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The Normative Impact of the Inter-American Court of Human Rights on Latin-American National Prosecution of Mass Atrocities

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Throughout its history, the Inter-American Court of Human Rights has ruled in a significant number of cases on the state's obligations to investigate and prosecute grave human rights violations and international crimes. Regardless of the existence of this body of international jurisprudence, an important question remains unanswered: Can the Inter-American Court's decisions have any significant normative impact on national jurisdictions when it comes to the prosecution of international crimes? This article argues that such an impact is possible provided that the national courts have a specific judicial identity, better associated with the idea of neo-constitutionalism. In this context, international law and regional human rights jurisprudence becomes a relevant argumentative resource, which can be incorporated into judicial decisions in order to ensure the effective prosecution of gross human rights violations and international crimes.

Keywords: Inter-American Court of Human Rights, constitutional jurisprudence, national jurisdiction, international crimes, judicial identity

1. Introduction

After decades of dictatorships and armed conflict, many Latin-American countries are coming to terms with the consequences of mass atrocities committed during those periods. An essential element of this process has been, indeed, a social (and political) commitment to bring to justice those responsible for the perpetration of unspeakable crimes.

Within this general frame, this article explores a concrete aspect of what may be considered a transitional justice period in many countries in Latin-America: whether the judicial precedents established by the Inter-American Court of Human Rights (Inter-American Court or IACtHR, indistinctively) have had any impact whatsoever on national prosecution of mass atrocities. In this regard, it is argued that the normative impact of Inter-American jurisprudence correlates to a particular judicial identity of domestic courts. This identity is the result of a renewed commitment to constitutionalism, which in turn leads to a different conception of the law and the role of courts within a legal system. As is argued in this article, this new normative paradigm has allowed the incorporation of international standards by domestic courts, as a means to strengthen their arguments and consolidate their place in the prosecution of mass atrocities at the national level. By the same token, when used strategically, international law and jurisprudence have

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reduced the risk of a direct confrontation between national courts and other branches of the government, even when dealing with highly political issues.

From this perspective, it could be claimed that the Inter-American Court has had a considerable normative impact on the courts of several Latin-American countries, even if not all perpetrators of crimes included in cases brought before the court have actually been prosecuted and sentenced. In other words, this article highlights the importance of what could be called the indirect impact of the Inter-American Court on national prosecutions.

In order to better understand the argument advanced here, it is important to acknowledge the effect that long-standing dictatorships, authoritarian regimes and armed conflicts have had on the judiciary within the region.[1] During these times, people involved in the prosecution of mass atrocities were commonly the target of attacks and threats against their life and integrity.[2] Courts were also the object of 'legal' attacks, carried out by the legislative and executive branches, through the adoption of laws that substantially reduced the judiciary's independence and powers.[3] In some extreme instances, courts actively participated in the perpetration of gross violations of human rights through deliberate and generalised violations of due process standards.[4] In short, there is clear evidence to establish that during the period of authoritarian and dictatorial regimes, courts in Latin-America were systematically disbanded and weakened by groups interested in fostering impunity.

This dreadful scenario was worsened by a particularly restrictive and prevailing conception of the 'law' and the role of the courts within a state. All in all, broadening the conclusions of the Peruvian Truth and Reconciliation Commission to a regional scale, many courts in Latin-America appeared to have[5]

> lack[ed] the audacity to overcome narrow legal frames through creative interpretations of the law. They lack[ed] the civic courage to challenge the threat of the powerful, which contrasted with the negligent attention given to the most humble … [The implementation of repressive regimes depended on judges renouncing] their duty to exercise … control of the constitutionality of laws, i.e. to give up acting conscientiously, in order to implement unfair laws over constitutional principles. (A judicial behavior contrary to the repressive regime would have) to start from the assumption that the rule of law (*Estado de Derecho*) recognizes that the supremacy and normative dimension of the Constitution requires it to be the parameter of control to determine the validity of other rules (and acts).

[1] The conditions and role of the judiciary during the Latin-American dictatorships and conflicts have been described in academic studies, national and international judicial decisions and, more particularly, in the reports of inquiry commissions throughout the region.

[2] For instance, *Case of the Rochela Massacre v Colombia* (2005) Inter-Am Ct HR, Judgment of 11 May 2007 (Ser C) No 163.

[3] See, eg, Alexandra Barahona, 'Truth, Justice, Memory, and Democratization in the Southern Cone', in Alexandra Barahona De Brito, Carmen Gonzalez-Enriques and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford University Press 2001).

[4] *Final Report of the Truth and Reconciliation Commission of Peru, Vol III* (Peru 2003) Ch 2.6, 264 (author's translation). Available only in Spanish, http://www.cverdad.org.pe/ifinal.

[5] ibid 249 and 279.

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Bearing in mind this factual and legal scenario, achieving the judicial capacity to prosecute mass atrocities implied not only overcoming material and external shortcomings, such as security issues or lack of resources and independence, but it also meant transforming deep-rooted legal conceptions and ideas, which had become undeniable obstacles for justice and had served to foster impunity. According to the argument in this article, it is precisely at this level that the normative impact of the Inter-American Court is better perceived and appreciated.

The article is structured in four sections. The first section presents a brief review of selected decisions of the IACtHR, as a means of introducing the reader to some of the most relevant judicial precedents of the court with regard to the prosecution of mass atrocities at the national level. The same section reproduces some of the more acute criticism raised against these precedents. In the next section attention is shifted to domestic courts and their judicial identity. It highlights the importance of constitutionalism and the transformation of the prevailing legal culture in Latin-America as crucial elements for enabling the normative impact of the Inter-American Court. Section 4 presents some selected national decisions, as initial evidence of the correlation between judicial identity and the normative impact of the Inter-American Court. The final section presents some general conclusions.

2. THE INTER-AMERICAN SYSTEM BEFORE NATIONAL PROSECUTIONS FOR MASS ATROCITIES

To better understand the normative impact of the Inter-American jurisprudence on national prosecutions for mass atrocities, it is important to review some basic jurisdictional and procedural aspects of the Inter-American Court.[6] As in the case of its counterparts in other regions, this court has jurisdiction to determine the responsibility of the *state* for breaching its international obligations.[7] Therefore, the court establishes whether the perpetration of a specific type of conduct (which might also be characterised as a crime) can be attributed to a given state, and/or whether the state failed to adopt, in compliance with its international obligations, appropriate measures to prevent and/or respond to the crime. Therefore, the court will never decide on the individual criminal responsibility of a specific person.

Based on these jurisdictional considerations, as a general rule the Inter-American Court would not produce normative standards on elements of the crimes, theories of individual responsibility or grounds for excluding criminal responsibility. Instead, decisions issued by the IACtHR concentrate on norms, principles and standards regarding the state's conduct. From this point of

[6] Although this article concentrates exclusively on the jurisprudence of the Inter-American Court, it is crucial to recognise the fundamental role that the Inter-American Commission has played, and will continue to play, in the protection and promotion of human rights in the Americas.

[7] In order for the Inter-American Court to have jurisdiction over a contentious case, states must have accepted the optional clause on obligatory jurisdiction set out in art 62.1 of the American Convention on Human Rights (see n 9 below). Beside this general norm, some treaties expressly provide for the jurisdiction of the IACtHR in contentious cases. In other instances, the jurisdiction is based on an interpretation by the IACtHR. See, eg, *Case of the 'Street Children' (Villagrán-Morales and Others) v Guatemala* (1999) Inter-Am Ct HR, Judgment of 19 November 1999 (Ser C) No 63.

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view, Inter-American jurisprudence actually shares some commonalities with national constitutional jurisprudence. According to the applicable jurisdictional and procedural rules of the relevant courts, both might establish the incompatibility of the conduct of a state's agents with its constitutional and international obligations regarding human rights. Similarly, without imposing particular outcomes, Inter-American and constitutional jurisprudence can determine the legal framework within which any state conduct should be accommodated, criminal matters included.[8]

In addition to these jurisdictional criteria, it is also important to consider some procedural rules which determine which cases can actually be adjudicated by the Inter-American Court. As a starting point, it is important to highlight the subsidiary nature of the Inter-American system, which means that a case may be admitted only if local remedies have been exhausted or if an exception to this general rule applies.[9] Secondly, there is the mandatory nature of the procedures before the Inter-American Commission. In other words, it is only after the Commission has dealt with the case that it might be brought before the court. The submission of a case is subject to the state's failure to comply with the recommendations issued by the Commission or with any amicable settlement reached by the parties.[10]

These procedural criteria mean that only a handful of cases actually reach the Inter-American Court and, in comparison with other judicial bodies, it has little discretion over which cases will integrate its docket. As a consequence, the court appears to be limited in setting its 'judicial agenda' in order to develop or consolidate specific jurisprudential lines.

The final consideration of this brief review of the Inter-American Court's institutional characteristics is its authority during the compliance stage. Although none of the regional instruments determines a specific follow-up procedure, the Inter-American Court has consistently upheld its competence to monitor compliance with its judgments.[11] This competence includes the power to request states to submit reports, issue instructions and orders, and even to rule on any dispute arising during this stage.[12]

Even though a comprehensive evaluation of the implication of these jurisdictional and procedural characteristics exceeds the scope of this article, it is worth concluding this section by pointing to a possible cumulative effect they have had on the court's practice and jurisprudence.

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[8] Probably one of the best-known decisions that can be used to exemplify this point is the judgment of the United States (US) Supreme Court in *Miranda v Arizona* 384 US 436 (1966). In light of such commonalities, it is not surprising that the more numerous references to Inter-American jurisprudence by national courts, at least on the subject under study, have been made in decisions dealing with constitutional questions. See Ximena Medellin, *Digest of Latin-American Jurisprudence on International Crimes* (USIP-DPLF 2010).

[9] American Convention on Human Rights (ACHR) (entered into force July 18 1978) 1144 UNTS 123, arts 46 and 47. For a more comprehensive analysis on the principle of subsidiarity see, among others, Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38, and Jorge Contesse, 'Constitucionalismo interamericano: algunas notas sobre las dinámicas de creación e internalización de los derechos humanos' in Cesar Rodríguez Garavito (coord), *El derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI* (Siglo Veintiuno Editores 2011).

[10] ACHR, ibid arts 46–51. Also, *In the matter of Viviana Gallardo et al* (1984) Inter-Am Ct HR, Judgment of 15 July 1981 (Ser A) No 101.

[11] *Case of Baena-Ricardo and Others v Panama* (2003) Inter-Am Ct HR, Judgment of 28 November 2003 (Ser C) No 104.

[12] ibid [59], [68], [84]–[138].

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As affirmed by Mykola Sorochynsky, the Inter-American Court, together with the Commission, have strived to balance two approaches to the international protection of human rights, namely,[13]

> to address … [almost all] human rights violations occurring in every member state if [they are] not remedied by national authorities … [or] use their limited resources in a way that would be likely to achieve [the] maximum possible systemic improvements without addressing most individual cases.

Indeed, the Inter-American Court seems to have a more strategic approach towards the cases that it gets to adjudicate, by promoting a more structural analysis of the violations rather than concentrating only on the individual characteristics of the case at hand.

With this consideration in mind, the next section presents some of the most relevant criteria established by the Inter-American Court in matters having direct impact on national prosecutions of mass atrocities.

2.1 The Jurisprudence of the Inter-American Court Related to National Prosecutions of Mass Atrocities

Since it was first established, the Inter-American Court has ruled in numerous cases dealing with the perpetration of large-scale violations of human rights. In more precise terms those cases normally involved either a large number of victims, or violations perpetrated against fewer victims but which were part of a systematic or generalised pattern. In most instances, the cases also referred to the state's failure to adequately and effectively investigate, prosecute and punish those responsible for the violations.

Within this context, this section briefly addresses some important jurisprudential criteria regarding three key issues: (i) characterisation of the facts as grave violations of human rights and/or international crimes; (ii) the state's obligation to investigate, prosecute and punish mass atrocities in order to protect the rights of the victims and their next-of-kin, and (iii) impunity, as the consequence of the failure to fulfil these obligations, along with some legal and material obstacles that prevent criminal prosecutions from taking place.

Before addressing these aspects, it is important to stress that the Inter-American Court has consistently called upon national courts to 'make sure that the provisions of the Convention are not affected by the application of laws contrary to its object and purpose'.[14] According to the court, national courts must exercise a *control of conventionality* over local legislation.[15] In doing so, national courts must consider treaty norms as well as Inter-American jurisprudence.[16]

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[13] Mykola Sorochynsky, 'International Human Rights Law and Education: Rediscovering the Classical Tradition', JSD thesis, University of Notre Dame, 2010.

[14] *Case of Radilla-Pacheco v Mexico* (2009) Inter-Am Ct HR, Judgment of 23 November 2009, (Ser C) No 209 [339].

[15] It is interesting to note the similarity between this concept, proposed by the Inter-American Court itself, and the term '*control of constitutionality*', which is directly related to the principle of supremacy of the Constitution.

[16] *Radilla-Pacheco* (n 14) [339].

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In short, the court itself has established a juridical 'path' which facilitates the normative impact of its own jurisprudence on national procedures.

2.1.1 CHARACTERISATION OF THE FACTS

Two essential concepts have been used by the Inter-American Court in characterising the facts: (i) gross violations of human rights, and (ii) crimes against humanity.[17] Regarding the first, an initial review of the Inter-American Court decisions allows for the identification of at least three relevant criteria used by the court to characterise a violation as 'gross'. These are whether it (i) infringes a *jus cogens* norm;[18] (ii) affects essential values of the international community, or (iii) violates non-derogable rights recognised by international human rights law.[19] Furthermore, the court has also provided an apparently open-ended list of violations which it considers to be 'gross'. Such violations include torture; extrajudicial, summary or arbitrary execution; and forced disappearance.[20] It is worth noticing that the 'scale' of the violations seems to be irrelevant when characterising such violations as 'gross'. In other words, it can be argued that a single act of torture is a gross violation of human rights, even if it is not part of a larger scheme.

Additionally, the Inter-American Court has also resorted to the concept of crimes against humanity when characterising a relevant fact.[21] Using other international instruments, including the Rome Statute of the International Criminal Court,[22] the Inter-American Court has underlined[23] that

> [w]hen examining the merits in cases of serious human rights violations, … if they were committed *in the context of massive and systematic or generalized attacks against one sector of the population* [note omitted], *such violations can be characterized or classified as crimes against humanity in order to explain clearly the extent of the State's responsibility under the Convention in the specific case, together with the juridical consequences*. … What the Court does … is to employ the terminology used by other branches of international law in order to assess the legal consequences of the alleged violations vis-à-vis the state's obligations.

[17] Interestingly, despite mentioning the concept of crimes against humanity in several decisions, the IACtHR has not been as open to use other international crimes, including genocide or war crimes, as part of its reasoning: *Case of Bámaca-Velásquez v Guatemala* (2000) Inter-Am Ct HR, Judgment of 25 November 2000, (Ser C) No 70; *Case of the Pueblo Bello Massacre v Colombia* (2006) Inter-Am Ct HR, Judgment of 31 January 2006, (Ser C) No 140.
[18] *Case of Goiburú et al v Paraguay* (2006) Inter-Am Ct HR, Judgment of 22 September 2006, (Ser C) No 153, [128].
[19] *Case of Barrios Altos v Peru* (2001) Inter-Am Ct HR, Judgment of 14 March 2001, (Ser C) No 75, [41]; *Case of the Moiwana Community v Suriname* (2005) Inter-Am Ct HR, Judgment of 15 June 2005, (Ser C) No 124.
[20] *Barrios Altos*, ibid [41].
[21] *Goiburú* (n 18); *Case of Almonacid-Arellano and Others v Chile* (2006) Inter-Am Ct HR, Judgment of 26 September 2006, (Ser C) No 154; *Case of La Cantuta v Peru* (2006) Inter-Am Ct HR, Judgment of 29 November 2006, (Ser C) No 162.
[22] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90.
[23] *Case of Manuel Cepeda-Vargas v Colombia* (2010) Inter-Am Ct HR, Judgment of 26 May 2012, (Ser C) No 213, [42] (emphasis added).

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As is inferred from this paragraph, the characterisation of the facts has taken central stage in Inter-American jurisprudence, particularly when determining the scope of the state's obligations. In the words of the IACtHR:[24]

> In this type of situation of systematic violence and grave violations of the rights in question in a zone of conflict [notes omitted], the State's obligation to adopt positive measures of prevention and protection is increased and is of cardinal importance within the framework of the obligations established [in] article 1(1) of the Convention.

In addition to these general criteria, in some cases the court has also provided specific interpretation regarding the elements of some human rights violations or crimes. Within this context, those decisions dealing with the constitutive elements of forced disappearance have proved to be of particular relevance for Latin-American national jurisprudence.[25]

All in all, the characterisation of facts seems to be a cornerstone of regional jurisprudence, when establishing the scope and reach of the state's obligations regarding criminal prosecution of mass atrocities. More on these obligations will be reviewed in the following sections.

2.1.2 The State's Obligation and Individual Rights

Throughout its decisions, the IACtHR has repeatedly emphasised that states are obliged to respect and ensure the protection of human rights. Of particular relevance for this study is the duty to ensure, enshrined in Article 1(1) of the American Convention on Human Rights (ACHR), which[26]

> implies the duty of state 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.

In more detail, the Inter-American Court has determined that any investigation, as difficult as it might be, must be carried out in a[27]

[24] *Case of the Ituango Massacres v Colombia* (2006) Inter-Am Ct HR, Judgment of 1 July 2006, (Ser C) No 148, [137].
[25] As identified by the IACtHR, the constitutive elements of this crime are: 'a) the deprivation of freedom; b) the direct intervention of state agents or their acquiescence, and c) the refusal to acknowledge the arrest and reveal the fate or whereabouts of the interested person': *Radilla-Pacheco* (n 14) [139].
[26] *Case of Velásquez-Rodríguez v Honduras* (1988) Inter-Am Ct HR, Judgment of 29 July 1988, (Ser C) No 4, [166] (emphasis added).
[27] ibid [177]–[172]. Also, *Goiburú* (n 18) [88]; *Case of Chitay-Nech and Others v Guatemala*, Inter-Am Ct HR, Judgment of 25 May 2010, (Ser C) No 212, [192].

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> serious manner and not as a mere formality preordained to be ineffective. [It] must have an objective and be assumed by the state as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. […] [A]n illegal act which … is initially not directly imputable to a state … can lead to (its) international responsibility … not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

It must be underlined, as the court has done, that the duty to investigate (and in turn, to prosecute and punish) are more relevant in cases of large-scale crimes.[28] This is because 'the lack of an investigation constitutes a determining factor in the systematic repetition of human rights violations'.[29] Even more, as mentioned earlier, the IACtHR has gone as far as to affirm that the obligations to investigate and punish certain human rights violations, such as forced disappearance, have attained *jus cogens* status.[30]

In more recent decisions, the Inter-American Court has given a more robust interpretation of state obligations, concluding that they are not limited to domestic investigations and remedies. Because of the 'nature and seriousness' of the violations (crimes) committed in a widespread and systematic way,[31]

> the need to eradicate impunity reveals itself … as a duty of cooperation among states for such purpose. Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States' *erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and international law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction.

This quote unveils yet another dimension of Inter-American jurisprudence. As a necessary complement to the state's obligations, the court has devoted a significant part of its decisions to discussing the content and scope of the victims' and next-of-kin's individual right of access to justice, enshrined in Articles 8(1) and 25 of the ACHR. As established by the jurisprudence of the IACtHR, this right encompasses: (i) an effective investigation aimed at the prosecution of those responsible for perpetrating the crime; (ii) having their cases heard by a competent, independent and impartial tribunal; (iii) the taking of 'every necessary step … to know the truth and punish those responsible for the events' within a reasonable period of time, and (iv) 'ample opportunity to take part and be heard, both in the elucidation of the facts and the punishment of those responsible, and in the quest for fair compensation'.[32]

In addition to the right of access to justice, the Inter-American Court has affirmed that the failure to investigate, prosecute and punish grave violations and international crimes, in

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[28] *La Cantuta* (n 21) [110]; *Goiburú* (n 18) [128]; *Chitay-Nech*, ibid [193].
[29] *Goiburú* (n 18) [90].
[30] ibid [84].
[31] *La Cantuta* (n 21) [160]; *Goiburú* (n 18) [131].
[32] *Goiburú*, ibid [117].

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accordance with standards set out in its own jurisprudence, also violates other rights – among them, the right to life, personal integrity and security, and personal freedom.[33]

In sum, the Inter-American Court has developed vast jurisprudence on the scope and reach of the state's obligations, emphasising the relationship between obligations, rights of the victims and next-of-kin, and the scale or gravity of the violations and crimes. These criteria are the foundations upon which the court has built most of its precedents in relation to the obligation to fight impunity.

2.1.3 Impunity and Legal Obstacles that Impair Prosecution

As mentioned earlier, a third dimension of the Inter-American Court's relevant jurisprudence regarding national prosecutions for mass atrocities deals with the concept of 'impunity'. Defined as 'the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention',[34] the court has emphasised that impunity leads to the 'erosion of the confidence of the population in public institutions'[35] and affects individuals and society.[36]

In this regard, the IACtHR has established that states have a *juridical obligation* to eliminate all legal and material obstacles that could foster impunity and impair the exercise of the right of access to justice.[37] Although the court has developed vast jurisprudence on all these matters,[38] the next paragraphs concentrate exclusively on some of the most important de jure obstacles that bar

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[33] *La Cantuta* (n 21) [110]; *Ituango Massacres* (n 24) [127]–[131]; *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006) Inter-Am Ct HR, Judgment of 29 March 2006, (Ser C) No 146, [150]–[154]; *Pueblo Bello Massacre* (n 17) [143]–[146]; *Goiburú* (n 18) [88].

[34] *Case of the 'White Van' (Paniagua-Morales and Others) v Guatemala* (1998) Inter-Am Ct HR, Judgment of 8 March 1998, (Ser C) No 37, [173]; *Almonacid-Arellano* (n 21) [111]; *Case of Serrano-Cruz Sisters v El Salvador* (2005) Inter-Am Ct HR, Judgment of 1 March 2005, (Ser C) No 120, [170].

[35] *Barrios Altos* (n 19) Concurring Opinion of Judge AA Cançado Trindade, [4].

[36] For a further discussion about Inter-American jurisprudence on impunity, see Javier Donde, 'El concepto de impunidad: leyes de amnistía y otras formas estudiadas por la Corte Interamericana de Derechos Humanos' in Gisela Elsner (ed), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional* (Konrad-Adenauer-Stiftung 2010), and Douglass Cassel, 'Inter-American Court of Human Rights' in Katya Salazar and Thomas Antkowiak (eds), *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Due Process of Law Foundation 2007) 151–66.

[37] *La Cantuta* (n 21) [226]; *Radilla-Pacheco* (n 14) [212]; *Chitay-Nech* (n 27) [199].

[38] For instance, the IACtHR has pointed out that in order to fulfil its obligations and ensure human rights, states must not only establish formal judicial mechanisms but must also guarantee their effectiveness. In particular, the court has stated 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. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective': *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and 8 of the American Convention on Human Rights)* (1987) Inter-Am Ct HR, Advisory Opinion OC-9/87 of 6 October 1987, (Ser A) No 9, [24]; *Chitay-Nech* (n 27) [202]. A general context of intimidation, as well as a specific act targeted toward individuals or extreme poverty, will be considered, among others, a de facto obstacle that will impair the right to access to justice provided by ACHR arts 8.1 and 25.

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criminal prosecutions before national courts, namely (i) amnesty laws; (ii) the application of statutes of limitations; (iii) 'fraudulent' double jeopardy, and (iv) military jurisdiction.

The Inter-American Court first addressed the matter of amnesty laws in the *Barrios Altos* case against Peru, when it established that[39]

> all amnesty provisions, [statutes of limitation] 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.

In more recent decisions, the Inter-American Court has continued to uphold the same principle. However, it is worth noting that in some of these later decisions it has opted for an explicit characterisation of the facts as 'crimes against humanity'. From the text of these judgments, it is not wholly clear whether this different characterisation had any substantive impact on the interpretation advanced by the court. In other words, it is difficult to conclude definitively that the IACtHR intentionally restricted the scope of the limitation against amnesty laws to violations amounting to crimes against humanity, or that this limitation applies equally to both categories.[40]

Another legal obstacle addressed by Inter-American jurisprudence is the application of statutes of limitation to criminal procedure in mass atrocities. In contrast to amnesty laws (which are exceptions by nature) statutes of limitation, a common norm in criminal law, were widely applied to prosecutions in different countries in Latin-America. Interestingly, on the first occasion on which the court made reference to this matter, it did so in a tangential fashion. Indeed, it was in the above-transcribed paragraph of the *Barrios Altos* decision in which the court explicitly mentioned statutes of limitation among those legal obstacles that are incompatible with the ACHR (even though the case actually concerned amnesty laws).

This matter was later (and briefly) analysed in two other cases: *Bulacio* and *Albán-Cornejo*. In the first case, the IACtHR reaffirmed that a statute of limitations, as a 'legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations, [is] inadmissible'.[41] This interpretation was based on the state's obligations to prevent, investigate, prosecute and punish human rights violations. Crucially, in contrast to the *Barrios Altos* case, which involved a massacre later characterised as a gross violation within a systematic pattern, the *Bulacio* case focused on the killing of a 17-year-old boy by the Argentinean police, after a detention operation in 1991.

[39] *Barrios Altos* (n 19) [41]. In the same decision, the IACtHR emphasised that the prohibition against 'self-amnesties' or other legal means which impair the investigation, prosecution and punishment of 'serious human rights violations' could not have effect in this or any other case before national courts. In this way, the IACtHR expanded the legal effect (and one might say the binding nature) of its decision from one specific set of facts presented in the case at stake, to all similar situations before national courts: *Barrios Altos*, ibid [43].

[40] Cassel (n 36).

[41] *Case of Bulacio v Argentina* (2003) Inter-Am Ct HR, Judgment of 18 September 2003, (Ser C) No 100, [116].

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As a matter of characterisation of the facts, it could be argued that there was a considerable difference in the nature and gravity of the violations: the first case was part of a systematic and widespread pattern while the second, as far as the facts in the judgment reveal, constitute a brutal but isolated violation. The consequence would be, as in the interpretation regarding amnesty laws, some level of uncertainty in the scope of the state's obligations.

Fortunately, in the *Albán-Cornejo* decision the IACtHR seemed to refine its jurisprudence on the matter by arguing that[42]

> in criminal cases, the statute of limitations … is a guarantee that needs to be duly observed by the judge for the benefit of any defendant charged with an offense. This notwithstanding, the statute of limitations is inadmissible in connection with and inapplicable to a criminal action where *gross human rights violations in the terms of international law* are involved.

A third obstacle to the prosecution of gross violations of human rights and international crimes analysed by the Inter-American Court is 'fictitious' or 'fraudulent' double jeopardy.[43] In its early decisions, the court stated that Article 8(4) of the ACHR provides broader protection in comparison with other international instruments, since it establishes the prohibition against prosecuting a person who has been acquitted by a non-appealable judgment, *for the same cause.*[44]

Notwithstanding this general rule, the IACtHR has strongly held that[45]

> the *non bis in idem* principle is not applicable when the proceeding in which the case has been dismissed or the author of a violation of human rights has been acquitted, in violation of international law, has the effect of discharging the accused from criminal liability, or when the proceeding has not been conducted independently or impartially pursuant to the due process of law.

The impact that this interpretation could have on the prosecution of mass atrocities at the national level seems to be self-evident. The possibility of initiating new criminal procedures is especially important in cases where the non-appealable decision was the result of the application of an amnesty law or statute of limitations in the early stages of the procedure, and not of an actual criminal judgment. In other words, there could be cases where the accused has benefited from the *non bis in idem* principle, without any judicial procedures that could unveil the truth about the facts or the involvement of the accused in the crime. In contrast to these positive outcomes, without a precise delimitation regarding the reach of 'fraudulent' double jeopardy, this

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[42] *Case of Albán Cornejo and Others v Ecuador* (2007) Inter-Am Ct HR, Judgment of 22 November 2007, (Ser C) No 171, [111] (emphasis added).

[43] *La Cantuta* (n 21) [153]; *Almonacid-Arellano* (n 21) [154]; *Case of Gutiérrez-Soler v Colombia* (2005) Inter-Am Ct HR, Judgment of 12 September 2005, (Ser C) No 132, [98].

[44] *Case of Loayza-Tamayo v Peru* (1997) Inter-Am Ct HR, Judgment of 17 September 1997 (Merits), (Ser C) No 33, [66]–[77]. It is important to mention that the Spanish version of the ACHR, which is widely used by the Inter-American Court, refers to the impossibility of prosecuting someone for the 'same facts' and not cause: 'El inculpado absuelto por una sentencia firme no podrá ser sometido a nuevo juicio por los mismos hechos'.

[45] *Almonacid-Arellano* (n 21) [154]; *La Cantuta* (n 21) [153].

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interpretation could prove disastrous if it were to be misused by 'rogue regimes' against fundamental rights, such as legal security and certainty of judicial decisions.

As a final aspect of the Inter-American jurisprudence on matters relating to the national prosecution of mass atrocities, the IACtHR has developed an important body of work regarding the need to limit the scope of military jurisdiction. A complete recollection of these standards within this article would prove impossible because they are so numerous. However, it is important to present, at least briefly, the main arguments.

The Inter-American Court has continuously reaffirmed that[46]

> in a democratic State, the jurisdiction of military criminal courts must be restrictive and exceptional, and they must only judge military men for the commission of crimes or offences that, due to their nature, may affect any interest of [a] military nature.

As part of this general argument, the Inter-American Court has pinpointed two particular reasons why human rights violations and international crimes can never be subject to military jurisdiction. First, 'the nature of the crime and the legally protected interest'[47] can never correspond with the interests of the military system. Second, the prosecution of such violations and crimes must adhere to standards of due process, which include the independence, impartiality and competence of the natural judge. The court has emphatically affirmed that, when it comes to the prosecution of gross violations or crimes against humanity, military jurisdiction satisfies none of these requirements, in theory or in practice.[48]

To summarise, the Inter-American Court has developed a vast and robust jurisprudence on the state's obligations to protect human rights, which include the duty to investigate, prosecute and punish those responsible for the perpetration of mass atrocities. The court has also emphasised some specific rights, correlative to these obligations, including the right of access to justice, judicial protection, life, personal integrity and security, and personal freedom. As a natural consequence of these rights and obligations, states must use all their resources to fight impunity and they must, in particular, refrain from adopting any legal measures that could foster it.

2.2 Critical Evaluation of the Inter-American Court's Jurisprudence

Notwithstanding the richness of Inter-American jurisprudence, it has its critics. This section presents some of the most insightful arguments in this regard, which are particularly relevant when discussing the incorporation of regional jurisprudence into criminal prosecutions for mass atrocities. Indeed, these critics go to the heart of the debates and unveil what seems to be an ongoing tension between Inter-American jurisprudence and the application of criminal law at the national

[46] *Almonacid-Arellano*, ibid [131]; *La Cantuta*, ibid [142]; *Pueblo Bello Massacre* (n 17) [189]; *Radilla-Pacheco* (n 14) [272].
[47] *La Cantuta*, ibid [142]; *Radilla-Pacheco*, ibid [273].
[48] *La Cantuta*, ibid [142]; *Radilla-Pacheco*, ibid [273]; *Case of the 19 Tradesmen v Colombia* (2004) Inter-Am Ct HR, Judgment of 5 July 2004 (Merits, Reparations and Costs), (Ser C) No 109, [167].

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level. Some (partial) opponents of the jurisprudence of the IACtHR have even argued, as will be discussed in this section, a potential incompatibility between certain aspects of the legal regime applicable to international crimes (and probably gross violations of human rights) vis-à-vis due process norms, in particular a traditional interpretation of the principle of legality in the civil law tradition.

As has already been suggested, there are some apparent discrepancies within Inter-American jurisprudence when it comes to the characterisation of facts and the delimitation of state obligations. In an interview carried out as part of this research process, Juan Méndez identified this issue as an important problem when it comes to the consolidation of the Inter-American Court's judicial interpretation. In this context, he concluded that it is doubtful that *all* human rights violations should result in an *absolute obligation* to investigate, prosecute and punish, leading to a determination of whether statutes of limitations or *ne bis in idem* apply to cases of isolated violations. Nonetheless, as pointed out by Méndez, based on current Inter-American jurisprudence, the limits to these obligations are not yet completely clear.[49]

Indirectly, Douglass Cassel has also pointed out this apparent ambiguity. In a study on the role of the Inter-American system before transitional processes in Latin-America, Cassel is forced to enter into an interpretation of the court's jurisprudence in order to come to a conclusion on the specific scope of the limitation against amnesty laws. As Cassel points out, such an interpretative exercise is the result of the difference in the characterisation of the facts in the *Barrios Altos, Almonacid-Arellano* and *La Cantuta* cases.[50]

Along with these critics, other scholars have focused more closely on the broadness of Inter-American jurisprudence and its possible collision with the national legal regime. Ezequiel Malarino, for example, argues that in some instances the Inter-American Court has exceeded the boundaries of a reasonable interpretation of the Inter-American treaties. According to Malarino's argument, the court has entered into a process of modifying the law in order to adapt it to current social needs ('judicial activism'). At the same time, it has created new rights (particularly for the victims) that actually infringe other human rights enshrined in the ACHR, mainly due process norms.[51]

Significantly, Malarino concludes that Inter-American jurisprudence regarding the non-applicability of amnesty laws, statutes of limitations and *ne bis in idem* constitute the maximum expressions of the Inter-American Court's judicial activism. This author emphasises that such interpretations (or activism by the court) imply a partial substitution of the domestic legislatures and judiciaries, as well as the 'partial abandonment of the liberal guarantees that serve as limits of the punitive powers of the State'.[52]

[49] Interview with Juan Méndez, Visiting Professor of Law at the American University Washington College of Law, Washington DC, and UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Lima, 19 May 2010.
[50] Cassel (n 36).
[51] Ezequiel Malarino, 'Activismo Judicial, Punitivización y Nacionalización: Las Tendencias Antidemocráticas y Antiliberales de la CIDH' in Elsner (n 36) 25–63.
[52] ibid 61 (author's translation).

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Malarino's arguments have even been visible in some national decisions. For example, in *Espósito*[53] the Argentinean Supreme Court affirmed its duty to comply with the Inter-American decision in the *Bulacio* case, not without expressing its disagreement with the standard set by that decision. According to this court, the regional judgment 'forced' it to determine the non-applicability of the statute of limitation in a case that did not fall within the regime established by international law. Furthermore, according to the court, the implementation of the Inter-American decision 'transferred' to the accused the consequences of the state's failure to guarantee to the victims prompt access to justice, thus causing an unjustified limitation of the right to a defence.[54]

In a nutshell, from different angles, some authors have underscored the problems resulting from inconsistent and over-reaching interpretations of treaty norms, particularly when such interpretations impact on criminal prosecutions at the national level. And even if this article focuses on mass atrocities, which will always fall within the scope of an absolute obligation to investigate, prosecute and punish because of their nature and gravity, these inconsistencies could negatively affect the interaction between the Inter-American Court and national judiciaries, at least in two circumstances.

First, if the national judiciary is not sufficiently strong – because it has not reached institutional independence and impartiality, or it lacks the skills needed to develop complex legal arguments – a direct incorporation of the Inter-American Court's jurisprudence (as it stands now) could potentially be misconstrued. This could result in the unrestrained and inappropriate use of the punitive power of the state, much in line with Malarino's arguments.

In a different scenario, a perception of unpredictability and imprecision in Inter-American jurisprudence by stronger and more consolidated national courts could potentially lead to a lack of observance and adherence to the international interpretation. This is because such a lack of consistency and clarity could affect the Inter-American Court's authority and legitimacy in the eyes of national judiciaries. The presumption is based on the belief that a more consolidated judiciary complies with an international interpretation not only because of formalistic arguments, namely the mandatory nature of the judgments, but for substantive reasons. In other words, strong domestic courts would be more likely to follow the regional human rights jurisprudence if they find merits in the interpretation and arguments proposed by the international decision.

These considerations will be analysed further in the final section. However, at this point, it is important to conclude that despite the importance of the jurisprudence developed by the Inter-American Court, it has not been exempt from criticisms which must be noted if this regional body is to have a greater and more positive impact on national prosecutions for mass atrocities.

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[53] Miguel Angel Espósito was one of those accused of the extrajudicial killing of Walter Bulacio.

[54] Supreme Court of Justice of Argentina, *Espósito, Miguel Angel s/ incidente de prescripción de la acción penal,* E.224.XXXIX, 23 December 2004, [10]–[17].

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3. BASIS FOR THE ANALYSIS OF THE NORMATIVE IMPACT OF THE INTER-AMERICAN JURISPRUDENCE ON LATIN-AMERICAN COURTS

As was set out in the initial considerations, this article highlights the importance of the *indirect* normative impact of the Inter-American Court on national prosecutions for mass atrocities. In this context, Ariel Dulitzky has concluded that an evaluation of the impact of the Inter-American system 'through the lens of resolved cases is limited and problematic … [since it] fails to elicit its true contribution'.[55] Dulitzky also presents a provocative question: 'Can the mere examination of a judgment's content be sufficient to establish whether the Inter-American system is in fact fulfilling the role it is called upon to perform?'[56]

The following sections propose a particular approach to the debate on the impact of the Inter-American Court, based on the idea that such impact is correlated to an 'evolution' of the legal tradition and culture at the national level. In this context, it is argued that even a complete recollection of national decisions that refer to Inter-American jurisprudence would provide an inaccurate evaluation of the court's impact, if such a descriptive exercise does not delve into the mechanisms that make this impact legally possible.

Hence, it is contended that the mechanism in question is one that operates at the level of the legal tradition. Specifically, this mechanism implies the replacement of a formalistic conception of the law, according to which legal norms are always rules adopted by a legislative body, which courts must apply to individual cases without further consideration. Instead, from a neo-constitutional perspective, a juridical system is composed of norms and rules from different sources, as well as constitutional jurisprudence resulting from the interpretation of open-ended principles. Furthermore, in this new juridical paradigm, constitutional and international human rights norms become valid parameters to control the conduct of all state actors, including the legislator.[57]

Within this general context, this section discusses a different dimension of the interaction between national courts and the IACtHR: the 'judicial identity' of the former. For the purpose of this article, the concept of 'judicial identity' attempts to capture national courts' ideas about the law, rather than their institutional characteristics. In particular, this concept incorporates the national courts' perspective on the normative system, including international law, as affected by the legal tradition and culture. The said concept also comprises some elements which may provide an insight into the relationship between the courts and other government bodies, as an indirect confirmation of the courts' position regarding the first two aspects, namely their conception of the normative system and their role within it.

By opting for the renewal of constitutionalism as the basis for the analysis, this article has a twofold objective: (i) acknowledging an important tendency in many Latin-American legal systems and, at the same time, (ii) underscoring how a conservative approach to the civil law

[55] Ariel Dulitzky, 'The Inter-American Commission on Human Rights' in Salazar and Antkowiak (n 36) 129.
[56] ibid.
[57] Gustavo Zagrebelsky, *El derecho dúctil: ley, derechos y justicia* (Trotta 1995).

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tradition, as shaped by an argued positivist theory of a legal system, has in many instances led courts to fail in the fulfilment of their obligations to respond to mass atrocities.

Even though a detailed study of the essential characteristics of the civil law tradition exceeds the scope of this article, it is pertinent to say a few words on the matter. In one of his academic works, Italian professor Gustavo Zagrebelsky has affirmed that the liberal conception of *Estado de Derecho* (which, based on its uniqueness, cannot be compared with or translated as 'rule of law')[58]

> is characterized by an idea about law as a deliberate act of a representative Parliament and it is concretized in: a) the supremacy of the law before the administration; b) the subordination to the law, and only the law, of the citizens' rights [and] … c) the existence of independent judges with exclusive jurisdiction to apply the law, *and only the law*, to any controversy between citizens, and between those and the administration.

At first glance, these principles seem to be adequate bases for a system where the protection of rights takes central stage. Nonetheless, as Zagrebelsky notes, the supremacy of the law is affirmed by the principle of legality, which 'in general, express[es] the idea of the law as [a] supreme and irresistible normative act against which no other stronger norm can be opposed, regardless of its source or fundament'.[59]

The practical implications of this conception of the law have been clearly felt in Latin-America over many decades. For instance, by referring to Luis Solar's words, Javier Couso describes the perspective on the role of courts that prevailed in Chile for decades: [60]

> Even if the law exhibits a notorious injustice, the judge ought to apply it as it is: '*Dura lex sed lex*' (tough law is nonetheless law). If we allow judges to correct the injustice[s] of legislation, these would be replaced according to the conscience of the judge, and individuals would not know what to do, since each person has its own ways to understand fairness, and fairness would then inspire the most anomalous and contradictory decisions.

Chilean courts did not stand alone in this formalistic approach towards the law. As mentioned in the first section of this article, similar conclusions were reached, for example, by the Peruvian Truth and Reconciliation Commission on the role of the judiciary during Fujimori's regime.[61]

Even courts that attempted to stay active throughout the dictatorship and political transitions gave in to this particular conception of the law. As Alexandra Barahona concludes, despite some initial commitment to justice, for years Argentinean courts applied amnesty provisions that had been adopted while thousands of cases relating to crimes perpetrated during the dictatorship were

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[58] ibid 23 (author's translation).
[59] ibid 24 (author's translation).
[60] Javier Couso, 'The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America' in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010) 150.
[61] *Final Report of the Truth and Reconciliation Commission of Peru* (n 4).

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pending.[62] Based on a still traditional approach to the legal system, the courts retreated before decisions of the political bodies, which included the amnesty laws, without further consideration.

As these simple examples illustrate, without a true transformation of the conception of the law, it is hard to imagine national courts advancing interpretations based on international jurisprudence against local legislation (statutory law). In this scenario, there is no possibility of overcoming the legal obstacles identified by the Inter-American Court as contrary to the obligations and rights enshrined in the ACHR since they are, indeed, obstacles established *by law*. At the same time, in this normative paradigm there are only few possibilities, if any, for an effective impact of the work of the Inter-American system on national procedures for mass atrocities.

In contrast, the transformation of this formalistic understanding of the law could renovate the approach towards the juridical system. With time, this process should facilitate the incorporation of different norms and principles that exist outside positive law (statutory law), including the jurisprudence of the Inter-American Court. Echoing Couso, this transformation implies[63]

> a theory that regards the Constitution as embodying universal principles (human rights) deemed to be above any statutory law and susceptible to be directly applied by the judiciary, even at the cost of trumping the sovereign decisions of the democratically elected branches of the government.

Retrieving the idea of 'judicial identity', it is clear that it will be radically different between courts that have already experienced some level of transformation within the paradigm of a renewed constitutionalism and those which still obey the logic of the principle of legality, as the maximum expression of the liberal state of law (*Estado liberal de Derecho*). It is in the first type of judicial identity – which, for the purpose of this article, will be called *neo-constitutional* in opposition to *over-traditional* – that an opportunity for a greater normative impact of the Inter-American Court will be found. Which aspect of this new approach towards the Constitution, and the legal system at large, facilitates the incorporation of Inter-American jurisprudence? As Roger Rodríguez points out[64]

> [t]he possibility of reconciling [different] legal norms and rules without entering (unless the situation is insurmountable) in[to] a conflict of interpretations becomes more evident once we take into account that the specifics of the legal system – within constitutional states – on many occasions allows, through techniques of rational argumentation, to generate relations of coordination and complementarity in the interpretation of fundamental rights.

The process Rodríguez describes is only feasible (and acceptable) within a neo-constitutional identity where the courts admit other norms as valid in addition to legislative acts, and where

[62] Barahona (n 3) 119–60.
[63] Couso (n 60) 154.
[64] Roger Rodríguez, 'Relaciones de coordinación interpretativa entre la Corte Interamericana de Derechos Humanos, el Tribunal Constitucional y la Corte Suprema, con especial incidencia en los procesos penales' in Victor Manuel Quinteros (coord), *Judicialización de violaciones de derechos humanos: aportes sustantivos y procesales* (IDEHPUC 2010) 43 (author's translation).

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rights can have different sources and foundations. Constitutional and international human rights norms are a particularly fruitful soil for this kind of integrative interpretation, as they are 'statements that do not respond to a formal and clear structure of premise-consequence, which have an open-texture content'.[65]

In addition to this new understanding of law, in a neo-constitutional identity the judiciary redefines its role and perceives itself as the true guarantor of rights.[66] Acting accordingly, the courts are capable of addressing some of the most critical political decisions (and questions) adopted through positive norms, and of rendering opinions that go beyond a textual interpretation of the law.

Evidently, as a precondition for this transformation of judicial identity, domestic courts should reach certain levels of consolidation, in terms of independence, impartiality and the ability to develop complex legal arguments. These are, no doubt, necessary elements if the judiciary is to resist attacks from persons or groups involved in the perpetration of mass atrocities and who still may hold some power. Within this context judicial identity must be understood as a complementary element of the environment under which courts operate, and not as a substitution for other institutional characteristics.

In sum, in order to maximise the normative impact of the Inter-American Court on national prosecutions for mass atrocities, it is indispensable to promote (or witness) an evolution of the identities of national judiciaries. A new identity, based on a new conception of the 'law' and the role of the courts, allows for such bodies to become true guarantors of human rights and develop judicial practice that goes beyond a textual interpretation of positive law. On this basis, the next section presents some cases that are representative of the arguments presented above.

4. Analysis of the Normative Impact of the Inter-American Court on National Decisions

As mentioned earlier, recent studies have identified an evolving transformation in legal cultures in different countries in Latin America.[67] Such evolution seems to go hand in hand with another phenomenon that has also been identified by the same literature: a rise in the 'judicialisation of politics'.[68] Interestingly enough, parallel studies have pointed to an exponential increase in national decisions relevant to the prosecution of mass atrocities, which resort to concepts traditionally associated with international law (including categories of international crimes), and/or contain extensive references to international norms and jurisprudence.[69] The possible connection

[65] Roger Pereira, 'El derecho penal constitucional: interpretación y aplicación' in Quinteros, ibid 64 (author's translation).
[66] Marian Ahumada, *La jurisdicción constitucional en Europa. Bases teóricas y políticas* (Universidad de Navarra-Civitas 2005).
[67] Couso (n 60).
[68] See Rachel Sieder, Line Schjolden and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave MacMillan 2005) 320.
[69] See Kai Ambos and Ezequiel Malarino (eds), *Jurisprudencia latinoamericana sobre Derecho Penal* (Konrad-Adenauer-Stiftung 2008).

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between these two phenomena has been discussed marginally, but it is precisely in the realm of such possibilities that this article is constructed.

Based on theoretical considerations, this section analyses specific decisions issued by courts in Argentina, Chile and Mexico as examples of the possible correlation between judicial identity and the normative impact of the Inter-American Court.[70]

Before embarking on this analysis, it is important to stress that the 'judicial identity', as put forward in previous section, is not an unalterable characteristic of domestic courts. Courts may show varying practices and interpretations not only throughout time but also in respect of different topics. Thus, even if this article identifies a particular 'judicial identity' for a given national court, this must not be understood as a definitive characterisation, but only in relation to the decisions presented herein. Additional analysis would be needed in order to propose a definitive characterisation for the identity of any given judiciary.

Without further preamble, the analysis of the national judicial precedents will begin with two decisions delivered by the Argentinean Supreme Court after 2004. At that point, international human rights law had attained constitutional hierarchy within the Argentinean legal system.[71] In addition, crucial reforms had been approved with the aim of strengthening the judicial independence of the Supreme Court, which had been suffering from a deep crisis of credibility.[72] These changes were reinforced with the election of highly regarded jurists as justices, including Eugenio Raúl Zaffaroni.

It was in the midst of these changes that a renewed Argentinean Supreme Court delivered the *Espósito* decision. As mentioned earlier, this decision was directly related to the *Bulacio* case in which the Inter-American Court had upheld the non-applicability of a statute of limitations to criminal prosecutions against those accused of killing Walter Bulacio. Even when the Argentinean court expressed its disagreement with this criterion, it upheld the mandatory nature of the Inter-American Court's ruling and the obligation of all Argentinean courts to decide any remedy in line with the regional judgment.[73]

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[70] It is important to say that the analysis provided in this section is not based on empirical research and does not attempt to be exhaustive. It only proposes a theoretically possible connection between some relevant characteristics of the legal systems and courts in those three countries, and some landmark decisions directly related to the incorporation of Inter-American jurisprudence and national prosecutions for mass atrocities. There is no doubt that in order to reach more solid conclusions as to the proposed correlation, further studies must be carried out.

[71] Argentinean Constitution, art 75(22), according to which: 'The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.' An authoritative translation in English of the Argentinean Constitution can be found at http://www.senado.gov.ar/web/interes/constitucion/english.php.

[72] See Alba Rubial, 'Self-restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court' (2009) 51 *Latin American Politics and Society* 59–86.

[73] *Espósito* (n 54) [6] and [10].

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The *Espósito* decision is, no doubt, an important precedent which leaves no question about the obligation to comply with an international decision. Nonetheless, for the purpose of this article, it is important to remember that this ruling was not the result of an adherence with the Inter-American judicial interpretation, but quite the opposite.

Only a few months later after the *Espósito* ruling, the same court issued another decision that became a cornerstone for future prosecutions for mass atrocities in Argentina. In *Simón*, the Argentinean Supreme Court affirmed the non-applicability of the Full Stop and Due Obedience Laws that, for many years, had barred criminal prosecutions. Crucially, this ruling was almost fully supported by the decision issued by the Inter-American Court in the *Barrios Altos* case against Peru. This aspect of the national decision must not be taken lightly.

In an unprecedented move, the Argentinean court resorted to a judgment issued against a third country in order to determine the scope of Argentina's international obligations. Moreover, based on this decision, the Argentinean Supreme Court established a clear limit to the powers of other branches of government, based on a progressive interpretation of certain constitutional principles and international human rights norms.[74] In the words of the Argentinean Supreme Court:[75]

> While it is true that Article 75(20) of the … Constitution empowers the Legislative Branch to issue general amnesties, the scope of this power has been restricted significantly. In principle, amnesty laws have been used historically as tools of social pacification, for the explicit purpose of resolving residual conflicts in the aftermath of civil struggles. In an analogous sense, Laws 23.492 and 23.521 attempted to leave behind clashes between 'civilians and the military'. Just as with all amnesties, however, insofar as they are oriented toward 'forgetting' gross human rights violations, they contravene the provisions of the American Convention on Human Rights … and are, therefore, constitutionally intolerable … Consequently, in view of 'the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, *the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible*'.

Within this context, it is of the utmost importance to highlight that, despite relying heavily on regional interpretations, the *Simón* decision was not adopted as a means of complying with an order issued by the Inter-American Court against Argentina.[76]

The two decisions described above illustrate different aspects of the normative impact of Inter-American jurisprudence on national prosecutions. While *Espósito* represents a formalistic approach in which the national court obeys the regional judgment solely because of its mandatory nature, the *Simón* decision exemplifies an incorporation of international jurisprudence based on identification with the substantive arguments advanced in the regional judgments.

[74] *Simón and Others v Office of the Public Prosecutor*, Appeal judgment, S.1767.XXXVIII, ILDC 579 (AR 2005).
[75] ibid (footnote omitted).
[76] It is important to note that in 1992 the Inter-American Commission issued a recommendation on the incompatibility of the Argentinean amnesty laws with the ACHR. See IACHR, *Consuelo et al v Argentina,* Case 10.147 and others, Report No 28/92, 2 October 1992. Nonetheless, as the Supreme Court underlined, the *Barrios Altos* decision provided the criteria needed to determine the scope of the prohibition of the amnesty laws.

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Despite their differences, both decisions align with a *neo-constitutional identity,* in which courts obey and resort to Inter-American jurisprudence in order to determine the scope of constitutional norms. Courts are also willing and able to address more politically sensible questions, aiming at better protection of human rights. These conditions are indispensable in overcoming legal obstacles regarding the prosecution of mass atrocities and to consolidate a constitutional system.

The *Simón* decision exemplifies a particularly interesting and, arguably, more positive normative impact of the Inter-American Court precisely because it was not adopted in compliance with a direct order of the court. In this kind of judgment a deeper meaning of judicial dialogue can be found: national courts observe regional jurisprudence because of the legitimacy of the argumentation rather than its formalities.

Following a series of critical decisions, largely in line with the *Simón* judgment, national prosecutions for mass atrocities have skyrocketed in Argentina. In March 2010, 1,464 individuals were facing criminal procedures for crimes against humanity perpetrated during the dictatorship.[77] In December 2010, a federal court imposed a long-overdue sentence of life imprisonment on Rafael Videla, former general and leader of the *Juntas.*[78]

The second case study will focus on Chile. Intrinsic complexities of the Chilean legal system and institutions, coupled with difficulties in accessing the original judgments, make this case a less certain example. Nonetheless, it is worth exploring some decisive moments that seem to indicate a new approach to judicial interpretation in respect of prosecutions for mass atrocities.

In 2004, the Chilean Supreme Court ruled on the non-applicability of the amnesty law to the kidnapping of a guerrilla leader. The court reached this conclusion based on the continuous nature of the crime: since the whereabouts of the victims were still unknown, the crime had exceeded the time period covered by the amnesty decree. The Chilean court also made some references to international instruments, even though they were not the legal bases of the main argument. Despite the importance of this decision, the Supreme Court did not rule on the non-applicability of the amnesty law in more general terms.[79]

Two years later, the Inter-American Court issued its decision against Chile in the *Almonacid-Arellano* case. On that occasion, the IACtHR ordered the Chilean authorities to 'ensure that Decree Law No 2.191 [amnesty law] does not continue to hinder the investigation, prosecution, and, if applicable, punishment [of gross violations and crimes against humanity]'.[80] As Alexandra Huneeus has emphasised, despite public pronouncements against the

[77] Centro de Estudios Legales y Sociales, *Adelanto del Informe 2010 sobre la situación de los derechos humanos en Argentina* (CELS 2010).
[78] Federal Criminal Tribunal (Córdoba, Argentina), *Videla Jorge Rafael y otros, p.ss.aa Imposición de tormentos agravados, Homicidio calificado, Imposición de tormentos seguidos de muerte, Encubrimiento (Expte N° 172/09)*, and *Menéndez, Luciano Benjamín y otros p.ss.aa. Privación ilegítima de la libertad agravada, Imposición de tormentos agravados (Expte N° 13/09)*, 22 December 2010.
[79] Rol No 517-2004 *Miguel Angel Sandoval Case, Action to annul* ILDC 394 (CL 2004).
[80] *Almonacid-Arellano* (n 21) operative para 6.

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Almonacid-Arellano decision, '[t]he [Chilean] Supreme Court has … complied with [it] in that the Amnesty Decree has not been applied … since the Inter-American Court's ruling'.[81] Furthermore, more recently, in the *Lecaros Carrasco* case, the Chilean Supreme Court upheld that the amnesty law could never be applied to prosecutions for crimes against humanity. Much in line with Inter-American jurisdiction, this court also referred to the non-applicability of the statute of limitations to this type of crime.[82]

Reflecting on this noticeable evolution in Chilean jurisprudence, Huneeus concludes that 'this was the direction that the Chilean courts have been heading since 1998 … [t]hus it is impossible to attribute this switch to the Inter-American Court's single decision, or even to a line of decisions'.[83] Despite this initial statement, Huneeus also agrees that 'the Inter-American Court provided one more tool in the kit of those arguing against the Amnesty Decree'.[84]

Rather than lead to a discouraging outcome, Huneeus' conclusions portray Chile as an appropriate example to support the argument advanced in this article. It also reveals the importance of the indirect normative impact of Inter-American jurisprudence. Despite some rhetoric and reticence, Chilean courts have progressively resorted to international standards as part of their argument 'tools', resulting in a clearer alignment with Inter-American jurisprudence. Thus, although in a more discreet fashion, the latter Chilean decision seems to be closer to a *neo-constitutional identity* in as much as it uses arguments based on international law as a 'tool' to limit the legal effects of national legislation.

Finally, this article will discuss two decisions of the Mexican Supreme Court, as a third case study. As a starting point for this part of the analysis, it is important to stress that, for decades, the Mexican legal system presented some unclear constitutional bases when it came to the relationship between domestic and international law.[85] Constantly changing and ambiguous interpretations regarding the hierarchy of international law resulted in a complex scenario in which the incorporation of international human rights norms and jurisprudence was uncertain. In addition, despite some important constitutional amendments adopted in the 1980s and 1990s aimed at

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[81] Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights' in Couso, Huneeus and Sieder (n 60) 123.

[82] Supreme Court of Chile (Criminal Chamber), *Case against Claudio Abdón Lecaros Carrasto for the crime of kidnapping* (*Caso de Claudio Abdón Lecaros Carrasco seguido por el delito de secuestro calificado*), Rol No 47.205, 18 May 2010.

[83] ibid.

[84] Huneeus (n 81) 123.

[85] According to the Mexican Constitution, art 133: 'This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union.' For decades, the Mexican Supreme Court of Justice upheld the idea that there could be no conflict between domestic and international law, since each body of law has a different scope of application. Since 1999, the Mexican Supreme Court has changed its own interpretation in order to affirm that, from a hierarchical point of view, in the event of conflict between different norms, constitutional provision must prevail, followed by international treaties and, lastly, general laws issued by the Federal Congress. See, eg, the academic commentaries to the decision of the Mexican Supreme Court of Justice in *Amparo en revision 1475/98*, published in the Mexican legal journal, (2000) 2 *Cuestiones Constitucionales*, available only in Spanish, http://www.juridicas.unam.mx/publica/rev/cconst/cont/3/cj/cj7.htm.

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strengthening the independence of the Mexican Supreme Court and its role as a constitutional tribunal,[86] some scholars continued to stress the failure of this court to protect human rights effectively.[87]

Within this context, the Mexican Supreme Court delivered its decision in the *Corpus Cristi* case, which concerned a massacre perpetrated during the 'dirty war'.[88] On that occasion, the Supreme Court upheld the application of the statute of limitations. This ruling was based on a textual interpretation of the principle of legality enshrined in Article 14 of the Constitution and contrary to prevailing international norms and jurisprudence, including that of the Inter-American Court. According to the Mexican court, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity could be applied only to crimes perpetrated or initiated after Mexico ratified this treaty, in 2002.[89]

This decision served as evidence of the court's extremely formalistic approach towards the use of international law in the prosecution of mass atrocities, much in line with what could be expected from a judiciary with an *over-traditional* identity. In practical terms, the judgment became a monumental blow to all cases arising from the period known as the 'dirty war' that were being investigated at the time by the relevant authorities.

Years would pass before the Mexican Supreme Court was faced again with a case relating to the prosecution of mass atrocities. The opportunity came in 2010, when the court became engaged in intense debates about the means to comply with the Inter-American decision in the *Radilla-Pacheco* case, which involved the forced disappearance of a *campesino* leader during the 'dirty war'. At the national level, criminal proceedings against a former general were allocated to a military tribunal. On this particular point, the Inter-American Court ruled that any future criminal prosecutions arising from this case must be brought before ordinary courts. It also concluded that national judges must exercise control of conventionality and issue 'constitutional … interpretations regarding the material and personal competence criteria of military jurisdiction in Mexico … [in line with] the principles established in the jurisprudence of this Tribunal [on the matter]'.[90]

[86] Héctor Fix-Fierro, 'La reforma judicial en México: ¿De dónde viene? ¿Hacia dónde va?', Working Paper, Instituto de Investigaciones Jurídicas, UNAM, 2002.
[87] Karina Ansolabehere, 'More Powers, More Rights? The Supreme Court and Society in Mexico' in Couso, Huneeus and Sieder (n 60); Ana Laura Magaloni, '¿Por qué la Suprema Corte no ha sido un instrumento de defensa de los derechos fundamentales?', Working Paper, CIDE, 2007.
[88] The term 'dirty war' is being used to refer to a particular period of the 75-year rule of the Party of the Institutional Revolution in Mexico. According to the *Informe Historico a la Sociedad Mexicana* (the result of the work of a government-established group of historians which constituted the closest Mexico had to an inquiry commission), during this period mass atrocities were perpetrated in Mexico. This report has even characterised some of those crimes as international crimes. In November 2001, Mexican President Vicente Fox created the Special Prosecutor for Crimes of the Past. The *Corpus Cristi* was one of the most notorious cases investigated by the Special Prosecutor, who attempted to indict former President Luis Echeverria as being responsible for the massacre of students perpetrated in 1971.
[89] Appeal No 1/2004-PS, Appeal No 8/2004-PS *FEMOSPP and the Federal Prosecutor v Echeverría and Others*, Appeal Decision, ILDC 76 (MX 2005).
[90] *Radilla-Pacheco* (n 14) [340].

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Over a year after the *Radilla-Pacheco* judgment was issued by the Inter-American Court, the Mexican Supreme Court was still caught up in protracted debates on procedural formalities regarding compliance with the judgment. These debates included such questions as whether the regional decision had been legally notified to the Supreme Court and whether compliance with an international ruling should fall within the exclusive responsibility of the Ministry of Foreign Affairs.[91] Furthermore, at some point of the discussion it was suggested that even if the regional decision did impose a legal obligation on the judiciary, no action could be taken since there were no pre-existing legal rules governing compliance with international judgments by national courts.[92]

Up to that point, the Mexican Supreme Court's debates seemed to be yet another example of how procedural arguments, based on conservative and formalistic interpretations of the national legal system, had the potential to radically limit the impact of Inter-American jurisprudence over national prosecutions for mass atrocities. However, this scenario dramatically shifted after the approval, in June 2011, of a set of constitutional amendments, which incorporate the obligation of all state authorities to respect, protect, ensure and promote human rights, and clarify the duty to incorporate international law when defining the existence and scope of any human right.

On 14 July 2011, the Mexican Supreme Court adopted a groundbreaking decision in which it: (i) affirmed the obligatory nature of the judgments of the Inter-American Court against Mexico; (ii) concluded that no national authority (including the Supreme Court itself) can review or modify the regional judgment; (iii) stated that all authorities must interpret national legislation in accordance with constitutional and international human rights standards, and (iv) ordered all national judges and courts to exercise, if necessary, constitutional and conventional control over national legislation (an extensive version of traditional judicial review).[93] Even more, in compliance with an express order of the Inter-American Court, the Mexican Supreme Court issued a revised constitutional interpretation of the Military Code of Justice, by which the competence of military courts to prosecute members of the armed forces for the perpetration of any human rights violation is completely excluded.[94] This decision constitutes a radical departure from previous interpretations regarding the scope of military justice, as had been upheld by the Supreme Court just a few months before approval of the constitutional amendments.

All in all, the decision adopted by the Mexican Supreme Court in compliance with the Inter-American ruling in *Radilla-Pacheco* becomes more relevant when understood not only as part of the efforts to bring justice for crimes perpetrated decades ago, but also against the backdrop of the robust involvement of the Mexican armed forces in the current security crisis. In this regard, the normative impact of the Inter-American Court not only relates to events in the past;

[91] Official records of the public hearings of the Mexican Supreme Court (31 August; 2, 6 and 7 September 2010), available only in Spanish, http://www.scjn.gob.mx/pleno/Paginas/ver_taquigraficas.aspx.
[92] Official records of the public hearing of the Mexican Supreme Court (31 August 2010) 57–59, available only in Spanish, http://www.scjn.gob.mx/pleno/Paginas/ver_taquigraficas.aspx
[93] *Expediente varios 912/2010*, Supreme Court of Justice of Mexico (14 July 2011).
[94] ibid.

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rather, it becomes a true precedent that should be applied in future cases, thus unveiling the structural impact that one Inter-American decision can potentially have.

Even though it would be extremely daring to pinpoint the precise reasons why the Supreme Court opted to modify its interpretation in the midst of a highly politicised and polarised scenario, it is impossible not to consider the concurrence of two important factors: (i) the issuing of an important regional decision, and (ii) the entry into force of a crucial and novel constitutional amendment, which clearly set the path for the incorporation of international law into Mexican judicial decisions. Thus, bearing in mind the merits of the arguments, as well as the concurrence of international and constitutional elements, the Supreme Court's decision in the *Radilla-Pacheco* affair might very well become a determining building block in the Mexican courts' transition from an *over-traditional identity* to a *neo-constitutional* one. The contrast between the *Corpus Cristi* decision (and even the first stages of the national discussion regarding the *Radilla-Pacheco* case) and the final decision on *Radilla-Pacheco* is, without a shadow of doubt, outstanding – especially considering the short period of time that elapsed between them.

5. CONCLUSIONS

In discussing the normative impact of Inter-American jurisprudence on national prosecutions for mass atrocities, this article presented a particular question: Under which circumstances are local courts more likely to follow and incorporate Inter-American jurisprudence into their decisions?

Bearing in mind some initial considerations on why, for decades, Latin-American judiciaries failed to prosecute mass atrocities, this article has presented a brief review of some of the most relevant Inter-American jurisprudence regarding standards and principles on the subject. This section served as a reference point for a subsequent analysis of some recent national decisions which, relevant to the matter under study, represent different levels of incorporation of Inter-American jurisprudence, and international law at large.

Within this context, this article has argued that any variation in the normative impact of Inter-American jurisprudence from one decision to another could not be explained exclusively through a review of the national or international rulings. Rather, it is deemed appropriate to incorporate into the analysis a parallel phenomenon occurring at the local level: the evolution of the legal tradition and cultures in many countries in Latin-America. For the purpose of this article, the effect of this evolution on the courts is captured in the concept of 'judicial identity'.

With these bases, through the study of specific national decisions, it was concluded that there appears to be a correlation between the judicial identity of national courts and the normative impact of Inter-American jurisprudence related to criminal prosecution for mass atrocities. In other words, there appears to be a relationship between a higher degree of judicial departure from traditional interpretations of the legal system and ideas about the courts' role before other state powers, and a higher possibility for national courts to advance arguments based on Inter-American jurisprudence in cases related to mass atrocities.

In this context, the indirect normative impact of the Inter-American Court will be of great importance, as its jurisprudence can prove to be an essential argument tool in the process of

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consolidating the courts' new identity and their rightful place in the prosecution of mass atrocities and protection of human rights. This is however, a complementary element to other institutional capabilities, including the independence of the courts, which are of course needed.

Furthermore, as a necessary consequence of the argument presented in this article, it is important to acknowledge that the normative impact of the Inter-American Court seems to be extremely contingent on national phenomena. In other words, if the argument advanced in this article is correct, a sustained impact of Inter-American jurisprudence cannot be guaranteed unless national transformation of the legal culture is strongly entrenched. In this context, efforts by relevant national and international actors must not only focus on compliance with individual judgments but should also be directed at the consolidation of a *new constitutional* identity of the judiciary. Based on the case studies presented here, such an identity could in fact be present, in different degrees, in many Latin-American countries. However, affirming whether such transformations are actually sustainable, and can endure time, definitely require more extended studies.

From a different perspective, it is also important to bear in mind some critics of Inter-American jurisprudence, who have identified possible tensions between judicial interpretations based on regional decisions and certain essential guarantees in criminal proceedings. This is undoubtedly an important issue that must be further studied, if Inter-American jurisprudence is to continue to have a positive impact on national processes for mass atrocities.

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