborate with criminal investigations so as to help clarify the circumstances surrounding different cases of human rights abuses or help identify those individuals responsible for specific abuses, whether as material or intellectual authors. They claim that official documents either do not exist or were destroyed. However, evidence has been obtained in some cases (in the Barrios Altos case, a judge showed up unannounced at military headquarters and seized official documents).¹⁷ Defendants often appear in court with official documents that also belie these claims. Additionally, the Permanent Historical Commission of the Peruvian Army published a report, *In Honor of the Truth*, which cites military documents from the 1980s.¹⁸

the Barrios Altos and La Cantuta cases, were adjudicated in specially constituted courts.

¹² The Inter-American Court had ruled on this case in 1997, ordering the Peruvian state to investigate, prosecute, and punish those responsible, but the 1995 amnesty law shielded the presumed perpetrators from prosecution. The case was reopened in Peru under the aegis of the special human rights system. The 2006 verdict was upheld on appeal in 2008.

¹³ Carlos Rivera Paz, *Una sentencia histórica: La desaparición forzada de Ernesto Castillo Páez* (Lima: Instituto de Defensa Legal, 2006).

¹⁴ Data based on information obtained from the Public Ministry.

¹⁵ Ibid.

¹⁶ Author's interview with Víctor Cubas Villanueva, Fiscal Superior Coordinador de las Fiscalías Penales Supraprovinciales, Ministerio Público, Lima, July 2010.

¹⁷ Jo-Marie Burt and Casey Cagley, "Access to Information, Access to Justice: The Challenges to Accountability in Peru," *Sur: International Journal on Human Rights*, no. 18 (2013).

¹⁸ Comisión Permanente de Historia del Ejército del Perú, *En Honor a la Verdad: Versión oficial del Ejército Peruano sobre la lucha contra el terror-*

Another level of concern focuses on the comportment of the Judiciary. The SPN was initially intended to be a specialized tribunal for human rights and terrorism cases. But over the years, its mandate has expanded to incorporate other types of cases, from drug trafficking and money laundering to social protest and freedom of expression. As a result, human rights cases now constitute less than 10 percent of the SPN's docket, and judges have little time for them. This has meant long delays at all stages of the process. In the case of the Los Cabitos military base—one of the 47 cases investigated by the CVR, involving the arbitrary detention, torture, and forced disappearance of 54 Peruvians in 1983—there was a three-year delay between the date the MP issued the indictment in 2008 and the opening of the public trial in May 2011.¹⁹

Once a public trial is underway, hearings are scheduled intermittently and for only a few hours at a time, resulting in extended trial periods. The Cabitos case, for example, is still underway two and a half years after its start date. In the case of the Accamarca massacre, in which 69 peasants were killed by army forces just weeks after Alan García became president in 1985, the public trial began in November 2010 and is ongoing as of this writing in January 2014. Survivors and relatives of victims, who have already waited two decades or more for their cases to be heard in court, perceive the lack of celerity in these cases as another violation of their human rights, undermining their confidence in the justice system. The extended trials are also problematic from the perspective of the defendants.

Additionally, there has been a dramatic shift in the sentencing patterns of the SPN.²⁰ Between 2005 and 2013, there have been 60 rulings in 46 distinct episodes of violence related to the internal armed conflict.²¹ The majority of these cases involve

There has been a dramatic shift in the sentencing patterns of the National Criminal Court (Sala Penal Nacional, SPN). Between 2005 and 2013, there have been 60 rulings in 46 distinct episodes of violence related to the internal armed conflict. The majority of these cases involve forced disappearances and extrajudicial executions.

forced disappearances and extrajudicial executions. As noted, the convictions to date have included some very high-profile cases (aside from the Fujimori verdict), several of which have been upheld on appeal by the Peruvian Supreme Court. At the same time, however, the overall acquittal rate is very high and has gotten worse in recent years. In 26 of these 60 rulings, at least one defendant was found guilty

and sentenced to prison (in 15 of the 26, all the defendants were found guilty, while 11 were mixed verdicts in which at least one defendant was found guilty and at least one was acquitted). In 34 of the 60 rulings (57 percent), all the defendants were acquitted. The ratios are even more alarming when we consider the number of individuals acquitted or convicted in this same period: since 2006, 67 former state agents have been convicted of human rights crimes, while 137 have been acquitted.²²

It is conceivable that the high rate of acquittals merely indicates that due process is at work and that prosecutors are not successfully proving their cases. However, it is important to note that to date, the Supreme Court has annulled or partially annulled 14 judgments in which one or more state agents was acquitted and in virtually all cases has ordered a full or partial retrial. This suggests a level of contention within the Peruvian Judiciary about the norms and concepts being applied in these cases. In at least two of these cases, the retrial also resulted in acquittals of all defendants, and at least two cases have gone to a third retrial. Two recent cases, in which the Supreme Court has overturned convictions, stand out as departures from this trend: the Barrios Altos decision of July 2012²³ and the December 2013 reversal of the conviction in the Chillitira case, despite the Supreme Court's confirmation of the 2011 sentence in 2012.²⁴

In addition, many of the judgments acquitting defendants diverge from jurisprudence outlined in earlier rulings of the SPN itself and other Peruvian courts as well as standards and norms established in international law. For example, in recent rulings the SPN has insisted on the need for direct written evidence to

ismo (1980–2000) (Lima: Armed Forces of Peru, 2010).

¹⁹ Author's interviews with public prosecutor Dr. Luz del Carmen Ibáñez, Lima, June 2010, and Dr. Gloria Cano, a human rights lawyer representing the victims in this case, Washington, DC, March 28, 2011.

²⁰ See, for example, Carlos Rivera Paz, "La desaparición forzada es un delito permanente," *Ideele-mail* (Instituto de Defensa Legal), no. 671 (February 9, 2011), http://www.justiciaviva.org.pe/webpanel/doc_int/doc10022011-201449.pdf.

²¹ Some cases have gone to trial multiple times with different defendants. The La Cantuta case, for example, has four distinct judgments, with at least one still pending. In other cases, the first instance verdict was overturned on appeal, resulting in more than one judgment. Of these 60 rulings, 47 were handed down by the SPN. Other rulings have been issued by specially constituted courts handling crimes related to the Fujimori government, while a handful have been adjudicated in regular courts at the department

level.

²² Ten members of a civil defense patrol were convicted in 2005, but since these are not state agents, I exclude them from this accounting.

²³ The annulment of the Barrios Altos ruling was subsequently left without effect after the Inter-American Court of Human Rights challenged the decision.

²⁴ "Corte Suprema anula por primera vez una sentencia condenatoria en un caso de derechos humanos," Human Rights Trials in Peru Project, January 3, 2014, <http://rightspereu.net/index.php/blog/analisis/297-corte-suprema-anula-por-primera-vez-una-sentencia-condenatoria-en-un-caso-de-derechos-humanos>.

demonstrate culpability in human rights violations. This contradicts the jurisprudence established in the Fujimori ruling and others which held that in cases of grave human rights violations, in which direct evidence is unlikely to exist because of the context in which the violations occurred, circumstantial evidence can be used to establish individual culpability. In recent decisions the SPN has refused to acknowledge that superior orders to commit human rights violations may be oral and clandestine. The SPN instead has required documentary evidence establishing the existence of superior orders in order to demonstrate intellectual authorship, and it has acquitted superior officers when no such orders can be produced. This contradicts long-standing jurisprudence that takes into consideration the military as a hierarchical organization in which orders may sometimes be spoken rather than written.

The SPN has also disqualified the testimony of family members of victims, though they are often the only witnesses to crimes, particularly in the case of forced disappearances. In some judgments, the SPN has asserted that the relatives' testimony is necessarily biased, while no such assumption is made about the testimony of military officials. The Court has emphasized the responsibility of material authors in these cases, primarily low-ranking officers and soldiers, ignoring a now-robust international jurisprudence that seeks to establish the responsibility of those who give the orders. While in early rulings, the Court refers to several cases of human rights violations as crimes against humanity, in more recent judgments it obviates such references, referring to them as mere "excesses" committed by the armed forces in the context of the counterinsurgency war. Such arguments mark a departure not only from the Court's earlier rulings but also from the findings of the CVR, and they open the door to legal arguments that statutes of limitations should apply to these crimes.²⁵ They also contradict several rulings handed down by Peru's Constitutional Tribunal, affirming that Peruvian courts must take into account international law when adjudicating human rights cases.

In cases of forced disappearance, early decisions issued by the SPN, for example in the Castillo Páez and Chuschi cases, established that these constituted crimes against humanity. In a number of recent cases, however, judges have ignored these

In a number of recent cases, however, judges have ignored these precedents or revised them in such a way as to result in the acquittal of alleged perpetrators.

precedents or revised them in such a way as to result in the acquittal of alleged perpetrators. For example, in the 2009 ruling in the Los Laureles case, which acquitted all six defendants, the SPN ignored the idea that forced disappearance is a permanent and continuing crime that cannot therefore be subject to statutes of limitation. In 2009, the Supreme Court adopted a Plenary Agreement

stating that if the person accused of forced disappearance is no longer an active-duty member of the security forces, he cannot be considered culpable since forced disappearance is a state crime. This is a juridical aberration that has been challenged by international jurists but remains technically on the books in Peru.²⁶

The question then is why the same Court that produced important and substantive rulings between 2006 and 2009 began to adopt different criteria in recent years, resulting in such a high rate of acquittals.

The Impunity Bloc

While the special human rights system to investigate and prosecute human rights crimes made progress during its first few years, it has come under sharp criticism recently. There are real capacity issues, as noted above, but many of the problems are due to lack of political will.

Particularly during the latter years of the second government of Alan García (2006–2011), there was a clear reorganization of conservative social forces interested in preserving impunity, including sectors of the armed forces and conservative politicians and elites. These forces developed a series of strategies to shift the playing field, such as getting the state to pay for the lawyers for military and police officials accused of human rights violations.²⁷ They also attempted to quash prosecution ef-

²⁵ Carlos Rivera Paz and Jo-Marie Burt, *El proceso de justicia frente a crímenes contra los derechos humanos en el Perú* (Lima: Instituto de Defensa Legal; Fairfax, VA: George Mason University, forthcoming).

²⁶ Supreme Court of Peru, *Acuerdo Plenario, V Pleno Jurisdiccional de las Salas Penales Permanente y Transitoria*, 2009. International human rights organizations questioned the validity of this argument; see the letter presented to the Peruvian Supreme Court by Human Rights Watch and signed by several international law experts, <http://derechoshumanos.pe/2010/06/organizaciones-internacionales-presentan-analisis-sobre-la-interpretacion-vinculante-del-delito-de-desaparicion-forzada-realizada-por-la-corte-suprema/>. In a handful of cases judges have departed from this binding accord and produced convictions even though the perpetrators were no longer active-duty military officials.

²⁷ In 2008, this policy was modified so that the Ministry of Defense and Interior would coordinate the selection of defense lawyers for active and former state agents accused of human rights abuses and assume all associated costs.

forts entirely through renewed calls for amnesty laws.²⁸ These initiatives did not succeed, but there have been credible reports of behind-the-scenes efforts to pressure prosecutors and judges to desist from some investigations and to refrain from issuing convictions, especially against high-ranking military officials. To date, only a handful of generals have been convicted

of human rights abuses; most of those convicted are mid- and low-ranking officers or soldiers. Government officials, including President García himself, as well as successive ministers of defense, also frequently accused human rights lawyers and judicial operators in these cases of engaging in “political persecution” of the armed forces. The rhetoric against judicial operators has eased since the election of Ollanta Humala in 2011,²⁹ but other examples of judicial interference have emerged that are deeply concerning. Among them are audiotapes revealing efforts by the then minister of justice, the supranational prosecutor, and the head of the Supreme Court with the trial court judge to ensure an acquittal in the Chavín de Huántar case.³⁰

García has never faced criminal prosecution for the massive violations of human rights that occurred during his first presidency (1985–1990). Few cases that occurred during his first government have come to trial, and critics charge that this is not coincidental. That may be changing, however. One recently opened trial involves the murder of several regime opponents in the late 1980s by a death squad known as the Rodrigo Franco Command.³¹ Among those on trial are García’s minis-

Shifting political winds appear to have narrowed the space for accountability efforts in post-conflict Peru, with grave consequences for victims’ rights to truth and justice.

ter of interior, Agustín Mantilla, and several members of García’s Peruvian Aprista Party (APRA) party who are accused of ordering and carrying out the murders. Victims included presumed members of Shining Path but also regime opponents, including trade union leader Saúl Cantoral, who was killed in 1989. Should there be a conviction in the case, it is not inconceivable that a case could be brought

against García.

Trials for other human rights cases from the first García presidency are due to open soon. These cases include the 1986 Frontón prison massacre, in which more than 100 inmates were executed by security forces,³² and the 1988 Cayara massacre, in which dozens of peasants were murdered by security forces in retaliation for a Shining Path attack on a military convoy.³³ Several eyewitnesses to the Cayara massacre were later killed off, one by one. The state prosecutor in that case, Carlos Escobar, sought asylum in the United States when his investigations came too close to powerful interests.³⁴

And the victims?

Peru has made important strides in its efforts to seek justice for grave human rights violations committed by state agents during the country’s internal armed conflict. But serious challenges have emerged in recent years. It is perhaps not surprising that Peru’s transitional justice process is plagued by a series of capacity issues that undermine the efficient and swift resolution of such a large number of complex human rights cases. But these capacity issues only tell part of the story. Shifting political winds appear to have narrowed the space for accountability efforts in post-conflict Peru, with grave consequences for victims’ rights to truth and justice. ■

²⁸ Two bills were introduced in 2008 that would have amounted to de facto amnesty laws, but neither was passed. In September 2010 President García signed Decree Law 1097, which human rights activists charged was a veiled amnesty law. After domestic and international outcry, the decree law was annulled. See Jo-Marie Burt, “1097: La nueva cara de la impunidad,” *NoticiasSER*, September 8, 2010, <http://www.noticiasser.pe/08/09/2010/contracorriente/en-edicion>.

²⁹ The Madre Mía case against Humala, who was an army captain and head of the counterinsurgency base in the Upper Huallaga Valley in the early 1990s, was closed in 2010 after witnesses withdrew their testimony. Human rights lawyers have brought the case to the inter-American system. See “Piden a CIDH reabrir proceso ‘Madre Mía,’” *Perú 21* (Lima), April 11, 2012, <http://peru21.pe/2012/04/11/imprensa/piden-cidh-reabrir-procesomadre-mia-2019587>.

³⁰ During the rescue operation of 72 people held hostage by the MRTA insurgent group, at least one of the MRTA militants was killed after surrendering to military forces. See “Aprodeh presentará recurso ante CNM por audios sobre Chavín de Huántar,” *RPP Noticias*, August 5, 2013, http://www.rpp.com.pe/2013-08-05-aprodeh-presentara-recurso-ante-cnm-por-audios-sobre-chavin-de-huantar-noticia_619518.html.

³¹ “Hoy inician juicio contra Agustín Mantilla y el Comando Rodrigo Franco,” *La República* (Lima), May 27, 2013, [http://www.larepublica.pe/27-05-](http://www.larepublica.pe/27-05-2013/hoy-inician-juicio-contra-agustin-mantilla-y-el-comando-rodri-go-franco)

[2013/hoy-inician-juicio-contra-agustin-mantilla-y-el-comando-rodri-go-franco](http://www.larepublica.pe/27-05-2013/hoy-inician-juicio-contra-agustin-mantilla-y-el-comando-rodri-go-franco).

³² The Constitutional Tribunal’s recent ruling that the Frontón massacre does not constitute a crime against humanity has been sharply criticized by human rights groups, who say the tribunal is prejudging a case currently in litigation. Regardless of whether it is a crime against humanity, it no doubt constitutes a grave human rights violation, and under international law, states are obligated to prosecute such crimes and hold accountable those responsible.

³³ “Military Accused of Massacre of 80 Peruvian Peasants,” *Los Angeles Times*, May 19, 1988, http://articles.latimes.com/1988-05-19/news/mn-4828_1_peasants-military-accused.

³⁴ “CVR solo recomendó acusar a 13 militares,” *La República* (Lima), September 25, 2006, <http://www.larepublica.pe/25-09-2006/cvr-solo-recomendo-acusar-13-militares>.

Barrios Altos: The Failed Attempt to Reverse Justice

Carlos Rivera

Peruvian attorney and coordinator of the legal defense area at the Instituto de Defensa Legal (IDL, Legal Defense Institute) in Lima, Peru

The Peruvian justice process is complex and difficult. The publication of the final report of the Truth and Reconciliation Commission in August 2003 provided a major incentive for the criminal justice system to take action with respect to those crimes of the past that had never been investigated. But it is clear that in the following years the momentum dissipated significantly as a result of a new political balance of power in Peruvian society, much different from the one that staunchly encouraged the process of democratic transition at the beginning of the last decade. This new scenario has been reflected in the courts, in the numerous acquittals of members of the military accused of serious human rights violations.

Nonetheless, against this backdrop, the trial and conviction of former President Alberto Fujimori was a historic event with universal significance, given the legal and political importance of the trial and of his conviction in April 2009 as the indirect perpetrator, through an organized apparatus of power, of the crimes of Barrios Altos (1991) and La Cantuta (1992). In addition to this fundamental achievement of the Peruvian justice system, there are others worth noting, such as the prosecution of crimes of rape committed during the internal armed conflict, charged as crimes against humanity. These offer clear indications of the progress made against impunity at the judicial level.

The Supreme Court judgment

The July 20, 2012, judgment of the Permanent Criminal Chamber of the Supreme Court of Justice of Peru in the case of the Barrios Altos massacre was very clearly intended to be a turn-



ing point in Peruvian case law in the area of human rights. The content of this judgment offers a new interpretation of some of the most important evidentiary and legal issues relating to human rights crimes, departing sharply from the interpretation that some national courts had maintained up to that point—especially the court that tried and convicted Fujimori.

One of the most questionable legal aspects of the judgment is, without a doubt, the content of the chapter on crimes against humanity.

The decision establishes that the Barrios Altos massacre is not a crime against humanity, but merely a common crime, because it supposedly fails to meet one of the requirements of international law for classifying an offense as a crime against humanity. It also declares that such classification, established in the conviction, gave rise to a violation of the due process rights of the defendants.

Although the judgment acknowledges that the intervention of the Colina intelligence detachment was part of the State policy against subversion, it later holds that said State policy was not aimed against the civilian population, but rather against the terrorist leaders and criminals, who, as indicated above, were not part of the **civilian population** [emphasis in original]. Consequently, the crimes attributed to the defendants, such as murders and injuries to the victims, violated their human rights; however, they do not constitute crimes against humanity.¹

The Supreme Court justices thus put forward an inconceivable legal argument in which they assert—without any evi-

¹ Supreme Court of Justice, Permanent Criminal Chamber, R.N. No. 4104-2010, Lima, July 20, 2012, para. 162.

dence—that the victims of the Barrios Altos massacre were not civilians but rather members of a belligerent force, who could therefore be physically eliminated even though they were unarmed.

Another questionable part of the judgment is the use of so-called due obedience, a concept that is prohibited under international law. The judgment acquitted the former chief (1992) of the Army Intelligence Service (SIE):

[The Court] notes that the defendant acted in compliance with the orders given by the DINTE [Army Intelligence Directorate] relating to the suspension of personnel deployment—the function of said Army unit being to manage intelligence and counter-intelligence personnel in personnel procedures stemming from security requirements—in accordance with the regulations contained in the DINTE’s 1991 Operations and Functions Manual (MOF).²

The judgment handed down in July 2012 not only suggested a new range of interpretation of these issues, but did so in one of the most emblematic cases involving human rights crimes in Peru and one with a direct link to the case of Alberto Fujimori, who had been convicted based on a framework of interpretation diametrically opposed to the July 2012 decision.

The decision of the Inter-American Court of Human Rights

The Supreme Court judgment was categorically rejected by human rights organizations and by a broad majority of Peruvian society. Accordingly, in the absence of any type of legal proceeding or mechanism with which to challenge judgments handed down by the Supreme Court, nongovernmental human rights organizations filed a request before the Inter-American Court of Human Rights for a hearing to monitor compliance. More than a decade earlier, in March 2001, the Court had handed down a judgment in the Barrios Altos case establishing the international responsibility of the Peruvian State. The judgment was a decisive factor in the reopening of the court case that had been closed in 1995 following the enactment of the amnesty laws during Alberto Fujimori’s administration.

The judgment handed down in July 2012 not only suggested a new range of interpretation of these issues, but did so in one of the most emblematic cases involving human rights crimes in Peru and one with a direct link to the case of Alberto Fujimori.

The hearing to monitor compliance with the 2001 judgment was held before the Inter-American Court on August 27, 2012. It made clear that it was impossible for the Peruvian State to seriously and coherently explain the reasons for its disregard of the international obligations of the State. A few weeks later, on September 7, the Court published its Order Monitoring Compliance with the Judgment, in which it stated, “given its importance, the obliga-

tion to investigate cannot be carried out haphazardly; rather, it must be conducted in accordance with the standards established by the international case law and provisions on the investigation of human rights violations.”³ It further stated that the principle of *pacta sunt servanda* “requires the removal of any obstacle preventing the investigation and adjudication of the facts and, if appropriate, the punishment of those responsible for the violations found, as well as the search for the truth.”⁴ In the Court’s opinion, “If the State apparatus acts in such a way that the violation goes unpunished, and the full rights of the victims are not restored to the extent possible, it can be said that it has failed to comply with the judgment.”⁵ The Inter-American Court also declared that the decision of the Supreme Court “contradicts the prior ruling of the same Supreme Court of Justice in the prosecution of another individual involved in the events of the instant case”⁶—a clear reference to the Fujimori case. Based on these considerations, the Inter-American Court concluded that the domestic courts are required to remove any procedural practice, provision, or institution inconsistent with the duty to investigate serious human rights violations.

On September 27, the Permanent Criminal Chamber of the Supreme Court found itself obliged to issue an order vacating the judgment of July 20, 2012. This is most definitely not a common procedure in the Peruvian justice system. Nevertheless, the high court was compelled to do it because the judgment in question had resulted in the State’s failure to meet its international obligations before the inter-American system and international law; it therefore had to correct its noncompliance immediately. Despite the internal debate that undoubtedly took place within

² Ibid., para. 314.

³ *Case of Barrios Altos v. Peru*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights, September 7, 2012, para. 26.

⁴ Ibid., para. 28.

⁵ Ibid.

⁶ Ibid., para. 48.

the Supreme Court, the Peruvian State complied, vacating the judgment and ordering that the Court, with a different group of justices, hold a new hearing to listen to the parties' arguments in order to render a new decision.

The challenge faced by the Supreme Court and the Peruvian justice system

In January 2013, the Permanent Criminal Chamber of the Supreme Court—now made up of a new set of justices—heard the oral arguments of the parties. At stake was not only the upholding of the convictions of Vladimiro Montesinos, Nicolás Hermosa, Juan Rivero, and the members of the Colina Detachment, but also, and above all, the role of the Supreme Court in the national justice system with respect to the crimes against humanity perpetrated during the internal armed conflict and in view of the emblematic court decisions handed down in recent years. What we are talking about is not insignificant. We are referring to the conditions under which the judicial system will deal with these types of cases, and therefore about the essential conditions that the justice system offers to provide continuity in the justice process.

This becomes much more relevant if we consider that most of the judgments handed down in recent years by the National Criminal Chamber—the court with jurisdiction over human rights crimes and crimes against humanity—not only have acquitted the defendants but also have established criteria for the weighing of evidence that contradict the nature of these types of crimes. Such judgments, until last year, had been vacated by the Supreme Court, which had turned the high court into a safeguard against impunity in Peru.

At the beginning of August 2013, the Criminal Chamber of the Supreme Court issued a judgment upholding the convictions of those who ordered and those who carried out the Barrios Altos massacre. It also affirmed that under international law the massacre is a crime against humanity.

We have before us, then, a judicial event of major importance for Peru. This judgment is a response to the unfaltering will of the victims' relatives, who for more than two decades became the symbol of the fight against impunity. It has helped consolidate and signifies a fundamental achievement in the process of justice in Peru. ■

LEGAL OPINION

DPLF submits legal opinion in case against the perpetrators of the Barrios Altos massacre

In July 2012, the Supreme Court of Peru handed down a judgment in favor of members of the paramilitary Colina Group that had been charged with the extrajudicial executions carried out in 1991 in the Barrios Altos neighborhood of Lima, and of the forced disappearance of villagers from Valle de Santa and of journalist Pedro Yauri in 1992. **This decision was harshly criticized, because it ruled that the acts were not crimes against humanity**, and it prompted a resolution from the Inter-American Court of Human Rights and the subsequent nullification of the judgment in question by the Supreme Court itself, which ordered that a new judgment be issued.

On January 10, 2013, the Supreme Court held a hearing before handing down the new decision. **DPLF submitted a legal opinion to the Permanent Criminal Chamber hearing the case, indicating that the acts attributed to the Colina Group in the cases of Barrios Altos, El Santa and Pedro Yauri were crimes against humanity** – which by definition are not subject to any statute of limitation – because the way in which they were committed meets the criteria established under international criminal law for such crimes.

DPLF also argued that the acts could be considered war crimes under international humanitarian law and international criminal law, and on those grounds were also not subject to any statute of limitations. Moreover, even if they did not constitute crimes against humanity or war crimes, Inter-American law provides that in cases of grave human rights violations, such as those committed in the cases of Barrios Altos, El Santa and Pedro Yauri, domestic statutes of limitations cannot be invoked, regardless of the legal classification of the facts under national criminal law.

In August 2013, the Permanent Criminal Chamber handed down a new judgment upholding the convictions of the former members of the Colina Group and classifying their acts as crimes against humanity.

The full text of the legal opinion is available at: http://www.dplf.org/sites/default/files/opinion_juridica_-_carta_dplf_sala_penal_csj_peru-grupo_colina_version_final.pdf

Procedural Rights and the Obligation to Investigate and, Where Appropriate, Prosecute and Punish the Perpetrators of International Crimes: The Example of Uruguay

Jorge Errandonea

Attorney at the Inter-American Court of Human Rights and professor of human rights law at the University of Costa Rica School of Law in San José¹

For several years now, the institutions of international human rights law (IHRL) have been developing various standards on the obligations of States to investigate and, where appropriate, prosecute and punish the perpetrators of international crimes² committed in the context of armed conflicts or during the rule of authoritarian regimes.³ The intention in developing these standards is to prompt specific actions aimed at putting an end to the impunity so often seen with respect to the crimes committed in those contexts.

This set of international obligations that States must meet with respect to criminal acts committed in situations of massive

human rights violations gradually came to encompass, among other things, the prohibition against granting amnesty or pardons⁴ to those responsible for international crimes,⁵ as well as the reinterpretation of certain trial rights of those prosecuted for international crimes (no criminal retroactivity, statute of limitations, *res judicata*, and *ne bis in idem*).⁶

However, these developments regarding the obligation to investigate have come under criticism from various quarters

¹ The opinions expressed in this article are those of the author and do not necessarily reflect those of the Inter-American Court of Human Rights. I am grateful for the valuable comments from Agustín Martín, Carolina Villadiego, María Clara Galvis, and Leonor Arteaga.

² Although the term “international crimes” can refer both to crimes defined in the statutes of the main international criminal tribunals and to transnational crimes (drug trafficking, piracy, human trafficking, money laundering, and others), for purposes of this article this term will be used to designate crimes against humanity, genocide, or war crimes. Reference will also be made to “serious human rights violations,” particularly in relation to IHRL. That expression should, however, be used with caution, given that it deals with a nebulous category without a definition that describes its precise characteristics and exhaustively lists all of the acts encompassed by this concept (for example, the Inter-American Court tends to designate some acts that would fit under this category but has never clearly defined their scopes or limits).

³ For a systematized description of the standards for investigation, see, e.g., María Clara Galvis, “La debida diligencia judicial en la investigación de la violencia basada en género,” in *Visibilizar la violencia de género*, ed. Gloria Bernal Acevedo (Bogotá: GIZ, 2011), pp. 53–80; International Commission of Jurists, *Impunidad y graves violaciones de derechos humanos*, Guía para Profesionales No. 3 (Geneva: ICJ, 2008); and Catalina Botero Marino and Esteban Restrepo Saldarriaga, “Estándares internacionales y procesos de transición en Colombia,” in *Entre el perdón y el paredón: Preguntas y dilemas de la justicia transicional*, ed. Angelika Rettberg (Bogotá: Universidad de los Andes, Facultad de Ciencias Sociales, Departamento de Ciencia Política, CESO, Ediciones Uniandes; Ottawa: International Development Research Centre, 2005), pp. 19–66.

⁴ The international standard is not limited to amnesties but is in fact broader. For example, the Inter-American Court found that “all amnesty provisions, [statutes of limitations], and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations” (*Case of Barrios Altos v. Peru*, Merits, Judgment of March 14, 2001, Series C, No. 75, para. 41). Certain instruments, notably the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, refer to “amnesty and other measures of clemency” (United Nations Commission on Human Rights, E/CN.4/2005/102/Add.1, February 8, 2005). The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions mention “blanket immunity” measures (recommended by United Nations Economic and Social Council Resolution 1989/65, May 24, 1989). The Declaration on the Protection of All Persons from Enforced Disappearance alludes to blanket amnesty laws “or similar measures” (United Nations General Assembly, Resolution 47/133, December 18, 1992).

⁵ This is the case even when those instruments of impunity may have been supported by the will of the people, as in the case of Uruguay. See Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Merits and Reparations, Judgment of February 24, 2011, Series C, No. 221, paras. 238–39.

⁶ To this we can also add the international cooperation obligations in matters involving investigation and extradition or the limits to military jurisdiction. For a more detailed discussion, see International Commission of Jurists, *Impunidad y graves violaciones de derechos humanos*, *supra* note 3, and Oscar Parra Vera, “La jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: Algunos avances y debates,” *Revista Jurídica de la Universidad de Palermo*, Year 13, no. 01 (November 2012): 5–51.

with respect to different issues.⁷ In particular, the tension between the trial rights of individuals prosecuted for international crimes, on one hand, and the reading of those rights in light of IHRL when such crimes are investigated, on the other, is one of the points that has stirred the most debate recently.

Some authors have criticized the international entities for undermining certain individual procedural rights by demanding, at whatever cost, the punishment of those responsible for certain human rights violations. In referring to the international human rights bodies, these critics use terms such as “neo-punitivist” and assert that those same bodies are promoting the application of the criminal law of the enemy or the criminal law of the perpetrator when they seek to impose a punishment that runs counter to the classic tenets of criminal law.⁸

Some authors have criticized the international entities for undermining certain individual procedural rights by demanding, at whatever cost, the punishment of those responsible for certain human rights violations.

The debates surrounding these tensions have also arisen within several of the region’s national judicial systems that have had to grapple—and are still grappling—with a history of massive human rights violations. In this regard, it is interesting to examine the case of Uruguay, and in particular the debates arising from the application of criminal law to State crimes that took place during the dictatorship.

It should be recalled that, starting a few years ago, people began to question the balance between justice, democratic governability, and impunity that had been reached in Uruguay in the post-dictatorship years of the 1980s. The Uruguayan Expiry Law (Ley de Caducidad),⁹ which prevented prosecution of the crimes of the dictatorship for nearly two decades, began to be called into question in 2000, and it became possible to prosecute various civilians and members of the military for human rights violations.¹⁰

In 2009, the Supreme Court of Justice (SCJ) declared the Expiry Law unconstitutional.¹¹ This decision reversed, after more than 20 years, the SCJ’s ruling of 1988, which had found the

⁷ Without intending to be exhaustive, we could say that this criticism refers in general terms to at least six issues: (a) the need to avoid maximalist positions regarding the prohibition against amnesty or pardons in certain post-conflict or political transition contexts, especially when the perpetrators of massive human rights violations are in positions of strength or retain very significant measures of power; (b) the obligation to investigate that appears in some case law as an obligation of result; (c) the debates arising from the diversity of State sanctions, in which the IHRL bodies are accused of exclusively promoting the penalty of imprisonment as the only way to deal with this type of crime, without evaluating other alternatives; (d) the sources on which the construction of these standards is based; (e) the relaxation of procedural rights in the application of the criminal law of the enemy; and (f) in the Gelman case, the inability to acknowledge relevant nuances pertaining to the strength and legitimacy of public decisions. See Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (New York: Cambridge University Press, 2009); Legal Status of Amnesty, Third Party intervention in the case of *Marguš v. Croatia*, Application No. 4455/10; Leonardo Filippini, “Reconocimiento y justicia penal en el caso Gelman,” in *Anuario de Derechos Humanos* (Santiago: Centro de Derechos Humanos, Universidad de Chile, 2012), pp. 185–93; and Roberto Gargarella, “Sin lugar para la soberanía popular: Democracia, derechos y castigo en el caso Gelman,” paper presented at the 2013 Seminar in Latin America on Constitutional and Political Theory, available at http://www.law.yale.edu/documents/pdf/sela/SELA13_Gargarella_CV_Sp_20120924.pdf. For a more detailed analysis of several of these criticisms, see Parra Vera, “La jurisprudencia de la Corte Interamericana,” *supra* note 6.

⁸ See Daniel Pastor, *Encrucijada del derecho penal internacional y del derecho internacional de los derechos humanos* (Bogotá: Pontificia Universidad Javeriana, 2009), p. 103; Daniel Pastor, “La ideología penal de ciertos pronunciamientos de los órganos del Sistema Interamericano de Derechos Humanos: Garantías para el imputado o para el aparato represivo del Estado,” in *Sistema interamericano de protección de los derechos humanos y derecho penal internacional* (Montevideo: Konrad Adenauer Stiftung, Programa Estado de Derecho para Latinoamérica, 2011), pp. 491–516; and Ezequiel Malarino, “Activismo judicial, punitivización, y nacionalización: Tendencias antidemocráticas y antiliberales de la Corte Interamericana de Derechos Humanos,” in *Sistema interamericano de protección de los dere-*

chos humanos y derecho penal internacional (Montevideo: Konrad Adenauer Stiftung, Programa Estado de Derecho para Latinoamérica, 2010), pp. 25–55.

⁹ The Law on the Expiration of the Punitive Claims of the State (Ley de Caducidad de la Pretensión Punitiva del Estado, Law 15.848 of December 22, 1986) was the Uruguayan amnesty law. It guaranteed impunity for members of the military and the police responsible for serious human rights violations committed during the civilian-military dictatorship of 1973 to 1985. It was declared consistent with the Constitution by the Supreme Court of Justice in 1988 and then approved by referendum in 1989 and by plebiscite in 2009.

¹⁰ On this matter, see Pablo Galain Palermo, “The Prosecution of International Crimes in Uruguay,” *International Criminal Law Review* 10, no. 4 (2010): 601–18; Martin Prats, “Uruguay,” in *Las víctimas y la justicia transicional ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales?* (Washington, DC: Due Process of Law Foundation, 2010), pp. 219–44; Francesca Lessa, “Barriers to Justice: The Ley de Caducidad and Impunity in Uruguay,” in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh A. Payne (New York: Cambridge University Press, 2012), pp. 123–51; and Jorge Errandonea, “Justicia transicional en Uruguay,” *Revista IIDH*, no. 47 (2008): 13–69.

¹¹ Supreme Court of Justice of Uruguay, Case of Sabalsagaray Curutchet, Blanca Stela – Denuncia de Excepción de Inconstitucionalidad (Constitutional Challenge), Judgment No. 365 of October 19, 2009. In Uruguay, judgments on the unconstitutionality of laws have effects only on the specific case at hand. Therefore, through the mechanism of “advance ruling,” the opinion was reiterated in the Organización de los Derechos Humanos (Human Rights Organization) case of October 29, 2010, and in the Fusilados de Soca (Shooting Victims of Soca) case of February 10, 2011.

law constitutional.¹² Subsequently, in 2011, the Inter-American Court of Human Rights handed down a judgment in the case of *Gelman v. Uruguay* in which it found the Expiry Law invalid due to its incompatibility with several international instruments. The Court ordered the Uruguayan State to guarantee that the law would not prevent the investigation and potential punishment of those responsible for serious human rights violations.¹³

The Uruguayan Parliament subsequently enacted an interpretive law¹⁴ declaring that the crimes committed during the dictatorship were crimes against humanity and therefore not subject to any statute of limitations.¹⁵ The intent of this law was to resolve the problem caused by subjecting the crimes of the dictatorship to a statute of limitations that was set to expire in November 2011. But in early 2013 the SCJ declared the interpretive law partially unconstitutional.¹⁶ It suggested, among other considerations, that the law “affected the right derived from the principle of legality and the prohibition against the retroactivity of unfavorable penalty provisions, as well as the protection of the legal certainty provided for under the constitutional rule of law.”

Several weeks later, in monitoring compliance with the judgment in the *Gelman* case, the Inter-American Court indicated that serious human rights violations—such as the ones in this case—were not subject to any statute of limitations, and that the principle of non-retroactivity of criminal law had to be in-

The SCJ suggested, among other considerations, that the law “affected the right derived from the principle of legality and the prohibition against the retroactivity of unfavorable penalty provisions, as well as the protection of the legal certainty provided for under the constitutional rule of law.”

terpreted in view of the international law in effect at the time the criminal acts were committed.¹⁷

The Inter-American Court also held that it is incompatible with the international obligations of a State Party to the American Convention on Human Rights for the State to fail to investigate those responsible for serious human rights violations, to the detriment of the victims’ right to access to justice, based on conditions of impunity that the State’s own authorities and bodies have fostered through the imposition of *de jure*

or *de facto* obstacles preventing investigations or prosecution during a specific period of time.¹⁸ In the case of Uruguay, although the SCJ was not the body that initially promoted the impunity that has benefitted the State agents who committed serious human rights violations during the dictatorship, it was nevertheless the institution that *in fine* protected the impunity, shut down the possibility of investigating those crimes for several years, and, in the end, allowed for the statutes of limitation to run without the authorities having a real opportunity to investigate. In this regard, as the Inter-American Court stated, it is unreasonable for the SCJ to declare that the prosecution of certain crimes is barred by the statute of limitations when it was the same Court that kept those cases from being investigated, by virtue of a law that—indeed—it ended up declaring unconstitutional.

With respect to the issue of the non-retroactivity of criminal law, the Inter-American Court added that the importance of considering this principle broadly, so that it also encompasses international law, lies in the fact that there was an attempt to prevent the verification, through legal provisions or proceedings, of serious human rights violations committed by State agents under the protection of an organized apparatus of power. The Court also noted that if we accept the idea that domestic law alone determines the application of criminal non-retroactivity, it would mean that the agent of an organized apparatus of power could legitimately commit the most serious crimes if the State protecting him guarantees by legal means that he will go unpunished.¹⁹ The Court further held that in those circumstances there

¹² On May 2, 1988, the Supreme Court of Justice ruled that the Expiry Law was constitutional because it was a valid amnesty according to the Constitution of 1967. See Supreme Court of Justice file entitled “D., J.; M., N.; M., F.; M., O.; B., J. Denuncia. Inconstitucionalidad Ley 15.848. Arts. 1, 2, 3 y 4” (Constitutional Challenge to Law 15.848. Arts. 1, 2, 3, and 4), F. No. 112/87, Judgment of May 2, 1988.

¹³ See Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, *supra* note 5, operative paragraph 11.

¹⁴ Law 18.831 of October 27, 2011, reestablishes the full exercise of the punitive claims of the State for crimes committed in the implementation of State terrorism.

¹⁵ These acts are being investigated according to the provisions of the criminal code in effect at the time of the events; therefore, the legal provisions establishing the inapplicability of the statute of limitations to these types of crimes, which arose from subsequent legislation, were not applicable. This statute of limitations began to run on the date of the return to democracy, that is, March 1, 1985.

¹⁶ See Supreme Court of Justice of Uruguay, “M. L., J. F. F., O. – Denuncia – Excepción de Inconstitucionalidad, Arts. 1, 2 y 3 de la Ley 18.831” (Complaint, Constitutional Challenge, Arts. 1, 2, and 3 of Law 18.831), IUE 2-109971/2011, Judgment No. 20 of February 22, 2013. This judgment was affirmed on several subsequent occasions.

¹⁷ See Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of March 20, 2013, paras. 95–98.

¹⁸ *Ibid.*, para. 94.

¹⁹ *Ibid.*, para. 96.

is no room for a strict interpretation of certain procedural safeguards without distorting their very meaning.²⁰ It also recalled that all of the authorities of the Uruguayan State, including its highest courts of justice, have the duty to comply in good faith with international law²¹ and to ensure that their judgments have effective results, making certain that this principle is applied not only with respect to the substantive provisions of human rights treaties (that is, the ones that contain provisions on protected rights) but also with respect to the procedural provisions.²²

The above lends itself to reflection on the legal issue raised by the opposing positions of the two courts (the SCJ and the Inter-American Court) and raises the following question: Can the application of some criminal law safeguards be modified according to their interpretation (or *reinterpretation*) under IHRL in cases involving international crimes? Some thoughts on this question are explored briefly below.

First, it is necessary to clearly distinguish which procedural rights are being interpreted in light of international law. We thus find that the procedural rights that would be subject to a second look in light of IHRL are not those that regulate the equality of arms in the case, or the opportunity to defend oneself from accusations through the production of evidence, or the right to appeal a court decision. In fact, the *reinterpretation* refers solely to certain safeguards: *res judicata*, *ne bis in idem*, statute of limitations, and non-retroactivity of criminal law—in other words, those that effectively keep an investigation or a case from going forward.

A specific analysis of the nature of the *reinterpretation* of those protections demonstrates that the infringement of the principles of legality and non-retroactivity of criminal law is not as clear as the Uruguayan SCJ or the scholarly criticism suggests. Indeed, as the Inter-American Court has held, the principle according to which no person may be convicted for actions or omissions that were not crimes at the time they were committed must also take account of international law.²³ Accordingly, it would not be correct to say that the application of the principle of legality pertains solely to the domestic law of a country and that the application of a criminal law that takes account of international law violates that principle. The States themselves, sovereignly and through their representative bodies, agreed that these types of standards and principles should be understood in accordance with international law, in addition to domestic law.²⁴

Furthermore, with respect to institutions of criminal law such as *res judicata* and *ne bis in idem*, the assertion of fraudulent *res judicata*²⁵ in the event of a new trial would not be such a foreign concept. Indeed, that possibility exists in nearly all domestic legal systems in the region.

Therefore, we are quite far from the alarming scenario described by critics, according to which criminal defendants would be powerless before the State's criminal prosecution apparatus, unable to defend themselves from the charges of which they are accused.

The need thus arises to reexamine the true extent of the procedural institutions of criminal law that are being interpreted in light of international law, given that (a) not all of the procedural safeguards are at issue; (b) some of these interpretations coincide with provisions contained in domestic legal systems (*res judicata*, *ne bis in idem*); (c) others arise from the treaties signed by the States themselves (legality and non-retroactivity); and (d) they are designed only for an independent and impartial assessment of the "responsibility of the person investigated or prosecuted according to the evidence gathered, to determine whether it demonstrates his responsibility or the absence thereof."²⁶

Second, with respect to the criminal statute of limitations issue, it would be reasonable to consider, as the Inter-American Court does, that it is neither logical nor fair for the statute of limitations on criminal actions not to be tolled in cases where judicial authorities effectively lack the ability to investigate international crimes due to the presence of *de jure* or *de facto* impediments. It bears recalling here that one of the main reasons for which the concept of a criminal statute of limitations has gradually been consolidated in the legal systems of the States²⁷ is to prevent the potential prejudice to criminal suspects if they are subject to excessive time periods during which they may be investigated.²⁸ In cases such as those in Uruguay, in which

y graves violaciones de derechos humanos, *supra* note 3, pp. 129–34, and "Comentario de Pablo Galain Palermo," <http://www.kas.de/wf/doc/9176-1442-4-30.pdf>.

²⁵ The fraudulent element would be the outcome of a judgment in a case in which a fraud was perpetrated by one or both parties or by the judge.

²⁶ See Galvis, "La debida diligencia judicial," *supra* note 3, p.72.

²⁷ On this point, it also bears noting that the common law legal systems tend to have much more restrictive criminal statutes of limitations, in particular with respect to murder offenses or the most serious crimes. See, e.g., Vivienne O'Connor and Colette Rausch, eds., *Model Codes for Post-Conflict Criminal Justice: Model Criminal Code*, vol. 1 (Washington, DC: United States Institute of Peace, 2007), pp. 56–57, and John M. Scheb and John M. Scheb II, *Criminal Law and Procedure* (Belmont, CA: Wadsworth Cengage Learning, 2009), p. 410.

²⁸ The writings of legal scholars also refer to other explanations for the existence of the institution of criminal statutes of limitations, namely: (a) it is difficult to preserve physical evidence or witness testimony over time—a situation that affects both the prosecution and the defense; (b) the passage of time diminishes the justifications for criminal prosecution, given that

²⁰ *Ibid.*, para. 98.

²¹ *Ibid.*, paras. 59–61.

²² *Ibid.*, para. 63.

²³ *Ibid.*, para. 95.

²⁴ See International Covenant on Civil and Political Rights, December 16, 1966, Art. 15, and Universal Declaration of Human Rights, December 10, 1948, Art. 11.2. See also International Commission of Jurists, *Impunidad*

the agency responsible for criminal prosecution did not have the opportunity to conduct an investigation due to various *de jure* or *de facto* impediments (under the Expiry Law), it would be reasonable and consistent with the purposes of the statute of limitations for it to be tolled for the entire period during which it was impossible to prosecute.²⁹

Additionally, in terms of the relationship between the principle of non-retroactivity of criminal law and the inapplicability of the statute of limitations to international crimes that took place at a time when such acts were subject to the statute of limitations under the domestic law of different countries (as in the case of Uruguay), it can be said that considering those crimes (which occurred in the 1970s) not to be subject to the statute of limitations would not affect the principle of non-retroactivity of criminal law, because “the inapplicability of the statute of limitations to crimes against humanity was already established under customary international law, as custom operates as a source [of international law] in this area of law.”³⁰

The Uruguayan Parliament subsequently enacted an interpretive law declaring that the crimes committed during the dictatorship were crimes against humanity and therefore not subject to any statute of limitations.

Third, the order of the Inter-American Court in the *Gelman* case suggests a *reconfiguration* of some procedural rights in order to adapt them to the nature of criminal acts that are international crimes. As the Court maintained, it is unreasonable to require a strict application of the classic criminal law safeguards, understood as a *protective shield*

against the abuses of the Leviathan,³¹ when the perpetrator is protected or defended by the State and is often in a position to unlawfully influence the creation of provisions or agreements that guarantee his own impunity. It is important to underscore that the Inter-American Court does not question the existence of these rights, which are inherent to the rule of law; it merely underscores the imperative that they not be used improperly and for purposes of ensuring impunity for crimes that were planned from within the very institutions of the State.³²

In other words, certain classic criminal law protections are not completely adapted to the prosecution of these types of crimes, given that they were not designed for situations in which the criminal conduct originates within the State itself. For this reason, international law has been modifying these procedural safeguards so that the competent bodies of the State can effectively have the opportunity to prosecute acts constituting international crimes without the perpetrators of those crimes unlawfully (and unequally, in comparison to individuals prosecuted for “common crimes”) benefitting from a dysfunction orchestrated from within the State apparatus itself in order to guarantee its impunity.

In short, understood in this manner, the *reinterpretation* of some criminal law safeguards for defendants prosecuted for international crimes has been consolidated in international law standards that tend to allow and even enable the stripping away of everything that ends up operating as *extraordinary benefits* granted to the perpetrators of international crimes, provided that those benefits were unlawfully granted by the State in the first place. Accordingly, the perpetrators of such criminal acts will find themselves in exactly the same procedural situation as a person accused of a “common crime” before a State’s criminal justice system. ■

the victims and their relatives, or society as a whole, may have overcome the offenses perpetrated or may have reconciled with the offenses of the past; or (c) it is assumed that the purpose of the criminal justice system—that is, to ensure social order—has been reestablished with the passage of time. See, in this regard, O’Connor and Rausch, *Model Codes*, supra note 27; Eugenio Raúl Zaffaroni, *Manual de Derecho Penal: Parte General* (Buenos Aires: Ediar, 2006), p. 685; and Alberto Binder, *Justicia Penal y Estado de Derecho* (Buenos Aires: Ad-Hoc, 2004), p. 130.

²⁹ See Binder, *Justicia Penal y Estado de Derecho*, supra note 28, pp. 132–33: “the tolling or suspension can be based only on the existence of some condition that makes it impossible for the State to take such initiative. For example, the disruption of the constitutional order [...]. It must be a condition that makes it totally impossible [to bring] the criminal action.” He further adds, “It must be made clear, then, that the precise terms of the temporary limitation can be overcome only when a condition outside the State’s activity makes it absolutely impossible to exercise penal authority or pursue criminal prosecution.”

³⁰ Zaffaroni, *Manual de Derecho Penal*, supra note 28, p. 150. See also Article 38 of the Statute of the International Court of Justice; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, *Rules* (New York: Cambridge University Press), pp. 694ff; United Nations General Assembly Resolution 95(I), “Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal,” December 11, 1946; United Nations General Assembly Resolution 488(V), “Formulation of the Nürnberg principles,” December 12, 1950; Resolutions 1074 D (XXXIX), July 28, 1965, and 1158 (XLI), August 5, 1966; United Nations General Assembly Resolution 2391 (XXIII), Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, November 26, 1968, entered into force on November 11, 1970; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, January 25, 1974; and International Commission of Jurists, *Impunidad y graves violaciones de derechos humanos*, supra note 3, p. 135.

³¹ See Binder, *Justicia Penal y Estado de Derecho*, supra note 28, pp. 34 and 130. See also Yves Cartuyvels et al., *Les droits de l’homme, bouclier ou épée du droit pénal?* (Brussels: Facultés Universitaires Saint-Louis, 2007), p. 237.

³² See Galvis, “La debida diligencia judicial,” supra note 3, p. 72.

Pre-trial Detention and Legal Culture

Luis Pásara

Legal sociologist, a researcher on justice systems and judicial reform in Latin America. DPLF Senior Fellow

Under international human rights instruments and the new codes of criminal procedure, pre-trial detention, with some national variations, is authorized only in cases of procedural risk. This refers to situations where there is both a serious risk of the defendant's flight and the presumption that pre-trial release would adversely affect the evidence necessary to the case. This basic concept, which strictly speaking applies the principle of presumption of innocence to the pre-conviction stage, hits a roadblock in the legal culture prevalent in our countries. The average citizen tends to think of pre-trial detention as providing a head start on the sentence to be imposed against the person considered likely to be responsible for a crime. This idea is perhaps fueled by the broad uncertainty with respect to whether there will ultimately be a conviction in the case.

Since the presumption of innocence has been slow to take root in the legal consciousness of the public—even among highly educated people—anyone identified by the police as potentially responsible for a crime is seen as guilty in the eyes of the public until proven otherwise. Many people thus consider it not only prudent but also essential to detain someone who appears, according to the initial evidence, to be the perpetrator of a crime.

At the same time, the media and political actors in the countries of the region have used the issue of public safety to develop what has come to be called “penal populism,” a repressive and authoritarian approach centered on “reestablishing order” through the use of a “firm hand.” In this discourse, pre-trial detention is a central issue: it is promoted as a general practice to be applied to every person the police bring before the justice system, save for exceptional cases. So-called public opinion, influenced by the media, thus exerts pressure (frequently of a regressive nature) on the operation of the criminal justice system.

The judicial tradition has been consistent with this position. As a result, the number of pre-trial detainees held in Latin American prisons has been significantly higher than the number of convicts. It matters little that some of them ultimately will be acquitted at trial; in the meantime, they will have suffered the atrocities that are rampant in our prisons.

The association between the entry into force of new codes of criminal procedure and the increase in crime is used, some-

times quite deceptively, to influence the public debate in countries where such reforms are in effect. Indeed, the arguments put forth from counter-reformist positions, in support of maintaining traditional practices, center on pre-trial detention.

In relation to pre-trial detention, however, the changes to investigation and procedures that advocates of criminal reform procedure envisioned as arising from revised legal codes have in fact been very limited. This is because the implementation of pre-trial detention, under current laws, faces resistance based on what the public thinks justice is or should be. In this respect, efforts to ensure that pre-trial detention is used, in practice, as the law prescribes, go against the prevailing culture.

It is not just the public. In spite of the change in the codes—which, as we have consistently found in the region, does not ultimately mean much—prosecutors and judges tend to use pre-trial detention as an advance on the sentence or as a measure to isolate the undesirable individual from society. The police, certainly, are at the forefront of those taking this position. At the same time, pre-trial detention is used opportunistically, to benefit those who have the most power, in a way that can distort the institution through new discriminatory practices and double standards.

Making changes to ensure that pre-trial detention is not “the general rule,” or, better yet, to ensure it is applied only when essential to the aims of the criminal case, is no simple task. It is not principally an issue of training—as all-but-useless international cooperation programs continue to claim—because the persistent practices are not explained by a lack of information on the part of legal practitioners in the system. Their actions reflect certain convictions regarding crime and criminals that must be changed completely.

We are up against the ideas and beliefs, values and discourses, attitudes and behaviors of those who populate the justice system. At issue is the legal culture of the practitioners: a certain way of thinking, feeling, and acting in relation to the law, particular to a specific social group. Clearly, ideas and representations are of interest here not in the abstract, nor for their own sake, but only insofar as they have sufficient weight to guide and reinforce behaviors. We cannot think about changing institutions without taking account of the culture that exists within them.

In part, change requires a different understanding of how crime arises and what explains it. In supporting the genuine right to security, which is in serious jeopardy in Latin America, it is also necessary to determine how much of the response

that society demands can be provided within the justice system's limited scope of action. That is the framework within which to rethink the role of pre-trial detention. ■

PUBLICATION

Insufficient Judicial Independence, Distorted Pre-trial Detention: The Cases of Argentina, Colombia, Ecuador, and Peru



A new DPLF report, *Insufficient Judicial Independence, Distorted Pre-trial Detention: The Cases of Argentina, Colombia, Ecuador, and Peru*, examines the pressures placed on judges when they rule on the use of pre-trial detention and the response of the judiciaries to this phenomenon. The study includes four national reports drafted by the Centro de Estudios Legales y Sociales (CELS, Center for Legal and Social Studies) in Argentina;

the Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia, Center for the Study of Law, Justice, and Society) in Colombia; the Centro sobre Derecho y Sociedad (CIDES, Center on Law and Society) in Ecuador; and the Instituto de Defensa Legal (IDL, Legal Defense Institute) in Peru. Also included is a comparative analysis, written by DPLF senior fellow Luis Pásara, that identifies common trends and makes suggestions for addressing the issue at the institutional level.

Across the countries studied, despite their individual particularities, there is a huge societal demand for tougher policies on crime. In this atmosphere, no distinction is made between defendant and convict. Detention has become the normal, obligatory consequence of the opening of a criminal case, violating the presumption of innocence. The crime rate, presented in exaggerated terms by the media, together with the idea—promoted even by state actors—that the judiciary is responsible for “letting criminals go free,” creates a climate of intimidation that makes it hard for judges to rule impartially. They fear criticism from the media and even from institutions within the justice system itself.

The study concludes that the broad use of pre-trial detention has become an unwritten public policy, fostered by an environment that dissuades judges and prosecutors from using it as what it was intended to be (according to the international instruments on the issue): an exceptional measure. At the same time, in specific cases there are pressures at work that lead to its arbitrary application, above all in court cases that are in the media spotlight or involve individuals with political or economic power. The excessive use of pre-trial detention has roots in a punitivist legal culture and is encouraged by the absence of judicial policies conducive to the independent functioning of the judiciary.

This research was presented in Argentina, Ecuador, and Peru at public events, workshops with legal practitioners, and discussion groups with academics and members of civil society.

In Lima, on September 10, 2013, a forum was held entitled “Prison, Pressure, and Procedure: Judicial Independence and Its Impact on Pretrial Detention,” organized by DPLF and IDL. One of the presenters at this conference was Commissioner Rodrigo Escobar Gil, the Rapporteur on the Rights of Persons Deprived of Liberty of the Inter-American Commission on Human Rights. He discussed the main problems that result in the violation of the rights of detainees in different countries of the region and the need for States to use pre-trial detention only for precautionary purposes and according to the standards of exceptional circumstances.



Participants in the Lima forum. Center: Commissioner Rodrigo Escobar Gil.

Board of Directors

Naomi Roht-Arriaza
President

Christopher Jochnick
Vice President

Susan Popkin
Treasurer

Douglass Cassel

Ariel Dulitzky

Alejandro Garro

Margaret Roggensack

Staff

Katya Salazar
Executive Director

Laura Park
Director of Finance and
Institutional Development

Mirte Postema
Senior Program Officer
Judicial Independence

Leonor Arteaga
Senior Program Officer
Transitional Justice

Grace Durante
Communications and
Operations Manager

Maria Clara Galvis
Senior Legal Advisor

Luis Pásara
Senior Fellow



Due Process of Law Foundation

1779 Massachusetts Ave., NW, Suite 710
Washington, D.C. 20036
Tel.: (202) 462.7701 – Fax: (202) 462.7703
E-mail: info@dplf.org Web site: www.dplf.org

The **Due Process of Law Foundation (DPLF)**, a nonprofit, nongovernmental organization based in Washington, DC, was founded in 1996 by Thomas Buergenthal, former judge of the International Court of Justice and of the Inter-American Court on Human Rights, and his colleagues from the United Nations Truth Commission for El Salvador. DPLF works to strengthen the rule of law and promote respect for human rights in Latin America through applied research, strategic alliances, outreach, and advocacy. Our vision is a Latin America in which civil society, using national and international legal instruments, participates fully in consolidation of the rule of law, and in which judicial institutions are independent, transparent, accessible, and able to fulfill their role in strengthening democracy.

DPLF's Transitional Justice Program was responsible for the production of this issue of *AportesDPLF*. The Transitional Justice Program promotes the use of international and inter-American law in determining State and individual responsibility for international crimes and grave violations of human rights in Latin America.

This publication was made possible thanks to the generous support of:

