



DPLf

**Digest of Latin American
Jurisprudence on the
Rights of Victims**

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**DIGEST OF
LATIN AMERICAN
JURISPRUDENCE
ON THE RIGHTS
OF VICTIMS**



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PREFACE

For more than six years, a team of experts and consultants from the Due Process of Law Foundation (DPLF) has been working extensively to reflect upon, compile, analyze, and systematize judgments from Latin American courts that address innovative and relevant aspects of the domestic prosecution of international crimes using international law. The main objective of this work has been to create a simple and accessible tool that adds to the knowledge of judges, prosecutors, and lawyers involved in these kinds of proceedings, promotes dialogue and lessons learned from comparative experience, and also serves as a starting point for the academic discussion of these issues. To date, this project has resulted in two earlier volumes that together form the *Digest of Latin American Jurisprudence on International Crimes*.

Knowing the practical impact that this digest has had in academic contexts and on domestic litigation both in Latin America and elsewhere, there is no doubt that our main objective has been met. But beyond these concrete outcomes, the ongoing analysis of national court decisions has provided our team with the opportunity to systematize the Latin American experience around one of the most important issues in the transitions from dictatorial or totalitarian regimes to substantive democracies: criminal procedure and how it is applied in the fight against impunity. This accumulated knowledge is being used by DPLF and its allies to shed light on the issue in other regions dealing with similar legacies following years of war or state repression.

Motivated by the outcomes described above, we have continued to discuss the importance of making the most significant jurisprudential developments in the region available to the interested parties. In so doing, we have been convinced that no system of judicial decisions would be complete or make sense without ensuring the rights of victims and highlighting the progress of the Latin American courts in this respect. As author Ximena Medellín explains in detail in the methodological considerations of this edition, this digest covers both the victims of human rights violations and the victims of ordinary crimes, as legal categories entitled to interconnected rights that must also be guaranteed by the State.

For a long time, it was thought that allowing the victims to play an active role in a criminal investigation could result in the erosion of the defendant's procedural rights. The role of the victims in criminal cases, and in the broader sense, the victim's relationship to the justice system, was the subject of controversy and debate. After several centuries of exclusion and near oblivion, the victim has reappeared on the criminal justice scene as a central concern of criminal law and policy. This interest is evidenced by the movements that fight for the rights of crime victims and victims of human rights violations, the reforms to national and international positive law that focus on the victim and his or her interests and protection, and—more recently—the advances in national and international jurisprudence.

Now, although there is no question that victims and defendants have equal rights, the issue is not without its tensions. It is therefore important to create a constitutional and criminal doctrine that adequately harmonizes the rights of the accused and the rights of victims, as democratic

and rights-based criminal procedure must not only ensure due process for the defendant but must also include the demands for justice asserted by the victims and their relatives.

The evolution of the Latin American case law contained in this digest is significant: the judgments that have been selected are a point of reference on issues such as reparation and participation, which until recent years have been addressed only within the inter-American human rights protection system. They also serve as an excellent vantage point for the analysis—even in adversarial cases involving individuals or groups—of the difficulties, achievements, and meanings inherent in the recognition of victims’ rights and the role of the various actors who take part in the proceedings.

DPLF would like to take this opportunity to acknowledge the participation of victims and the international community in developing international standards on the rights of victims. We extend this recognition to all of the judges who crafted the decisions included in this digest, especially those who have found innovative and progressive ways to interpret and apply the law in order to enhance the protection of victims’ rights in response to the complex challenges raised in the criminal law and in view of the historical and political realities.

The team that has worked on this study is grateful for the support received from different institutions and individuals in the process of compiling the judgments included in this Digest. First, we would like to underscore the cooperation of the Constitutional Division of the Supreme Court of El Salvador, which provided some of its judgments to us directly. We would also like to thank the *Instituto de Defensa Legal* (Peru), as well as José Manuel Ruiz Ramírez (Mexico), Jorge Ordóñez (Mexico), and Cath Collins (Chile).

We would like to extend special recognition to Ximena Medellín Urquiaga, professor and research associate with the División de Estudios Jurídicos of the Centro de Investigación y Docencia Económicas (CIDE) in Mexico City, as the author of the digest. She designed the methodology and format; compiled, systematized, and analyzed the jurisprudence; and wrote the analytical commentary. María Clara Galvis and Tatiana Rincón-Covelli who, in addition to undertaking a technical review of this digest, assisted in selecting and updating the Colombian judgments.

We are also thankful to Aimee Sullivan who translated the digest from Spanish to English and Cathy Sunshine who edited the English version of the work. Finally, we would like to acknowledge the essential support of the Oak Foundation and the Open Society Foundation (OSF) for this work.

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FOREWORD

The research and analysis undertaken by the Due Process of Law Foundation (DPLF) in the *Digest of Latin American Jurisprudence on the Rights of Victims* is an important and well-deserved acknowledgment of the role that victims themselves play in the task of demanding respect for their rights to truth, justice, services, and protection, and to the redress of harm. At the same time, the Digest underscores the role of national courts and tribunals as guarantors of respect for these rights, as well as the value of their work in defining the content and scope of those rights through their case law.

It must be acknowledged that the evolution of victims' rights, both in international law and within national legal systems, is relatively recent. Their recognition and codification are contemporary, particularly when compared to the development of human rights in general or the rights of the accused in particular. The latter developments were codified from the inception of international human rights law through the rights to a fair trial and due process, while it took several decades for victims' rights to be consolidated in a dedicated international instrument.

A similar situation unfolded with the codification of victims' rights at the State level. The inclusion of catalogs of victims' rights in the criminal codes and national constitutions has only occurred within the past three decades; it was in the 1990s that national constitutions and codes of criminal procedure began to codify these rights more clearly. A simple and logical explanation of this difference between the evolution of defendants' rights and victims' rights can be found in the fundamental need to place limits on the monopolistic use of criminal law by the State with countervailing rights, and to prevent or curtail potential abuses in its exercise. This is in view of the possible consequences of the State's power to punish (*jus puniendi*), which can result in the restriction of fundamental rights such as freedom, and even—in some countries—in the loss of life.

In this context, limiting the use of punitive action by the State resulted, first of all, in recognition of the rights to equality before the law, to an effective remedy, and to be heard by a court (Universal Declaration of Human Rights, A/RES/217A(III), 1948). Later it resulted in the identification of the trial rights necessary for any proceeding to be considered fair and impartial (International Covenant on Civil and Political Rights, A/RES/2200A(XXI), 1966).

Current realities made clear that legal protection had to be granted not only to those facing a potential punitive State action but also to those persons whose rights were adversely affected as the result of an unlawful act or an abuse of power: the victims. The recognition of these rights also served later as the legal rationale for victims' rights.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (AG Res. 40/34, 1985), adopted by the United Nations (UN), emerged as the initial response at the international level, and was drafted specifically to protect victims of crimes. This legal instrument is the cornerstone of the protection of victims' rights, as it was the first international document to contain a catalog of rights and a definition of the concept of victims.

For the first time, victims are defined as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. This broad concept includes immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

The concept of victim contained in the Declaration remains valid and has served as the basis for definitions set forth in other national and international instruments (regarding the concept of victim at the national level, see Section 1.1 of the Digest).

It is similarly established that victims should be treated with compassion and respect for their dignity, and that they are entitled to access to the mechanisms of justice and to prompt redress.

Two decades later, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/2005/102/Add.1, 2005) was adopted within the framework of the UN. These principles establish the duty of States to investigate violations of human rights and international humanitarian law and to bring the perpetrators to justice. Undoubtedly, the main contribution of this instrument was to define victims' rights as the right to know, to have access to justice, to reparation, and to the guarantee of non-recurrence, all established as fundamental rights. Those rights are reflected, to a greater or lesser extent, in the 23 Latin American judgments selected and examined in this Digest.

The UN General Assembly also adopted 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 (AG Res. 60/147, 2005), which broadened the legal framework of victims' rights at the international level. These principles detail the obligations of the State to prevent serious violations; to investigate, prosecute, and punish the perpetrators; to ensure effective access to justice for victims; and to provide adequate reparation. The main contribution of this instrument is undoubtedly the development of measures that constitute the five forms of comprehensive reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition (regarding the right to reparation, see Section 5 of the Digest).

In the countries of Latin America, victims' rights have been developed mainly within the framework of criminal law. In this context, we can see how the participation of victims is not homogenous among the countries of the hemisphere; it has different expressions and scopes, the broadest being the one that allows victims to bring criminal actions. It bears noting that the role of victims has recently been modified in various States of the region due to the shift to an adversarial criminal justice system. In some other countries the enactment of special laws, particularly in the context of the transition to peace, has limited the rights to which victims were previously entitled under the framework of national criminal law; an example is Colombia's Justice and Peace Law and the supplemental legislation. In other countries, such as Honduras and Mexico, the adversarial system has allowed for the inclusion of victims' rights as a full part of the criminal proceedings. (For an overview of victims' rights in transition processes or in special peace processes, see Section 6.2 of the Digest.)

In some countries of the region, victims can act as private prosecutors or as plaintiffs claiming damages in a criminal case, which allows them direct access to the judge (Colombia, Honduras, Costa Rica); in others, their participation in the criminal proceeding is only through the investigating agency as a criminal complainant (Guatemala) or as a mere “assistant” or aide to the investigating agency (Mexico in the inquisitorial system). (See Section 4 of the Digest on the participation of victims in criminal proceedings and their different approaches.)

The development of victims’ rights in the sphere of international criminal proceedings has also proceeded gradually. At first, the international military tribunals (Nuremberg and Tokyo) did not provide for the participation of victims in their proceedings. The international criminal tribunals created by the UN Security Council in the early 1990s (*ad hoc* tribunals for Rwanda and the former Yugoslavia) only considered victims as witnesses: victims were called upon at trial only to answer the questions of the prosecution or the defense, that being the extent of their participation. It was only with the adoption of the Rome Statute of the International Criminal Court (A/CONF.183/9, 1998) that an international criminal tribunal gave an independent voice to victims during its proceedings, considering them to be participants and granting them a right to participation, protection, and the redress of harm. This innovation of the Rome Statute is recognized as one of the International Criminal Court’s main contributions to the development of international criminal law.

Some of the hybrid tribunals created after the adoption of the Rome Statute allow for victim participation. However, in any given country, the way in which victims are recognized as participants or parties is a direct reflection of the way in which the national laws provide—or do not provide—for the participation of victims in national criminal proceedings. For example, the Extraordinary Chambers in the Courts of Cambodia (ECCC) consider the victim to be a full party to the proceedings, because the national criminal justice system recognizes victims as *plaintiffs claiming damages in a criminal case*, with extensive rights. (See Section 4.2 of the Digest on the role of victims as parties to or participants in criminal proceedings.)

It is impossible to examine the rights of victims in the region’s countries without referring to the jurisprudence of the inter-American system for the protection of human rights, derived from the decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. To do so would be to deny the fundamental role that the system has played not only in shaping the content of each of the victims’ rights, but also in creating or fostering legal changes at the national level that today acknowledge and enable the exercise of victims’ rights in the different States of the region.

Accordingly, we must recognize that the inter-American system has evolved in relation to the participation of victims in its proceedings. Although victims are still not afforded direct access to the Inter-American Court, the rules of the Court have increasingly been adapted to recognize the importance of the direct participation of victims in its proceedings. Without question, we can affirm that the clearest and most recognized contribution of the inter-American jurisprudence in relation to victims’ rights is tied to the development of the right to obtain redress. The inter-American jurisprudence has shown creativity and innovation in designing State responses that enable victims to overcome the harm and prevent the recurrence of human rights violations through measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, achieving comprehensive reparation for victims and their

communities. (See Section 5 of the Digest for further discussion of the right to reparation in terms of its different forms and the impact of the international jurisprudence on the subject.)

But beyond the State, regional, or international efforts to codify victims' rights, we must acknowledge that progress has only been possible thanks to the valuable contributions, tenacity, and courage of the individual victims and victims' groups, and the civil society organizations that have represented them; over the years, they have been able to transform their pain into an impetus for change, for which they must be recognized today. The work of victims and the civil society organizations representing them, at all levels, has resulted in major advances in the law, in legal victories affirming and enforcing victims' rights, and in the establishment of international standards to guide government action. Without them, without their efforts, little progress would have been made. In this respect, the Digest is testimony to the impact of their struggle, which is still ongoing from day to day at the national, regional, and international levels, to obtain respect for and compliance with these hard-won rights.

To ensure the full exercise of victims' rights, both the State and society in general must recognize the significant role that victims play in any proceeding, whether administrative, judicial, quasi-judicial, international, regional, or national, including within institutions where public policy is formed. Their participation not only brings personal benefits, in terms of overcoming the harm they have suffered as the result of a crime, human rights violation, or international crime; it also has beneficial effects on their community, even extending to the society or nation to which they belong.

The contribution of victims in a particular case supports not only the legality of a case but also, most importantly, its legitimacy. It builds ownership of the authority's action and fosters the perception not only that "justice is being served" but also that this justice is sensitive to the needs and opinions of the individuals affected: the victims.

In addition to helping establish legal truth and historical memory, directly hearing the observations or concerns of the victims encourages acknowledgment of the suffering or loss. It fosters an understanding of the magnitude of the harm inflicted and enables victims to experience the process in a way that has a reparative effect.

This new manner of including victims—making them participants in the assessment, the selection of the path, and the identification of the solution—is changing the perception that victims who take part in a proceeding are interested only in obtaining redress. Instead, there is growing recognition of the value of their active participation. This participation transforms passive actors into individual rights-holders, and in many cases even into social actors who bring about change. Thus, the experience of the process is often as important as the outcome.

Finally, it is crucial to acknowledge that in order to make victims' rights to justice, truth, and reparation a reality, other rights must be guaranteed, including the right to information, to protection, to assistance and services, and to legal representation, to name a few. Without a doubt, one of these rights is key to ensuring the exercise of the others: the right to information. Victims who know their rights can make informed decisions and manage expectations about the proceedings in which they take part, while being able to demand full respect for their rights. Toward this end, the Digest not only disseminates the work that has been done in the region for the recognition of victims' rights by national courts; it also allows victims to gain a deeper knowledge of their rights, learn of advances in Latin America that have provided content to

those rights, and improve their ability to assert these rights before national authorities. This work is unquestionably a valuable contribution to the efforts of victims and their legal representatives in claiming these rights. Congratulations.

Paulina Vega González
Guanajuato, México, 2014

METHODOLOGICAL CONSIDERATIONS

For decades, the transition to democracy in different countries of Latin America has been marked by complex social, political, and legal processes, which have been resolutely driven by national, regional, and international victims' movements.¹ This continuing struggle of the victims of crimes and human rights violations has also resulted in the consolidation of a new regulatory approach to the proper place of victims in national and international justice systems. In other words, the active participation of victims in the Latin American democratization processes has made a substantive contribution to solidifying the recognition of their rights, both within the framework of national justice systems and before the international human rights protection mechanisms.

In this context, the international instruments, case law, and doctrine have played a decisive role by setting minimum standards with respect to the legal content and scope of protection of victims' rights. Nevertheless, the international criteria have been established in fairly general terms, which has hindered their operation in the strictest national procedural frameworks. With this reality in mind, the Due Process of Law Foundation has once again undertaken to promote a study of Latin American case law, this time focused on the rights of victims of crimes and of human rights violations. We are convinced that the comparative experience makes an extensive and unprecedented contribution to the acceptance, inclusion, and consolidation of the constitutional and international debate on the protection of victims' rights in the context of domestic court proceedings.

It is important to underscore that this Digest is part of a broader project centered on the analysis of Latin American jurisprudence and case law. As such, it maintains analytical continuity by addressing themes related to the transformation of the legal culture in the context of the process of democratization. Nonetheless, the *Digest of Latin American Jurisprudence on the Rights of Victims* offers a thematic basis that differs from the previous studies, which focused on Latin American case law pertaining to international crimes.

This thematic shift has implications at the methodological level. Although the central design and structure of the Digest follows the same guidelines used previously for the systematization of Latin American court decisions, the selection of decisions for this volume was not based solely on the criterion of regional representativeness and relevance. Considering the particularities of the national judgments related to victims' rights, it was not sufficient to select a few leading or seminal decisions from different countries of the region; rather, we also sought to identify and include decisions that would show the different substantive and

¹ On the litigation of cases involving human rights violations in the context of transitions to democracy, see, e.g., E. Gonzales Ocantos, "Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina," *Comparative Politics* 46, no. 4 (2014): 479–98; and V. Michel and K. Sikkink, "Human Rights Prosecutions and the Participation Rights of Victims in Latin America," *Law and Society Review* 47, no. 4 (2013): 873–907.

procedural approaches to the issues raised by the protection and enforceability of victims' rights at the national level.

In contrast to the national criteria for the prosecution of international crimes, which have been strongly influenced by the international legal system, the debate on victims' rights is much more firmly anchored in the national procedural systems. In concrete terms, this means that the comparison of different judicial opinions must acknowledge the margin of discrepancy that results from the particular characteristics of each national system. The variation in criteria is not explained solely by the different procedural models or institutions adopted in different countries of the region; rather, it also involves some cross-sectional criteria that substantively affect the ways in which the legal debates are framed. These include, for example, the prevailing criteria on the scope of constitutional control, the operation of constitutional principles and fundamental rights—both subjective (individual) and objective—and the treatment and acceptance of international treaties and instruments, as well as of the international or regional case law and doctrine.

As a result of the particular characteristics of each national legal system, the examination of the Latin American case law on victims' rights reveals different levels or standards of protection, at least in some countries of the region. In this respect, it is important to understand the precedents included in this Digest as part of a process of evolution that is still underway. Accordingly, rather than being presented as a clear reiteration of specific criteria, the comparison of the national court decisions can be understood in terms of a continuum that ranges from more traditional (and to a certain degree more simple) criteria to highly complex criteria derived from the incorporation of international standards. An example of such a "continuum" is evident in the opinions on, *inter alia*, the redress of harm. Among these judgments, we can identify precedents that examine the concept and content of the *compensation of damages* from a more traditional perspective, as well as complex arguments about *comprehensive reparation* and the forms it can take. In this regard, it should be noted that many of the judgments included in this Digest establish seminal or foundational criteria that provide a basis for needed further development of the law, with a view to the effective protection of victims' rights.

LIST OF JUDGMENTS

In this study of Latin American judicial precedents on victims' rights, we have systematized 23 judgments handed down by courts and tribunals in eight countries of the region: Argentina, Chile, Colombia, Costa Rica, El Salvador, Mexico, Peru, and Venezuela. For purposes of contextualizing the court opinions, they are organized in the body of this Digest thematically. This section presents a brief summary of the most relevant legal and factual background to each case. Because the debate surrounding victims' rights at the national level has been characterized by a particular focus on procedural aspects, the summaries presented below also contain specific references to the judicial remedies that resulted in the decision in question, as well as the most relevant procedural history of the case.

In this section of the Digest, the decisions are organized by country, and within each country, ordered chronologically. Each decision in this section has a double number: the first number indicates the number of the country on the list (Argentina: 1, Chile: 2, Colombia: 3, Costa Rica: 4, etc.), and the second number indicates the order of the decision within the list for that country.² These double numbers are cited in the body of the Digest to facilitate location of the complete citation and summary of the judgment: for example, *List of judgments 1.1*.

1. ARGENTINA

1.1 Petition for review of a denied appeal G. 1015. XXXVIII (August 11, 2009). Case No. 46/85 A, Gualtieri Rugnone de Prieto, Emma Elidia et al., re: abduction of minor children under the age of 10, Supreme Court of the Nation, August 11, 2009.

Petition for review of a denied appeal filed by Emiliano Matías Prieto in the case of Gualtieri Rugnone de Prieto, Emma Elidia et al., challenging the decision of the 2nd Division of the National Chamber of Federal Criminal and Correctional Appeals of the Federal Capital, which affirmed the trial court's decision ordering the petitioner to report to the Hospital Durand to provide a blood sample.

According to the judgment, the purpose of the blood sample extraction ordered by the judge of first instance was to determine the identity of the petitioner, Emiliano Matías Prieto, who was thought to be one of the babies abducted during the military dictatorship in Argentina. The controversy before the Supreme Court of the Nation arose from the refusal of the (now adult) petitioner to submit to that test.

² The complete texts of the judgments included in this Digest (in Spanish) can be found on the website of the Due Process of Law Foundation, www.dplf.org.

Relevant issues in the decision: victims of human rights violations; crime victims; international crimes and the right to the truth; right to personal autonomy and integrity; competing rights; balancing; victims' rights in view of the State duty to prosecute crimes; cessation of the criminal act.

1.2 *Ordinary appeal M.1181.XLIV (November 8, 2011)*. Mezzadra, Jorge Oscar v. Ministry of Justice and Human Rights, re: damages, Supreme Court of the Nation, November 8, 2011.

Ordinary appeal challenging the decision of the 5th Division of the National Federal Administrative Chamber of Appeals, which affirmed the trial court's judgment admitting, in part, the claim brought against the National State for the reparation of damages.

Jorge Oscar Mezzadra, the appellant in this judgment, brought an action against the National State alleging its financial responsibility for the damages arising from the deprivation of his liberty in pretrial detention, as well as the unreasonable duration (more than 20 years) of the criminal case against him, "Braceras, Luis Braulio, et al. re: contraband." The events leading to the criminal case against Mr. Mezzadra go back to January 1976. After being reported by the Customs Service, Mr. Mezzadra was accused of bringing merchandise into the country without the proper customs clearance. That case was dismissed in an order dated March 25, 1999, which was affirmed by the Financial Crimes Chamber on October 29, 1999.

Relevant issues in the decision: victim of a human rights violation; right to reparation; compensation; unreasonable duration of a criminal case; improper acts of the judiciary; judicial error; financial liability of the State.

2. CHILE

2.1 *Petition for cassation, File No. 12.357-2011 (December 7, 2012)*. Petition for cassation, File No. 12.357-2011, Third Division, Supreme Court, December 7, 2012.

Petition for cassation brought by the National Tax Authority against a judgment of the Santiago Court of Appeals. The challenged judgment had overturned the first instance court's decision to dismiss the claim for compensation and instead ordered the Tax Authority to pay each one of the plaintiffs the sum of 20 million pesos as compensation for non-pecuniary damages, adjusted for inflation and without costs. The claim for the compensation of damages stemmed from the August 1974 disappearance of Sergio Sebastián Montecinos Alfaro.

The petition for cassation alleges a mistake of fact due to the failure to apply the statute of limitations provisions of the Civil Code, as well as the failure to apply international treaties. According to the appellant, the judgment of the Court of Appeals makes no reference to any specific international treaty establishing the obligation to compensate civil damages, but rather is a conclusion based on the application of international human rights standards and international criminal law.

Relevant issues in the decision: victims of human rights violations; international crimes; right to reparation; compensation; non-applicability of statutes of limitations; international treaties; financial liability of the State.

3. COLOMBIA

3.1 *Judgment C-228/02 (April 3, 2002)*. Unconstitutionality action, File No. D-3672, delivered by J. Manuel José Cepeda Espinosa and Eduardo Montealegre Lynett, Criminal Division, Constitutional Court, April 3, 2002.

Unconstitutionality action filed by Ricardo Danies González, challenging the constitutionality of Article 137 of Law 600 of 2000 enacting the Code of Criminal Procedure. The claim alleged that the challenged provision is inconsistent with Articles 13, 93, and 95 of the Colombian Constitution, as well as Articles 1 and 5 of the Declaration of the Rights of Man and of the Citizen (1789).

The plaintiff alleged the violation of the constitutional principle of equality on the basis that, while the defendant is free to act directly in his or her defense, the complainant or injured party must act through a representative. It was similarly alleged that a plaintiff claiming damages in a criminal case is barred from access to the court proceedings during the preliminary investigation stage, because he or she is not a party to the case.

Relevant issues in the decision: crime victims; plaintiff claiming damages in a criminal case; constitutional and procedural rights; adversarial criminal proceedings; principle of dignity; right to access to justice; right to the truth; participation of victims in the criminal case; freedom of legislative action.

3.2 *Judgment C-370/06 (May 18, 2006)*. Unconstitutionality action, File No. D-6032, delivered by J. Manuel José Cepeda Espinosa, Jaime Córdoba Triviño, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Álvaro Tafur Galvis, and Clara Inés Vargas Hernández, Plenary Chamber of the Constitutional Court, May 8, 2006.

Public unconstitutionality action, filed by Gustavo Gallón Giraldo and a number of other individuals, challenging Law 975 of 2005, “Enacting provisions for the reintegration of members of unlawful organized armed groups who contribute effectively to the attainment of national peace, and enacting other provisions for humanitarian agreements.”³ The provisions challenged in the lawsuit included, in particular: (i) Article 4 (right to the truth, justice, reparation, and due process); (ii) Article 5 (definition of victim); (iii) Article 6 (right to justice); (iv) Article 7 (right to the truth); (v) Article 8 (right to reparation); (vi) Article 15 (establishment of the truth); (vii) Article 17 (voluntary statement and confession); (viii) Article 22 (investigations and

³ According to the decision in question, the public unconstitutionality action challenged the law “in its entirety, or, in the alternative, the constitutionality of Articles 2 in part, 5 in part, 9 in part, 10 in part, 11.5 in part, 13 in part, 16 in part, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 34, 37.5, 37.7, 46 in part, 47, 48 in part, 54 in part, 55 in part, 58, 62, 69, 70, and 71 of the same Law.”

accusations prior to demobilization); (ix) Article 23 (petition for comprehensive reparation); (x) Article 29 (alternative sentence); and (xi) Article 37 (victims' rights).

According to the plaintiffs' arguments, the procedures established in Law 975 of 2005—in particular the challenged articles—constitute a “system of impunity” that fails to adequately guarantee victims' rights to truth, justice, and reparations. More specifically, it is alleged that the investigations will be insufficient because they fail to adequately reflect the seriousness of the acts, in terms of their being systematic and widespread. Similarly, they argue that there are no adequate guarantees for the victims' participation and access to justice, nor are there guarantees to ensure the comprehensive reparation of the harm suffered by victims.

Relevant issues in the decision: victims of human rights violations; right to access to justice; right to the truth; right to reparation; impunity; justice as a constitutional principle; transition processes; right to peace; balancing.

3.3 *Judgment C-209/2007 (March 21, 2007)*. Unconstitutionality action, File No. D-6396, delivered by J. Manuel José Cepeda Espinosa, Criminal Division, Constitutional Court, March 21, 2007.

Unconstitutionality action filed by Leonardo Efraín Cerón Eraso, challenging various articles of Law 906 of 2004, “Enacting the Code of Criminal Procedure.” The challenged articles include, in particular: (i) Article 11 (victims' rights); (ii) Article 137 (participation of victims in criminal proceedings); (iii) Article 306 (request for the imposition of measures to ensure the defendant's appearance at trial); (iv) Article 316 (non-compliance); (v) Article 324 (grounds for the use of prosecutorial discretion); (vi) Article 327 (judicial oversight of the use of prosecutorial discretion); (vii) Article 342 (protection measures); and (viii) Article 391 (cross-examination of the witness). In general terms, the plaintiff alleged that these legal provisions restrict the constitutional and convention rights of crime victims.

According to the plaintiff, based on the recognition of victims' rights under the Constitution and international conventions, every (modern) criminal case must rest on three essential pillars, to wit: “(i) ‘victims are entitled to truth, justice, and reparation as fundamental rights,’ (ii) ‘the criminal indemnification action [*acción civil*] (or the “private right of action” to which victims are entitled in the criminal case for the defense of their rights that have been violated) is equal in rank to the criminal action,’ and (iii) ‘the victim and the defendant are the protagonists of the criminal case and therefore are equal in terms of conditions, rights, and obligations.’”⁴ According to these arguments, the unconstitutionality action alleges “a relative legislative omission that entails the discriminatory treatment of victims vis-à-vis the parties and other participants in the criminal case, and prevents victims from directly negotiating their rights, or contributing to the establishment of the truth by offering and debating evidence or challenging decisions that affect their rights.”⁵

⁴ Verbatim transcription of the arguments made by the plaintiff, according to Judgment C-209/2007 of the Constitutional Court of Colombia.

⁵ Verbatim transcription of the arguments made by the plaintiff, according to Judgment C-209/2007 of the Constitutional Court of Colombia.

Relevant issues in the decision: crime victims; right to access to justice; right to the truth; right to obtain redress; right to benefit from protection measures; participation of the victim in the evidentiary proceedings; adversarial criminal justice system; prosecutorial discretion.

3.4 *Direct reparation action, File No. 16996 (February 20, 2008).* Direct reparation action, File No. 76001-23-25-000-1996-04058-01(16996), delivered by J. Enrique Gil Botero, Administrative Disputes Division, Third Section, Council of State, February 20, 2008.

Appeal filed by the Ministry of Defense–National Police, in its capacity as civil respondent in a direct reparation action, against the decision handed down by the Administrative Court of Valle del Cauca. In the challenged judgment, the Administrative Court had found the Ministry of Defense–National Police administratively liable for the disappearance and subsequent execution of the brothers Omar and Henry Carmona Castañeda, while in police custody, in January 1995. Consequently, the Administrative Court of Valle del Cauca ordered the respondent to pay compensation for pecuniary and non-pecuniary damages to various relatives of the Carmona brothers.

The appellant argued that the acts on which the reparation claim was based were carried out exclusively by a third party, as the victims were kidnapped by individuals dressed in civilian clothing, who did not at any time identify themselves as members of the National Police. According to the evidence presented in the case, the Administrative Disputes Division of the Council of State found that, at the time of the kidnapping, the Carmona Castañeda brothers were deprived of their liberty, and therefore it was also the responsibility of the authorities of the Municipality of Tuluá to protect them. Accordingly, it was determined that the acts in question were indeed attributable to the respondent entity and should have been the subject of comprehensive reparation.

Relevant issues in the decision: victims of human rights violations; improper acts by authorities; State obligations to detainees; State authorities as guarantors; principle of and right to reparation; concept of comprehensive redress of harm; forms of reparation.

3.5 *Appeal for Review, File No. 29075 (July 6, 2011).* Appeal for Review, File No. 29075, delivered by J. José Leonidas Bustos Martínez, Criminal Cassation Division, Supreme Court, July 6, 2011.

Appeal for review filed by the Fifth Assistant Prosecutor before the Criminal Judges of the Specialized Circuit, assigned to the National Human Rights and International Humanitarian Law Unit headquartered in Bogotá, against the July 25, 2001, judgment of the Superior Court of the Judicial District of Medellín, which upheld the acquittals of Jaime Alberto Angulo Osorio and Francisco Antonio Angulo Osorio for the murder of Jesús María Valle Jaramillo.

According to the appellant's arguments, the legal basis for the appeal for review is the third ground set forth in Article 220 of the Code of Criminal Procedure of 2000, as interpreted by

the Constitutional Court in judgment C-004/2003.⁶ In support for this claim, the respective Prosecutor's Office submitted to the Court, *inter alia*, Reports 5/03 and 75/06 of the Inter-American Commission on Human Rights, as well as the November 27, 2008, judgment in the Case of Jesús María Valle Jaramillo v. Colombia, and the July 1, 2006, judgment in the Case of the Ituango Massacres v. Colombia, both of the Inter-American Court of Human Rights.

The events leading to the case in question concern the murder of human rights defender Jesús María Valle Jaramillo. Prior to his murder, Valle Jaramillo had been systematically denouncing crimes committed by paramilitary groups led by Carlos Castaño Gil, particularly in the municipality of Ituango.

Relevant issues in the decision: victims of human rights violations; crime victims; principle of *ne bis in idem*; review of convictions and acquittals; scope of the recommendations of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

4. COSTA RICA

4.1 *Judgment 01193-1995 (March 13, 1995)*. Advisory opinion on constitutionality, File No. 5798-94, Constitutional Division, Supreme Court, March 13, 1995.

Request for an advisory opinion on constitutionality submitted by the Third Division of the Supreme Court, in relation to the limitations contained in Article 473 of the Code of Criminal Procedure, which stipulate specific amounts and types of penalties for which a petition for cassation filed by the Public Ministry is admissible. This request asserts that the article in question violated the principle of justice in the specific case at hand, the right to access to the courts, access to criminal justice, the opening of the petition for cassation, and due process.

⁶ According to Article 220 of Law 600 of 2000 (Code of Criminal Procedure), "The appeal for review is admissible against final judgments in the following cases: [...] 3. When, subsequent to the conviction, new evidence or facts come to light that were not known at the time of trial, which establish the innocence of the convicted defendant or demonstrate that the acts cannot have been attributed to him." This provision was interpreted by the Plenary Chamber of the Constitutional Court of Colombia in accordance with the constitutional rights of victims. As a result, the Chamber held that "the appeal for review on this basis is also admissible in cases of termination of the investigation, termination of the proceedings, and acquittal, provided that [i] the case concerns human rights violations or serious violations of international humanitarian law, and [ii] a domestic court order, or a decision from an international human rights monitoring and oversight body, formally accepted by Colombia, has verified the existence of the new fact or evidence not known at the time of trial[,] [or] [iii] [the aforementioned authorities] verify a clear breach of the obligations of the Colombian State to seriously and impartially investigate the aforementioned violations." See Constitutional Court of Colombia, Judgment C-004/2003, opinion delivered by J. Eduardo Montealegre Lynett, Plenary Chamber, January 20, 2003. The above-cited court opinion was shortly thereafter incorporated by the national legislature into the Code of Criminal Procedure, in the fourth paragraph of Article 192 of Law 906 of 2004. The relevant extracts of Judgment C-004/2003 can be reviewed in the *Digest of Latin American Jurisprudence on International Crimes, Volume I* (Washington, DC: Due Process of Law Foundation, 2009), List of judgments 4.g.

Accordingly, the Third Division maintained that the unnecessary procedural obstacles must be removed so that it would be able to hear a specific matter in which a decision has been issued. In its reasoning, the Constitutional Division examined the scope of the right to appeal a judgment in light of the victim's role in modern criminal proceedings.

Relevant issues in the decision: crime victims; constitutional principle of justice; right to access to justice; victims' rights in criminal proceedings.

4.2 *Judgment 7497-98 (October 21, 1998)*. Mandatory advisory opinion on constitutionality, File No. 98-006500-0007-CO, Constitutional Division, Supreme Court, October 21, 1998.

Mandatory advisory opinion on constitutionality, issued by the Court of Criminal Cassation, within the motion for review filed on behalf of Jorge Solís Martínez, challenging judgment No. 261-F-97 of the Superior Court of Criminal Cassation of the Second Judicial Circuit of San José. According to the appellant's arguments, the court of cassation committed an error of law and violated the principle of *ne bis in idem* by hearing and overturning an acquittal handed down by the trial court judge. In weighing the arguments, the Constitutional Division examined the right of victims to challenge any decision that might affect their constitutional and convention rights, including acquittals.

Relevant issues in the decision: crime victims; right to access to justice; due process; victim's right to challenge decisions; scope of cassation or judicial review following an acquittal.

4.3 *Judgment 01017-2000 (September 1, 2000)*. Petition for cassation, File No. 98-001287-0058-PE, Third Division, Supreme Court, September 1, 2000.

Petition for cassation brought by the defense of Carlos Luis Brenes Ortega against Judgment No. 414-99, handed down by the Trial Court of Cartago, finding him guilty of the offense of sexual abuse. The appeal was filed on the basis of the alleged unlawfulness of the judgment, which was alleged to have relied on evidence that was unlawfully included in the case. Specifically, it refers to the admission of the victim's identification of the defendant, which was offered by the Public Ministry as evidence not known at the time of filing.

Relevant issues in the decision: crime victims; constitutional principle of justice; right to access to justice; victims' rights in criminal proceedings; evidentiary material; evidence not known at the time of filing; proceedings to obtain additional evidence; obligation of judges in view of the rights of the parties.

4.4 *Judgment 04140-2003 (May 16, 2003)*. Unconstitutionality action, File No. 02-009657-0007-CO, Constitutional Division, Supreme Court, May 16, 2003.

Unconstitutionality action filed by Hermes Jiménez Madriz, challenging the decision of the Court of Criminal Cassation according to which a victim who is not a criminal complainant or

plaintiff claiming damages in a criminal case lacks standing to file a petition for cassation. The plaintiff alleged that the decision violated the rights to equality, non-discrimination, effective judicial protection, and due process—rights recognized both at the constitutional level and in different international treaties—to the extent that it prevents a victim who is not a plaintiff claiming damages in a criminal case from filing a petition for cassation.

Relevant issues in the decision: crime victims; constitutional principle of justice; right to access to justice; monopoly on criminal prosecution versus victims' rights; criminal indemnification action.

4.5 Judgment 01920-2004 (February 22, 2004). Petition for a constitutional remedy [amparo], File No. 03-011110-0007-CO, Constitutional Division, Supreme Court, February 22, 2004.

Petition for a constitutional remedy brought by Joseph Marigliano against the Office of the Public Prosecutor of Golfito. The petitioner in this case alleged that, even though he was the complainant and the party directly injured by the crime at issue in investigation File No. 02-000817-0455-PE, the relevant Prosecutor denied him access to that file. In its response, the Prosecutor's Office argued that, because he was not a party to the criminal case, the appellant could not have access to the case file.

Relevant issues in the decision: crime victims; constitutional principle of justice; victims' rights; distinction between victims' rights and the rights of the criminal complainant or civil party; effective participation of the victim; access to the case file.

5. EL SALVADOR

5.1 Consolidated constitutional cases 5/2001 (December 23, 2010). Unconstitutionality action 5-2001/10-2001/24-2001/25-2001/34-2002/40-2002/3-2003/10-2003/11-2003/12-2003/14-2003/16-2003/19-2003/22-2003/7-2004, Constitutional Division, Supreme Court, December 23, 2010.

Multiple unconstitutionality actions, filed separately by different citizens, challenging the constitutionality of several provisions of (i) the Criminal Code, (ii) the Code of Criminal Procedure, (iii) the Telecommunications Act, and (iv) the Penitentiary Act. Within the accumulated allegations or opinions regarding unconstitutionality asserted before the Constitutional Division, some of the plaintiffs argued that Articles 20, 21, 84, and 235 of the Code of Criminal Procedure violated the constitutional rights of victims.

In its judgment, the Constitutional Division examined the challenged articles and, in the case of victims' rights, returned to the respective constitutional and international framework. In particular, this judgment analyzed the scope of victims' rights as they relate to the constitutional and legal duties of the Office of the Prosecutor General of the Republic and the Judiciary.

Relevant issues in the decision: crime victims; victims' rights in criminal proceedings; international recognition of victims' rights; scope of the duties of prosecutorial and justice administration agencies as it relates to victims' rights.

5.2 *Judgment 665-2010 (February 5, 2014).* Petition for a constitutional remedy, File No. 665-2010, Constitutional Division, Supreme Court, February 5, 2014.

Petition for a constitutional remedy brought by a group of citizens challenging actions of the Prosecutor General, which they alleged to have violated their right to access to the courts, right to the truth, right to legal certainty, and right to petition, as well as the prohibition of undue delay. The facts on which the case is based concern the mass murder committed on July 25, 1981, in the community of San Francisco Angulo, Municipality of Tecoluca, Department of San Vicente.

In July 2005, at the request of some of the survivors of the massacre, proceedings were conducted to exhume the bodies of the murder victims. Shortly thereafter, these proceedings were ordered permanently suspended. On November 23, 2009, the petitioners' representative filed a complaint before the Office of the Prosecutor General of the Republic requesting that the Prosecutor General order the investigation of the aforementioned events. Nevertheless, and as alleged in the petition for a constitutional remedy, the petitioners have not obtained any response, in spite of having requested updated information on the proceedings conducted on the basis of the previously filed lawsuit.

Relevant issues in the decision: victims of human rights violations; right to access to justice; right to the truth; individual and collective aspects of the right to the truth; State duties with respect to victims' rights.

6. MEXICO

6.1 *Review of petition for a constitutional remedy 75/2009 (March 18, 2009).* Review of petition for a constitutional remedy 75/2009, delivered by J. José Ramón Cossío Díaz, First Division, Supreme Court, March 18, 2009.

Motion for review brought by the petitioners against the interlocutory judgment issued on March 7, 2008, by the Ninth District Judge for Civil Matters in the Federal District, in ordinary criminal indemnification action 121/2005-A. The challenged decision ruled partially admissible a motion for enforcement whereby the respondent in the criminal indemnification action, Compañía de Luz y Fuerza del Centro, was ordered to pay each one of the petitioners a specific sum as compensation for non-pecuniary damages.

In the corresponding civil trial, Compañía de Luz y Fuerza del Centro was ordered to pay non-pecuniary damages, but not on the basis of strict liability. In the motion for enforcement, the respective court additionally set the amount of the compensation in accordance with the maximum amount allowed by law. The petition for a constitutional remedy challenged the

constitutionality of the upper limit set by the legislature for non-pecuniary damages, alleging that it violates the principle of and right to equality. In its decision, the Supreme Court focused its constitutionality analysis on the right to reparation.

Relevant issues in the decision: victims of human rights violations; financial liability of the State; improper government acts; right to reparation; non-pecuniary damages; compensation; maximum amount of compensation; fiscal sustainability; balancing of constitutional rights and interests.

6.2 *Review of petition for a constitutional remedy 168/2011 (November 30, 2011).* Review of petition for a constitutional remedy 168/2011, delivered by J. Arturo Zaldívar Lelo de Larrea, First Division, Supreme Court, November 30, 2011.

Motion for review brought by the Mexican Commission for the Defense and Promotion of Human Rights [Comisión Mexicana de Defensa y Protección de los Derechos Humanos] and María Sirvent Bravo Ahuja, as well as by the Federal Institute for Access to Public Information [Instituto Federal de Acceso a la Información Pública] (IFAI), challenging the decision of the Fourth Judge for Administrative Matters in the Federal District to dismiss the petition for a constitutional remedy filed by the first two petitioners.

The case stemmed from a request for information filed by the Mexican Commission for the Defense and Promotion of Human Rights and María Sirvent Bravo Ahuja, in their capacity as representatives of Tita Radilla Martínez, asking the Office of the Attorney General (PGR) to provide a certified copy of all of the proceedings conducted in preliminary investigation SIEDF/CGI/454/2007 into the forced disappearance of Rosendo Radilla Pacheco.

In view of the refusal to turn over the information, the petitioners filed a motion for review before the IFAI, which was adjudicated in their favor. Accordingly, the Institute ordered the immediate disclosure of the requested information, given that it dealt with an investigation into human rights violations or international crimes. Following this decision, the PGR filed a motion to vacate and a summary constitutional appeal against the decision of the IFAI.

Relevant issues in the decision: victims of human rights violations; criminal proceedings; victims' rights; right to access the case file; right to access to information; public interest in investigations.

6.3 *Judgment 163/2012, settling a contradiction between inconsistent rulings (November 28, 2012).* Judgment 163/2012, settling a contradiction between inconsistent rulings, delivered by J. Guillermo I. Ortiz Mayagoitia, opinion written by J. Jorge Mario Pardo Rebolledo, Plenary Chamber, Supreme Court, November 28, 2012.

This petition alleged a contradiction between opinions rendered by the Fifth Three-Judge Court for Criminal Matters of the First Circuit, seated in the Federal District, and the Ninth Three-Judge Court for Criminal Matters of the First Circuit, also seated in the Federal District. According to the petition, the rulings at issue were the following: (i) *"Injured party. It is not a*

violation of the guarantee of equality for the principle of 'strict law' to be applied in a petition for a constitutional remedy" (non-binding opinion of the Fifth Court); and (ii) "*Court's authority to amend deficient pleadings with respect to violations or offenses against the victim or injured party in a petition for a constitutional remedy in a criminal matter. Operates in accordance with 'conventionality control' (inapplicability of Article 76 bis, clause ii, of the Amparo Act and Judgment 2. CXXXVII/2002 and 1./J. 26/2003)*" (decision of the Ninth Court).

In the abstract appeal for the standardization of judicial interpretation criteria, the judgments (non-binding and binding precedent) handed down by the courts in question are the subject of the inconsistency. The facts of the underlying cases that resulted in the contradictory interpretations are described, in general terms, in the judgment settling the contradiction.

Relevant issues in the decision: crime victims; access to justice; judicial protection; standing of the victim or injured party; Court's authority to amend deficient pleadings; cause of action; equality of rights; *pro persona* principle.

6.4 *Direct review of petition for a constitutional remedy 125/2012 (September 26, 2012).* Direct review of petition for a constitutional remedy 125/2012, delivered by J. Olga Sánchez Cordero de García Villegas, First Division, Supreme Court, September 26, 2012.

Motion for review challenging the decision of the First Three-Judge Court for Criminal Matters of the Second Circuit, denying the petition for a constitutional remedy filed by the mother of the victim (a minor child) against the August 8, 2011, judgment issued in the case against the defendant for the offense of statutory rape.⁷

According to the appellant's arguments, the First Three-Judge Court for Criminal Matters of the Second Circuit erroneously considered that the victim of a crime is legally authorized to file a petition for a constitutional remedy only against decisions that affect his or her right to obtain redress for the harm caused by the commission of a crime. According to this logic, maintained by the aforementioned Court, the crime victim or aggrieved party does not have standing to challenge the issues relating to the proof of the elements of the offense and its aggravating factors, nor those concerning proof of the defendant's guilt. The First Three-Judge Court for Criminal Matters of the Second Circuit concluded that to hold otherwise would entail granting the victim a kind of power comparable to the authority to prosecute.

In the petition for a constitutional remedy, the victim's mother asserted that the court of appeals improperly amended the lower court's judgment when it eliminated the aggravating factor of the offense of statutory rape on the grounds that it was committed by the victim's stepfather rather than by her father.

⁷ Under national provisions on the protection of personal data, the names and/or any other identifying information about the individuals involved in the respective cases are redacted in the published versions of the judgments of the Supreme Court of Mexico. Accordingly, the summary of this judgment can only make reference to the victim, the victim's mother, and the defendant.

Relevant issues in the decision: crime victims; right to access to justice; right to judicial protection; standing to act in the proceedings; effective exercise of human rights; international instruments on access to justice.

6.5 *Petition for a constitutional remedy II-810/2013 (March 11, 2014)*. Petition for a constitutional remedy II-810/2013, First District Court in the State of Guanajuato, March 11, 2014.

Petition for a constitutional remedy challenging the order of the Supervisory Judge of the Criminal Trial Court of the First Region to bind over the defendant for trial on charges of assault and battery and sexual abuse against the (now) petitioner.

According to the arguments set forth in the petition for a constitutional remedy, the trial court judge erred in classifying the offense, by failing to consider other offenses such as false imprisonment and attempted rape. Bearing in mind the constitutional and convention framework, the challenged order is a violation of the rights of access to justice, to truth, and to possible reparations.

Relevant issues in the decision: crime victims; victims' rights outside the proceedings; capacity of the victim in the proceedings; right to access to justice; right to the truth; *pro persona* principle.

7. PERU

7.1 *Extraordinary appeal 2488-2002-HC/TC (March 18, 2004)*. Extraordinary appeal, File No. 2488-2002-HC/TC, Constitutional Court, March 18, 2004.

Extraordinary appeal filed by María Emilia Villegas Namuche against the September 13, 2002, judgment of the First Criminal Division of Piura, which ruled the writ of habeas corpus filed by the appellant on behalf of her brother, Genaro Villegas Namuche, partially admissible. In the original writ of habeas corpus, Ms. Villegas Namuche alleged the violation of the rights to life, due process, self-defense, and personal liberty, and requested that the Peruvian State be ordered to return her brother alive or identify his remains, as well as to vacate the criminal conviction entered against him in a military court.

The facts that gave rise to this case concern the forced disappearance of Genaro Villegas Namuche, a student at the School of Mining Engineering at the National University of Piura, who, on October 2, 1992, left for work and was never seen again. Genaro Villegas was also convicted in absentia, in a military court, and sentenced to life in prison for the offense of treason. In view of the writ of habeas corpus in question, the Seventh Criminal Court of Piura vacated the conviction.

Relevant issues in the decision: victims of human rights violations; right to effective judicial protection; right to the truth; impunity; forced disappearance of persons; investigative habeas corpus.

7.2 *Unconstitutionality action 0024-2010-PI/TC (March 21, 2011)*. Unconstitutionality action, File No. 0024-2010-PI/TC, Plenary Chamber of the Constitutional Court, March 21, 2011.

Unconstitutionality action filed by 25 percent of the legal number of members of congress against Legislative Decree No. 1097, which expedited the entry into force of certain articles of the New Code of Criminal Procedure, with a view to establishing a uniform regulatory framework with respect to crimes involving human rights violations. The case alleges that the challenged provisions violate the principle of and right to equality by establishing disparate treatment that benefits only police officers and members of the military accused of human rights violations. To this extent, the plaintiffs allege that the legislative decree renders the victims of such violations defenseless and grants impunity and benefits to the perpetrators.

In response to the arguments put forward in the unconstitutionality action, the Office of the Public Prosecutor of the Executive Branch argued, *inter alia*, that the application of the legal concepts of dismissal and statutes of limitations contained in Legislative Decree No. 1097 were subject to clear judicial oversight, in addition to being compatible with the respective international treaties. In particular, the Office of the Public Prosecutor asserted that, in view of the corresponding interpretive declaration, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity should be understood to be applicable only to acts committed subsequent to its ratification, which is compatible with the provisions of the challenged decree.

Relevant issues in the decision: victims of human rights violations; international crimes; right to access to justice; right to the truth; State obligations; reasonable duration of a criminal case; non-applicability of statutes of limitations to international crimes.

8. VENEZUELA

8.1 *Judgment 418 (July 26, 2007)*. Petition for cassation, File No. C07-0185, delivered by J. Eladio Ramón Aponte Aponte, Criminal Cassation Division, Supreme Court, July 26, 2007.

Petition for cassation challenging the decision of the Court of Appeals of the Criminal Judicial Circuit of the Caracas Metropolitan Area, which dismissed the appeal filed against the July 6, 2005, decision of the Second Trial Court of the same Criminal Judicial Circuit. In this last decision, Daniel Alfonso Palma was convicted of the unlawful possession of a firearm and the murder of Cora Adriana Castellanos Mujica. According to the arguments made in the petition, the Court of Appeals erred in stating that the victim may participate in the trial under the same conditions as the other parties to the case, even without having met the procedural deadlines to act in the capacity of a criminal complainant. The High Court responded to these arguments with a broad construction of the concept of victims, as well as of the human rights of access to justice and due process.

Relevant issues in the decision: crime victims; right to access to justice; participation of victims in the case (trial); victims' rights in the proceedings.

OVERVIEW OF THE RIGHTS OF VICTIMS

D elving into the study of victims' rights from the perspective of national legal systems raises challenging issues that are difficult to cover in depth in a few brief paragraphs. Nevertheless, to provide a framework for the case law systematized in this Digest, this section sets forth some general considerations regarding the complex legal framework through which progress has been made in strengthening the recognition and protection of victims' rights, at both the national and international levels.

As a starting point, it is essential to recognize the procedural aspects that have characterized the judicial debate at the national level. Unlike other issues relating to the protection of the individual, victims' rights have been strongly affected by the institutional designs and procedures typical of the different legal systems—particularly the criminal justice and/or administrative systems. In practice, the resulting development has been somewhat uneven and divergent with respect to the field of victims' rights. Bearing in mind these considerations, the Latin American judicial opinions presented herein must also be understood in terms of a continuum that reflects varying degrees of complexity in the arguments put forward.

Beyond these particularities, which will be addressed in different sections of this Digest, it is fundamental to acknowledge the impact that—in different venues, contexts, and time periods—international law has had on the consolidation of victims' rights at the national level. On this point, we must underscore at least two central aspects of the international debate that have been especially relevant to the theme of this Digest. These are (i) the rights of victims of acts considered criminal offenses under national or international law (crime victims), and (ii) the rights of those persons who have suffered harm as a consequence of the breach of an obligation derived from international human rights or humanitarian law, even if that obligation is not recognized under domestic law (victims of human rights violations).

The 1980s were a watershed in the discussion of victims' rights at the international level. In 1985, the UN General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, a seminal instrument on the issue.⁸ Among its distinct features, the Declaration is based on an inclusive definition of the concept of victims, which encompasses persons who have individually or collectively suffered any type of harm or impairment of their rights as a result of the commission of an act that is punishable under the criminal law of the States, as well as the immediate family of “direct victims” or those who have suffered harm in intervening to assist the victim or prevent the victimization.⁹ Moreover, the

⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in Resolution 40/34 of November 29, 1985. For a detailed analysis of the substantive content of the Declaration, see, e.g., Jan J. M. Van Dijk, “Benchmarking Legislation on Crime Victims: The UN Victims Declaration of 1985,” in *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup*, ed. E. Vetere and P. David (New York: United Nations, 2005).

⁹ The Declaration begins by establishing that “Victims’ means persons who, individually or collectively,

Declaration includes specific parameters that should serve as the basis for the conceptualization of *victims of abuse of power*. According to this document, this term includes those persons who have suffered harm “through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.”¹⁰ Given this conceptual breadth, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power established an initial frame of reference for the discussion of the rights of both crime victims and victims of human rights violations.¹¹ Subsequent actions on the issue, particularly with respect to the rights of crime victims, have included, for example, the adoption of Resolution 1989/57 of the United Nations Economic and Social Council (UNESCO),¹² as well as a variety of actions undertaken by specialized bodies and agencies, including the United Nations Office on Drugs and Crime.

Essentially paralleling these developments in the universal system, the Council of Europe adopted several recommendations designed specifically to recognize and protect the rights of crime victims.¹³ Significantly, those measures were complemented by the European Parliament’s Resolution on Violence against Women, of June 11, 1986, and the European Convention on the Compensation of Victims of Violent Crimes, of November 24, 1983. The promotion and protection of the rights of crime victims has thus remained a central issue on the European legal and political agenda for more than three decades, and has been reflected in the adoption of new instruments, directives, and resolutions. Recent notable decisions include, for example, Resolution 2011/C 187/01 of the Council of the European Union, establishing a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, as well as Directive 2012/29/EU of the European Parliament and the Council of the European Union, establishing minimum standards on the rights, support, and protection of victims of crime.¹⁴

have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. [...] The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” Principles 1 and 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹⁰ Principle 18 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹¹ For a more detailed analysis of the content and operation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, see, e.g., Centre for International Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York: UNODC, 1999).

¹² UNESCO, *Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Resolution 1989/57, E/1989/89, May 24, 1989.

¹³ Those recommendations include, most notably: (i) Recommendation (85) 4, on violence in the family, adopted by the Committee of Ministers of the Council of Europe on March 26, 1985; (ii) Recommendation (85) 11, on the position of the victim in the framework of criminal law and procedure, adopted by the Committee of Ministers of the Council of Europe on June 28, 1985; and (iii) Recommendation (87) 21, on assistance to victims and the prevention of victimization, adopted by the Committee of Ministers of the Council of Europe on September 17, 1987.

¹⁴ The documents (resolutions, directives, recommendations) adopted by the different institutions of the European Union on the rights of victims, in particular the victims of crime, can be viewed at http://ec.europa.eu/justice/criminal/victims/index_en.htm.

From the American hemisphere, the most important contributions to the debate on the rights of crime victims have been made by the bodies of the inter-American human rights system (IAHRS), that is, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (hereafter, Inter-American Court). Although those bodies have subject matter jurisdiction solely over human rights violations, many of the opinions issued by them—particularly with respect to the rights to access to justice, due process, and the correlative State obligations—have been decisive for the recognition of the rights of crime victims in the context of national proceedings.

It is impossible to present a detailed inventory of all of the relevant judgments, reports, and recommendations produced by the mechanisms of the IAHRS in this brief introductory section. Nevertheless, the different sections of this Digest will make reference, to the extent possible, to the inter-American standards applicable to the analysis of the rights in question.

Beyond the progress we have discussed up to this point, it is essential to recognize that the international advances in the rights of crime victims have not been limited to the adoption of principles, guidelines, or opinions intended solely for application in national criminal proceedings. As these debates evolved at the national level, the recognition of those rights ended up being incorporated into the regulatory and institutional frameworks—now consolidated—of international criminal law. The Rome Statute of the International Criminal Court stands out clearly in this framework, along with its supplemental documents, which include different provisions establishing the rights of victims to (i) be the beneficiaries of protection measures; (ii) take part in the proceedings (although as participants rather than as parties); and (iii) obtain redress in the proceedings before the Court.¹⁵ The recognition of these “framework” rights also has significant implications with regard to the substantive, procedural, and organizational rules of the International Criminal Court (ICC), in addition to being the basis for an important judicial debate in this international forum. To the extent possible, reference will be made throughout this Digest to the legal framework applicable to ICC proceedings.

The intense development of the content and scope of the rights of crime victims, of course, does not mean that the international system has paid any less attention to the rights of victims of human rights violations. With the creation of the international and regional mechanisms for the protection of human rights, this issue, not surprisingly, has occupied a central place in the development of international law. During their decades of operation, the international proceedings on State responsibility for human rights violations have become a driving force for progress in the recognition of victims’ rights. In spite of their own limitations and shortcomings, those mechanisms have been able to propose innovative solutions, even in procedural terms,¹⁶

¹⁵ See Articles 68 (Protection of the victims and witnesses and their participation in the proceedings) and 75 (Reparations to victims) of the Rome Statute of the International Criminal Court. See also Articles 15 (Prosecutor), 19 (Challenges to the jurisdiction of the Court or the admissibility of a case), 43 (The Registry), 53 (Initiation of an investigation), 54 (Duties and powers of the Prosecutor with respect to investigations), 57 (Functions and powers of the Pre-Trial Chamber), 64 (Functions and powers of the Trial Chamber), 65 (Proceedings on an admission of guilt), 82 (Appeal against other decisions), and others, of the Rome Statute. As a complement to these provisions, see the Rules of Procedure and Evidence of the International Criminal Court, in particular Chapter 4, Section III, Articles 85–99.

¹⁶ The growing impact of victims and their representatives in cases involving international responsibility for human rights violations resulted in their full inclusion as (central) subjects of those mechanisms. In

that have sought to respond to the particularities of the experience (physical, emotional, social, political) of victims of human rights violations.

Specifically, within the framework of the IAHRS, solid doctrine and case law has been developed with respect to the substantive content of the rights to the truth, access to justice, and reparations, as well as the scope of the respective State obligations. Those criteria are not only aimed at national proceedings but also have direct applications in international litigation. In this respect, the Inter-American Court has developed a firm practice with regard to reparations for human rights violations¹⁷ as the natural and indispensable consequence of a determination of State responsibility.

Parallel to the evolution of the international systems of State responsibility, important international instruments have been adopted in the past decade that are designed to strengthen the position of the rights of victims of human rights violations at the national level. These include, notably, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joinet/Orentlicher Principles),¹⁸ as well as 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

this way, the procedural situation of the victim underwent a substantial change, as the victim's position as plaintiff in international law was consolidated. Nevertheless, the human rights mechanisms, including the IACHR and the Inter-American Court, continue to recognize the specific nature of proceedings concerning matters of human rights. This has led to the adoption and/or development of specific rules, for example, for the admission and weighing of evidence, as well as particular formulas for shifting the burden of proof. In addition to these developments, there is also the use of principles of legal interpretation that more appropriately reflect the nature of the human rights protection systems. All of the above has resulted in their recognition as "autonomous systems," characterized by their specialized secondary or procedural rules. See, e.g., UN General Assembly, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission, A/CN.4/L.682, April 13, 2006); and *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001).

¹⁷ The issue of reparations and the practice of the Inter-American Court will be examined in greater depth in other sections of this Digest. For a general overview of the topic, see, e.g., J. F. Calderón Gamboa, "La evolución de la 'reparación integral' en la jurisprudencia de la Corte Interamericana de Derechos Humanos," in *Derechos Humanos en la Constitución: Comentarios de jurisprudencia constitucional e interamericana*, vol. I, ed. E. Ferrer Mac-Gregor, J. L. Caballero Ochoa, and C. Steiner (Mexico: SCJN/IJ-UNAM/KAS, 2014), 145–219; B. Mayeux and J. Mirabal, *Collective and Moral Reparations in the Inter-American Court of Human Rights* (Human Rights Clinic, University of Texas School of Law, 2009); C. Grossman, et al., "Reparations in the Inter-American System: A Comparative Approach Conference," *American University Law Review* 56, no. 6 (2007): 1375; A. Carrillo, "Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past," in *The Handbook of Reparations*, ed. P. de Greiff (New York: Oxford University Press, 2006), pp. 504–38; D. Cassel, "The Expanding Scope and Impact of Reparation Awarded by the Inter-American Court of Human Rights," in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (Antwerpen: Intersentia, 2005), pp. 191–223).

¹⁸ UN Economic and Social Council, Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, addendum to the report of Diane Orentlicher, independent expert to update the set of principles to combat impunity (E/CN.4/2005/102/Add.1, February 8, 2005).

Humanitarian Law (Van Boven/Bassiouni Principles).¹⁹ With respect to the fight against impunity and the right to reparations, both instruments have contributed important criteria that must be incorporated into national systems.²⁰ The different sections of this Digest will specifically mention some of the criteria or standards recognized in these principles in instances where they help provide a better understanding of the scope of the specific rights.

This brief and cursory description of international developments in the area of victims' rights must not, however, lead us to think that we are facing a chaotic or poorly organized scene. Beyond the potential theoretical or practical interest in the distinction between the concepts of *victims of crime* and *victims of human rights violations*, it is important to recognize that the synergy created by these debates has led to the consolidation of some "framework rights" that have been established, with increasingly precise regulatory content, in specific spheres of protection. In other words, given the current status of the matter, it would be difficult to deny that victims (of criminal acts as well as of human rights violations) have the rights to protection, the truth, access to justice, and reparations. Nevertheless, this is not to say that there are not different spheres of protection—understood as "the legal limitations on the exercise of the right within its scope"²¹—that depend not only on the institutional or procedural designs of each jurisdiction but also on the inherent characteristics of the crimes or violations.²²

¹⁹ UN General Assembly, *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* (A/RES/60/147, March 21, 2006).

²⁰ Before presenting a more detailed analysis of the content of the Joinet/Orentlicher Principles and the Van Boven/Bassiouni Principles in other sections of the Digest, it is pertinent to briefly review the topics included in each of these instruments. In the former, the central focus of which is the fight against impunity, specific criteria are established to ensure free exercise of the rights to the truth, access to justice, and reparations. In this regard, the Joinet/Orentlicher Principles establish some minimum standards with respect to (i) the institutional conditions, terms of reference, and operation of truth commissions or commissions of inquiry; (ii) preservation of and access to archives; (iii) the distribution of jurisdiction between national, foreign, and international courts; (iv) the specific legal system responsible for the prosecution of serious violations or crimes in accordance with international law; (v) reparation procedures, and (vi) measures of non-repetition, as a specific form of reparation. For their part, the Van Boven/Bassiouni Principles, which focus on the right to access to justice and reparations for serious violations of human rights and international humanitarian law, place emphasis on (i) relevant State obligations, (ii) minimum conditions for access to justice, (iii) the scope of the right to comprehensive reparation, and (iv) forms of reparation. For a detailed study of each of these instruments, as well as background information, see, e.g., Comisión Colombiana de Juristas, *Principios internacionales sobre impunidad y reparaciones: Compilación de documentos de la Organización de las Naciones Unidas* (Bogotá, 2007).

²¹ A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, trans. Doron Kalir (Cambridge: Cambridge University Press, 2012), p. 19.

²² Without attempting to delve too deeply into such a complex issue, it is important to recognize that, indeed, there can be differences regarding the spheres of rights protection when crimes or violations reflect widespread or systematic acts. These characteristics trigger the application of a specific legal system that includes, for example, the non-applicability of statutes of limitations to legal actions, as well as the non-applicability of amnesties or pardons. In turn, that system has a specific impact on the rights of victims—not in terms of their regulatory content, but rather in terms of the respective sphere of application. For an example of this impact see, e.g., Section 3.5.2 in this Digest, *Right to the truth in relation to the non-applicability of statutes of limitations to international crimes*. A more complex debate concerns the classification of acts as "serious human rights violations." This term, introduced by the Inter-American

In the context of these broad debates, the examination of the judgments presented in this Digest is intended to be merely an introduction to the Latin American case law, meant to provide a better understanding of the way in which the national courts have approached the complex problems that characterize the judicial analysis of the rights of victims.

Court in decisions such as the judgment on the merits in the case of *Barrios Altos v. Peru*, also seems to trigger the application of a special judicial system, comparable to the one for international crimes. Notwithstanding its practical relevance, this concept has not been clearly conceptualized or defined. Consequently, the use of this qualifier may pose particular challenges for the authorities when they attempt to invoke it in national proceedings.

SECTION 1 VICTIMS' RIGHTS

1.1 LEGAL CONCEPT OF “VICTIMS”

As noted in the overview section of this Digest, the plurality of regulatory and institutional frameworks in which the principles and rules on victims' rights have been developed has resulted in, among other things, the creation of diverse and changing terminology, which has important substantive and procedural implications. Although the word “victim” has been a common element of both criminal law (national and international) and international human rights law, the content of that term can have significant differences, depending on the context in which it is used.

In the framework of international human rights law, the Inter-American Court has developed a body of case law that is of particular interest. Initially, this Court seemed to follow a more traditional view of the concept of “victim,” taking account only of those individual persons who had suffered a direct harm arising from an act attributable to a State that violated an international human rights obligation. Nevertheless, the Inter-American Court itself recognized, in its early decisions, that the violating conduct could also affect the relatives of and persons directly linked to those who suffered the harm directly. This legal foundation led to the consolidation of a more complex typology, in which a distinction was drawn between the concepts of “direct victims” and “indirect victims” of human rights violations. Accordingly, this latter category encompassed persons who, without having suffered the direct harm caused by the violation, have felt its effects.²³ In this same conceptual framework, indirect victims could also be considered beneficiaries or assignees of the reparations ordered by the Inter-American Court on behalf of the direct victims in cases where those direct victims have died.

Beyond the didactic interest of this typology, it is important to recognize the impact that broadening the concept of “harm” had on the legal classification of victims. Once the Inter-American Court admitted that harm should be understood to include not only the physical consequences but also the psychological, moral, and emotional repercussions of the violation, the category of “direct victims” underwent a necessary expansion. Therefore, beginning with relatively early judgments such as those in the cases of *Blake v. Guatemala* or *Villagrán Morales et al. v. Guatemala*, the relatives of the executed persons were also considered to be direct victims of violations of the rights to humane treatment, judicial protection, and due process, among others.

²³ See, e.g., the concurring opinions of Judges Antônio Cançado Trindade and Sergio García Ramírez in the Inter-American Court judgment in the case of *Bámaca Velásquez v. Guatemala*, Merits, Judgment of November 25, 2000, Series C, No. 75.

On the other side of the debate, that is, in national and international criminal courts, a unique typology has also been developed, which has significant consequences for the discussion of both substantive and procedural rights. From the domestic law perspective, most Latin American countries have incorporated into their procedural laws a variety of concepts of “victim,” “injured party,” or “aggrieved party” [*víctima*, *ofendido*, or *perjudicado*]. Without addressing at length the complex theoretical and practical implications that arise from this typology, we can affirm that, in general terms, the term “victim” (strictly speaking) refers to those persons against whom the act legally defined as a crime is perpetrated, or who have experienced the direct harm resulting from that act. The “injured party” is the person (individual or legal entity) who, regardless of having suffered or not suffered the direct harm, feels the legal consequences of the unlawful act, which is the trigger for the legal interest protected by the criminal laws. In some jurisdictions, such as in Colombia, the concept of “aggrieved party” is also included and is understood as referring to those persons “who have suffered a harm, even if not financial, as a direct consequence of the commission of the crime.”²⁴

To these terms we must also add each jurisdiction’s specific nomenclature for the legal institutions that recognize a procedural status specific to persons (natural persons or even legal persons) seeking to represent their own interests in a criminal proceeding. The terms corresponding to those institutions include, for example, “plaintiff claiming damages in a criminal case,” “private prosecutor,” or “assistant.”²⁵ It bears noting that, as evidenced in the judgments systematized in this Digest, the procedural rights corresponding to each of these concepts may vary significantly, depending on the relevant national laws. In any case, there is a trend, which can be inferred from the different Latin American decisions, toward recognizing that the victims of criminal acts are entitled to certain substantive and procedural rights, even if they are not formally participants or parties to the proceedings.²⁶

As a natural complement to the aforementioned debates, it is important to refer briefly to the status of the issue under international criminal law.²⁷ In this framework, the Rules of Procedure and Evidence of the International Criminal Court unquestionably stand out.²⁸

²⁴ See Constitutional Court of Colombia, Judgment C-228/02, opinion delivered by J. Manuel José Cepeda Espinosa and Eduardo Montealegre Lynett, April 2, 2002. Different portions of this judgment have been systematized and included in different sections of this Digest, as it is a seminal case for the discussion of the rights of crime victims in Colombia.

²⁵ For a comparative European perspective on the position of victims in criminal proceedings, as well as the respective procedural laws, see, e.g., M. E. Ingeborg Brienen and E. H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Nijmegen, Netherlands: Wolf Legal Productions, 2000).

²⁶ Some examples of these criteria are provided in Section 4.5 of this Digest, *Specific rights of victims in criminal cases*.

²⁷ For a more detailed review of the principles and rules governing the participation of victims within the framework of international criminal law, see, e.g., P. Vega González, “El papel de las víctimas en procedimientos internacionales,” in *Perspectiva iberoamericana sobre la justicia penal internacional*, vol. I, ed. H. Olásolo Alonso and S. Cuenca Curbelo (Valencia: Tirant lo Blanch, 2012), pp. 187–209.

²⁸ The Rules of Procedure and Evidence of the International Criminal Court are an instrument for the application of the Rome Statute, to which they are always subject. These rules were adopted by the Assembly of States

They establish that, for purposes of proceedings before the ICC, the term “victims” may include “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,”²⁹ as well as “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”³⁰ Without question, the definitions included in these rules must be examined in light of the opinions issued by the Chambers of the ICC with respect to the scope of the rights (particularly the right to participation) recognized in the provisions governing the proceedings before the ICC.³¹ This point will be discussed further in the section on the right to access to justice.

VENEZUELA, *Judgment 418 (July 26, 2007) (List of judgments 8)*. According to the United Nations definition, victims shall be understood as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States. [...]

On this point, the Criminal Cassation Division has stated that “... *It follows from the analysis of Articles 19, 26, and 30 of the Constitution of the Bolivarian Republic of Venezuela and Articles 23, 118, 119, and 120 of the Organic Code of Criminal Procedure, that there are substantive and procedural guarantees within the requirements of due process that recognize the victim as that person who, because of a criminal act, has been physically, psychologically, or economically harmed, and who participates in a case against the alleged perpetrator of the act, in order to mitigate or obtain redress for the harm suffered*” [*italics in the original*].

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. The plaintiffs allege that the challenged provisions establish a restriction by limiting the right to be recognized as victims for purposes of the Law in question to relatives in the first degree of consanguinity. In examining the challenged language, starting with the entire clause in which it is contained, the Court finds that it establishes a presumption in favor of persons related to the victim in the first degree of consanguinity and in the first degree by marriage. Indeed, those clauses begin with the

Parties to the ICC at its first session, in September 2002, under Resolution ICC-ASP/1/3 and Corr. 1.

²⁹ See Rule 85.a of the Rules of Procedure and Evidence of the International Criminal Court.

³⁰ See Rule 85.b of the Rules of Procedure and Evidence of the International Criminal Court.

³¹ For some judicial opinions on the scope of the rights of victims in proceedings before the ICC, see, e.g., International Criminal Court, Appeals Chamber, *Judgment on victim participation in the investigation stage of the proceedings*, ICC-01/04 OA4 OA5 OA6, Situation in the Democratic Republic of the Congo, December 19, 2008. For a scholarly approach to the rights of victims before the International Criminal Court, see, e.g., T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (New York: Oxford University Press, 2010); J. A. Wemmers, “Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims,” *International Review of Victimology* 16, no. 2 (2009): 211–27; M. Cherif Bassiouni, “International Recognition of Victims' Rights,” *Human Rights Law Review* 6, no. 2 (2006): 203–79; M. Cohen, “Victims' Participation Rights within the International Criminal Court: A Critical Overview,” *Denver Journal of International Law and Policy* 37, no. 3 (2009): 351–78.

words “will also be considered a victim” or “likewise.” The issue thus lies in determining whether those provisions can lead to the exclusion from recognized victim status of other relatives (such as siblings, grandparents, or grandchildren) who may have suffered harm as a consequence of any crimes committed by members of unlawful armed groups that decide to submit to the Law under examination.

As mentioned in an earlier section of this decision, all persons who may have been victims of a crime have the right to an effective remedy to request that the State guarantee their rights to the truth, justice, and reparation [*footnote omitted*]. The arbitrary limitation of the group of individuals with the capacity to go before judicial authorities for the satisfaction of their rights constitutes a violation of the rights of access to justice, due process, and an effective judicial remedy, enshrined in Articles 1, 2, 29, and 229 of the Constitution and Articles 8 and 25 of the American Convention on Human Rights.

International human rights law recognizes that the relatives of victims of human rights violations, such as, for example, the crime of forced disappearance, have the right to be considered victims for all legal, constitutional, and convention purposes. Furthermore, Protocol I [Additional to the Geneva Conventions] recognizes the “right of families to know the fate of their relatives” [*footnote omitted*], which does not refer only to the possibility of obtaining financial compensation [*footnote omitted*]. At the same time, Article 79 of the [Rome] Statute of the International Criminal Court provides that “A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”

The Constitutional Court and the Inter-American Court of Human Rights have held that victims or injured parties include, among others, direct victims and their relatives, without distinction as to the degree of relationship or kinship, at least for purposes of recognizing their status as crime victims. [...]

To cite a few additional cases, in the Judgment of March 14, 2001 [in the case of *Barrios Altos v. Peru*], the Court recognized the right of the relatives—without distinction as to the degree of kinship—to know the truth about the human rights violations, as well as their right to reparation for those violations. [...] The authorized interpreter of the American Convention on Human Rights—Articles 8 and 25 of which are part of our body of constitutional law—has held that relatives, without distinction, who can demonstrate harm are entitled to an effective remedy to demand the satisfaction of their rights to the truth, justice, and reparation.

For its part, the Constitutional Court has held that any person who has suffered a real, concrete, and specific harm should be considered a crime victim or injured party, regardless of the nature of the harm or the crime that caused it. The Court underscores that the presumptions established in clauses 2 and 5 of Article 5 include the defining elements of certain crimes. Thus, clause 2 indicates that the status of victim-relative is established when the “direct victim” “has been killed or disappeared.” In other words, the relatives to the degree stated therein will be considered victims only under such circumstances. This could be interpreted to mean that relatives, even to the first degree as stated in the provision, are not considered victims if a relative has not been killed or disappeared. This interpretation would be unconstitutional in that it excessively limits the concept of victim to the point of excluding from that status, and therefore, from the enjoyment of the constitutional rights to which victims are entitled, the relatives

of kidnap victims, those who have sustained serious injuries, victims of torture, involuntarily displaced persons—in short, many relatives of direct victims of crimes other than those whose elements require proof of death or disappearance. This exclusion is particularly onerous in cases where the crime is against entire families, as in the case of involuntary displacement, or where the direct victim, being alive or present, has suffered psychological harm such that he or she is unable to assert his or her own rights, as can happen in a case like torture. Victims who demonstrate that they have suffered a real, concrete, and specific harm, as well as their relatives who meet the respective evidentiary requirements, can exercise their rights.

In this respect, it would adversely affect the rights to equality, due process, and access to justice for the legislature to consider only one group of relatives to be crime victims, and only for certain offenses, without taking account of the fact that in many cases the degree of consanguinity is not the most important factor in determining the magnitude of the harm, and death or disappearance are not the only relevant circumstances in identifying the victims of unlawful armed groups.

On this point, the above-cited judgment held:

There must be real, concrete, and specific harm, not necessarily of a financial nature, that justifies the participation of the victim or injured parties in the criminal case for purposes of seeking truth and justice, which must be assessed by the judicial authorities in each case. Once it has been established that the person is a victim, or in general that the person has suffered a real, concrete, and specific harm, regardless of its nature, he or she has standing as a plaintiff claiming damages in a criminal case, and can focus his or her claim exclusively on obtaining justice and seeking the truth, setting aside any financial objective. Furthermore, even when the financial harm is compensated, when it exists, if the person has an interest in truth and justice, he or she can remain in the proceedings in the capacity of a party to the case. This means that the only indispensable procedural requirement to take part in the case is to prove the specific harm, without the requirement that there be a claim for financial reparation. The determination in each case of who has the legitimate interest in participating in the criminal proceedings also depends on other criteria, and not only on the existence of a quantifiable financial loss. These criteria include the legal interest protected by the provision that defined the crime, the harm to that interest by the crime, and the harm suffered by the person or persons affected by the crime.

In short, according to the constitutional law, interpreted in light of the standards of constitutionality, the relatives of persons who have suffered direct violations of their human rights are entitled to appear before the authorities—assuming they can demonstrate real, concrete, and specific harm suffered as a result of the criminal activity—in order to request that their rights be guaranteed. This does not mean that the State is required to presume harm with respect to all of the relatives of the direct victim. Nor does it mean that all relatives have exactly the same rights. What does nevertheless arise from the above-cited standards and case law is that the law cannot prevent the relatives of a victim of a human rights violation from accessing the authorities responsible for investigating, prosecuting, and convicting the perpetrator and redressing the violation.

1.2 LEGAL AND POLICY RATIONALE FOR VICTIMS' RIGHTS

In the general framework of discussion on victims' rights, it is important to specify that the extracts of the two judgments transcribed immediately below pertain, in both cases, to the debate surrounding the legal and policy rationale for those rights in the context of criminal proceedings. In other words, the following opinions, issued by Latin American courts, must be more specifically linked to the way in which the national courts have begun to (re)conceive of the objective of the criminal justice system, in direct relationship to the (re)inclusion of crime victims therein.

This approach is not insignificant when examined in light of a more traditional view on criminal proceedings. Assuming the risk involved in any generalization, we can say that in more traditional discourse the purpose of criminal proceedings has generally been identified with the search for objective truth—as a condition or prerequisite for establishing the defendant's guilt or innocence—as well as with the social need to prevent or deter crime. As stated in the above paragraphs, the judgments presented in this section provide an innovative perspective on these debates by interpreting the criminal proceedings as an instrument to resolve social conflicts (by nonviolent means) and foster peaceful coexistence, linked to the duty to “cooperate for the sound administration of justice” (Colombian Constitution, Article 95(7)).

COSTA RICA, *Judgment 7497-98 (October 21, 1998) (List of judgments 4.2)*. It must not be overlooked that victims' rights were one of the aims of the criminal procedure reforms that led to the 1996 Code. Provisions such as Articles 7, 16, 70, and 71 evidence the trend toward the resurgence of the victim, *closely tied to the notion of the criminal process as an instrument to resolve social conflicts* in which the victim is, indeed, one of the protagonists [*emphasis added*].

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. There is a worldwide trend that is also reflected at the national level in our Constitution, whereby the victim or party injured by a crime (whether completed or attempted) not only has the right to financial reparation of the resulting damages but also has the right to have the truth established and justice served through criminal proceedings. This trend is apparent both in the text of the Constitution and in international and comparative law. [...]

In a society based on the rule of law and in a participatory democracy (Constitution, Article 1), the rights of crime victims are constitutionally relevant. Therefore, the framers of the Constitution gave constitutional status to the legal concept of victim. [...]

As a result of Article 2 of the Constitution, when the authorities in general—and court authorities in particular—conduct the necessary investigations and proceedings to establish the facts surrounding criminal acts, they must promote the effective enjoyment of the rights of all residents of Colombia and safeguard the legally protected interests that are particularly important to society. This protection refers not only to the pecuniary reparation of harm caused by the crime but also to the comprehensive protection of citizens' rights.

The right of victims to participate in criminal proceedings is linked to respect for human dignity. According to Article 1 of the Constitution, which states that “Colombia is a society

based on the rule of law, founded on respect for human dignity,” the victims or parties injured by a criminal act may demand treatment from others in accordance with their human condition. It would be a serious violation of the dignity of victims and parties injured by crimes if the only protection afforded to them was the opportunity to obtain financial reparations. The principle of dignity prevents individuals, and the rights and interests legally protected under the criminal law to promote the peaceful coexistence of equally free and responsible persons, from being reduced to an economic appraisal of their value. The recognition of compensation for the damages stemming from a crime is one of the solutions that the legislature has opted for in view of the difficulty of attaining under criminal law the full restoration of the rights and legally protected interests violated as the result of a crime. But it is not the only alternative, much less the one that fully protects the intrinsic value of every human being. On the contrary, the principle of dignity keeps the protection of crime victims and injured parties from being exclusively financial in nature [*footnote omitted*].

This is also seen in the conception and operation of judicial mechanisms for the protection of the rights enshrined in the Constitution, such as the writ for the protection of constitutional rights, compliance actions, and public interest actions, among others. The purpose of these mechanisms is to ensure the effective guarantee of the dignity and rights of individuals, and therefore they are not primarily oriented toward seeking financial reparations. [...]

The right of victims to participate in criminal proceedings in order to obtain the restoration of their rights is also based on the constitutional principle of participation (Constitution, Article 2), according to which individuals can take part in the decisions that affect them [*footnote omitted*]. However, this participation must be in accordance with the rules of participation for plaintiffs claiming damages in a criminal case, without the victim or injured party taking the place of the Office of the Public Prosecutor or the Judge in the performance of their constitutional duties, and without the victims' participation turning the criminal case into an instrument of retaliation or revenge against the defendant. [...]

In addition, the reduction of the rights of victims and injured parties to an interest in financial redress ignores other constitutional standards that establish fundamental principles and duties closely related to the restoration of those rights. The principle of “ensuring peaceful coexistence” (Constitution, Article 2) demands that the State provide mechanisms to prevent the violent resolution of conflicts, and the principle of guaranteeing “the enforcement of a just order” (Constitution, Article 2), makes it necessary to take measures to combat impunity. As for the duties, the duty to “cooperate for the sound administration of justice” (Constitution, Article 95(7)), means that individuals should work together for the attainment of prompt and reliable justice, but not only in order to receive a financial benefit.

It follows from the above that the constitutional notion of the rights of crime victims and injured parties is not limited to pecuniary reparation. It is broader. It includes demanding that the authorities and the judicial instruments developed by the legislature to attain the effective enjoyment of rights be oriented toward comprehensive restoration—and that is possible only if the victims and parties injured by crimes are guaranteed, at a minimum, their rights to truth, justice, and financial reparation of the harm suffered.

In international law, as well as in comparative law and in our body of constitutional law, the rights of crime victims and injured parties are broadly envisaged—not limited exclusively

to financial reparation—and are based, *inter alia*, on their rights to be treated with dignity, to participate in the decisions that affect them, and to obtain effective judicial protection of the real enjoyment of their rights. This concept requires the authorities to direct their actions toward the comprehensive restoration of victims’ rights when they have been violated by a criminal act, which is possible only if the victims and parties injured by crimes are guaranteed, at a minimum, their rights to truth, justice, and financial reparation of the harm suffered.

1.3 LEGAL RECOGNITION OF VICTIMS’ RIGHTS IN DOMESTIC LAW

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. Article 229 of the Constitution guarantees “The right of any person to have access to the administration of justice.”³² [...]

The rights of victims to take part in criminal proceedings to obtain the restoration of their rights also has a constitutional basis in the principle of participation (Constitution, Article 2), according to which individuals may take part in the decisions that affect them [*footnote omitted*].³³

Finally, the rights to the truth, justice, and financial reparation to which crime victims are entitled may have a constitutional basis in other rights, especially the right to one’s good reputation and honor (Constitution, Articles 1, 15, and 21). Criminal proceedings may be the only opportunity for victims and injured parties to be able to refute versions of the events that may be manifestly harmful to those constitutional rights, such as when statements are made during the criminal proceedings that could adversely affect the honor or reputation of the victims or injured parties [*footnote omitted*].

[In short], crime victims and injured parties have other interests besides mere financial reparation. Some of their interests have been protected by the 1991 Constitution and can be translated into three rights that are relevant to the examination of the provision challenged in this case:

1. The right to the truth, that is, the opportunity to know what happened and to seek to reconcile the procedural truth and the actual truth. This right is particularly important in view of serious human rights violations [*footnote omitted*].
2. The right to see justice served in the specific case, that is, the right to have crimes not go unpunished.
3. The right to obtain redress for the harm by means of financial compensation, which is the traditional form in which reparations have been made to crime victims [*footnote omitted*].³⁴

³² Editors’ note: The complete argument regarding the regulatory content of Article 229 of the Constitution of Colombia is addressed in Section 4 of this Digest, *Right to access to justice*.

³³ Editors’ note: The complete argument on the “participation principle” as a constitutional basis for the participation of victims in criminal proceedings is addressed in Section 1.2 of this Digest, *Legal and policy rationale for victims’ rights*.

³⁴ Editors’ note: Decisions subsequent to Judgment C-228 of 2002 have specified, defined, and developed the scope of the rights of crime victims, including Judgments C-578 of 2002, C-580 of 2002, C-875 of

MEXICO, *Judgment 163/2012, settling a contradiction between inconsistent rulings (November 28, 2012) (List of judgments 6.3)*. The decree amending Article 20 of the Federal Constitution was published in the Official Gazette of Mexico on September 3, 1993. At that time, the objective of the amendment was to respond to public complaints regarding impunity and the effects of crime on the victim. This last reason was the factor that triggered the filing of legal actions that would enable victims or injured parties to participate at different stages of criminal proceedings as a means of compensation for the effects of the criminal act.

The constitutional amendment resulted in the recognition of several rights of crime victims or injured parties, which essentially enabled them to have a greater presence at the different stages of criminal proceedings [*footnote omitted*]. [...]

Although this advance was significant from the perspective of victims' rights, it was in fact insufficient to meet the intended aim of granting victims the opportunity to fully exercise their rights at the various stages of criminal proceedings. Once the federal legislature acknowledged this circumstance, it undertook the process to amend Article 20 of the Federal Constitution of 2000 in order to clarify the provision by introducing a specific precautionary section on the rights of crime victims or injured parties and extending the guarantees that must be established for their benefit. The intent was for them to have a real opportunity to fully exercise their rights, both at the preliminary investigation phase and during the criminal proceedings [*footnote omitted*].

This First Division has found that section B of Article 20 of the Federal Constitution, added by the 2000 amendment, recognizes that the victim or party injured by the crime is entitled to specific rights. The scope of the amendment, according to its legislative history, was to constitutionally recognize the victim as a "party" at the different stages of the criminal proceedings, with a view to ensuring his or her effective, active participation.

EL SALVADOR, *Consolidated constitutional cases 5/2001 (December 23, 2010) (List of judgments 5.1)*. We cannot overlook the development of victimology as a new discipline of the criminal sciences and the adoption of international instruments such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN, 1985), as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of

2002, C-004 of 2003, C-228 of 2003, C-570 of 2003, C-775 of 2003, C-899 of 2003, C-014 of 2004, C-114 of 2004, C-591 of 2005, C-979 of 2005, C-1154 of 2005, C-047 of 2006, C-454 of 2006, C-209 of 2007, C-516 of 2007, C-144 of 2010, C-260 of 2011, and SU-254/2013. In these and other judgments, the Constitutional Court has developed the scope of each of the rights of crime victims. The subsequent judgments have broadened and developed the elements of the right to reparation in order to harmonize them with international human rights law. Thus, for example, Judgment C-454 of 2006 established that the right to reparation, "in accordance with modern international law, also presents both individual and collective aspects. In its individual dimension, it covers all damages sustained by the victim and includes the adoption of individual measures relating to the rights to (i) restitution, (ii) compensation, (iii) rehabilitation, (iv) satisfaction, and (v) guarantees of non-repetition. In its collective aspect, it involves measures of satisfaction that are general in scope, such as the adoption of measures designed to restore, compensate, and rehabilitate the rights of groups or communities directly affected by the violations. The comprehensive nature of the reparation involves taking all necessary measures to erase the effects of the violations committed, and to return the victim to the situation he or she was in prior to the violation."

Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN, 2005).

From this new perspective, both Criminal Law and Criminal Procedure have undergone various transformations and enabled the victim to enter new legal scenarios, including: (a) participation throughout the criminal proceedings and at the criminal enforcement stage; (b) the inclusion of the substantive rights of victims; (c) the regulation of the criminal complainant and the extension of the grounds for complaint, in order to claim their autonomous character or lessen the secondary nature of their participation in the event that the criminal action is converted [from a public action to a private action]; (d) conciliation with respect to the special proceedings for crimes that can only be prosecuted at the victim's request; (e) the promotion of reparation agreements in the case of some crimes subject to public prosecution; and (f) the enumeration of a catalog of duties that both the criminal justice system and criminal defendants must take into consideration in their interactions with victims.

In view of the above, we can speak nowadays of a criminal policy principle that is related to the autonomy of the victim and that constitutes a new structural guideline that informs modern criminal prosecution systems, especially the system of criminal procedure that is still in force.

This guideline is clearly anchored in the Constitution, insofar as a person who has suffered the infringement or loss of a fundamental or instrumental legally protected interest provided for in the Constitution has the right to access the courts, not only in order to have his or her claim heard and decided by a third party but also to receive judicial assistance and protection when his or her physical and moral integrity, as well that of his or her family, is at risk—before, during, and after the criminal case.

COSTA RICA, *Judgment 01920-2004 (February 22, 2004) (List of judgments 4.5)*. When the new Code of Criminal Procedure entered into force in 1998, it granted victims several powers to participate in criminal proceedings. Article 71(a) of the Code grants victims the right to take part in the proceedings, and 71(b) enables them to appeal a dismissal or final ruling in favor of the defendant. Specifically, Article 282 of the Code of Criminal Procedure stipulates that the dismissal can be appealed by the victim, the criminal complainant, the plaintiff claiming damages in a criminal case, or the Public Ministry. In addition, the victim can object before the court handling the preliminary proceedings to the Public Ministry's decision to shelve the proceedings, and he or she can appeal a final ruling for the defendant issued at the preliminary or intermediate stages, as provided in Articles 298 and 315, respectively, of the Code of Criminal Procedure. In other spheres, it is incumbent upon the victim to monitor the proceedings of the Public Ministry through various petitions, as well as by requesting that it file motions to challenge the rulings contrary to the victim's interests, as prescribed in Article 426 of the Code of Criminal Procedure [*footnote omitted*]. The victim is entitled to these rights, which do not depend upon the victim's status as a criminal complainant or plaintiff claiming damages in a criminal case; in other words, the victim is not required to be a party to the case, as is required for other types of procedural actions, such as the ability to file petitions for cassation [*footnote omitted*]. It is beyond question that none of the powers that pertain to the victim as such—specified at the beginning of this conclusion of law—can be exercised effectively if the victim

is denied prior access to the respective court file. On this point, the following decision of the Court is quite instructive:

“...the Court finds that the rights of the victim as a person directly affected by the criminal act must also be taken into account. Modern criminal procedure allows for the ever-increasing participation of the person harmed by the crime and asserts his or her rights, without going so far as to effect deregulation or break the State monopoly on criminal prosecution. The main objective of the victim’s participation in the case, whether directly or through another person who defends his or her rights and interests, is for the process to accomplish one of its essential aims: the effective compensation of the injured party. We must not lose sight of the fact that the crime creates an interpersonal conflict that must be resolved, although technically we refer only to the harm to the legally protected interests.” [italics in the original]

MEXICO, *Petition for a constitutional remedy II-810/2013 (March 11, 2014) (List of judgments 6.5)*. According to various criteria (cited below) established by the Supreme Court, as well as by the Three-Judge Circuit Courts, concerning the new paradigm in the criminal law and in the petition for a constitutional remedy [*amparo*], the fundamental rights of the crime victim or injured party and, if appropriate, the petitioner in an *amparo* proceeding are an essential condition of the equality of the parties to the criminal case or the constitutional proceeding; this is reflected in the final part of the above-cited Article 5(I) of the respective law, which expressly establishes: *“The crime victim or injured party may be a petitioner in an amparo proceeding under this Law.”*

The above also finds support in the systematic and teleological interpretation of Articles 1, 17, and 20(C) of the Constitution of the United Mexican States, in relation to Articles 4,³⁵ 7(III), (VII), (XXII), (XXIV), and (XXIX),³⁶ 10,³⁷ 18,³⁸ and 19³⁹ of the General Victims Act.

As stated in the above-cited articles, the victim is that person who has suffered an economic, physical, mental, or emotional harm or loss or, in general, any risk or impairment to his or her legally protected interests or rights, as a consequence of the commission of a crime or violations of his or her human rights recognized in the Constitution and in international treaties. The

³⁵ Editors' note: Article 4 of the General Victims Act (Mexico): "Direct victims are those persons who have suffered an economic, physical, mental, or emotional harm or loss or, in general, any risk or impairment to their legally protected interests or rights as a consequence of the commission of a crime or violations of their human rights recognized in the Constitution and in international treaties to which Mexico is a State Party. Indirect victims are the relatives or immediate dependents of the direct victim. Potential victims are persons whose physical safety or rights are at risk because they have provided assistance to the victim, either by preventing or stopping the violation of rights or the commission of a crime. The status of victim is acquired by proving the harm or loss of rights in the terms established in this Act, regardless of whether the person responsible for the harm is identified, apprehended, or convicted, or whether the victim participates in any judicial or administrative proceedings. Victims also include groups, communities, or social organizations whose collective rights or legally protected interests have been adversely affected as the result of the commission of a crime or a violation of rights."

³⁶ Editors' note: Article 7 of the General Victims Act (Mexico): "The victims' rights provided for in this Act are without limitation, and must be interpreted in accordance with the provisions of the Constitution, the applicable treaties, and laws concerning victim services, at all times favoring the broadest protection of their rights. Victims shall have, *inter alia*, the following rights:

[...] III. To know the truth surrounding the events in which their human rights were violated, for which the authorities must disclose the results of their investigations; [...] VII. To truth, justice, and comprehensive reparations through accessible, appropriate, sufficient, prompt, and effective remedies and proceedings; [...] XXII. To not be subject to discrimination or the curtailment of their rights; [...] XXIV. To access the available judicial mechanisms to determine responsibility for the commission of the crime or the human rights violation; [...] XXIX. The right to avail themselves of legal remedies to challenge decisions that affect their rights and interests [...]."

³⁷ Editors' note: Article 10 of the General Victims Act (Mexico): "Victims have the right to an adequate and effective judicial remedy before competent, impartial, and independent authorities, who guarantee them the exercise of their right to know the truth; to an immediate and exhaustive investigation, conducted with due diligence, into the crime or the human rights violations committed against them; to have the perpetrators of the crime or human rights violations be prosecuted and punished, with respect for due process; and to obtain comprehensive reparations for the harm suffered. Victims shall have access to the mechanisms of justice available to the State, including judicial and administrative proceedings. The respective laws regulating their role in the different proceedings shall facilitate their participation."

³⁸ Editors' note: Article 18 of the General Victims Act (Mexico): "Victims and society in general have the right to know about the acts that constitute the crime or the human rights violations perpetrated against them, the identity of the perpetrators, the circumstances of their commission, and to have access to justice under conditions of equality."

³⁹ Editors' note: Article 19 of the General Victims Act (Mexico): "Victims have the right, not subject to any statute of limitations, to know the truth and to receive specific information about the rights violations or the crimes that affected them directly, including the circumstances in which the events took place and, in the case of disappeared, absent, unreachable, missing, or deceased persons, to know their fate or whereabouts, or the whereabouts of their remains. Every victim who has been reported as disappeared has the right to have the competent authorities effectively and urgently take actions to locate them and, where appropriate, rescue them in a timely manner."

definition of “victim” can also even include a group of persons whose collective rights or legally protected interests have been adversely affected as the result of a crime or a violation of rights.

As such, **victims** have the following rights, among others:

- a) To know the truth regarding the events in which their human rights were violated, for which the authorities must disclose the results of their investigations;
- b) To truth, justice, and comprehensive reparations of the damages caused, through accessible, appropriate, sufficient, prompt, and effective remedies and proceedings;
- c) To not be subject to discrimination or the curtailment of their rights;
- d) To access the available judicial mechanisms to determine responsibility for the commission of the crime or the human rights violation;
- e) To avail themselves of legal remedies to challenge decisions that affect their rights and interests;
- f) To an adequate and effective judicial remedy.

In short, **victims** are entitled to know about the acts that constitute the crime, the identity of the perpetrators, and the circumstances of its commission, and to have access to justice under conditions of equality.

As a complement to the legal recognition of victims' rights, the national courts have turned to the specialized doctrine on the subject in order to propose a more precise typology or taxonomy with respect to the nature, categories, and scope of the substantive and procedural rights of victims (in a broad sense). These conceptual guides, developed from the doctrine, have been useful in creating a conceptual framework for a more comprehensive analysis of multiple principles and rules. On this point, see, for example, the extracts of the judgments of the Supreme Court of Costa Rica transcribed below.

COSTA RICA, *Judgment 7497-98 (October 21, 1998) (List of judgments 4.2)*. The set of rights to which victims are entitled under the new criminal procedure law [Code of Criminal Procedure, CCP] has been systematized in Costa Rican law as follows:

- 1) *Powers of disposition: (a) right to request prosecution and the revocation of that request (Arts. 17 and 30.b CCP); (b) conciliation (Art. 36 CCP); (c) acceptance of comprehensive reparation (Art. 30.j CCP);*
- 2) *Powers with respect to prosecution: (a) right to appeal dismissal and rulings in favor of the defendant (Art. 71.c CCP); (b) right to act as a joint criminal complainant (Art. 75 CCP) or sole criminal complainant (Art. 72 CCP), as appropriate; (c) right to request that the Public Ministry file an appeal (Art. 426 CCP); (d) recognition of the rights of associations that protect broad interests, including them in the concept of victims and granting them the right to act as joint criminal complainants (Art. 70.d CCP);*
- 3) *Hearing rights: (a) right to be heard at the end of the oral argument phase of the proceedings (Art. 358 CCP); (b) right to be heard with respect to a request for probation before judgment (Art. 25 CCP);*

- 4) *Rights to information (for monitoring): (a) information on decisions that terminate the proceedings (Art. 71.b CCP); (b) notice of the indictment (Art. 306 CCP); (c) notice of a request for dismissal or use of prosecutorial discretion (Art. 300 CCP);*
- 5) *Rights to be represented and assisted by the Public Ministry's Office of Civil Defense for Victims: (a) right to delegate the criminal indemnification action to the Public Ministry [PM] (Art. 39 CCP and Art. 33 of the Organic Law of the PM, according to Law 7728); (b) right to be advised on the exercise of their rights (Art. 33 of the Organic Law of the PM, according to Law 7728);*
- 6) *Rights of reparation: (a) filing of the criminal indemnification action (Art. 37 CCP); (b) reparation in the case of probation before judgment (Art. 25 CCP); (c) comprehensive reparation as grounds for the termination of the criminal action (Art. 30.j CCP);*
- 7) *Protection from re-victimization: (a) limits to the public nature of the trial proceedings (Art. 330.a and 330.d CCP); (b) witness examination of women and child assault victims or victims of sexual assault (Art. 212 CCP, Arts. 121–127 of the Code of Children and Adolescents, Law 7739);*
- 8) *Protection from physical attacks or threats to victims or witnesses: (a) pretrial detention based on the risk of obstruction or criminal recidivism (Art. 239.b CCP); (b) order requiring the defendant to vacate the home (Art. 244.g CCP).” [footnote omitted] [italics in the original]*

1.4 JUDICIAL ACCEPTANCE OF INTERNATIONAL STANDARDS ON VICTIMS' RIGHTS

The inclusion of international human rights law through the case law has been one of the deciding factors in the evolution of the arguments put forward in Latin American courts. Beyond the national debates on the binding nature of international law, it is unquestionable that the standards, principles, rules, interpretation, and doctrine produced by the international mechanisms have been an important point of reference in the crafting of many of the new Latin American judicial opinions on the issue of victims' rights. The process of acceptance may entail the acknowledgment of the direct normative effect of the international provisions (as far as applicable law in a case), or it may (even simultaneously) be used as an important interpretive guide. With these approaches, the national courts have begun to move from a more formalistic debate regarding the nature and binding character of international standards toward an argument that underscores the weight or relevance of the international material, in order to be able to identify the meaning of the provisions that recognize victims' rights.

The following paragraphs present selected examples of a much broader range of national decisions that have taken an inclusive position by referring not only to international treaties on human rights, international humanitarian law, or international criminal law, but also to another variety of international documents and sources. Most notable among them are (i) the decisions of international and regional courts, including the Inter-American Court and the European Court of Human Rights (ECHR), (ii) international instruments such as declarations, principles, or guidelines, and (iii) resolutions of political bodies, including the United Nations General Assembly and the Committee of Ministers of the Council of Europe, among others.

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. The traditional view of crime victims' rights as limited to financial compensation has been changing in international law since the mid-twentieth century, particularly in relation to human rights violations, as part of a trend toward a broad concept of the right to suitable and effective judicial protection whereby victims obtain both reparation for the harm as well as clarity regarding the truth of what happened, and justice is served in the specific case. The 1991 Constitution reflected this trend, which gained strength at the end of the 1960s and underwent further development in the 1980s.

The mere awarding of compensation for damages to victims and injured parties has been considered insufficient under international law for the effective protection of human rights, insofar as truth and justice are necessary to prevent the repetition of the situations that gave rise to serious human rights violations in a society. Furthermore, the recognition of the inherent dignity and the equal and inalienable rights of all human beings requires that the judicial remedies designed by the States be oriented toward a comprehensive reparation of the victims and injured parties; this includes financial compensation as well as access to justice to learn the truth about past events and to seek the proper punishment of the perpetrators through institutional channels.

In 1948, both the American Declaration of the Rights and Duties of Man [*footnote omitted*] and the Universal Declaration of Human Rights [*footnote omitted*] marked the beginning of a trend in international law to develop instruments that guarantee the right of all persons to the effective judicial protection of their rights, whereby they not only obtain reparation for the harm suffered but also have their rights to truth and justice guaranteed.

In the Inter-American System for the Protection of Human Rights, the Inter-American Court of Human Rights has held similarly, stating that:

“[...] the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.”⁴⁰ [*emphasis added*]

In 1988 the Inter-American Court stated the following:

“This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁴¹ [*emphasis added*]

⁴⁰ Note in the original: I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), *Advisory Opinion OC-9/87*, October 6, 1987, Series A, No. 9, para. 24.

⁴¹ Note in the original: I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Series C, No. 4, para. 166.

In a recent case, the Inter-American Court of Human Rights found that laws that leave victims without the opportunity to know the truth and obtain justice are contrary to the American Convention on Human Rights, in spite of the fact that the State was willing to grant them financial reparations.⁴² The Inter-American Court held that:

“41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations 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.

“42. The Court [...] considers that the amnesty laws adopted by Peru prevented the victims’ next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. [...]

“43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.” [*emphasis in the original*]

This right has been included and developed in multiple international instruments. For example, the American Convention on Human Rights establishes the right of all persons to an effective judicial remedy [*footnote omitted*], which has been interpreted by the Inter-American Court of Human Rights, as noted earlier, not only as the right to financial reparations but also as the right to effectively know the truth about the events and to have the perpetrators appropriately punished [*footnote omitted*]. Similarly, the International Covenant on Civil and Political Rights establishes the duty of States Parties to provide effective judicial remedies for the protection of human rights [*footnote omitted*].

This international law trend is also evident in the United Nations system. In particular, on November 29, 1985, the UN General Assembly adopted by consensus the “Declaration of Basic

⁴² Note in the original (excerpt): I/A Court H.R., *Case of Barrios Altos v. Peru* (Chumbipuma Aguirre et al. v. Peru), Merits, Judgment of March 14, 2001.

Principles of Justice for Victims of Crime and Abuse of Power” [*footnote omitted*], according to which victims “are entitled to access to the mechanisms of justice and to prompt redress [...] for the harm that they have suffered,” for which it is necessary to allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”

This trend to not limit the rights of victims or injured parties to the search for financial reparation is also reflected in international humanitarian law[,] [as well as in international criminal law].

[Specifically, the Rome Statute of the International Criminal Court] expressly established the rights of victims to submit observations on the jurisdiction of the Court or the admissibility of the case, to make a complete presentation of the facts of the case in the interests of justice, to be treated with dignity, to have their safety and privacy protected, to have their opinions and observations taken into account, to receive financial reparations, and to appeal certain decisions that affect their interests [*footnote omitted*].

The rights of victims have also been broadly recognized in the European context, and include not only compensation for damages but also the right to have an exhaustive investigation conducted to establish the facts and lead to the appropriate punishment of the perpetrators. In 1977, the Committee of Ministers of the Council of Europe passed Resolution (77) 27, with recommendations for the compensation of victims of crime [*footnote omitted*]. In 1983, the European Convention on the Compensation of Victims of Violent Crimes was drafted to address the situation of victims who have sustained bodily injury or impairment of health and the dependents of persons who have died as a result of such crime. However, it also refers to the obligation to protect victims and to grant them certain rights to take part in the criminal case [*footnote omitted*]. Later, in 1985, the Committee of Ministers of the Council of Europe adopted Recommendation R (85) 11 on the position of the victim in the framework of criminal law and procedure [*footnote omitted*]; and in 1987, as a complement, it passed Recommendation R (87) 21, on assistance to victims and the prevention of victimization [*footnote omitted*]. Recently, as part of the fundamental rights recognized by the European Union, the Charter of Fundamental Rights established the right to an effective judicial remedy [*footnote omitted*].

Similarly, the European Court of Human Rights[,] [citing the European Convention for the Protection of Human Rights and Fundamental Freedoms,] stated the following in 1996:

“95. The Court observes that Article 13 (right to an effective remedy) guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision [...]. Nevertheless, the remedy required by Article 13 must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.” [...]

“98. [...] Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.”⁴³ [*emphasis in the original*]

As a result of this trend in human rights law, the international community has rejected the internal mechanisms that lead to impunity and the concealment of the truth [*footnote omitted*]. Although this consensus refers to serious human rights violations, the language of the texts cited, as well as their judicial interpretation (also mentioned), goes beyond such crimes or offenses.

CHILE, *Petition for cassation, File No. 12.357-2011 (December 7, 2012) (List of judgments 2)*. [With respect to] human rights violations, and following the [Declaration of] Basic Principles [of Justice for Victims of Crime and Abuse of Power] of the UN General Assembly (Resolution 40/34 of November 29, 1985), (1) “Victim” is understood as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. (2) Also included are the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Therefore, a person may be considered a “victim” regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim. (4) These persons should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. (5) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. (6) The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, to protect their privacy, when necessary, and to ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims. It is stated that (7) informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

⁴³ Note in the original: European Court of Human Rights, *Case of Aksoy v. Turkey*, Judgment of December 18, 1996.

The same Declaration states with respect to compensation that (8) offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services, and the restoration of rights. (9) It provides for governments to potentially take action on their own initiative, urging them to review their practices, regulations, and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions. It expressly states that (11) where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the government under whose authority the victimizing act or omission occurred is no longer in existence, the State or government successor in title should provide restitution to the victims.

The Declaration addresses compensation specifically, stating that (12) when compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to: (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization. In this respect, (13) the establishment, strengthening, and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

[The Declaration] is particularly concerned with comprehensive assistance (14), stating that victims should receive the necessary material, medical, psychological, and social assistance through governmental, voluntary, community-based and indigenous means, (15) and should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them. In order to undertake this task, (16) police, justice, health, social service, and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid. In addition, (17) in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted.

Special reference is made to (B) victims of abuse of power, which include (18) persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but [that violate] internationally recognized norms relating to human rights. In this respect, (19) States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological, and social assistance and support. Similarly, (21) States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances; should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well

as promoting policies and mechanisms for the prevention of such acts; and should develop and make readily available appropriate rights and remedies for victims of such acts.

The declaration of rights is thus broadly comprehensive, as the persons within its purview are entitled to judicial remedies (right to justice), information about how the events in question took place (right to the truth), the punishment of the perpetrators (right to a criminal conviction), and access to mechanisms of comprehensive redress for the harm (right to restoration). In this latter respect, reparation—and even restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition of the criminal acts—must be proportionate to the seriousness of the violations of fundamental rights and the harm caused. Restitution consists of restoring the victim to the situation he or she was in prior to the commission of the violations; compensation is the payment of damages for physical or mental harm, for lost economic, employment, educational, or social opportunities and for expenses; rehabilitation includes medical and psychological care, and legal and social services; satisfaction consists of measures designed to put a stop to the violations, establish the facts, and publicly acknowledge those events, as well as to punish the offenders; and guarantees of non-repetition involve democratic reforms to foster the inclusiveness of democratic institutions and of public and societal authorities, the establishment of mechanisms to prevent and resolve social conflicts, and the adoption of educational plans on human rights.

It is incumbent upon the States, then, to effectively confront the phenomenon created by the perpetrators—not by the victims—in a concerted fashion that includes establishing the truth, obtaining justice, assigning responsibility, declaring the right to compensation, publicly and officially acknowledging the way in which the events occurred, and alleviating and rehabilitating those who sustained the violations, the consequences of which persist to the extent that an effective and efficient decision is not made by the State. A delayed response by the State to comprehensively redress the harm is in itself an act that violates victims' rights when those rights were violated by State agents and the same State then fails to acknowledge the victims' right to obtain redress, thereby excusing its own offense. Indeed, for the prosecution of such crimes, the courts have the power to act *sua sponte* and are required to do so, as [in the absence of State action] the victims are subject to discrimination through both the failure to prosecute and the lack of compensation.

1.5 VICTIMS' RIGHTS IN THE TRANSITION TO OR RESTORATION OF DEMOCRACY AND/OR PEACE

In the general discussion on victims' rights, it is important to make particular reference to the contexts of the restoration of or transition to democracy and/or peace. According to the Joinet/Orentlicher Principles, those contexts refer to “situations leading, within the framework of a national movement towards democracy or peace negotiations aimed at ending an armed conflict, to an agreement, in whatever form, by which the actors or parties concerned agree to take measures against impunity and the recurrence of human rights violations.”⁴⁴

⁴⁴ UN Economic and Social Council, Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, addendum to the report of

Based on comparative experience, processes for the restoration of democracy and/or peace are times of particular significance and, at the same time, of particular risk to the protection of the rights of victims who have been harmed by the actions of different actors under dictatorial, arbitrary, or totalitarian regimes, or during the respective armed conflicts. Given the plurality of interests and needs typically at stake in transition processes, political (and even social) entities may take measures that (disproportionately) limit victims' rights, in the interest of advancing or accomplishing other types of objectives. The outcome of these kinds of assessments has been, for example, the enactment of amnesty laws, the dismissal of criminal cases, the granting of pardons to perpetrators, or the application of statutes of limitations to criminal actions or penalties. The international case law has found that the use of these measures, without guaranteeing the exercise of victims' rights, is a practice that is incompatible with the international framework for the protection of human rights.⁴⁵

Diane Orentlicher, independent expert to update the set of principles to combat impunity (E/CN.4/2005/102/Add.1, February 8, 2005).

⁴⁵ With respect to the international judgments on measures that hinder the investigation, prosecution, and punishment of human rights violations committed during dictatorships, totalitarian or arbitrary regimes, and armed conflicts, see, e.g., I/A Court H.R., *Case of García Lucero et al. v. Chile*, Preliminary Objection, Merits and Reparations, Judgment of August 28, 2013, Series C, No. 267; I/A Court H.R., *Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 20, 2012, Series C, No. 253; I/A Court H.R., *Case of the Massacres of El Mozote and neighboring locations v. El Salvador*, Merits, Reparations, and Costs, Judgment of October 25, 2012, Series C, No. 252; I/A Court H.R., *Case of Gelman v. Uruguay*, Merits and Reparations, Judgment of February 24, 2011, Series C, No. 221; I/A Court H.R., *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; I/A Court H.R., *Case of Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 12, 2008, Series C, No. 186; 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; I/A Court H.R., *Case of La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C, No. 162; I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 26, 2006, Series C, No. 154; I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia*, Merits, Reparations, and Costs, Judgment of September 15, 2005, Series C, No. 134; I/A Court H.R., *Case of Serrano Cruz Sisters v. El Salvador*, Merits, Reparations, and Costs, Judgment of March 1, 2005, Series C, No. 120; I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 25, 2003, Series C, No. 101; I/A Court H.R., *Case of Barrios Altos v. Peru*, Interpretation of the Judgment of the Merits, Judgment of September 3, 2001, Series C, No. 83. For an analysis of the impact of the inter-American case law on national proceedings, see, e.g., Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, DC: Due Process of Law Foundation, 2007); Due Process of Law Foundation, *Las víctimas y la justicia transicional ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales?* (Washington, DC: Due Process of Law Foundation, 2010). For a study on the Latin American precedents on State decisions that hinder the investigation, prosecution, and, if appropriate, punishment of international crimes with international human rights and humanitarian law, as well as on the rights of victims, see X. Medellín Urquiaga, *Digest of Latin American Jurisprudence on International Crimes* (Washington, DC: Due Process of Law Foundation, 2009), and X. Medellín Urquiaga, *Digest of Latin American Jurisprudence on International Crimes, Volume II* (Washington, DC: Due Process of Law Foundation, 2013).

On the contrary, as stated by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,⁴⁶ a comprehensive transition in which victims' rights are protected is a fundamental component of the process toward sustainable human, social, and political development.⁴⁷ Of course, this does not mean that the international standards on the subject ignore the need to make victims' rights compatible with other societal needs and interests. Striking a balance between the rights at stake will, unquestionably, be one of the most crucial aspects of these processes.

Against the backdrop of this debate, the Latin American case law has also begun to develop criteria of particular interest. Presented below are some extracts from a judgment of the Constitutional Court of Colombia that underscore the importance of protecting victims' rights in contexts of transition.

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. The Inter-American Commission on Human Rights has issued reports detailing the concepts of justice, truth, and reparation within processes of the transition to or restoration of peace and/or democracy. Most notable among them, because of its particular relevance to the instant case, is the *Report on the Demobilization Process in Colombia*, released on December 13, 2004.

In this Report, the Commission expressed the following opinions regarding the concepts of truth, justice, and reparation within processes of transition to peace, which provide a summary of all of the aforementioned international standards derived from the different sources of international law:

a. The Commission reiterated that the right to the truth must not be curtailed through legislative or other measures [*footnote omitted*]. It added that this right means that the design of the process for establishing the truth must include the free exercise of the right to seek and receive information, while also enabling the judiciary to undertake and complete the respective investigations [*footnote omitted*]. The Commission further recalled that, according to the case law of the Inter-American Court, the right to the truth is included within the right of the victim or his or her relatives to have the State establish the facts and prosecute the perpetrators, in keeping with Articles 8 and 25 of the American Convention.

In any event, the Commission recalled that the right to the truth is not limited to relatives of the victims; rather, society as a whole has the right to know about the acts of persons who have been involved in the commission of serious violations of human rights or international humanitarian law, especially when those violations are mass or systematic [*footnote omitted*].

b. With respect to the right to justice, the Commission's report maintained, with particular emphasis, that every time crimes against humanity, war crimes, and/or human rights violations are perpetrated through the commission of, *inter alia*, murder, forced disappearance, rape, forced

⁴⁶ UN Human Rights Council, Resolution 18/7, A/HRC/RES/18/7, October 13, 2011.

⁴⁷ UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/68/345, August 23, 2013; UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/67/368, September 13, 2012; UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/21/46, August 9, 2012.

displacement or relocation, torture, inhumane acts intended to cause death or serious harm to the physical and mental welfare of individuals, attacks against civilians or their property, or the recruitment of children under the age of 15, the States had—according to customary international law and treaty law—the mandatory obligation to investigate the facts and to prosecute and punish the perpetrators. It added that, according to international law, these types of crimes are not subject to amnesty or to the application of any statutes of limitations, and that the State's failure to establish the facts in such cases could give rise to the international responsibility of the State and *“open the door to universal jurisdiction to establish the individual criminal liability of the persons involved.”*

Also regarding the right to justice, the Commission stressed the point that States were under an obligation to combat impunity by all legal means available, since it fosters the chronic repetition of human rights violations and the defenselessness of the victims and their next of kin [*footnote omitted*].

The Commission additionally recalled that the protections derived from the right to due process and judicial protection applicable in international and non-international armed conflicts provided for in the Geneva Conventions correspond substantially to the protections of international human rights law, and require that the States prosecute and punish persons who commit or order the commission of gross violations of international humanitarian law. Furthermore, it affirmed that no derogation from these obligations is allowed on grounds of the continuation of the conflict.

In the opinion of the Commission, it follows specifically from international law that the right to justice means that States must adopt *“the measures necessary to facilitate victims' access to adequate and effective remedies both for reporting the commission of these crimes and to attain reparation for the harm suffered and in this way help prevent their repetition. The ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law’ provide that the states must: (a) make known, by official and private mechanisms, all remedies available against violations of international human rights and humanitarian law norms; (b) adopt, during judicial, administrative, or other proceedings that have a negative impact on the victims' interests, measures to protect their privacy, as appropriate, and guarantee their security, and that of their next-of-kin and witnesses against any act of intimidation or retaliation; and (c) use all appropriate diplomatic and legal means for the victims to be able to exercise their right to pursue remedies and obtain reparation for violations of international human rights and humanitarian law norms”* [*italics in the original*].

c. On the right to reparation, the Commission reiterated that the victims of crimes committed during an armed conflict have the right to adequate reparation for the harm suffered, which should take the form of individual measures of restitution, compensation, and rehabilitation, collective measures of satisfaction, and guarantees of non-repetition, making it possible to re-establish their *status quo ante*, without discrimination [*footnote omitted*].

Finally, among the aspects concerning the right to reparation, the Commission included the need for guarantees of non-repetition, which require that measures be taken to prevent new human rights violations. It held that these guarantees of non-repetition *“require dissolving parastatal armed groups; derogating laws that favor the commission of human rights violations or international humanitarian law; effective control of the Armed Forces and security forces by the*

civilian authorities; resorting to military courts exclusively for service-related crimes; strengthening the independence of the judiciary; protecting the work of judicial officers, human rights defenders, and journalists; training for citizens and state agents on human rights issues and compliance with the codes of conduct and ethical standards; and creating and improving mechanisms for preventive intervention and conflict resolution” [italics in the original].

SECTION 2

RIGHT TO PROTECTION MEASURES

From a general perspective, the recognition of victims' rights has been based on the need to protect the life, physical and psychological integrity, personal autonomy, safety, and general welfare of the victims of both common crime and human rights violations. This means that, in proposing a comprehensive response for the protection of victims' rights, we must go beyond those approaches that are merely procedural in nature, whereby those rights are limited in terms of court proceedings. In other words, bearing in mind the complexity of the victim's experience, it is essential to propose comprehensive responses that aim to assist the victim (as well as his or her relatives) in the process of (re) consolidating his or her identity, as a necessary condition for the effective exercise of all of his or her rights.

In specific terms, based on the international and comparative standards, these proposals have resulted in the recognition of the right to protection measures, which, as noted previously, must not be conditioned upon whether or not a case is brought to court. For purposes of this Digest, the right to protection is understood broadly to consist of both the measures specifically designed to safeguard the life and safety of a person, by virtue of his or her relationship to the court proceedings, and any other measure designed to guarantee the exercise of a variety of victims' rights, regardless of whether court proceedings have been initiated. In these terms, protection measures in a broad sense may include, for example, (i) urgent, intermediate, and long-term medical, psychological, health, and social services,⁴⁸ (ii) legal advice, (iii) measures for the protection of private life and personal information,⁴⁹ (iv) measures of protection from acts of intimidation, harassment, or threats,⁵⁰ and (v) information and communication measures.

It is important to recognize that in different countries, including Colombia and Mexico, there is a precise theoretical and normative distinction between protection measures (in the strict sense of the term) and assistance measures. From this perspective, protection measures would focus on protecting victims (and witnesses) from acts of coercion, threats,

⁴⁸ Principles 14 and 15 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

⁴⁹ See, e.g., (i) Principle 6.c and 6.d of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (ii) Article 68.1 of the Rome Statute of the International Criminal Court, and (iii) Principle 8.2 of the Ibero-American Charter on the Rights of Victims [Carta Iberoamericana de Derechos de las Víctimas].

⁵⁰ Although focused on judicial proceedings, this right has been recognized in, for example, the Ibero-American Charter on the Rights of Victims, adopted by the Ibero-American Judicial Summit (April 2012). See Principle 8.1 of the Charter: "The victim has the right to be free from intimidation, harassment, and abuse throughout the judicial process. The justice systems shall ensure the effective enforcement of these rights, taking the necessary measures when the person's physical safety is threatened. These measures may vary according to the stage of the criminal proceedings" [*unofficial translation*].

intimidation, and harassment—which are, moreover, an obstacle to the exercise of other rights.⁵¹ In contrast, assistance measures are envisaged more broadly, and their objective is to provide victims with the necessary measures to guarantee, *inter alia*, their lives and their physical and psychological welfare.

In those contexts, emphasis is placed on the premise that any assistance measure must be supported, from its design and implementation, by certain essential principles and rights that govern all State action in matters concerning human rights. These include, for example, the principle of and right to be treated with dignity, equality, and non-discrimination. As a complement to these points, particular attention must be paid to those victims that have “special needs because of the nature of the harm inflicted or because of factors”⁵² such as “race, color, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.”⁵³

The primary objective of the standards discussed up to this point is their implementation in the national systems. As with other issues related to the protection of victims, this does not mean that protection and assistance measures have not also been incorporated into the workings of the international human rights and international criminal law mechanisms. Most notable in this context are the protection measures of the IAHRs, i.e., the precautionary measures of the IACHR⁵⁴ and/or provisional measures of the Inter-American Court.⁵⁵

As the Inter-American Court has itself underscored, these measures reflect the particular nature of the human rights protection mechanisms, and therefore their objective goes far beyond maintaining the *status quo* in international proceedings. Precautionary and/or provisional measures are “a fundamental element for the effective protection of human rights” insofar as they seek to prevent irreparable harm to individuals. As such, unlike in other international jurisdictions, the aforementioned measures have a dual function: (i) precautionary, and (ii) protective or preventive. In the words of the Inter-American Court,

The [precautionary] nature of the provisional measures is related to the framework of [international litigation]. In this sense, the measures are aimed at preserving those rights

⁵¹ For further reference on the national and international definition of protection measures, in the strict sense of the term, directly related to safeguarding the physical safety of victims, see, e.g., Redress, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action* (London, 2009). <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

⁵² Principle 17 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

⁵³ Principle 3 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

⁵⁴ According to Article 25 of its Rules of Procedure, the IACHR may issue precautionary measures on behalf of persons in view of “serious and urgent situations presenting a risk of irreparable harm.” In such a case, the appropriateness of the measures does not depend upon whether the case has been submitted to be heard by the regional bodies; rather, the need for protection is based on the existence of a risk and the need to prevent victimization. Additionally, these measures may be adopted for purposes of preserving the *status quo* of cases or petitions pending before the bodies of the IAHRs.

⁵⁵ Article 63.2 of the American Convention on Human Rights: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.”

that are in a state of possible risk until the controversy is resolved in order to assure the integrity and effectiveness of the decision on the merits, and in this way avoid harm to the rights under litigation, a situation that could render the *effet util[e]* of the decision meaningless. In regard to the protective nature, the provisional measures become a real [judicial] guarantee of a preventive nature, as they protect human rights, in so much as they seek to avoid irreparable harm to persons.”⁵⁶

Under this same logic of protection, it is important to note that, as established by the Inter-American Court, it is possible to grant precautionary and/or provisional measures on behalf of “a group of persons who have not been identified by name previously, provided that they could be identified and determined and were in a situation of grave danger because they belonged to a group or a community.”⁵⁷ The measures ordered must always be consistent with the situation of (extreme) gravity and urgency that led to their adoption and, in general terms, the specific means of enforcing them must be agreed upon by the beneficiaries and the State authorities. This is without prejudice to the monitoring conducted by the IAHRS bodies.

In addition to the protection measures that exist in the international and regional human rights systems, a general overview of this topic would be incomplete without making a brief reference to the status of the matter at the ICC. According to Article 68 of the Rome Statute, “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” This general rule is made operational through an intricate institutional design, in which courts and administrative bodies coexist, and through which both protection measures and assistance programs—for victims, their families, and, in some cases, entire communities—can be adopted and/or promoted.

⁵⁶ According to recent orders of the Inter-American Court: I/A Court H.R., *Matter of Danilo Rueda regarding Colombia*, Order of the Inter-American Court of Human Rights of May 28, 2014, Whereas Clause 3. Similarly, see, e.g., I/A Court H.R., *Matter of the Penitentiary Complex of Curado Regarding Brazil*, Order of the Inter-American Court of Human Rights of May 22, 2014, Whereas Clause 4.

⁵⁷ I/A Court H.R., *Matter of Ávila Moreno et al. (Case of Operation Genesis) regarding Colombia*, Order of the Inter-American Court of Human Rights of May 30, 2013, Whereas Clause 10. Among the decisions on provisional measures issued on behalf of (determined or determinable) groups of persons, see, e.g., I/A Court H.R., *Matter of Luisiana Ríos et al. regarding Venezuela*, Order of the Inter-American Court of Human Rights of September 12, 2005; I/A Court H.R., *Matter of the Mendoza Prisons regarding Argentina*, Order of the Inter-American Court of Human Rights of November 22, 2004; I/A Court H.R., *Matter of Pueblo Indígena de Sarayaku regarding Ecuador*, Order of the Inter-American Court of Human Rights of July 6, 2004; I/A Court H.R., *Matter of the Peace Community of San José de Apartadó regarding Colombia*, Order of the Inter-American Court of Human Rights of June 18, 2002; I/A Court H.R., *Matter of the Peace Community of San José de Apartadó regarding Colombia*, Order of the Inter-American Court of Human Rights of November 24, 2000. Among the decisions of the IACHR regarding precautionary measures on behalf of a group of identifiable persons, see, e.g., *PM 50/14 – Campesino Leaders of Bajo Aguán, Honduras*; *PM 408/13 – Members of the Movimiento “Reconocido,” Dominican Republic*; *PM 8/13 – Persons Deprived of Liberty at the Porto Alegre Central Prison, Brazil*; *PM 137/13 – Girls Deprived of Liberty in Adult Detention Centres, Jamaica*; *PM 259/02 – Detainees in the US Military Base in Guantanamo*; *PM 152/11 – Members of the House for Migrants “Frontera Digna,” Municipality of Piedras Negras, Coahuila, Mexico*.

Within this complex system, emphasis is placed on protection measures for victims and witnesses, which are ordered by the Chambers of the ICC in coordination with the Victims and Witnesses Unit of the Registry, in view of the participation or involvement of such individuals in the investigative or judicial proceedings. Similarly, specific measures may be taken during the trial to safeguard the privacy of the victims (particularly in cases of sexual violence or cases involving minor children), provided that the rights of the accused and the principles of impartiality and justice that must govern the proceedings are not adversely affected.⁵⁸

As a supplement to the judicial protection measures, the ICC framework has established the regulatory and institutional groundwork for the development of plans or programs to assist victims, their relatives, and even their communities. According to the relevant instruments, these assistance measures must be operated by the ICC Trust Fund for Victims⁵⁹ as part of its dual mandate.⁶⁰ The assistance measures must favor persons, groups, or communities linked to the situations being examined by the ICC, although they are not conditioned upon the court proceedings.⁶¹ To date, the ICC Trust Fund for Victims has carried out victim assistance projects in areas such as (i) physical and psychological rehabilitation, including surgical procedures and prosthetics; (ii) social reintegration of individuals (particularly of child soldiers, kidnap victims, and orphans) into their communities, which includes vocational guidance programs and return packages; (iii) facilitation of temporary housing; (iv) intensive education for girls kidnapped by armed

⁵⁸ With respect to judicial protection measures pertaining to proceedings before the ICC, see Article 68 of the Rome Statute, as well as Rules 87 and 88 of the Rules of Procedure and Evidence of the ICC. As a supplement to those provisions, it is important to take into account the Regulations of the Court, the Regulations of the Office of the Prosecutor, and the Regulations of the Registry.

⁵⁹ The Trust Fund for Victims was created by Article 79 of the Rome Statute of the ICC. Its rules of operation are detailed in Article 98 of the Rules of Procedure and Evidence of the ICC, as well as in the Regulations of the Trust Fund for Victims. This latter document was adopted by the Assembly of States Parties to the ICC in 2005, through Resolution ICC-ASP/4/Res.3.

⁶⁰ According to the Regulations of the Trust Fund for Victims, it shall be considered to be seized of a matter when (i) its Board of Directors “considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families [...],” or (ii) “the Court makes an order for reparations against a convicted person and orders that [the respective sums] be deposited with or made through the Trust Fund in accordance with rule 98 [...] of the Rules of Procedure and Evidence” (Rule 50 of the Regulations of the Trust Fund for Victims). It is thus concluded from the two above-cited regulatory assumptions that the Fund has a mandate (i) to adopt assistance measures on behalf of the victims and their relatives (extending even to more general measures), and (ii) to operate in compliance with the reparations orders issued by the Chambers of the ICC.

⁶¹ It follows from the mandate that the Trust Fund may promote assistance measures and programs for victims of the matters before the ICC, even if such measures or programs have not been directly ordered by its Chambers. According to Rule 50 of the Regulations of the Trust Fund, the Fund must notify the proper Chamber(s) as soon as it decides to adopt an assistance measure. The respective Chamber will have a period of 45 days (subject to a 30-day extension, under certain circumstances) to issue a ruling on whether a specific project would predetermine any issue to be determined by the Court, on issues such as (i) jurisdiction and admissibility of the situations and/or cases; (ii) the presumption of the defendant’s innocence; or (iii) other rights of the accused or the fairness and impartiality of the trial (Rule 50 of the Regulations of the Trust Fund).

forces who gave birth during captivity; (v) microcredit and financial and other kinds of education; and (vi) community rebuilding projects, including reconciliation programs, peace education, conflict management, and the preservation of memory.⁶²

Setting aside the specific examples of protection or assistance measures at the national and international levels, it is important to recognize that the needs for protection of the rights to life, humane treatment, privacy, and honor, among others, may be good cause to restrict or limit other measures that seek to satisfy, for example, the right to the truth. An example of this is Principle 22 of the Van Boven/Bassiouni Principles, which recognizes that “Verification of the facts and full and public disclosure of the truth” as a form of reparation (satisfaction) should be conducted “to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.” This type of language, then, signals the importance of considering the particularities of the cases and their contexts, in order to ensure that the measures adopted (whatever they may be) are not arbitrary or disproportionately intrusive or harmful to victims’ rights.⁶³

In sum, it is clear from an overview of the current status of regulatory and case law development that protection and/or assistance measures constitute an autonomous right with its own content. As with other victims’ rights, the scope of protection of this right specifically may vary significantly depending upon the particular jurisdiction. In any case, it is important to note that, according to the most advanced opinions on the issue, the exercise of the right to protection and/or assistance should not necessarily require the existence of a court case (national or international), much less the identification and punishment of those responsible for the commission of a crime and/or a human rights violation. Similarly, in practice, it will be essential to differentiate the normative content and the exercise of the right examined in this section from other rights that may arise in similar actions—especially the right to obtain redress.

In the extracts of the judgment presented below, the Constitutional Court of Colombia rules on the scope of the right to request and receive protection measures in the context of court proceedings. Nevertheless, the specificity of the criteria upheld in this judgment should not be understood to exclude other protection and/or assistance measures, as we have briefly summarized in this section.

COLOMBIA, *Judgment C-209/2007 (March 21, 2007) (List of judgments 3.3)*. With respect to the adoption of protection measures or measures to ensure the defendant’s appearance at trial,

⁶² For in-depth information on the programs currently being carried out or promoted by the Trust Fund for Victims with respect to assistance to victims and communities, see: <http://www.trustfundforvictims.org/programmes>. The Trust Fund’s programs have also been the subject of an external institutional evaluation. For more information on the outcome of that evaluation, see J. McCleary-Sills and S. Mukasa, *External Evaluation of the Trust Funds for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective for Upcoming Interventions* (The Hague: International Center for Research on Women, 2013).

⁶³ For additional details on cases that involve the weighing of victims’ rights against other rights and interests, see Section 6 of this Digest, *Competing rights and/or principles*.

the plaintiff asserts that Article 137(1), the term “*prosecutor*” used in Article 306, the phrase “*at the request of the Office of the Public Prosecutor or the Public Ministry*” contained in Article 316, and the phrase “*at the request of the Office of the Public Prosecutor*” used in Article 342 of Law 906 of 2004, by denying the victim the opportunity to request the respective measures directly before the supervisory judge in preliminary proceedings or the judge who hears the case, as appropriate, prevent the victim from obtaining protection against possible threats and force him or her to depend upon the prosecutor’s initiative to request such measures.

The challenged provisions concern two types of measures that could have a significant impact on the protection of victims’ rights. Articles 306 and 316 refer to the measures to ensure the defendant’s appearance at trial, while Article 342 addresses protection, in the strict sense of the word.

Both are pertinent to the protection of victims’ rights. Thus, for example, the measures to ensure the defendant’s appearance at trial affect the victims’ right to the truth when they are issued “*in order to prevent the defendant from obstructing the proper administration of justice*” [footnote omitted].

Protection measures, strictly speaking, also protect the rights of victims from risks to their lives or physical safety or that of their families, for example, due to possible threats or adverse reactions to the lawful exercise of their rights.

The contested provisions state that the prosecutor is the one who can ask the supervisory judge in preliminary proceedings to impose measures to ensure the defendant’s appearance at trial. To do so, the prosecutor must state the reasons for the type of measure and its urgency, and submit the evidence to support his or her request (challenged Article 306). For its part, Article 316 states that in cases where the defendant fails to comply with the obligations imposed pursuant to house arrest or other non-custodial measures to ensure his or her appearance at trial, the prosecutor or the Public Ministry are the ones who submit the request seeking a judge’s order to amend the measure.

With respect to protection measures, in the strict sense of the term, the challenged provision states that it is the prosecutor who submits the request to the judge for the imposition of the measure when he or she finds it necessary for the protection of the victims or witnesses (challenged Article 342). The new code stipulates that different judges have the authority to order these types of measures, depending on the stage of the proceedings. Hence, Article 134—which is not being challenged in this case—states that victims can “*request that the supervisory judge in preliminary proceedings adopt the measures that are indispensable for their care and protection.*” In contrast, Article 342, which is being challenged, concerns a stage of the proceedings at which the judge who hears the case will be able, “*once the indictment has been issued,*” to order these types of measures “*when deemed necessary for the comprehensive protection of the victims.*”

As for the relevance to the victims of decisions relating to the imposition of measures to ensure the defendant’s appearance at trial, in Judgment C-805 of 2002 [footnote omitted] the Court recognized the right of crime victims to request a review of the legality of the prosecutor’s decision not to impose such measures. It was thus acknowledged that victims are entitled to exercise oversight over the omissions, inaction, or decisions that affect their rights. [...]

To determine whether the legislative omission raised by the plaintiff is unconstitutional, the Court will rule on [...] four methodological issues[.] [(i) Does the factual premise of the

provision exclude a person who, by virtue of being in a situation similar to those provided for therein, should be included? (ii) Is there an objective and sufficient reason that justifies the exclusion? (iii) Is an unjustified inequality created between the different actors in the proceedings? and (iv) Does this omission amount to the breach of a constitutional duty on the part of the legislature, in this case the duty to enable the true participation of the victim in the criminal case?]⁶⁴

The Court observes that a request to the supervisory judge in preliminary proceedings or before the judge who hears the case, as appropriate, for protection measures or measures to ensure the defendant's appearance at trial, as provided in Law 906 of 2004, can only be made by the prosecutor. This formula is designed to develop the duty to protect victims established in Article 250(7) of the Constitution, in accordance with Article 11(b) of Law 906 of 2004.

Nevertheless, the formula chosen by the legislature leaves the victim powerless in cases of a prosecutor's omissions, or in urgent circumstances in which the victim has firsthand knowledge of threats or harassment that make it necessary to impose the respective measure, or of non-compliance with the measure imposed, or the need to amend the measure. This applies both to protection measures, strictly speaking, and to measures to ensure the defendant's appearance at trial.

Therefore, this omission excludes the victim as a special participant who, by virtue of being in a better position to have firsthand information on the need for protection or precautionary measures, could effectively request the necessary measure before the judge of competent jurisdiction.

The Court sees no objective and sufficient reason to justify this exclusion. Allowing the victim to request protection measures or measures to ensure the defendant's appearance at trial directly before the competent judge, without the intercession of the prosecutor, does not create an inequality of arms, does not alter the fundamental features of an accusatory criminal justice system, and does not entail a transformation of the victim's role as a special participant in this system of criminal procedure. On the contrary, it ensures to a greater degree the adequate protection of the life, integrity, privacy, and safety of the victim, of his or her relatives, and of the prosecution witnesses, as well as their rights to truth, justice, and reparation.

This omission also creates inequality in the weighing of the victim's rights, by rendering the victim defenseless in circumstances in which he or she must go before the competent judge urgently to request the imposition of a protective or preventive measure, or the amendment of a measure that was initially granted.

Finally, this omission involves the legislature's breach of the duty to allow for the effective participation of the victim in the criminal case, to the extent that it leaves the victim unprotected in urgent circumstances or in cases where the prosecutor fails to comply with his or her duty to protect victims and witnesses from possible threats or harassment, and to request the measures necessary to pursue the aims provided for in Article 308 of the law, which are closely related to the victim's rights to truth and justice.

⁶⁴ Editors' note: The text in brackets is from the same decision, Judgment C-2009/2007, but from an earlier part prior to the initial paragraphs reprinted in this section. The bracketed text has been repositioned within these extracts for purposes of clarifying the Court's opinion.

In view of the foregoing, and the Court's examination of the plaintiff's allegations, Article 306, Article 316, and Article 342 of Law 906 of 2004 shall be declared constitutional with the understanding that the victim may also go directly before the competent judge, whether that is the supervisory judge in preliminary proceedings or the judge who hears the case, as appropriate, to request the respective measure.

The above does not mean that the judge of competent jurisdiction, upon directly receiving the victim's request for the imposition of measures to ensure the defendant's appearance at trial, or a specific protection mechanism, must immediately order such measure without following the procedure specified in the applicable provisions. Thus, for example, in the case of measures to ensure the defendant's appearance at trial, the judge must first hear from the prosecutor, the defense, and the Public Ministry, as required in the challenged Article 306.

SECTION 3 RIGHT TO THE TRUTH

The recognition of the right to the truth as an autonomous right with its own content has been one of the most important achievements of the national and international victims' movements. In general terms, this right encompasses the legal authority to know and remember the truth about violations or criminal acts, and it applies individually and collectively to all of society.

From a historical perspective, the first regulatory basis for the right to the truth was directly linked to the phenomenon of the murder or disappearance of persons in the context of armed conflicts or totalitarian regimes. With the 1977 adoption of Protocol I Additional to the Geneva Conventions of 1949,⁶⁵ a key component of the (still nascent) recognition of the right to the truth was established. According to Article 32 of that instrument, the activities of the parties to the conflict, as well as of humanitarian organizations, "shall be prompted mainly by *the right of families to know the fate of their relatives*."⁶⁶ This same article provided the legal basis when, a few years later, the Ad Hoc Working Group to Inquire into the Present Situation of Human Rights in Chile⁶⁷ affirmed the right of the relatives of disappeared persons to know their fate.⁶⁸

On this foundation, the right to the truth continued to be developed within the framework of the universal human rights protection mechanisms. Particular emphasis was placed on the phenomenon of the forced disappearance of persons as a serious violation of human rights and international humanitarian law and, under certain conditions, as

⁶⁵ Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on June 8, 1977, by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Entry into force: December 7, 1978.

⁶⁶ Article 32 of Protocol I Additional to the Geneva Conventions of 1949 (1977) [*emphasis added*]. This article is directly complemented by Articles 33 and 34 of the same protocol, which establish the obligation of the parties to the conflict to search for missing persons, as well as to exhume the bodies of the deceased and turn them over to their relatives.

⁶⁷ The Ad Hoc Working Group to Inquire into the Present Situation of Human Rights in Chile was established in 1975 by Resolution 8 (XXXI) of the Commission on Human Rights. In 1979, this working group was replaced by a special rapporteur and two experts to study the fate of the disappeared in Chile. The mandates of those groups, rapporteurs, and experts, together with the special rapporteur on apartheid and the Ad Hoc Working Group of Experts on Southern Africa, were the direct precursors of the current special procedures of the Human Rights Council. The first of those procedures, the Working Group on Enforced or Involuntary Disappearances, was established in 1980 through Resolution 20 (XXXVI) of the United Nations Commission on Human Rights. Information available at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>.

⁶⁸ UN Economic and Social Council, Commission on Human Rights, *Study on the Right to Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91, January 9, 2006, para. 8.

an international crime.⁶⁹ Nevertheless, this did not mean that the actions of the United Nations to promote the right to the truth were limited to the issue of disappeared persons. On the contrary, in a process of reciprocal influence, the universal human rights system was strengthened by the developments that took place within the regional human rights systems, and even at the national level. Eventually, the right to the truth was linked to other types of human rights violations, including extrajudicial executions, forced displacement, torture, and the kidnapping of minor children.⁷⁰

Parallel to the progress made up to that point within the United Nations framework, the right to the truth became a relevant issue in the doctrine and case law of the IAHRS. From its initial cases, and along the same lines as the universal system, the Inter-American Court recognized the right of relatives to know the whereabouts of disappeared persons.⁷¹ In the Court's opinion, the lack of information about the fate of their next of kin gives rise to suffering and anxiety, which is in itself a violation of the right to the physical and psychological integrity of persons.⁷²

In relation to other human rights violations, the IACHR has held since 1998 that "the 'right to truth' is a basic and indispensable consequence for every State Party. The disregard for the facts connected with the violations is translated into a system of protection which, in practice, cannot guarantee the identification and eventual punishment

⁶⁹ The right to the truth in the context of the forced disappearance of persons was again recognized by the UN General Assembly in Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, December 18, 1992. See, in particular, Articles 10.2, 13, and 20.1.

⁷⁰ For a more detailed analysis of the legal and historical development of the recognition of the right to the truth, see, e.g., UN Economic and Social Council, Commission on Human Rights, *Study on the Right to Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91, January 9, 2006; UN General Assembly, Human Rights Council, *Right to the Truth: Report of the Office of the High Commissioner for Human Rights*, A/HRC/5/7, June 7, 2007; UN General Assembly, Human Rights Council, *Right to the Truth: Report of the Office of the High Commissioner for Human Rights*, A/HRC/12/19, August 21, 2009; F. Andreu-Guzmán, *Derecho a la verdad y derecho internacional* (Bogotá: Comisión Colombiana de Juristas, 2012).

⁷¹ I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Series C, No. 4, para. 181. In more recent judgments, the Inter-American Court has held that the right to know the whereabouts of the victims can be violated even when the appropriate measures are not taken to exhume and identify the remains of individuals. See, e.g., I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 4, 2012, Series C, No. 250, para. 220; I/A Court H.R., *Case of Pacheco Teruel et al. v. Honduras*, Merits, Reparations, and Costs, Judgment of April 27, 2012, Series C, No. 241, para. 73. Along these same lines, see, e.g., Article 34 of Protocol I Additional to the Geneva Conventions of 1949.

⁷² See, e.g., I/A Court H.R., *Case of Valle Jaramillo et al. v. Colombia*, Merits, Reparations, and Costs, Judgment of November 27, 2008, Series C, No. 192, para. 102: "The absence of a complete and effective investigation into the facts constitutes a source of additional suffering and anguish for victims and their next of kin, who have the right to know the truth of what happened. This right to the truth requires a procedural determination of the most complete historical truth possible, including the determination of patterns of collective action and of all those who, in different ways, took part in the said violations, as well as their corresponding responsibilities." See also I/A Court H.R., *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 20, 2012, Series C, No. 253, para. 301.

of those responsible.”⁷³ This interpretation, derived from the arguments advanced by the Inter-American Court in prior cases,⁷⁴ was the point of departure for the consolidation of an important line of case law in the IAHRS, by virtue of the fact that the right to the truth is understood to be intrinsically linked to the rights to access to justice and to due process, in relation to the State obligations to investigate, punish, and make reparations for human rights violations.⁷⁵ As a supplement to these criteria, the Inter-American Court has held that “The State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures.”⁷⁶ Moreover, the Inter-American Court has emphasized the link between the right to know the truth and the obligation of State authorities to conduct serious, diligent, and thorough investigations to determine the responsibility of all persons involved in the acts, including both direct perpetrators and masterminds, particularly if they are State agents.⁷⁷

⁷³ IACHR, Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675, and 11.705, Chile, April 7, 1998, para. 87.

⁷⁴ According to the above-cited IACHR report, the construction of the right to the truth is derived from the Inter-American Court’s judgment on the merits in the *Case of Castillo Páez et al. v. Peru*. In that case, the IACHR alleges the violation of the right to the truth for the first time. As part of its early case law, which has undergone significant evolution since then, the Inter-American Court stated that “the Commission considers that there has been a violation of the right to truth and information, in the light of the State’s lack of interest in investigating the events that gave rise to this case. It adduces that argument without citing any specific provision of the Convention, while pointing out that this right has been recognized by several international organizations. [...] [The issue] has already been disposed of in this Case through the Court’s decision to establish Peru’s obligation to investigate the events that produced the violations of the American Convention.” I/A Court H.R., *Case of Castillo Páez v. Peru*, Merits, Judgment of November 3, 1997, Series C, No. 34, paras. 85–86.

⁷⁵ In the words of the Inter-American Court, “the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention.” I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*, Merits, Judgment of November 25, 2000, Series C, No. 70, para. 201. See also I/A Court H.R., *Case of Barrios Altos v. Peru*, Merits, Judgment of March 14, 2001, Series C, No. 75, para. 48; I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 26, 2006, Series C, No. 154, para. 148.

⁷⁶ I/A Court H.R., *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. 202. See also I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 25, 2003, Series C, No. 101, para. 180; I/A Court H.R., *Case of Tiu Tojin v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 26, 2008, Series C, No. 190, para. 77.

⁷⁷ I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment of July 4, 2007, Series C, No. 166, para. 123; 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. 148. In more general terms, see I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 25, 2003, Series C, No. 101; I/A Court H.R., *Case of La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C, No. 162.

In the evolution of its own opinions, the IAHRS has also recognized the collective aspect of the right to the truth.⁷⁸ In this same vein, it has underscored the importance of creating truth or investigative commissions, as they lead to “[...] determinations of the truth that complement each other, because each has its own meaning and scope, as well as particular potentials and constraints that depend on the context in which they arise and the specific cases and circumstances they analyze.”⁷⁹

In one last aspect of the decisions being issued by the IAHRS, the right to the truth has also been linked directly to the right to reparations. Specifically, the Inter-American Court has consistently reiterated that the right to learn of (to know and remember) the acts that constitute human rights violations is a form of reparations, both to individuals and to society as a whole.⁸⁰

⁷⁸ I/A Court H.R., *Case of Gelman v. Uruguay*, Merits and Reparations, Judgment of February 24, 2011, Series C, No. 221, para. 192. With respect to the collective aspect of the right to the truth, the IACHR underscored in Report No. 25/98, para. 88, that “The right to truth constitutes both a right of a collective nature which allows society as a whole to have access to essential information on the development of the democratic system, and an individual right which allows the families of the victims to have access to some kind of reparation in those cases in which amnesty laws are in force.”

⁷⁹ I/A Court H.R., *Case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 20, 2012, Series C, No. 253, paras. 298 and 301; I/A Court H.R., *Case of the Massacres of El Mozote and neighboring locations v. El Salvador*, Merits, Reparations, and Costs, Judgment of October 25, 2012, Series C, No. 252. See additionally, I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment of July 4, 2007, Series C, No. 166, para. 128. In this last judgment, the Inter-American Court noted in particular that “the establishment of a Truth Commission—depending on its object, proceedings, structure and purposes—can contribute to build and safeguard historical memory, to clarify the events and to determine institutional, social and political responsibilities in certain periods of time of a society. The recognition of historical truths through this mechanism should not be understood as a substitute to the obligation of the State to ensure the judicial determination of individual and state responsibilities through the corresponding jurisdictional means, or as a substitute to the determination, by this Court, of any international responsibility. Both are about determinations of the truth which are complementary between themselves, since they all have their own meaning and scope, as well as particular potentialities and limits, which depend on the context in which they take place and on the cases and particular circumstances object of their analysis. In fact, the Court has granted a special value to reports of Truth Commissions as relevant evidence in the determination of the facts and of the international responsibility of the States in various cases which has been submitted before it.”

⁸⁰ On this point, “The Court has reiterated that every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations. This right to the truth has been developed by International Human Rights Law [citation omitted]; recognized and exercised in a concrete situation, it constitutes an important means of reparation. Therefore, in this case it gives rise to an expectation that the State must satisfy for the next of kin of the victim and Guatemalan society as a whole [citation omitted].” I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 25, 2003, Series C, No. 101, para. 274. In this same regard, see, e.g., I/A Court H.R., *Case of the 19 Merchants v. Colombia*, Merits, Reparations, and Costs, Judgment of July 5, 2004, Series C, No. 109, para. 261; I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia*, Judgment of September 15, 2005, Series C, No. 134, para. 297; I/A Court H.R., *Case of Baldeón García v. Peru*, Merits, Reparations, and Costs, Judgment of April 6, 2006, Series C, No. 147, para. 196; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*, Merits, Reparations, and Costs,

Criteria similar to those developed by the inter-American case law on human rights were additionally incorporated into important international instruments, including the Van Boven/Bassiouni Principles and the Joinet/Orentlicher Principles. In particular, the latter instrument establishes some of the most relevant international standards on institutional guarantees for the exercise of the right to the truth, outside judicial proceedings. Those guarantees include, most notably: (i) the conditions for creating and operating truth or investigative commissions, including the scope of their mandates, as well as (ii) the conditions for the preservation of and access to relevant records and information for the determination of human rights violations.⁸¹

From this starting point, the right to the truth has undergone a clear process of regulatory consolidation. In recent times, different United Nations bodies, including the General Assembly, have passed significant resolutions reaffirming the importance of guaranteeing the right to the truth to victims of human rights violations, as an essential element in the fight against impunity and the strengthening of democratic regimes.⁸² In 2011, the Human Rights Council also created the position of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, with the specific mandate of contributing to the improvement of conditions for the protection of these rights.

Moreover, the development of international humanitarian law and international human rights law has proposed an important dialogue with the national criminal justice systems. Accordingly, the right to know the truth has been gaining strength, not only as an objective of the proceedings but also as an individual right to which the victims, their relatives, and society as a whole are entitled. There are specific State obligations that correspond to these rights, which also link the satisfaction of the right to the truth to the right to access to justice and reparations.

The paragraphs from the Latin American judgments presented below show an interesting range of judicial opinions with respect to the normative content of the right

Judgment of November 25, 2006, Series C, No. 160, para. 440; I/A Court H.R., *Case of La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C, No. 162; I/A Court H.R., *Case of Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 12, 2008, Series C, No. 186, para. 244. Similarly, see, e.g., Principle 22(b) of 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.

⁸¹ See Principles 2–18 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. As a complement to these principles, the Van Boven/Bassiouni Principles establish, more generally, that “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.” See Principle 24 of 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.

⁸² See, e.g., UN General Assembly, *Right to the Truth*, A/RES/68/165, January 21, 2014; UN Human Rights Council, *Right to the Truth*, A/HRC/RES/12/12, October 12, 2009. Also see UN, Report of the Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearance*, A/HRC/16/48, January 26, 2011, pp. 13–18.

to the truth. In large measure, those decisions find support in the international standards examined in this introduction.

3.1 RIGHT TO THE TRUTH (VICTIMS OF CRIME)

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. The Constitutional Court has repeatedly held that the right of crime victims to know the truth about what happened, and society’s right to cast light on the patterns of “macro-criminality” that grossly and systematically affect the human rights of our population, are constitutional rights [...]. As mentioned in an earlier section of this decision, those rights are derived from the right to access to justice ([Articles] 29 and 229 [of the Constitution]), from the right to not be subjected to cruel, inhuman, or degrading treatment ([Article]12), as well as from the State obligation to fully respect and guarantee the rights, due process, and right to an effective judicial remedy enshrined in Articles 1, 8, and 25 of the American Convention on Human Rights [*footnote omitted*]. As is well known, these rights cannot be suspended in states of emergency, and therefore, they are included within the body of constitutional law, strictly speaking. In this regard, it bears recalling that the Inter-American Court of Human Rights—the authorized interpreter of the above-cited provisions—has repeatedly addressed the scope of the right to the truth. Thus, for example, in its Judgment of November 22, 2000 (Reparations), the Court stated:

This Court has referred once and again to the right of the relatives of the victims to know what happened [*footnote omitted*] and to know which State agents were responsible for the respective facts [*footnote omitted*]. “Investigation of the facts and punishment of those responsible, [...] is an obligation of the State when there has been a human rights violation and this obligation must be fulfilled seriously, and not as a mere formality [*footnote omitted*].” Later, the Court stated, “The right that every person has to the truth has been developed in international human rights law [*footnote omitted*], and, as this Court has stated previously, the possibility of the victim’s next of kin knowing what happened to the victim [*footnote omitted*] and, if that be the case, the whereabouts of the victim’s mortal remains [*footnote omitted*], is a means of reparation, and therefore an expectation regarding which the State must satisfy the next of kin of the victims and society as a whole [*footnote omitted*].”

On another occasion, referring to the reasonableness of judicial time periods and examining the constitutionality of Article 579 of Law 522 of 1999 (Military Criminal Code) in Judgment C-178 of 2002 [*footnote omitted*], the Court found that the brevity of the time periods provided for in that law to investigate certain crimes under the jurisdiction of the Military Criminal Justice System was a violation of the constitutional provisions relating to the right to due process, especially the defendant’s right to a defense, the victims’ right to justice, and the impossibility of establishing the truth [...].

3.2 RIGHT TO THE TRUTH (VICTIMS OF HUMAN RIGHTS VIOLATIONS)

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. With respect to the right to the truth asserted within processes for the restoration of or transition to democracy and/or peace, the Set of Principles [for the Protection and Promotion of Human Rights through Action to Combat Impunity] [...] specifies that it is not just a matter of the individual right of every victim or his or her next of kin to know what happened; rather, it also concerns a collective right that is based on the need to prevent the recurrence of violations. Accordingly, the State has the “*duty to remember*” for purposes of preventing the distortion of history [*footnote omitted*].

With respect to victims and their relatives, the Principles state that they have “*the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.*” [*footnote omitted*] [*italics in the original*]

In order to meet the above objectives, the Principles contain two categories of proposals. One refers to the advisability of establishing non-judicial investigative commissions in the short term in States that are in the process of consolidating democracy or pursuing processes for peace and the return of the rule of law [*footnote omitted*]. The second set of measures aims to preserve the records that are related to human rights violations [*footnote omitted*].⁸³ [...]

⁸³ Editors’ note: The Constitutional Court of Colombia has developed the content of the right to the truth for victims of human rights violations extensively in judgments subsequent to Judgment C-370/06, including judgments C-771/2011, C-715/2012, C-099/2013, C-579/2013, and C-180/2014. More specifically, in Judgments C-715/2012 and C-099/2013, the Court established the following jurisprudential criteria on the right to the truth: “(i) The right to the truth is enshrined in Principles 1–4 of the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, and is based on the principle of human dignity, on the duty to preserve historical memory and to remember, and on the right to one’s good name and image; (ii) Thus, victims and parties harmed by serious human rights violations have the inalienable right to know the truth about what happened; (iii) Victims, their relatives, and society as a whole are entitled to this right, and therefore it involves an individual dimension and a collective dimension; (iv) The individual dimension of the right to the truth involves victims and their relatives knowing the truth about what happened, the perpetrators, and the consequences of the events. This right therefore includes the right to know who committed the crime, the motives, and circumstances of time, place, and manner in which the criminal acts took place, and finally, the criminal pattern that marks the commission of criminal acts. The latter includes the right to know whether the crime under investigation is a serious violation of human rights, a war crime, or a crime against humanity; (v) The collective dimension of the right to the truth means that society must know the reality of what happened, know its own history, and have the opportunity to create a collective narrative through the public disclosure of the outcomes of the investigations; it involves the obligation to have a “public memory” of the outcomes of these investigations into serious human rights violations; (vi) The right to the truth is not subject to any statutes of limitations, and can and should be guaranteed at all times; (vii) The guarantee of the right to the truth seeks to reconcile the procedural truth and the actual truth; (viii) This right is intrinsically related and connected to the right to justice and reparation. Accordingly, the right to the truth is linked to the right to access to justice, since the truth is only possible if impunity is prohibited and if serious, responsible, impartial, thorough, and systematic investigations by the State can guarantee the establishment of the facts and the respective punishment; (ix) In addition, the right to the truth is linked to the right to reparation, insofar as the knowledge of what happened is a form of reparation for the victims and their relatives; (x) The relatives

PERU, *Extraordinary appeal 2488-2002-HC/TC (March 18, 2004) (List of judgments 7.1)*. The nation has the right to know the truth about painful and unjust acts and events caused by the multiple forms of State and non-State violence. That right entails the opportunity to know the circumstances of the time, place, and manner of their occurrence, as well as the motives of the perpetrators. The right to the truth is, in this respect, an inalienable, collective, legally protected interest.

Parallel to the collective dimension, the right to the truth has an individual dimension, which pertains to the victims, their families, and close associates. The right to know about the circumstances in which the human rights violations were committed—and in the case of death or disappearance, the victim's fate—is not subject to any statute of limitations. The persons directly or indirectly affected by a crime of this magnitude have the right to know at all times, among other things, who the perpetrator was, when and where the crime was committed, how it happened, why it was committed, and where the victim's remains are located, even if a significant amount of time has passed since the date of the offense. [...]

The Constitutional Court finds that although other fundamental rights, such as life, liberty, or personal safety, underlie the right to the truth, it has its own autonomous character, its own composition, which distinguishes it from the other fundamental rights to which it is linked, due to both the protected object and the ultimate goal pursued by means of its recognition.

Without prejudice to the constitutionally protected content of the right to the truth, it also has constitutional status, as it is a concrete expression of the constitutional principles of human dignity, the social and democratic rule of law, and the republican form of government.

EL SALVADOR, *Judgment 665-2010 (February 5, 2014) (List of judgments 5.2)*. The *right to know the truth* finds constitutional support in Articles 2(1) and 6(1) of the C[onstitution]. First, by virtue of the right to protection in the preservation and defense of rights—Article 2(1) of the C[onstitution]—the truth is possible only if serious, thorough, responsible, impartial, comprehensive, systematic, and conclusive investigations conducted by the State can guarantee the establishment of the facts and the appropriate punishment. In addition, freedom of information is intended to ensure the publication, disclosure, and receipt of facts of public relevance that allow individuals to be informed about the conditions of their environment, in order to make free decisions. Accordingly, the right to know the truth involves free access to objective information about acts that have violated fundamental rights and about the temporal, personal, material, and territorial circumstances surrounding them; this right therefore entails

of disappeared persons have the right to know the fate of the disappeared and the status and results of official investigations. In this respect, the right to know the whereabouts of disappeared or kidnapped persons is supported by the right of the victim's relatives and persons close to them to not be subjected to cruel, inhuman, or degrading treatment, and must be satisfied even if there are no criminal cases against the alleged perpetrators (due to death, uncertainty, or any other reason); (xi) Finally, with respect to the right to the truth, the Court underscores not only the importance of the State's obligation to conduct criminal investigations aimed at establishing individual criminal liability and the truth of the events but also the importance of alternative mechanisms for the reconstruction of the historical truth, such as administrative truth commissions, which in cases of gross and systematic human rights violations must serve the aforementioned constitutional objectives."

the real opportunity and ability to research, seek, and receive reliable information that leads to the impartial establishment of the facts.

Thus, *the right to know the truth is the right of the victims of violations of fundamental rights—in a broad sense, that is, both direct victims and their relatives—as well as of society as a whole, to know what actually occurred in those situations.* In this respect, we note that the State is required to undertake all necessary tasks to contribute to the establishment of the facts by using the tools that lead to the truth, whether in or out of court. Moreover, to the extent to which society is also considered to be entitled to the right to know the truth about what happened, it becomes possible to shape a collective memory, which will help build a future based on the knowledge of the truth, a cornerstone in the prevention of new violations of fundamental rights [*emphasis in the original*].

We note, then, that the right to know the truth is a fundamental right that has both a collective and an *individual dimension*. According to the individual dimension, persons directly or indirectly affected by a violation of their fundamental rights always have the right to know—regardless of how much time has passed since the date of the offense—who the perpetrator was, the date and place it was committed, and how and why it was perpetrated, among other things; this is because the knowledge of what happened is a form of reparation for the victims and their relatives. As for the *collective dimension*, society has the legitimate right to know the truth about acts that have seriously violated the fundamental rights of individuals [*emphasis in the original*].

On this point, in reference to a case against El Salvador, the Inter-American Commission on Human Rights has maintained: “The right to know the truth with respect to the incidents which took place and the serious human rights violations which occurred in El Salvador, as well as to know the identity of those who participated in them, constitutes an obligation which the State has to the relatives of the victims and to the society, as a consequence of the obligations and duties assumed by that country in its capacity as a State Party to the American Convention on Human Rights. [...] [All of] society has the inalienable right to know the truth about what has occurred, as well as the reasons and circumstances in which those crimes came to be committed, so as to avoid a repetition of such events in the future. In turn, no one can prevent the victims’ relatives from learning what has happened to their loved ones [...]” (*Case of Lucio Parada Cea et al. v. El Salvador*, paras. 147 [148] and 152 [153]; *Case of Ignacio Ellacuría, S. J. et al. v. El Salvador*, paras. 221 and 226).

It has also found that “the right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition” (*Case of Monseñor Oscar Arnulfo Romero y Galdámez v. El Salvador*, para. 148).

For its part, the Inter-American Court of Human Rights has also reiterated the “... right of the next of kin of victims to know what happened and the identity of the State agents responsible for the respective [acts] [...] This measure benefits not only the next of kin of the victims, but also society as a whole, because, by knowing the truth about such crimes, it can prevent them in the future” (*Case of the 19 Merchants v. Colombia*, paras. 258 and 259). The Court has also held that “... any person, including the next of kin of victims of grave human rights violations, has the right to know the truth, under Articles 1(1), 8(1), and 25 and also, in

certain circumstances, Article 13 of the Convention; therefore, they and society in general must be informed of what happened” (*Case of the Massacres of El Mozote and neighboring locations v. El Salvador*, para. 298).

Bearing in mind the above, the right to know the truth includes the power to request and obtain information about: the circumstances of and motives for the perpetration of the acts that violated the victim’s fundamental rights; the identity of the perpetrators; the whereabouts of the victims, in cases involving the violation of rights such as life and liberty; and the progress and results of the investigation. The State has specific obligations that consist not only of facilitating relatives’ access to the documentation that is under State control but also undertaking to investigate and corroborate the acts reported. In addition, given that the State has the duty to prevent and put a stop to violations of fundamental rights, the priority of the right to know the truth is essential in order to combat impunity and guarantee the non-recurrence of those harmful acts.

Nevertheless, it must be made clear that a decision not to prosecute in a particular case does not mean that the right to know the truth has been violated. The same is true in the event that the decision on the merits results in the acquittal of the defendants. However, the State will continue to be obligated to undertake all necessary tasks to contribute to the establishment of the facts by using the tools that lead to the truth, whether in or out of court.

3.3 LEGAL AND POLICY RATIONALE FOR THE RIGHT TO THE TRUTH

PERU, *Extraordinary appeal 2488-2002-HC/TC (March 18, 2004) (List of judgments 7.1)*. The right to the truth is derived not only from the international obligations contracted by the Peruvian State but also from the Constitution, Article 44 of which establishes the State obligation to safeguard all rights, especially those that affect human dignity. This is a matter that concerns a historical circumstance that, if not duly clarified, may affect the very life of the institutions.

The rights to life, liberty, and personal safety are the support and foundation of all human rights; therefore, their validity must be respected unreservedly, without it being morally acceptable to provide for exceptions or justify their conditioning or limitation. Respect for them and the guarantee of their free and full exercise is a responsibility that is incumbent upon the State. In the event that there is no explicit provision in the legal system to guarantee them, the legislative or other measures necessary to make them effective must be enacted in accordance with the constitutional procedures and the provisions of the American Convention. This is stipulated in Articles 1 and 2 of the American Convention on Human Rights, and Article 2 of the International Covenant on Civil and Political Rights.

International law, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention all define the rights that human beings must enjoy; additionally, some constitutional texts have incorporated the recognition of new rights, in particular those directly linked to the principle of dignity, in order to establish them as authentic fundamental rights. It is clear that they are the result of new needs and scientific, technological, cultural, and social advances; therefore, in view of this new and diverse

context, the constitutions usually enable a “development of fundamental rights” clause, the purpose of which is not only to recognize them as rights of the highest rank but also to provide them with the same guarantees as those rights that are expressly guaranteed.

Article 3 of our Constitution recognizes an “open enumeration” of fundamental rights that, without being in the text of the Constitution, are based on human dignity, or on the principles of the sovereignty of the people, the democratic rule of law, or the republican form of government.

Thus, the right to the truth, although not expressly recognized in the text of our Constitution, is a fully protected right, derived first of all from the State obligation to protect fundamental rights and from the right to judicial protection. Nevertheless, the Constitutional Court considers that, as far as reasonably possible and in special and unprecedented cases, the implicit constitutional rights should be developed. Doing so would improve the guarantee of and respect for the rights of persons, thus helping to strengthen democracy and the State, as stipulated in the Constitution currently in force. [...]

It is a right that arises directly from the principle of human dignity, as the harm caused to victims results not only in harm to such relevant protected interests as life, liberty, and humane treatment, but also in the ignorance of what really happened to the victims of criminal acts. Not knowing where the remains of a loved one are located, or what happened to him or her, is perhaps one of the most perversely subtle, yet no less violent ways of damaging the conscience and dignity of human beings.

The right to the truth, in its collective aspect, is thus a direct concretization of the principles of the social and democratic rule of law and the republican form of government, as its exercise makes it possible for all of us to be aware of the levels of degeneration we are capable of reaching, whether through the use of law enforcement or the actions of criminal terrorist groups. We have a common demand that what happened be made known, but also that the criminal acts that were committed not go unpunished. If the social and democratic rule of law is characterized by the defense of the human person and respect for his or her dignity, it is clear that the violation of the right to the truth is an issue that affects not only the victims and their relatives but also all of Peruvian society. Indeed, we have the right to know, but we also have the right to learn about what happened in our country in order to change the path and strengthen the minimum and necessary conditions for an authentically democratic society, a prerequisite for the effective exercise of fundamental rights. Of course, behind these demands for access and investigation into human rights violations are not only the demands for justice for the victims and their relatives but also the demand that the State and civil society take the necessary measures to prevent the repetition of such acts in the future.

The Constitutional Court similarly considers that the right to the truth stems from a requirement derived from the principle of the republican form of government. Indeed, information about how the fight against subversion was handled in the country, as well as about how the criminal acts of the terrorists were carried out, is an authentic public or collective good, and it also contributes to the full realization of the principles of openness and transparency on which the republican system is based. These principles are necessary not only to learn about these painful events but also to strengthen the institutional and societal oversight that must be the basis for the punishment of those who, through their criminal acts, harmed the victims and society and the State in general. [...]

In view of [all of the foregoing], in the opinion of this Court, although the right to the truth is not expressly acknowledged, it does in fact form part of the list of guaranteed constitutional rights. As such, it is subject to full protection through the constitutional rights of freedom, but also through the ordinary rights that exist in our legal system, as it is founded on human dignity, and on the concomitant State obligation to protect fundamental rights, the full expression of which is the right to the effective protection of the courts.

3.4 STATE OBLIGATIONS IN RELATION TO THE RIGHT TO THE TRUTH

PERU, *Extraordinary appeal 2488-2002-HC/TC (March 18, 2004) (List of judgments 7.1)*. [As this court has recognized, the right to the truth is also derived from a requirement of the republican system].⁸⁴ Accordingly, the State has a specific obligation to investigate and inform, which consists not only of facilitating access for the relatives to the documentation that is under government control but also of undertaking the work to investigate and corroborate the acts reported.

This has been the opinion of the Inter-American Court of Human Rights when it has held that the failure to investigate and punish the perpetrators and accomplices of forced disappearances is a violation of the State duty to respect the rights recognized by the American Convention, as well as to guarantee their full and free exercise (*Case of Bámaca Velásquez*, para. 129).

Additionally, in the case of human rights violations, the victim's right is not limited to obtaining financial reparation; rather, it includes the right to have the State conduct an investigation into the acts. The Inter-American Court of Human Rights has so held (*Case of Castillo Páez*, Reparations, para. 168, and *Loayza Tamayo*, Reparations, para. 175), given that the full knowledge of the circumstances of each case is also part of a form of moral reparation that the country requires for its democratic health.

3.5 RIGHT TO THE TRUTH IN RELATION TO THE RIGHT TO ACCESS TO JUSTICE

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. The minimum content of victims' right to the truth protects, first of all, the right to have the most serious crimes investigated. This means that such offenses must be investigated and that the State is responsible by act or omission if there is not a serious investigation consistent with national and international law. One of the ways in which this right is violated is by the absence of measures to punish fraud on the court or incentive systems that fail to take serious account of these factors or to pursue the truth seriously and resolutely.

The right to the truth additionally includes the right to know the causes and circumstances of time, place, and manner in which the crimes were committed. All of this leads to the public

⁸⁴ Editors' note: For the entire argument of the Constitutional Court of Peru with respect to the relationship between the right to the truth and the principle of the republican form of government, see Section 3.3 of this Digest, *Legal and policy rationale for the right to the truth*.

acknowledgment of the victim's pain and his or her full citizenship in terms of being recognized as an individual rights-holder. It also means that persons affected can know, if they so wish, the reasons and conditions under which the crime was committed. [...]

Naturally, all of these rights give rise to the inalienable duty of the State to seriously and exhaustively investigate the crimes committed and to report the outcome of its investigations.

With respect to the collective dimension of the truth, its minimum content includes the opportunity for societies to know their own history, to compose a relatively reliable collective narrative of the events that have defined this history, and to have memory of those events. Therefore, it is necessary to conduct impartial, thorough, and systematic judicial investigations into the criminal acts that are part of the historical narrative. A system that fails to promote the reconstruction of the historical truth, or that establishes only weak incentives for doing so, could jeopardize this important right.

MEXICO, *Petition for a constitutional remedy II-810/2013 (March 11, 2014) (List of judgments 6.5)*. [As] provided in Article 19 of the Constitution of the United Mexican States, [the purpose of the indictment] is [...] **to state clearly and precisely the offense or offenses to be prosecuted**, based on the specific acts that gave rise to the charge and, if appropriate, the suspect's alleged participation in their commission [*emphasis in the original*].

Only in this manner is it possible to establish a principle of legal certainty and reliability so that the case is prosecuted for the offense specified in the indictment; what is sought is the reconciliation of the acts alleged in the indictment and the evidence of their existence, with the respective classification of the offense according to the appropriate statutory definition.

The above reasoning clearly permeates each one of the human rights of both the defendant and the victim, since there is greater legal certainty for both parties from the beginning of the criminal case. The defendant knows the offenses for which he or she has been indicted, and with this knowledge, where relevant, he or she has a better opportunity to prepare a defense; the victim has a better chance of arriving at the truth through the correct statutory definition of the acts perpetrated against him or her, and thus of accessing an appropriate reparation of the harm that was caused.

In other words, the above-cited premises aim to accomplish the objectives for which this new oral accusatory system was created: *to establish the facts, protect the innocent, ensure that the guilty do not go unpunished, and ensure redress for the harm caused by the crime*; these are clearly stipulated in clause I, Article 21, section A of the Constitution [*emphasis in the original*].

3.5.1 Social dimension of the right to the truth and its connection to popular action

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. In the context of [judicial] protection, in Judgment T-249 of 2003 [*footnote omitted*], the Court addressed the issue of the collective right to the truth and the possibility of satisfying this right through the concept of a citizen complainant in a public action crime [*actor popular*]. Among the considerations expressed regarding the collective right to the truth about serious human rights violations, the following are particularly notable:

In direct relation to this point, the Court has held that there are certain crimes with respect to which “the interest of the victims and injured parties in knowing the truth of the events and establishing individual responsibility is projected onto society as a whole” [*footnote omitted*].

There are circumstances where the commission of a crime activates an interest of society at large in establishing the truth and ensuring that justice is obtained, for which a citizen complainant would be allowed to act as a plaintiff claiming damages in a criminal case. [...] Article 45 of Law 600 of 2000 authorizes a plaintiff claiming damages in a criminal case to become a citizen complainant “in matters involving direct harm to legally protected collective interests.” Accordingly, there is a restriction on standing to become a citizen complainant in the criminal case, consisting of the requirement that a “legally protected collective interest” is being harmed. This begs the question: Does the commission of crimes against humanity—an issue that is relevant in this case—entail the infringement of legally protected collective interests? [...]

The Court has held that there is a societal interest—peace and justice—with respect to forced disappearance, which is a crime against humanity. Accordingly, it is reasonable to assume that there is a relationship between the seriousness of the criminal act and the existence of a societal interest in knowing the truth and obtaining justice. Criminal acts of such a serious nature will be those that involve grave violations of human rights and international humanitarian law, and the serious jeopardization of collective peace. [...]

Peace—[Article] 22 of the Constitution—is a collective good to which citizens are entitled. They and the public authorities have the obligation to respect it and to strive for its preservation [*footnote omitted*]. In Judgment T-008 of 1992, the Constitutional Court stated that peace is a collective right, which can only be understood to comprise legally protected collective interests.

Along these lines, in cases where there are criminal acts that involve grave violations of human rights and international humanitarian law and the serious jeopardization of collective peace, as assessed by the respective judge or prosecutor, society must be allowed to participate—through a citizen complainant—as a plaintiff claiming damages in the criminal case.

The Constitutional Court does not hesitate to include crimes against humanity within such serious acts, as the commission of such a crime significantly alters the minimum order of civility and entails disregard for the underlying principles of the prevailing social order.

3.5.2 Right to the truth in relation to the non-applicability of statutes of limitations to international crimes

PERU, *Unconstitutionality action 0024-2010-PI/TC (March 21, 2011) (List of judgments 7.2)*. The fundamental right to the truth not only includes the duty of the authorities to investigate acts that constitute crimes against humanity; it also includes the right to identify and punish the perpetrators, and to compensate, to the greatest extent possible, the victims and/or their relatives. Therefore, crimes against humanity “cannot go unpunished; that is, the direct perpetrators, as well as the accomplices to the acts that constitute a human rights violation, cannot avoid the

legal consequences of their acts [*footnote omitted*].” “The persons directly or indirectly affected by a crime of this magnitude have the right to know at all times, among other things, who the perpetrator was, when and where the crime was committed, how it happened, why it was committed, and where the victim’s remains are located, even if a significant amount of time has passed since the date of the offense [*footnote omitted*].”

Hence, the constitutionally protected content of the fundamental right to the truth includes the non-applicability of statutes of limitations to crimes against humanity. This Court has held that “it is incumbent upon the State to prosecute the perpetrators of crimes against humanity and, if necessary, to enact restrictive provisions to prevent, for example, the application of statutes of limitations to crimes that seriously violate human rights. The application of these provisions enables the legal system to be effective and is justified by the prevailing interests of the fight against impunity. The objective, clearly, is to prevent certain mechanisms of the criminal law from being applied with the repugnant aim of attaining impunity. This should always be prevented and avoided, given that it encourages criminals to repeat their acts, serves as a breeding ground for revenge, and erodes two underlying values of democratic society: truth and justice [*footnote omitted*].”

Based on the foregoing, it should be clear that the rule barring the application of statutes of limitations to crimes against humanity, and consequently, the mandate for their prosecution—regardless of the date of their commission—is not in effect in the Peruvian legal system as a result of the entry into force of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (November 9, 2003); rather, it arises by virtue of a peremptory norm of international law that, as the Inter-American Court has held, was not created by the Convention but rather is recognized therein [*footnote omitted*]. To circumvent this obligation derived from international practice is to disregard the enforceable constitutional content of the fundamental right to the truth as a tacit expression of the principle and right to human dignity (Article 1 of the Constitution), of the fundamental right to effective protection of the courts (Article 139(3) of the Constitution) and of the duty of the State to guarantee the full enjoyment of human rights (Article 44 of the Constitution). This rule is also meant to fully guarantee the fundamental rights to life (Article 2(1) of the Constitution), to humane treatment (Article 2(1) of the Constitution), to personal liberty (Article 2(24) of the Constitution), and to equality (Article 2(2) of the Constitution), in the face of very serious violations.

By virtue of this constitutional recognition, and in view of Article 55 and the Fourth Final and Transitional Provision of the Constitution, the Court must specify that the aforementioned rule barring the application of statutes of limitations is a norm of *jus cogens* derived from international human rights law, applicable at all times, not subject to contrary agreement, applicable *erga omnes*, and fully effective in the Peruvian legal system.

SECTION 4

RIGHT TO ACCESS TO JUSTICE

The right to access to justice has been recognized at the international level through a complex framework of regulatory provisions that complement one another. Since the adoption of the Universal Declaration of Human Rights,⁸⁵ universal human rights instruments, in particular the International Covenant on Civil and Political Rights, have established the obligation of States to provide effective remedies in view of the commission of human rights violations.⁸⁶ For its part, the American Convention on Human Rights recognizes not only the State obligation but also the individual right to access to justice, which encompasses both the right to have simple, adequate, and effective remedies for the protection of rights in the face of (possible) violations, as well as the right to go before the national courts for a decision on any right or obligation.⁸⁷ Under the Convention, any remedy (judicial or otherwise) must be processed in keeping with the due process standards recognized in Article 8 of the Convention.⁸⁸

⁸⁵ Article 8 of the Universal Declaration of Human Rights: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

⁸⁶ See Article 2.3 of the International Covenant on Civil and Political Rights. That provision must be interpreted in conjunction with Article 14 of the Covenant, which recognizes the right to due process. With respect to the normative content of these rights, see UN Human Rights Committee, *General Comment No. 32. Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32, August 23, 2007. Other international instruments of the universal human rights protection system that bear mentioning are: (i) Articles 6 and 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (ii) Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women; (iii) Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; (iv) Articles 3 and 12 (in particular) of the International Convention for the Protection of All Persons from Enforced Disappearance; (v) Articles 16(8) and 18 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. With respect to the right to effective remedies for the protection of the rights recognized in the International Covenant on Economic, Social and Cultural Rights, see, e.g., UN Economic and Social Council, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9. The Domestic Application of the Covenant*, E/C.12/1998/24, December 3, 1998.

⁸⁷ See Articles 8 and 25 of the American Convention on Human Rights. As in the universal system, the recognition in the Convention of the right to access to justice was preceded by its establishment in the American Declaration of the Rights and Duties of Man. See Article XVIII of the American Declaration: “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”

⁸⁸ For a more detailed analysis of the different forms in which access to justice and judicial protection is configured in international treaties, see, e.g., D. O’Donnell, *Derecho Internacional de los Derechos Humanos: Normativa, jurisprudencia y doctrina de los Sistemas Universal e Interamericano* (Mexico: OACNUDH/Tribunal Superior de Justicia del Distrito Federal, 2012), pp. 497–555.

Within this regulatory framework, the international interpretation of the right to access to justice has been based on the recognition of its dual status: as an autonomous right, with its own content, and as an essential mechanism for the full exercise of other rights. The Inter-American Court has emphatically identified the right to access to justice “as one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.”⁸⁹ On this basis, the inter-American case law has identified a variety of State obligations that must be met in order to ensure the free exercise of the right to access to justice. They encompass both the duties of abstention, or negative duties—that is, to not directly hinder access to justice—as well as the obligation to take all necessary measures to ensure the satisfaction of this right. Such measures include, most notably: (i) to establish an adequate regulatory framework, with suitable and effective remedies; (ii) to create an independent and impartial judiciary with the capacity to hear and decide cases and claims filed by all persons; (iii) to remove any legal or material obstacle that limits access to the courts; and (iv) to take the specific measures, on behalf of the most vulnerable sectors of the population, that are necessary to guarantee the satisfaction of this right. Such measures include, for example, access to free legal assistance, taking into account the resources available to the affected person, the complexity of the matter, the remedy in question, and, of course, the importance of the rights affected.⁹⁰

A detailed study of the substantive content of the right to access to justice goes far beyond the scope of these brief introductory paragraphs. As the UN Human Rights Committee has noted, this right “[combines] various guarantees with different scopes of application,”⁹¹ which makes the study of it a particularly demanding task.

Nevertheless, it is important to begin by recognizing at least some of the essential elements that, according to the international case law, provide content to the right to access to justice, as reference points of particular interest to the analysis of the Latin American decisions on the right to access to justice for victims of crimes and human rights violations.

As stated in the inter-American case law, the right to access to justice entails the ability to avail oneself of independent and impartial courts⁹² in order to obtain a reasoned

⁸⁹ See I/A Court H.R., *Case of Castillo Páez v. Peru*, Merits, Judgment of November 3, 1997, Series C, No. 34, para. 82; I/A Court H.R., *Case of Blake v. Guatemala*, Merits, Judgment of January 24, 1998, Series C, No. 36, para. 102; I/A Court H.R., *Case of Ivcher Bronstein v. Peru*, Merits, Reparations, and Costs, Judgment of February 6, 2001, Series C, No. 74, para. 135.

⁹⁰ IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129 Doc. 4, September 7, 2007.

⁹¹ UN Human Rights Committee, *General Comment No. 32. Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32, August 23, 2007, para. 3.

⁹² I/A Court H.R., *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 28, 2013, Series C, No. 268, paras. 143 *et seq.* For a more detailed discussion of guarantees of the independence and impartiality of judges and courts as part of the right to access to justice, trial rights, and the respective State obligations, see IACHR, *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/Ser.L/V/II. Doc. 44, December 5, 2013. On the same issue, see UN General Assembly, *Basic Principles on the Independence of the Judiciary*, Resolutions 40/32 of November

judgment that states the grounds for the decision that was rendered therein, as well as the establishment of the facts of the crime and/or violation⁹³ within a reasonable period of time. On this last point, it is important to underscore that the reasonableness of the duration of the proceedings must be determined bearing in mind not only the processing of the remedies themselves, including all levels of appeal, but also the duration of the investigations and the time period for the enforcement of judgments.⁹⁴

In a more detailed fashion, the Inter-American Court has reiterated that victims “should have wide-ranging possibilities of being heard and taking part in the respective proceedings, both in order to clarify the facts and punish those responsible, and also to seek due reparation.”⁹⁵ This line of interpretation has paved the way for a broader discussion of the scope of the rights (constitutional, convention, and legal) of victims, not only of human rights violations but also of criminal acts.

The right to access to justice is summed up, then, in several procedural guarantees benefitting victims, including especially the ability to: (i) access the case file and relevant information about the case, (ii) submit evidence at the appropriate procedural stage, and (iii) challenge the decisions or acts of the authorities that prevent or hinder the full exercise of their rights, among others. Additionally, it is essential to bear in mind the specific needs that arise from the particular status of certain victims, with a view to the full satisfaction of the right to access to justice. In this respect, both the national and international courts have upheld the importance of adopting special protocols or adjusting judicial practices with respect to, for example, minor children, migrants, disabled persons, or the perspective of gender.⁹⁶

In addition, the inter-American case law has emphasized that the advancement of investigations and judicial proceedings must not be conditioned or dependent upon

29, 1985 and 40/146 of December 13, 1985.

⁹³ See, e.g., I/A Court H.R., *Case of García Lucero et al. v. Chile*, Preliminary Objection, Merits, and Reparations, Judgment of August 28, 2013, Series C, No. 267, para. 121 *et seq.*

⁹⁴ Regarding application of a reasonable time period for determining compliance with the State duty to investigate, see, e.g., I/A Court H.R., *Case of García Lucero et al. v. Chile*, Preliminary Objection, Merits, and Reparations, Judgment of August 28, 2013, Series C, No. 267, paras. 124–127.

⁹⁵ See I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 30, 2010, Series C, No. 215, para. 192; I/A Court H.R., *Case of Rosendo-Cantú et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 31, 2010, Series C, No. 216, para. 176; I/A Court H.R., *Case of Lysias Fleury et al. v. Haiti*, Merits and Reparations, Judgment of November 23, 2011, Series C, No. 236, para. 107.

⁹⁶ See, e.g., IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, OEA Ser. L/V/II Doc. 63, December 9, 2011; Ibero-American Judicial Summit, *Carta de Derechos de las Personas ante la Justicia en el Espacio Judicial Iberoamericano* (2002); the Brasilia Regulations Regarding Access to Justice for Vulnerable People (2008); and, most recently, the *Protocolo Iberoamericano de actuación judicial para mejorar el acceso a la justicia de personas con discapacidad, migrantes, niñas, niños, adolescentes, comunidades y pueblos indígenas* (2014). As a complement to these international documents, some national judiciaries have adopted protocols designed to facilitate the adaptation of judicial proceedings to the specific conditions of the defendants. These protocols most notably include, for example, those published by the Supreme Court of Mexico (SCJN), such as *Protocolo para juzgar con perspectiva de género: Haciendo realidad el derecho a la igualdad* (Mexico, 2013), and *Protocolo de actuación para quienes imparten justicia en casos que involucren a niñas, niños y adolescentes*, 2nd ed. (Mexico, 2014).

the legal action of the victim. In other words, the State authorities must meet their respective obligations, even in the event that the victim decides not to assert his or her rights, particularly in cases of serious human rights violations (regardless of how they are prosecuted within the national criminal justice systems). Indeed, the establishment of the truth, as well as the punishment of the perpetrators, is not only a human right but also a State duty with its own content. On this point, the inter-American case law has consistently held that the investigation of the facts “is an obligation of means and not of results; however, it must be assumed by the States as an inherent legal obligation and not as a mere formality preordained to be [fruitless], or as an individual measure depending on the procedural initiative of the victims or their next of kin, or on the provision of [evidence] by private individuals.”⁹⁷ With respect to the action of judges, the Inter-American Court has underscored that:

“The right to effective legal protection requires that the judges direct the proceeding in such a way as to avoid undue delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights,” and that “the judges who are in charge of directing the proceeding have the duty to direct and channel the judicial proceeding with the aim of not sacrificing justice and due legal process in favor of formalism and impunity,” which otherwise “leads to a violation of the international obligation of the State to prevent and protect human rights and it abridges the right of the victim and the next of kin to know the truth of what happened, for all those responsible to be identified and punished and to obtain the attendant reparations.”⁹⁸

The recognition and evolution of the right to access to justice in the framework of international human rights law has also permeated international criminal law. As mentioned in other sections of this Digest, in contrast to the *ad hoc* international criminal tribunals, the Rome Statute of the International Criminal Court recognizes the right to participate in its proceedings, stating that “where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered.”⁹⁹ According to the Statute, the exercise of this right must be compatible with the rights of the accused and the principles of a fair and impartial trial,¹⁰⁰ for which the judges are required to evaluate, in each case, the appropriateness of the victims’ participation.¹⁰¹

⁹⁷ See, e.g., I/A Court H.R., *Case of Luna López v. Honduras*, Merits, Reparations, and Costs, Judgment of October 10, 2013, Series C, No. 269, para. 155; I/A Court H.R., *Case of García Lucero et al. v. Chile*, Preliminary Objection, Merits, and Reparations, Judgment of August 28, 2013, Series C, No. 267, para. 121.

⁹⁸ I/A Court H.R., *Case of Luna López v. Honduras*, Merits, Reparations, and Costs, Judgment of October 10, 2013, Series C, No. 269, para. 156. Note in the original: I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment of November 25, 2003, Series C, No. 101, para. 211.

⁹⁹ Article 68(3) of the Rome Statute of the International Criminal Court.

¹⁰⁰ *Ibid.*

¹⁰¹ For further details regarding the content and scope of the right to participate in ICC proceedings, see G. Bitti and G. González, “La participación de las víctimas ante la Corte Penal Internacional,” in *La Corte Penal Internacional: Una visión Iberoamericana*, ed. J. Guevara and T. Dal Maso (Mexico: Editorial Porrúa, 2005); P. Vega González, “El papel de las víctimas en la Corte Penal Internacional: Sus derechos y las primeras decisiones,” *Sur: Revista Internacional de Derechos Humanos* 5, no. 3 (2006): 19–41; M. Pena, “Acceso a la Justicia por Parte de las Víctimas ante la Corte Penal Internacional: Aspectos Prácticos y

Within this general framework, the victims in the situations and/or cases before the ICC can participate autonomously at different times during the proceedings before those international bodies, even during the investigation of those situations. The victims are also able to present, upon the submission of a prior request, their observations and remarks at specific stages of the proceedings, such as the authorization for the Office of the Prosecutor to open an investigation, the decision on the admissibility of a case, the confirmation of charges hearing, different proceedings and hearings during the trial, the proceedings directly related to the determination of reparations, or the appeal of interlocutory decisions or judgments, among others. In general terms, the judge's determination regarding the participation of victims must take account of the nature and specific stage of the proceedings in order to weigh the appropriateness of such participation against the rights of the accused and the principles of a fair and impartial trial.

As part of this brief analysis of the right of victims to take part in proceedings before the ICC when their personal interests are at stake, we refer to the criteria established by several ICC Chambers, recognizing that those interests are not limited to the right to obtain or be the beneficiary of reparations. On the contrary, some decisions have held that the right to access to justice is, in itself, a personal interest that can justify the participation of victims in certain procedural steps, even when they are not related to the issue of reparations.¹⁰²

In any case, for purposes of proceedings before the ICC, victims are considered participants rather than parties. This has significant implications in terms of the (im) possibility of filing certain procedures or appeals autonomously, in the same capacity as the Office of the Prosecutor and the defense. In this respect, the exercise of the victims' right to participation remains, to a certain extent, dependent upon the action taken by the parties during the trial.¹⁰³ Nevertheless, victims are not considered "assistants" to the Office of the Prosecutor, and therefore their opinions and observations may be submitted independently, without having to adhere to the position of the Prosecutor's Office.

The international debates on the right to access to justice, which we have merely touched on in these brief introductory lines, should support and provide feedback on the important case law produced by the national courts in this respect. The extracts of the judgments presented below are just a small sample of a broad range of judicial opinions that—based on a complex analysis of the constitutional framework—have served to lay the foundation for the effective exercise of this right in the context of national proceedings.

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. This right means that every victim must have the opportunity to assert his or her rights, benefitting from a fair and

Desafíos," in *La Corte Penal Internacional y Sus Primeros 10 Años: Un Enfoque Práctico*, ed. C. Cárdenas and K. Fernández (Santiago de Chile: Legal Publishing, 2013). See additionally note 29 *supra*.

¹⁰² See, e.g., ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth decision on victims' participation, ICC-01/05-01/08, December 12, 2008.

¹⁰³ In a case exemplifying these limitations derived from the position of victims and their representatives as participants, the Appeals Chamber ruled to dismiss their request to participate and present their observations in proceedings for the appeal of a conviction, given that both the Office of the Prosecutor and the defense had withdrawn their appeals. See ICC, *The Prosecutor v. Germain Katanga*, Decision on the victims' requests to participate in the appeal proceedings, ICC-01/04-01/07, July 24, 2014.

effective remedy, mainly to obtain the prosecution of the perpetrator, and obtaining reparation. This is stated [in the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity], whereby “*there can be no just and lasting reconciliation unless the need for justice is effectively satisfied.*” The Principles also establish that “*The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is initially a State responsibility, supplementary procedural rules should allow victims to be admitted as civil plaintiffs in criminal proceedings or, if the public authorities fail to do so, to institute proceedings themselves*” [*italics in the original*].

Prima facie, the jurisdiction of the national courts must be the rule, but when those courts are not able to administer justice impartially, or they are physically unable to function, the potential jurisdiction of an *ad hoc* international tribunal [*footnote omitted*], or a permanent international court such as the International Criminal Court, should be examined. In any case, the rules of procedure must meet due process criteria [*footnote omitted*].

As for the application of statutes of limitations with respect to criminal prosecution or sentencing, the Principles assert that they cannot be used in cases involving serious crimes that are considered to be crimes against humanity under international law. Furthermore, they cannot run in respect of any violation while no effective remedy is available. Statutes of limitations cannot be invoked against civil, administrative, or disciplinary actions brought by victims. With respect to amnesty, the Principles state that it cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy, and it must have no legal effect on any proceedings brought by victims relating to the right to reparation [*footnote omitted*].

COSTA RICA, *Judgment 01193-1995 (March 13, 1995) (List of judgments 4.1)*.¹⁰⁴ The fundamental aim of the strengthened and increased participation of the injured party in the criminal case is to favor the operation of a constitutional guarantee: the right to justice, to which the victim of a crime is entitled under Article 41 of the Constitution. Justice must not be seen as a value that is extraneous and contrary to the positive legal system, but rather as one of its guiding principles. In that respect, justice in a specific case, or the effective resolution of the controversy brought before the court, is one of its principal manifestations. The fundamental right to justice includes the right to the protection of the courts that belongs to all persons who avail themselves of the judicial system in order to have the competent bodies examine their claims and issue a reasoned decision according to law. This right to judicial protection assumes the adherence of the courts to the principles and rights that govern the process and that constitute an entire system of guarantees composed essentially of: access to judicial protection, the attainment of a judgment based on law, the enforcement of the judgment (which entails restoring the person’s rights and compensating him or her if he or she was entitled to the recovery of damages for the harm suffered), and the exercise of the powers and remedies provided for by law. This determines the effectiveness of the guarantee of judicial protection, and therefore there can be no obstacles that

¹⁰⁴ Editors’ note: Although this judgment is from 1995, it was affirmed by the Constitutional Division of the Supreme Court of Costa Rica in Judgment 01920 of 2004. Hence, it remains valid precedent in spite of the normative evolution of the issue examined in this Digest.

may be deemed excessive, that are the product of simple formalism, or that are not justified and proportionate to the objectives in keeping with this constitutional guarantee.

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. Article 229 of the Constitution guarantees “the right of all persons to access the justice system.” As this Court has recognized, this right includes, *inter alia*, having suitable and effective procedures for the legal determination of rights and obligations [*footnote omitted*], the disposition of controversies brought before the judges within a reasonable period of time and without undue delay [*footnote omitted*], the issuance of decisions with full respect for due process [*footnote omitted*], the existence of a broad and sufficient set of mechanisms for resolving disputes [*footnote omitted*], the provision of mechanisms to facilitate access to justice for the poor [*footnote omitted*], and the availability of access to justice throughout the entire country [*footnote omitted*].¹⁰⁵

¹⁰⁵ Editors’ note: In subsequent judgments, the Constitutional Court of Colombia has developed the content and scope of the right to justice. These judgments include Judgments C-936/2010, C-250/2011, C-771/2011, C-715/2012, C-099/2013, and C-579/2013. In Judgment C-715/2012, the Court systematized several of the rules that arose from its case law on the right to justice, stating the following: “As for the **right to justice**, the Court has established various rules in its case law, such as: (i) the obligation of the State to prevent serious human rights violations, especially in cases of mass, ongoing, and systematic violations such as internal forced displacement; (ii) the State obligation to fight against impunity; (iii) the obligation to establish mechanisms for expeditious, timely, prompt, and effective access to justice for the effective judicial protection of the rights of crime victims. In this respect, the obligation of the State to design and guarantee effective judicial remedies is established so that the affected persons can be heard, as is the obligation to advance investigations and assert the interests of the victims at trial; (iv) the duty to investigate, prosecute, and punish the perpetrators of serious human rights violations such as forced displacement; (v) respect for due process and the establishment of rules of procedure in accordance with due process; (vi) the obligation to establish reasonable time periods for court proceedings, taking account of the fact that disproportionately short time periods can result in the denial of the victims’ right to justice and in the non-attainment of just reparations; (vii) the duty to initiate investigations *ex officio* in cases of serious human rights violations; (viii) the constitutional mandate to ensure that domestic judicial mechanisms such as amnesties or pardons—in both the ordinary justice system and in processes of transition to peace—do not lead to impunity or the concealment of the truth; (ix) the establishment of limits and restrictions, based on the rights of victims, to concepts of legal certainty such as *non bis in idem* and the application of statutes of limitations with respect to criminal prosecutions or sentencing in cases of gross violations of human rights, international humanitarian law, and international human rights law; (x) the establishment of limits to legal concepts for release from criminal responsibility or the reduction of sentences in transition processes, as the exoneration of the perpetrators of serious human rights violations and violations of international humanitarian law is inadmissible, and therefore there is a duty to prosecute and sentence the perpetrators of the crimes investigated to appropriate and proportionate sentences. This rule, as the Court has stated, may be subject to exceptions only in transitional justice processes in which human rights violations are investigated in depth and the victims’ minimum rights to truth and comprehensive reparation are restored and measures of non-repetition are designed to prevent the recurrence of such crimes; (xi) the legal standing of victims and of society as civil plaintiffs in criminal proceedings involving serious violations of human rights and international humanitarian law for purposes of obtaining the truth and the redress of harm; (xii) the importance of the participation of victims in the criminal case, in accordance with Articles 29 and 229 of the Constitution and 8 and 25 of the American Convention on Human Rights; (xiii) the indispensable guarantee of the right to justice in order to thereby guarantee the victims’ right to the truth and to reparations” [*emphasis in the original*].

EL SALVADOR, *Consolidated constitutional cases 5/2001 (December 23, 2010) (List of judgments 5.1)*. It bears emphasizing that the State's duty to safeguard the legally protected interests and fundamental rights of all persons is also incumbent upon the judiciary, as court proceedings are an instrument that serves to satisfy the claims of individuals, enabling legal claims against individual and State acts that violate those rights [*footnote omitted*].

Derived from this is a resulting right related to access to the courts, which is enshrined in Articles 2, 11, 12, 15, and 172 of the Constitution, and which has been defined as the ability of all persons to avail themselves of the courts—through the legally established channels—for purposes of defending their rights and obtaining a reasoned decision based on law.

The right to the protection of the courts thus consists of the opportunity for a rights-holder or person with a legitimate interest to access the courts in order to state a claim or contest one that has already been brought, and to receive a response to his or her claim or objection based on law, through a fair and equitable process conducted in accordance with the Constitution, the international law currently in force, and the respective national laws.

It follows from the above notion that this judicial protection falls under four broad headings: (a) access to the courts; (b) the constitutionally prescribed process, or due process; (c) the right to a reasoned and consistent decision on the merits; and (d) the right to have decisions enforced [*footnote omitted*]. It is observed, then, that we are dealing with a fundamental right that obligates the State to create the legal, judicial, and administrative conditions for real and expedited access to the courts and the effective protection of individual rights. [...]

This line of jurisprudence is consistent with the established case law of the Inter-American Court of Human Rights in relation to the prompt investigation and prosecution of those acts that constitute violations of any of the legal categories stipulated in the Convention.

In its judgment of July 29, 1998 (*Velásquez Rodríguez v. Honduras*), the Court held that the State "... has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation" (para. 174).

The Inter-American Court ruled similarly in a March 1, 2005, judgment (*Serrano Cruz Sisters v. El Salvador*), in which it held that "the next of kin of the alleged victims have the right to expect, and the States the obligation to ensure, that what befell the alleged victims will be investigated effectively by the State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the losses suffered by the next of kin repaired" (para. 64).

Both the above opinions and the previously cited court decisions are based on the State's obligation to investigate, identify the direct perpetrators or persons who have commanded others to commit the crimes, pursue, prosecute, and punish those responsible for an infringement or impairment of the legally protected interests of the victims.

4.1 CONSTITUTIONAL LIMITATIONS TO THE LEGISLATIVE DEVELOPMENT OF THE RIGHT TO ACCESS TO JUSTICE

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. [Although] [...] the legislature has a broad margin of discretion to regulate the means and procedures that guarantee [the right of all persons to access the courts], this discretion does not include the power to restrict the purposes of access to justice—which are oriented toward the full and comprehensive judicial protection of rights of the parties—in order to limit that access, in the case of crime victims, to the receipt of financial compensation. Accordingly, the right to access the justice system can include various judicial remedies designed by the legislature, which are appropriate for obtaining the truth about what occurred, the punishment of the perpetrators, and pecuniary reparation of the harm suffered.

Also intimately tied to the legislative development of victims' right to access to justice is the normative design of the criminal procedure itself. In the following judgment, the Constitutional Division of the Supreme Court of El Salvador addressed the issue of limits to freedom of legislative action with respect to the forms of procedure, using victims' rights as a criterion for oversight.

EL SALVADOR, *Consolidated constitutional cases 5/2001 (December 23, 2010) (List of judgments 5.1)*. In procedural matters, then, the legislature can, within its freedom of legislative action, establish the procedural model it deems optimal for the accomplishment of its constitutional and legal aims.

This does not mean that the exercise of that freedom in procedural matters (as in any other) entails disregarding the constitutional parameters and the rights and fundamental guarantees recognized in the Constitution. [...]

A procedural structure is built on the order of its different elements. It is a necessary and asymmetrical order, in the sense that it must be built in a successive and irreversible manner.

The procedural steps cannot be understood to be unrelated to the objectives pursued through the process—to produce or accomplish certainty. And this functional view of the process, in turn, must follow a certain order, a certain structure. In most cases, the functional structuring of procedure is based on the adversarial principle, so that a proceeding is classified as adversarial because it allows the parties to the litigation have an equal opportunity to mutually challenge their respective assertions—that is, the parties can confront one another in the proceedings.

In this respect, the constitutionally designed adversarial process is set up to provide the opportunity and the manner for the exercise of reciprocal controls between the parties to the proceeding [...].

The general duty to protect fundamental rights arises from their objective dimension. It follows from the meaning and aims of those rights within the constitutional system that the guarantee of their operation cannot be limited to the ability of individuals to assert claims; rather, it must be assumed by the State. Therefore, we can infer not only the State's negative obligation to not harm the individual sphere protected by fundamental rights but also the positive obligation to contribute to the effective enjoyment of those rights [...].

In this respect, fundamental rights link all branches of government, and are the source of State obligations, principally in the tasks of prevention, promotion, protection, and the reparation of harm.

[In the legislative design of criminal procedure, the secondary laws establish that] the Prosecutor has the obligation to comply with the prompt administration of justice, so that the duration of the investigation is not so excessively long as to become unreasonable, given that the time period for the filing of the charging document has been defined as “the shortest time possible.”

To date, the phrase “the shortest time possible” used in the contested provision has been interpreted according to criteria of reasonableness and proportionality which, logically, take account of the specific case; the aim is to establish a weighted or balanced relationship, in order to have sufficient evidence or indicia to support the content of the charging document.

We must bear in mind, then, that the general admissibility of the use of indeterminate legal concepts breaks down when the absence of more specific or defined parameters can affect the exercise of fundamental rights. This stems from the mandate of clarity—derived from legal certainty—that seeks to prevent judicial references to ambiguous general concepts, the establishment of imprecise legal consequences, or the application of vague frameworks in State proceedings.

In view of the above, it is observed that the protection of victims’ rights can be left waiting for however long a prosecutor deems “reasonable” for the litigation; this situation distorts the nature of the initial acts of investigation and hinders the normal progression of the criminal case. [...]

There is no doubt that delays in criminal prosecution create various types of harm in the lives of defendants, as well as in the lives of the victims who seek the State’s protection by filing a criminal case. [...]

Under these conditions, the use of vague legal concepts raises the risk that the deadline of “the shortest time possible” will be longer than “the longest time tolerable,” from the perspective of people’s right to know what to expect in relation to the exercise of punitive power.

Indeed, in order to resolve or reduce the normative vagueness of “the shortest time possible” a new indeterminate concept is used—“reasonable time period,” or reasonableness in general—which serves only to maintain and prolong the uncertainty. Therefore, this formulation enacted by the legislature must be considered unacceptable. And it is dismissible even though, from a contrary position, it can be argued that the intent of that regulatory term is to ensure an essential margin of adaptation to the specific case and that therefore the use of concepts whose connotation can only be casuistic is inevitable. [...]

Within its freedom of legislative action, the legislature can extend or lengthen that time period—always subject to the requirements arising from fundamental rights—or use other more flexible formulas that, without waiving the definition of a maximum time limit, defer this determination to a judicial decision in the specific case (such as a time period for the defendant or the victim to ask the judge to set a deadline for the filing of the charging document).

4.2 THE VICTIM AND/OR INJURED OR AGGRIEVED PARTY AS A PARTICIPANT IN AND/OR PARTY TO THE CRIMINAL PROCEEDING

COSTA RICA, *Judgment 7497-98 (October 21, 1998) (List of judgments 4.2)*. The extensive participation [of the victim in the criminal proceedings] is supported by the Constitution and is a true fundamental right, as previously held by this Court, in spite of the fact that its frame of reference was the 1973 Code, which was inquisitorial in style and therefore much more restrictive toward the victim on this issue:

“In addition, account must be taken of the fact that the new global trends in criminal law seek to reclaim the role of the victim or injured party through mechanisms that enable them to adequately defend their interests, within and outside the criminal proceedings, even replacing the Public Ministry in those cases in which it—for reasons of timing or legality—determines that the investigation of the act in question should not go forward. If the essential function of constitutional justice is to seek the fairest solution, interpreting and applying the law within the context of a democratic system governed by the rule of law, inspired by respect for the dignity of the person and equality of treatment and opportunities, this case must be decided in favor of the interests of the victim or injured party, in order to grant him or her the opportunity to exercise, on an equal footing, the remedies designed to defend his or her interests. In addition, Article 41 of our Constitution, as the constitutional case law has previously held, establishes a set of basic principles to which individuals and the State must adhere in the sphere of justice. Because it states that individuals must be able to obtain redress for harm or damages, it is clearly stipulating that the laws must be oriented to protect the violated rights with provisions that, first of all, regulate or protect the rights of all persons, and secondly, establish the appropriate procedural instruments for individuals to have access to justice and to obtain it if the offense is proven.” (Decision No. 5751-93 [...] of November 9, 1993) [*italics in the original*]

Along the same lines, we cite Judgment No. 5752-93 handed down at 2:42 p.m. on November 9, 1993:

“Granting the victim or injured party the opportunity to exercise, on an equal footing, the most relevant remedies designed to defend his or her interests is the only way to give full effect to the constitutional principles contained in Articles 33 and 41 of the Constitution—above all if, as in the instant case, the Public Ministry failed to represent the interests entrusted to it in the Law, by belatedly appealing the order granting the extraordinary extension of the investigation stage of the criminal proceeding.” [*italics in the original*]

MEXICO, *Judgment 163/2012, settling a contradiction between inconsistent rulings (November 28, 2012) (List of judgments 6.3)*. **The notion of the set of fundamental rights of the crime victim or injured party is best understood as a state of equilibrium between the parties to the criminal proceedings** [*emphasis in the original*]. In the most recent amendment to Article 20 of the Constitution of the United Mexican States [...], which is part of the new accusatory system [...], the set of constitutionally recognized rights of the victim or injured party was set forth in section C, which includes, with the same scope and breadth, the right to actively participate in the different stages of the criminal proceedings [*footnote omitted*].

The outcome of the inquiry at the constitutional level is conclusive: the status of the crime victim or injured party in criminal proceedings—also applicable at the preliminary investigation stage—in view of the prerogatives granted to him or her under the Federal Constitution, is that of a “party to the proceedings” [*footnote omitted*] with the right to participate actively.

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. One of the most relevant contributions of the international case law on victims’ rights is the consolidation of their right to enjoy the broadest opportunities to participate in the criminal proceedings for the crimes that were perpetrated against them, which includes full access and capacity to act at all stages and levels of the investigation and the respective trial [*footnote omitted*]. The Court emphasizes that these victims’ rights now enjoy practically universal recognition, and they must be guaranteed within the Colombian legal and constitutional system regardless of the specific status of those victims within the system of criminal procedure established in the national codes.

[Colombian constitutional case law has held] that one of the natural components of the right to access to justice is the right to have justice served. This right involves a true constitutional right to a criminal proceeding [*footnote omitted*], and the right to *participate* in the criminal proceeding [*footnote omitted*]. Therefore, the right to a criminal proceeding in a democratic State must be highly participatory. This participation is stated, for example, as follows: “*the relatives of the deceased and their legal representatives shall be given notice of the hearings that are held, and shall have access to them, as well as to all information pertinent to the investigation, and shall have the right to submit additional evidence*” [*footnote omitted*]. [...] [*italics in the original*]

The victim or parties injured by a crime have the right to participate in the criminal case not only to obtain financial compensation but also to enforce their rights to truth and justice. In addition, they can participate with the sole purpose of seeking truth and justice, without being required to demonstrate a financial harm or claim, thus overcoming a precarious conception of victims’ rights that is limited solely to financial reparation.

4.3 PROCEDURAL INSTITUTIONS FOR THE PARTICIPATION OF THE VICTIM AND/OR INJURED OR AGGRIEVED PARTY IN THE CASE

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. The Court finds that plaintiff claiming damages in a criminal case, victim, and injured party are different legal concepts. The victim is the person against whom the criminal act was committed, while the category of “injured party” is wider in scope insofar as it includes all persons who have suffered a harm, even when it is not financial in nature, as a direct consequence of the commission of the crime. Obviously, the victim also suffers the harm, and in this respect is likewise an injured party. The concept of plaintiff claiming damages in a criminal case is a legal institution that allows victims or injured parties—including the victim’s heirs—to participate as parties to the criminal proceedings. The civil nature of the party has been understood in a merely financial sense, but in fact can have a different connotation given that it refers to the participation of members of civil society in a proceeding conducted by the State. Thus, based on criteria that

will be addressed later, the plaintiff claiming damages in a criminal case is the party directly and legitimately interested in the course and outcome of the criminal case. [...]

Two major trends can be identified with respect to the opportunity for victims and injured parties to take part in the criminal case. In the Roman-Germanic legal systems, victims have generally been permitted to take part in criminal proceedings as plaintiffs claiming damages in a criminal case. In the Anglo-Saxon systems, even though the victim and injured parties traditionally are not parties to the criminal case and their participation is that of a simple witness, this position has been changing, and they have even been granted the right to initiate criminal investigations and criminal proceedings [*footnote omitted*]. [...]

In relation to the possibility of victims being able to initiate a criminal case when the State does not do so, different solutions have been adopted in consideration of the principles of prosecutorial discretion and legality. In the systems guided by the principle of legality, the occurrence of a crime requires the State to prosecute in all cases [*footnote omitted*]. In the systems that recognize prosecutorial discretion, the prosecutor's office enjoys greater latitude to decide when not to initiate a criminal prosecution. In those cases, even though in principle the State has a monopoly on prosecution, victims or injured parties are allowed to file private criminal charges and mechanisms have been developed for them to challenge the State's decision to refrain from criminal prosecution in a specific case.

In the systems that emphasize the principle of legality, the Public Ministry is required to prosecute in all cases. [...] In principle, the only reason for which prosecution is not initiated is that there is insufficient evidence to determine the occurrence of the criminal act or the alleged responsibility of the suspects [*footnote omitted*]. Nevertheless, various exceptions have been established in order to make this system more flexible. In Germany, for example, the victim or the injured parties can initiate an investigation and criminal proceedings in the case of offenses for which criminal complaints can be filed, offenses affecting individual privacy, and certain misdemeanor offenses [*footnote omitted*]. In the event of more serious crimes, the victim or injured parties can appeal the decision not to prosecute before the Office of the Attorney General, and if that office refuses to prosecute, they can even avail themselves of the Court of Appeals to force the Public Ministry to prosecute.

Nevertheless, this does not mean that any person who alleges to have an interest in the establishment of the truth and the service of justice can be a plaintiff claiming damages in a criminal case—the inference being that the crime affects all members of society—nor that the expansion of the opportunities for the participation of such plaintiffs who are interested only in truth or justice can turn the criminal case into an instrument of retaliation against the defendant. There must be a real, concrete, and specific harm (not necessarily financial) that legitimizes the participation of the victim or injured parties in the criminal case in pursuit of truth and justice. This must be assessed by the judicial authorities in each case [*footnote omitted*]. Once the status of victim has been established, or it has been generally established that the person has suffered a real, concrete, and specific harm, regardless of its nature, he or she has standing as a plaintiff claiming damages in a criminal case and can focus his or her claim exclusively on the service of justice and the search for the truth, leaving aside any financial objective. Moreover, even when the victim or injured party receives compensation for financial harm, where it exists, he or she may remain a party to the proceedings based on an interest in truth and justice. *This means that*

the only essential procedural requirement for participating in the proceedings is to prove the specific harm, without any requirement that there be a claim seeking financial reparation [emphasis added].

Closely tied to the analysis of the procedural concepts whereby victims or aggrieved or injured parties can take part in criminal proceedings is the debate surrounding the nature of the institution of the criminal indemnification action [*acción civil*] versus the public right of action [*acción pública*]. The criterion established by the Constitutional Division of the Supreme Court of Costa Rica in the judgment transcribed below is of interest to this discussion.

COSTA RICA, *Judgment 04140-2003 (May 16, 2003) (List of judgments 4.4)*.¹⁰⁶ The innovations introduced as part of the new system included—in addition to orality and other principles—the monopoly on the exercise of public prosecution that was granted to the Public Ministry so that it would represent the interests of the State. The criminal indemnification action became secondary, as the plaintiff claiming damages in a criminal case was transformed into a private prosecutor. For this reason, the plaintiff claiming damages in a criminal case is given the right to appeal only his or her action and not the criminal action; otherwise, the plaintiff claiming damages in a criminal case would essentially be a private prosecutor independent of the Public Ministry. It can be said that this concept of being an adjunct to the prosecution does not allow for the interests of the victim to be represented on the same level as those of the defendant, and that therefore there is procedural inequality between them. Nevertheless, this is not true in all cases. [...] In spite of the plaintiff’s accessory status, this does not always depend—nor should it depend—on the outcome of the main action. The case law and relevant doctrine have recognized that there are cases in which, notwithstanding the fact that an acquittal was handed down, those plaintiffs can avail themselves of the criminal indemnification action. Thus, for example, Judgment No. 87 F [...] of the Third Division of this Court held:

“Two actions are born of every criminal offense: the main one, which is the criminal action, and another accessory action, which is the criminal indemnification action. Each requires the commission of a criminal act to serve as its basis and origin. Although a criminal indemnification action can be filed following an acquittal, it is understood that this is possible when the acquittal is based exclusively on grounds of criminal law, such as the application of statutes of limitations, since in this case the crime that is the basis for these actions was indeed committed.”

Article 11 of the Code of Criminal Procedure allows for exceptions to the principle that the victim acts as an adjunct by establishing that:

“The criminal indemnification action can be brought in the criminal case only while the principal action is pending; however, the acquittal of the defendant shall not prevent the trial court from ruling on it in the judgment, nor will the subsequent termination of the

¹⁰⁶ Editors’ note: The paragraphs transcribed below were included in Judgment 04140 (2003) of the Constitutional Division of the Supreme Court of Costa Rica, as part of the procedural history of the judgment in question. The criterion cited was initially established in Judgment 05751 (1993), also handed down by the Constitutional Division of the Supreme Court.

criminal action prevent the Cassation Division from deciding the criminal indemnification action.”

The legislature allowed for the criminal indemnification action to become the principal action when the prosecution is terminated in certain cases. It could not be otherwise, as the intention, in addition to favoring judicial economy, was to favor the victim when he or she timely filed his or her claim for redress. There is no danger, then, in allowing the criminal indemnification action to be severed from the criminal action in some cases, in order for the injured party to act with certain independence. Similarly, there is no reason why the plaintiff claiming damages in a criminal case should remain subject to the action of the prosecution in these cases, creating a dangerous independence of the plaintiff from the prosecutor, who in the newly adopted system is the only agent able to initiate and pursue the judicial investigation of a crime.

The Code of Criminal Procedure, while giving the Public Ministry a monopoly on criminal prosecution, simultaneously granted the injured party the right to act in defense of his or her own interests by filing a criminal indemnification action. Therefore, if this right is being granted in the new procedural system to the plaintiff claiming damages in a criminal case as the alleged victim of the act, it is logical that the system should provide the instruments necessary for the exercise of the right to which it deems victims entitled and allow them to obtain complete justice, without delay or denial. To do otherwise would be tantamount to only half recognizing the victim's rights. Furthermore, it is not true that allowing the plaintiff to go before the court independently of the Public Ministry affects its monopoly on prosecution; the plaintiff claiming damages in a criminal case participates and goes to court to defend his or her own action to the extent that it is affected by the dismissal or acquittal and not the prosecution *per se*—although it is possible, given the close relationship between the two, that the recognition of the right of the plaintiff claiming damages in a criminal case could indirectly affect how the criminal case is decided.

4.4 PROCEDURAL TIMING OF THE PARTICIPATION OF THE VICTIM AND/OR INJURED OR AGGRIEVED PARTY

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. As far as the time at which victims or injured parties can take part in criminal proceedings, most countries that allow for their participation provide for it both at the investigation stage and during the trial phase [*footnote omitted*]. Nevertheless, in those systems where an inquisitorial system of criminal investigation still prevails, victims or injured parties do not have the opportunity to participate during the investigation phase.

Confidentiality during the preliminary investigation phase has been justified by the interest in protecting the information gathered during this phase. Nevertheless, given that the purpose of the preliminary investigation is to determine whether the criminal act occurred, whether the act is defined as a crime, whether criminal prosecution is time-barred by a statute of limitations, whether a criminal complaint is required to initiate the criminal prosecution, whether the criminal complainant has standing to file the action, and whether there is any exclusionary

ground of unlawfulness or culpability (Article 322, Law 600 of 2000), keeping the plaintiff claiming damages in a criminal case from acting at this stage or allowing him or her to access the case file only by filing a petition can absolutely result in the violation of his or her rights to the truth, justice, and reparation. Such limitations, therefore, are a serious infringement of the right to access to justice to which a crime victim is entitled.

Although truth and justice in the criminal case depend upon the information and evidence gathered in the preliminary investigation phase being free from outside interference or threats, the interest in its protection cannot go so far as to violate the rights of the defendant [*footnote omitted*] or of the plaintiff claiming damages in a criminal case—especially when there are mechanisms for protecting the integrity of the case file and the information therein from potential attempts to disseminate or destroy it. These include establishing criminal or other penalties against persons who violate the confidentiality of the criminal investigation or destroy evidence, without undermining the rights of the parties to the criminal proceeding.

Additionally, because the rights of the plaintiff claiming damages in a criminal case are not based exclusively on financial interest, his or her rights to truth and justice fully justify his or her participation at the preliminary investigation stage.

4.5 SPECIFIC RIGHTS OF VICTIMS IN CRIMINAL CASES

4.5.1 Right to legal assistance (national effects of the international representation of victims)

MEXICO, *Review of petition for a constitutional remedy 168/2011 (November 30, 2011) (List of judgments 6.2)*. It bears noting that if an individual or a legal entity—as in the instant case—has represented the victims before the Inter-American Court of Human Rights, that representation is effective for all purposes in the Mexican legal system, whether before the administrative authorities or before the local or federal Mexican courts. This is because the ratification of the American Convention on Human Rights and the recognition of the contentious jurisdiction of the Inter-American Court of Human Rights carries the inescapable consequence that the judgments issued by the Court in cases to which Mexico has been a party are binding upon the Mexican State, which includes the recognition of the legal capacity of the victims' legal representatives. However, the victims may revoke that representation through the channels provided for by law, in which case the representatives will not be able to act before the Mexican courts.

4.5.2 Right to the protection of privacy and personal information in criminal cases

MEXICO, *Review of petition for a constitutional remedy 168/2011 (November 30, 2011) (List of judgments 6.2)*. In order to protect privacy and personal information—considered to be one of the constitutionally permissible limits—Article 18 of the Law established the criterion of “**confidential information**,” which restricts access to data containing personal information

that requires the consent of the individuals for its release, distribution, or sale [*emphasis in the original*].

The above also finds constitutional support in: (i) the second paragraph of Article 16 of the Constitution, which recognizes that the right to the protection of personal information—as well as to its access, correction, and cancellation—must be protected as a general rule, save in exceptional cases provided for in secondary laws [*footnote omitted*]; and (ii) Article 20, section C, subsection V of the Constitution, which protects the identity and other personal information of victims and injured parties who are parties to the criminal proceedings [*footnote omitted*].

4.5.3 Right to pursue criminal action autonomously

EL SALVADOR, *Consolidated constitutional cases 5/2001 (December 23, 2010) (List of judgments 5.1)*. In accordance with the principle of independence and the cooperation among bodies established in the Constitution, it is recommended that the Legislative Assembly revise the treatment of the victim in our criminal procedure, in relation to criminal proceedings and his or her constitutional right to access judicial protection by means of the criminal case—particularly with regard to the State’s failure to initiate criminal prosecution through the respective charging document.

In this regard, the current system of criminal procedure does not provide any mechanism for accessing the courts in a case where the prosecutor or his or her superior shows disinterest or refuses to investigate, which leaves the victim unprotected and at a clear disadvantage. Once the victim sees that it is impossible to access the criminal justice system, he or she will have to go before the constitutional or administrative disputes courts to safeguard his or her right to judicial protection, which may result in delayed and ineffective protection.

It is clear that this legal shortcoming must be addressed by making the victim’s interests compatible with the Public Ministry’s supposed monopoly on criminal prosecution, particularly regarding the presumed “exclusiveness” of its exercise. Although this government activity cannot be subjected to the will of private individuals, it is possible to *modify the regulation of the private prosecutor to allow the victim autonomously—that is, not complementarily—to initiate and pursue a criminal prosecution in those cases in which the respective authority does not wish to criminally investigate or proceed with the criminal case, out of disinterest or for any other reason.*

It is concluded from the above that *public prosecution is not a monopoly or within the exclusive competence of the Prosecutor General; to understand it as such would be to disregard or negate crime victims’ right to access to justice. Therefore, in accordance with the principle of the unity of the Constitution, Article 193(4) of the Constitution must be interpreted in harmony with Article 2(1) in fine thereof* [*emphasis in the original*].

4.5.4 Right to participate in the indictment hearing

COLOMBIA, *Judgment C-209/2007 (March 21, 2007) (List of judgments 3.3)*. The Court observes that pursuant to Article 336 of Law 906 of 2004, when the material and physical evidence and the information legally obtained at the investigation phase make it possible to state with “a likelihood of truth” that a criminal act took place and that the suspect is the perpetrator or

accomplice, the prosecutor presents a charging document before the judge who hears the case. This document, *inter alia*, identifies the defendants, provides a succinct statement of the facts, and discloses the evidence, to mention just a few of the requirements for the charges to be brought (Article 337, Law 906 of 2004). A copy of this document is provided to the defendant, the Public Ministry, and the victims “*solely for informational purposes.*” [...] [*emphasis in the original*]

During the indictment hearing, it is stated expressly and exhaustively who may participate: the parties to the proceedings, the Office of the Public Prosecutor and the defense, and the Public Ministry. Just as the plaintiff states, the victim was not included among the parties to the proceedings that take part in that hearing; nor is the victim given the opportunity to participate even incidentally at this stage. This confirms that providing a copy of the charging document to the victim pursuant to Article 337 is above all for informative purposes, and does not allow him or her to take any type of action to oversee the application of the elements of the criminal offense to the facts of the case, or the disclosure of the prosecution evidence that will be used at the trial stage.

As stated in Article 339 of Law 906 of 2004, the purpose of the participation of the parties authorized to take part in the indictment hearing is for them to exercise oversight by two means: (i) making observations to the charging document, in order for the prosecutor to clarify, correct, or amend it; and (ii) the oral statement of grounds for any potential jurisdictional challenges, impediments, recusals, or nullities. The exclusion of the victim at this stage prevents him or her from establishing his or her position with respect to the indictment and, in particular, ensures that the victim acts in a manner that will effectively guarantee his or her rights to the truth, justice, and reparation at a critical time during the case. The participation of victims in the indictment hearing concerns the recognition of their status as victims and that of their legal representatives (Article 341, Law 906 of 2004). Additionally, in the event that the prosecutor deems it necessary and urgent, comprehensive protection measures may be adopted on behalf of victims and witnesses (Article 342, Law 906 of 2004).

It follows from the above that, according to the legislature’s design, the victim has no opportunity to establish his or her position with regard to the indictment, the application of the elements of the criminal offense to the facts of the case, or the disclosure of the prosecution evidence that will be used at trial, while the parties and participants such as the Public Ministry do. Given that the interests of the Office of the Public Prosecutor and the victim, or the victim and the Public Ministry, do not necessarily coincide at the indictment stage, the rights of victims to truth, justice, and comprehensive reparation may be insufficiently protected at this crucial stage of the criminal proceedings. Bearing in mind the importance of the victim’s participation at this stage, it is clear that the legislature’s omission jeopardizes the effectiveness of the victim’s rights and is therefore unconstitutional.

Although the Constitution granted the Office of the Public Prosecutor the power to bring charges, we see no objective and sufficient reason to completely exclude the victim from stating a position with regard to the indictment, given that the victim’s participation does not involve any modification of the structural features of the accusatory criminal system, nor a transformation of the victim’s status as a specially protected participant. The establishment of the victim’s position does not affect the autonomy of the prosecutor to bring charges, much

less displace the prosecutor in the exercise of his or her authority. This exclusion of the victims creates an unjustified inequality vis-à-vis the other parties to the case that leaves the victim's rights unprotected. Therefore, both the limitation stipulated in Article 337, which allows the victim to be provided with a copy of the charging document “solely for informational purposes,” and the failure to include the victim (or his or her representative) in the indictment hearing so that he or she can make observations, request its clarification or correction, or state any potential grounds for jurisdictional challenges, impediments, recusals, or nullities, amount to a breach of the constitutional duties of the legislature with respect to the protection of the victim's rights.

4.5.5 Right to access the case file

COSTA RICA, *Judgment 01920-2004 (February 22, 2004) (List of judgments 4.5)*. That case law having been updated in light of the new Code of Criminal Procedure, in accordance with the explanation at the beginning of this conclusion of law, it must be underscored that the victim is entitled to several procedural rights—regardless of whether he or she is acting as a criminal complainant—which can only be exercised if he or she is allowed full access to the case file. Nevertheless, this does not bar the Public Ministry from declaring the secrecy of the proceedings, as stipulated in Article 296 of the Code of Criminal Procedure, provided that this measure is the result of a well-founded decision, does not exceed a period of ten consecutive days, and provides a reasoned and objective statement of why the Prosecutor considers that the investigation would be hindered if the case records were known to the parties [*footnote omitted*].

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. The Court notes in particular that timely access to the case file allows victims and their relatives to identify gaps in the information in the possession of the prosecutor and contribute factual elements through the institutional channels prior to the receipt of the defendant's voluntary statement or at a subsequent stage, all with a view to cooperating with the Office of the Public Prosecutor in keeping with its duty to conduct an exhaustive investigation.

4.5.6 Right to participate in trial proceedings

VENEZUELA, *Judgment 418 (July 26, 2007) (List of judgments 8)*. In the opinion of the Criminal Cassation Division, the victim, as a party directly or indirectly affected by a criminal act, has the right to participate in the entire criminal case regardless of whether he or she is a criminal complainant, private prosecutor, or has joined the prosecutor's indictment.

With respect to the victim as a party to the proceeding, the Constitutional Division has ruled as follows:

... This Court observes that the Organic Code of Criminal Procedure has supported as one of the great advances of our criminal justice system the consideration of the victim as a party to the proceeding, although the victim is not the accuser. In view of this legal recognition, it is now incumbent upon the judges to give the proper importance to the participation granted to victims expressly in Article 120 ejusdem, and indirectly through other legal provisions of the Code that give the victim the right to participate in the entire process, even at the investigation stage, and

in any case in which a decision contrary to his or her interests is issued. Regardless of whether the victim is acting as a criminal complainant, private prosecutor, or has joined the prosecutor's indictment, he or she is given the right to appeal those judgments and the courts are required to guarantee the full enjoyment of those rights ... (Judgment No. 188 of March 8, 2005). [italics in the original]

On this point, the Criminal Cassation Division has stated the following:

Articles 19, 26, and 30 of the Constitution of the Bolivarian Republic of Venezuela and Articles 23, 118, 119, and 120 of the Organic Code of Criminal Procedure give rise to substantive and procedural rights within the framework of due process that recognizes the victim as that person who, as the result of a criminal act, has been harmed physically, emotionally, or financially, and takes part in a case against the alleged perpetrator of the acts in order to obtain the mitigation or reparation of the harm suffered.

The opinion of the Criminal Cassation Division regarding this matter is as follows: "... The victim's right to go before the courts is unequivocally derived from the right to effective judicial protection provided for in Article 26 of the Constitution and Article 25(1) of the American Convention on Human Rights, the basic content of which includes the right to access the courts without discrimination of any kind, the right to initiate and participate in a case, the right to obtain a reasoned judgment, the right to appeal, and above all, the right to have the judgment enforced. Accordingly, based on these premises, it is concluded that the exercise and enjoyment of the right to effective judicial protection seeks to prevent impunity and provide redress for the harm cause to the victim ..." (Judgment No. 41 of April 27, 2006. [italics in the original]

Consistent with the above opinions and the innovations being introduced in the field of criminal procedure by the science and practice of victimology, in particular "... the recognition of the role of victims as protagonists, with special and autonomous assistance from the Office of the Public Prosecutor, attorneys, criminologists, psychiatrists, and forensic pathologists ..." [footnote omitted], a victim joining in the prosecution's indictment may participate during the trial proceedings. He or she can contest evidence, submit additional evidence that has come to light subsequent to the preliminary hearing (Article 343 of the Organic Code of Criminal Procedure), examine the defendant if he or she testifies (Article 347 *ibidem*), examine the experts and witnesses (Articles 354 and 355 *ejusdem*), request a continuance of the trial proceedings in order to offer new evidence in the event that the trial court observes the possibility of a new legal determination (Article 350 *ibidem*), file a motion for reconsideration during the hearing (Article 445 *ejusdem*), and participate in the closing arguments at trial (Article 360 *ibidem*).

Having examined the record of these proceedings, the Court verified that at the beginning of the oral arguments the victim's representative participated to state: "... that s/he approves of the content of the prosecutor's indictment in which s/he joined, as well as the evidence stated therein ..." [footnote omitted] [italics in the original].

The victim's representative subsequently intervened on two occasions during oral argument, [examining both the witness and the defendant, and making a specific statement during the closing arguments].

[Contrary to the assertions of the appellants] the aforementioned participation of the victim was rightly allowed by the trial court in accordance with the victims' rights provided in Articles 19, 26, and 30 of the Constitution of the Bolivarian Republic of Venezuela, Articles 23, 118,

119, and 120 of the Organic Code of Criminal Procedure, and Article 25(1) of the American Convention on Human Rights, the purpose of which is precisely to ensure the full enjoyment of their rights as victims, the search for the truth, and their just claims for reparations.

4.5.7 Right to appeal an acquittal

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. Within the context of protection, the Court has also referred to the constitutional rights of victims in criminal proceedings, especially when they are acting as plaintiffs claiming damages in a criminal case. Thus, for example, in Judgment T-1267 of 2001 [*footnote omitted*], the Court explained that a criminal conviction could be aggravated at the second instance, as a consequence of the appeal filed by the plaintiff claiming damages in a criminal case, inasmuch as the crime victim was entitled to the fundamental right to access to justice, with a view to satisfying his or her individual rights to truth, justice, and reparation. It held that:

While the law allows the plaintiff claiming damages in a criminal case to make an essentially compensatory claim, this does not preclude him or her from being able to appeal an acquittal for one of the following two reasons:

First, crime victims have the right to the truth and to justice, which goes beyond simple reparation, as clearly stated in the international human rights doctrine, which is relevant for interpreting the scope of constitutional rights (Constitution, Article 93). Therefore, victims' rights go beyond a purely economic scope.

In addition, even if we find that the plaintiff claiming damages in a criminal case has a purely compensatory aim, he or she obviously can appeal a judgment of acquittal, since his or her claim will only be satisfied with a conviction. [...]

The representative of a plaintiff claiming damages in a criminal case is also entitled to the fundamental right to access the justice system, and therefore the judicial authorities have the duty to admit and rule on his or her requests as provided by law. Being considered a party to the proceeding and having standing to file motions, the representative of the plaintiff claiming damages in a criminal case shall be treated on an equal footing, under the conditions stipulated by the legislature. Under those conditions, the representative could appeal the acquittal handed down by the trial court.

4.6 EXERCISE OF STATE DUTIES IN VIEW OF THE RIGHT TO ACCESS TO JUSTICE

4.6.1 The duty to investigate in relation to the victims' rights

EL SALVADOR, *Consolidated constitutional cases 5/2001 (December 23, 2010) (List of judgments 5.1)*. This duty to prosecute is based first of all on the absolute theories of punishment, under which it is an unavoidable duty of the State to serve justice in an absolute sense when there is a violation of criminal law (*ethical justification*). In addition, it is considered to be consistent with the constitutional principle of equality that there can be no discrimination of any kind with respect to the application of the punitive laws (*legal justification*). Finally, it is maintained that

this principle safeguards the separation of powers, leaving it up to the judges to determine the guilt or innocence of the defendant (*institutional justification*).

In contrast to the ethical notions of the absolute theories of punishment that support the principle of legality, the bases for prosecutorial discretion are pragmatic and convenient; they are ideas pertaining to the relative theories on the justification of the punishment (*general and specific prevention*).

Seen this way, the general rule continues to be that the Prosecutor General has the obligation to investigate and bring criminal charges with respect to all crimes subject to public prosecution; nevertheless, the law allows the waiver of this obligation in exceptional cases (principle of regulated prosecutorial discretion). [...]

In most of the continental systems of procedure—in contrast to the Anglo-Saxon justice systems—prosecutorial discretion is established to a limited extent.

This principle functions as an alternative to the principle of legality that predominantly governs the actions of the [Office of the Prosecutor General of the Republic], as nowadays we cannot envision the pure and simple use of those discretionary powers by the prosecution, lest there be a clear interference in functions that can only be established by the legislature and which, consequently, would violate the principles of general prevention, equality before the law, and criminal legality. [...]

The above must not be understood to mean that this alternate solution is fully available to the Prosecutor General without taking account of the opinions and fundamental rights of victims. [...]

It is this Court's interpretation that, based on Article 13(4) of the Code of Criminal Procedure, the victim must be "heard prior to any request favorable to the defendant." This means that the victim has the right to object to the granting of that benefit or, if appropriate, to file a private criminal action [...] in cases of crimes and situations not covered by Article 29(3) of the Code of Criminal Procedure; he or she may also request that the action be converted [from a public action to a private action] in situations that are covered by that Article.

In any case, based on the right of victims to access the courts, derived from Article 2(1) *in fine* of the Constitution, the Prosecutor is required to authorize the conversion of the criminal prosecution from a public action into a private action when the public action is foregone, in order to guarantee, ultimately, the right to access to the courts and effective judicial protection.

This obligation is also based on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN, 1985), which recognizes that victims "are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered." Accordingly, "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: [...] (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."

Thus, the criminal complaint referred to in Article 21(2) of the Code of Criminal Procedure includes the participation of the victim in the criminal case not only when the prosecutor has filed a charging document in support of a punitive claim but also when the prosecutor's

request is to refrain from pursuing that punitive claim, as in the case of the use of prosecutorial discretion.

In other words, based on Article 2 of the Constitution, the victim is authorized to: (i) be heard in cases in which the prosecutor wishes to use prosecutorial discretion, in accordance with Article 20 of the Code of Criminal Procedure; (ii) challenge the court decision granting that use of prosecutorial discretion; (iii) request the conversion of the criminal prosecution from a public action into a private action, pursuant to Article 29 the Code of Criminal Procedure; and (iv) file a private criminal action—as a criminal complainant—under Article 21(2) of the Code of Criminal Procedure, provided that the situation does not fall under Article 29 of the Code.

EL SALVADOR, *Judgment 665-2010 (February 5, 2014) (List of judgments 5.2)*. In Judgment 2-2005, the Court held that criminal prosecution by the State is the responsibility of the Prosecutor General, given that crimes must be prosecuted with rigor, uniformity, and objectivity, without consideration of interests other than the application of the law. That decision also held that prosecution by the Office of the Public Prosecutor was established to exclude any possibility that a criminal case could be brought *ex officio* by a judge.

Nevertheless, in Judgment 5-2001 *that prosecutorial function was reinterpreted* to take account of the right to access to justice and its relationship to victims' rights: rights and guarantees that allow victims to participate in court proceedings, be heard, present evidence, appeal judicial decisions or orders, and obtain comprehensive reparation. In short, it was held that nowadays there is a principle of crime policy that is related to the victim's autonomy and constitutes a new structural guideline that informs modern criminal justice systems, especially criminal procedure.

In this respect, it was concluded that *public prosecution "is not a monopoly" or within the exclusive competence of the Prosecutor General, because to understand it as such would be to disregard or negate crime victims' right to access to justice [emphasis in the original]*.

4.6.2 Due diligence (proactive and exhaustive) and victims' rights

EL SALVADOR, *Judgment 665-2010 (February 5, 2014) (List of judgments 5.2)*. In the instant case, the respondent authority maintained that the Office of the Prosecutor learned of the facts concerning the mass murder in San Francisco Angulo through an exhumation request filed in 2005; it stated that this knowledge had not been gained during the course of a criminal investigation, but rather from a request, which was granted, for cooperation in the exhumation of the remains of persons who died in 1981. Consequently, prior to the order issued by the First Magistrate's Court of Tecoluca on January 24, 2010—with which the exhumation proceedings were formally concluded—that Prosecutor's Office had been unable to conduct an investigation, even though a complaint had been filed on November 23, 2009, because it had not been concluded that the matter in fact involved a criminal act.

It is clear from the documentation submitted by the parties that the Office of the Prosecutor General of the Republic did, in fact, gain initial knowledge of the mass murder in San Francisco Angulo as the result of the exhumation request filed by the relatives and survivors of that event—that is, not through a formal complaint. Nevertheless, in view of the evidence set forth in that request, the Office of the Prosecutor ordered that a technical police inspection be conducted at

the site where the bodies were allegedly buried. During that inspection, individuals stating that they were survivors of the massacre of July 25, 1981, in the district of San Francisco Angulo led the authorities to eight alleged graves containing the remains of some 45 persons who had been murdered there. Therefore, the same Office of the Prosecutor, at the time it requested judicial authority to conduct the exhumation, considered that it had obtained "... information that due to its nature is presumed to be accurate in terms of time, space, and circumstances ...".

This means that, in spite of the fact that no formal complaint was filed in 2005, the Office of the Prosecutor learned from the facts set forth and the proceedings undertaken that it was dealing with a factually accurate situation concerning the commission of criminal acts. [...]

The constitutional function assigned to the Prosecutor General is to investigate crime and prosecute the alleged perpetrators on its own initiative. Therefore, it cannot be maintained that, merely due to the fact that no formal criminal complaint was filed in 2005, the Prosecutor's Office did not have the obligation to investigate the facts concerning the mass murder that took place, according to the complainants, in San Francisco Angulo on July 25, 1981. On the contrary, *from the time the Office of the Prosecutor General of the Republic had knowledge of the aforementioned acts, with respect to which it believed it had "... information that due to its nature is presumed to be accurate in terms of time, space, and circumstances," it had the constitutional obligation to investigate them [emphasis in the original].*

Thus, to accept the notion that the Office of the Public Prosecutor did not have the obligation to investigate *ex officio* the acts that had been brought to its attention, simply because a lawsuit had not been filed, amounted to a lack of protection of the fundamental rights of the survivors and the victims' relatives—rights that are a source of State obligations, mainly those of prevention, promotion, protection, and reparation of the harm caused. [...]

The Office of the Prosecutor General of the Republic asserted that, after the controversy was resolved with respect to which authority was responsible for conducting the investigation into the massacre of San Francisco Angulo, it conducted the appropriate investigation, thus complying with its duties. On this point, it is observed that, indeed, the respondent authority did conduct some investigative activities between June 4, 2011 and January 17, 2012; in addition to issuing the respective investigation guidelines on two occasions, it filed petitions with various institutions in order to gather information.

Nevertheless, the Office of the Prosecutor General of the Republic has not conducted any additional investigation proceedings since January 17, 2012, nor has it been monitoring compliance with the investigative activities assigned to the National Civil Police investigators. In this regard, the respondent authority has not led the investigation into the crime, as this cannot be limited to the simple issuance of the document known as the "investigation guidelines." Rather, the investigation entails conducting all of the necessary proceedings relating to the facts alleged, and, in this manner, determining whether a crime has been committed. The Office of the Prosecutor General must therefore examine the results of the investigation and, if necessary, propose new proceedings that enable full compliance with its constitutional duty, for purposes of protecting fundamental rights. Accordingly, *in spite of the fact that certain investigative proceedings have been carried out, they cannot be deemed sufficient to satisfy the constitutional obligation to lead the criminal investigation [emphasis in the original].*

On this point, the Inter-American Court has held that the State "... has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation" [footnote omitted]. It ruled similarly in the *Case of Serrano Cruz Sisters v. El Salvador*, stating that "... the next of kin of the alleged victims have the right to expect, and the States the obligation to ensure, that what [occurred] [...] will be *investigated effectively* by the State authorities ..." [footnote omitted]. [...]

The legally protected interests underlying the investigation demand that efforts to meet its objective be redoubled. Indeed, the passage of time bears a directly proportional relationship to the limitation and, in some cases, the impossibility of obtaining evidence and/or testimony—in the instant case two of the complaining witnesses have already died—hampering and even rendering futile or ineffective the performance of evidentiary proceedings to establish the facts under investigation, the identification of the possible perpetrators and accomplices, and the determination of any criminal responsibility. Therefore, the respondent authority is not exempt from making every necessary effort to meet its obligation to investigate.

In this respect, the Office of the Prosecutor General of the Republic must consider the case law of the Inter-American Court, which establishes, on one hand, that "In order to guarantee its effectiveness, the investigation must be conducted taking into account the complexity of this type of facts, which took place in the context of the Armed Force's counterinsurgency operations, and also the structure in which those who were probably involved were situated; thereby avoiding omissions in the collection of evidence and in following logical lines of investigation" [footnote omitted] [...]. [...]

For all of the above reasons, we conclude that *the Prosecutor General violated the [appellants'] rights of access to the courts and to know the truth, by failing to investigate ex officio the mass murder that was perpetrated, according to the plaintiffs, on July 25, 1981, in the district of San Francisco Angulo, Tecoluca, Department of San Vicente, and by having delayed without good cause the initiation of that investigative activity, which to date has not been serious, thorough, or diligent. The result has been to hinder the access of the survivors and victims' relatives to the courts to have their claim adjudicated. In this regard, in the absence of an investigation and search for information about the truth of the events—that is serious, thorough, and diligent—neither justice nor the subsequent comprehensive reparation is possible. Accordingly, the Court finds that this part of the plaintiffs' claim is admissible [italics in the original].*

4.6.3 Prosecutorial discretion and victims' rights

COLOMBIA, *Judgment C-209/2007 (March 21, 2007) (List of judgments 3.3)*. As a general rule, and by virtue of the principle of legality, Article 250 of the Constitution¹⁰⁷ requires the Office

¹⁰⁷ Editors' note: Article 250 of the Constitution of Colombia: "The Office of the Prosecutor General is required to prosecute and to investigate potential crimes that come to its attention by means of a report, special request, criminal complaint, or *ex officio*, provided that there are sufficient reasons and factual circumstances indicating the possible existence of a crime. Therefore, it may not suspend, interrupt, or waive criminal prosecution, except in those cases established by law for the application of the principle

of the Prosecutor General to prosecute. However, in exceptional cases, Article 250 allow[s] for the Office to waive criminal prosecution in the exercise of prosecutorial discretion. [...]

In Judgment C-873 of 2003 [*footnote omitted*], [this Court held that] [...] “The scope of the power to *dispose of the case* was also amended by the 2002 constitutional assembly, as *prosecutorial discretion* was established at the constitutional level, distinct from the principle of legality. Prosecutorial discretion has been recognized in many criminal law systems around the world. It is based on the premise that criminal prosecution requires not only that there be sufficient *merit* to indict, based on legal and factual grounds, but also that there not be any reasons of *expediency* to shelve the case—that is, valid reasons for which the State may legitimately decide not to prosecute a certain act, in ‘legally established cases’ and ‘within the framework of the crime policy of the State’ [...].” More recently, in Judgment C-095 of 2007 [*footnote omitted*], the Court [held that]

the application of the prosecutorial discretion provided for in the Constitution must be compatible with respect for the rights of crime victims. This is clearly inferred from the text of Legislative Act 03 of 2002, which assigns to the Prosecutor, who is simultaneously responsible for applying prosecutorial discretion, the mission of “**Ensuring the protection of the victims**” (C.P. Article 250(7)) and “*Requesting that the supervisory judge in preliminary proceedings issue the measures necessary to ensure ... the protection of the community, especially the victims*” (C.P. Article 250(1)).

This protection of the victims in certain cases is also an international obligation of the Colombian State, as different treaties on human rights and international humanitarian law refer to (i) the requirement that there must be an effective judicial remedy available to the victims of crimes that are serious violations of human rights or international humanitarian law; (ii) the duty of the States to guarantee access to justice; and (iii) the duty to investigate violations of human rights and international humanitarian law for purposes of learning the truth; (iv) the obligation of the States to cooperate in the prevention and punishment of international crimes and serious human rights violations, as well as the restoration of the victims’ rights [*footnote omitted*]. [...]

Thus, when establishing the grounds for the application of prosecutorial discretion in criminal cases, the Congress of the Republic has to bear in mind that obligations arise both from the Constitution and from Colombia’s international commitments with respect to the protection of crime victims’ rights. These constitutional mandates and these international obligations concerning victims’ rights must be weighed against the State’s interests in streamlining the criminal prosecution, interests which underlie the constitutional establishment of prosecutorial discretion. Certainly, a systematic interpretation of the Constitution entails accepting that the reconciliation of the principles of promptness and effectiveness in the administration of justice cannot disregard the protection of fundamental rights, which act simultaneously as limits to the legal design of the grounds for, and the very application of, prosecutorial discretion. [*emphasis in the original*]

of regulated prosecutorial discretion within the framework of the crime policy of the State, the legality of which shall be subject to the oversight of the supervisory judge in the preliminary proceedings” [*unofficial translation*].

[With these prior considerations, the Court will examine the plaintiff’s argument that Article 327 of Law 906 of 2004,¹⁰⁸ by] denying victims the opportunity to challenge the decision of the supervisory judge in preliminary proceedings concerning the use of prosecutorial discretion, is a violation of their rights[.] The Court [finds] that the plaintiff is correct. Given the impact of the use of prosecutorial discretion on the rights of crime victims, preventing them from being able to challenge the State’s waiver of criminal prosecution does leave their rights to truth, justice, and comprehensive reparation unprotected. Although the satisfaction of the victim’s rights is attained not only through a conviction, the effectiveness of those rights does depend on the victim having the opportunity to contest the fundamental decisions that affect his or her rights [*footnote omitted*]. Therefore, barring a challenge to the decision of the supervisory judge in this event is incompatible with the Constitution. [...]

[In the exercise of prosecutorial discretion] pursuant to Article 328 of Law 906 of 2004,¹⁰⁹ the prosecutor must “*take account of the victim’s interests*.” The Court finds it necessary to specify the meaning of the phrases “*victim’s interests*” and “*take account of*” used in Article 328. In relation to the term “*interests*,” the Court observes that it is not limited to the victim’s potential financial interest in seeking redress for the harm caused by the crime. In whatever way the victim avails himself or herself of the criminal process to obtain the satisfaction of his or her rights to the truth, justice, and reparation—and it is so recognized in Law 906 of 2004—the term in fact refers to victims’ rights. When using prosecutorial discretion, the Prosecutor must consider those rights in their entirety, rather than just the financial interest. Additionally, the Court specifies that the phrase “*take account of*” means to expressly assess the victims’ rights, so that the victim can monitor the decision of the supervisory judge in preliminary proceedings and have a material basis to appeal a judicial decision he or she deems harmful to his or her rights [*emphasis in the original*].

4.6.4 Judicial intervention in the case as a measure for the protection of victims’ rights at trial

EL SALVADOR, *Consolidated constitutional cases 5/2001 (December 23, 2010) (List of judgments 5.1)*. Because of its relevance in the instant case, we must underscore the close relationship between the authority of the court and the protection of individual rights, as well as public policy oversight, from the perspective of legality. Indeed, the right to the protection of the courts has been established for the essential purpose of ensuring the effectiveness of the rights of all persons, by allowing them to validly assert claims against the acts of individuals and State

¹⁰⁸ Editors’ note: Article 327 of Law 906 of 2004: “*Judicial oversight of the application of the principle of prosecutorial discretion*. The supervisory judge in preliminary proceedings must conduct the respective verification of legality within five (5) days of the decision of the Prosecutor’s Office to exercise prosecutorial discretion, provided that the criminal case is closed. This judicial oversight shall be mandatory and automatic, and shall be conducted at a special hearing at which the victim and the Public Ministry may challenge the evidence produced by the Office of the Prosecutor General in support of its decision. The judge’s decision shall be final, and shall not be subject to appeal.”

¹⁰⁹ Editors’ note: Article 328 of Law 906 of 2004: “*Participation of victims*. In using prosecutorial discretion, the prosecutor must take account of the victim’s interests. To this end, the prosecutor must hear from the victims that may have been present during the proceedings.”

agents who violate those rights, while “the proceeding, as the means of implementation of the right to the protection of the courts, is the instrument used by the State to satisfy the claims of individuals in compliance with its duty to administer justice” [*footnote omitted*]. [...]

In this way, judges implement several principles of the process and the proceedings with the aim of preventing abuses of power and guaranteeing a process that is consistent with the Constitution, in which the basic and essential rights of the individual are respected. In a system governed by the Constitution and the rule of law, there is no room for the creation of spheres of impunity that prevent citizens from going before the courts to defend their legitimate rights and interests against unlawful acts [*footnote omitted*]. [...]

According to the accusatory principle established in the Constitution and the Code of Criminal Procedure, *the judge, as the director of the criminal case, must coordinate the participation of all parties in the proceedings as it relates to the exercise of the rights linked to the prosecutorial investigation, in order to ensure adherence to the aforementioned principle of cooperation and to balance the interest in conducting an effective criminal prosecution against the rights of the accused, the victim, and other participants [...]* [*emphasis in the original*].

With respect to the judge’s power to order the production of evidence, we must take note of one of the aspects that characterizes the exercise of judicial authority—in the instant case, in the field of criminal law.

As stated, this authority includes the judicial application of law, which is characterized by the irrevocability of the decision, as well as the essential elements of independence and impartiality that the judge must possess. This “application of the law” by means of a judicial decision cannot be based on just any criterion (such as utility or consensus), in particular when applying provisions whose legal effect depends on a factual premise, as is the case with criminal law. [...]

Furthermore, the above is consistent with the case law of the Inter-American Court of Human Rights—which must be understood to be binding on El Salvador—regarding the State duty to investigate human rights violations with “due diligence,” pursuant to Articles 1, 8, and 25 of the American Convention on Human Rights. This is the right to know what happened and to know who the perpetrators or accomplices were in the acts in question (*Case of the Serrano Cruz Sisters v. El Salvador*, Judgment of March 1, 2005, para. 62).

In keeping with this right, the Inter-American Court has held that the correlative State duty to investigate extends to all State entities, as it must be fulfilled “using all available means” (*Case of García Prieto et al. v. El Salvador*, Judgment of November 20, 2007, para. 112). The failure to act with due diligence in the investigation and establishment of the facts would give rise to impunity.

The operation of this principle, through the evidentiary powers of the judge in the criminal case, is heavily moderated by the constitutional authority of the Prosecutor as the director of the criminal investigation. Those powers can only be recognized and applied in exceptional and necessary cases, after the Prosecutor has had the opportunity to comply with his or her investigative duties, and, in any case, are subject to the oversight of the parties through the appeals system.

The judge’s authority in the evidentiary proceedings allows for essential information to be provided in order for a decision to be rendered according to the law, but without replacing the

prosecutor in his or her role. *The mere inclusion of evidence ex officio does not entail a breach of the judge's impartiality, since the outcome of the evidentiary proceedings could also favor the defense, and in any case such evidence can still be examined and challenged by the parties [emphasis in the original].*

It should be understood that this power is reserved for those cases in which it is essential to clarify specific factual points that have to do exclusively with the accusation and only when it is absolutely necessary. The latter characteristic leads to an extremely restrictive interpretation of this authority, which can only be used in relation to “*ex novo*” situations that arise during argument, and that are derived exclusively from the evidence produced during the trial. Therefore, necessity and exceptionality are the proper interpretive frameworks for upholding its constitutionality.

In addition, the production of all *ex officio* evidence—whether it favors the prosecution or the defense—must be ordered with the knowledge of the parties in order to safeguard their rights. [...]

Given the nature of the interests at stake (legally protected interests affected, rights violated, public peace and safety), the criminal court judge cannot have a rigidly fixed position with respect to the procedures for the investigation of the crime; rather, *in exceptional cases*—in addition to being able to order proceedings in accordance with the accusatory principle that help elucidate the matter before the court and provide better conditions and a greater degree of certainty to the decision—the judge is also authorized to receive reports or complaints, which must be forwarded immediately to the prosecutor in order for the respective charging document to be drafted [*emphasis in the original*].

4.6.5 Proceedings to obtain additional evidence and the protection of victims' rights

COSTA RICA, *Judgment 01017-2000 (September 1, 2000) (List of judgments 4.3)*. [This appeal] alleges as the sole basis for cassation the unlawful legal underpinnings of the judgment, because it was based on evidence that was unlawfully admitted in the proceedings. [...] Specifically, [it refers to] the Trial Court's admission of an identification of the defendant by the victim, which does not arise from “new facts or circumstances provided during the hearing” but was offered into evidence by the Public Ministry on the assertion that it was a new circumstance, which it is not.

The issue of when it is proper to admit additional evidence has already been examined by this Court [...]. Although [on that occasion] the matter concerned the statement of the victim, evidence that had not been offered by the Public Ministry, it bears a similarity to the instant case, in which the identification of the defendant was not offered. On this point, the Court stated: “The issue raised by the appellants in their first ground of appeal is reduced to establishing whether the admission of the victim's testimony during argument is legal, even though this evidence was not offered by the Public Ministry and no new fact or circumstance was presented that warranted clarification, which is the scenario envisaged in Article 355 of the Code of Criminal Procedure for the admission of additional evidence. To resolve the issue at hand we must first note that the interpretation of Article 355, like that of any regulatory text, cannot be fragmented or isolated. The provision must be examined as part of a set of provisions

that have a common foundation, in addition to being part of the legal system, whose main pillar is the Constitution and the international human rights treaties ratified by our country (Article 48 of the Constitution) with respect to fundamental rights.[”]

The new Code of Criminal Procedure is in fact an instrument of change in the understanding of the system of criminal procedure, one that, inspired by the democratic principle of separation of powers, entrusts the initial criminal investigation to the prosecuting agency and reclaims the role of the judge as the guarantor of the fundamental rights of the parties. In turn, the quintessential phase of the criminal case—the trial—is strengthened, giving priority to its fundamental principles: orality, concentration, continuity, immediacy, and adversarial nature. It accentuates the role of the parties, although it does not entirely dismiss the judge’s opportunity to request the addition of evidence to the case if this serves the purposes of investigating the actual truth. [...] The judge at the intermediate phase—the phase at which, in principle, the admissibility of the evidence for argument should be resolved—can order the inclusion of evidence in the trial *ex officio* even if the parties have not submitted it, “*if it is essential*” or “*when there is clear negligence on the part of one of the parties and its source lies in the proceedings already conducted,*” according to Article 320 of the Code of Criminal Procedure. [...] This reflects the fact that our procedural system, although markedly accusatory, still allows the judge certain powers with respect to the production of evidence. The aim, without question, is the effective operation of the principle of actual truth, which must be adhered to in strict observance of the rights of the parties—the right to a hearing, the right to a defense—and the duty of objectivity [...].

We must add to the above a circumstance that is not raised in the appeal. One of the main objectives of the new system is also to reclaim the victim, totally [illegible] from the criminal case. The modern trends in criminology, as well as the authorities on procedural law, advocate for a balance of the converging forces in the process in order to return part of the prominence to the party truly affected by the conflict: the victim of the criminal act. The new procedural model not only reclaims the participation of the victim but also defines a set of rights—such as in Articles 70 and 71—that outline the victim’s role and indicate that he or she is an important part of the proceedings, especially if the primary objective is the resolution of conflict “*with a view to contributing to the restoration of social harmony among the parties.*” This has been recognized in the constitutional case law, which has held that: “*It must not be forgotten that victims’ rights were one of the aims of the criminal procedure reform that resulted in the Code of 1996. Provisions such as Articles 7, 16, 70, and 71 are clear indications of the trend toward the resurgence of the victim, closely linked to the notion of the criminal case as an instrument for the resolution of social conflicts in which the victim, precisely, is one of the key figures. [...]*” [*italics in the original*] [...]

Along the same lines, it is worth citing the following extract from Judgment No. 5752-93 [...] also from 1993: “*Granting the victim or injured party the opportunity to exercise, on an equal footing, the most relevant remedies designed to defend his or her interests is the only way to give full effect to the constitutional principles contained in Articles 33 and 41 of the Constitution—above all if, as in the instant case, the Public Ministry failed to represent the interests entrusted to it in the Law, by belatedly appealing the order granting the extraordinary extension of the investigation stage of the criminal proceeding*” [*italics in the original*]. [...]

It is also relevant to cite Judgment 1193-95 [...] of March 3, 1995, which addressed in depth the constitutional basis of victims' rights in the criminal proceedings[.] [On that occasion, the Court held:] "*The fundamental aim of the strengthened and increased participation of the injured party in the criminal case is to favor the operation of a constitutional guarantee: the right to justice, to which the victim of a crime is entitled under Article 41 of the Constitution. Justice must not be seen as a value that is extraneous and contrary to the positive legal system, but rather as one of its guiding principles. In that respect, justice in a specific case, or the effective resolution of the controversy brought before the court, is one of its principal manifestations. The fundamental right to justice includes the right to the protection of the courts that belongs to all persons who avail themselves of the judicial system in order to have the competent bodies examine their claims and issue a reasoned decision according to law. This right to judicial protection assumes the adherence of the courts to the principles and rights that govern the process and that constitute an entire system of guarantees composed essentially of: access to judicial protection, the attainment of a judgment based on law, the enforcement of the judgment (which entails restoring the person's rights and compensating him or her if he or she was entitled to the recovery of damages for the harm suffered), and the exercise of the powers and remedies provided for by law. This determines the effectiveness of the guarantee of judicial protection, and therefore there can be no obstacles that may be deemed excessive, that are the product of simple formalism, or that are not justified and proportionate to the objectives in keeping with this constitutional guarantee*" [italics in the original].

[Based on this constitutional precedent, it is clear that] an isolated reading of Article 355 of the Code of Criminal Procedure would lead us to the conclusion that it [the extemporaneous admission of the victim's testimony] is not possible during argument, if there are no "new facts or new circumstances" that warrant clarification. However, if broad reference is made not only to the system of procedural law but also to the Constitution and the international human rights instruments ratified by Costa Rica, it is clear that the evidence is admissible for purposes of giving real effect to the right to be heard at trial, which belongs not just to the defendant but to every citizen in any type of controversy in which he or she is involved or has an interest. This is reflected especially in criminal matters: Article 41 of the Constitution, Article 10 of the Universal Declaration of Human Rights, Article 18 of the American Declaration of the Rights and Duties of Man, Article 14 of the International Covenant on Civil and Political Rights, and Article 8 of the American Convention on Human Rights. The appellants' claim is contrary not only to the spirit of the new code but also to the general principles of effective judicial protection and access to justice enshrined in our Constitution and in the international treaties ratified by Costa Rica. In the opinion of the Court, the lower court's solution is the correct one: to admit the victim's testimony as additional evidence, not only because of the negligence involved in its omission, but also because [not admitting it] would be a flagrant violation of the victim's rights. This circumstance alone was "a new fact" that warranted the admission of the evidence, according to an interpretation and a reading consistent with the constitutional principles and fundamental rights—which have a supralegal status—provided for in Article 355 of the Code of Criminal Procedure. This is especially true given the particular circumstances surrounding this case, in which any merely legalistic interpretation authorizing the exclusion of the victim's testimony would be patently disproportionate, unjustified, and irrational, as well as inconsistent with current international human rights standards [...].

4.7 VICTIMS' RIGHTS AS A LIMIT TO THE JUS PUNIENDI OF THE STATE

ARGENTINA, *Petition for review of a denied appeal G.1015.XXXVIII (August 11, 2009) (List of judgments 1.1)*. [This petition was filed with respect to unprecedented events involving an attempt to force an alleged victim of child kidnapping during the military dictatorship to provide a blood sample for the purpose of establishing his full identity.] With respect to the forced extraction of blood (the measure that gives rise to the constitutional claims), Emiliano Matías Prieto alleges that it violates the rights to privacy, to physical, psychological, and moral integrity, to dignity, and to private life, as well as the rights to enjoy civil rights, to not be deprived of one's liberty except in the cases and manners established by law, to not be arbitrarily detained or arrested, to enjoy equality before the law, and to not be subjected to torture [...].

The instant case presents an extreme tension between values and principles that can be tentatively summarized as follows: (a) a crime against humanity has been committed and continues to be committed to this day, given its continuous nature; (b) the State has the duty to punish that crime, but at the same time it had a role in its commission and in the 30-year delay in punishing it and putting a stop to its continuous commission; (c) the passage of time has had effects on all of the victims and the prosecution of the crime at all costs could irreparably harm the rights of the alleged kidnap victim; and (d) the failure to investigate the crime could infringe upon other victims' legitimate right to the truth, namely the relatives of the kidnap victim and the relatives of his parents.

There are two circumstances that make the conflict in this case extraordinary: the nature of the crime investigated, and the prolongation of its commission to the present time. [...]

The forcible measure against the kidnap victim would be the only measure that would put a stop to the commission of the crime that continues to be perpetrated against him; he refuses it, exercising his right not to be re-victimized, but the full recognition of this right would condemn him to continued victimization. [...]

[Nevertheless,] the punitive power of the State—the so-called *jus puniendi*—cannot authorize an act of coercion that seriously harms any victim against his will by invoking a nebulous and abstract societal interest—that is, by claiming the will of all citizens and thereby making State and society one and the same; in addition to this being an authoritarian proposal, the State is in any case prohibited from engaging in a dual victimization.

This claim is even less feasible when the crime that the State has a duty to punish was perpetrated by its own apparatus of power and when, for thirty years, it has allowed or has not been able to prevent its ongoing commission.

Although the State has the duty to put a stop to a continuous crime, and it is just for it to do so—better late than never—it cannot do so with disregard for the painful consequences this could have for the victims of the actions and omissions of its agents.

Unquestionably, this authority is an expression of the sovereignty of the same State that committed the human rights violations, first, by having determined, permitted, or in some way failed to prevent its agents from committing a gross or abhorrent crime against humanity and, in addition, by having for decades been remiss or impotent in their prosecution, cessation, and punishment. The legal, ethical, and republican force of its intended *jus puniendi*—which would result in the imposition of additional pain upon any of the victims—is greatly diminished, to

the point of forcing the courts to radically depart from the argument meant resolve the conflict that arises in this case and in many others on the basis of the prosecutorial interest of the State.

It is not even possible to legitimize the intended *jus puniendi* of the State based on the international legal obligation to punish the perpetrators of crimes against humanity. From the perspective of international human rights law, it is true that the State is obligated by the international law set forth in the conventions and as a matter of *jus cogens* to prosecute and punish those responsible for State crimes against humanity, especially in the case of the forced disappearance of persons. But it is also true that international human rights law requires the protection of the victims, and that the indisputable victim of this crime—although not the only one—is the disappeared person.

There is no international convention or custom that allows a State to meet an international obligation by denying or violating another, unless international law is interpreted in a contradictory, and therefore irrational, fashion. The purpose of the *pro homine* clause is precisely to prevent such interpretations.¹¹⁰

4.8 DENIAL OF ACCESS TO JUSTICE

ARGENTINA, *Ordinary appeal M.1181.XLIV (November 8, 2011) (List of judgments 1.2)*. The denial of justice occurs, as this Court has held repeatedly, when individuals are prevented from going before the courts for the protection of their rights—right to access to the courts—and when the undue delay in the proceedings is the result, essentially, of the negligent conduct of the court in handling the case, which prevents the issuance of the final judgment in a timely manner [*footnote omitted*].

As a complement to this criterion adopted by the Supreme Court of Argentina in Ordinary Appeal Judgment M.1181.XLIV, see the opinion below of Chief Justice Ricardo Luis Lorenzetti from the same judgment.

ARGENTINA, *Ordinary appeal M.1181.XLIV (November 8, 2011) (Opinion of Chief Justice Ricardo Luis Lorenzetti), conclusions of law. (List of judgments 1.2)*. Unquestionably, our National Constitution—as a derivation of the right to due process—also guarantees, tacitly, the right of individuals to have their rights determined in an expeditious proceeding without undue delays. Certainly, this applies to any kind of case, not just criminal proceedings—although that might obviously be the most sensitive context. In that respect, consistent with the above, the American Convention on Human Rights establishes as a judicial guarantee against any criminal

¹¹⁰ Editors' note: In order to specifically define the scope of the criteria adopted by the Supreme Court of Argentina in this case, it is important to note that, although this Court found that the argument on the State's duty to prosecute was insufficient to justify an interference in the petitioner's exercise of the right to humane treatment, the outcome should have been different when that right came up against the right to the truth of victims of human rights violations. From a perspective that gives priority to maximizing the protection of the rights in conflict, the Supreme Court adopted an intermediate criterion, which seeks to satisfy the demands of the different parties involved in the litigation. The respective argument can be consulted in Section 6.1 of this Digest, *Right to the truth versus the right to individual self-determination*.

accusation, or in the determination of civil, tax-related, and other rights and obligations, the right of every person to be heard by a judge or court of competent jurisdiction "... within a reasonable period of time ..." (Article 8(1)), which includes, of course, the right to obtain a judgment on the matter in controversy.

The human right to a judicial proceeding governed by the principle of promptness, without undue delay, is closely linked to the concept of the denial of justice, which, as this Court has underscored, occurs not only when individuals are prevented from going before the courts for the protection of their rights—right to access to the courts—but also when the delay in the proceedings is the result, essentially, of the negligent conduct of the court in handling the case, which prevents the issuance of the final judgment in a timely manner [*footnote omitted*].

We must, then, define conceptually the point at which the undue delay in the processing of the case is considered to constitute a denial of justice. This is a preliminary and necessary step in examining the potential responsibility of the State for the actions of its courts.

Relevant to this point of analysis is the ruling of the Constitutional Court of Spain (Judgment No. 177/2004), which has parallels in Argentine law insofar as:

a) The satisfaction of the right to a speedy trial requires an appropriate balance between, on one hand, the performance of all judicial acts necessary for the court to rule on the case before it and to guarantee all of the rights of the parties, and, on the other hand, the time required to conduct those activities, which must be the shortest possible time.

b) Together with the autonomy of the fundamental right in question, stated in consistent and well-known constitutional doctrine, emphasis has also been placed on its dual aspects of action and reaction. The first consists of the right to have the courts render and execute a decision within a reasonable time period, and means that judges and courts must comply with their duties to guarantee freedom, justice, and security with the promptness allowed by the normal duration of the proceedings, preventing any undue delays that would undermine the effectiveness of the protection. At the same time, the reaction aspect operates within the strict framework of the proceedings and entails the right to have the court order the immediate termination of proceedings in which there are undue delays.

c) The objective scope of the right in question can be invoked in all types of proceedings; however, in criminal proceedings, where undue delays can amount to a sort of *poena naturalis*, the judge must be even more zealous in preventing its occurrence. The same is true in the subsequent phases and levels of appeals of the case, including in the execution of judgments.

d) In addition, it is established constitutional doctrine that the recognition of the right to a speedy trial has not presumed the constitutional status of the right to the procedural time periods established by law. On the contrary, as previously stated, the reasonableness of the duration of a case must be assessed according to the circumstances of the specific case.

e) Finally, the person claiming a violation of the right to a speedy trial is required to have complained of the delay in a timely manner before the court, and to have given the court a reasonable period of time in which to remedy the delay. Therefore, only in those cases in which, upon the complaint of the interested party, the courts have failed to take the pertinent measures to put an end to the delay within a prudent or reasonable period of time—understood as the period of time that allows for the court to take the necessary measures to put an end to the alleged delay—could it be understood that the constitutional violation invoked has not

been remedied through the ordinary court proceedings. On the contrary, in those cases in which the courts have addressed the complaint, and have consequently taken the pertinent measures to put an end to the reported delays within that reasonable or prudent time period, it should be understood that the violation of the right to a speedy trial has been remedied in the ordinary court proceedings. The delay in the processing of such a case will no longer have any constitutional relevance, since, as stated earlier, the fact that a court order has been issued within an unreasonable period of time is insufficient for a determination that the delay is one of constitutional relevance; rather, the appellant must necessarily have given the court the opportunity to put an end to the delay and the court must have disregarded the complaint, with a prudent period of time having elapsed between the complaint of the delays and the filing of the lawsuit.

4.9 RIGHT TO JUDICIAL PROTECTION

An essential element of the right to access to justice is the availability of simple and prompt remedies for the protection of the rights recognized in constitutions, conventions, and laws.¹¹¹ Depending on the different institutional and procedural arrangements, this right can take the form of constitutional remedies—such a petition for a constitutional remedy, a writ for the protection of constitutional rights, or a writ of habeas corpus,¹¹² which must not merely exist in a formal sense but must also be suitable and effective for combating or responding to the violation alleged.¹¹³ The inter-American

¹¹¹ A study of the most important international human rights instruments makes it possible to identify the ways in which the right to judicial protection has been recognized through the enunciation of different legal standards. Notably, Article 25 of the American Convention on Human Rights recognizes *an individual right* “to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the *constitution or laws of the state concerned or by this Convention*” [*emphasis added*]. The wording of this article distinguishes it from other international provisions, including Article 2(3) of the International Covenant on Civil and Political Rights. For a more detailed discussion of the different legal provisions establishing the right to an effective remedy, see, e.g., D. O’Donnell, *Derecho Internacional de los Derechos Humanos: Normativa, jurisprudencia y doctrina de los Sistemas Universal e Interamericano*, 2nd ed. (Mexico: OACNUDH/Tribunal Superior de Justicia del Distrito Federal, 2012).

¹¹² The Inter-American Court has held that “because of its nature, [the petition for a constitutional remedy] is ‘the simple and brief judicial procedure whose goal is the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention’ [*citation omitted*].” In addition, it has found that this remedy falls within the scope of Article 25 of the American Convention, and “therefore it has to meet certain requirements, including suitability and effectiveness [*citation omitted*].” See I/A Court H.R., *Case of the “Las Dos Erres” Massacre v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of November 24, 2009, Series C, No. 211, para. 107. See also I/A Court H.R., *Case of Castañeda Gutman v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 6, 2008, Series C, No. 184.

¹¹³ See, e.g., I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 30, 2010, Series C, No. 215, para. 182; I/A Court H.R., *Case of Rosendo-Cantú et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 31, 2010, Series C, No. 216, para. 166.

case law has similarly underscored that these remedies must be litigated in accordance with the essential standards of due process, which entails the duty of the State to establish the appropriate regulatory foundation for the effectiveness of those remedies.

With respect to the victims of both crimes and human rights violations, the recognition of the right to judicial protection has become a true guarantee of the protection and enforceability of rights within the framework of the national justice mechanisms. In a process of mutual interdependence, judicial protection has strengthened the rights to the truth, access to justice, and reparations, while at the same time the reconceptualization of these rights has been a determining factor in the advancement toward an expansive interpretation of judicial protection. For example, in the cases of *Fernández et al.* and *Rosendo Cantú et al.*, both against Mexico, in which the national courts had ruled inadmissible a petition for a constitutional remedy brought by the victims to contest a decision granting jurisdiction to the military courts, the Inter-American Court underscored that:

The victim's participation in criminal proceedings is not limited merely to redressing the damage but, above all, to making effective her rights to know the truth and to justice before a competent court. This necessarily implies that, at the domestic level, adequate and effective remedies must exist for a victim to be able to contest the competence of the authorities that exercise jurisdiction over matters regarding which it is considered that they do not have competence.¹¹⁴

The conclusion of the Inter-American Court in the aforementioned judgments has been similar to those of different Latin American courts in cases in which acts of government authorities interfered with the exercise of the victims' rights. From a broad interpretive perspective, the decisions included in this section present both substantive and procedural aspects of the right to judicial protection as a condition for the exercise of other victims' rights.

COSTA RICA, *Judgment 7497-98 (October 21, 1998) (List of judgments 4.2)*. Respect for victims' rights is supported by provisions of law with constitutional status. Furthermore, one of the corollary principles to this tenet is to recognize that victims have instruments to challenge decisions that are prejudicial to their interests, such as an acquittal handed down with disregard for, or based on the erroneous application of, a substantive legal provision. Thus, before precluding the opportunity to assert rights that—we reiterate—find support in the Constitution, the examination of one final solution must be exhausted, since the problem lies in the fact that the argument made up to this point makes clear that the rights of both the defendant and the victim are involved and are difficult to satisfy simultaneously. In any case, attempting to harmonize the interests at stake is the inevitable task of the constitutional law judge.

MEXICO, *Judgment 163/2012, settling a contradiction between inconsistent rulings (November 28, 2012) (List of judgments 6.3)*. The recognition of the rights of the victim or injured party has

¹¹⁴ I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 30, 2010, Series C, No. 215, para. 183; I/A Court H.R., *Case of Rosendo-Cantú et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 31, 2010, Series C, No. 216, para. 167.

been constantly evolving as a result of the different constitutional reforms that the Legislative Branch has promoted on their behalf.

Proof of this is the fact that Article 20 of the Constitution now places the rights of the defendant and the victim on an equal footing, in two lengthy sections: A and B.

These important reforms have had an impact on the way in which judges are required to address the fundamental rights of both victim and defendant in the criminal proceedings; the framework of protection for both covers everything from the preliminary investigation to the appeals level, through the petition for a constitutional remedy, as a constant constitutional guarantor.

For this reason, this Court has been changing the stringent set of rules that used to apply to crime victims, seeking at all times to provide standards conducive to the improved and effective access to justice, which is evidenced by the different judgments handed down to date. [...]

From the beginning, it was established that the objective of the petition for a constitutional remedy was to create a means that would serve as the basis to support the supremacy of the Constitution, giving priority to the rights of citizens, safeguarded through the constitutional guarantees. This objective would be attained through the nullification of acts inconsistent with those rights and with the Constitution; in other words, the objective was to establish a way to remedy the violation of individual rights, restoring to the citizen the full enjoyment of those rights [*footnote omitted*]. [...]

It bears repeating that this First Division of the Supreme Court has been emphatic in specifying that the victim or party injured by a crime has standing, in his or her capacity as a plaintiff, to file a petition for a constitutional remedy against those acts of authority that are a personal and direct violation of his or her [rights] [...].

The catalog of constitutional rights includes the rights [of victims] to: I. Receive legal advice, be informed of their constitutional rights, and receive information on the development of the criminal proceeding; II. Assist the Public Ministry, so that it receives all of the information or evidence that they have—in the preliminary investigation and during the proceedings—for the respective procedures to be conducted, and in the event of the Public Ministry's refusal to do so, to receive a reasoned response stating the basis for its decision; III. Receive urgent medical and psychological care, from the time of the commission of the crime; IV. Obtain redress for the harm. The effectiveness of the constitutional protection requires the Public Ministry to request the respective conviction and bars the judge from issuing an acquittal after a conviction has been handed down. Victims additionally have the right to proceedings that expedite the enforcement of the judgment as it pertains to obtaining redress for the harm; V. Minor children have the right not to be forced to confront the defendant in cases involving the offenses of rape or kidnapping; and VI. Request the measures and court orders that guarantee their safety and assistance.

[There are] presumptions for the admissibility of a petition for a constitutional remedy, to which we can add the theories of standing included in the regulatory framework, aimed at the attainment of redress for the harm or the civil liability arising from the commission of a crime. Accordingly, the right to file a petition for a constitutional remedy is recognized with respect to: I. Acts arising from the petition for reparation or civil liability; II. Acts arising within the criminal proceeding that are directly and immediately related to the safety of the victim and

the attachment of the assets for the reparation or civil liability; and, III. Decisions of the Public Ministry to not prosecute or to dismiss the criminal prosecution.

Those scenarios will have to be updated to include the individual rights incorporated into Article 20 of the Federal Constitution by the amendment of June 18, 2008, to: I. Participate in the trial and file motions under the terms provided by law; II. Directly request that the judge order the reparation of the harm; III. In cases involving minors, as well as those involving the commission of the offenses of rape, kidnapping, and organized crime, and in those cases in which the court deems it necessary for the protection of the victim or injured party, to have his or her identity and other identifying information kept confidential; IV. To request the precautionary measures and court orders necessary for the protection and restoration of rights; and V. To challenge before a judge the omissions of the Public Ministry in the investigation of the crimes, as well as its decisions to maintain confidentiality, to not prosecute, or to dismiss the criminal case, or to stay the proceeding when reparations have not been made. [...] From a model for the petition for a constitutional remedy that was strictly legalistic and inflexible with respect to the concept of the injured party, this Supreme Court has been transforming the current standards under the Amparo Act, and through the interpretation of its different provisions, has been able to make satisfactory progress.

The consolidation of opinions of this High Court under a rights-based focus has yielded immediate results, with significant repercussions within our country's justice system, which continues to contribute to ensuring the improvement of the full right to access to justice for the party affected by the crime. [...]

Along this line of argument, it bears noting that Article 76 *bis*, subsection II of the Amparo Act, which expressly provides the opportunity to amend deficient pleadings to the defendant only, is not consistent with the current social and constitutional reality of our country, as that principle has been fundamentally surpassed by the transformation of the human rights in force.

MEXICO, *Direct review of petition for a constitutional remedy 125/2012 (September 26, 2012) (List of judgments 6.4)*. [In the decision on appeal, the lower court], based on precedent from the First Division [of this Supreme Court], concluded that the victim of a crime is authorized to file a petition for a constitutional remedy only against decisions that affect his or her right to obtain redress for the harm caused by the commission of a crime against him or her.

[The court] ruled inadmissible the petitioner's allegations that the responsible authority improperly amended the trial court's judgment by eliminating the aggravating factor of the crime of statutory rape which was committed by the victim's stepfather, as the victim lacks standing to challenge issues related to proving the elements of the crime and its aggravating factors, or those related to proving the defendant's responsibility for its commission. The court held that to find otherwise would mean granting the victim authority comparable to the power to prosecute, as she would be authorized to bring her claim before the courts in order for someone to be punished for having been found guilty of the commission of an unlawful act, a power that is within the exclusive purview of the Public Ministry.

[In her arguments against the lower court's decision, the victim alleged, *inter alia*, that] the Public Ministry lacks the authority to file motions or appeals against judgments issued by an

appellate court, so that it cannot avail itself of the constitutional proceedings directly, and that this is evidence of a procedural gap that is prejudicial to her and renders her defenseless. [...]

She adds that the Public Ministry abstained from using the legal proceedings to prevent the occurrence of a legal injustice, leaving her completely defenseless and with a serious irreparable harm; the perpetrators of crimes that affect society should not be allowed to be rewarded with reduced sentences when they have committed a crime against a minor child with whom they have a family relationship, even if it is a *de facto* relationship, as customs can sometimes be stronger than the relationships that are recognized by law.

[The legal issue raised above] leads to the question of whether the person harmed by the commission of a crime has the right to demand in court that the respective penalty be imposed against the perpetrator, which would entail recognizing the victim's standing to take part in the proceedings, independently of his or her right to obtain redress for the harm [...].

[In view of the relevant constitutional and convention standards] the victim must be allowed to take part in the proceedings, for the purpose of enforcing her fundamental rights recognized in the legal system and in the international treaties signed by Mexico, especially with respect to access to justice.

The above having been established, and solely as a guideline, given the particular characteristics of the matter, it should be emphasized that although the Brasilia Regulations Regarding Access to Justice for Vulnerable People are not binding in nature, they do provide a parameter for ensuring the effective right to access to justice for victims, and that according to these rules, vulnerable people are considered to include those persons who, due to various circumstances, find it especially difficult to fully exercise before the justice system their rights as recognized by law.

The Rules establish the following with respect to victimization:

“To the effects of these Regulations, a victim is any physical person that has suffered damages caused by a criminal offence, including physical or psychological injury, such as moral suffering and economic damages. The term ‘victim’ may also include, if applicable, the immediate family or the people in charge of the direct victim.

Any victim of a crime with relevant limitations in avoiding or mitigating the damages derived from criminal offences or in their contact with the justice system or in facing the risks of suffering a new victimisation is considered to be in a vulnerable situation. Vulnerability may be derived from their own personal characteristics or from other circumstances of the criminal offence. Some of these victims may be minors, victims of domestic or family violence, sex crime victims, aged adults, as well as relatives of victims who died violently.

The adoption of measures aimed at mitigating the negative effects of the crime (primary victimisation) shall be encouraged.

In addition, efforts shall be made to ensure that the damage suffered by the victim of the crime is not worsened as a result of their contact with the justice system (secondary victimisation).

Efforts shall be made to guarantee, throughout all the phases of the criminal proceedings, the protection of the physical and psychological integrity of the victims, especially in favour of those who are at the highest risk of intimidation, reprisal or reiterated or repeated victimisation (the same person being a victim of more than one crime over a certain period

of time). It may also be necessary to grant specific protection to victims who are going to give evidence in the trial. Special attention shall be paid to cases of family violence, as well as to cases where the person accused of having committed the crime is set free.” [*emphasis in the original*].

In Chapter II, on the “Effective Access to Justice for the Defence of Rights,” the Rules state that the necessary conditions should be promoted so that the judicial protection of the rights recognized by law is effective, adopting the measures that best adapt to each condition of vulnerability.

Rule number 75 states as follows:

“It is recommended to adopt the necessary measures to guarantee an effective protection of the safety of the vulnerable people who are taking part in the judicial proceedings as victims or witnesses, as well as that of their belongings, home and family; in addition to guaranteeing that the victim be heard in those criminal proceedings in which their interests are at stake.” [*emphasis in the original*]

For its part, the Inter-American Court of Human Rights has held that the Mexican State must ensure effective access to justice for victims or injured parties, making it possible for them to take part in the court proceedings in order to obtain the proper defense of their fundamental rights. The Court addressed the right to access to justice in the case of [*Rosendo Cantú v. Mexico*], specifically in paragraphs [166, 167, 176, and 213].¹¹⁵

[In an earlier decision] this First Division [held] that the victim of a criminal offense has constitutionally recognized procedural standing that is virtually comparable to that of a party to the proceeding when a decision could affect his or her fundamental rights—in this case, the right to obtain redress for the harm. Therefore, if the direct petition for a constitutional remedy is the suitable procedural means to assert that claim, it is clear that the victim recognized in the proceeding has standing to file it in the event that the defendant is acquitted, insofar as it affects the origin of this fundamental right. This does not mean that the victim acquires powers that belong to the Public Ministry in its capacity as the entity responsible for the criminal prosecution, because the victim’s petition does not place the defendant in a different situation with respect to the criminal accusation; the reasons for the victim’s dissatisfaction cannot exceed the terms in which the prosecution asserted the punitive claim, and he or she must explain why a conviction should be handed down, as a condition for the admissibility of the claim for reparation of the harm [*footnote omitted*].

In ruling on those matters, the Court found that in view of the operation of a constitutional provision the protection of the right guaranteed therein must be immediate, and that the absence of any express regulation in the secondary law cannot prevent decisions considered to violate that guarantee from being contested in a petition for a constitutional remedy.

Therefore, it is the opinion of this High Court that the victim of a crime has standing to file a petition for a constitutional remedy in all those cases in which there is a direct and personal harm resulting from the violation of his or her fundamental rights, which are given constitutional status for their increased protection. It would be absurd to deny access to a

¹¹⁵ Editors’ note: In the text of the original decision, each of the cited paragraphs from the Judgment of the Inter-American Court of Human Rights in the case of *Rosendo Cantú v. Mexico* is reprinted in its entirety. In order to simplify the reading of the national decision, that text has not been reprinted here.

petition for a constitutional remedy when any of those rights are deemed to have been violated, as this would be inconsistent with the text of the Constitution.

For the above reasons, this Court finds that the victim of a crime has standing to avail himself or herself of the ordinary and extraordinary remedies in the resulting criminal proceedings—including a petition for a constitutional remedy that is admissible against a final judgment—in the same cases and conditions as the defendant, because it is necessary to allow the victim access to all stages of the criminal proceedings and not just the enforcement phase. To deny this access would not only hinder the victim’s access to the quantification and measures of reparation but would also constitute a failure to fully serve persons affected by the commission of crimes.

Additionally, the above is consistent with Article 1 of the Federal Constitution, according to which all judges reviewing petitions for a constitutional remedy are required to examine, and if appropriate order reparation for, any violation they observe in the case brought before them. This first requires a ruling on the admissibility of the petition for a constitutional remedy filed by the victim in a criminal proceeding, so that it can then be examined on the merits.

Accordingly, in the event of a reclassification of the offense in an appeal judgment, and with a view to enforcing the right to access to justice provided for in Article 17 of the Constitution, it is proper to allow the petitioner to challenge that judgment in a direct petition for a constitutional remedy. The opportunity to access the mechanisms for the protection of the petitioner’s rights, through the interpretation of the legally established conditions provided in Article 20(B) of the Federal Constitution, and under the terms of applicability examined by the three-judge court, will give the petitioner the chance to demand the correct application of the law in order to optimize the effectiveness of the right.

In addition, this position is consistent with the objective of implementing constitutional oversight as a means to protect the individual human rights to which the victim of a crime is entitled, as his or her right to assist the Public Ministry requires a direct and active participation that allows him or her to demand the receipt of his or her evidence, which is offered to prove the allegations in support of the imposition of an appropriate sentence for the crime.

[The contested judgment] held that the victim lacked standing to challenge the amendment of the aspects concerning the elements of the criminal offense, its aggravating factors, and the defendant’s responsibility, even though this could harm her indirectly in her capacity as victim, and it affects her fundamental right to participate in the criminal case against the defendant in the terms that have been set forth. In any case, ultimately, it would affect the redress of harm to which she is also entitled, and this circumstance alone—if appropriate—would be sufficient to justify her standing to avail herself of direct constitutional proceedings to challenge the judgment.

MEXICO, *Petition for a constitutional remedy II-810/2013 (March 11, 2014) (List of judgments 6.5)*. Under Article 5, subsection I, and Article 6 of the Amparo Act, a crime victim or injured party can file a petition for a constitutional remedy when his or her rights are affected by the contested act or by the general provision of law, provided that such adverse effect is real and current, whether it affects him or her directly or by virtue of his or her special position in the legal system [*footnote omitted*]. [...]

This issue is closely related to subsection XII of Article 61 of the Amparo Act, which requires the existence of a legal or legitimate interest of the petitioner as the direct object of constitutional protection in order for a petition for a constitutional remedy to be admissible [*footnote omitted*]; that is, this remedy concerns the individual right to which all citizens are entitled, or to which persons affected by the contested act or general provision are entitled due to their special position in the legal system.

In this particular case, the contested act for which the specified authority is alleged to be responsible¹¹⁶ could infringe upon the petitioner's human rights to know the truth about the events, to obtain redress for the harm, and to have the alleged perpetrator of the crime tried for the criminal act committed against her. Those rights are not directly in conflict with the human right to liberty that pertains to the defendant in the underlying case; in that case, each of the rights provided on his behalf in Article 20, section B of the Constitution of the United Mexican States remains intact.

EL SALVADOR, *Judgment 665-2010 (February 5, 2014) (List of judgments 5.2)*. With respect to the right to access to the courts, this Court has held [*footnote omitted*] that Article 2 of the Constitution establishes several rights it deems fundamental to a dignified human existence under conditions of liberty and equality. In order for those rights not to be reduced to an abstract acknowledgment, and for them to have the potential to be effective, the recognition of a guarantee that enables their prompt and effective realization is essential. Article 2(1), final part, of the Constitution establishes *protection in the preservation and defense of the rights of all persons*. The right to *protection in the defense* of rights involves—in general terms—the creation of suitable mechanisms for the immediate or intermediate response to violations of individual rights [*emphasis in the original*].

As it pertains to the courts, that fundamental right has been established with the essential aim of making fundamental individual rights effective by allowing individuals to validly assert claims before the courts regarding acts of the State or private individuals that have violated those rights, using the dispute resolution mechanism designed for that purpose: *court proceedings* before all of the system's bodies and at all levels of appeal. In that respect, the *proceeding*, as the means of implementation of the right to the protection of the courts, is the instrument used by the State to satisfy the claims of individuals in compliance with its duty to administer justice; or, from the perspective of the defendants in such proceedings, it is the instrument through which a person can be deprived of the rights to which he or she is entitled, when it is done in accordance with the Constitution.

Judicial protection entails, then, the rights to *access the courts* to assert a claim, or contest one that has already been filed, and to *obtain a response* to the claim or challenge, based in law, through a *fair proceeding* conducted in accordance with the Constitution and the respective laws.

¹¹⁶ Editors' note: According to the judgment in Petition for a Constitutional Remedy II-810/2013, the contested act was "the September 30, 2013, order of the Supervisory Judge of the Criminal Trial Court of the First Region, located in this city, in criminal case 1P1413-199, in which it bound ***** over for trial for his alleged participation in the commission of acts defined under the law as sexual assault and sexual abuse, against *****."

It follows from the above notion that judicial protection falls under four broad headings: (i) *access to the courts*; (ii) *the constitutionally prescribed process, or due process*; (iii) *the right to a reasoned and consistent decision on the merits*; and (iv) *the right to have decisions enforced*.

Consequently, the essential element of that right is free access to the courts—understood as single-judge courts or three-judge courts—provided that it is done through the legally established proceedings. Accordingly, a denial of this right, based on unconstitutional grounds or due to the imposition of conditions or consequences that limit or discourage the possibility of going before the court, amounts to a violation of constitutional law.

Nevertheless, it must be made clear that if the court decides to dismiss the legal action filed, in the application of grounds established in a specific and applicable body of law that prevent it from hearing and ruling on the merits of the case, this does not amount to a violation of the right to access to the courts, unless it is—as stated previously—due to an interpretation that is restrictive or less favorable to the effectiveness of the aforementioned fundamental right.

4.9.1 Pro-victim interpretation of the procedural rules governing constitutional remedies

MEXICO, *Petition for a constitutional remedy II-810/2013 (March 11, 2014) (List of judgments 6.5)*. [The aggrieved third party in this case] alleges that the petitioner failed to adhere to the principle of finality that governs in a petition for a constitutional remedy, as, prior to filing it, she should have exhausted the appeal remedy provided for in the law regulating the contested act [...].

This argument is unfounded. While it is true that the victim or injured party has the right under Article 20(C)(II) *in fine* of the Constitution to take part in a criminal proceeding and to file motions [*footnote omitted*], this right is subject to the terms provided for in the law, in this case, the Criminal Procedure Act for the State of Guanajuato.

In that respect, the requirement that a person who files a petition for a constitutional remedy must first exhaust an ordinary means of defense is derived from the clear and sufficient specification in the respective law—and not in any lower-ranking, secondary law—of the appropriate remedy to challenge the act in question, of the persons who have standing to do so, and of the requirements they must meet.

Thus, in accordance [with the relevant articles] of the Criminal Procedure Act for the State of Guanajuato [*footnote omitted*] [...] the indictment—as well as the decision not to indict—can be appealed **by any of the parties**, without distinction, within a period of seven days [*emphasis in the original*].

Nevertheless, a reading of Article 30, in conjunction with Article 29(IV), both of the same local law [*footnote omitted*], leads to the conclusion that the only parties to an accusatory criminal case under the laws of this State are the following: the Public Ministry, the private prosecutor, the defendant and his or her defense attorney, and the third party having civil liability for the consequences of the crime. **Victims or injured parties are only considered parties to the proceedings** provided that they do not act as private prosecutors [*emphasis in the original*].

Consequently, in the matter now before us, it is not clear that the petitioner—in her capacity as an aggrieved party or victim in the underlying case—was plainly able to exhaust the aforementioned appeal prior to filing this petition for a constitutional remedy.

In other words, the Law that governs the contested act does not provide with complete certainty for the admissibility of the petitioner's appeal, and therefore an additional interpretation would be required to determine whether it was necessary to first exhaust that remedy.

These circumstances, then, update the exception provided for in the final paragraph of subsection XVIII of Article 61 of the Amparo Act, which makes it optional for the petitioner seeking a constitutional remedy to file that ordinary defense measure [*footnote omitted*].

This conclusion yields a greater benefit for defendants; otherwise, it would mean leaving them defenseless, given that, in matters similar to the one in this case, they would be prevented from going before a different judge—*whether ordinary or extraordinary*—to have their objections examined. [...]

The Court has not overlooked the fact that in a criminal case, considering the capacity of the parties (*perpetrator and victim*) to the proceeding, the human rights at stake are not of the same magnitude. In the case of the suspect, defendant, or convict, the fundamental right potentially at risk is liberty; in the case of the victim or injured party, it could be his or her rights to an appropriate judicial remedy, to know the truth, to obtain redress for the harm, to allege civil liability, to have the facts properly established, to have the alleged perpetrator of a crime be tried for the crime committed against [the victim or injured party], to non-discrimination with respect to those rights, and to not have them curtailed.

Nevertheless, among the new principles that govern the oral and accusatory criminal procedure—under which the original trial resulting in the contested order was conducted—the principle of **contradiction** stands out. This principle allows for balance between the parties and leads to a full judicial analysis of the controversy; that is, the acts of each party to the proceeding can be challenged by the other [*emphasis in the original*].

In view of the above, the admissibility of the victim's petition for a constitutional remedy in this matter cannot be restricted or barred, when in the original proceeding her rights were being defended on an equal footing with those of the defendant. Otherwise, the victim would be subject to discrimination and the curtailment of her fundamental rights, which in this case, as she is a victim and a woman, are clearly recognized in the above-cited national and international laws.

This right is also protected under Article 25 of the American Convention on Human Rights, which stipulates that every person has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties [*footnote omitted*].

4.9.2 Court's authority to amend deficient pleadings

MEXICO, *Judgment 163/2012, settling a contradiction between inconsistent rulings (November 28, 2012) (List of judgments 6.3)*. It must be acknowledged that the notion that **deficient pleadings**

can be amended on behalf of the crime victim or injured party was an ideological shock to the legal culture in our country when it was established with respect to petitions for a constitutional remedy [*emphasis in the original*] [...].

There are conflicting opinions on this, as there are those who, faithful to the legal framework, cherish the conservative idea that the Court's authority to amend deficient pleadings should remain intact, only in favor of the defendant, as established in Article 76 *bis*, subsection II, of the Amparo Act. Nevertheless, there is another, progressive current that supports the argument that it is no longer possible to maintain such regulatory rigor and that this principle should, of necessity, be extended to the victim.

This last theory is the one that has gained significant strength in recent times, as the practice of the courts demonstrates that the fundamental rights of victims or injured parties are violated in various respects when they resort to the petition for a constitutional remedy to seek justice—justice they were unable to obtain in the original criminal proceedings—and that those violations in many cases go far beyond the defense of their interests, to the point of being irreparable.

This reality is evident. It is visible to any citizen, and therefore it is clear that not in all criminal investigations is the only “weak” party, so to speak, the defendant; rather, in others, it is also the victim or injured party, who in many cases see their fundamental rights violated because of the financial power of the defendant, who, seeking to evade the legal problem at hand, is capable of eluding responsibility. [...]

The consolidation of opinions of this High Court under a rights-based focus has yielded immediate results, with significant repercussions within our country's justice system, and still helps ensure the improvement of the full right to access to justice for the party affected by the crime. [...]

Along this line of argument, it bears noting that Article 76 *bis*, subsection II, of the Amparo Act, which expressly provides the opportunity to amend deficient pleadings to the defendant only, is not consistent with the current social and constitutional reality of our country, as that principle has been fundamentally surpassed by the transformation of the human rights in force [*emphasis in the original*].

Consequently, the spirit of reform behind the enactment of this article, in the terms provided in the above-cited subsection of the law, has lost its constitutional basis. Therefore, in criminal matters, that rule must extend to the crime victim or injured party [*emphasis in the original*]. [...]

From this point forward, judges examining petitions for a constitutional remedy will have the obligation to amend deficient pleadings on behalf of both the defendant and the injured party, in the same terms and with equal effort for both, that is, under the same conditions that currently exist for the former [*emphasis in the original*]. [...]

This principle provides an encouraging outlook. By recognizing the Court's authority to amend deficient pleadings on behalf of the victim or injured party, it will be possible for the petition for a constitutional remedy to have a radically different structure with respect to the victim, in which priority is given to the legal truth, and the rendering of judgments—regardless of the outcome—is the consequence of an exhaustive examination, consistent with the law and in keeping with the spirit of Article 17 of the Federal Constitution.

The above arguments support this First Division's emphatic position that there is no valid reason to think that the principle of equality of arms would be violated by also amending the deficient pleadings of the victim, by virtue of the constitutional obligation arising from the significant amendments to Articles 1 and 20 of the Constitution, which place the defendant and the victim on an equal footing as persons entitled to human rights [*emphasis in the original*].

SECTION 5

RIGHT TO REPARATION

Among the catalog of rights currently recognized as pertaining to victims of crime and human rights violations, the right to reparation for harm suffered undoubtedly has its normative basis most firmly rooted in the national and international legal systems. Beyond the institutional and procedural arrangements of each country, every legal system recognizes an individual's right to be compensated when conduct inconsistent with the laws of that system result in a harm. Even within the framework of criminal justice systems, a determining factor on the path leading back to the victim as a central actor was the reconceptualization of the sentence in order to have its objectives include redress for the harm caused to the victim and/or injured or aggrieved party.¹¹⁷

Under international law, the reparation of harm has also been recognized as a general principle of law. On this basis, according to the studies performed by the United Nations International Law Commission, the obligation to redress the harm is a direct and immediate consequence of the commission of an act, attributable to a State, that violates an international norm.¹¹⁸

¹¹⁷ See J. B. J. Maier, *Derecho Procesal Penal*, vol. II, *Parte General: Sujetos Procesales* (Buenos Aires: Editores del Puerto, 2003), p. 584. Such a broad assertion no doubt warrants a few qualifications. Although the right to obtain reparations for the harm caused by an act punishable under the criminal laws is a feature of the current Latin American criminal law systems, this does not mean that the proceedings for exercising those rights are the same in all countries. As noted in this introduction, the institutional and procedural structures can vary significantly from country to country. In some systems, the action for the reparation of harm depends upon the prosecution, and therefore must be exercised by the same individuals that have standing to bring the criminal action. In other cases, the action for the reparation of harm can be brought in civil court, as a complement to the criminal action, and therefore can be brought by the agency that has standing to prosecute, as well as by private individuals. In a different scenario, the action for the reparation of harm may be partially or completely independent of the criminal action. In that case, the civil proceedings may have different conditions of admissibility and may even require evidence independent of the criminal case.

¹¹⁸ See Article 31 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*: “Article 31: 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.” This international rule must be interpreted consistent with other standards established in the draft articles on State responsibility, including: (i) Article 29 (continued duty to perform the obligation breached), (ii) Article 30 (obligation to cease the wrongful conduct and offer guarantees of non-repetition), and (iii) Articles 34–37 (forms of reparation, including restitution, compensation, and satisfaction). For an analysis of the basis for these rules, see International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, A/56/10, in *Yearbook of the International Law Commission*, vol. II, part 2.

Different international human rights instruments have also included specific provisions regarding the obligation of States to redress human rights violations.¹¹⁹ Most notable among those provisions, of course, is Article 63(1) of the American Convention on Human Rights, which establishes that “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” This provision has been the legal basis for the development of a robust body of inter-American case law on the right to reparation and modes of complying with it. Without any comparable precedent, the Inter-American Court has become one of the most important driving forces in the evolution of the right to reparation, and it is a point of reference for courts at the national and international levels.

A detailed review of the extensive inter-American case law on the issue of redress for harm is beyond the scope of this brief introduction. Suffice it to say that the Inter-American Court has taken an expansive view with respect to (i) the persons who should be the beneficiaries of reparations, as well as (ii) the specific measures that should be taken with a view to comprehensive redress for the harm. These measures most notably include: (i) compensation for pecuniary and non-pecuniary damages; (ii) the publication of the judgment; (iii) public apologies and acknowledgment of the facts; (iv) the investigation and, if appropriate, punishment of those responsible for the violations; (v) physical and psychological rehabilitation; (vi) the restitution and titling of lands; (vii) commemorative ceremonies; (viii) constitutional and/or legislative reforms, or the creation of administrative mechanisms; (ix) training programs for public servants or officials, including members of the armed forces and the judiciary; (x) the release of a detained person; (xi) the return to public office; (xii) academic or commemorative scholarships; (xiii) the implementation of social programs in the areas of education and culture; (xiv) programs for the reconstruction of housing and infrastructure; and (xv) the construction of social service centers and centers for vulnerable groups, to cite a few.¹²⁰

¹¹⁹ The provisions contained in the international human rights instruments include, most notably: (i) Article 7(g) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belém do Pará”; (ii) Article 10 of the Inter-American Convention against All Forms of Discrimination and Intolerance; (iii) Article 10 of the Inter-American Convention against Racism, Racial Discrimination, and Related Intolerance; (iv) Article 9(5) of the International Covenant on Civil and Political Rights; (v) Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; (vi) Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (vii) Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance; and (viii) Article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In this context, it is important to specify that the above-cited provisions refer to the right of victims to obtain reparations and to the obligation of States to create and/or facilitate access to appropriate and efficient national mechanisms.

¹²⁰ For a more detailed study of the inter-American case law on the reparation of harm, see, e.g., J. F. Calderón Gamboa, “La evolución de la ‘reparación integral’ en la jurisprudencia de la Corte Interamericana de Derechos Humanos,” in *Derechos Humanos en la Constitución: Comentarios de jurisprudencia constitucional e interamericana*, vol. I, ed. E. Ferrer Mac-Gregor, J. L. Caballero Ochoa, and C. Steiner

Another milestone in the consolidation of the notion of comprehensive reparation came in 2005 with the adoption of the Van Boven/Bassiouni Principles. Following international practice, these principles recognize the different modalities or forms of reparations, to wit: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹²¹ Similarly, this instrument establishes important principles, designed to give effect to the right to reparations for victims of serious violations of human rights or international humanitarian law. Most notably, they include: (i) the subsidiary responsibility of the State, when the responsible individual or legal entity cannot or will not meet its obligations; (ii) the importance of establishing administrative programs for reparations in the case of gross human rights violations; and (iii) the importance of having effective mechanisms for the enforcement of reparations judgments, including international or foreign judgments.¹²² As a complement to these criteria, the Joinet/Orentlicher Principles, also adopted in 2005, emphasize the content of the guarantees of non-repetition as a specific form of complying with the right (obligation) of comprehensive reparation.¹²³

The concept of comprehensive reparation has also been incorporated into international criminal law. According to Article 75 of the Rome Statute, the ICC can order, among other measures, compensation, restitution, and rehabilitation of the victims and/or their heirs, whether by the defendant or the Trust Fund for Victims, when the Court deems it advisable.¹²⁴ The instruments that govern the proceedings before the ICC specify that it can order both individual and collective reparations, in accordance with the scope and magnitude of the harm.¹²⁵

On these legal bases, in its first judgment on reparations, Trial Chamber I identified some of the guiding principles of reparations proceedings, as well as their purposes. In the words of the Chamber, “The Statute and the Rules [of Procedure and Evidence] introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.”¹²⁶ In this respect, the Chamber further stated, “Reparations [must]

(Mexico: SCJN/IIJ-UNAM/KAS, 2014), pp. 145–219; T. M. Antkowiak, “La Corte Interamericana de Derechos Humanos y sus reparaciones centradas en la víctima,” in *Perspectiva Iberoamericana sobre la Justicia Penal Internacional*, vol. I, ed. H. Olásolo Alonso and S. Cuenca Cubrelo (Valencia: Tirant lo Blanch, 2012), pp. 3017–317.

¹²¹ See Principles 19 to 23 of 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.

¹²² See Principles 15 to 17 of 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.

¹²³ See Principles 35 to 38 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

¹²⁴ Complementarily to Article 75 of the Rome Statute. See Rules of Procedure and Evidence of the International Criminal Court, subsection 4 (Reparations to Victims) of section III (Victims and Witnesses).

¹²⁵ See Rule 97 of the Rules of Procedure and Evidence of the International Criminal Court.

¹²⁶ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, Trial Chamber I, August 7, 2012, para. 177.

[...]—to the extent possible—relieve the suffering caused by these offenses; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations, and contribute to the effective reintegration of former child soldiers.”¹²⁷

In the Court’s interpretation, the process for determining and implementing the different modes of reparation is as important as the outcome itself. To this extent, it must encourage the extensive participation of the victims (in a broad sense) of crimes, as well as “address any underlying injustices [...] [in order to avoid] replicating discriminatory practices or structures that predated the commission of the crimes.”¹²⁸ Furthermore, to the extent possible, reparations should also serve as means to “promote reconciliation between the convicted person, the victims of the crimes, and the affected communities.”¹²⁹

Beyond the institutional and procedural particularities of the ICC, the judicial practice it has developed is of particular interest to the (re)conceptualization of the criminal justice systems that has been underway in different Latin American countries for years now. It is important to specify that the extracts of judgments presented below are derived from judicial remedies of a different nature, and therefore not all of them correspond to principles established in the context of criminal proceedings. Bearing in mind the diversity of national justice systems, some decisions have been issued with respect to constitutional remedies, administrative remedies (regarding the financial liability of the State), transitional justice processes, and, on an exceptional basis, in criminal trials. The above tells us, first, the extent of the judicial debate surrounding the right of victims to reparations and, in addition, the importance of reinforcing that right in the context of national criminal proceedings.

COLOMBIA, *Direct reparation action, File 16996 (February 20, 2008) (List of judgments 3.4)*. The Colombian State clearly recognizes the right of all persons to request that the government agency or private individual who has caused a specific harm to a person or to things provide the respective comprehensive reparation of that harm, which must be guaranteed under equal terms. [...]

All reparations begin with the need to verify the existence of a harm to a legally protected interest, or a violation of a legitimate right or interest that results in a harm that, likewise, must be considered unlawful, insofar as the person who suffers the harm is not required to bear it, in whatever way the legal system provides.

Thus, we can arrive at the following conclusions:

- Every human rights violation creates the inescapable obligation to comprehensively repair the harm arising from that violation.

- Not every reparable (recoverable) unlawful harm is based on the violation of or disregard for a human right, and, therefore, although the harm suffered must be redressed comprehensively, that situation does not presume the adoption of restorative justice measures.

seen in the first scenario, the domestic judge, within his or her sphere of competence, must fully establish the comprehensive reparation of the harm suffered. In such cases, according to

¹²⁷ *Ibid*, para. 179.

¹²⁸ *Ibid*, para. 192.

¹²⁹ *Ibid*, paras. 179 and 193.

the legal standards currently in force (Law 446 of 1998 and Law 975 of 2005), the court should initially seek the *restitutio in integrum* of the harm and of the structure of the right violated. If it can be shown that it is impossible to carry out fully, the court can then address additional means of reparation such as rehabilitation, satisfaction, guarantees of non-repetition, and, additionally, symbolic restoration, among other aspects.

In other terms, with respect to the factual analysis of the human rights violation, and according to the normative and descriptive parameters contained in the respective articles of the Constitution and the international provisions, the administrative disputes judge must not be limited by his or her main function of establishing and ordering the financial compensation of a harm whose economic and technical value can be assessed in actuarial terms. Rather, the judge must go far beyond this, so that the principle of comprehensive reparation is clearly implemented, for which he or she must apply the set of standards provided in the numerous instruments designed to attain the effective, comprehensive reparation of the harm [...].

The principle of comprehensive reparation, understood as a guideline for the compensation of a harm that aims to bring the victim, at the very least, to a point close to where he or she was prior to its occurrence, must be interpreted and applied in accordance with the type of harm suffered: in other words, whether it is one derived from the violation of a human right, according to its positive recognition in the national and international legal systems, or if it involves the injury of a legally protected interest or asset that is unrelated to the human rights system.

From this perspective, comprehensive reparation in the human rights sphere assumes not only compensation for the damages that arise from a violation of nationally and internationally recognized rights; it also seeks to restore the *status quo*, which involves taking a number of symbolic and commemorative measures that promote the restitution of the essential core of the right or rights violated—especially if those violations are considered to have stemmed from offenses or crimes legally defined as crimes against humanity.

This conclusion is clearly inescapable, since in these events the recognition of financial compensation aimed at covering a specific harm or detriment can in no way be classified as sufficient. The person or social group suffers the violation of a right that, in most cases, is among those considered first-generation human rights; consequently, as a general rule, it involves the curtailment of fundamental rights, without which a human being's existence is incomplete.

The administrative disputes judge must take a dynamic stance in view of the new requirements of the domestic and international legal systems, since the protection of human rights has become an aspect of positive regulation that has broken through the barriers traditionally set by the States in their staunch defense of the principle of national sovereignty. This new paradigm shift, in which the individual and society are the focal point of the State (governed by the social and democratic rule of law), makes the entire international legal system directly interested in the real and effective enjoyment of the rights and guarantees to which every human being is entitled [...].

The comprehensive reparation that operates in relation to the harm of a legally protected interest other than a human right is related specifically to the possibility of fully compensating all of the damages that the wrongful conduct has created, whether pecuniary or non-pecuniary. So, even if the judge in this venue does not take symbolic or commemorative measures, or

measures of rehabilitation or non-repetition, that circumstance, *per se*, does not mean that there is no comprehensive redress of the harm. This is the case insofar as, in these events, the unlawful harm does not entail the personal infringement of a right or a guarantee that goes to the essential core of the human person and his or her ability to live and interact with others in conditions of absolute respect for the dignity of the individual; rather, it is based on the financial detriment suffered (e.g., the destruction of a thing such as a vehicle, an injury caused by a government error, etc.).

5.1 LEGAL AND POLICY RATIONALE FOR THE RIGHT TO REPARATION (VICTIMS OF CRIME)

CHILE, *Petition for cassation, File No. 12.357-2011 (December 7, 2012) (List of judgments 2)*. Nowadays, the responsibility derived from an unlawful act gives rise to a restorative obligation, with broad connotations. It requires a process, rather than a mere pretense, in which both victims and offenders take part, thoroughly addressing the act's direct and indirect effects or consequences, and even its long-term repercussions. Restorative justice is different from retributive and rehabilitative justice. Without prejudice to the punishment and social rehabilitation of the offender, its central focus is on comprehensively repairing the harm. Understood as a process, it tends to seek multiple objectives, with restoration being the outcome of the reparation, which includes—to the greatest extent possible—restitution, compensation, reparation, reconciliation, and acknowledgment. Ultimately, it confronts the act with all of its consequences, given that it includes all those concerned with the issue: the victim, the perpetrator, their families, other affected persons, the community, and, in short, the State itself. Unlawful acts are not just a problem between the State and the defendant, but rather a conflict in which all those who are affected, in the different spheres where repercussions are felt, have an interest. It is a conflict that, for legal or policy reasons, has historically been dealt with by the courts, which have the ability to intervene. However, that is not the only channel, just as compensation is not the only form of reparation. The acceptance of this new concept was taken up in the United Nations Resolution on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, adopted by the Economic and Social Council in July 2000, following discussions at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna.

From the perspective of restorative justice, a way must be found to go back and resolve the harm caused by an unlawful act, as well as to compensate and provide assistance. Therefore, financial benefits must seek not only to repair a harm but also to contribute to other objectives, such as those concerning nutrition, health, and education, to generally foster development, rehabilitation, or compensation of the harm and other equally relevant objectives. This comes from the fundamental idea of repairing all harm and, to the greatest extent possible, restoring the situation that existed prior to the act that gave rise to that harm. [...] Even though there is ultimately a financial disbursement from the person or institution found liable, the restoration cannot be exclusively financial in nature.

5.2 FORMS OF REPARATION

COLOMBIA, *Judgment C-228/02 (April 3, 2002) (List of judgments 3.1)*. The Constitution also reflects a broad conceptualization of the protection of victims' rights, which is not *prima facie* limited to financial matters. Indeed, Article 250(1) of the Constitution establishes that the Office of the Prosecutor General has the duty to "take the necessary measures to effectively ensure the restoration of the right and the compensation of the harm caused by the offense." Accordingly, compensation is only one of the potential elements of reparation to the victim, and the restoration of his or her rights encompasses more than mere compensation. The Constitution has outlined as an aim of the Office of the Prosecutor General the "restoration of the right," which represents the full and comprehensive protection of the rights of victims and injured parties. The restoration of their rights requires knowing the truth about what happened, in order to determine whether it is possible to return to the *status quo* prior to the violation, as well as for justice to be served [*emphasis in the original*].

COLOMBIA, *Direct reparation action, File 16996 (February 20, 2008) (List of judgments 3.4)*. It is perfectly feasible, in application of the principle of "comprehensive reparation," for the administrative disputes judge to order pecuniary and non-pecuniary measures that are identical or similar to the ones found in the case law of the Inter-American Court of Human Rights, including the following:

- a) Restitution, or *restitutio in integrum*, is the restoration of things to their normal state or the state they were in prior to the violation. It is the perfect form of reparation, and only when restitution is not possible is it appropriate to order other measures of reparation.
- b) Compensation for the pecuniary harm suffered by the victims in a particular case includes pecuniary damages (actual damages, lost wages) and non-pecuniary damages.
- c) Rehabilitation includes the funding of medical and psychological or psychiatric attention or social, legal, or other services.
- d) Satisfaction encompasses "moral" measures of a symbolic and collective nature that include non-pecuniary damages such as the State's public acknowledgment of its responsibility, commemorative ceremonies, the dedication of public thoroughfares, monuments, and so on.
- e) Guarantees of non-repetition are those suitable administrative, legislative, or judicial measures designed to ensure that victims are never again subjected to violations of their dignity, including measures aimed at dismantling unlawful armed groups or repealing laws, among other things.

As a corollary to the above, in the opinion of the Court, comprehensive reparation promotes the effective remedy of a harm to a specific right or legally protected interest. Therefore, in each specific case, the judge at the national level must verify what authority he or she has to order the redress of the harm, whether through purely compensatory measures or, if the factual scenario allows for it (different categories of human rights violations), by issuing measures or orders of a different kind, such as those listed above or others.

5.2.1 Amounts of compensation as a form of reparation

MEXICO, *Review of petition for a constitutional remedy 75/2009 (March 18, 2009) (List of judgments 6.1)*. [In determining whether national secondary laws can set a cap on compensation for non-pecuniary damages for which the State is financially liable], account must be taken of the fact that Article 63(1) of the American Convention on Human Rights establishes the following:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Neither the above-cited article nor the consistent jurisprudence of the Inter-American Court and the Commission on Human Rights has established a limit on “moral” reparation or “non-pecuniary damages,” as it is now called in the context of the inter-American human rights system.

In its case law, the Inter-American Court of Human Rights has developed criteria relating to the nature and scope of the obligation to provide redress [*footnote omitted*], and within these criteria, the concept of non-pecuniary damages and the scenarios in which it is appropriate [*footnote omitted*]. However, it has not set a minimum or maximum limit for an award of compensation in any case, as the relevant issue when a harm has been caused, or an international obligation of the State has been breached based on a human rights violation, is to return things to their prior state, that is, the restoration of the previous situation. If that is not possible, it is necessary to identify measures that, in addition to guaranteeing the rights in question, remedy the consequences of the violations and establish the payment of money damages as compensation for the harm [*footnote omitted*] in compliance with the duty to make reparations [*footnote omitted*]. In other words, the existence of a harm gives rise to the duty to appropriately repair that harm [*footnote omitted*] without consideration for budgetary or monetary limits, but taking into account the harm caused and the State’s negligence or lack of diligence to prevent that harm from occurring. [...]

The suffering that the violations caused to the victim and his or her relatives, as well as the changes to their living conditions and other non-pecuniary consequences they suffered, cannot be established by law, as they will be different in each case. Therefore, the Inter-American Court of Human Rights has in multiple cases deemed it appropriate to set an amount, in equity, for non-pecuniary damages [*footnote omitted*], fairly evaluating the suffering caused by the violations, but never with a limit in mind.

Along these lines, if the Federal Law on the Financial Liability of the State is to be the means through which the recommendations and judgments of the inter-American human rights bodies are observed, it is clear that the establishment of a maximum cap for “moral” or non-pecuniary reparation is contrary to the obligation assumed by the Mexican State as a party to the American Convention on Human Rights, specifically because of the content of Article 63.1 thereof; accordingly, the challenged provision is contrary to Article 133 of the Federal Constitution.

5.2.2 Compensation must be paid by the perpetrator and subsidiarily by the State (victims of human rights violations)

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. The Court questions whether the right to comprehensive reparation guarantees that, even in transitional justice processes, the perpetrators of crimes must pay with their own resources for the harm their criminal activity has caused.

In theory, although the general principle of law that whoever causes harm must make amends for it applies in the ordinary justice system, it could be maintained that in transitional justice processes dealing with gross and systematic violations of human rights, where there are an enormous number of direct and indirect victims, it is the State rather than the perpetrators that must be responsible. It could even be asserted that those who decide to submit to a peace process in the wake of gross and systematic violations of human rights might do so on the condition that the financial component of the reparations will be assumed by the State and not by the perpetrators of the harm, who would not be willing to risk and deplete their personal assets to pay for the considerable harm caused. Finally, it can be said that this form of reparation—through public funds rather than the personal assets of the perpetrators—does not constitute a violation of the victims’ rights, as they will finally receive some type of reparation, regardless of its source of funding.

This argument nevertheless has several constitutional shortcomings that the Court cannot fail to note. First, there are no apparent constitutional grounds for making an exception to the general principle that any person who causes an unlawful harm is required to make reparations for it, and for passing on the total cost of the reparations to the public. Second, even assuming that the State can transfer this liability, it is not authorized to pardon—either criminally or civilly—persons who have committed atrocities or those responsible for gross and systematic acts of violence. To completely release the perpetrators of the harm from civil liability amounts to a comprehensive amnesty. Finally, it seems constitutionally disproportionate not to go after the assets of those responsible for the harm, at least in those cases in which it can be proved that the perpetrators have immense fortunes, while those who have suffered the harm are living in situations of poverty and displacement as a result of it. The Court will explain each of these issues below.

First, at least in principle, there does not seem to be a sufficient constitutional basis, in the context of mass violence, for failing to apply the general principle that those who cause harm must make amends for it. On the contrary, as the Court has already explained, the relevant standards, doctrine, and national and international case law have considered that financial reparation at the expense of the perpetrator is one of the conditions necessary to guarantee victims’ rights and promote the fight against impunity. Only in the event that the State is responsible—by act or omission—or when the resources of the perpetrators are insufficient to pay the cost of mass reparations, does the State step in to assume the subsidiary responsibility that this entails. And this allocation of liability does not appear to vary in transitional justice processes in the context of peacebuilding.

In the context of transitions to peace, it might seem proportionate for the perpetrators of crimes who have decided to join a negotiation process to retain a portion of their assets in order

to be able to live in decent conditions and fully integrate into a democratic society governed by the rule of law. What nevertheless appears to have no constitutional basis whatsoever is for the State to completely release the perpetrators from civil liability and to transfer the costs of reparation entirely to the national treasury. This would create a type of amnesty from civil liability, which would then be assumed by the citizens, through their taxes—citizens who have not caused any harm and who, on the contrary, have been victims of the “macro-criminal” process being addressed. The Court recognizes that in view of the type of crimes addressed by the contested law it seems necessary to use public funds for reparations, but only subsidiarily. As previously mentioned, this does not preclude the legislature from adjusting this liability in a manner that is reasonable and proportionate to the circumstances of each case. What it cannot do is completely relieve the perpetrators of gross violence or atrocities from their respective responsibility for those crimes. Thus, it is consistent with the Constitution for the perpetrators of these types of crimes to pay with their own assets for the harm they caused, in accordance with the ordinary procedural laws that set a limit on financial liability in order to allow the liable individual to maintain a decent standard of living—which would have to be determined according to the particular circumstances of each individual case.

5.3 COMPREHENSIVE REPARATION AS PART OF TRANSITIONAL JUSTICE PROCESSES

COLOMBIA, *Direct reparation action, File 16996 (February 20, 2008) (List of judgments 3.4)*. The criteria for comprehensive reparation, based on the importance and relevance of human rights at the domestic and international levels, must adhere to the parameters and premises of restorative justice that have recently been defined at the domestic level by the National Reparation and Reconciliation Commission, and include the following:

“[...] b. Reparations must be consistent with and complementary to other components of transitional justice, that is, to the establishment of the truth, the reconstruction of historical memory, the administration of justice, and institutional reforms, as this is the only way in which to accomplish the ultimate aim of reparations, which includes restoring the dignity of the victims.

c. Reparations must be internally comprehensive; that is, they must achieve an appropriate balance between individual and collective measures, as well as between material and symbolic measures, which is the only way to ensure that the victims feel that reparations have truly been made. In addition, the concept of comprehensive reparation means that the reparation measures provide for *restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition*.

d. Reparations must be appropriate, in the sense that the measures of reparation must be consistent with and proportionate to [the human rights violations that were committed].

e. Reparations must be effective; that is, they must in fact be carried out effectively.

[...] g. Reparations must be proportionate to the wrongful act committed and to the harm caused [...].”¹³⁰

¹³⁰ Note in the original: National Reparation and Reconciliation Commission, “Recomendación de criterios de reparación y de proporcionalidad” (Bogotá, 2007), pp. 24–25.

5.4 FINANCIAL LIABILITY OF THE STATE FOR IMPROPER ACTS OR HUMAN RIGHTS VIOLATIONS

In the context of the debates on the enforceability of the right to obtain redress for human rights violations, the Latin American case law has focused part of its efforts on (i) international proceedings on State responsibility, and (ii) national administrative proceedings on the financial liability of the State. Regardless of the difference in their nature, both types of proceedings share a common basis. Under a reconceptualization of the notion of sovereignty, the conduct of the State toward individuals no longer enjoys absolute immunity; on the contrary, it must be subject to the law (in a broad sense). According to this premise, the harm caused by the unlawful or improper exercise of government authority must be redressed by the State itself, as a collective legal entity.¹³¹ This complements, then, the traditional systems for determining the individual liability (criminal, administrative, political, or civil) of private citizens and/or public servants and government officials.

The United Nations International Law Commission has conducted a detailed study on the rules governing the international responsibility of States. Most notably, these include those that establish: (i) the different forms of attribution of conduct to a State, (ii) the particularities of the breach or violation of international law, (iii) exceptions to responsibility, and, of course, (iv) the consequences of reparations, in terms of the obligation to make reparation.¹³² On this point, it is nevertheless important to consider that, as with other aspects of international human rights law, the rules on State responsibility reflect the specific object and purpose of the system, and therefore there may be significant variations in the rules applicable in proceedings conducted under general international law. This is, as previously described, particularly relevant as it relates to the practices of the international mechanisms for reparations, especially in the case of the Inter-American Court.

A detailed study of the theoretical or normative underpinnings of national administrative proceedings on the financial responsibility of the State is far beyond the scope of these brief introductory paragraphs. Nevertheless, it is important to note that the scope and conditions for the operation of this financial responsibility vary substantially among different countries. In some jurisdictions, responsibility may be incurred by the conduct of any State body, including the legislative or judicial branches, while other systems focus on control over the (wrongful) conduct by the central bodies of the executive branch (in a limited interpretation of the concept of *government*). Similarly, the responsibility may, in some systems, originate on the basis of extracontractual civil or administrative responsibility for an unlawful or negligent act, whereas in other contexts it may be understood in terms of strict liability, where it is not necessary to prove the element of intent in the conduct.

Beyond the particularities of the national and international systems of State responsibility, for purposes of studying the Latin American case law, it is essential to underscore the process of evolution those systems have undergone with respect to the

¹³¹ See, e.g., B. Schwartz, *French Administrative Law and the Common-Law World*, 2nd ed. (Clark, NJ: Lawbook Exchange, 2011).

¹³² See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted at its 53rd session in 2001. The text of the draft articles was included as an annex to Resolution 56/83 of the United Nations General Assembly, of December 12, 2001.

notion of the reparation of harm. At the beginning, their emphasis—particularly with regard to the financial responsibility of the State—rested on the compensatory aim of the proceedings; however, the judicial opinions have made it possible to move toward a complex notion of *comprehensive redress* for the harm.

The introductory paragraphs of section 5 have already addressed the modes or forms that, as a whole, can lead to a more complete reparation of the harm caused by the human rights violation. Without minimizing the relevance of those criteria, it is important to understand the Latin American case law presented below not as a secondary reflection of the inter-American judicial opinions but as its own body of case law, presenting everything from the most traditional opinions regarding compensation and redress to a more complex view of comprehensive reparation.

5.4.1 Legal bases for the financial liability of the State

CHILE, *Petition for cassation, File No. 12.357-2011 (December 7, 2012) (List of judgments 2)*. [The evolution of the modern State, and with it, of our legal systems, reveals a] fundamental change [...] [that is] evident in the transition from the rule of the State’s exemption from liability—derived from sovereign immunity, according to the rule that “*The king can do no wrong*”—to a principle of responsibility that includes all authorities and individuals in the country, and which emanates from equality before the law in a democratic State. In this development, we observe how an appeal challenging the legality of an administrative decision, which provides for the potential nullification of government actions, can replace that administrative decision and even result in the imposition of penalties. Timing, merit, and advisability were not subject to control at the initial stage; however, in the application of the principle of the prohibition of arbitrariness, they are now included. In the same way, an appeal alleging that an administrative decision violated an individual right or constitutional guarantee, which basically seeks an order of compensation, moves into the broader domain of restoration, the purpose of which is to fully address the harmful effects of the government’s acts. Other actions are designed to provide certainty in legal situations, interpret proceedings, and prevent them when appropriate.

All of these developments have resulted in a broadly comprehensive and non-exclusionary regulation, which, with respect to the matter at hand in the instant case, will be known as an appeal for judicial review alleging responsibility; it could also be called State litigation, as it has been extended from the State-as-Administrator to the State-as-Legislator and State-as-Judge. [...]

In substantive terms, the case law has evolved to a currently harmonious state that acknowledges the responsibility of the State-as-Administrator, requiring, in most cases, a factor of attribution that rests on the notion of “lack of service” and includes the unlawful legal action of the government, its defective operation, and omissions or silence when it should have acted, all of which must cause harm to its citizens. This does not overlook the fact that responsibility is also incurred through risk and even through lawful activity in which the government causes harm, without prejudice to the fact that, in this last case, the doctrine has stated that it refers more specifically to the responsibility of the State-as-Legislator [...].

The circumstance to be underscored is that the case law, based on the special legislation, has upheld the responsibility of the State. This special body of law is derived from Articles 2, 4, 5, 6, 7, and 38 of the Constitution of the Republic, and Articles 4 and 42 of Law No. 18.575. The rule in Article 21(2) of Law No. 18.575 does not affect Article 4, and therefore the concept of the State set forth in Article 1(2) of the Constitution should be borne in mind, so that this system of responsibility unquestionably applies to the Armed Forces, as well as to law enforcement and public safety personnel.

The above does not disregard the responsibility derived from the public law concept of nullity, which is based not on the appeal alleging the violation of individual or constitutional rights by a State action, but rather on the appeal alleging the illegality of such action.

The national doctrine and case law no longer needs to invoke provisions of private law in order to find the responsibility of the State for a wrongful act committed by its agents.

MEXICO, *Review of petition for a constitutional remedy 75/2009 (March 18, 2009) (List of judgments 6.1)*. As is evident from its content, Article 113 of the Federal Constitution establishes that the State has strict and direct liability for the harm that it causes to the rights or interests of individuals as a result of its improper administrative activity. Correlative to this obligation, this constitutional article establishes the right of private individuals to receive compensation according to the grounds, limits, and procedures established by law. [...]

In order to be able to examine [the arguments presented in this constitutional appeal] [...], we must first mention the considerations of this First Division in its decision on the review of petition for a constitutional remedy 903/2008 [...] interpreting the individual right enshrined in [Article 113 of the Constitution]. [...]

In that case, this Court held that the compensation that must be determined based on the improper administrative action of the State **is a substantive constitutional right**:

In the opinion of this Court, therefore, Article 113, second paragraph, of the Federal Constitution must be interpreted bearing in mind that the above-cited article places emphasis on **the right of individuals to obtain compensation for the improper administrative action of the State**. The basis on which the Permanent Constituent Assembly established this right is the concept of the **direct and strict** financial liability of the State. Nevertheless, the regulatory proposal of this concept is invariably to establish an individual right to “compensation in accordance with the grounds, limits, and procedures established by law.” [*emphasis in the original*]

This Court held that three consequences follow from this premise: (1) the scope of validity of this right extends to all legal systems of the Mexican State, “giving those entitled to it the right to demand its content immediately and directly before any government body in any of the legal systems and their divisions”; (2) this right has its own substantive scope that cannot be limited by the ordinary legislature in the exercise of its powers to enact laws; and (3) it establishes an obligation for the authorities to orient their public powers, including the shaping of laws, toward ensuring that rights-holders enjoy the full breadth of this constitutional right [...] [*emphasis in the original*].

The legislature indicated that the system of financial liability of the State has three objectives: (1) to comply with the imperative of justice and strengthen the rule of law in Mexico; (2) to

improve the quality of public services; and (3) to deepen or regain the public's trust in the State, as well as in the respectability of the law as the best instrument for resolving issues of societal coexistence [...].

5.4.2 Judicial acceptance of international grounds for the financial liability of the State

CHILE, *Petition for cassation, File No. 12.357-2011 (December 7, 2012) (List of judgments 2)*. Article 5 of the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in Resolution 47/133, of December 18, 1992, states: “In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law.”

Legal action is thus brought against the State for its responsibility based on the acts of its agents and for purposes of obtaining comprehensive redress for the harm caused. [...]

In the same regard, the International Covenant on Civil and Political Rights [...] and the American Convention on Human Rights [...] contain provisions directly and indirectly referring to the financial liability of the State, to wit: Articles 9.5 and 14.6 of the former and, especially, Articles 68 and 63.1 of the latter, which mention the “compensatory damages” established in the judgments of the Inter-American Court of Human Rights in which the State is found to be responsible, as well as the duty to make reparations for the consequences of the measure or situation that constituted the violation of the right or freedom in question, and the requirement “that fair compensation be paid to the injured party.”

International humanitarian law also contains provisions relating to the obligation of the contracting Parties to pay compensation in cases of violation of its provisions. This is the case, for example, of Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land; the Geneva Conventions of August 4 [*sic*], 1949, particularly Article 68, on the treatment of prisoners of war; [...] as well as Article 91 of Protocol I Additional to the Geneva Conventions, relating to the protection of victims of international armed conflicts. [...]

The reference to the international laws is related to the establishment of comprehensive redress for harm. This point, which is not disputed in the international sphere, addresses reparations not only to States or population groups but also to persons considered on an individual basis; that is, reparations assessed not just against the perpetrators of the crimes but also against institutions and the State. Moreover, this international body of law has not created a system of responsibility, but has only acknowledged it—as, undoubtedly, it has always existed—while developing the tools designed to make its declaration more expeditious, simple, and effective, bearing in mind the nature of the violation and the right violated.

5.4.3 Scope of judicial authority to determine comprehensive reparation

COLOMBIA, *Direct reparation action, File 16996 (February 20, 2008) (List of judgments 3.4.)*¹³³

In that context, and if the international law recognizing and regulating human rights clearly prevails in the domestic system at the regulatory and interpretive levels, it is evident that the administrative disputes judge will have various tools and instruments designed to ensure the comprehensive reparation of human rights violations whenever they are brought before the court with a view to compensation of the injury. Therefore, it is the duty of the judge on such occasions to not just limit him or herself to ordering monetary compensation based on the application of actuarial guidelines and criteria; rather, the judge's obligation is to fully integrate the measures available under the national and international laws, with a view to ensuring the restoration that must follow a violation of human rights. [...]

Accordingly, at the domestic level, administrative disputes judges and the Constitutional Courts must promote the full and complete restoration of human rights in cases brought before them—given that this is their work, and precisely for purposes of keeping the international human rights courts (in the specific case of Colombia, the supranational Inter-American Court of Human Rights) from having to displace the national justice system in complying with the above-cited commitments. [...]

Therefore, the role played by judges in a society governed by the rule of law must be underscored, since they are called to serve, as stated by Professor Zagrebelsky [*footnote omitted*], as the connector between the State and society, insofar as the legal system confers upon them, according to the nature of the controversy brought before them, an extremely broad range of opportunities to do real, substantive justice, whereby regardless of the origin of the harm or injury to the right or interest, in all cases the person can be assured that the reparation of the harm will be comprehensive and based on criteria of justice.

Now, the above points in no way disregard the principles of *requested jurisdiction* and *consistency* (Article 305, Code Crim. Pro.), since, in view of serious human rights violations (e.g., crimes against humanity), the domestic legal system must yield to the international system, insofar as it imposes the obligation on States, and on its various constituent bodies—including the Judiciary—to take all possible measures to foster the protection and reparation of these individual guarantees.

Accordingly, the principle of comprehensive reparation gains strength in those cases in which the administrative disputes judge must rule on matters relating to alleged infringements of fundamental human rights, given that in those cases the national and international legal systems provide several tools and instruments for the restoration of rights.

This view in no way implies disregard for the procedural assumptions outlined by the legislature. On the contrary, it represents the correct and appropriate harmonization of the legal rules of the domestic system with the principles and standards that protect individuals at the international level, most of which have been signed and ratified by Colombia.

¹³³ Editors' note: For a better understanding of the criteria established in the paragraphs reprinted herein, it is essential to relate them to the broader discussion of the right to comprehensive reparation. On this point, see the extracts of the decision of the Council of State of Colombia in Direct Reparation Action No. 16996, in Section 5 of this Digest, *Right to reparation*.

In addition, the measures that may be taken by the judge to attempt to restore the human rights violated in a specific case do not disregard the fundamental guarantee of *non reformatio in pejus* (closely related to the principle of consistency), insofar as they do not propose to modify or disregard the limits outlined by the *causa petendi* of the claim; rather, those commemorative or symbolic measures, or measures of non-repetition of the conduct, require educational outreach designed to raise awareness in public entities and among the general public with regard to the importance of respecting fundamental individual rights.

5.4.4 Presumptions of the non-applicability of statutes of limitations to the financial liability of the State

CHILE, *Petition for cassation, File No. 12.357-2011 (December 7, 2012) (List of judgments 2)*. [In the respective pleading, the appellant] asserts that the lower court committed an error of law by failing to apply the provisions of the Civil Code on statutes of limitations, concluding that the statute of limitations was inadmissible because those provisions do not apply in view of the operation of international treaties that allegedly contradict them. Article 2332 establishes a period of four years for the filing of a claim for compensation, counting from the date of perpetration of the act causing the harm. Even assuming that this time period was tolled during the military government and is calculated from the advent of democracy in 1990, or from the official date of delivery of the Report of the Truth and Reconciliation Commission on March 4, 1991, the statute of limitations had already run by the time the claim was filed. [...]

[Similarly, the appellant] alleges that the trial court erred by falsely applying the international treaties. The appellant asserts that the contested judgment did not cite any specific provision of any international treaty signed by, and valid in, our country that establishes the obligation under international law to pay the civil damages sought in this case; rather, the conclusion was obtained by applying, in the context of domestic civil law, principles of international human rights law that have only been considered for the non-applicability of statutes of limitations in criminal matters with respect to the commission of crimes against humanity. [...]

[Along these lines, the appellant argued] that there is no international norm incorporated into our legal system that establishes the general non-applicability of statutes of limitations to actions seeking acknowledgment of the extracontractual liability of the State or its institutional bodies. The American Convention on Human Rights does not contain any provision that establishes the non-applicability of statutes of limitations alleged by the appellant. Indeed, Article 1 only establishes the duty of the Member States to respect the rights and liberties recognized in that Convention and to guarantee their free and full enjoyment, without any discrimination; and Article 63(1) requires that the Inter-American Court of Human Rights take a specific course of action if it determines that there was a violation of a protected right or liberty.

This responsibility of the State-as-Administrator also finds support in the provisions of international humanitarian law. [...]

Based on the international laws currently in force in our country, and on the current state of development of universal awareness, there should be no need for excessive reasoning to affirm the existence of fundamental human rights, which no person or State authority can disregard,

and which unquestionably include the rights to life, personal safety, and physical and mental integrity. It can also be stated that:

a. There is a set of events that, under certain parameters, can be classified as crimes against humanity. These include acts by State agents that violate the right to life, provided that they are politically motivated; this act that can additionally be classified as an act of genocide, in accordance with the terms of the previously cited Convention.

b. Respect for and observance of human rights is an internationally valid principle, and it gives rise to the principle that a breach of those rights must be sanctioned.

c. The suppression of war crimes, crimes against humanity, and genocide is undoubtedly an imperative of domestic law, and is also established in the provisions of Articles 55(c) and 56 of the United Nations Charter, as well as in the declarations adopted by the United Nations and the inter-American system with respect to the American Declaration of the Rights and Duties of Man and other international instruments. [...]

e. The failure to adequately investigate crimes against humanity falls preferentially within the jurisdiction of the State in which the events took place, but will fall within the subsidiary—if not joint—jurisdiction of any State in view of the fact that the investigation has not been efficient and effective. [...]

These arguments, and the existence of an extensive set of declarations and international treaties ratified by Chile—with others in the process of being ratified—as well as various declarations signed by the competent authorities, lead us to the conclusion that there is a body of humanitarian law that all authorities and individuals in our country must respect; there is a body of public international law or *jus cogens* that is peremptory and binding upon the national authorities, including the courts. [...]

The [...] [Inter-American] Court [of Human Rights] has ruled that “provisions [relating to the application of statutes of limitations] and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations 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 (*Case of Barrios Altos v. Peru*, Judgment of March 14, 2001).”

In this same respect, a constitutional amendment authorized the State of Chile to recognize the Rome Statute of July 17, 1998, [...] which prohibits, *inter alia*, crimes against humanity, genocide, war crimes, and crimes against peace, and stipulates that they are not subject to statutes of limitations. [...]

These arguments are sufficient to find that the State of Chile considers the acts of forced disappearance and murder of citizens during times of internal armed conflicts, classified as a state or time of war, for political reasons, to be unlawful. Therefore, the State agents who acted in the events in question have incurred the liability of the Treasury of Chile, which must compensate the plaintiffs. [...]

In the instant case, the facts in evidence have been classified as unlawful acts—a classification that is inescapable, furthermore, given that it is the duty of the members of the Chilean military and police forces to ensure the public, societal, and individual safety of the population, and that

these institutions exist to uphold the law, as provided in Article 101 of the Constitution of the Republic.

According to the above reasoning, the lower court judges have not committed an error of law by applying the provisions of the Constitution and the international treaties ratified by Chile that regulate the issue of State responsibility, rather than applying the provisions of the Civil Code. In fact, it is untenable to assert that the only rules that exist in our country to regulate the responsibility of the State are those contained in the Civil Code. To do so would be to deny the validity and effectiveness of the constitutional, administrative, and international standards that have already been applied by the courts with respect to human rights violations. [...]

[Based on these considerations, the Court must find that the] termination of the action must be decided in light of several factors: (a) The nature of the individual right claimed; (b) The admissibility of the termination of a legal action by the application of a statute of limitations; (c) The requirements of this mode of terminating obligations, especially the calculation of the time period, tolling, interruption, or waiver. [...]

In view of the foregoing, it has been stated that the underlying acts giving rise to *the action are crimes against humanity, which, as explained, are not subject to statutes of limitations. This non-applicability of statutes of limitations refers to every action that arises from the facts, and is indivisible, so that it refers both to the criminal aspect and to the so-called claim for comprehensive reparation, derived from these same provisions, which even refer expressly to that claim [...]* [emphasis added] [...].

Without prejudice to the consistency required of the plaintiff, the same “principle of consistency,” as the doctrine calls it, must be required of the judges resolving legal conflicts. There are no discernible reasons to rule differently with regard to the assertion that statutes of limitations should terminate actions seeking to impose criminal penalties against the perpetrators and claiming comprehensive redress for the harm, given that this also affects the guarantees of equality and non-discrimination. Indeed, *the Court observes no reason for which an action that is not subject to statutes of limitations when the State is the claimant would suddenly—in spite of being based on the same facts—become subject to statutes of limitations when the allegation of responsibility is against the State* [emphasis added].

5.4.5 State responsibility for the improper acts of judicial authorities

ARGENTINA, *Ordinary appeal M.1181.XLIV (November 8, 2011) (List of judgments 1.2)*. The plaintiff’s claim for compensation is based on the responsibility of the National State arising from the undue delay of the criminal case against him. The plaintiff does not allege the unlawfulness of any court decision; rather, the allegation against the respondent concerns the abnormal operation of the administration of justice for which it is responsible. Consequently, the claim should not be framed by the doctrine created by this Court with respect to “judicial error”; rather, it should be decided in light of the general principles established for determining the extracontractual responsibility of the State for a wrongful act.

This Court has ruled repeatedly that it is inappropriate to hold the National State responsible for the lawful acts of the courts [footnote omitted]; however, it did find compensation appropriate

when in the processing of a case the improper actions of the judicial authority resulted in the undue prolongation of the defendant's pretrial detention, resulting in serious harm directly and immediately caused by that lack of service [*footnote omitted*]. It is therefore appropriate to examine whether in the instant case—unreasonable delay in the criminal proceedings—there has been a judicial delay of such magnitude that it could be deemed a denial of justice, and if so, whether the State should incur responsibility for the lack of service from the court. To this end, the Court must examine the complexity of the case, as well as the conduct of defense counsel and the judicial authorities.

Article 75(22) of the National Constitution, which recognizes that various human rights treaties have constitutional status, requires taking account of the fact that Article 8(1) of the American Convention on Human Rights, in reference to trial rights, stipulates not only the right to a hearing but also the right to exercise that right with due guarantees and within a reasonable time; and, in turn, in establishing judicial protection, Article 25 ensures effective judicial protection from any act that violates fundamental rights recognized in the National Constitution, the law, or the Convention, even if that violation is committed by persons acting in the exercise of their official duties.

The European Court of Human Rights has held similarly in several judgments in which it found the violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes that “*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...*” [*italics in the original*]. To arrive at this conclusion, the European Court evaluated the extent of the judicial delay in light of the complexity of the case, as well as the conduct of the petitioner and of the competent authorities [*footnote omitted*]. Similarly, but with respect to the undue prolongation of pretrial detention (involving actual jail time), the Inter-American Commission on Human Rights addressed this issue in Report No. 2/97 of March 11, 1997, concerning several cases filed by Argentine citizens against the Argentine Republic [*footnote omitted*].

It follows from the above that the right not to be subjected to an excessively lengthy criminal proceeding results in the State obligation to serve justice in a timely manner. Accordingly, when it is shown that the court's processing time for a case is excessive or unreasonable, according to the particular characteristics of that case, there will be an unlawful act for which the State is responsible.

In order to assess the State action in the instant case, we begin by noting that the case in which the plaintiff was accused began on July 3, 1978, that his prosecution was formally ordered on April 6, 1979 [*footnote omitted*], and that he gave a formal statement at the initial appearance on February 25, 1980 [*footnote omitted*]. Nevertheless, it was not until July 7, 1992, that the judge requested the file in order to rule on the case [*footnote omitted*], and the Third Court for Criminal Financial Matters rendered a judgment on August 13, 1993. In that judgment, the case was ordered closed due to the unreasonable length of the process, and the charges against all of the defendants were dismissed in part and with prejudice [*footnote omitted*]. Nevertheless, that judgment was overturned on appeal on October 24, 1994 [*footnote omitted*]. This resulted in a new judgment, this time from the Fourth Court for Criminal Financial Matters, which, on March 25, 1999, also found that the criminal prosecution was time-barred by the statute

of limitations and dismissed the case against Mr. Mezzadra with prejudice. This decision was upheld on appeal on October 29, 1999 [*footnote omitted*].

In its argument, the National State seeks to relativize the circumstances, limiting itself, based on general and vague statements, to the assertion that the delay was due to the complexity of the events under examination and to the conduct of the plaintiff himself. Nevertheless, the Court does not find that the facts investigated were extraordinarily complex or that they involved evidence that was difficult or complicated, expensive, or time-consuming to gather. This was also the opinion of the trial court judge for criminal financial matters, who held that this was “... *a case that did not suffer from extraordinary circumstances ...*” [*footnote omitted*]. The Court also does not find the fact that the case involved several co-defendants to be a factor that could justify a prosecution that lasted for more than two decades.

With respect to the defendant’s own actions, the appellant failed to sufficiently identify the reasons for which they could be considered dilatory. Additionally, the appellant’s assertions also appear to have been discredited by the judge for criminal financial matters, who emphasized that “*the parties were not observed to have engaged in any obvious delay tactics other than those allowed for in the Code of Criminal Procedure ...*”.

Based on the foregoing, we can affirm without a doubt that the judges who handled the criminal case engaged in clear, serious, judicial delay that went beyond the normal terms established in the procedural law. In fact, the duration of the case for more than two decades clearly violated Mr. Mezzadra’s right to a defense and his right to be tried within a reasonable time period, and makes clear that the respondent has failed to administer, or has engaged in the improper administration of, the justice services under its responsibility, the consequences of which must be redressed.

5.5 NATIONAL ENFORCEMENT OF REPARATIONS ORDERED IN AN INTERNATIONAL JUDGMENT

COLOMBIA, *Direct reparation action, File 16996 (February 20, 2008) (List of judgments 3.4)*. [This Third Division of the Council of State has previously held] that the effects of a decision of the Inter-American Court of Human Rights at the national level are as follows:

It is therefore affirmed, without question, that if there is an international judgment from the Inter-American Court of Human Rights against a State for the violation of one or several human rights, and the case includes a binding decision regarding the compensation of harm on behalf of the victims and their relatives, at the domestic level the Administrative Disputes Courts—within the context of an ordinary direct reparation action—must, *ex officio* or at the request of one of the parties, declare that the international judgment has *res judicata* effect. A national court cannot disregard the international judgment, especially when the Inter-American Court defines the responsibility of the State in general terms, and does not limit itself solely to the specific aspect of the injury [*footnote omitted*].

With respect to the jurisdiction of the Inter-American Human Rights System, a judgment of the Inter-American Court of Human Rights has binding force in our domestic legal system; therefore, it is imperative that the national authorities observe the effects of that judgment in all spheres.

SECTION 6

COMPETING RIGHTS AND/OR PRINCIPLES

A study of the Latin American case law on victims' rights, however brief, cannot overlook the impact of the process of redefinition of the democratic constitutionalism in the region. In a significant change of direction, most Latin American countries have borne witness to a reconceptualization of the legal systems, which includes a new way of understanding the function of the constitutional texts, the importance of the integration or acceptance of international law, and, of course, the place of human rights in the social, political, and regulatory order.

In an ongoing dialogue with the constitutionalist tradition of Latin America and Europe, as well as with the international human rights protection mechanisms, the courts in the region have moved away from the traditional concept of formalistic judicial logic—characterized by rules, hierarchies, exceptions, subsumptions, and syllogisms—and toward a legal debate of their own.¹³⁴ Under this new model, legal issues are not always resolved through the traditional criteria, which are commonly proposed in terms of normative validity or invalidity; rather, they must be offered based on the need to maximize the effectiveness of all the fundamental principles of society, recognized in the texts of our own constitutions and conventions.¹³⁵ In other words, in this new way of conceptualizing the law, it is not satisfactory to think, for example, that there are black-and-white answers to problems as complex as the need to protect—within the same case—the rights of both the accused and the victims, the social demands for justice, and the punitive duty of the State, so that one takes absolute priority or supremacy over the other.

Based on these types of considerations, some of the most important scholars of our time have agreed with Robert Alexy, who asserts that “if two principles compete [...] then one of the principles must be outweighed. This means neither that the outweighed principle is invalid nor that it has to have an exception built into it. *On the contrary, the outweighed principle may itself outweigh the other principle* in certain circumstances.”¹³⁶ In other words,

¹³⁴ M. Atienza, *El derecho como argumento* (Madrid: Ariel, 2012); N. P. Sagües, *La interpretación judicial de la Constitución: De la constitución nacional a la constitución convencionalizada* (Mexico: Editorial Porrúa/IMDPC, 2013).

¹³⁵ On this point, Robert Alexy asserts, “The decisive point in distinguishing rules from principles is that *principles* are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities [citation omitted]. Principles are *optimization requirements* [citation omitted], characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules [citation omitted] [emphasis in the original].” R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2009), pp. 47–48.

¹³⁶ *Ibid.*, p. 50. In contrast to the way in which principles operate, “*rules* are norms which are always either fulfilled or not [citation omitted]. If a rule validly applies, then the requirement is to do exactly what it says,

the solution to an apparent conflict between principles will not be the normative invalidity of one or the other; rather, a way must be found to maximize the protection of the relevant principles, based on a casuistic analysis of the legal and factual conditions of its exercise. This involves, in more specific terms, the need to conduct a careful evaluation of the degrees of government intervention in the conditions for the exercise of a right—in other words, an analysis of the compatibility of the limits or restrictions in the sphere of protection of that right with the system of constitutional and convention values.

Based on these considerations, German jurist Robert Alexy has proposed the so-called *law of competing principles*—also known as balancing or proportionality—as a form of logical and argumentative analysis that can be used to establish relationships of conditional precedence between two or more principles. In other words, through balancing, an argument can be made for why, under certain specific legal and factual conditions, a principle must be understood to have more value or weight and, therefore, must prevail over another.

The balancing exercise comprises four sub-tests or sub-principles, which must be examined sequentially. Those sub-principles are: (i) justification, (ii) reasonableness, (iii) necessity, and (iv) proportionality (in the narrow sense). In a more detailed manner, in keeping with these sub-principles or phases, in evaluating the interference (understood as potential restriction) with the exercise of a right, we must consider whether: (i) it pursues a legitimate constitutional or convention-compatible aim (justification), (ii) the measures chosen to promote (not necessarily accomplish) that aim are suitable (reasonableness), (iii) insofar as the least restrictive option among the available alternatives (necessity) has been selected, and (iv) without it imposing a disproportionate burden, considering the specific circumstances of the person who will suffer the intervention in his or her rights (proportionality).¹³⁷

The extracts from the judgments presented below seek to exemplify some scenarios in which the Latin American courts and tribunals have conducted balancing or proportionality exercises with a view to attaining the maximum protection of the principles in conflict. The common denominator of the judgments included in this section is that in all of them one of the principles under discussion corresponds to one or more rights of victims.

6.1 RIGHT TO THE TRUTH VERSUS THE RIGHT TO INDIVIDUAL SELF-DETERMINATION

ARGENTINA, *Petition for review of a denied appeal G. 1015. XXXVIII (August 11, 2009) (List of judgments 1.1)*. The right protected in the case, which involves an adult person who refuses

neither more nor less. In this way rules contain *fixed points* in the field of the factually and legally possible. This means that the distinction between rules and principles is a qualitative one and not one of degree [*citation omitted*]. Every norm is either a rule or a principle [*citation omitted*].” Ibid., p. 48.

¹³⁷ See, e.g., A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012); R. Arnold, J. I. Martínez Estay, and F. Zúñiga Urbina, “El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional,” *Estudios Constitucionales* 10, no. 1 (2012): 65–116.

to provide a blood sample, is personal autonomy, protected under Article 19 of the National Constitution.

It is not only a matter of respect for acts performed in private, but rather the acknowledgment of a sphere in which every individual has the autonomy to freely make decisions concerning his or her lifestyle of choice. This boundary, built on the most memorable historical foundations of human liberty, cannot be crossed by the State; it cannot judge the intentions of a person—an adult with sound judgment—who repeatedly refuses to find out his identity.

There can be no other judge than the affected person who is sufficiently competent to assess the consequences that would be involved in the establishment of his own identity. [...]

It is clear that the unspeakable crime against humanity, an aspect of which has been investigated in this case, comprises multiple offenses and, therefore, recognizes a plurality of victims; one of them is the kidnap victim, but others are the relatives of the murder victims, the biological relatives of the surviving victim.

Their status as victims is unquestionable in the national and international legal settings, but it is even more so in the real world. They are people whose families have been torn apart, who have seen all of their life plans destroyed by this brutal act; they are parents who lost their children, sisters who lost their brothers, husbands who lost their wives, disappeared forever in the obscurity of concentration and extermination camps. In many cases the families of the disappeared have gone without ever knowing the date of their death or the circumstances, and have even been deprived of their mortal remains, making impossible a normal grieving process.

Added to this desolation of unresolved absence is the presumption or the certainty that a grandchild, a brother, a nephew, is wandering the world without knowing it. The painful burden of loss and the anguish of knowing at least of the existence of a person who survived but cannot be found constitute an irreparable harm. [...]

According to the facts of this case, the conflict at hand arises between the equally legitimate rights of two categories of victims: the rights of the alleged kidnap victim and those of the alleged biological relatives.

The alleged kidnap victim has the right to demand respect for his personal autonomy. His alleged biological relatives legitimately seek an end to the continuous crime. One has the right to demand to be left in peace even though the crime is ongoing; the others have the right to demand that peace be returned to them through the cessation of the crime allegedly committed in the case. Both rights are legally protected by the highest-ranking provisions of law to which any court decision must refer. Both positions are legitimate. [...]

Conflict arises when the full satisfaction of one right leads to the infringement of another equally protected right. As noted earlier, this is the situation in the instant case, given that allowing the search for the truth pursued by the biological family would violate the personal autonomy of the person who refuses to have his blood taken.

Accordingly, dogmatic reasoning does not provide solutions and we must turn to the balancing of legal principles.

Proposing all of the possible theories and imagining what one decision or another would mean for the victims—that is, if the right of one or the other is sacrificed—it seems clear that respect for the right to the truth of the alleged biological family does not necessarily require that the other (kidnapped) victim should bear all of the emotional and legal consequences of the

establishment of a new official or legal identity. It would be sufficient for the biological family to be informed of the identity, in this way putting an end to the decades-long search and stopping the commission of the crime; in the event that the test yields a match, the true identity will be factually established and the suppression will have ceased, without it being relevant whether the other victim chooses to exercise his right.

The theory constructed on this basis would injure or limit both of the rights in conflict much less severely, by resulting in a decision that provides for various aspects of mutual interest, with a view to reducing any possible present or future harm to a minimum.

6.2 VICTIMS' RIGHTS IN VIEW OF THE TENSION BETWEEN PEACE AND JUSTICE AS CONSTITUTIONAL PRINCIPLES (IN TRANSITION PROCESSES)

COLOMBIA, *Judgment C-370/06 (May 18, 2006) (List of judgments 3.2)*. In the previous chapter of the judgment, we recalled the constitutional and international importance of peace, justice, and victims' rights. And we have underscored that the tension between these rights is expressed differently, depending on various factors, especially—in this case—on the adoption of legislative and judicial instruments to promote the transition to peace in a democratic context. Based on those general considerations regarding the elements that are at odds in judging a law that pursues the attainment of peace, the Court will now discuss the manner in which this tension must be resolved.

Above all, it bears noting that it is incumbent upon the legislature to identify the areas in which this tension is expressed and to define the ways to resolve it, in the exercise of the powers clearly entrusted to it by the framers of the Constitution. Thus, the legislature can design the mechanisms it deems conducive to the attainment of peace, assessing the specific circumstances in each context. This does not mean that the broad authority of the legislature has no constitutional limitations. It is the responsibility of the constitutional judge to identify and enforce those limits, without sacrificing any of the opposing constitutional elements and without standing in for the legislature in the exercise of its own authority. [...]

In the interest of attaining the constitutional value of peace, Congress set forth several formulas in the Law that generally involve the amendment of the criminal procedure with repercussions on justice—understood as an objective value and also as one of the rights of the victims of human rights violations. Thus, certain benefits are established in the criminal law, as well as a special proceeding before certain specific authorities for individuals who decide, individually or collectively, to demobilize from unlawful armed groups and reenter civilian life. This reflects a political decision made by the Legislature and is crystallized in the Law under review: with a view to attaining peace, a specific and distinct system of criminal procedure was established as a form of obtaining justice. And it is precisely due to the existence of this conflict between constitutionally protected values—peace and justice—that the above-cited legal action has been brought. The petitioners additionally argue that the formulas designed by the Legislature are harmful to the other rights of victims, to wit: the rights to the truth, reparation, and non-repetition of the criminal acts that violate human rights. [...]

The value of peace cannot be made absolute in scope, as the value of justice—as well as the other rights of victims—must also be guaranteed, in spite of the legitimate limitations imposed upon them in order to bring the armed conflict to an end. The Legislature already opted for specific formulas of harmonization between those values and rights, which, as stated, restrict the scope of effectiveness of the value and the right to justice with a view to attaining peace by granting criminal and procedural benefits to demobilized combatants. The Court must thus determine, through the balancing of those values and rights, whether the harmonization designed by Congress and set forth in the contested provisions respects the minimum content protected by the Constitution.

[After examining different possibilities on how to approach the values in conflict, the Court finds that it must weigh] peace, justice as an objective value, justice as a right of the victims, and their other rights, e.g., the rights to the truth, reparation, and non-repetition. This is the option that best respects the complexity of the legal problems to be resolved because it does not exclude any of the constitutionally relevant values and rights from the constitutional analysis.

Along these lines, the Court observes that it was the Legislature itself that, in opting for formulas that limit the right to justice in order to attain peace, established the essential terms under which this balancing exercise must be performed. [...]

It bears noting that the novel issue raised by Law 975 of 2005 is the weight that should be assigned to peace. The issue is complicated not only because of its novelty but also because of the enormous importance of peace under the 1991 Constitution. [...]

Nevertheless, we must underscore that, in spite of its importance within the constitutional system, peace cannot be transformed into a kind of “reason of State” that takes automatic priority, and to the degree necessary, over any other constitutional right or value. In that scenario, peace—which remains a highly indeterminate concept—could be invoked to justify any type of measure, including some that could render constitutional rights inoperative, which would be inadmissible in light of our body of constitutional law.

It must be stressed that justice is also of major constitutional significance and has an extensive reach throughout the Constitution. First, justice is the foundation of one of the branches of government—the Judiciary—as well as of several constitutional provisions that seek to realize justice in each specific case and prevent impunity. Second, it is one of the founding values of the constitutional system, one that the Constitution was adopted to attain—as expressed in the Preamble to the Constitution. Third, it is one of the essential aims of the State: Article 2 of the Constitution states that those aims include the assurance of “the existence of a just order”; therefore, justice as the basis for a just order must be considered one of the fundamental principles of the Colombian constitutional system. Fourth, justice is a right to which every person is entitled, and it is expressed in, *inter alia*, the standards of due process, the right to access to justice, and the right of crime victims to justice.

Additionally, it bears noting that justice does not necessarily oppose peace. The administration of justice contributes to peace by resolving controversies and conflicts through institutional channels. In this regard, justice is an ongoing prerequisite for peace.

This does not mean that justice can, in turn, be elevated to the category of an absolute right, to the point that peace is sacrificed or its realization hindered. Justice may be obtained in

different forms, for which the Legislature not only has a broad margin to enact law but also has express constitutional authorizations. [...]

Such is the case of the language in Article 3 that conditions a suspended criminal sentence on “cooperation with justice.” This requirement, formulated in such general terms and devoid of specific content, does not satisfy the victims’ right to the effective enjoyment of their rights to truth, justice, reparation, and non-repetition. This cooperation could be limited to providing some information about the acts of other members of an unlawful armed group, rather than fully and truthfully disclosing the facts surrounding the commission of the crimes for which the defendant now seeks to receive the benefit of an alternative sentence. Understood in this way, cooperation would not respect victims’ right to the truth. The same could be said for the right to reparation. Cooperation with justice might consist of turning over the illegal assets that are the proceeds of criminal activity, which would clearly be insufficient to ensure the effective enjoyment of victims’ right to reparation. Alternative criminal sentencing would seem to be a disproportionate infringement of the victims’ rights if the “cooperation with justice” fails to include the rights of such victims in their entirety, and if it fails to require that those seeking to avail themselves of those benefits take specific action to ensure the effective enjoyment of those rights, which are set forth in Law 973 of 2005.

Accordingly, the Court will declare the constitutionality of Article 3, with the understanding that “cooperation with justice” must be aimed at the effective attainment of the victims’ rights to the truth, justice, reparation, and non-repetition. [...]

The analysis [...] of the guarantee of victims’ right to the truth raises an additional question that can be summarized as follows: When it has been proven that the beneficiary of the alternative criminal sentencing has concealed a significant crime in light of the objectives of Law 975/05, can he or she still retain the benefit that was granted? Article 29(5) specifies the conditions under which the benefit can be revoked during the probationary period. Nevertheless, that provision does not explicitly require that the beneficiary must disclose completely and truthfully in his or her voluntary statement all of the crimes he or she committed as a member of a specific bloc or front. [...]

As mentioned earlier, Law 975 of 2005 is one of the most important components of the legal framework of the peace processes in Colombia. In order to provide incentives for this process, the law established a substantial reduction in prison sentences for persons who have committed extremely serious crimes. [...]

As the Court has indicated, this substantial reduction in prison sentences pursues a constitutionally imperative aim, which is the attainment of peace. In this respect, it bears recalling that the pursuit of this objective, through the granting of criminal sentencing benefits, can justify significant limitations of the rights, principles, and values of the constitutional State, in particular, the right to justice. As previously mentioned, in balancing constitutionally protected interests, the right to justice may take different forms, for which the Legislature not only has a broad margin to enact law but also has express constitutional authorizations, provided that certain conditions, requirements, and constitutional limitations are respected. [...]

The Court must undertake to ascertain whether the limitation that the contested provisions place on the right to justice—in particular, on the component of individual and collective truth—is proportionate. This exercise, as stated earlier, entails determining whether the means

designed by the Legislature to accomplish the legitimate aims it pursues are appropriate for attaining them and whether those measures do not amount to a manifestly disproportionate infringement of other constitutional rights. It bears noting with regard to this point that, according to the constitutional doctrine, any provision that exceeds the minimum or non-negotiable limits that the Constitution imposes on the power of Congress to enact law at any time is clearly disproportionate. [...]

As the Court has held, in a State governed by the constitutional rule of law like Colombia, the minimum protection of this intricate network of rights cannot be ignored under any circumstances. In other words, the government is not authorized to disregard these rights in the name of another constitutionally protected interest or value, as they represent the limit to the power of Congress to enact laws, to government administration, and to judicial interpretation. They are, as stated in the earlier part of this decision, constitutionally binding norms that must be observed by all government authorities. Their effectiveness cannot be reduced or suspended in the event of a state of emergency or a peace process. Indeed, according to the provisions of constitutional law, concealment, silence, or misrepresentations concerning the crimes committed cannot serve as the bases for a negotiation process that respects the Constitution. Nevertheless, the sincere and truthful accounting of the facts, accompanied by serious and thorough investigations and the recognition of the dignity of the victims, can serve as the foundation of a negotiation process in which even the waiver of the imposition or full application of the sentences established under the ordinary criminal law is constitutionally admissible, including for those crimes that all of humanity considers to be the most serious. [...]

In the opinion of the Court, the contested law does not clearly provide the necessary and sufficient judicial mechanisms to allow us to clarify the facts of the “macro-criminal” phenomenon we face. Nor does it establish judicial mechanisms that ensure the disclosure of the truth about the crimes committed by the members of the specific demobilized groups. Indeed, the individuals who avail themselves of the benefits of the law have the obligation to admit to the crimes for which the State would be able to bring charges against them. This is important in order to satisfy the rights that have been violated and to reconstruct the history of what happened, but it is completely insufficient to ensure the minimum constitutional content of the right to the truth.

First, the mechanisms designed by the Law fail to effectively promote the full disclosure of the truth. These mechanisms assign no consequences to the misrepresentation or concealment of serious acts that the State has not been able to shed light on, nor do they provide incentives for the complete and truthful disclosure of the truth about the crimes committed by members of those specific groups. [...]

The Law fails to provide a system of effective incentives that promote the complete and accurate disclosure of the truth. [...]

The State must adopt suitable procedural mechanisms to ensure that the persons who benefit from reduced alternative sentences for the crimes committed cooperate effectively in the satisfaction of their own victims’ rights to the truth. In this way, individuals who will have the benefits of living under the rule of law will also carry the proportionate burdens that the law imposes upon them. The weighing of the right to peace against victims’ rights, especially the right to the truth, is thus accomplished. Otherwise, the State would be renouncing its duty to

conduct serious and exhaustive investigations into the acts within a reasonable period of time, and would be disproportionately sacrificing the victims' right to know the whole, accurate truth of what happened.

6.3 RIGHT TO THE REPARATION OF HARM VERSUS THE PROTECTION OF PUBLIC FUNDS

MEXICO, *Review of petition for a constitutional remedy 75/2009 (March 18, 2009) (List of judgments 6.1)*. This matter originated with an ordinary civil trial, in which the plaintiff sued *Compañía de Luz y Fuerza del Centro*, a decentralized agency of the Federal Government and the aggrieved third party in these proceedings, seeking compensation for pecuniary and non-pecuniary damages based on the claim that the public entity was responsible for the death of her daughter. [...]

The plaintiff filed a motion to enforce the judgment, which resulted in the entry of an order against the respondent to pay the maximum amount established in Article 14 of the Federal Law on the Financial Liability of the State, subsection 2, paragraph 2, which states: “The compensation for non-pecuniary damages that the State is required to pay shall not exceed the equivalent of 20,000 times the general daily minimum wage currently in effect in the Federal District for each claimant affected.” [...]

The appellant does not claim that there is no objective criterion for calculating the compensation owed to individuals in the event that the State is liable for non-pecuniary damages; rather, she claims, fairly, that these general criteria established in the law (the criteria provided in the Federal Civil Code and the assessments of the respective expert witness reports) should be applied objectively without any limit on the scope of their application—that is, without those criteria being capped at 20,000 times the general daily minimum wage currently in effect in the Federal District for each claimant affected. [...]

[It follows from a comprehensive study of the different legal provisions of the Law on the Financial Liability of the State] that the federal legislature established several rules that restrict the opportunities available for individuals to sue for damages caused by the State (including non-pecuniary damages), as well as several rules that regulate the modes of compensating that harm in order to avoid negative consequences to the National Treasury [*emphasis in the original*]. [...]

First, compensation is informed by a principle that defines it objectively: the compensation must be for the comprehensive reparation of the harm and, if appropriate, for personal injury and non-pecuniary damages. This means that the courts must individualize the compensation for which the State is liable in order to strictly attain the accomplishment of an objective: comprehensive redress for the harm. In other words, the courts are not authorized to order that the State pay compensation in excess of that limit. [...]

The legal context provides that once the court has determined the compensation to which each individual is specifically entitled, the respective sums must be paid taking account of the State's available budget and must be based on the principle of planning, in order to prevent negative impacts on the social function of the State. This is based on two rules: (1) payment is subject to the available budget for the respective fiscal year, and therefore any compensation

that the State has not been able to pay in a given year must be paid the following year; and (2) compliance with the objectives of the programs approved in the respective Federal Budget must not be affected. [...]

Having clarified the legal context of the contested provision, the Court will now determine whether its content violates the Federal Constitution. [...]

This Court has held that constitutional rights are not absolute and, therefore, all are subject to restrictions. Nevertheless, the regulation of those restrictions cannot be arbitrary; rather, it must be based on legal reasons that can pass a three-part constitutional test: (a) the restrictions must be constitutionally admissible; that is, the ordinary legislature can only restrict or suspend the exercise of individual rights for purposes that fall within the scope of the Constitution; (b) the regulation must be necessary to ensure the accomplishment of the aims on which the constitutional restriction is based—in other words, it is insufficient for the restriction to be useful for the attainment of those objectives in broad terms; rather, it must be suitable, meaning that the aim pursued by the legislature cannot reasonably be met by other measures less restrictive of fundamental rights; and, (c) it must be proportionate; that is, the legislative measure must recognize both the importance of the aim pursued by the law and its prejudicial effects on other constitutional rights and interests, with the understanding that a constitutional aim cannot be pursued at the cost of an unnecessary or excessive infringement of other constitutionally protected rights and interests. [...]

As stated in the paragraphs above, the right to compensation for wrongful acts of the State is a substantive right that has constitutional status and can be asserted directly by all persons. The bodies of the State must follow two guidelines concerning this right: (1) in the exercise of their powers to create law, they must not arbitrarily and disproportionately restrict its material scope; and (2) they must use their public authority to protect the content of the right. [...]

Nevertheless, as also stated earlier, constitutional rights are not absolute; all of them are subject to restrictions, but any restrictions must be justified. In the instant case, the justification for the limit established in the contested provision on the right of individuals to receive compensation for non-pecuniary damages stemming from improper acts of the State must be examined with the aforementioned scrutiny. [...]

Setting limits on the monetary sums that the State can be ordered to pay to compensate individuals is expressly permitted by the Constitution. The second paragraph of Article 113 of the Federal Constitution establishes that “The State shall be directly and strictly liable for harm caused to the property or rights of individuals by unlawful government activity. Individuals shall be entitled to compensation according to the grounds, limits, and procedures established by law” [*emphasis in the original*] [*unofficial translation*].

Therefore, setting limits on the compensation to which individuals are entitled based on the financial liability of the State is a constitutionally explicit objective that must be regulated by the ordinary legislature.

Nevertheless, the limits to compensation established by the legislature must have an ulterior motive, as it is clear that those limits can end up limiting the protective sphere of the constitutional right to the financial liability of the State, established in the second paragraph of Article 113 of the Constitution, the essential core of which cannot be restricted by the ordinary legislature [...]. [...]

The aim pursued by the legislature is to keep private individuals from taking advantage of the situation to make unjustified claims against the State for the payment of excessive amounts of compensation on the presumption that the State is always solvent. [...]

Second, it is necessary to examine the soundness or suitability of the distinction made by the legislature. In order for the normative distinction introduced by the challenged provision to meet this second criterion, it must be a necessary measure conducive to the aim or objective that the legislature wishes to accomplish; in other words, there must be a proven relationship of instrumentality between the qualifying measure and the aim pursued. **This Court finds that the contested provision does not satisfy this second requirement, for the following reasons** [*emphasis in the original*]. [...]

As is clear from the legal context that regulates the financial liability of the State, including non-pecuniary damages caused by the State, there are measures that are sufficient by themselves to prevent the filing of unjustified claims and the awarding of excessive compensation. These measures are more closely linked to the general structure of the system governing the financial liability of the State than to the maximum limit on compensation that the State can be ordered to pay. [...]

This Court finds that the establishment of a maximum cap on the amount of compensation the State can be ordered to pay for non-pecuniary damages does not directly affect the qualitative screening of individual claims brought before the courts; nor does it influence—at least not directly and decisively—the specific individualization of appropriate compensation amounts.

The screening of individual claims to ensure that only justified claims are admitted for processing can be done by establishing substantive and procedural requirements for the filing of such claims, as well as through the authority's power of oversight over the accuracy and authenticity of the grounds on which the claims are based. In addition, excessive compensation can be prevented by establishing individualizing criteria that are binding on the court in its decision, in order to seek the proportionality of the respective reparation or compensation.

6.4 VICTIMS' RIGHTS VERSUS THE PRINCIPLE OF NE BIS IN IDEM

COLOMBIA, *Appeal for review, File 29075 (July 6, 2011) (List of judgments 3.5)*. In ruling on the constitutionality of [Article 220 of the Code of Criminal Procedure of 2000], the Constitutional Court established in Judgment C-004 of 2003 that “*an appeal for review on this ground is also admissible in cases involving the termination of the investigation, termination of the proceeding, or acquittal, provided that they concern human rights violations or serious breaches of international humanitarian law, and that a domestic court decision, or a decision from an international human rights court formally accepted by our country, has verified the existence of a new fact or evidence that was unknown at the time of trial. Similarly, and in accordance with the conclusions of law set forth [...] in this judgment, an appeal for review of the termination of the investigation, termination of the proceeding, or acquittal is admissible in cases of human rights violations or serious breaches of international humanitarian law, even in the absence of a new fact or evidence that was unknown at the time of trial, provided that a domestic court decision, or a decision from an international human rights court formally accepted by our country, verifies the clear non-compliance of the Colombian State*”

with its obligations to seriously and impartially investigate the aforementioned violations” [*italics in the original*].

Accordingly, the Constitutional Court stated in the aforementioned judgment:

The Court concludes then that there is a particularly severe violation of the victims’ rights (Constitution, Article 229) that seriously hinders the existence of a just order (Constitution, Article 2) when there is impunity in cases of human rights violations or serious violations of international humanitarian law. This impunity is even more serious if it can be attributed to the fact that the Colombian State failed to fulfill its duty to seriously and impartially investigate those violations of human rights and international humanitarian law in order to punish the perpetrators.

Under those conditions, the normative force of the constitutional rights of the victims and the imperative that the Constitution imposes upon the authorities to achieve a just order (Constitution, Article 2) mean that, in cases of human rights violations or serious breaches of international humanitarian law, if new facts or evidence arise that can lead to the identification of the perpetrators of those atrocities, then the investigations can be reopened—even if acquittals have been handed down and are considered to be *res judicata*. The reason for this is that an absolute ban on reopening those investigations hinders the realization of a just order and entails a sacrifice that is extremely onerous to victims’ rights. Therefore, in cases where violations of human rights or international humanitarian law have gone unpunished, the pursuit of a just order and the victims’ rights displaces the protection of legal certainty and the guarantee of *non bis in idem*. Therefore, the existence of a final acquittal must not prevent the reopening of an investigation into those acts if new facts or evidence arise that were unknown at the time of trial. This is because legal certainty in a democratic society based on human dignity cannot be built upon a foundation of silencing the pain and demands for justice of the victims of the most atrocious acts, such as human rights violations and serious breaches of international humanitarian law. [...]

It must be made clear that the provisions on review contained in Law 600 of 2000 and Law 906 of 2004 are applicable to this case, even though the underlying facts of the case took place on February 27, 1999—that is, prior to the Law’s entry into force, and even prior to the issuance of Judgment C-004 of 2003; as the Court has held [*footnote omitted*], “the relevant point in that discussion is not the law currently in force at the time of the events, but rather the constitutional framework in which they took place and the time at which the investigation that is now the subject of the appeal for review was opened” [*italics in the original*].

Thus, bearing in mind the meaning and scope of the ground for review asserted in this case, it is clear that the appellant must prove (*i*) that a case was prosecuted in the Colombian justice system for acts related to human rights violations or serious breaches of international humanitarian law; (*ii*) that the proceeding ended with the termination of the investigation, termination of the proceeding, or an acquittal; (*iii*) that the decision that ended the case is final and not subject to appeal, in other words, that it is *res judicata*; and (*iv*) that a clear and conspicuous breach of the State’s obligation to seriously and impartially investigate those acts was subsequently established by the decision of an international human rights court, the jurisdiction of which has been formally accepted by the Colombian State. [...]

In any case, it will be within the respective case in which defense counsel for the [previously acquitted individuals] will have to make their arguments relating to the validity, efficacy, and persuasive merit of the evidence gathered in the reopened proceeding or that may eventually be gathered. It is clear that even if the Inter-American Court of Human Rights declared the Colombian State responsible, in the precise terms outlined above, it is the trial court judges in charge of hearing and deciding the matter who must examine the evidence, determine the facts, and apply the respective legal consequences according to what the evidence proves—in other words, based exclusively on the outcome of the trial and not on particular considerations, assumptions, or conjecture that by their very nature are outside the scope of the trial. [...]

In that respect it is clear that the Court will not entertain the appeal filed by the Prosecutor seeking to take the case back “*to the moment of the acquittal, at both the first and the second instance.*” To do so would not accomplish anything other than simply reviving the procedural terms so that the party that failed to do so can challenge the decisions it now deems legally or factually incorrect. This contradicts the nature and objectives of the principle invoked, which distinguish it from cassation, and contradicts the idea of legal certainty that *res judicata* is meant to guarantee.

The Court also notes that the liberty of the [acquitted] persons shall be maintained in the same terms in which it was granted to them in the proceedings under review; if a judgment of acquittal was handed down in their favor, it means that up to the present time the presumption of innocence has not been overcome by the State, and it must therefore be respected during the course of the reconsideration of the proceedings, as long as no final decision has been issued to the contrary. [...]

Finally, for purposes of enforcing this ruling, the Court will order that the record of proceedings be forwarded for assignment to the Criminal Courts of the Specialized Circuits of Medellín, in order to [...] immediately designate the person who will be in charge of processing the matter as soon as the court-ordered nullity takes effect, namely, upon the transfer provided for in Article 400 of Law 600 of 2000.

6.5 VICTIMS' RIGHTS VERSUS CONTEMPT OF COURT IN CASES INVOLVING CRIMES AGAINST HUMANITY

PERU, *Unconstitutionality action 0024-2010-PI/TC (March 21, 2011) (List of judgments 7.2)*. Article 4.2 of Legislative Decree No. 1097, provides as follows: “With respect to defendants declared absent or in contempt of court, who express their willingness to appear in court, the judge can modify the arrest warrant to resolve their status of ‘absent’ or ‘in contempt of court,’ setting a cash bond if the defendant’s income so allows, which may be substituted by a suitable and sufficient surety bond from the defendant or a relative, or a third-party guarantor, whether that is an individual, a legal entity, or the military or police institution to which [the defendant] belongs.” [...]

The status of being in contempt of court denotes an objective element that makes it possible to presume, quite reasonably, that the person is a flight risk, and to a certain extent, that the investigation of the truth could potentially be disrupted. This concerns a person who,

certain of his or her status as a defendant, demonstrates a reluctance to submit to the orders of the criminal judge and to cooperate with the prosecution. Certainly, that conduct affects the proper development of the criminal case and, therefore, it affects due process and the effective protection of the courts recognized in Article 139(3) of the Constitution.

This circumstance becomes extraordinarily serious in cases involving prosecutions for crimes against life, physical integrity, and health that constitute serious human rights violations, and for crimes against humanity, which are precisely those to which the measure in question is applicable.

In these cases, by operation of the Constitution and the international human rights treaties ratified by the Peruvian State, there is a duty to investigate the truth surrounding the events that have taken place and to identify and punish the perpetrators, and to provide redress, to the extent possible, for the harm caused to the victims [*footnote omitted*].

Indeed, Articles 2 and 3 of the International Covenant on Civil and Political Rights, as well as Articles 1 and 2 of the American Convention on Human Rights, establish the State's obligation to respect and guarantee the rights that are recognized in those treaties and also recognized in the Constitution. In particular, in the opinion of the Inter-American Court of Human Rights, as a consequence of the duty to "guarantee" human rights, required by Article 1(1) of the Convention, "the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation" (*Case of Velásquez [Rodríguez] v. Honduras*, Judgment of July 29, 1988, para. 166). Therefore, "if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention" (para. 176).

In view of the foregoing, a person who is in contempt of court in a case involving the investigation of serious human rights violations infringes upon the fundamental right to the truth and hinders the Peruvian State in its full compliance with the aforementioned fundamental international obligation.

Notwithstanding the above, Article 4(2) of Legislative Decree No. 1097 allows the criminal judge to replace the arrest warrant issued against a defendant who is in contempt of court, and therefore issued on the reasonable and objective conclusion that the defendant is a flight risk, with a cash bond, based on the defendant's subjective expression of willingness to appear in court—an assurance that, however, is unequivocally contradicted by his or her conduct.

This is an irrational exemption that, in the opinion of this Court, clearly jeopardizes the success of the criminal case, affecting the fundamental right to the truth, due process, the effective protection of the victims by the courts (Article 139(3) of the Constitution), and the international obligation of the Peruvian State to investigate and punish serious human rights violations (Articles 1 and 2 of the American Convention on Human Rights). Additionally, as it is an unconstitutional measure, it lacks the objectivity and reasonableness that can justify disparate treatment, and therefore it is, in turn, a violation of the principle of and right to equality (Article 2(2) and paragraph 1 of Article 103 of the Constitution).

Accordingly, it is proper to declare the unconstitutionality of Article 4.2 of Legislative Decree No. 1097.

6.6 VICTIMS' RIGHTS VERSUS DISMISSAL OF THE CASE FOR EXCEEDING A REASONABLE PERIOD OF TIME

PERU, *Unconstitutionality action 0024-2010-PI/TC (March 21, 2011) (List of judgments 7.2)*. Article 6(2) of Legislative Decree No. 1097 establishes that: “Upon verification of the expiration of the investigative phase, and if all of the time periods established in Article 202 of the Code of Criminal Procedure have been exceeded, the court that has the main file in its possession shall issue the respective order of partial dismissal on behalf of all of the defendants who have been subject to an excessively long investigation.”

The ground for dismissal regulated in Article 6(2) of Legislative Decree No. 1097 is unprecedented in the Peruvian legal system. Therefore, bearing in mind the provisions of that Legislative Decree, it is only applicable to members of the military or police officers accused of committing crimes against life, physical integrity, and health considered to be serious human rights violations, as well as crimes against humanity, regardless of the stage of the proceedings.

Dismissal is a legal category of the law of criminal procedure that refers to the existence of a court order terminating the prosecution of the defendant for some reason that prevents the activation of the punitive power of the State against him or her. According to Article 344 of the New Code of Criminal Procedure, the grounds for a judgment of dismissal are as follows: (a) the act giving rise to the prosecution was not committed or cannot be attributed to the defendant; (b) the act alleged is not defined as a crime under the law or there are grounds for justification, innocence, or non-punishment; (c) the criminal prosecution has been terminated; or, (d) there is no reasonable opportunity to include new information in the investigation and there is insufficient evidence to make a well-founded request for the prosecution of the suspect. [...]

The [challenged article] was apparently intended to be based on the fundamental right to a speedy trial. This fundamental right is recognized in Article 14(3)(c) of the International Covenant on Civil and Political Rights, which establishes that “In the determination of any criminal charge against him, everyone shall be entitled [...] to be tried *without undue delay*” [*emphasis added*], and in Article 8(1) of the American Convention on Human Rights, which states that “Every person has the right to a hearing, with due guarantees and *within a reasonable time*, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature” [*emphasis added*]. Based on Article 55 and the Fourth Final Provision of the Constitution, the fundamental right to be tried within a reasonable period of time is an implicit expression of the fundamental right to due process, provided for in Article 139(3) [*footnote omitted*].

This is a fundamental right whose purpose is to prevent the State from making individuals the “object” (rather than the “subject”) of the punitive power of the State, negatively affecting their dignity as an ontological precondition of fundamental rights. The principle and right to

human dignity requires appreciating the human being as an end, rather than as a means to an end. This is why Article 1 of the Constitution provides that “the defense of the human person and respect for dignity are the supreme objective of society and the State.” [...]

The criminal case itself clearly entails a certain restriction of the content of specific fundamental rights, such as personal liberty and emotional well-being. This restriction is assumed to have been considered in light of the Constitution, insofar as its objective is the pursuit of the truth and the determination of criminal responsibility for the certainly or reasonably presumed violation of specific, constitutionally relevant interests protected by the criminal law.

However, when the course of the criminal proceeding clearly and arbitrarily exceeds a reasonable time period for the investigation of the truth and the defendant is kept in a state of “eternal uncertainty” with respect to his or her legal status, the criminal prosecution by the State—which no longer has an identifiable terminus—becomes constitutionally unlawful since, because of time, it has “objectified” the “subject” of the proceeding. Under those conditions of extraordinary arbitrariness, the value of the defendant’s dignity outweighs the latent status of the criminal prosecution. The proceeding must therefore be terminated or, at the very least, depending on the circumstances, the extent of its last manifestation must be appreciably diminished (for example, by commuting the sentence to a certain extent in proportion to the extent to which the reasonableness of the time period was exceeded).

Nevertheless, determining the moment at which the reasonable duration of the criminal case has been exceeded is difficult to do, without assuming a few essential criteria. To start, it is accepted that this exceedance can in no way be associated with a particular time period established in the abstract. Indeed, as this Court has held with regard to the reasonableness of the duration of pretrial detention—an opinion that can be extended *mutatis mutandis* to the reasonableness of the duration of a case *in toto*—“it is impossible to establish in the abstract a single period of time [for the criminal case] after which it can be deemed unreasonable. This would mean assigning an objective and uncontroverted uniformity to criminal proceedings, which is incompatible with the serious and sensitive task involved in assessing the potential criminal responsibility of each individual accused of committing an unlawful act [*footnote omitted*].” Additionally, and in specific relation to the fundamental right to be tried within a reasonable time period, this Court has held that “it is necessary to establish categorically that the reasonable time period is not a right that can be objectively ‘*measured*,’ since it is impossible to assign an objective and uncontroverted uniformity to the criminal proceedings [*footnote omitted*].” The essence of this criterion was also maintained by the European Court of Human Rights, when it held that “reasonable time [...] cannot be translated into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offense” [*footnote omitted*].

Therefore, the determination of a violation of the aforementioned reasonableness requires the consideration of several factors closely and inextricably tied to the particularities of each case. Those factors are: (a) the complexity of the matter, (b) the actions taken by the interested party during the proceedings, and (c) the conduct of the judicial authorities [*footnote omitted*].¹³⁸

¹³⁸ Editors’ note: With respect to the conditions for determining the reasonableness of the duration of a criminal proceeding, it is important to refer to a fourth element, set forth by the Inter-American Court in its judgment on the merits in the *Case of Valle Jaramillo et al. v. Colombia*. In that judgment, the Court held, following

In view of the foregoing, with respect to the fundamental right to a speedy trial, it can be said, first of all, that, like every fundamental right, it lacks an absolute or unlimitable content. It is in constant tension with other fundamental rights, particularly the fundamental rights to the truth, due process, and the effective protection of the courts, and with the protection of the constitutionally protected legal interest affected by the conduct under investigation. Second, with this in mind, its violation can only be proven under extraordinary circumstances, in which it is absolutely clear that the defendant has become the “object” of a criminal prosecution that shows every indication of lasting *sine die* and in which the lack of impartiality on the part of the judicial authorities can be presumed, as they extend the deadlines for the sole purpose of proving the suspect’s alleged connection to criminal acts that have not been proven through proceedings conducted over an extremely prolonged time period. Third, in light of the manner in which the content of this right is expressly regulated in the previously cited international treaties, and the meaning that has been ascribed to them, we can affirm that the reasonableness of the time period is related to the duration of the criminal case in its entirety, and not just to one of its phases. To reason otherwise would reduce the content of the right to a scope of protection that is insignificant in comparison to that protected by the fundamental rights with which it tends to conflict. Fourth, it is a right whose violation *prima facie*, because of its characteristics, cannot be determined in the abstract, but only specifically.

6.7 ACCESS TO INFORMATION ON CRIMINAL INVESTIGATIONS INTO SERIOUS HUMAN RIGHTS VIOLATIONS VERSUS THE PERFORMANCE OF PROSECUTORIAL DUTIES

MEXICO, *Review of petition for a constitutional remedy 168/2011 (November 30, 2011) (List of judgments 6.2)*. [According to the judgment contested in this constitutional appeal] [...] the information [requested by the appellants] consists of the content of a preliminary criminal investigation, for which the respective regulatory framework must be observed [*footnote omitted*].

[On this point, the lower court continues to hold that] it follows from Article 16 of the Federal Code of Criminal Procedure that **preliminary investigations and all matters relating to them, regardless of their content or nature, are considered strictly confidential**. In balancing the right to information against the confidentiality of preliminary investigations, as a matter of public policy and social interest, the latter must prevail, because only a public version of the decision is allowed to be provided in the event that there is no prosecution, and unless [there is a] proven exception, it is inadmissible to grant access to the preliminary investigation [*footnote omitted*] [*emphasis in the original*].

Along these lines, **the refusal to provide information from the preliminary investigation cannot be considered to be a violation of Articles 6, 14, and 16 of the Constitution; on the**

the European Court of Human Rights, that “in this analysis of reasonableness, the adverse effect of the duration of the proceedings on the judicial situation of the person involved in it must be taken into account; bearing in mind, among other elements the matter in dispute. If the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so that the case is decided as soon as possible.” I/A Court H.R., *Case of Valle Jaramillo et al. v. Colombia*, Merits, Reparations, and Costs, Judgment of November 27, 2008, Series C, No. 192, para. 155.

contrary, it is consistent with the guidelines established in the article that regulates the right to public information [*footnote omitted*] [*emphasis in the original*].

[According to the appellants' arguments against the lower court's decision], Article 16 of the Federal Code of Criminal Procedure did not control in that case; rather, the international sources such as the judgment of the Inter-American Court of Human Rights in the *Case of Radilla Pacheco*, of November 23, 2009, were controlling [...]. Among these obligations, the Mexican State must turn over the information that was ordered by the Federal Institute for Access to Public Information, exercising "conventionality control" in the matter. [...]

The Director General of Legal Affairs of the Office of the Attorney General filed a motion for review joining the one filed by the petitioners [...]. [That motion alleges that] the Federal Institute for Access to Public Information misinterpreted Article 14 of the Federal Transparency and Access to Government Information Act, as it circumvented the fact that both Article 6 of the Constitution and Article 14(I) of the Act provide that access to public information will be restricted in those cases in which it is confidential or secret, and that it therefore should have invoked Article 16 of the Federal Code of Criminal Procedure, which stipulates that preliminary investigations shall be considered confidential information [*footnote omitted*]. [...]

First, it is important to note that the right to access to information establishes as a general rule that all information in the possession of government authorities is public. Nevertheless, the Constitution recognizes certain principles and fundamental rights that operate as exceptions to the general rule, allowing for information to be kept secret or considered confidential in certain cases that, following the constitutional guidelines, must be provided by law. Finally, the law itself establishes the exceptions, that is, scenarios in which the limits to the general rule do not operate.

The right to access to information is regulated in the second paragraph of Article 6 of the Constitution of the United Mexican States [*footnote omitted*], Article 13 of the American Convention on Human Rights [*footnote omitted*], and Article 19 of the International Covenant on Civil and Political Rights [*footnote omitted*].

Article 6, subsection I, of the Constitution states that all information in the possession of any federal, state, or municipal authority, entity, body, or agency is public and may only be kept confidential temporarily for reasons of public interest under the legally established terms. In addition, subsection 3 of Article 6 complements the constitutional mandate by stipulating that all persons, without having to prove any interest or provide an explanation for its use, shall have access to public information, as well as to their personal data or the correction thereof, free of charge. [...]

Subsections I and II of paragraph 2 of Article 6 of the Constitution establish that the right to access to information can be limited by: (i) the public interest; and (ii) privacy and personal data. As we can infer from a reading of those subsections, they merely state the constitutionally valid or legitimate aims that justify placing limitations on the right in question; nevertheless, they both refer to the secondary laws for the development of the specific scenarios in which such exceptions (that seek to protect the constitutionally declared interests) are admissible as limits on the right to access to information [*footnote omitted*] [*emphasis in the original*]. [...]

[According to the law on this issue], preliminary investigations [...] are considered “confidential information,” both from a general perspective and from a specific point of view. As for the general focus, Article 13(V) of the Federal Transparency and Access to Government Information Act considers that information that may “cause a serious harm [...] to the prosecution of crimes [and the] administration of justice” should be classified as confidential; with a specific focus, Article 14(III) of the law expressly states that preliminary investigations shall be considered to be confidential information.

In the same respect, paragraphs 2 and 7 of Article 16 of the Federal Code of Criminal Procedure establish that: “*Only the defendant, defense counsel, and the victim or injured party or his or her legal representative shall have access to the case file on the preliminary investigation. The preliminary investigation and all of its documents, regardless of their nature or content, as well as objects, voice and image recordings, and related items, are strictly confidential*” [...] [*italics in the original*].

This limit also cannot be considered absolute, and presents an exception [*footnote omitted*][—]indeed, an exception to the exception—which is that, as provided in the last paragraph of Article 14 of the Federal Transparency and Access to Government Information Act, **confidentiality cannot be alleged when the preliminary investigation is investigating acts that are serious human rights violations or crimes against humanity**. Therefore, the conclusion of the District Judge is inaccurate in the sense that preliminary investigations and everything related to them, regardless of their content or nature, are considered strictly confidential, as that assertion avoids the aforementioned exception to the exception [*emphasis in the original*]. [...]

Preliminary investigations are kept confidential in light of the fact that the dissemination of the information contained therein could seriously affect the prosecution of crimes and, therefore, the justice administration system. Nevertheless, the law provides an exception to the confidentiality of preliminary investigations in those extreme cases in which the crime being prosecuted is so serious that the public interest in keeping the preliminary investigation confidential is outweighed by the interest of society as a whole in knowing all of the proceedings that are being conducted for the timely investigation, arrest, prosecution, and punishment of the perpetrators. Those exceptional cases involve the investigation of: (i) serious human rights violations, and (ii) offenses or crimes against humanity.

This First Division recalls that in Judgment P./J. 54/2008 the Full Court recognized the dual nature of the right to access to information: as a right in itself, but also as a means or instrument for the exercise of other rights [*footnote omitted*]. In this respect, the Full Court underscored that the right to access to information is the basis for citizen oversight over the institutional workings of government. As such, it acts as a limit to the State’s exclusive management of information, and therefore is a social requirement of the rule of law.

Accordingly, **the need to allow access to information on record in preliminary investigations into acts that constitute serious human rights violations or crimes against humanity is especially relevant**, as these scenarios not only affect the victims and parties directly injured by the wrongful acts, but also offend all of society, precisely because of their seriousness and the repercussions they entail [*emphasis in the original*].

The aforementioned conclusion is further strengthened by the fact that both the Inter-American Court of Human Rights and this Supreme Court sitting *en banc* ordered that the

victims be granted access to the case file on the preliminary investigation, which, of course, included Tita Radilla Martínez [*emphasis in the original*].

EPILOGUE

Writing a chapter of conclusions to the commendable work that the Due Process of Law Foundation (DPLF) has accomplished in its *Digest of Latin American Jurisprudence on the Rights of Victims* is no easy task—much less when Paulina Vega González has written a foreword to the Digest that summarizes the evolution and essential framework of victims’ rights.

Therefore, rather than attempting to summarize the main elements of the Digest in a few paragraphs and pages, I will endeavor to contextualize this work within some broader debates that the Digest helps to unravel. Obviously, given the nature of a digest, the author had to select a few judgments that allow the work to be, in her own words, “an introduction to the Latin American case law, meant to provide a better understanding of the way in which the national courts have approached the complex problems that characterize the judicial analysis of the rights of victims.”

We can say, unequivocally, that the Digest fully serves this purpose of opening doors. It provides us with an overview that covers some of the crucial topics such as the procedural mechanism that allows for the participation of victims, the procedural rights granted to them, the substantive rights to which they are entitled, and the legal, political, and philosophical grounds that the courts have found in recognizing those rights.

The Digest also opens the door to our understanding of the idea of victim, and it teaches us the recognition of a broad concept of victim that encompasses all persons who have been affected by a human rights violation. Wisely, the Digest introduces—but allows readers to form their own conclusions about—the issue of whether there is a distinction between victims of crime and victims of human rights violations. We reply that while all serious human rights violations are crimes, not all crimes are human rights violations. At the same time, it is essential to analyze—philosophically, ideologically, politically, and legally—certain notions of the so-called crime victims’ movements that, rather than conceiving fundamentally of a human rights policy that includes victims, attempt to bolster more repressive State responses, ranging from the imposition of the death penalty (in the countries that allow it) to increased “iron-fisted” security policies, the lowering of the age of criminal responsibility for minors, and the reduction of alternative sentencing or opportunities for release from prison. These are policies that seek to increase the punitive power of the State in the name of crime victims rather than to promote a holistic view of citizen security from a human rights perspective.

The Digest invites us to reflect on the proper balance between the rights of victims of human rights violations and the rights of those accused of committing those violations. The only viable and acceptable opinion from a human rights perspective is that it is impossible to sacrifice some rights in favor of others. In other words, just as the rights of victims cannot be forfeited in the name of protecting the rights of the accused, neither can the rights of the accused be ignored or undermined in the interest of ensuring the victims’ right to truth, justice,

reparations, or guarantees of non-repetition. There, the Digest once again leaves the door open for future research into the multiple challenges with which the national and international courts continue to grapple. To cite just a few examples of tension between the rights of victims and of defendants, we can consider the fundamental principles of every democratic criminal proceeding, such as the principles of *non bis in idem*; of *res judicata*; of the most benign criminal law and its relationship to the victims' rights to effective justice, to not have amnesty laws implemented, to not have fraudulent *res judicata*, and to the removal of the factual and legal obstacles that facilitate impunity. How are these tensions resolved? How can a balance be struck between the rights of defendants and of victims? We are very familiar with, and we welcome, the inter-American case law on this issue that has tipped the balance in favor of the victims. But we recognize nonetheless that not all of the Latin American courts have found the inter-American case law completely persuasive, and not all sectors of academia agree with it. What the Digest provides us is solid, consistent jurisprudential data that help us continue to ponder these issues.

The Digest and the foreword by Paulina Vega also show us how the inter-American case law influences the Latin American case law. And I would like to emphasize this point, as there are various aspects of it to consider. First, they show us that the inter-American case law is not static, but rather is evolving. It has gone from the diminished concept of victims in the historic *Velásquez Rodríguez* case to the most modern and expanded—albeit in certain respects still restricted—understandings of who is considered a victim in the inter-American system. One very clear advance, for example, is reflected in the difference between the *Aloeboetoe* case, in which the Inter-American Court refused to recognize a tribal community as a victim with the right to reparation, and the *Sarayaku* case, in which the Court accepted that the community as such (and not just the members of that community) was the victim and had the right to obtain reparations. This progress is also evident in the reparations measures that the Inter-American Court orders for “society as a whole.”

A second essential element in this evolutionary process is the recognition of the victims' right to participate in the inter-American proceedings. We recall that the Court used to preclude the independent representation of the victims; then it allowed them to take part at the reparations phase, and later progressed to the full participation of the victims once the case was brought before the system. In the current stage, the Court places emphasis on the direct dispute between the State and the victims, enormously (and in our opinion, unfairly and dangerously) diminishing the role of the Inter-American Commission.

This procedural advance (although it is often impossible to understand what is procedural and what is substantive) also allows us to see a parallel process that has still not been sufficiently examined. We are thinking of how the participation of victims in the Inter-American Court has allowed the Court to make progress in the recognition victims' rights. Let us recall, for example, that in *Velásquez Rodríguez*, when the victims did not have the right to autonomous representation, the Court simply ordered the payment of financial compensation; in its ruling on the interpretation of the judgment, it held that an investigation would of course also have to be conducted, but did not specifically order it. If we compare the evolution of reparations, we will see how each advance is directly related to the autonomous and independent participation of the victims in the cases before the Court. But, obviously, the advances themselves can be seen

in the substantive case law of the inter-American system. In the cases involving gender-based violence, indigenous peoples, and children, we see that the victims and their representatives are the ones who have helped the Court make progress in these areas.

This leads us to the understanding that the participation of victims in cases involving human rights violations is not only required to satisfy the rights of those victims but also essential to making substantive jurisprudential progress. At the national level, what the studies are starting to show is that the participation of victims and recognition of their rights, and particularly their roles as central actors in the criminal proceedings, are essential to break patterns of impunity. The studies available to us now, as well as personal observation and experience in the region in recent decades, allow us to see how victims and their allies are the ones who have managed to keep court cases open, promote investigations, and deepen the analysis of the types of violations committed. The early stages of many transition processes show us that victims' rights were often sacrificed under the amnesty laws that were prevalent. Nevertheless, the path of the transitions and the current reality make clear that the victims did not allow that impunity to stand. They fought it in the courts (many times successfully, as the cases summarized in this Digest indicate), most of the time alone, with little State support and facing great hostility or indifference in most cases. But the Digest also shows us that the judiciary can be an extremely important ally in ensuring victims' rights. Just as political negotiation allowed for the enactment of amnesty laws at the expense of victims' rights, the judiciary, in recent decades, has shown itself to be more inclined to protect those laws and to oversee those political agreements. In other words, we can say that this participation of the victims also served to consolidate the institutional capacity of the judiciary.

One final relationship between the inter-American system and the Digest that focuses on the national case law concerns so-called "conventionality control": that is, the analysis of the compatibility of the inter-American standards and the Latin American laws and practices. The Digest shows us that Latin American judges are receptive to the inter-American case law. It also provides clear evidence that the Latin American case law is surpassing, detailing, and refining the inter-American case law, or is advancing in areas where no inter-American guidelines have yet been developed. In this respect, the Digest opens the door for us and calls on us to examine the inter-American case law in light of the national case law. It invites the Court not to have a jurisprudential monologue, in which it only gives lessons to the national judges on the standards that should be applied, but rather to engage with humility and expansiveness in a dialogue with the national judges that allows the Court to appreciate the advances in the case law, learn from them, and inform the interpretation of the American Convention on Human Rights with what our Latin American judges say. Hopefully one day the Court will move more quickly to find interpretive tools in the Latin American case law than to rush to copy and cite the European Court of Human Rights. That day (which we hope will be in the not too distant future), this Digest and its predecessors will almost certainly be consulted by the Inter-American Court.

By reading this Digest, we accept the invitation it extends to us. It invited me to ask myself what is behind or beyond the judicial decisions summarized and compiled herein. For example, what were the social and political factors that allowed for this recognition of victims' rights? What coalitions within and outside the Judiciary made those judgments possible? What are the relationships between the victims and the organizations or attorneys that represent them?

How were these decisions taken by the agencies of the State? How does the press portray these judgments? What legislative changes were undertaken thanks to these decisions? Did these decisions later serve as the legal bases for expansion into other areas? What institutional changes were there thanks to these judgments? In other words, it raises the question of how to contextualize these judicial decisions and how to think of their impact.

Over the past 20 years I have had the opportunity to work with victims (and I hope that others can say that I have worked for victims). This is a good time to include some ideas in this epilogue about this path traveled alongside the victims. I will not bore the reader with my personal reflections and lessons learned; I only want to mention some principles that have emerged from my own experience, which I do not intend to be taken as universal principles. First, I have understood that talking about victims in general terms conceals the fact that each victim is an individual human being who inhabits and experiences his or her own situation in a very particular manner. We can speak of victims, but without losing sight of the fact that often they may have different views about their cases, as well as different demands, hopes, disappointments, and commitments. It is not the same thing to be the victim of the continuous crime of forced disappearance as it is to be the victim of prior censorship at a newspaper. All rights are equal, and all victims have suffered the violation of one or more of their rights, but the manifestations, consequences, and impacts are different. It is not the same for the victim to be a woman, an indigenous person, an immigrant, a girl, or a rural worker as it is for the victim to be a white, middle-class professional man. They are different experiences that we often render invisible. As an attorney, I must understand these similarities and differences, these individual and collective traits.

Second, when speaking of victims, we must not idealize them. On a personal level, I respect them, I recognize the significance of the violation of their freedoms, but I accept them as human beings whose rights were violated. This means that I can agree or disagree only partially with their ideas. In other words, I do not believe that the victims always possess the truth, the correct position, the best strategy. They have a position that I take as such—as that of the victim or victims. And this leads me to the third lesson learned. The victims and those of us who represent victims are not one and the same. The agenda of the victims and the agenda of the organizations we work with are different. Frequently they coincide, but sometimes they diverge. Representing a victim in a specific case might mean obtaining justice, truth, and reparation for that person. For my organization, nevertheless, I might be seeking a jurisprudential development, or a case that raises the profile of the organization, or that allows for the strengthening of a court, to name just a few. The victim may be thinking only about his or her case, but I might be thinking about prior and future cases and about the consequences that a particular case might have for other people.

What I have learned above all is that I always learn from the victims. I learn the law—not the kind I can read about in my office in books or in the judgments in this Digest, but rather the law of real life: that is, how human rights are experienced, and how they are translated into daily life; how rights are expressed in the interaction with State authorities, with law enforcement, with judges, but also with non-State actors, whether they are transnational corporations, criminal organizations, or gangs. I learn to have a realistic outlook, to not create false expectations, to be

responsible professionally, to think strategically. The cases that the Digest presents implicitly demonstrate some of these lessons.

Finally, the Digest invites us to reflect even more deeply and to avoid a temptation that can easily arise. Here we have petition XXX, *amparo* YYY, judgment ZZZ, decision WWW. We have what the Constitutional Court, or the Supreme Court, or the Council of State said about this issue or that issue. We attorneys will read and recall these petitions, *amparos*, and judgments, along with the standards that are developed and the jurisprudential theories that are constructed. But the Digest calls upon us to remember that behind every one of those decisions there is a human rights movement that constantly reminds us that there is no possibility for efficient public policy if we do not consider victims' rights as a central element in the shaping of those policies. The main invitation extended in the Digest is to know that behind every petition, *amparo*, and judgment there is a personal, human story. A history of pain, fear, sadness, distress, or anxiety, but also a history of hope, strength, courage, and love for dear ones. In every *amparo* there is a mother, father, sibling, spouse, child, parent, friend, colleague, companion. And they all have rights as victims, but above all they all have rights as human beings.

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Human Rights Clinic
University of Texas School of Law, 2014

For decades, the transition to democracy in different countries of Latin America has been marked by complex social, political, and legal processes, which have been resolutely driven by national, regional, and international victims' movements. These same processes have given rise to a renewed debate on the rights of victims to know the truth about the events, gain access to justice, receive assistance and protection, and receive comprehensive reparation for the harm. Despite the recognition of each of these rights under the law, however, their protection continues to encounter challenges that must be addressed through solid legal arguments. In this respect, the *Digest of Latin American Jurisprudence on the Rights of Victims* seeks to facilitate the analysis, comparison, interpretation, and application of different Latin American legal provisions and criteria as an essential step toward the effective enjoyment of the rights of victims within different court proceedings.

www.dplf.org

The Due Process of Law Foundation (DPLF) is a regional organization composed of a multinational group of professionals, whose mandate is to promote the rule of law in Latin America. DPLF was founded by Thomas Buergenthal, former president of the International Court of Justice (The Hague) and of the Inter-American Court of Human Rights (Costa Rica). Its work focuses on the strengthening of judicial independence, the fight against impunity, and respect for fundamental rights in the context of natural resources extraction. DPLF conducts its work through applied research, cooperation with public and private organizations and institutions, and advocacy and outreach actions.

DPLF's Transitional Justice Program, which was responsible for the production of the *Digest of Latin American Jurisprudence on the Rights of Victims*, works to advance the fight against impunity. This program promotes the use of international and inter-American law to determine State and individual responsibility for the commission of international crimes and serious violations of human rights in Latin America.



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