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Case of Bolt *et al.* v. the Cardenal Republic

Bench Memorandum

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Table of Contents

Introduction

This case was written with the idea of encouraging a discussion on the relationship between inter-American standards on the protection of rights and contexts of mass violence where policies are implemented within the paradigm of transitional justice. Although there has been ample experience in the Americas on how to design policies to address mass atrocities, there are still many doubts regarding the legal and institutional challenges faced in such a task. Similarly, even though the case law of the Court has been held up as a major influence in the development of the legal standards for transitional justice, the Inter-American Court has made little reference to that concept.

There are multiple challenges and concerns about what is allowed and what the content and scope of transitional justice measures should be. This case is written based on the premise that an honest effort at transitional justice is being made by a State that is emerging from an armed conflict through a negotiated peace settlement. Given this reality and its inherent limitations, a solution is reached through a holistic approach to justice that seeks to take account of the victims' rights; however, because of the nature of the circumstances, it does not satisfy the standards that would be required for the full establishment and acknowledgement of the truth, exhaustive and strict justice, and maximalist comprehensive reparations. Under those specific circumstances, then, the case invites debate on the following issues: What are the available options under the inter-American legal framework, and how should those legal standards be interpreted in light of the factual limitations created by this type of situation? Do rights have minimum contents? What are they, what should they be, and how should they be set? Other general issues that we hope will be raised in the discussion include how to understand the content and scope of the obligation to investigate, prosecute, and punish violations in the context of mass violence, as well as how to understand the concept of comprehensive, fair, and proportional reparation in that context.

We drafted the case with greater certainty about the questions that should be asked than about the answers we think are the right ones. We hope that this discussion with a group that is vibrant, thoughtful, and committed to human rights, like the one this competition tends to assemble, will shed a positive light on these difficult issues.

I. Admissibility and jurisdiction

This case is designed to give priority to discussions on the merits of the case. Accordingly, it is suggested that the judges avoid delving too deeply into the issues of jurisdiction and admissibility. Nevertheless, the teams are prepared to debate this topic and, therefore, some basic considerations are important in this section.

1. Jurisdictional issue: The filing of the case by the State

The first relevant issue will concern the submission of the case to the Court. The facts of the case indicate that it was filed by the State. This marks a fundamental point of difference from the experience of all of the past competitions and from the experience of the IACHR and the Court, to the extent that cases have only ever been submitted to the Court by the IACHR.

Therefore, this initial point of debate will require knowledge of the provisions of the ACHR and the Rules of Procedure of the Court that allow for this possibility. Article 36 of the Rules of Procedure is the provision that regulates Article 61 of the Convention, which allows for a case to be submitted by a State. That provision summarizes the formal requirements for what the State's "reasoned brief" must contain.

A second issue to be clarified will be whether there is relevant case law to guide the procedure to be followed. The only adversarial case in which a somewhat similar situation arose was the case of *Lori Berenson v. Peru*. However, in that case the Court received the briefs from the State and the IACHR nearly simultaneously. The Court was of the opinion that, because the IACHR's brief had been filed first, the case was filed by the IACHR, and it processed the State's communication within that framework.

The third issue concerns the procedure that will be followed and the role that will be given to the IACHR in processing the case, according to the current Rules of Procedure of the Court. With regard to the former, the Rules of Procedure mention the filing requirements in two separate articles (35 – IACHR, and 36 – State), but later appear to establish a common route regardless of who filed the case; Article 38 provides for the preliminary analysis by the Presidency, and Article 39 addresses notice. Immediately thereafter, the Rules provide for the filing of a brief containing pleadings, motions, and evidence, and then for the State's answer. This suggests that the order of the litigation does not change. Nevertheless, the teams could make the motion that, insofar as the State is the party that submitted the case to the Court, it must present its arguments first. In any case, the students should address one issue: once the State files the case before the Court, should it be understood to have waived any potential arguments on jurisdiction and the admissibility of the case?

While the team representing the victims will be arguing for the waiver with respect to both issues, the State—although it would be hard to argue that they can question the Court's jurisdiction—can argue that on issues of admissibility erroneously decided by the IACHR, the Court should issue an opinion prior to its decision on the merits in order to correct the erroneous application of the principles of the Convention.

With regard to the second aspect, Article 36 provides that Article 35(3), which states that the IACHR shall indicate which facts contained in the Article 50 report it is submitting to the

consideration of the Court, must be applied even when the case is filed by the State. This is contradictory because, if the State submits the case, should it not decide the reason for its submission? However, this could encourage the practice of States filing cases in order to preclude the filing of a comprehensive case to the Court. This could be an interesting line of debate between the teams.

In addition, under the Rules of Procedure in effect since 2009, the most important role the IACHR plays before the Court is to submit cases and present them at hearings before the Court. Should this scenario arise in cases submitted by States? Should the role of the IACHR simply be to appear at the proceedings and request to take part in the case if necessary in its capacity as an advocate for the inter-American public interest? Would this type of case allow for the Court to receive written pleadings from the IACHR in defense of its report? Would it be admissible for the IACHR to offer evidence or expert testimony in the case, and if so, at what time during the proceedings should such requests be handled?

2. The exhaustion of domestic remedies

One of the issues that competition participants tend most to prepare for is the debate on the exhaustion of remedies in the national legal system. Although the judges are encouraged to not delve too deeply into this point in order to allow for the merits of the case to be explored thoroughly, the teams will inevitably raise discussions based on the basic and well-known rules on exhaustion established by the Court. The issue most relevant to the relationship between transitional justice and international responsibility will be the nature of the domestic remedy for litigating the waiver of criminal action, and whether those who disagree with the nature or amount of reparations provided by the administrative program should be required to exhaust a domestic remedy evidencing that dissatisfaction.

As for the first point, given the facts of the case, the regular criminal action would be the legal action designed to meet the requirements that the system has established. To the extent that the transition process creates a special framework that allows for the waiver of that action, the nature of this mechanism (which, as stated in the facts, generally meets the requirements of Article 25 of the ACHR) could be discussed.

In addition, the victims in the case (who under normal circumstances should eventually receive reparations through ordinary civil or criminal judicial proceedings) are included in an administrative reparations program. But they express their total or partial dissatisfaction with such arrangement. Are the victims then required to litigate that disagreement in an additional judicial proceeding? And if they do so, what remedy should it be? The representatives of the State will argue that because a new and special channel has been created, the disagreements should be litigated at the domestic level. On the other hand, the representatives of the alleged victims could argue that the judicial remedy was ineffective and that they are not required to exhaust an additional remedy, much less in the ordinary system, to challenge an exceptional program such as the one mentioned.

In order to facilitate the process when it comes time to follow the admissibility arguments put forward by the teams with respect to each of the victims, the following chart summarizes the situation of the victims, violations, and exhaustion.

<table>
<tr><th colspan="2">Victims: Lucrecia Rossi (para. 37), Maximiliano Rossi (Father), Emily Rossi (Sister)</th></tr>
<tr><th>Violation</th><th>Judicial Remedy Pursued</th></tr>
<tr><td>Murder, Sexual Violence, and Torture

2000- In June, the body of Lucrecia Rossi, a student at the public university in the capital and alleged MRLB guerrilla, was found dismembered with signs of torture and sexual violence in a public square in the city.</td><td>2009- In June, father and daughter filed a complaint before the IACHR against the State of Cardenal for Lucrecia Rossi's death and the lack of investigation, prosecution, and punishment in the case.</td></tr>
<tr><th colspan="2">Victims: Ricardo Bolt (paras. 37 & 42) Annika Bolt (Wife)</th></tr>
<tr><th>Violation</th><th>Judicial Remedy Pursued</th></tr>
<tr><td>Torture and Forced Disappearance

- 2002- In April, Paulo Mukundi, an MRLB militant, stated that he had been unlawfully detained together with Bolt.
- 2008- The Truth Commission determined that Mukundi and Bolt had been arrested and taken to a clandestine detention site where they had been subject to torture. It further stated that Bolt may have died during the torture and that his body was disappeared, as was the practice of some military units during the armed conflict.</td><td>- 2002- After April, Annika Bolt filed a complaint with the office of the public prosecutor for his alleged forced disappearance (para. 40). This complaint was dismissed by the Public Ministry.
- 2002- In December, she filed a complaint before the IACHR alleging the State's responsibility for her husband's disappearance and the attacks on the Boneca community.
- 2004- She filed suit against the State to request the judicial review of the administrative decision (para. 51). In 2007, the Council of State denied the claims, citing a lack of evidence. However, in 2010, following the release of the Truth Commission's report, she received additional compensation.
- 2008- She filed a motion for the reconsideration of the Council of State's judgment based on the information contained in the Truth Commission's report.
- 2009- She filed an appeal for the review of the waiver of prosecution of Ferreira and members of the military named by Pires before the Truth Commission as masterminds of the events (para. 47). On February 20, the Transitional Tribunal denied her request.</td></tr>
<tr><th colspan="2">Victims: Aníbal López (paras. 30, 33 & 34) Lupita López (Mother)</th></tr>
<tr><th>Violation</th><th>Judicial Remedy Pursued</th></tr>
</table>

Kidnapping and Murder - 2000- **An urban column of the MRLB hijacked a school bus carrying 23 children from the Ángeles del Saber School**, one of the most expensive private schools in the capital of the Republic. They were held captive for more than 90 days. - 2000- On March 28, a joint army-police anti-kidnapping commando unit conducted an operation in a slum in the capital city where it was thought the kidnapped children were being held. The anti-kidnapping commando unit asked the captors to free the children and surrender peacefully, in exchange for which their lives would be respected. This situation led to the confrontation with the captors. The official police report stated that a loud noise (like that of a grenade) was heard inside the house. The joint commando unit, on the direct orders of President Ferreira, opened fire with long-range weapons and grenades in order to gain access to the structure. After a brief confrontation, members of law enforcement were able to gain access. Of the seven individuals presumed to be the captors, two bodies were found that were later identified as MRLB militants, none were Bonecas.	- 2009- Lupita López filed a **complaint before the IACHR** alleging impunity in the death of her son Aníbal López, a child from the Ángeles del Saber School.

II. Merits

1. Complementarity, transitional justice measures and the violation of substantive ACHR rights

One of the central points of the case is to establish, according to the principles of subsidiarity and complementarity that govern the system, whether the State has incurred international responsibility. In this regard, current internationalist doctrine states that in order for there to be an international breach, there must be an act attributable to the State that is a violation of an international obligation.[1] Asserting State responsibility thus requires demonstrating not only that the violation occurred but also that it is internationally attributable to the State. In order establish this link of attribution under international human rights law, it is necessary to consider that the international mechanisms are complementary to the national systems, and to this extent they act based on criteria of subsidiarity. The international bodies only act when the national justice systems are ineffective. The State is first given the opportunity to serve justice, and the parties may avail themselves of the international bodies only if it is demonstrated that the national process was not conducted independently and impartially in accordance with the guarantees of international law.

The issue then arises of how to evaluate the adequacy of the domestic response in order to determine whether international responsibility can be attributed. The evaluation of State actions is now more complex in the Inter-American System than it used to be. Decades ago, the States either did nothing to address the violations, or they simply did not litigate these matters before the system. Nowadays, on the contrary, to the extent that the national systems have become more complex and there is greater attention, it is essential to set parameters for evaluating what is reasonable and appropriate as a State response. The case seeks to encourage discussions on this issue.

The question of how to evaluate the timeliness, relevance, and sufficiency of the State measures to address the violations becomes even more problematic when they have been committed on a large scale. In cases of mass violations and with the limitations faced by societies in transition, should the standard of response be the same? Is it reasonable to expect that the State's response to mass violations—for example, in a reparations case—should be the same under transitional circumstances as under normal circumstances? In cases of mass violations, are transitional justice measures sufficient to reasonably meet international obligations?

The traditional view of the Court—which will most certainly be argued by the victims' representatives—is based on the idea that once the violation is committed, the State must answer for it. This is what the Inter-American Court held in the *Case of the Gómez Paquiyauri Brothers v. Peru* more than a decade ago. In that case, the Court found that "when the case was brought before the Inter-American System, the acts that generated the alleged violations had already been committed," and it recalled that "the international responsibility of the State arises immediately when the internationally illegal act attributed to it is committed, although it can only be demanded once the State has had the opportunity to correct it by its own means. Possible subsequent reparation under domestic legal venue does not inhibit the Commission or the Court from hearing the case that has already begun under the American Convention." Under that line of argument, the Court maintained that it "cannot

[1] Article 2. Articles of the International Law Commission on the Responsibility of States for internationally wrongful acts, United Nations General Assembly Res. A/RES/56/83, January 28, 2002.

accept the position of the State that it duly investigated [in order] to find that the State has not violated the Convention."[2] Accordingly, the Court dismissed the preliminary objection to its jurisdiction over the case.

In contrast, the team representing the interests of the State will find the recent decision in the *Case of Tarazona Arrieta et al. v. Peru* very useful. In that case, the Court called to mind that "State responsibility under the Convention can only be attributed at the international level after the State has had the opportunity to establish, if appropriate, that a right has been violated, and to redress the harm by its own means." The Court maintained that this rule follows from the "principle of complementarity (or subsidiarity) that informs the breadth of the IAHRS," which is "adjunctive or complementary to the [protection] offered under the domestic laws of the American States." The Court further held in this decision that the State "is the principal guarantor of individual human rights. Accordingly, in the event that those rights are violated, it is the State itself that must resolve the matter at the domestic level and, [if appropriate], provide redress, prior to having to answer to international authorities such as the Inter-American Human Rights Protection System. This is because of the subsidiary nature of the international process vis-à-vis the national systems for the guarantee of human rights."[3] Therefore, the Court found that in this specific case, to the extent that the State had already investigated and criminally punished the perpetrators of the violations, the State was not responsible for the substantive violation of the ACHR by the acts investigated.

2. Right to a fair trial and judicial protection, in relation to the duty to investigate, prosecute, and punish

a. Applicable standards

i. Nature of the duty to investigate, prosecute, and punish

The Court has consistently held throughout its case law that there is a duty to investigate, prosecute, and punish violations of the human rights recognized in the Convention. From its first case, *Velásquez Rodríguez v. Honduras*, the Court has been emphatic in holding that this obligation arises from the general duty to guarantee human rights recognized in Article 1(1) of the ACHR. It has additionally held that a joint reading of the general obligation to guarantee rights and the right to an effective judicial remedy (Article 25 of the ACHR), consistent with the rules of due process (Article 8(1) of the ACHR), creates the State obligation to guarantee effective access to justice as well as to a prompt and simple remedy to obtain the prosecution of the perpetrators of human rights violations and reparations for the harm caused.[4]

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[2] *Case of the Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Para. 75.

[3] *Case of Tarazona Arrieta et al. v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 15, 2014. Paras. 134 *et seq*.

[4] *Case of Loayza Tamayo.* Reparations. Judgment of November 27, 1998. Series C No. 42, para. 169; *Case of Velásquez Rodríguez*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 91; *Case of Fairén Garbi and Solís Corrales*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 2, para. 90; *Case of Godínez Cruz*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 93; *Case of the Rochela Massacre.* Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No.163, para. 145.

The Inter-American Court has fine-tuned the broad formulation of the duty to investigate, prosecute, and punish human rights violations it set forth in *Velásquez* by establishing that it does not arise from every human rights violation committed within a member State, but rather that the obligation is applicable in those cases that involve serious human rights violations. In some cases, the Court has recognized the threshold of seriousness as a standard for ordering the criminal investigation of the acts[5] or has found that the victims' right to know the truth is satisfied through mechanisms other than criminal proceedings.[6]

Along the same lines, as Oscar Parra underscores,[7] parameters were outlined in *Almonacid Arellano v. Chile* that included so-called international crimes as acts that could be considered to fall within the category of serious human rights violations. That judgment established that those acts that are part of a "systematic and [widespread] pattern against the civilian population"[8] are the ones that would be equivalent in nature to international crimes. We will discuss this debate further in the following section.

The Court has recognized that the obligation arising from the duty to investigate, prosecute, and punish is an obligation of means rather than ends. In other words, the States Party to the Convention must act with due diligence to investigate alleged human rights violations, with a view to identifying the masterminds and direct perpetrators of those acts.[9] This obligation "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof."[10] In this regard, the inter-American case law has underscored how important it is for the States Party to conduct serious, impartial, and effective investigations on their own initiative, notwithstanding the fact that the obligation is understood to have been satisfied if the investigations are conducted in accordance with the standard of due diligence even if the perpetrators are never tried and punished.[11] Similarly, when there are mass and systematic violations, this duty has a distinctive feature: "the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators."[12]

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[5] *Case of Albán Cornejo et al. v. Ecuador.* Merits, Reparations and Costs. Judgment of November 22, 2007. Series C No. 171.

[6] *Case of Vera Vera et al. v. Ecuador.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of May 19, 2011 . Series C No. 226. This case concerns the death of an individual who was shot while in the custody of the State at a detention center. The Court ordered the State to satisfy the "the right of the mother and family to know what exactly happened Mr. Vera Vera."

[7] Parra (2012: 27).

[8] *Case of Almonacid Arellano v. Chile.* Preliminary Objections, Merits, Reparations and Costs. Series C No.154. para. 104; *Case of the Massacres of El Mozote and nearby places v. El Salvador*, para. 244.

[9] Regarding the scope of the due diligence standard, see: De León, Krsticevic & Obando (2010:11-33)

[10] *Case of Velásquez Rodríguez v. Honduras.* Merits, para. 177; *Case of Ximenes Lopes v. Brazil,* para. 148; *Case of the Massacres of El Mozote and nearby places v. El Salvador*, para. 248; *Case of Pacheco Teruel et al. v. Honduras*, para. 129.

[11] Uprimny, Sánchez & Sánchez (2014: 59)

[12] *Case of Manuel Cepeda Vargas v. Colombia.* Judgment of May 26, 2010. Preliminary Objections, Merits and Reparations. Series C No. 213, para. 118.

The duty to prosecute is understood to have been satisfied so long as the State conducts criminal proceedings designed to shed light on what happened and to determine the responsibility of both the masterminds and the direct perpetrators of the acts. This obligation cannot be replaced by mechanisms such as truth commissions. Nevertheless, debates persist regarding the content of this obligation in contexts of negotiated peace settlements between States and non-State armed groups seeking a transition to peace—especially with respect to potential agreements to grant partial and conditional amnesties. We will address this debate in the section on the scope of the obligation.

With regard to punishment, there is no clear-cut interpretation of what characteristics it should have in order for the obligation to be deemed to have been met—that is, whether the obligation to prosecute and punish requires the effective imposition of a penalty. A standard of proportionality has been established in the Inter-American System whereby the punishment of the perpetrators must correspond to the severity of the human rights violations they have committed, at least with respect to acts of forced disappearance and torture. According to the previously cited case of *Velásquez Rodríguez,* the duty involves the imposition of "appropriate punishment,"[13] but there is still uncertainty regarding which punishments are admissible according to the duty to investigate, prosecute, and punish. We will address this debate in the section on the scope of the obligation.

In principle, the duty to investigate, prosecute, and punish in the Inter-American System has several characteristics: (i) it is derived from Articles 1, 8 and 25 of the ACHR; (ii) it arises when serious human rights violations are committed in a State Party to the Convention; (iii) it is an obligation of means that is met once it can be determined that the State has acted with due diligence in taking punitive action to identify the structures that allowed for those violations to occur; (iv) it entails prosecuting criminal cases to determine the masterminds and direct perpetrators of the acts; and (v) it specifies the duty to impose appropriate punishment but its content is not entirely clear.

Although there is a notion of the obligation to investigate, prosecute, and punish that has been partially demarcated by the case law of the Court, there are current debates surrounding its content and scope. In particular, there are no clear answers to the following questions: What acts are considered serious human rights violations in the inter-American context? What happens in transitional justice processes? Are the legal concepts of amnesties, diversion programs, or mechanisms that release individuals from responsibility compatible with this duty? What penalty is required according to the obligation?

ii. Content of the duty to investigate, prosecute, and punish

There are three instruments in the Inter-American System that expressly provide for the imperative duty of States to investigate, prosecute, and punish the crimes of forced disappearance, torture, and violence against women as serious human rights violations.[14] First, there is Article II of the Inter-American Convention on Forced Disappearance of Persons. Second, this duty is established in Article 3 of the Inter-American Convention to Prevent and Punish Torture. Finally, Article 1 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against

[13] *Case of Velásquez Rodríguez v. Honduras.* Merits, para. 174.
[14] Uprimny, Sánchez & Sánchez (2014: 45-53)

Women (Convention of Belém do Pará) provides for the duty to investigate and punish acts of violence against women.

The Inter-American System contains these provisions that, in some way, expressly define the acts that give rise to the duty to investigate, prosecute, and punish; however, there are gray areas in the case law of the Inter-American Court regarding what other acts can be deemed to fall within the category of serious human rights violations. Because the Inter-American Court has maintained a broad formulation of this duty, as referenced in the above section, its case law does not currently provide a general opinion in this regard. Nevertheless, in the case-by-case examinations contained in its judgments, the Court has catalogued other acts as serious violations.

For example, in addition to forced disappearance and torture, extrajudicial, summary, or arbitrary executions committed by State agents were recognized in the case of *Barrios Altos v. Peru* as serious human rights violations. The Court has similarly reaffirmed the duty to investigate, prosecute, and punish those three acts in other judgments.[15] It has also examined this duty in view of acts of torture and forced disappearance that have not been part of a systematic pattern of violations, setting aside the quality of "systematic" or the presence of an armed conflict in order for those acts to be considered serious violations. In the case of *Bueno Alves v. Argentina,* the Court recognized an act of torture that was not systematic in nature as a serious human rights violation.

> "In the instant case, on the basis of the claim made by Mr. Bueno-Alves, *an obligation arises for the State to fully investigate the facts*, taking also into account that said facts had occurred while the victim was under police custody [emphasis added]."

A review of the inter-American case law fails to provide certainty as to whether acts other than forced disappearance, torture, and extrajudicial executions that are not associated with widespread or systematic patterns can be recognized as serious violations. However, the broad and general formulation of the duty to investigate, prosecute, and punish all serious violations envisaged by Inter-American Court is perhaps the most coherent way to understand it, as this would include the different applicable sources of international law.

Such is the mandatory nature of this duty with respect to those offenses that are international crimes as defined in the Rome Statute of the International Criminal Court, in particular, and other instruments of international criminal law, in general. The Inter-American Court has established that acts that meet the elements of crimes against humanity and war crimes must be investigated, prosecuted, and punished in keeping with the ACHR. The cases of *Almonacid Arellano v. Chile* and *Massacres of El Mozote v. El Salvador* are illustrative of this trend in the inter-American case law. In the first judgment, the Court examined a case of extrajudicial execution that remained unpunished pursuant to the amnesty laws granted by the Chilean State. The Court found that, at the time the acts were committed (in 1973), there was an international consensus that established the prosecution

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[15] *Case of the Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2011. para. 294. See also: *Case of Barrios Altos v. Peru.* Merits. Judgment of March 14, 2001. Series C No. 75, para. 41; *Case of Albán Cornejo v. Ecuador.* Merits, Reparations and Costs. Judgment of November 22, 2007. Series C No. 171, para. 111; *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219, para. 171; *Case of Gelman v. Uruguay*. Merits and Reparations. para. 225. *Case of Vera Vera et al. v. Ecuador*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of May 19, 2011. Series C No. 226, para. 117.

of crimes against humanity as a norm of *jus cogens*. It further held that there is a duty under the standards of the Convention to investigate, prosecute, and punish these kinds of acts. The Court underscored:

> "The obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain international crimes, *among which are crimes against humanity*, is derived from the duty of protection embodied in Article 1(1) of the American Convention [emphasis added]."[16]

In the second case, the Inter-American Court clarified this position with respect to war crimes committed during an internal armed conflict—specifically, the crimes committed during the armed conflict in El Salvador. The Court found that the Reconciliation Act, which granted a general amnesty to all persons who cooperated with the Truth Commission, and which had been enacted by the State of El Salvador as a result of the peace negotiations, lacked legal effect. By preventing the investigation and prosecution of persons who had taken part in the commission of serious crimes during the armed conflict, this general amnesty had led to "the installation and perpetuation of a situation of impunity." Consequently, taking account of the provisions governing conflict situations, including Additional Protocol II to the Geneva Conventions, the Court underscored the mandatory investigation of war crimes, stating that "*under international humanitarian law, States also have an obligation to investigate and prosecute war crimes*. [...] [Therefore], persons suspected or accused of having committed war crimes, or who have been convicted of [them] cannot be covered by an amnesty [emphasis added]."[17]

Without prejudice to the above, concerns have arisen in the inter-American sphere about the authority the Inter-American Court has acquired to determine when a serious human rights violation is an international crime. In view of decisions such as those cited above, some have evaluated the powers of the Court as a human rights tribunal to declare the commission of international crimes when it examines facts that constitute serious violations and their respective consequences, such as the non-applicability of statutes of limitations or the prohibition against amnesty. The main objection that has been made is that the Court, by including categories typical of international criminal law to declare the existence of crimes against humanity or war crimes and the international responsibility of a State, conditions the domestic courts to render decisions consistent with inter-American precedent. Víctor Abramovich has noted in reference to the case of *Bulacio,*[18] which found that the arbitrary execution of the youth Walter Bulacio was a crime against humanity, that the Court's judgment stirred debate in Argentina because the strictest criminal law scholars maintained that this decision would put an end to institutions of criminal law such as *res judicata* and the application of statutes of limitations, which are essential components of due process. Some in Argentina even spoke of "overwhelming obedience" to the inter-American case law.[19]

There are other positions asserting the notion that some of the acts defined in the international criminal law instruments should be recognized and declared as serious violations by the Inter-

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[16] *Case of Almonacid Arellano v. Chile.* Judgment of September 26, 2006. Preliminary Objections, Merits, Reparations and Costs. Series C No.154. Para. 110.
[17] *Case of the Massacres of El Mozote and nearby places v. El Salvador.* Judgment of October 25, 2012. Merits, Reparations and Costs. Para. 286.
[18] *Case of Bulacio v. Argentina.* Judgment of September 18, 2003. Merits, Reparations and Costs.
[19] Abramovich (2008: 256-260)

American Court—especially because "it is a tool used by an international tribunal or by national institutions to specify the scope of due diligence in the respective investigations and some aspects necessary to overcome impunity in a particular case."[20] Therefore, it should not be considered a decision on criminal responsibility in the case.

iii. Scope of the duty to investigate, prosecute, and punish

In order to examine the scope of the duty to investigate, prosecute, and punish the perpetrators of human rights violations, we will focus on three existing debates surrounding its compatibility with transitional justice mechanisms typical of negotiated peace settlements within the framework of an internal armed conflict: the position regarding self-amnesties and amnesties; the compatibility with the ACHR of case processing strategies such as case selection in situations of mass human rights violations, and the possibility of granting alternative sentences for perpetrators of serious human rights violations.

1. Self-amnesties and amnesties

In various decisions, the Court has upheld the theory that the concession of unconditional self-amnesties and general amnesties is a violation of the duty to investigate, prosecute, and punish that operates in the inter-American context. This position is based on the assertion that granting such amnesties perpetuates the state of impunity and constitutes a serious violation because it is a clear infringement of the victims' rights.

According to the Court, impunity is defined as "the *total* lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives [emphasis added]."[21] Consequently, when a State completely exempts the perpetrators of serious human rights violations from responsibility through mechanisms such as "full stop" laws or "forgive and forget" pardons, it has perpetuated a situation of impunity that flagrantly violates duty to investigate, prosecute, and punish that prevails in the Inter-American System.

In the case of *Barrios Altos v. Peru,* the Court held that amnesty provisions "are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[22] This case concerned the amnesty laws passed in Peru in 1995, which exempted from criminal responsibility members of the armed forces and police—and even

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[20] Parra (2012: 14)
[21] *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala.* Merits. Judgment of March 8, 1998. Series C No. 37. para. 89; *Case of Ivcher Bronstein.* Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. para. 186; *Case of the Constitutional Tribunal (Camba Campos et al.)*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71. para. 123; *Case of Bámaca Velásquez*. Merits. Judgment of November 25, 2000. Series C No. 70. para. 211.
[22] *Case of Barrios Altos v. Peru.* Merits. Judgment of March 14, 2001. Series C No. 75. para. 41.

some civilians—who were being investigated, prosecuted, or who were in prison for the commission of human rights violations. The Inter-American Court found that these laws were a self-amnesty. It held that the exemption of members of law enforcement from the possibility of being investigated and prosecuted violated the victims' rights to judicial protection, as they were deprived of the opportunity to have their complaints of serious human rights violations heard by a judge. The Court also found that these laws violated the duty to investigate, prosecute, and punish that arises from the duty to guarantee human rights.[23]

Indeed, the Court has not backed self-amnesties even when they are democratically endorsed by a significant majority of citizens, whether by referendum or similar plebiscite mechanisms. In the case of *Gelman v. Uruguay*, the Court stated that "The democratic legitimacy of specific [acts or events] in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, [so] that the existence of [a] true democratic regime is determined by both its [procedural and substantive] characteristics, and therefore, particularly in cases of serious violations of [international human rights law], *the protection of human rights constitutes [an] impassable limit to the rule of the majority, that is, to [what is] 'possible to be decided' by majorities [in a democracy]* [emphasis added]."[24]

The Inter-American Court has broadened the range of this prohibition, as it not only proscribes the granting of so-called self-amnesties limiting criminal penalties that those in power grant to themselves and their accomplices but also prohibits general and unconditional amnesties. With reference to the case of Brazil, where amnesty was granted in 1979 to all persons who perpetrated human rights violations during the dictatorship, the Court held in *Guerrilha do Araguaia* that: "[...] the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, 'self-amnesties.' Likewise, as has been stated prior, the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations in international law committed by the military regime. The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention."[25]

In the case of the *Massacres of El Mozote v. El Salvador,* the Inter-American Court found itself facing an unprecedented situation—the compatibility of amnesty laws enacted during a transition from internal armed conflict to a negotiated peace settlement with the ACHR. Indeed, the above-cited cases dealt with self-amnesties and general and unconditional amnesties in the context of transitions from military regimes to democracy. Given the Salvadoran context, the Court decided to examine the parameters of the Convention in light of Additional Protocol II to the Geneva Conventions of 1949, applicable to internal armed conflicts, and in light of the peace agreement itself. It used this framework to evaluate the compatibility of the amnesties that arose from the peace negotiations in

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[23] Ibid. para. 43.
[24] *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011. Series C No.221. para. 239.
[25] *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil.* Judgment of November 24, 2010. Preliminary Objections, Merits, Reparations and Costs. Series C No. 219, para. 175.

El Salvador, which were conditioned upon the effective participation of the alleged perpetrators in the Truth Commission.

In that judgment, the Inter-American Court maintained its position on the inadmissibility of general amnesties, but qualified it because the case concerned a negotiated peace settlement. In this regard, although the Court upheld the effects of the General Amnesty Law, it called attention to the application of the law, finding it incompatible with the duty to investigate and punish serious violations.[26] The argument of the Court is notable, as it demarcated the scope of action that States in transition from armed conflict have to grant amnesties. Among its conclusions of law, the Court determined that amnesty "explicitly contradicted what the parties to the armed conflict themselves had established in the Peace Accord that determined the end of the hostilities."[27] The reference to the peace accords within the framework for the analysis of the lawfulness of an amnesty is a distinctive point in the case law of the Inter-American Court, "as it implicitly acknowledged the value of peace, and furthermore suggests the existence of a certain margin of maneuverability for States in defining the instruments necessary to ensure it."[28] It also found that the political process that led to the Salvadoran peace accords imposed the duty to investigate and punish "*at least the grave human rights violations* established by the Truth Commission, so that they did not remain unpunished and to avoid their repetition [emphasis added]."[29]

Additionally, the Court is aware that in transitions to peace it is possible to apply alternative mechanisms of prosecution and punishment that are consistent with the Convention guidelines, including partial amnesty. Regarding the prohibition against amnesty in the Inter-American System, it stressed that "this norm is not absolute, because, under international humanitarian law, States also have an obligation to investigate and prosecute war crimes. [...] Consequently, it may be understood that article 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts […] that can be categorized as war crimes, and even crimes against humanity."[30]

Accordingly, it is important to emphasize with regard to the case of *El Mozote*: (i) the relevance the Inter-American Court gives to the peace agreement signed between the Salvadoran State and the armed groups within the context of the internal armed conflict, insofar as it uses the breach of that agreement as the basis for the violation of the ACHR; and (ii) the qualification of the obligation to investigate, prosecute, and punish serious human rights violations when they are connected to a transition to peace consistent with the provisions of international humanitarian law instruments, where the duty to prosecute applies at least with respect to serious human rights violations, particularly war crimes or crimes against humanity. According to Judge Eduardo Ferrer McGregor, this judgment supports the possibility of granting broad amnesties to persons who, in an armed conflict setting, have not committed acts that fall within the category of war crimes or crimes against

[26] *Case of the Massacres of El Mozote and nearby places v. El Salvador.* Merits, Reparations and Costs. Paras. 283-296, resolution No. 8 and conclusion of law No. 4.
[27] Ibid., para. 292.
[28] Uprimny, Sánchez & Sánchez (2014: 59-60)
[29] *Case of the Massacres of El Mozote and nearby places v. El Salvador.* para. 288.
[30] Ibid. para. 286.

humanity.[31] From this perspective, the Court would find the possibility of amnesties for perpetrators of other serious human rights violations consistent with the duty to prosecute and punish.

2. Case selection and prioritization strategies

The concepts of selection and prioritization have been envisaged as case management tools, at both the domestic and the international levels. Without getting into an exhaustive analysis of the issue, suffice it to say that these two concepts have different but complementary objectives in contexts of mass human rights violations. As described by Bergsmo and Saffon,[32] in transitional settings where an overwhelming number of international crimes have been committed and there are an infinite number of perpetrators, the capacity of the national criminal justice system to prosecute and punish them will be inadequate—especially considering that after years of war and/or authoritarianism, the national criminal justice system is likely to be in a critical state. In situations of transition, it is very probable that the justice system will be burdened with an excessive backlog of cases and that, in the interest of demonstrating prompt results, it will adopt *de facto* criteria that often run counter to the expected outcomes of transitional justice.[33] Consequently, the selection process seeks to identify which cases should be investigated and adjudicated by a particular court. This selection must take account of several important elements for the court, which serve as a checklist. These criteria do not establish an order of importance or representativeness of the cases; they operate only to determine which cases will be subject to prosecution.[34] In addition, prioritization allows for the classification of the cases taken on by a particular court. This will take account of some criteria that often coincide with the selection criteria, but the relevance of each one must be determined, as well as the relevant components of each criterion.

Examples of these concepts can be seen at both the national and international levels. Thus, the different statutes of the *ad hoc* international criminal tribunals and the ICC recognize case selection criteria. The International Criminal Tribunal for the former Yugoslavia (ICTY), for example, takes account of criteria such as: (i) the seriousness of the crimes, the number of victims, the duration of the offenses and the degree of destruction; (ii) the defendant's role, bearing in mind his or her hierarchical position within the group, his or her rank, and degree of participation in the crimes for which he or she is being investigated; and (iii) the notoriety of the events even if the defendant did not have a formal position within the hierarchy of the group.[35] The ICC uses criteria such as: (i) the seriousness of the crime according to its scale, nature, manner of commission, and impact; and (ii) the perpetrator status of persons who hold the highest level of responsibility.[36]

In the Americas, the experiences of Argentina and Chile are particularly notable. In Argentina, a selection strategy was implemented at the end of the 1980s, based on a subjective criterion that focused criminal prosecution on the individuals who held the highest positions in the military chain of command. They would be tried in the military courts with oversight by the civilian justice system

[31] Ferrer (2014:79)
[32] Bergsmo & Saffon (2011: 25)
[33] Ibid. pp. 25-26.
[34] Ibid. pp. 27- 28.
[35] Ramelli (2011: 300)
[36] Ibid. p. 309

in order for the trials to be held within a short period of time.[37] This initial approach was brought to an end with the enactment of the Full Stop Law [*Ley de Punto Final*]. Only with the reopening of the investigations were case management strategies readapted, this time based not on selection—as the aim was to prosecute all perpetrators of serious human rights violations—but rather on criteria of priority centered mainly on the status of progress in the case and the sufficiency of the evidence,[38] bearing in mind that nearly 30 had passed since the crimes were committed. In Chile, the ordinary justice system has prioritized cases using criteria to concentrate prosecution on the criminal phenomena that had the greatest impact, focusing the work and caseloads of the prosecutors on acts such as murder.[39]

In situations of transition to peace, Colombia has provided the clearest example of applying prioritization criteria to cases in the transitional and ordinary justice systems. After the United Self-Defense Forces of Colombia and some guerrilla groups demobilized and surrendered to the justice system, a transitional legal structure was established under the well-known Peace and Justice Law to allow for the imposition of alternative sentences in lieu of ordinary penalties in exchange for the defendants' cooperation to ensure the victims' rights to truth, justice, and reparation. With the implementation of that law, the Office of the Prosecutor General of Colombia has addressed the difficulties inherent in the prosecution of enormous numbers of human rights violations.

Given this situation, international bodies such as OAS Mission to Support the Peace Process in Colombia (OAS/MAPP) and the IACHR urged the Colombian State to improve strategies for prosecuting the acts committed by those unlawful armed groups. In its 2011 report, the IACHR stated:

> "The IACHR agrees with the MAPP/OEA that this situation should be eliminated, and to that end '[investigative and adjudicatory bodies] should be established […] which with coordinated, simultaneous, or successive activities and actions interact in the respective phases to attain the objective sought more quickly and effectively.' In addition, '*a radical change is needed in the strategy of investigating international crimes based on the adoption of criteria for selection and prioritization* [emphasis added]."[40]

At this time, the Colombian State has not initiated selection strategies, but it has engaged in prioritization based on three criteria: (i) objective; (ii) subjective; and (iii) complementary. In a 2014 order,[41] the Office of the Prosecutor General of Colombia introduced the criterion of degree of impact of the crime, as was done in Chile. The Office of the Prosecutor General has prioritized 16 cases involving the highest ranking commanders of the self-defense forces in the transitional justice system since 2013.

Although case selection strategies have not yet been implemented, there have been intense debates regarding the applicability of that concept in the Colombian context. In a recent report, the IACHR called the State's attention to the possible violation of the duty to investigate, prosecute, and punish.

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[37] Parenti & Polanco (2011: 139-140)
[38] Ibid. p. 170- 171.
[39] La Rota & Bernal (2014: 28)
[40] IACHR, 2011 Annual Report. Chapter IV, Colombia. OEA/Ser.L/V/II, Doc 69. December 30, 2011. para. 91.
[41] COLOMBIA. Office of the Prosecutor General. Order 1343 of 2014.

In spite of the fact that it made positive remarks to the State regarding the transitional justice mechanisms in 2011, in 2013 it stated:

> "The IACHR views with concern the concept of selectivity and the possibility of waiving the investigation and prosecution of serious human rights violations, insofar as they would be incompatible with the obligations of the State."[42]

For its part, the Inter-American Court has not addressed the use of selection or prioritization criteria. Nevertheless, there are at least two interpretations of their compatibility with the duty to investigate, prosecute, and punish. First, there are those that maintain that, by virtue of the considerations set forth in the case de *El Mozote,* there is some flexibility in this duty as an operating principle in the inter-American sphere. This stance is driven by the position of Judge García Sayán who stated the following in his concurring opinion:

> "In certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately. Thus, the degree of justice that can be achieved is not an isolated component from which legitimate frustrations and dissatisfactions can arise, but part of an ambitious process of transition towards mutual tolerance and peace. [emphasis added]."[43]

On the other hand, there are those who think that the duty to investigate, prosecute, and punish is requirement that cannot be modified. Thus, following the issuance of the directive on prioritization by the Office of the Prosecutor General of Colombia,[44] academics such as Ambos and Zuluaga maintained that "That case law does not contain rules on prioritization. The directive itself acknowledges this when it states that an initial reading of the protections recognized in the American Convention makes it difficult to think about the prioritization of cases in the national legal system, since it contains a general obligation to guarantee effective remedies for any act that violates fundamental rights. Nevertheless, it is maintained, based on some considerations of the Inter-American Court regarding the issue of impunity, that the failure to investigate and punish in certain cases—and much less the failure to prioritize one investigation over another—is not an international wrongful act. *This reasoning is highly questionable, as it cannot be surmised from the Court's case law that the Court commends prioritization as a case management policy.* A strict interpretation of the Inter-American Court's case law leads to the conclusion that serious human rights violations, especially core international crimes, must always be investigated; however, we cannot automatically infer from this that the Court approves of a national prioritization policy."[45]

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[42] IACHR, Truth, Justice and Reparation - Report on the Situation of Human Rights in Colombia (in Spanish). OEA/Ser.L/V/II, Doc 49/13. December 31, 2013. Para. 347.
[43] Concurring Opinion of Judge Diego García-Sayán to the Judgment of the Inter-American Court of Human Rights in the *Case of the Massacres of El Mozote*, October 25, 2012, para. 38.
[44] COLOMBIA. Office of the Prosecutor General. Directive 01 of 2012.
[45] Ambos & Zuluaga (2013)

3. Alternative sentences

There are doubts about the punishment aspect of the duty to investigate, prosecute, and punish. In particular, there are doubts about whether it is possible by virtue of the case law of the Inter-American Court and other international instruments to determine the existence of a State duty to effectively impose a punishment and, if so, whether it would require the actual deprivation of liberty or whether the imposition of alternative sentences may be considered.

Under the conventions that establish the duty of prosecution in the inter-American context, it is not clear what type of penalties should be imposed; however, it is clear that there is an obligation to impose punishment. The Inter-American Convention to Prevent and Punish Torture provides that "The States Parties shall take effective measures to prevent and punish torture within their jurisdiction. [...] [and ensure] that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature (art. 6)." In the same respect, the Inter-American Convention on Forced Disappearance of Persons establishes that "The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. [...] The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person (art. III)." Accordingly, it is possible to conclude that punishment as envisaged in these inter-American instruments must be proportional to the seriousness of the crimes committed. With respect to international crimes, the preamble to the Rome Statute indicates that "the most serious crimes of concern to the international community as a whole must not go unpunished," but it does not specify what kind of punishment.

Regarding all other serious human rights violations, the content of the obligation to punish is more debatable. In the case of *Velásquez Rodríguez,* the Inter-American Court held that according to the duty to prosecute and punish, States have the obligation to impose the "appropriate punishment." Along these same lines, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law indicate that States have the duty to punish persons who have been found guilty of such violations (Principle 4), and the United Nations Office of the High Commissioner for Human Rights, in reference to the issue of amnesties in cases involving serious violations, has recognized the admissibility of reduced sentences in exchange for the full disclosure of the truth about the facts, provided that the sentence is still "proportional to the gravity of the offenses committed,"[46] from which we can infer that some measure of punishment is required. In addition, the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity refers to the duty of States to convict, as well as to punish (Principle 19).

Based on the different international sources, we can conclusively affirm that the obligation to punish exists. Therefore, the duty to prosecute and punish is not exhausted by holding criminal

[46] United Nations Office of the High Commissioner for Human Rights (2009: 34)

trials for the perpetrators or by the diligent action of the State in doing so; rather, it means that a punishment must be imposed against the person found guilty. The type of punishment that should be imposed is still an issue for discussion. Authors such as Scharf have raised the possibility that the punishment "can take many noncriminal forms, including imposition of fines, removal from office, reduction of rank, forfeiture of government or military pensions and/or other assets."[47] However, there is a broader position that maintains that the punishment must be criminal and that the sentence must be proportional to the gravity of the crime. This is the position that follows from the previously cited Conventions and even from the reasoning of other tribunals such as the European Court of Human Rights.[48]

In the same vein, Judge Ferrer McGregor stated in a recent article examining the line of case law on self-amnesties and general amnesties that the Inter-American Court has held that, because of the obligation to prosecute and punish serious human rights violations, "there is an unconditional duty to criminally punish those who commit serious human rights violations. Consequently, *the Inter-American Court rejects alternative measures to criminal penalties designed to guarantee the right to the truth and the right of access to justice, as the creation of truth commissions can be*. These commissions may be important in establishing the historical truth of the facts, but they can never replace criminal punishment."[49]

It is important to underscore the stance that the IACHR has taken with respect to the possibility of adjusting the obligation to impose punishment exclusively through criminal penalties proportional to the crime committed when dealing with transitions to peace. In its recent country report on Colombia, it noted in particular that "in the implementation of a transitional justice law, the satisfaction of the components of truth and reparation must be rigorously examined *as an indispensable condition for the imposition, for example, of a reduced penalty* [emphasis added].[50]

This approach is reinforced by the Court's position in the case of the *Rochela Massacre v. Colombia* in which, according to the IACHR, although the non-waivability of the obligation to investigate, prosecute, and punish serious human rights violations was maintained in contexts of armed conflict, it "has recognized [...] the possibility of proposing the moderation of the punitive power of the State." Indeed, in this judgment the Court held that "Every element which determines the severity of the punishment *should correspond to a clearly identifiable objective and be compatible with the Convention* [emphasis added]."[51] In this regard, in his concurring opinion in the case of the *Massacres of El Mozote v. El Salvador*, Judge García Sayán stated that in contexts of transitional justice:

> "it is necessary to devise ways to process those accused of committing serious crimes such as the ones mentioned, in the understanding that a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice. Thus, for example, *in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes*

[47] Scharf (1999: 527).
[48] European Court of Human Rights (1985). *Case of X and Y v. The Netherlands*, Judgment, para. 27.
[49] Ferrer (2014: 84)
[50] IACHR, Truth, Justice and Reparation - Report on the Situation of Human Rights in Colombia (in Spanish). OEA/Ser.L/V/II, Doc 49/13. December 31, 2013. paras. 251 & 258.
[51] I/A Court H.R., *Case of the Rochela Massacre v. Colombia.* Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163. Para.196.

> *and the extent to which responsibility is acknowledged and information is provided about what happened*. This may give rise to important differences between the 'perpetrators' and those who performed functions of high command and gave the orders [emphasis added]."[52]

In conclusion, the obligation to investigate, prosecute, and punish necessitates imposing a penalty. It follows from the inter-American conventions that expressly contain this duty, and from the Rome Statute as well as from other soft law instruments, that this obligation is met with the imposition of a criminal penalty. According to the Inter-American Court, in the Inter-American System the criminal penalties imposed must also be proportional to the gravity of the crimes prosecuted and, consequently, in cases of serious human rights violations, it is not admissible to impose an alternative punitive measure other than a criminal punishment. Nevertheless, in scenarios of transition from an armed conflict to peace, where a transitional justice framework is applied, both the IACHR and the Inter-American Court have raised the possibility of establishing mitigated punishments, conditioning their compatibility with the ACHR on the satisfaction of the rights to truth and the provision of comprehensive reparation by means rigorously examined by the State.

b. Arguments of the victims' representatives

The victims can argue that the transition process undergone by the Cardenal Republic is typical of a shift from a dictatorship or authoritarian regime to a democracy, and therefore the line of case law drafted by the Inter-American Court for these situations should be applied.

First, they can note that the State of Cardenal was ruled by a military dictatorship from the 1960s to 2006, and since the 1990s has had an authoritarian government led by President Armando Ferreira, who—in spite of being democratically elected—orchestrated a "self-coup" to remain in power. As such, the peace accords that resulted from the negotiations between the State and the MRLB, which included members of the armed forces, were intended to bring a period of authoritarianism to an end. Consequently, the Accountability, Closure, and Reconciliation Law (LRCR) is an amnesty law designed to exempt the perpetrators of serious human rights violations from criminal responsibility, and it violates the victims' rights.

To support this argument, they can allege the non-applicability of general amnesties in the inter-American context by citing the line of Inter-American Court case law that follows the approach taken in the case of *Barrios Altos v. Peru* and, primarily, the precedent set in the case *Guerrilha do Araguaia*. They can also cite the case of *Gelman v. Uruguay* to refute the State's argument that the LRCR was legitimized by the Cardenalese people through a popular referendum, as the Inter-American Court found in that case that amnesty laws they cannot be considered to be consistent with the duty to investigate, prosecute, and punish, even if there is a popular support for them.

On this point, they can argue that there is an unconditional duty to investigate, prosecute, and punish all perpetrators of serious human rights violations. It follows that legal mechanisms that provide exemptions from responsibility, such as the establishment of criteria for selecting and prioritizing those "most responsible" for the crimes that were committed in the State of Cardenal,

[52] Concurring Opinion of Judge Diego García-Sayán to the Judgment of the Inter-American Court of Human Rights in the *Case of the Massacres of El Mozote*, October 25, 2012. Para. 30.

contradict the duty to prosecute all perpetrators of serious violations. They can cite the country report issued by the IACHR in 2013, which found that the selection instruments recognized by Colombia in the so-called "legal framework for peace" (which bears a close resemblance to the LRCR) could violate the obligation to prosecute and punish all perpetrators of serious violations.

Additionally, they can argue that the cases prioritized by the IACHR, both in Admissibility Report 05/12 and in Report 14/98, are acts for which the conventions and the Court's case law stipulate the obligation to investigate, prosecute, and punish, such as forced disappearance, torture, sexual violence, and extrajudicial executions. They can even argue that in contexts of systematic and widespread violations like the one experienced in the Cardenal Republic these acts can constitute crimes against humanity, thus reinforcing the duty to prosecute them.

Similarly, they can challenge the State's argument that victims' rights are guaranteed with the establishment of a truth commission. They can maintain that this argument is inconsistent with the duty to investigate, prosecute, and punish, insofar as the inter-American case law has held that, under Articles 8 and 25 of the ACHR, masterminds and direct perpetrators must be held accountable through criminal trials.

They can further argue that the mitigating factors in the execution of sentences like the ones the State applied to demobilized combatants including Guadamuz, Mukundi, and Pires contravene the principle of proportionality of the penalty, as those trials should have resulted in a punishment against the perpetrators that was proportional to the grave violation committed. They can argue that under the Criminal Code of the State of Cardenal the offenses in question are punishable by up to 60 years in prison, while they are currently being given sentences ranging from 4 to 8 years in alternative detention centers—a punishment that is just 6-12 % of the sentence ordinarily imposed.

In conclusion, the arguments of the victims' representatives will be focused on the broad formulation of the duty to investigate, prosecute, and punish all serious human rights violations. They can find support in the line of case law issued by the Inter-American Court with respect to self-amnesties and general amnesties, establishing in advance that the context of the State of Cardenal is not one of a transition to peace. From there, they can argue that it is impossible to relax the duty to investigate, prosecute, and punish, and therefore, with the implementation of the LRCR, the Cardenal Republic has failed to provide the measures to prosecute and punish all serious human rights violations, consistent with the previously cited opinion of Judge Ferrer McGregor.

c. Arguments of the State

The State will focus primarily on qualifying the duty to investigate, prosecute, and punish. Therefore, the State must first concentrate its arguments on the fact that the country is undergoing a transition from an internal armed conflict to peace and that this particular scenario led it to enact the LCRC, which provides the transitional justice mechanisms previously agreed to in the peace accords.

It will argue that the case law of the Court establishes this duty as a relationship between Articles 8 and 25, in conjunction with 1(1). Although it is a strong argument, it is true that none of those articles actually contains a duty to punish; rather, they establish a duty to guarantee rights, due process, and the right to a judicial remedy to protect rights. They do not say anything about

punishment—not even criminal punishment. However, the Court relies on an implicit assumption, which is reasonable but questionable, especially in a transition from war.

The assumption is that in order to guarantee rights, which is a duty under Article 1(1), it would be necessary to punish serious violations criminally. This in turn would be a duty of the State and a right of the victims, which must be exercised in keeping with due process and guarantees to the victims (8 and 25). It is not a bad argument, but the assumption is that this connection works—in other words, that one could reasonably assume that the criminal punishment for human rights violations contributes to the guarantee of those rights. And this could be admissible (although subject to argument) in normal times, because of the general preventive functions (positive or negative) of the punishment. But what happens if one firmly maintains that the absence of criminal prosecution, as a consequence of a peace process with amnesty, together with truth and reparation measures, is better able to prevent new human rights violations after the end of the armed conflict, while attempting to prosecute has the opposite effect, as it prevents peace? According to the logic of the Inter-American Court's own case law, one would have to conclude that those amnesties are lawful.

The State could further argue that pursuant to the judgment in the case of *El Mozote*, in contexts of negotiated peace settlement the duty to investigate, prosecute, and punish can be adjusted for purposes of guaranteeing stable peace in the future. It could argue that, under conditions involving the end of an internal armed conflict, the inter-American case law allows for the potential implementation of concepts such as case selection and prioritization criteria, the exemption from criminal responsibility of some perpetrators, and the granting of alternative sentences, so long as they are conditioned upon compliance with several requirements designed to guarantee the victims' rights to the truth and to comprehensive reparation.

In this regard, the State can argue that it has met the obligation to prosecute and punish by introducing a holistic approach to transitional justice. On this point, it can argue that its case selection strategy seeks to comply with the precedent established for these situations, which is that the transitional legal structure can concentrate its efforts on prosecuting and punishing those acts that amount to international crimes under the Rome Statute, to which it is a party. Here the State can assert that it has followed the position taken by the IACHR in its 2011 report in the chapter on the situation in Colombia, where it recommended to the State of Colombia that in implementing a transitional justice system it should initiate a process for the selection and prioritization of cases, because the overwhelming number of atrocities committed in that country had rendered the judicial apparatus in charge of prosecuting serious human rights violations inefficient. Given the current institutional fragility in the country, the Cardenal Republic could suffer the same fate if it does not streamline its judicial entities.

The State therefore can argue, contrary to what the victims' representatives are arguing, that it would not be granting a general and unconditional amnesty by applying the selection and prioritization criteria. On the contrary, it would be giving effect to the provisions of Additional Protocol II by granting the broadest possible amnesty but requiring the demobilized combatants to meet several requirements provided for in the LRCR, while simultaneously complying with the core of the obligation to prosecute and punish serious human rights violations that amount to international crimes as envisaged by the Inter-American Court. Therefore, the State can argue that it is a strategy of criminal prosecution that, first of all, grants a partial and conditional amnesty to

those perpetrators who are not selected and, additionally, administers transitional criminal justice with respect to those most responsible for the commission of international crimes.

The State will additionally argue, unlike the victims and the Commission, that, consistent with the Inter-American Court's judgment in the case of the *Rochela Massacre* and the concurring opinion of Judge García-Sayán in the case of the *Massacres of El Mozote,* it punished those responsible for committing serious human rights violations that were also international crimes. It will assert that under the current case law of the Court there is no legal certainty regarding what entails punishment in the Inter-American System, and that it has not incurred any international responsibility as a State by imposing alternative sentences. In addition, it can argue that the penalties have been imposed with the verifiable objective of establishing peace and under conditions that guarantee the protection of victims' rights. Finally, it can argue that the crimes committed against the victims now before the Court were selected during this process and prosecuted with the due diligence appropriate to these types of criminal trials within the framework of transitional justice.

3. Reparations

a. Applicable standards

The Inter-American Court of Human Rights has reiterated that reparations are "measures tending to eliminate the effects of the violations that have been committed [and the] pecuniary and non-pecuniary damage that has been caused" and that, therefore, they "should be proportionate to the violations."[53] Additionally, in identifying scenarios in which it is not possible to provide "the re-establishment of the previous situation" that existed prior to the violation, the Court "has considered the need to grant different measures of reparation in order to redress the damage in full; thus, in addition to pecuniary compensation, measures of restitution and satisfaction, and guarantees of non-repetition are especially relevant to the damage caused."[54]

In addition, both the international human rights instruments and the decisions and case law of different international protection bodies have stated that the full and adequate satisfaction of the right to comprehensive reparation must ensure that the reparation is proportional to the violation, to its seriousness, and to the harm suffered. In this regard, the international human rights instruments as well as the decisions of different international protection bodies make reference to the obligation to guarantee proportional, adequate, and fair reparation.[55]

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[53] I/A Court H.R., *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006, para. 143.

[54] I/A Court H.R., *Case of Chocrón - Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2011, para. 145.

[55] For example, the "UN Basic Principles and Guidelines of 2006" establish that reparation should be proportional to the gravity of the violations and the harm suffered (Principle 15), that the victims should be provided with full and effective reparation (Principle 18), and grant priority to restitution, which, whenever possible, should restore the victim to the original situation before the gross violations of international human rights law occurred (Principle 19). UN. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.* Economic and Social Council, A/RES/60/147, March 21, 2006.

The restoration of the victim to the original situation before the violations occurred, or *restitutio in integrum*, as the Inter-American Court has called it, can include the different forms in which a State might address the international responsibility it has incurred. At this time, there is an international consensus that establishes, for methodological purposes, that the various reparation measures available to victims of violations fall within five specific components: restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.

Measures of restitution involve the reestablishment, to the extent possible, of the situation that existed before the violation occurred. The Inter-American Court has established that this restitution can include measures such as: (a) the release of unlawfully detained persons; (b) the return of unlawfully seized property; (c) return to the place of residence from which the victim was displaced; (d) reinstatement of employment; (e) the expungement of judicial, administrative, criminal, or police records, and the deletion of the respective entries, and (f) the return, demarcation, and granting of title to the traditional lands of indigenous communities in order to protect their communal property.[56]

Measures of compensation seek to provide redress to the victims for the physical and emotional harm suffered, as well as for the loss of income and opportunities, pecuniary damages (actual damages and lost wages), attacks against their reputation, expenses incurred, and the costs of legal services and medical attention. Compensation may be monetary or in kind. Compensation in kind requires the delivery of a physical asset of the same characteristics and conditions as that of which the victims were deprived. Monetary compensation must be granted in a manner that is appropriate and proportional to the gravity of the violation and according to the circumstances of each case for all of the financial harm resulting from the violations that is subject to assessment.[57]

The purpose of measures of rehabilitation is to reduce the physical and psychological suffering of the victims through measures designed to provide medical, psychological, and psychiatric services, which enable the restoration of the dignity and reputation of the victims, and allow them to receive the legal and social services they require. In order to meet these objectives, service measures, as well as any medications, must be provided to the victims immediately and free of charge.[58]

Measures of satisfaction are designed to provide redress for the non-pecuniary damages (suffering and hardship caused by the violation, such as harm to values that have great significance for the individual and any change in the victims' living conditions that is not financial in nature). These measures include public ceremonies or projects, such as the broadcasting of an official message repudiating the human rights violations in question, in order to recover the memory of the victims, recognize their dignity, and console their bereaved families.[59]

Measures of satisfaction, insofar as their purpose is to publicly acknowledge the harm suffered by the victims in order to restore their dignity, also include measures for the investigation and

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[56] I/A Court H.R., 2010 Annual Report of the Inter-American Court of Human Rights. OAS. San José, Costa Rica, pp. 10-11. Available at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf.
[57] UN. "Basic Principles and Guidelines." Principle 20.
[58] I/A Court H.R., 2010 Annual Report of the Inter-American Court of Human Rights. OAS. San José, Costa Rica, p. 11. Available at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf.
[59] I/A Court H.R., 2010 Annual Report of the Inter-American Court of Human Rights. OAS. San José, Costa Rica, p. 11. Available at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf.

prosecution of the perpetrators of human rights violations, the determination and dissemination of the truth, the search for disappeared persons, the location and release of victims' mortal remains to their relatives, the State's public acknowledgement of its responsibility, as well as the offer of public apologies and official testimonies, tributes and commemorations of the victims, and the installation of plaques and/or monuments and atonement ceremonies in memory of the victims.

Finally, guarantees of non-repetition, with suitable administrative, legislative, or judicial measures are designed to ensure that the victims are never again subjected to violations of their dignity. These measures have a public scope or repercussion, and frequently resolve structural problems, so that they benefit not only the victims in the case but also other members and groups of society.[60] Guarantees of non-repetition can be divided into 3 groups, according to their nature and purpose: (a) training public officials and educating the general public with regard to human rights; (b) adopting measures under domestic law; and (c) adopting measures to guarantee the non-repetition of violations.

b. Judicial reparations and administrative programs

In situations involving mass violations it is common for States to establish administrative reparations programs that seek to address the massive scale of the events as well as to open an access route to reparations, which can end up being illusory for the victims if left exclusively to the courts. Massive administrative reparations programs are generally initiatives designed as a set of reparations measures systematically linked to each other. Their essential purpose is to restore the victims' rights, acknowledge their status as citizens with full rights—which necessarily entails a transformation of their situation of vulnerability—and to repair the social fabric. For these reasons, reparations programs tend to place greater emphasis on the components of restitution, compensation, and rehabilitation.

These reparations programs can range from the most basic—that is, the simple payment of cash—to the extremely complex, involving the distribution of not only money but also healthcare and educational and housing support, among other things, as well as symbolic measures that are both individual and collective in nature. These programs seek to reach the greatest possible number of victims, and therefore, in comparison to the judicial proceedings that offer reparations, they tend to be quicker, more economical, and place a lower evidentiary burden on the victims. Nevertheless, due to their massive nature, these programs set rates of compensation that are considerably lower than those granted through the courts, and do not tend to be accompanied by broad-ranging measures intended to prevent the repetition of the acts of violence. For this reason, it is considered desirable to design these programs alongside the establishment of institutional reforms and measures of non-repetition, as has occurred in some cases that have included the advancement of constitutional reforms, and other reforms including changes in the judicial system, police, and armed forces.

The debate that this case proposes is to evaluate, from the perspective of a transitional context and the holistic nature of the measures taken by the State, the degree to which the measures of

[60] I/A Court H.R., 2010 Annual Report of the Inter-American Court of Human Rights. OAS. San José, Costa Rica, p. 11. Available at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf.

reparation designed through this administrative program are consistent with the standards of the system. And, above all, the debate should evaluate how to choose the standards applicable to the relationship between reparations through international judicial proceedings and the assessment of massive national efforts in those cases in which societies have implemented such programs.

c. Arguments of the parties

The victims' representatives will argue that the reparations granted do not meet their needs and expectations. Although the reparations program is comprehensive (in the sense that it includes measures from the different components of reparation: compensation, satisfaction, rehabilitation, and guarantees of non-repetition, as well as a collective component), and is also prompt and easy to access, the victims' representatives will likely find that the content of the benefit is far inferior to what they would consider fair and adequate reparations. For example, the sums awarded for compensation are much lower than some of the reparations granted by the Court in similar cases of violence (torture, forced disappearance).

In support of their argument, they can cite the precedents set in the Peruvian and Guatemalan cases in which the Court evaluated the reparations programs in those countries and—even though it viewed them positively—ordered complementary reparations. Thus, in the *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*, the Court found that the Law creating the program failed to provide legal certainty as to whether the victims could also avail themselves of the courts in order to assert the rights they considered to have been violated. Accordingly, the Court ruled that the existing domestic remedies were not effective, individually or collectively, for purposes of adequately and effectively guaranteeing the right of access to justice.[61]

In the case of *Chitay v. Guatemala*, although the Court viewed positively the National Compensation Program (PNR) implemented by the State of Guatemala, it did not consider it to be sufficient for the comprehensive reparation of the victims in the case. Accordingly, it ordered the State to implement positive measures in each one of its components, including the determination of actual damages and lost wages.[62] On the other hand, in the *Case of the Río Negro Massacres v. Guatemala*, the Court found that the amounts of compensation duly acknowledged by the State of Guatemala through the PNR should be subtracted from the amounts determined by the Court according to international standards.[63]

The State, for its part, will find more recent favorable cases in which the Court has had to evaluate the reparations granted through administrative programs in Chile and Colombia. First, in the case of *García Lucero v. Chile*, the Court held that administrative reparations programs are compatible with the ACHR (art. 63(1)), provided that they do not bar the victims from filing reparations claims

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[61] *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Para. 146.
[62] *Case of Chitay Nech et al. v. Guatemala.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010.
[63] *Case of the Río Negro Massacres v. Guatemala.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Para. 304.

before the courts.[64] In this case, given the special particularities of its jurisdiction, the Court did not delve any deeper in the assessment of the damages, but it ultimately decided not to grant additional reparations to complement what the victims had already received through the administrative reparations program.

Along similar lines, the Court has ruled on recent cases from Colombia. In the *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis)*, the Court found that the amounts of compensation duly granted to the victims by the State of Colombia through the Victims Law and the regulations thereto should be recognized, and therefore, it abstained from granting reparations in this respect.[65] It bears noting that the IACHR opposed the State's claim that those reparations should be taken into account, under the following arguments: (a) it is a new law that is being implemented and adjusted; and (b) it distorts the nature and scope of the Inter-American System. For their part, the representatives maintained that it was insufficient, given the magnitude of the harm caused, as well as the nature and amount of the reparations provided therein; it is a law of a general character, and the compensation that it provided for displaced persons was unclear and included items that were not applicable to the specific case; and that it confused the provision of services for the displaced population with reparations. Notwithstanding, the Court stated that

> In scenarios of transitional justice in which States must assume their obligations to make reparation on a massive scale to numerous victims, which significantly exceeds the capacities and possibilities of the domestic courts, administrative programs of reparation constitute one of the legitimate ways of satisfying the right to reparation. In these circumstances, such measures of reparation must be understood in conjunction with other measures of truth and justice, provided that they meet a series of related requirements, including their legitimacy – especially, based on the consultation with and participation of the victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons given to provide reparations by family group and not individually; the distribution criteria among members of a family (succession order or percentages); parameters for a fair distribution that take into account the position of the women among the members of the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.

The Court acknowledged the progress made by the State in providing reparations to the victims of the armed conflict through the enactment of the Victims Law. Ultimately, the Court ordered the State to ensure that the individuals who were recognized as victims in the judgment have priority access to administrative compensation and that it proceed to pay them, as soon as possible, irrespective of the time frames that domestic law may have established for this, preventing obstructions of any type.

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[64] *Case of García Lucero et al. v. Chile.* Preliminary Objection, Merits and Reparations. Judgment of August 28, 2013. Paras. 185 *et seq.*

[65] *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Paras. 462 *et seq.*

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