

**Impunity: in the search of a socio-legal concept
Elucidations from a State Crime case study**

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General Abstract

In the contemporary world, the fight against impunity has become a fundamental political claim, a social goal and a main concern for human rights movements. However, it is unclear how we can delimit this fight, what are its aims and, ultimately, the remedies it proposes to overcome impunity. The academic studies and human rights mechanisms referring to this issue are not sufficiently clarifying. They often lack clear theoretical distinctions and stable empirical observations. Moreover, in social discourses impunity is employed with extremely vague connotations. This research addresses this lacuna, offering a conceptualization and characterization of impunity from a socio-legal perspective. With this purpose in mind, this work develops an analysis of impunity through the study of a particular kind of criminality.

The study of state crime provides a prolific perspective for the analysis of the phenomenon of impunity, allowing to visualize the constitution of different blockages against the autonomous operation of the criminal justice. Particularly, this research studies an event of enforced disappearance initiated at the siege of the Colombian Palace of Justice in 1985, through a reconstruction focused on the perspective of the victims using a combination of qualitative methods. This field work, alongside different explorations of the sociological, human rights and criminological state of art of impunity, provides a sociological reflection on the concept of impunity. In the end, taking into account the problematization of the concept and its uses in social discourses, this work proposes a conceptualization apt for overcoming the vagueness of the definition of impunity as well as allowing a delimitation of the fight against it, leaving space for possible innovations on the penal rationality and possibly reinforcing a human rights agenda, concerned with the escalation of repression through punishment and committed with the restoration of social links and the victims' rights.

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Más vale vivir por algo que morir por nada.

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Acronyms

AI	Amnesty International
Col.	Colonel
GGHM	Governmental Group of Historical Memory
IA Court	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission of the United Nations
MPR	Modern Penal Rationality
PJ	Palace of Justice
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
US	United States of America

*“Poco podrán las armas: les falta corazón.
Separarán de pronto dos cuerpos abrazados,
pero los cuatro brazos avanzarán buscándose
enamoradamente”*

Miguel Hernández

“Más vale morir por algo que vivir por nada”

José Eduardo Umaña Mendoza

1. Introduction

'There is nothing to be done, it is a state crime'

Impunity is an undeniably evocative and pervasive term. It has become so ubiquitous that its meaning is deemed obvious (Penrose 2000: 273). We all refer to impunity as an evident term and do so with a connotation of social regret. In social discourses, impunity is often used for broad and varied purposes: denouncing injustice, supporting law and order politics, expressing regret for social wrongdoing or mobilizing civil society, among others.

The early nineteenth century understanding of impunity as a possibly valid mechanism for dealing with social unease, juvenile delinquency, political transitions or situations of widespread criminality, is currently demoted. Contemporary western societies refer to impunity as a problem: “[i]n the twenty- first century, fighting impunity has become both the rallying cry and a metric of progress for human rights” (Engle, Miller and Davis 2016: 1).

The patent consensus against impunity, however, has not contributed to a sociological clarification of its notion and extent. Even though it is rare to come across academic studies problematizing and conceptualizing what impunity is, our work will refer to this issue as a social phenomenon in the sense that it is an observable fact of social life. Indeed, our starting point for developing a characterization and conceptualization of impunity is that this phenomenon *exists* in society. Although it is not difficult to find misleading notions of what impunity is and even though it may be difficult to delimit and describe it - some literature in the field recognizes that probably

no definition is exempted from major conceptual problems (Bonet & Fernández 2009; Penrose 2000; Alvarez 2012), this phenomenon will not be understood in this work as a mere social illusion: it is because impunity *exists* that we need to assess how we can observe it.

The present research will address these problems and lacunae through a problematization and elucidation around how we can observe, conceptualize and characterize impunity from a socio-legal perspective. Bearing this purpose in mind, considering the wide-ranging universe of wrongdoing from which impunity may arise, a preliminary step was the selection of a particular form of misconduct enabling a significant perspective for deconstructing and reconstructing a conceptualization of impunity. With this respect, our initial explorations suggested that crimes committed with the acquiescence, support or direct involvement of the State had a particular interrelation with the phenomenon of impunity. Thus, we decided to study *state crime* considering the possible analytical advantage that this kind of criminality may offer for exploring our research question: *how can we observe, conceptualize and characterize impunity from a socio-legal perspective through the study of state crime?*

States assume their authority from the proclaimed aim of protecting and guaranteeing the life and rights of the people. When States appear as instigators, collaborators or active actors of criminal activity, there is a documented tendency to block any public scrutiny. In literature and through social experience, we can find evidence that this kind of wrongdoing often lacks social restraint and proper redress. For these observations, impunity may emerge as a key notion.

In state crimes studies, impunity is often addressed as a violation of a human right that generally takes place when states shield from legal reaction those who commit human rights abuses on their behalf (Aldana-Pindell 2004: 606-608). Sometimes impunity is understood as a

transitional justice problem, when evaluating the reaction of the criminal law towards state crimes committed during regimes overruled in the context of political transformation (Eser, Arnold & Kreicker 2002). At times, impunity is viewed as a problem of the criminal justice with differing possible solutions ranging from a retributivist perspective (center of gravity of the current construction of the *fight against impunity*) to with a (extremely marginal) restorative orientation. However ambiguous in the literature, we considered that an analysis of this form of criminality might enable an analytical advantage to further our understanding of the phenomenon of impunity.

A socio-legal problematization and conceptualization of impunity through the study of state criminality could not be properly conducted without an empirical reference. Our socio-legal construction will be guided by both a theoretical study and a fieldwork. These two axes of research will be integrated into a shared field of analysis. Borrowing Bateson's (1972) terms, we aim at achieving a sort of 'pincers maneuver' (*operation en pince*), by which the observations of social life and the fundamentals of science or philosophy form one single field for the scientific exploration of a problem (the concept of impunity). Within this interconnected field of reflection, empirics and theory, each of which with "its own kind of authority" (Bateson 1972: 6), should operate under a cooperative interaction, avoiding any preeminence, hierarchy or subordination. In this line, we attempt to achieve a form of exchange by which every development of our axes of research involves the movement of the whole *corpus* of reflection.

The empirical analysis of this work is based on an event of enforced disappearance occurred in 1985 at the Palace of Justice in Colombia (hereinafter, the PJ case). This case consists of a series of crimes materialized during the taking of the National Palace of Justice by the 'M19' guerrilla and the subsequent retaking of the building by the military, in November 1985. At the PJ,

around one hundred people perished, including eleven justices of the Supreme Court and thirty-five guerrillas; a conflagration consumed a significant part of the structure of the Palace and a number of hostages were released. The military labelled some as accomplices of the guerrilla and held them for interrogation. During their detention, some people were tortured, some were killed and some were forcibly disappeared (IA Court 2014).

The present research will focus the analysis on the crime of enforced disappearance as well as its subsequent criminalization. Thirty years after the events there have been numerous legal inquiries: some judgments have been passed, but procedures have shed little light on those responsible for the wrongdoing as well as on finding the people disappeared. Indeed, not all the bodies have been recovered and there has been no final conviction of any of those involved in the disappearances. Over thirty-one years have elapsed and the victims are still wondering: where are the people that disappeared from the Palace of Justice and what happened to them?

The case study is relevant, exemplary and important for exploring our research question, especially with regard to the legal system reaction *vis-à-vis* the criminal events. With this respect, among a great amount of legal procedures in national and international courts, we will focus on the study of the criminal dossier against retired Colonel Alfonso Plazas Vega (hereinafter, Plazas or retired Col. Plazas), who was in charge of the field operation to retake the Palace of Justice. He was found guilty of enforced disappearance by the tribunals but afterwards acquitted by the Supreme Court of Justice.

We decided to focus on this dossier because it resulted in the first conviction of a high ranked military officer by ordinary tribunals for the PJ events and for the crime of enforced disappearance –although he was later acquitted. The indictment against retired Col. Plazas initiated

a lengthy procedure that undertook all possible instances within the domestic criminal justice system. This trajectory will allow us to review different instances of the criminal procedures, covering more than thirty years of history of the case. The dossier against retired Col. Plazas is also paradigmatic because of his status. Plazas is a prominent figure of the Colombian military, enjoying a widespread support amongst the Colombian traditional political class – especially of the political Right. For these reasons, the independent and most prestigious national magazine, *Semana* (2009), qualified this process as “the trial of the decade”: “[t]his is the first time that a senior military is on the bench for the crime of enforced disappearance. In the past, this seemed restricted to Southern Cone dictatorships.” (Semana 2009).

The PJ case presents a paramount historical relevance in Colombia; however, this event will not be dealt with through a phenomenological account. Our study of the case will focus on enabling a field of reflection around the system of ideas, notions, discourses and practices that it brings about. This intends to habilitate further observations, intercommunications and analysis when dealing with the concept of impunity in reference to the problem at hand of state criminality.

Concerning the mentioned elements and considering our analytical and conceptual aims, this case study is intended to furnish a point of reflection for our research question. As asserted before, this construction will be drawn in constant dialogue with the different parts of this research that will be divided into five main parts: the methodology (Chapter 2), the case of study (Chapter 3), the study and characterization of state crime (Chapter 4), the conceptualization and elucidation of impunity (Chapter 5) and, finally, the conclusions (Chapter 6).

In the *methodology* (chapter 2), we intend to offer a general characterization of the methods used for the research, as well as the structure and criteria for the selection, observation and analysis of

the information gathered in this work from literature and our own fieldwork. From a methodological perspective, this work can be characterized as a qualitative study based on a case study. With the purpose of exploring the research questions proposed in this project, this research will depict and analyze relevant experiences, ideas and discourses of four main groups of people involved in the case study: the victims, their lawyers, the defendant and the judicial operators related to the case. By depicting how victims, lawyers and justice operators construct their views, our objective will be to observe how they understand the notion of impunity and which elements could be significant for the observation of state criminality. The experiences, ideas and discourses of these actors will be depicted, developed and analyzed based on different sources of information. This exploration will include the analysis of legal records, a media and documentary review, observation *in situ* of different public commemorations related to the case, and thirty-one face-to-face semi-structured in-depth interviews. These sources of information are varied and complementary, providing a rich combination of primary and secondary information.

Following our general methodological considerations, in *Chapter 3* we will describe the case selected for the present research. In this part, we will offer a structured account of the Palace of Justice case reconstructing its antecedents and context (Section 3.1), the events of the taking and the operation to retake the Palace and the disappearances (Section 3.2), as well as a summary of the legal proceedings dealing with these actions, covering a period from 1985 to 2016 (Section 3.3). Working with our case study attempts at contributing to understand, enrich and characterize the link between the lack of legal intervention and state criminal actions suggested by the literature. The great amount of information that the PJ case provides and the prolific field of reflection that the crime of enforced disappearance enables may be important for furthering our understanding

around the operation of the criminal law system and, therefore, for addressing the problem of impunity.

Considering this study, in *Chapter 4* we will analyze and characterize the phenomenon of *state crime*. During the twentieth century, conservative estimations calculate between 100 million and 135 million deaths caused by the deliberate actions of the State (Friedrichs 1992: 54). Despite this fact, certain authors assert that there is a lack of research, curiosity and awareness on this topic (Rothe 2009: xvii). Others assert that the subject of state crime has often been raised by criminology but its implications have been “conveniently repressed” (Cohen 1993: 98). Among a variety of views, there seems to be a consensus on state crime literature about the need of more detailed, empirical and conceptual research: some commentators affirm that state crime research is still in its infancy (Grewcock, 2012).

Indeed, our preliminary approximations to this subject allow us to find different opacities: in Latin America, some commentators disagree with the notion of state crime claiming it to be a merely dramatic term leading nowhere. Others, especially coming from social and human rights movements, have embraced it as a significant form of naming and blaming state criminal wrongdoing –often through vague characterizations that ultimately refer to every possible injustice where state agents play a part. Indeed, a constant problem for the research is the notion state crime is employed with great ambiguity. The pervasive elusiveness around the characterization of state criminality involves a need to offer a socio-legal characterization of this phenomenon. With this purpose, we will explore and problematize the literature on the field, taking into account the developments from the international law (Section 4.1), sociology and criminology (Section 4.2), together with empirical considerations based on our case study.

This characterization aims at clarifying the empirical and theoretical delimitation of this kind of criminality but, fundamentally, our exploration on the subject of state crime intends to give a particular analytical advantage for our study of impunity.

Considering these developments, the first objective of *Chapter 5* will be to offer an account of the notions that social discourses have built around impunity (*Section 5.1*). This exploration will be based on a national poll conducted in Colombia about the perceptions of impunity, representative of the opinions of the adult urban population. The study of social discourses around impunity has the aim of enabling a problematization of the concept. In addition to this study, we will conduct a state of art of specialized sources about impunity, focusing on the human rights doctrine, jurisprudence and normativity (*Section 5.2*).

With respect to informal and specialized discourses around impunity, *Section 5.3* will provide a critical analysis of existing social discourses, exploring their different connotations in contemporary western societies. By exploring the characteristics that the term impunity presents from the perspective of these discourses, we will attempt at detecting different problems, blind spots and paradoxes that they bring to the socio-legal understanding of the phenomenon.

In the search for a conceptualization concerned with dealing with the problems that the notion of impunity raises within informal and specialized social discourses, the final part of this chapter will attempt at conceptualizing and characterizing impunity from a sociological perspective. As stated before, in the literature the word *impunity* is recurrently enunciated and its concept is often identified with the *automatic* notion of the lack of punishment. This perception often lacks further theoretical and empirical delimitations, and especially has the connotation of disregarding the potential of the fight against impunity for reproducing a criminal accountability

constructed around measures of intended infliction of pain (the traditional program of action of the criminal system).

In our view, this suggests a lack of sufficient sociological reflection on the phenomenon of impunity, making relevant the question: *how can we observe impunity from a sociological perspective?* With the purpose of answering this question, in *Section 5.5* we will propose a conceptualization using a strategy of both *exclusion* and *inclusion*. Through a strategy of *exclusion*, we will attempt to depict, characterize and discount the conceptual elements that, according to our study of the social discourses, hinder an appropriate construction around the conceptualization of impunity. This operation will attempt at diluting different conceptual obstacles, enabling the visualization, adoption and *inclusion* of different conceptual elements apt and valuable for a socio-legal construction of the notion. The subsequent *inclusion* will therefore attempt at identifying, selecting and developing different sociological elements for a general conceptualization of impunity.

Finally, based on the former developments, *chapter 6* will offer a series of concluding remarks on the conceptual and analytical reflections of *impunity* through the study of state criminality and the case that this research explores. When dealing with these phenomena, we do not only intend to problematize their conceptualization but also their practices, underlying ideas, and consequent discourses.

On the one hand, we intend to critically observe, analyze and understand criminal actions committed with the acquiescence, support or direct involvement of the State. On the other hand, we find important to contribute to a problematization and innovative understanding of the *fight*

against impunity and, ultimately, of the program of action of the criminal justice system¹. Thus, this research intends to offer a critical perspective of the traditional way of thinking about punishment. Thus, through the topic of impunity this work will suggest a reflection on the practices, discourses, ideas, values of use and content of the criminal law system. A serious debate about impunity should address the possibilities of controlling criminal actions preserving a critical and innovative regard on what can and should be the social response to these actions.

Last, not least, I would like to conclude this introduction by mentioning that an important part of this research originates from different personal reflections based on my own experience of victimization². On April 18, 1998, my father was assassinated. He was a prestigious human rights defender in Colombia. Among other cases, he was the lawyer of the families of those who were disappeared in the Palace of Justice - the case that we study in the present research. At the time, it was *vox populi* that the military were involved in his killing. On several occasions, my grandparents visited the Prosecutor General's office demanding a serious investigation. In one of their visits, the Prosecutor General told my grandmother: "There is nothing to be done, it is a state crime". Years have passed and, to date, the enquiries have not offered any results. Like the case of my father, several crimes in my home country have been perpetrated without legal reaction, control or even a minimal social attention.

Concerning the problems and themes of the present research, my personal stance proposes a positioned perspective for the academic study. In classical terms, this issue may be formulated as a

¹ The expression *program of action* refers to an arrangement of ideas forming a philosophical framework guiding its actors in their discourses, practices and notions. The program of action is not an action but a form of orienting the action, ideas that can frame choices (Durkheim 1922: 69; García 2013: 46; Pires 2008: 5).

² "It is often useful within social sciences to rely on personal experiences, or at least take this as our point of departure." (Christie 1986: 17)

problem of *possible objectivity*. Is my experience of the problem under study from a position of victimization an obstacle for my academic reflections? Or, perhaps, does this constitute a privileged perspective nourished by different inner elements for the evaluation of the problems studied in this research? In our view, none of these alternatives should be taken for granted.

Social sciences' field of observation is fundamentally formed by the comprehension, interpretation and experience of human beings who participate in social life. The activity of researching in this field involves different forms of relation with the object of research. The researcher has a social experience that is part of his or her approach to the problems under study –“toute science (sociale) participe, qu'elle le veuille ou non, puisque sans participation [...] il n'y a pas de recherche tout court.” (Pires 1997a: 44). There are various degrees of identification, distance and involvement with the social issues under study.

In my case, due to my personal experience, I might be placed in an *insider* perspective *vis-à-vis* the social problems that this work explores. This position does not automatically enable or impede a scientific approximation to the investigation. Rather than an advantage or a handicap, the connection with the subject of research can be portrayed as a condition for the observations. Using a classical term, the 'objectivity' that this work seeks is what Weber (1949: 98) calls the *elementary duty of scientific self-control*. Understanding that there is no free-value observation, such duty involves avoiding conducting scientific observations and constructing conclusions through mere judgments of value. In line with this, the researcher must seek scientific rigor for developing the arguments and a rich account of information and sources enabling external and internal awareness around the constraints and richness proposed by the researcher.

Using again a classical expression, the *subjectivity* that this work intends to avoid is the arbitrariness of the observations, the lack of analysis, reflection, auto-critique and self-control of mere judgments of value. “Bref, l’objectivation n’est pas incompatible avec la participation, mais seulement avec la participation apologétique.” (Pires 1997a: 44). The meticulousness in regard to the data gathered and the thoroughness of the analyses are fundamental to this purpose. Preserving the relation with the subject under research demands at the same time being aware of that condition and allowing a critical approach to our own positions and to the problem under study. This may be understood as a general duty for any academic work; however, the degree of engagement with the object of study can require specific efforts and special care in order to honor such serious aim.

In the case of the present research, our ideas will be drawn *with* an experience of victimization. This process of reflection entails particular challenges. Having experienced the phenomenon under study from a perspective of victimhood involves a duty of consistency and special attention regarding the development of the process, the sources of information and their interpretation. During the research, I was constantly confronted. My own experiences, emotions and ideas on criminality, criminal accountability and impunity were continuously in motion. Throughout the process of research and while drafting this thesis, I have endeavored to carry out a rigorous reflection with academic care, honesty and scientific consistency, capable of offering deep considerations on the importance of preserving life, social bonds and constructing a more humane society. With this purpose, a serious program of action could be nourished by a critical assessment of the current philosophy of intervention of the criminal law system with the purpose of creating a space for innovation before criminal wrongdoing and its accountability.

2. Methodology

This work employs a qualitative methodology based on a case study. This methodology intended to allow the observation, analysis and elucidation of the notions, characteristics, problems and paradoxes emerging from the social practices, ideas and discourses constructed around the phenomena of *impunity* and *state crime*. The observation and description of the information gathered in this research was conducted through the exploration of different events (empirics), alongside a study and discussion of the academic literature (theory) referring to our subject of research. The present work employed a model of observation integrating theory and empirics for developing our inquiries.

This research attempted at drawing a constant contrast and exchange between the observations coming from the empirics and the ideas elaborated on the basis of the theory. For the present research this form of interaction was characterized as a *model*; consequently, it was not only meant to describe the information gathered and the process of research but constituted a guiding parameter for our observations. This model was *theoretical-empirical* because it took into consideration both theoretical elaborations and empirical observations with the purpose of forming a common field of observation – “two bodies of knowledge, neither of which can be ignored” (Bateson 1972: 6). The constitution of this shared space of study suggests a constant interplay of empirics and theory.

The form of constructing the observations for this research should not be understood neither as inductive nor deductive, but rather as integrated: the empirics of the case study are not aimed at constructing theoretical generalizations, nor will we provide theoretical generalizations tested through the specific case study. In this line, we intend to abandon the classical instrumental use either of empirics or theory, drawing a progressive integration of these fields of research. In line with this model, the interrelation between theory and empirics is non-hierarchical. Such interaction intends to connect theory and empirics with no particular preeminence of any of these aspects. In a way, empirical observations permeate the conceptual work while the theory sheds light upon the observations around the fieldwork.

In this manner, we intend to take a step beyond the traditional inductive/deductive approach conducting a sort of ‘pincers maneuver’ (*opération en pince*) (Bateson 1972). This term involves the constant interplay of both the empirical observations and the fundamentals of science or philosophy as the basis for the research. Using this methodological approach, the exploration intended to draw a continuing dialogue of our axes of research. A constant integrative exchange involves that every movement on any of the axes of research involves and attempts to achieve a movement of the whole body of reflection. As Bateson (1972) argues, in this process the empirics are conducted in mutual interrelation with the ‘fundamentals’ or, what we could call, the approved knowledge³.

³ Bateson (1972) calls "fundamentals" two kinds of propositions and systems of propositions which are either truistical or generally true. For the truistical propositions, Bateson understands those tautological truths as the “‘Eternal Verities’ of mathematics where truth is tautologically limited to the domains within which man made sets of axioms and definitions obtain: numbers are appropriately defined and if the operation of addition is appropriately defined; then $5 + 7 = 12$ ” (Bateson 1972: 4). Whereas those propositions that Bateson describes as ‘scientifically or generally and empirically true’, are those "laws" that allow an empirical generalization.

In this part we will present the methodology employed in the present work describing the empirical data gathered in the research in Section 2.1; and, the epistemological approach employed for developing our observations in Section 2.2.

2.1. The empirical data: a case study

The fieldwork of this research was conducted using a *case study*. A *case* is a unity of analysis formed by a set of factors, actors and events interconnected through a pertinent analytical correlation delimited by the researcher. For the purpose of the analysis, the elements forming the case are brought together on the basis of a common property, a mutual influence, a specific relevance or simply due to a scientific intuition.

The *case* selected for the present research is the Palace of Justice case (hereinafter, the PJ case). The events of this case refer to the enforced disappearance of a group of people materialized in the context of the taking of the National Palace of Justice by a guerrilla group called *Movimiento 19 de Abril* (hereinafter, M19) and the subsequent operation to retake the building by the military, in November 1985. This event was selected for this research due to several reasons. Firstly, as exposed in the introduction, there is an *experiential reason*. When the PJ events took place, my father became the lawyer of the next of kin of a group of the disappeared. Because my father's office was located at the same place where my family used to live, I was able to meet the victims and to be in contact with some of the actors of the case.

Secondly, there is a *generational reason* to study this case. The events of the Palace of Justice constitute a landmark for my generation in Colombia. The commotion of the events at the Palace derived in a tough experience of the armed conflict for those who were born in Bogota

during the eighties. The great impact of the case in the media and the social life of the country involve a vibrant contact of my generation with the events.

Another important reason to study this case is the magnitude of destruction that took place at the moment of the events. Around one hundred people perished, including eleven justices of the High Courts and thirty-five guerrillas; a conflagration consumed a significant part of the structure of the palace and a number of hostages were released. The military labeled some people as accomplices of the guerrilla and held them for interrogation. During their detention, some people were tortured, some were killed and some were forcibly disappeared (IA Court 2014).

The present research focused the analysis of the case around the crime of enforced disappearance as well as the subsequent legal redress for these conducts. This particular form of violence constitutes a *scientific reason* justifying the selection of the PJ case for this research. According to the National Register of Disappeared People, up to 2017 there is record of 110,833 disappearances in Colombia. Out of these cases, 23,441 cases (21.15%) have been classified as presumably forced disappearances, while 87,392 cases (78.85%) present no further information (Segura and Ramirez 2015). We selected enforced disappearance as a rich field of reflection, not only because of its quantitative magnitude in the Colombian context, but also because its qualitative value for developing an understanding of state criminality and, importantly to our research, for evaluating the particular constraints and problems around the operation of the criminal law system a propos these conducts.

In the case, the fact that the military and different state officials were involved in these crimes calls for special criminological attention. Can we refer to these actions as a specific form of criminality? If so, how can we define it? What characteristics would it show? In addition, this case

also presents as a feature the particular difficulty for the legal system to acknowledge, process and address the wrongdoing: thirty years after the events no final conviction has been reached and the victims are still asking *where are the people that disappeared from the Palace of Justice and what happened to them?*

The phenomenological complexity and social significance of the case is another reason for its selection. “It is rare that a single event can illuminate an entire epoch. Yet the tragedy at the Palace of Justice provided a microcosm in which the three mythic figures of every Latin conflict of the last fifty years – the Rebel, the General, and the President- acted out their appointed roles without benefit of the usual, self-protective, camouflage” (Carrigan 1993: 13) . In this vein, this event has been qualified by different commentators as one of the most important and dramatic events in the history of Colombia (IACHR 1993: Introduction; Gómez, Herrera and Pinilla 2010: 276; Deutsche Welle 2015).

Among the emblematic factors of this case we can refer to its magnitude (more than one hundred people perished and disappeared on less than three days and a conflagration consumed a significant part of the PJ), the site wherein it took place (the main square of the country’s capital), the multiplicity of harms produced in the events (killings, disappearances, tortures, injuries, traumas, pillage⁴ and the destruction of the Palace of Justice), the clash between different public powers within the state (the highest courts of the ordinary and the contentious administrative jurisdictions, the humanitarian organizations, the President and the military), the war confrontation between the guerrillas and the *statu quo* in the middle of alleged peace talks and, because of the

⁴ “Pillage (or plunder) is defined in Black’s Law Dictionary as “the forcible taking of private property by an invading or conquering army from the enemy’s subjects”. The Elements of Crimes of the Statute of the International Criminal Court specifies that the appropriation must be done “for private or personal use”. As such, the prohibition of pillage is a specific application of the general principle of law prohibiting theft”. (ICRC, n.d.a)

social status of those implicated in the crimes (government officials and military members of high rank), and the media exposure of the judicial proceedings.

Considering the former reasons, this case may be understood as both *exemplary* and *emblematic*, enabling a pertinent, relevant and strategic approach to the knowledge of the phenomena that we study. This case is *emblematic*, relatively rare, infrequent and extraordinary, comprising a particular combination of events, actors and factors forming a relevant and strategic field of observation of the phenomena explored. Thus, the case is not to be qualified or characterized from the point of view of its frequency – in social science case studies can refer to rare phenomena which can be *unique* as a whole (Pires 1997). Rather, this case may be qualified as *exemplar* referring to the aptitude of the event for enabling the action of learning about a particular phenomenon (Pires 1997: 46). In this sense, the PJ case presents an exemplary character exhibiting several characteristics for studying *state criminality* and *impunity*, therefore enabling a proper conceptual and analytical consideration of the social phenomena under study.

A case study is not meant to generalize what is particular or strictly proper to the case (Yin 2009), but intends to offer analytical grounds in order to draw general observations on the phenomena under study. Thus, social events as those examined in the present research, encompass cultural and institutional references that allow an observation of society *in action* (Pires 1997). This analysis involves both, a phenomenological reflection based on the events and historic context, and an analytical reflection on their underlying ideas and concepts.

Given the amount of information, events and judicial proceedings that thirty years of history of the case implies, we selected one particular dossier as the *point d'ancrage* for the observation of the empirics. Choosing this *point d'ancrage* was meant to allow us to preserve an

overall perspective of the case, at the same time enhancing our capacity of observation, conceptual attention and analytical precision avoiding to dissipate the study into an excessive amount of details. With that in mind, we decided to select the first conviction of a military member in regard to the case, issued by ordinary tribunals, as our special event of attention: the criminal dossier against retired Col. Plazas, field commander of the operation to retake the Palace, who was prosecuted as co-author of the crime of enforced disappearance.

In 2008, retired Col. Plazas was indicted for the enforced disappearance of eleven people and in 2010 he was convicted and sentenced to thirty years of imprisonment (Juzgado Tercero 2010). The Court of Appeal upheld the first instance ruling only in respect of two of the disappearances. Later, the Supreme Court of Justice (2015) acquitted him in cassation and ordered to start the process all over with respect to the disappeared.

This event was selected because it allowed us to consider at the same time the criminal actions perpetrated at the PJ - particularly the enforced disappearances, the attempt of the criminal law system to process those actions, its limitations, obstacles and difficulties of operation and because it was the scenario where different actors of the case met. Furthermore, Plazas case was also selected as paradigmatic for at least four reasons. *First*, because of his presence and active role in the operation to retake the Palace of Justice as operational commander. *Second*, because he is a prominent figure of the Colombian military, who enjoys a widespread support of Colombian traditional political class - especially of the Right. *Third*, because the judicial case went through all possible instances within the domestic criminal justice system. This analysis covers a history of more than thirty years of the PJ case, from November 1985 to the beginning of 2017, after the

Supreme Court judgment in the *Plazas case*. And, *finally*, this case was selected because of the symbolic representation of the case in the country.

The PJ case was a leading dossier because it was the first time that a high ranked military was on the bench for the crime of enforced disappearance. Retired Col. Plazas's influence, rank and relevance within the military institution created a representation of this trial as a breaking point on the general responsibility of the military before ordinary tribunals. The case was permanently alluded as an argument around special regimes of responsibility favouring the military in the context of peace negotiations with the guerrillas⁵. Regarding this case, different commentators assessed that this prosecution was a milestone in the history of the accountability of the military before civil courts, and ultimately in the history of human rights in Colombia (Semana 2009).

Our model of study of the PJ case will take into consideration different factors of analysis. Our case study is then divided into the description of the context, the concrete events of the taking and the operation to retake the Palace of Justice in 1985, the judicial procedures and, finally, a general overview of the criminal dossier against retired Col. Plazas. The data of observation gathered on the case relied on five main types of sources of information: *a)* legal records, *b)* media review, *c)* documentary review, *d)* observation *in situ* of public commemorations related to the case, and *e)* thirty-one face-to-face semi-structured in-depth interviews. The language of most of these sources of information was Spanish. However, we translated the information used for this work with the objective of standardizing the language. Let us refer to these sources in detail:

a) The *legal records* gathered for this research are limited to documents of public access, related to the case and issued by the legal system in the context of the intervention of a formal

⁵ At the time of the events with the M19 and after the second instance judgment with the FARC.

proceeding. The main component of these records is the proceedings of the domestic and international judicial bodies. This includes documents of the criminal law domestic jurisdiction, the contentious-administrative courts, the Truth Commission on the events as well as the disciplinary proceedings, legislative investigations and the dossier conducted by the Inter-American system on Human Rights, alongside reports from the *Procuraduría*, the *Defensoría Pública* and the Inter-American Commission on Human Rights.

The PJ criminal rulings are principal sources of the present research. This documentary review was conducted with public documents to be found in the judiciary archives concerning the case. These rulings are public and contain an account of the events, the legal basis of the decisions and the Court provisions for the case. Because of the large amount of information that these documents contain, they are relevant for detecting and analyzing the subjects of inquiry proposed in the present research.

b) A media review was also conducted with the purpose of documenting the events, tracing circumstantial happenings to the judicial case, as well as obtaining the opinions of the actors that were not interviewed, mainly of the military⁶ and the political class. The media review involved gathering, selecting and analyzing different journal articles, documentaries, TV and radio recordings related to the case. The archive that we gathered was enormous. Until 2016, only in the two national journals in Colombia (*El Tiempo* and *El Espectador*) we found more than one thousand news. We estimate that our final selection covered around a 30% of this universe.

⁶ Since Plazas, convicted in the two first instances, was detained it was not possible to reach him for an academic research –he was only released by the end of 2015. Nonetheless, he gave a considerable amount of interviews to the media. The media echoed several of his declarations as well as published a number of interviews showing his perspectives to the public. For this reason, a media analysis was useful in order to depict and study some of Plazas’s views.

An important criterion of exclusion was limitation of time. The criteria of selection were the quality of the notes (we discarded the study of news that were merely propagandistic), the accessibility (privileging those sources accessible through internet) and the diversity of sources, scopes and positions regarding the events. Since 2012, I started collecting the media information. Every week I reviewed the media collecting the relevant news of the last seven days. I recorded the news in a single file under different categories. Soon, I had to reformulate my classification because of the amount of information and started using different files under different categories. I divided the information into three files: one for interviews, and the other two for reports and editorials. What I recorded was the title and reference, as well as one or two lines summarizing the content. By the end of 2013, I started doing a more selective collection because of the amount of information I already had. Instead of focusing on actual news, I decided to use more time collecting news from before 2012, until I arrived to the year 1985 –time of start of the events.

c) During this research, we also depicted, categorized and analyzed different *documentary sources*. In total we used forty-seven documents, including books, reports and videos. The relevant parts of these documents were either recorded or scanned and then coded according to different relevant categories with the purpose of enabling a cross-examination of the subjects of interest. These sources were further classified according to their emphasis as: artistic, scientific or academic and legal or political documents referring to the case. Some of these documents were published during the research process.

Artistic documents were a source of inspiration for the reflections. Reviewing these sources, we were able to have access to a recording of the theater play called “La Siempre Viva” (1994) that referred to the history of the victims of enforced disappearance at the PJ. We also had

the opportunity to share extensive and substantive talks with the playwright and writer Miguel Torres, who wrote the play. At that time two films were being produced on the events: one was inspired on the play and called “La Siempre Viva” (2016) and another called “Antes del fuego” (2015), a political thriller that described through a fiction history the nineteen days before the taking. Also, “Los Once” (2014) was published, a graphic novel of historical fiction inspired on the PJ disappeared. These artistic documents were interesting for reflecting on the interpretation of the events and how they can be shown and described.

Also we found twenty-one research works on the events, including thesis, academic papers and journalistic works, including three documentaries; as well as sixteen books of legal or political analysis of the case. Within these sources, it was particularly relevant to our observations the publications of the actors of the case. As a result of the reflection from the part of the victims it was important to review the master’s thesis of Alejandra Romero (2005). This thesis alongside different conversations with Alejandra, allowed me to reflect on her reality as niece of one of the auxiliary Justices that perished at the PJ.

Another important source was a publication by one father of the disappeared, Hector Beltrán (2015). In his book “El Suplicio de la Larga Espera”, Mr. Beltrán expressed his views on the disappearance and the legal procedures. On this subject as well, but from an opposed vision, one of the prosecuted for the crime and actor of our dossier of reference, the retired Col. Plazas and his wife, wrote three books. These books were extremely relevant for drawing our considerations. In the books “El Itinerario de una Injusticia” (2008) and “¿Desaparecidos? El negocio del dolor” (2011), retired Col. Plazas exposed his views on the injustice of the procedures, the inconsistencies of the investigations and the inexistence of the disappeared and the crime itself. In line with his

perspective, Thania Vega (2011), his wife, published the book “¡Qué injusticia!”, in which she expresses her emotions and thoughts on the prosecution against retired Col. Plazas.

d) The observation *in situ* of public commemorations related to the case was important for detecting and understanding different particularities of the case. These observations *in situ* comprised at least three main moments:

1. The public event for the launch of the book “El Suplicio de la Larga Espera”, wrote by Hector Beltrán (2015). I was invited by the next of kin of the disappeared. On August 19, 2015, at 5:30 pm the event started at the Bogota’s Memory Center. The program consisted of the launch of the book, a commemoration of the disappeared and, finally, recognitions awarded to the parents of the victims who were still alive and continued with the search of their family members disappeared at the PJ cafeteria. In this event we were able to listen to the testimonies of different family members and especially Mr. Beltrán’s. Their discourses but also the way they interacted between each other, the symbols used in the place for the remembrance of those disappeared and the different nonverbal communications of the participants were relevant for our observation.

2. The public event of acknowledgement of responsibility by the State: as will be explained in the Chapter of the PJ case, on November 6, 2015, the President of the Republic conducted a public ceremony in the presence of senior State officials and the victims, acknowledging State responsibility in relation to the human rights violations during the taking and operation to retake the Palace of Justice, as declared in the Inter-American judgment regarding the PJ case. I was invited to this event. During the act I had the occasion to take notes and to record the discourses of the different speakers for a posterior analysis. After the event, I was able to talk to some of the family members and to exchange perceptions regarding the acknowledgement of responsibility and

how it unfolded. This event was relevant to understand different conceptions about the responsibility for the violations committed in the case and to have more elements of analysis of the perceptions gathered during the interviews of the case.

3. The 30th anniversary memorial: on Friday, November 6, 2015, the next of kin of the PJ disappeared victims conducted a memorial at the Plaza de Bolívar in Bogotá. Between 2 pm and 9 pm there was an event with different artistic interventions, a video screening on the façade of the Palace and a private mass for the victims. During the event I was able to capture different symbols, ideas and discourses by the victims. In the memorial I took some pictures and recorded some impressions of the participants. The notes and recordings gathered in this event were a useful source of reflection and analysis for this research, especially for a better understanding of the victims' discourses.

e) Thirty-one face-to-face *semi-structured in-depth interviews* were conducted in order to depict and elucidate the constructions on the matter of impunity as well as the characterizations regarding state criminality. The participants were informed about the objectives of the present research so they could give their free and informed consent for participating. Once they expressed their consent, they were instructed about the possibility of taking breaks, abstaining to answer, asking for anonymity and asking for reformulations of the questions at any time. The questionnaire elaborated for the interviews was semi-structured and varied according to the different groups that we selected as will be detailed in the following paragraphs. These interviews were divided into three different groups: victims of enforced disappearance, lawyers representing the victims, and judicial officials – including the prosecutor of the case, the first instance judge and one of her judicial assistants.

a) The *first group* of interviews focused on the *victims of enforced disappearance*. According to the Truth Commission, there is “no doubt” that the cafeteria workers and some occasional visitors were victims of enforced disappearance (Gómez, Herrera and Pinilla 2010). The Commission concluded that the cafeteria’s employees, three occasional visitors and one M19 guerrilla were forcibly disappeared. Further findings from different courts have concluded that other workers, visitors and guerrilla members were also forcibly disappeared. However, the main focus of analysis of the present research is the group of people that were at the cafeteria at the moment of the events and were disappeared.

This group is formed by the families of twelve people: eight employees of the cafeteria (Carlos Rodríguez, Ana Castiblanco, Hector Beltrán, Cristina Guarín, Bernardo Beltrán, Gloria Lizarazo, David Suspes and Luz Portela), three visitors (Gloria Anzola, Luz Oviedo and Norma Esguerra), and one guerrilla (Irma Franco). These twelve people can be grouped not only according to the place of abduction (the PJ cafeteria) but also in line with their social position: these people were working class living in rather low-income contexts.

Until 2016, there has only been news on the whereabouts of four of them. The remains of Ana Rosa Castiblanco were identified in 2000 from rests found in a mass grave. The remains of Lucy Amparo Oviedo were found in the same mass grave and identified fifteen years later. Those of Cristina Guarín and Luz Portela were found in 2015 in graves that belonged to other people who perished during the PJ events – this information will be detailed in the impunity chapter.

On February 11, 2008, retired Col. Plazas was indicted as co-author of the crimes of aggravated enforced disappearance and aggravated kidnapping against eleven people (see table 1) – the case of Ana Rosa Castilblanco was supposedly solved in 2000 with the finding of her remains

in a mass grave. I conducted twenty-two interviews with family members who suffered the disappearance of their next of kin in the Palace of Justice (see table No. 1).

These were in-depth interviews aimed at depicting and understanding different problems, challenges and expectations that victims perceive in the case at a profound level. The questionnaire was semi-structured, aiming at allowing some degree of openness and variability according to the needs or specific interests and experiences of each person, but with a certain structure and focus in respect to the subjects of the research. After a general presentation of the research and the indication of the possibilities of clarifying the questions, taking breaks, reserving their identity or stopping the recording, there was a question on the informed consent and the authorization to record the dialogue.

The exchange was conducted with the support of an open questionnaire composed by five main questions. The first question was focused on a general presentation of the interviewees and of their connection with the case. After that, four questions were directed to depict their views on *a)* how they perceived the events and particularly the disappearances, *b)* what were their views on the enquiries and the prosecution against retired Colonel Plazas, and *c)* their thoughts on impunity regarding the case and *d)* what actions should be in place to address it⁷. These questions were designed as pertinent for identifying and analyzing elements on ideas around state criminality and impunity. They were not asked on the same order and with the same formulation but were intended to refer to these themes following a coherent thread in favor of the conversation to be fluent.

⁷ Asking victims about impunity may be perceived as a biased source: 'victims will always perceive impunity in their cases'. However, our explorations on this matter were intended to understand their representations and usages of the medium impunity rather than on judging the existence of impunity in this particular case. These data allowed us to obtain relevant information for exploring a conceptual construction of the subject of impunity from a sociological perspective. In this sense, who better to ask than a group of people that have worked and mobilized for thirty years under the motto of a fight against impunity?

Concerning the identification of the interviewees, none of the respondents asked for their identity to be withheld. Only in very few cases, they asked not to record certain parts of the conversation. Those parts were not taken into consideration when writing this text. While the present text includes references to the victims' names, some parts were anonymized in order to protect the wellbeing, security, intimacy and emotions of the participants.

The fact that all of them wanted their name in the research was perceived as an act of trust in regard to the interviewer but particularly as an act of telling, a desire to let their version be acknowledged, "proclaiming aloud" (Herman, 2001) their story and being heard. Throughout their researches, Winkler and Hanke (1995), Hollway and Jefferson (2000) and Lisa White (2010) observe that people that have faced violence can feel a sense of relief when pronouncing their experience. Taking into account the family link, in the present research we will identify the interviewees using their names (or other anonymous identifications in particular cases) and their family kinship with the person submitted to disappearance. Thus, next to the name of the interviewee the reader will find as elements of identification words as e.g. brother, sister, daughter or son. This, we believe, can clarify the reading due to the great amount of names and persons interviewed.

Table No. 1. Victims, biographical sketch and next of kin interviewed

<i>Identification</i>	<i>Situation at the time of the events and following search</i>	<i>Interviewees</i>
<p>Gloria Isabel ANZOLA MORA - Visitor at the Cafeteria</p>	<p>“Gloria [...] was 33 years of age in 1985; she was a lawyer and was married to Francisco José Lanao Ayarza, with whom she had a son. Her office was near the Palace of Justice and, as her aunt was a justice of the Council of State, she used to park her car in the Palace of Justice. [...] Following the events, her family went to the Palace of Justice and looked for her among the rubble and the corpses that were in the Palace of Justice and in the Institute of Forensic Medicine, unsuccessfully. They also looked for her in the 13th Brigade and the Cavalry School, but obtained no information on her fate” (IA Court 130-131).</p>	<p>Juan Francisco Lanao (son)</p>
<p>Héctor Jaime BELTRÁN FUENTES - Waiter</p>	<p>“Héctor [...] was 28 years old in 1985; he was married to María del Pilar Navarrete Urrea, with whom he had four daughters [...]. Mr. Beltrán Fuentes’ brother, who worked in the DAS, went to the Casa del Florero to look for his brother [...]. On the evening of November 6, his father approached the Palace of Justice and asked those who were outside the Casa del Florero about the cafeteria employees and he was allegedly told that “they were taken out alive and [were being held] in the Casa del Florero.” Following the events, the family of Héctor Jaime Beltrán Fuentes looked for him in the Institute of Forensic Medicine, hospitals, clinics and military facilities, including the Cavalry School and other places where it was rumored that the survivors of the Palace of Justice had been taken” (IA Court 120-121).</p>	<p>Héctor Beltrán (father) and María del Pilar Navarrete (wife)</p>
<p>Bernardo BELTRÁN HERNÁNDEZ - Waiter</p>	<p>“Bernardo [...] was 24 years old in 1985 [...] Following the events, his family went to the Palace of Justice to identify the body of Mr. Beltrán Hernández among the corpses. They then looked for him in hospitals, the Institute of Forensic Medicine, and the 13th Brigade, without obtaining information on his fate” (IA Court 118-119).</p>	<p>Bernardo Beltrán (father) and Sandra Beltrán (sister)</p>
<p>Norma Constanza ESGUERRA FORERO -food supplier</p>	<p>“Norma [...] was 29 years of age in 1985 and, at the time of the events, she worked selling pastries in different places, including the Palace of Justice. [...] On November 9, her family entered the cafeteria of the Palace of Justice and found several of her belongings on the counter, including “her wallet [...], but the contents had been taken.” The family also looked for her in hospitals and her mother went to the North Cantón to look for her, without obtaining information</p>	

	on her fate” (IA Court 126-127).	
<p>Irma FRANCO PINEDA -guerrilla at the cafeteria</p>	<p>“Irma [...] was 28 years of age in 1985 and was a law student. On November 6, 1985, she was in the Palace of Justice, as part of the M19. [...] In the Casa del Florero she was identified by several survivors as a member of the M19, and was therefore considered a suspect by the State authorities. Accordingly, she was taken to the second floor of the Casa del Florero and, according to the caretaker of the Casa del Florero, “between 7 and 8 p.m. on the evening of [November] 7, under strict security measures,” “she was placed in a four-wheel drive vehicle,” and to date her whereabouts are unknown. [...] After the operation to retake the Palace of Justice had concluded, her next of kin went to the police, the DAS, and the Cavalry School where she was being held according to the information they had received, but without success” (IA Court 111-112).</p>	<p>Jorge Franco (brother), María del Socorro Franco (sister)</p>
<p>Cristina del Pilar GUARÍN CORTÉS -Cafeteria cashier</p>	<p>“Cristina [...] was 26 years of age in 1985 and had a degree in social science. At the time of the events she was working on a temporary basis as a cashier in the Palace of Justice cafeteria, replacing Carlos Rodríguez’s wife, who had been on maternity leave since October 1985 [...]. On the evening of November 7, the father of Cristina del Pilar Guarín Cortés entered the Palace of Justice to look for his daughter. Her family also looked for her in the Institute of Forensic Medicine, the Military Hospital, police stations, and the 13th Brigade, and they also approached the Presidency of the Republic, without obtaining information on her whereabouts” (IA Court 114-115).</p>	<p>Rene Guarín (brother)</p>
<p>Gloria Estella LIZARAZO FIGUEROA -Cafeteria employee</p>	<p>“Gloria [...] was 31 years of age in 1985; she lived with Luis Carlos Ospina and had three daughters and one son [...] Following the events, her family members approached the Palace of Justice and looked for her in hospitals, clinics, the Cavalry School, the 13th Brigade, the DAS, the Sacromonte caves and the Ministry of Justice, but obtained no information about her whereabouts. According to a statement made by Luis Carlos Ospina, [...] “three or four days after the events,” a soldier at the Cavalry School told him that people had been brought there from the Palace of Justice. However, the soldier could not tell him whether his wife was among those taken to the School” (IA Court 122-123).</p>	

<p>Lucy Amparo OVIEDO BONILLA - Visitor at the Cafeteria</p>	<p>“Lucy [...] was 25 years of age in 1985; she was married to Jairo Arias Mendez, she had two children, she worked in a handicraft shop and she was going to study law. On November 6, 1985, Ms. Oviedo [...] had a work interview with Justice Raúl Trujillo near the Palace of Justice. The family supposes that “[...] as she was so near the Palace of Justice, [she went] to talk to Justice [Reyes Echandía] or to his secretary [Herminda Narváez] to seek their help in obtaining the job for which she was applying.” [...] Following the events, her family looked for her in the Institute of Forensic Medicine, hospitals, cemeteries, and the Charry Solano Battalion, and in the Bogota network of hospitals, and requested the help of the media and of senators of the Republic, without obtaining information on her fate” (IA Court 128-129).</p>	
<p>Luz Mary PORTELA LEÓN -General Service staff</p>	<p>“Luz [...] was 24 years of age in 1985; she worked as a dishwasher in the Palace of Justice cafeteria replacing her mother, Rosalbina León, who had been on sick leave since October 29, 1985. [...] Following the events, her family looked for her in the Casa del Florero, the Cavalry School, the Institute of Forensic Medicine and the DAS offices, among other places, without obtaining any information about her fate” (IA Court 124-124).</p>	<p>Rosa Milena Cárdenas (sister)</p>
<p>Carlos Augusto RODRÍGUEZ VERA -Cafeteria Manager</p>	<p>“Carlos [...] was 29 years of age in 1985 and was married to Cecilia Cabrera Guerra, with whom he had a daughter. He was the manager of the cafeteria of the Palace of Justice and studied law at the Universidad Libre. [...] At least one person saw him that morning in the cafeteria before the taking over began. [...] According to the evidence in the case file, the State authorities suspected him of collaborating with the M19 because he was the cafeteria manager” (IA Court 2014: 108-109)</p>	<p>César Rodríguez (brother), Cecilia Cabrera (wife), Adriana Rodríguez (niece) and Alejandra Rodríguez (daughter)</p>
<p>David SUSPES CELIS -Cafeteria Chef</p>	<p>“David [...] was 26 years old in 1985; he lived with his companion, Luz Dary Samper Bedoya, with whom he had a daughter[...] Following the events, his family looked for him in hospitals, the Institute of Forensic Medicine, the 13th Brigade, the Military Institutes Brigade, and the DAS offices, among other places, without obtaining any results”(IA Court 2014: 116-117).</p>	

Different emotions such as sadness, rage, indignation, vulnerability, pride, courage, were present in these interviews. The conversations were conducted with calm, thoughtfulness and consideration for the emotions that the interviewees raised. The conversations were, with no exception, constructive and courteous. This research was conducted with special concern for the wellbeing of the interviewees, ensuring that participants remained comfortable, with respect for their emotions. Attempting to ensure these conditions, the dialogues took place in the location that the participants chose as comfortable for the talk, including participants' homes. The interviews were preceded by a dialogue meant to create a space of confidence, transparency and informed consent for the interview. After the questions we had the opportunity to conduct informal dialogues with the purpose of giving feedback and comfort to the interviewees.

The next of kin of the disappeared are considered in the present research as *victims*. There are very varied definitions of who is and what a victim is (Maier 2007). To us, a victim is a social role that works as a form of social attribution of a status aimed at recognizing a regretful experience. When that situation is caused by the intervention of someone, according to the particularities of the case, they can be called 'victims of a crime'. Victims of crimes are not only those who are directly injured by the action, but also the next of kin⁸ of those people who, because of their relationship with the person harmed, suffer a particular affection recognized as an experience of victimization. The status of victim is awarded with a particular degree of variability as a label that depends not only of legal considerations -in the case of criminal activities, but on political and social categorizations giving interpretation to what is a regretful action, what can be called a harm, who are the actors of these situations and to what extent they can be called victims.

⁸ In this respect, for instance, the IA Court (2014: 532) has assessed that the next of kin of the victims of human rights violations may, in turn, be victims.

In an interview with Pilar Navarrete (wife) she asserted that while at the start no one would recognize them as victims, after different legal advances and according to their persistence for years society finally did so. However, she believes that from a certain perspective the only victim of her case was her husband, because what happened to her was not comparable to what probably happened to him. Nonetheless, the people on this group will be identified as victims not because of the amount of suffering but based on the existence of a direct or indirect harm due to a wrongful action performed by someone else. According to this approach, we will specifically refer to the victims of the case as those people that suffered different harms originated from the criminal actions that took place at the PJ events, especially focusing on the enforced disappearance.

In the eighties, when the families were asked to join ASFADDES (Colombian Association of families of the Disappeared) or to constitute their own organization, Enrique Rodríguez (father) said to their legal representative, lawyer Eduardo Umaña: "We don't want to make part of any organization, we are nothing but a group of families" (history recalled in an interview with Alejandra Rodríguez –daughter). The representation as a group was further found in different interviews with the actors of the case. Following this self-representation, in the present research family members are considered as a group. Despite the fact that they have never constituted an organization, understanding them as a group allows visualizing and analyzing the common factuality of the violations perpetrated against them and their rather synchronic efforts for finding their loved ones.

During the interviews it was visible that this group of victims shares a struggle and a history of suffering. In this sense, sometimes a shared discourse emerged in some of the interviews, especially in reference to the dynamics of the criminal case. However, this identification does not entail any sort of homogeneity or monolithic quality of the group. They are rather extremely

heterogenic, have different views on the case (even within each family) and hold different expectations. In the words of Hector Beltrán (father): “Every family is a world apart, each family suffered the pain in different forms, each family has a different opinion. But there is one thing I acknowledge: we have been united for 29 years” (El Espectador 2014a). Their experiences are different and they have different conceptions on what has happened to them: they lived the same events but experienced them differently. Nonetheless, they have learned to act together, sometimes as a collective that overcomes their diversity of opinions, sometimes as individuals with common goals. Sometimes divergences have prevailed and they have acted in contradictory ways. There have been a number of interpersonal disagreements bringing tensions to the group despite the different relations of familiarity and close friendship.

Besides this group of victims, we conducted a set of semi-structured interviews with the next of kin of some of the Justices that perished in the PJ. Using the same methods, questionnaire and criteria, we interviewed family members of Auxiliary Justices Carlos Urán, Emiro Sandoval and Rosalba Romero (see table 2).

Table No. 2. Auxiliary Justices. Victims, biographical sketch and next of kin interviewed

<i>Name</i>	<i>Situation at the time of the events and following events</i>	<i>Interviewees</i>
Carlos URÁN - Auxiliary Justice of the Council of State	Carlos Urán worked as an auxiliary Justice of the Council of State in the PJ. He was at his office in the PJ the day of the taking. Urán had four daughters and was married. He was particularly critical of the Armed Forces ⁹ . According to the Inter-American Court of Human Rights (2014) and the Truth Commission (Gómez, Herrera and Pinilla 2010), Urán left the PJ alive in the custody of soldiers, with non-lethal injuries in his left leg inflicted inside the Palace of	Ana María Bidegain (wife), Mairee Clarisa Urán, Anahí

⁹ In one of his writings, Urán states: “We think, at last, that from a popular dimension, there can only be one alternative in relation to the [Colombian] Armed Forces: their structural reformulation and their ideological redefinition or their dismantling following the model of President Manuel María Mallarino in 1856, that was then adopted in the Constitution of our neighbor Costa Rica” (Urán 1984: 21).

	Justice. His exit was not recorded on any list of survivors drawn by the State. Subsequently, he was executed while he was in the custody of State agents with a shot at a distance of less than a meter. Later, his body appeared in the Palace of Justice patio, on the first floor of the building. His corpse was undressed, washed, and taken to the Institute of Forensic Medicine. It was not until the evening of November 8, 1985, when a friend of Carlos Urán found the body in the Institute of Forensic Medicine and when his family had news about the whereabouts of Urán. Alongside these facts, the Inter-American Court concluded that Urán had been submitted to enforced disappearance. “For years my daughters and I were living a lie from the Colombian State, which made us believe that my husband had died in the crossfire” (CEJIL 2014) said Ana María Bidegain (wife).	Urán, Helena Urán and Xiomara Urán (daughters)
Emiro SANDOVAL - Auxiliary Justice of the Supreme Court of Justice	Mr. Sandoval was auxiliary Justice of the President of the Supreme Court and was at his office in the PJ the day of the events. Mr. Sandoval had one daughter and was married. He did not survive the PJ events. His body was given to his family right after the events and buried in a grave that bears his name. However, in 2015 his remains were exhumed due to doubts on the identification of his remains. In fact, the autopsy of Mr. Sandoval, which was carried out in 1985, warned that the remains actually corresponded to “at least two adult corpses”. In spite of this, the remains were buried as if belonged to one single person. When Amelia Mantilla, Sandoval’s widow, buried her husband, she was warned by state officials that the coffin should not be opened. In a hearing of the PJ case, in June 2016, Sandoval’s family was informed by the National Institute of Forensic Medicine and Science and the Prosecutor General’s office that the identification of the remains was negative: in the grave under Mr. Sanvoval’s name there were three individuals and none of them was Emiro Sandoval.	Alexandra Sandoval (daughter)
Rosalba ROMERO - Auxiliary Justice of the Supreme Court of Justice	Rosalba was justice Alfonso Patiño’s auxiliary Justice at the Supreme Court. She was married and had one son. Her remains were given to her family after the events and buried in a grave with her name. However, in 2016 her remains were exhumed due to doubts on the identification of the mortal remains. Until January 2017, Romero’s family was still waiting for a result on the identification of the remains: it is most likely that she is disappeared.	Alejandra Romero (niece)

The interviewees, next of kin of auxiliary Justices Urán, Sandoval and Romero were also regarded as victims because these officers did not survive the taking and the operation to retake the

Palace of Justice due to different criminal actions. While we are not able to determine the exact circumstances under which they became victims – as it neither is our research objective, we can understand that different crimes were committed. Mr. Urán was subjected to enforced disappearance and extrajudicial execution; Emiro Sandoval was killed and it is likely that he is disappeared; and, Rosalba Romero also perished and is possibly disappeared.

These people are not part of the group of the people of the PJ cafeteria; neither were they part of the victims of the prosecution against retired Col. Plazas. They could not be considered as a group because they do not act with any degree of coordination and in some cases not even dialogue. However, at the same time, they have had different (and sometimes common) experiences in regard to the subject of enforced disappearance and with respect to the difficulties of operation of the criminal law justice system. They do not appertain to a low-income class. Most of them have qualified jobs, a good number of them are middle class and some appertain to higher social classes. Understanding their differences with the group of the cafeteria, the perceptions of this group of people was relevant for enriching the comments on the group disappeared.

b) The *second group* of interviews was conducted with *lawyers representing the victims*. This group is composed by experienced law professionals who work on the case as legal representatives of the victims. After the assassination of their first lawyer, Eduardo Umaña, the families have had different legal representatives. In this project, we selected two lawyers of the criminal dossier. Jorge Molano and German Romero were selected, based on the fact that they were the only professionals present, one or the other, during all of the criminal hearings.

These interviews were conducted in Bogota. The exchange was conducted with the support of a questionnaire composed by semi-structured open questions. We used a set of five guiding

questions with the aim of emphasizing on the perceptions of these actors regarding the functioning of the criminal law system in the case. The first question was focused on establishing their history and actual situation as legal representatives of the case; the second question referred to the actual legal state of the case and their perceptions on the proceedings; the third question was about the particular case against retired Col. Plazas and the particular difficulties or advantages that they experienced during this process; the fourth question was about their views on the existence of impunity in the case and what actions should be in place to address it. These questions were meant to reflect from a legal perspective different elements on ideas around state criminality and impunity, focusing on the particularities, difficulties and challenges of the case as well as trying to bring about a reflexive exchange on the functioning of the legal system.

We conducted two interviews with lawyer Molano. The first one took place after the first instance judgment and the second one after the last instance decision by the Supreme Court of Justice in favor of retired Col. Plazas. With lawyer German Romero we conducted one interview that took place in his office, after the second instance judgment. As they are public to the case and have appeared before the media as legal representatives of the victims, they agreed with being identified in the present research with their names.

c) The *third group* of interviews was conducted with judicial officers who had worked in the judicial dossier against retired Col. Plazas. Within this group of people we conducted four semi-structured in-depth interviews with three people: the prosecutor of the case, the first instance judge and one of her judicial assistants. As asserted, for exploring their views we used a semi-structured questionnaire focused on the procedures. The objective of these interviews was that actors of the legal procedures could openly express their legal expertise. All of the interviews we

conducted with this group took place after their direct involvement in the process: in the case of the first instance judge and her assistant, the interview was conducted after her judgment against retired Col. Plazas; while in the case of the prosecutor, we interviewed her after her dismissal from the Prosecutor General's Office.

These exchanges were conducted in Bogota, with the support of a questionnaire composed by five main questions. The presentation of these questions varied according to the particular role of the judicial officers *vis-à-vis* the dossier. The first question was focused on a general presentation of the person and their position in the judicial system. The second question referred to their specific role in the case. The third question referred to their perceptions on the proceedings against retired Col. Plazas and the professional and personal conditions and obstacles that they experienced processing this case; the fourth question was about their perceptions on the results of the case; and, the fourth question was about their views on the existence of impunity in the case and what actions should be in place to address it.

The views of this group on the criminal process were important for understanding the problems and challenges that this case presents. This group of people provided us with different insights from the perspective of the operators of the judicial system. Within this group it was especially relevant to focus on the elaboration of ideas about the functioning of the criminal law system. For processing the interviews we transcribed each recording, coding the texts using the software *Atlas.ti*. Using 249 different codes we conducted a cross-examination of the findings with the aim of grouping the assertions of the actors in different themes.

2.2. The epistemological approach

The described set of data was intended to offer a series of specificities of the events around the taking and the operation to retake the Palace of Justice; further, this was not only aimed at understanding the particular case of study but also at providing insight into the general ideas, discourses and practices related to the phenomenon of impunity and the criminal activities of the State: the interest of this research is to visualize and understand “the complexity of the behavior patterns of the bounded system” of ideas (Cohen and Crabtree, 2006) taking place in this case. Thus, the analytical objective of the present work entails not only a description of the concrete events under study but an analysis of the problems, challenges and larger ideas regarding the social constructions around impunity and state crime.

With this aim, this research required an analytical tool allowing us studying and integrating the wide variety of sources employed, the multiplicity of information gathered as well as simultaneously forming a shared space of reflection with the theoretical framework that we explored. Such framework was meant to have the aptitude for depicting the perceptions of the actors gathered in this research but also gradually and simultaneously for drawing their underlying system of ideas analyzing the general theoretical developments on the field of inquiry.

In the search and construction of this tool, it was particularly relevant the discussions of the *Canada Research Chair in Legal Traditions and Penal Rationality* of the University of Ottawa where we conducted part of the present research. In different seminars we focused on a particular trans-disciplinary theory that served for drawing in-depth descriptions concurrently with unveiling the system of ideas underlying the observations. The first appearances of this *theory of observation* can be traced in the twentieth century through different researches coming

from a variety of disciplines, especially from natural and social sciences and from the mathematical work of Spencer Brown in *The Laws of Form* (1969). Although these sources were used and adapted for social studies mainly Luhmann systems theory (2000), this framework is not limited to a particular social theory. Presenting a trans-disciplinary vocation, beyond a bond with a specific discipline, this framework can be employed using different theoretical approaches to address social problems. However the different sources where we can find developments around this theory this framework is recent. The fact that the theory was somehow under construction provided us with the space for building our own variations, adaptations and reflections with a degree of openness in regard to the methodological approach during the process of research.

This *theory* is descriptive in nature, aiming at depicting how observers do observe: the focus of this approach is not the object of the observation (*X*) but the process itself. In other words, a sociological *theory of observation* is a framework for observing social phenomena, without reproducing the question of *what is reality*. Rather than asking: ‘what is *Y* observing?’, this theory asks: ‘How does *Y* observe *X*?’ and, through this question, ‘What are the distinctions and selections that *Y* employs when observing *X* as it does?’

“Spencer Brown’s concept of observation does not focus on the object of observation itself as a selection of what to observe. In this sense, the underlying question is not: what does an observer observe, but how does an observer observe; how is it that an observer is observing what he is observing, and not observing something else” (Seidl 2005:47).

This *theory of observation* suited with the methodological aims of the present work The problem of the present research is not whether people do observe impunity in the case or whether they judge a state crime was committed or not. The purpose of our work is to depict those ideas enabling an observation or not of these phenomena and what is the content of those elements

allowing them to observe in conformity with this - *how does a person or a system observe the phenomena under study? On the basis of what elements do they distinguish, characterize and select those phenomena?*

Our conceptual work could only be developed on the basis of those distinctions and selections drawn when observing the phenomena. In this line, the theory of observation teaches us that observing involves a process of drawing a distinction and operating a selection. “Drawing a distinction is the elementary act of observation which is the elementary act of human cognition” (Maturana & Varela 1980). Distinctions are drawn between a marked and an unmarked space or between a term and a contra-term¹⁰. For example, when asking about impunity the actors could draw a distinction by contrast *alter/ego* – this can take the form of a term/contra-term as when observers draw a distinction impunity/no-impunity; or an unidirectional distinction by which one side is indicated and the other is left blank –as when an observer distinguishes impunity/the rest.

“Once a distinction is drawn, the spaces, states or contents on each side of the boundary, being distinct, can be indicated” (Brown 1969); in other words, once a distinction is drawn, selection is enabled. Selections are indicating processes through which the observer opts for a direction in which the observation will be conducted (in our example I select ‘impunity’): observer systems draw distinctions and select a direction for their observation.

Referring to the action of observing does not confine the activity of the theory to a sensorial experience; it rather involves a cognitive process that operates through distinction, selection and, more importantly, exclusion. Observing is, somehow, an exercise of exclusion. Observer systems need to delimit their field of attention through the exclusion of different elements from their

¹⁰ The former is a distinction by contrast to the environment (e.g. the victim and the rest of society) and the latter is a distinction by contraposition of *ego* versus *alter* (e.g. the victim and the perpetrator).

observations; otherwise, they would be incapable of distinguishing. “No one can see everything” (Luhmann 2002: 74). There are no total observations. Observations are always partial. “[O]pacities remain, no matter how large the telescopes” (Rasch 2002: 4). Hence, the theory of observation allows us to depict not only those aspects that are being included for the observation but also those elements that are excluded from the observation drawing different descriptions on how and what we observe.

With the purpose of better understanding the construction of the observations drawn in this research let us describe two basic kinds of observation that the theory formulates as basic forms of operation of the observations: *first-order* and *second-order* observations. “First-order observation focuses on what others observe; second-order on how others observe” (Philippopoulos-Mihalopoulos 2009:18)

A *first-order observation* consists on asking: ‘what does the observer observe?’ This question does not focus on what is actually observed but on how that is observed. In other words, using the *theory of observation* this question should not answered by referring to the object of observation but by depicting the distinction made by the observer system and detecting its selection: the focus is the operation used for observing and, by this means, depicting the underlying system of ideas governing a particular observation. For example, when observing state criminality the issue is not if observers do depict in a particular situation a criminal event coming from the State, but what are the distinctions and selections that the observer employs with that end. Thus, the observation changes if, for example, the distinction drawn by the observer is state crime/ordinary crime or if it is state crime/ unnecessary crime (the same happens when for observing impunity, the distinction drawn is impunity/punishment or impunity/justice).

A *second-order observation* involves asking: ‘how does an observer observe?’. This form of observing can be characterized as epistemologically relevant since they are not focused on the ontological constitution of the world -”the social is this or that” (Borch 2011: 58); rather, they are concerned with the epistemological perspective of observing - “how do observers observe: how do they believe the world is constituted?” (Borch 2011: 58). This level of observation allows further to “comprehend more extended realms of selectivity and identify contingencies where the first-order observer believes he is following a necessary path or is acting entirely naturally” (Luhmann 2000: 62 in Raupp 2013: 148).

A *second-order observation* entails an observation of observers¹¹. As mentioned above, this form of observation asks ‘how does the observer observe?’, consequently asking ‘What is not being taken into consideration by the observer when observing as he or she is doing?’, ‘is it possible to observe differently (better) what is being observed?’ “Indeed, if a first-order observer distinguishes between observed and non-observed, a second-order observer can also observe what a first-order observer and *cannot* observe” (Philippopoulos-Mihalopoulos 2009:18). This is related to the so called *blind spots* of the observation.

As asserted before, observation entails exclusion. For excluding we need reasons. Elaborating those reasons involves taking into consideration what we exclude. Thus, when excluding although the observer does not select what is excluded, at the same time, he or she takes the excluded into account. This form of distinction and selection (or inclusion and exclusion) is different from a situation of not taking into consideration a particular element of

¹¹ “On this level [of observation] one has to observe not simple objects but observing systems - that is, to distinguish them in the first place. One has to know which distinctions guide the observations of the observed observer and to find out if any stable objects emerge when these observations are recursively applied to their own results” (Luhmann 1993: 763)

observation: a situation of *blindness*. To be blind is not to not see but to not see that one is not seeing. A *blind spot* of observation is formed when something is being excluded without taking it into consideration when drawing an observation. In these occasions, what is being left out of our field of observation is not what is not selected but what the observer does not perceive that he or she is not taking it into consideration. This theory of observation enables perceiving what is being observed, excluded and unnoticed by the observer systems to operate in the social world. In a way, the theory of observation allows us to see blindness.

In this context, the *observation theory* is auto-reflective in the sense that the researcher is acknowledged as an observer him/herself. A theory of observation therefore allows the researcher to be aware that his or her observations are also limited to the distinctions and selections drawn in the process, involving that the research is therefore bounded to its own limits and blind spots. Thus, the theory is useful as a mechanism of scientific control for the observations.

The *theory of observation* allows to put forward the limitations of the process of observing, avoiding the (re)presentation of the social science developments as complete, absolute or 'good'. This form of drawing the observations involves a scientific control of the inquiries while simultaneously allowing a structured and rigorous development of the process of research. Indeed, scientific consistency should involve awareness and restraint from mere-value judgments. This means that the process of research is intended to allow constant confrontation and contrast between differing ideas, especially controlling those ideas accepted as unquestioned. Even if engaged with a particular (political, ideological, religious) position, this process allows the researcher to adopt a cognitive openness.

This process therefore should be capable of guiding the research and the researcher influencing his or her cognitive processes. This form of reshaping and adjusting the process of knowing and perceiving involves focusing on how we observe the social life rather than what we observe: the theory of observation allows moving our attention to the operations of observation that particular social systems or actors employ in order to draw their distinctions. This could, for example, yield helpful insights into the convergence of ideas and practices between actors holding apparently opposed discourses (e.g. *liberal* human rights and *conservative* law and order acting both in favor of more criminal law repression) and vice versa. Moreover, it offers a richer perspective allowing to characterize the significance of social actors' ideas by understanding how they observe the social world. For instance, although two people may agree that a case involves a scenario of impunity they can do so for very different reasons, ultimately pointing toward very different phenomena.

In sum, for this research we used a *theory of observation* in order to depict, describe, understand and analyze the case selected as well as the ideas, practices and social discourses around the themes of state crime and impunity. This framework of analysis provided us with in-depth insights on the information gathered through the media, the documentary sources, the observations *in situ* and the personal interviews of the actors. It also gave us elements for reflecting on and questioning the way that we were processing the information enabling scientific awareness of the limitations and selections that we used when drawing the observations of this research. This enabled a more thoughtful form of conducting our investigation as well as reinforced our openness when trying to explore, categorize and analyze the meanings and content of the ideas, discourses and

practices of the actors of the PJ case and their underlying ideas on the subjects of impunity and state crime.

3. The PJ case

Different commentators have asserted that the PJ events are “one of the climactic moments in Colombia's problem with violence” (IACHR 1993: Introduction), “one of the most serious and disturbing events of the institutions in the long history of violence experienced by Colombia” (PJ Truth Commission in Gómez, Herrera and Pinilla 2010: 276), and ultimately “one of the most emblematic human rights violations of the country’s armed conflict” (Deutsche Welle 2015)

The present chapter aims at giving an account of the case giving a contextualized account of the taking of the Palace of Justice and the subsequent operation to retake it by the State security Forces in 1985, as well as the following legal investigations. A combination of various sources of information were taken into consideration with this purpose, including legal records, media reports, documents, *in situ* observation and factual aspects gathered in the interviews from our fieldwork. The great volume of available data, the variety of versions, the multiplicity of relevant events and the great controversy around them were a particularly complex feature for our analysis.

In this part, we will attempt at drawing a reconstruction of the case in order to visualize, understand and analyze some of its specificities with respect to the system of ideas that it reveals. The objective of this exploration will not be to present a ‘new version’ of the case or ‘discovering’ new information on the fate of the disappeared, nor determining responsibilities for the violations or clarifying the motivations or concrete circumstances of the crimes. We will neither determine

the scientific or judicial truth of what happened at the PJ. In line part, we will rather give a rich account of the events with the purpose of enabling an analysis of the phenomena under study.

Any reconstruction should take into account the intervention of the researcher and the limitations that condensing a singular version from a complex event entails. Researchers select for observing. A pretension of totality is both unfeasible – there is not a single point of observation allowing to assess the totality of an event (Bateson 1972: 5), and undesirable –it would only lead to the accumulation of desultory assessments (Popper 1952; Dahrendorf 1966). As Bateson (1972) puts forward, there is always a recoding, a sort of transformation between the brute event and the person who observes, between the researcher and the object of study.

Considering these constraints, in the following section we will offer an account of the PJ case. These events could not be understood without an historical background. For this reason, the first step will be to succinctly expose an historical context of the events, with the aim of subsequently describing the happenings and the legal enquiries that have taken place with regard to them. Thus, the objective of this chapter will be to draw a proper description of the case for assessing the system of ideas that it embeds with respect to the phenomena under study in this research.

3.1. The Historical Context and Background of the Events

Colombia is the northernmost country of South America. The waters of both the Atlantic and the Pacific oceans bathe its coastlines and provide an important geostrategic location to its land. The estimate current population of the country is over 48 million inhabitants. The formation of the modern Colombian State started with the independence movement from the Spanish Crown in the nineteenth century. In the period between 1810 and 1850, after different fights against the

Spanish rule, Colombia gained certain independence and entered a phase of institutional adjustments.

In the late nineteenth century, nine civil wars and more than a hundred regional civil conflicts burst out in the country. “Colombian history is often seen as a long series of civil wars and violence [...] Historians (e.g. Alape 1985; Fischer 1991; Jaramillo 2001) have counted 54 civil wars [only] in the 20 years between 1851 and 1871” (Sánchez, Solimano & Formisano 2005: 120). Violence were also pervasive during the twentieth century¹². However, since the independence and parallel to the violence, the country installed an electoral system sustaining public elections along most of its republican history¹³. In this context, during the nineteenth century and much of the twentieth century, two main political parties ruled the electoral life of the country: the liberals and the conservatives.

According to Bushnell (1986: 32), while during the independence almost every citizen of the Republic self-identified as liberal¹⁴, the bifurcation with the conservatives took place during the War of the Supremes (1839–1842)¹⁵. From that point of history onward, the conservatives were traditionally thought of as supporters of a Catholic-based government and strong centralization. In

¹² These battles derived into and from a variety of conflicts, i.a. the independence of Panama (1903), the Bananeras massacre (1928) and two territorial wars against Peru (1911; 1932). None of these episodes lasted as much as La Violencia (Deas 1986: 43), which is the common denomination for Colombia’s modern conflict that will be explained later on.

¹³ In contrast to the majority of Latin-American countries that at the time were ruled by long-lasting dictatorships: between 1970 and 1990 more than 75% of Latin-American population was ruled by military dictatorships (Torres-Vivas 1999: 285)

¹⁴ This expression congregated at the same time patriots and republicans.

¹⁵ “Colombian history is often seen as a long series of civil wars and violence dating to 1839. The first civil war—the war of the Supremes (Guerra de los Supremos)—began only a few years after Colombia was liberated from Spain in 1819. It was fought between supporters of Simon Bolivar (El Libertador), who attempted a coup d’état against the santanderistas (supporters of Francisco de Paula Santander, one of the leaders of Colombian independence). The war ended in 1841 and led to the founding of the Liberal and Conservative parties that have dominated Colombian politics” (Sánchez, Solimano & Formisano 2005: 120)

contrast, the liberals were represented as supporters of a secular government, agrarian reform and administrative and financial decentralization.

The key factors of distinction between liberals and conservatives were, on the one hand, their position towards the degree of centralization of the public administration – however, Bushnell (1986: 36) asserts with this respect that there could always be found liberals who were centralists and conservatives supporting federalism; on the other hand, the second difference was their position around the role of the ecclesiastic power *vis-à-vis* the State¹⁶. In this context, the conservatives took certain preeminence mostly due to the influence of the Catholic Church, an institution that was eager to preserve its power within the structures of the State.

During the nineteenth century and much of the twentieth century, the two political parties resorted to violence to settle their disputes over the control of the State apparatus (CNMH 2013:112). The political pugnacity between the traditional parties reached its most critical stage in the period known as ‘La Violencia’ (CNMH 2013:112). According to some commentators, *La Violencia* was a phase of escalation of a conflict that was presented in terms of partisan antagonism, but that was rooted in a number of different social conflicts, particularly in the confrontation between the oligarchy and the people. This was particularly manifest when the Gaitanist movement emerged claiming its opposition against the ruling class, asking for social reforms and leading the working class and the peasants into a political group that could represent their demands.

¹⁶ With respect to all the other political issues, it was difficult to find programmatic distinctions. Commentators as Gonzalo Sánchez (1986: 18) have asserted that these political parties were formed as subcultures or sometimes as labels rooted in oral tradition, rather than in tangible and concrete political discrepancies. With this respect, Bushnell (1986: 35) argues that the urban and rural masses were ascribed to one or another party for gaining access to the State bureaucracy.

In 1946 a period known as the Liberal Hegemony (1930-1946) reached its end with the election of the conservative Mariano Ospina Perez as President. President Ospina's government unfolded in a context of heightened social unease noticeable in a growing wave of strikes¹⁷, as well as a growing situation of insecurity (Guzmán, Fals & Umaña 1962: 28). Such challenging social situation was exacerbated by a number of crimes committed against political dissenters, especially against the Gaitanist movement. Between 1944 and 1947, Gaitán proposed a vision of the Colombian situation as a radical social division between those who had everything (the oligarchy) and those who had nothing (the people) (Pécaut 1969: 191). While *gaitanismo* (Gaitán's movement) was traditionally understood as part of the Liberal party, there is a current understanding of it as an alternative to the bipartisanism and therefore as against both the liberal and conservative oligarchies (Sánchez and Peñaranda 1986: 19).

In a context of rising violence, on February 7, 1948 Gaitán led a silent march in which he pronounced his renowned *Prayer for the Peace*, asking the government to stop its violent acts against the population and his party fellows. On April 9, 1948, the Presidency candidate of the liberal party Jorge Eliecer Gaitán was murdered while giving a public speech to his followers. In his funeral, Amparo de Gaitán (his widow) repudiated the continuation of the conservative regime but also refused its replacement by the Liberal leaders, accusing them of complicity with the crime¹⁸. Nationwide, this assassination provoked violent disorders and the distinction between liberals and conservatives became an open sign of war, hatred and hostility.

¹⁷ Since September 1946 there were more than 500 labor conflicts arising in collective bargaining and strikes (Guzmán, Fals & Umaña 1962)

¹⁸ Just a few hours after Gaitán was murdered, the leaders of the Liberal and Conservative parties gathered together on that same night to discuss on the political situation (Braun 1986: 205).

On November 9, 1949, Liberal congressmen visited President Ospina to announce that they were going to file a process against him in the Congress. In that same afternoon, the Congress building was occupied by the military (Ayala 2003). Based on the remarkable disturbance of the public order, President Ospina Perez issued the Decree 3513, by which he declared the state of siege. Hence, President Ospina was free to rule because of the extraordinary powers conferred by the state of exception until the end of his mandate (Ocampo n.d.).

La Violencia is the mainstream label for the violent socio-political conflict that emerged in the events mentioned above during the 1940s. Such rise in violence created a social environment of confrontation represented as a struggle between liberals and conservatives, present at least until the 1960s¹⁹. This conflict created a general climate of destruction and radical enmity among the civil society: according to Oquist, between 1948 and 1966, 193.017 people perished as a result of the political violence (Oquist 1978: 322 in CNMH 2013:115). Also, in this context the country was progressively militarized: while in 1946 the country's Armed Forces were as large as 8.000 men with a budget of 10,2% of the GDP, in 1965 the Armed Forces grew to 37.000 men with a budget that oscillated between the 17% and the 20% of the National Budget (Gilhodés 1986: 305).

In this context, under the excuse of protecting the public order, the government led an official campaign of repression that implied a crusade against liberals and communists. Numerous people were murdered and others were forcibly displaced. Some fled to neighboring countries and others, mostly liberals in the rural areas, either organized or joined self-proclaimed *self-defense*

¹⁹ Some commentators assert that *La Violencia* is a period of around twenty years –some commentators frame it within 1945 and 1965 (e.g. HRW 1996), others frame it between 1946 and 1958 (e.g. CNMH 2013:112) and some others that it was from 1946 to 1964 (e.g. Pécaut 1999:160). According to Pécaut (1999) this difference is due to different memories of *La Violencia*, some of them emphasizing on the continuity of social struggles since *La Conquista* (a permanent phenomenon with particular landmarks) and others laying emphasis on particular events as the War of a Thousand Days.

resistance groups since 1949 (Medina 1986: 249). These armed groups rapidly shifted their strategy from stationary defense to a more offensive and itinerant strategy. In short, these movement grew into guerrilla movements²⁰.

Around mid-twentieth century, the growth of these groups backed by a broad popular support made of this movements highly successful in their control of the territory and of the population. In this context, the *statu quo* that had disregarded these movements, perceived as trivial and weak by the political class and the military commanders at the time (Jaramillo 1986: 47), progressively considered them as a genuine threat to the national security. In this context, the conservative police targeted the guerrillas as their main goal. The abuse of the authority and the use of force by law enforcement officials became customary. The use of different methods of repression by the military and the police involved recurrent mistreatments, cruelties and crimes executed against the civil population, largely justified as part of the ‘fight against the rebels’²¹.

This campaign was complemented by the emergence of different pseudo-paramilitary groups such as the *Chulavitas*²². In different international litigations against Colombia, the Inter-American Court of Human Rights (hereafter, IA Court) (2004; 2005a; 2006a; 2006f; 2007) has concluded that the State has been actively involved in the creation of paramilitary groups, as well as in their legal, logistic and doctrinaire support. In 1962, members of the US Army Special

²⁰ Guerrilla warfare is a method of waging war that was present along the different conflicts and independence struggles in Colombia. The term ‘guerrilla’ indicates the military tactic of attacking the adversary through disperse mobile groupings. In early modern times, guerrilla warfare was considered in Colombia as minor groups resorting to a desperate form of making war.

²¹ Such fight aimed at ‘draining the sea to kill the fish’ - following the Maoist model claiming that ‘the fish is to water what the people is to the guerrilla’. Under this premise, the military framed their campaign with the objective of exterminating the guerrillas while isolating them from the popular support (Villar & Cottle 2011: 123). Later on, this kind of abuses became the regular configuration of the war in Colombia, and the term guerrilla became the current identification of those armed groups acting against the *statu quo*.

²² The Chulavitas were a group of armed men trained by the government and recruited in a rural area named Chulavita

Warfare Center and School at Fort Bragg presented in Colombia a plan for the formation of paramilitary groups (Giraldo 2004). After the formation of the first communist guerrillas, in December 1965, the Legislative Decree No. 3398 authorized the creation of “self-defence groups” for supporting anti-subversive operations. The military supplied arms to the paramilitaries under the excuse of combating the guerrilla (UN 1990). At the time, the emergence of paramilitary groups, the normalization of states of exception and the unrestrained enlargement of military power were expressions of an institutionalization of terror.

In an atmosphere of repression and in the middle of a fierce campaign of repression coordinated by the government and conducted by the conservative police and the military, the Liberal Party decided not to participate in the presidential elections, alleging a risk to their life and the absence of political rights. In the Presidency elections of November 27, 1949, the Conservative Party was the only running political force and the conservative candidate, Laureano Gómez, was elected for the period between 1950 and 1954. According to some commentators, Gómez led an authoritarian project that assimilated liberalism and communism and sought the return of the State to the Catholic Church as an element of social cohesion (Pécaut 2015)²³.

The armed conflict rapidly spread throughout the country. Civilians were largely victimized not only by war and violence but also by precarious living conditions, little public investment on

²³ “Although the liberal-conservative violence was promoted by the leadership of both parties, political confrontation was particularly fueled by the manifest sectarianism of the conservative leader Laureano Gómez, President of the Republic between 1950 and 1953. Since then, the political conflict resulted in open armed confrontation [...] as a hallmark of the 1950s, violence was present amongst the citizens from both tendencies through the attack by the opposite party or their territories. Political parties formed armed groups with different levels of organization: on the one side, the Chulavita police and the Birds (professional group of hit-men), at the service of the conservative government; on the other side, liberal guerrillas and communist self-defense groups” (CNMH 2013: 112).

basic sanitation services, and defective social policies. In this context of social unease, other guerrillas were formed – there have been around ten guerrilla groups in the modern Colombian history. The biggest have been the Revolutionary Armed Forces of Colombia (FARC)²⁴, the National Liberation Army (ELN) and the Popular Liberation Army, which were formed in the 1960s claiming to have a communist orientation.

On June 13, 1953, General Rojas Pinilla seized power in a coup installing a military government that lasted until 1958. General Rojas, acting with the support of the Catholic Church, the economic interest groups and both political parties, overthrew the conservative government. According to the U.S Department of State, the coup counted with the conservative support and the benevolent gaze of the liberals (U.S Department of State in Atehortúa 2010) due to the striking deterioration of the public order in the country.

After declaring the state of siege, in 1953 one of the first measures that General Rojas undertook was to declare a unilateral ceasefire offering amnesty to the liberal guerrillas that would surrender (Decree 1823/1954 of the state of siege). On June 13, 1956, at Bogotá's football stadium "El Campín", Rojas Pinilla presented his own political party: "the Third Force". Rojas suggested the need to overcome bipartisanship and proposed a socialist political program. This event was understood by the political elites as challenging the long-established political ruling class.

On July 24, 1956, Alberto Lleras (liberal) and Laureano Gómez (conservative) signed the Pact of Benidorm: in the name of their parties they agreed on a system of government called the *National Front*. Following this pact, Rojas stepped down and a military junta was established as

²⁴ According to Pizarro (1986: 397) the majority of the commanders of the FARC had participated in the liberal guerrillas.

the transitional government²⁵. The *Frente Nacional* was advertised to the public as a form of pacifying the civil conflict between liberals and conservatives. Under this agreement, during the following sixteen years, both parties alternated the Presidency every four years and shared their participation in the governmental bureaucracy. However, in the long run, this pact involved the discrimination and relegation of other political groups: “[i]nstead of working to exclude one another from power, the traditional parties now worked together to exclude all others from the political arena” (Rochlin 2003 in Isbester 2011: 212).

After a short asylum in the Dominican Republic, General Rojas returned to Colombia and founded a political movement called ANAPO (*National Popular Alliance*). In 1970 Rojas was presented as ANAPO’s candidate to run for President, competing against the National Front candidate Misael Pastrana. On April 19, 1970, the presidential elections took place²⁶. Rojas and his supporters alleged that the elections had been rigged. Nevertheless, the Electoral Council proclaimed Misael Pastrana President for the period 1970-1974.

The suspicion of fraud around the elections raised great social unease. In this context, former FARC Jaime Bateman led the creation of the 19th of April guerrilla (hereinafter, M19), as a remembrance of the day when the Presidential elections were held. This was mainly an urban movement with a socialist political program²⁷.

²⁵ The junta, presided over by General Gabriel Paris, governed the country from May 10, 1957 to August 7, 1958.

²⁶ The official results of the elections were 1,561,468 votes in favor of ANAPO’s candidate and 1,625,025 votes for the National Front candidate.

²⁷ In January 1974, this group issued its first public statement asserting: “Every worker, every anapista [partisan of Anapo’s party], and all the oppressed must understand: victory is not begged, it is taken. The people know that without struggle and armed organization, Anapo will not achieve victory; however, great is the number of votes that it can obtain in the polls. Such was the learning on April 19th, 1970, when they stole from us the victory. This history will never happen to us again” (Revista Alternativa 1974: 24).

The M19 conducted different armed actions that aimed at causing public impact. Hernando Gómez (1969) asserts that the target of this guerrilla was not the traditional rural guerrillas' crusade against the military but rather a propagandistic campaign directed to the public opinion. The M19 promoted an expectation campaign to announce its imminent appearance.

Table No. 3. Images of some advertisements published in journals and found on the streets

<p>Coming soon: M19</p>	<p>Lack of energy... Inactivity? Wait for M19 (El Espectador 1974a: 13A)</p>	<p>Parasites... Worms? Wait for M19 (El Espectador 1974b:1C)</p>	<p>Decay... forgetfulness? Wait for M19 (El Espectador 1974b 14A)</p>

Besides its advertising activities, the M19 conducted several armed actions of high impact on the public opinion. On January 17, 1974, their first armed action was the theft of Simon Bolivar's sword. On this occasion, the M19 sent to the media a public statement.

The only journal that published it was Revista Alternativa (1974: 24). On the statement that can be seen in the image next to the text, there was a photograph of the sword with the M19 flag and the declaration:

“The liberating sword is now in the hands of the people. [...] Bolivar comes back to disturb the oppressor. He comes back to awake the oppressed. His sword renews his fighting. Now it faces the Yankees. The exploiters. Those who give away our country to the dollar. Those who drown our people in misery. [...] Land for the peasants, justice for the workers, fair work for the unemployed, school for the children, a clear and clean life for all” (Revista Alternativa 1974: 24).

Later, on New Year's Eve of 1979, the M19



Picture No. 1. M19 Declaration. Retrieved from Revista Alternativa (1974: 24)

stole 4,076 weapons from a military base through a tunnel dug into one of the main Colombian Army weapons depot, at a military storage facility in Cantón Norte (Bogota). Due to festivities, activities in the depot were suspended for three days; the guerrillas took advantage of it and dug a tunnel from a nearby house. The excavation lasted about ten weeks. On the evening of December 30, 1978, they reached their goal, stole the weapons and kept them until January 1, 1979. On January 2, the army conducted an operation and recovered most of them (El Tiempo 1992). Besides these spectacular operations, during the seventies, the M19 adopted a systematic practice of kidnapping, some of them for political negotiation and others concluding with the payment of a ransom or with the killing of the people deprived of liberty²⁸.

²⁸ Five representative cases of kidnapping by the M19 were:

- In August, 1975, the M19 kidnapped the American citizen Donald Cooper, general manager of *Sears* stores in Colombia. Cooper was captive until a ransom of one million dollars was paid on November 5, 1975 (Revista Semana 1988).
- In February 15, 1976, Jose Raquel Mercado, president of the Confederation of Workers of Colombia (a working class union), was kidnapped and accused by the guerrilla of betrayal. They claimed he had received bribes from American interest groups. On April 19, 1976, Mercado was killed after a 'trial' and the M19 left his body exposed in the streets of the west side of Bogota (Revista Semana 1988).
- In August 19th, 1976, Hugo Ferreira, former Minister of Agriculture and Indupalma²⁸ manager was kidnapped. The condition for his release was for the Corporation to reach an agreement with the workers, who were in a process of collective bargaining. On September 14, 1976, the corporation accepted all of the requests of the workers and Ferreira was released in Bogota (Revista Semana 1988).
- On May 10, 1978, the ambassador of Nicaragua in Colombia, William Baquero, was kidnapped. The purpose was to denounce Somoza's regime and to call for solidarity with the Sandinista movement. Baquero was released after a few hours (Revista Semana 1988).
- On February 27, 1980, at about midday, the M19 took control of the Dominican Republic embassy when they were celebrating a national holiday with other diplomatic delegates in Bogota. The M19 demanded the release of about 320 political prisoners. "On April 27, in the early hours of the morning, the captors of the Dominican Republic Embassy and the hostages, accompanied by the members of the IACHR, Colombian Government officials, members of the Asociación Colombiana Pro-Derechos Humanos, and representatives of the Red Cross went to the El Dorado international Airport of Bogotá to board an airplane flying the Cuban flag and to depart for Havana. [...] Several hostages were released moments before the flight took off. Others were set free in the Cuban capital, following a period of captivity that has lasted 61 days" (IACHR 1981: Introduction).

In the early 1980s, the military started to implement a more integral plan to fight the guerrilla. In the 1970s, throughout Latin-America²⁹, the National Security Doctrine was implemented by the military against communism: the new *internal enemy*³⁰. The *statu quo* led a civil and military campaign against its ‘new’ antagonist force - represented by the imageries of the *bandoleros*, the *anarchists* and the *communists*. This consequently reframed the social conflict from a bipartisan cyclic struggle for the political power (between the conservatives and the liberals) into a conflict to be fought under the slogan of *the fight against communism*³¹ (Gilhodés 1986: 317, 320, 321).

The first official record of the National Security Doctrine in Colombia may be detected at the beginning of 1972, under the rubric of General Hernando Castro (Gilhodés 1986). This date coincides with the time in which the phenomenon of enforced disappearances started to be noticed

²⁹ “During the second half of the twentieth century, large sections of the population were exterminated in various parts of Latin America. Most of these events followed a similar pattern and were the result of what became known as the National Security Doctrine. Developed primarily by the United States, this policy widened the sphere of international conflict to Latin America in the belief that the region could play a strategic role in the fight against communism, an ideological struggle that had no territorial boundaries. The National Security Doctrine was inspired by the Cold War but also by the methods developed by Western powers in various counter-insurgency struggles. In particular, the methods applied by the ‘French school’ in Indochina and Algeria and adopted by the Americans during the Vietnam War were later taught at numerous military and ideological training centres in Latin America. The most important of these was the School of the Americas, first established in the Panama Canal Zone in 1946 to train Central American forces. Following the success of the Cuban Revolution in 1959, another branch of the School was opened at Fort Benning, Georgia, in 1963 to teach ‘French’ counter-insurgency tactics. Thus, the practice of systematic annihilation of political enemies in Latin America, which began as early as 1954 with the military coup in Guatemala, continued almost until the beginning of the twenty-first century, spreading throughout practically all of Latin America” (Feierstein 2012: 489-490).

³⁰ The notion of internal enemy was imported from Europe and especially from North America. This notion described a change in the military and law enforcement focus, from the mission of defending the territorial integrity of the State against foreign threats, to the goal of defending an ‘inner frontier’ against communism. This strategy was characterized as an anti-subversive war that became the key issue of concern to the military (Barak 2015: 309).

³¹ As Gilhodés (1986) assessed, between 1925 and 1930, the Armed Force Commanders displaced their view of the Colombian conflict from a struggle between Liberals and Conservatives for the political power, to a fight against communism.

in the country according to the Report of the *Working Group on Enforced or Involuntary Disappearances* (UN 1989) about Colombia

In the transition between the 1970s and the 1980s, different human rights sources indicate that enforced disappearances became particularly widespread (ASFADDES 2003). As reported by the Colombian Forensic Institute, enforced disappearances gradually increased since 1975, becoming persistent mainly since 1981 (between 1972 and 1975 there was one case per year while in 1979 there were 23 cases and between 1980 and 1988, the UN Group registered a media of more than 78 cases per year³²).

It was in 1977 when the first formal allegation of enforced disappearance was registered: the case of the leftist activist Omaira Montoya perpetrated by members of the Police and the military³³ (ASFADDES, 2003). Although enforced disappearances had been committed in the country in prior periods³⁴, the disappearance of Montoya is a central point for the denunciation of this phenomenon in the country, even though the crime was not recognized at the time as a domestic criminal offense.

One of the most relevant antecedents of the National Security Doctrine in Colombia is President Turbay's (1978-1982) Security Statute. Justified under the grave disturbance of the public

³² From 1972 to 1974 the Group registered one case per year; in 1975 and 1976, there were three cases each year; in 1977, there were nine cases; in 1978 there were six cases, in 1979, 23 cases, in 1980, 4 cases, in 1981, 80, in 1982, 74, in 1983, 73; in 1984, 89; in 1985, 76; in 1986, 94; in 1987, 65; and in 1988, 70.

³³ Omaira Montoya was a bacteriologist and leftist militant. At the time of the events, she was three months pregnant. She was with her partner, Mauricio Trujillo, at the Barranquilla's airport when she was approached by members of the Police Intelligence (F2). Mauricio Trujillo was illegally detained, tortured, eventually tried in a court and sentenced to 8 years in prison. Omaira was forcibly disappeared.

³⁴ Information around the genealogy of the practice of enforced disappearances in Colombia is obscure. The oldest case registered in the National Register of Disappeared people in Colombia dates back to 1938 (Segura and Ramirez 2015). However, there is little documentation on this violation before the mid-twentieth century. With this respect, according to Federico Andreu (international expert on the subject of enforced disappearance), in the country this violation has been part of the history of socio-political repression at least since the 1950s.

order³⁵, the Statute hardened punishment for certain crimes³⁶, imposed prison penalties for those who participated in public demonstrations³⁷, awarded competence to the military authorities to prosecute crimes³⁸ and conduct administrative detentions³⁹, as well as to the administrative authorities to enact curfews⁴⁰ and censure the media when informing about ‘illegal’ strikes⁴¹.

These provisions affected the human rights situation of the population. The criminalization of social movements facilitated arbitrary detentions⁴², some of which were used as means for disappearing people who were irregularly apprehended. With this respect, Amnesty International (1980: 52) claimed that many of these people were accused of subversion, were subjected to solitary confinement without proper legal aid, and were subjected to various forms of physical and psychological torture.

³⁵ “[...] [P]eriódicamente se han venido reiterando y agudizando las causas de perturbación del orden público, que crean un estado de inseguridad general y degeneran en homicidios, secuestros, sedición, motín o asonada, o en prácticas terroristas dirigidas a producir efectos políticos encaminados a desvirtuar el régimen republicano vigente o en la apología del delito, actos éstos que atentan contra los derechos ciudadanos reconocidos por la Constitución y por las leyes y que son esenciales para el funcionamiento y preservación del orden público” (Decreto Legislativo 1923 de 1978).

³⁶ The Decreto Legislativo 1923/1978 toughened penalties for kidnapping (Art. 1), rebellion (Art. 2), offenses against the public order (Art. 3), among others.

³⁷ The Decreto Legislativo 1923/1978 introduced the punishment of imprisonment against those affecting peaceful social activities (Art. 4). Also against those occupying, even momentarily, public spaces or other private entities with the purpose of pressuring public authorities, distributing subversive propaganda or fixating insulting writings or drawings exhorting citizens to rebel. Also, against those who incite to disobey the law or the authorities, as well as those who use without legal justification masks or any device hiding their identity (Art. 7).

³⁸ The Decree 1923/1978, gave military justice competence to try crimes committed against the life or integrity of members of the armed forces, security public bodies and against civilians at their service.

³⁹ In accordance with the 1886 Constitution, the government was competent to order detentions in the context of disturbances of public order and security.

⁴⁰ The Decree 1923/1978, authorized the Mayors to limit and prohibit gatherings, demonstrations and open-air meetings (Art. 8).

⁴¹ The Decree 1923/1978 granted the Ministry of Communications the power to veto radio stations and TV channels when informing about public order and illegal strikes or other labor-related work stoppages (Art. 13).

⁴² Only from August 1978 to August 1979, the Minister of Justice notified 68,000 arrests.

These actions were part of a strategy issued by the General Command of the Armed Forces under the denomination *Plan Tricolor*, which consisted on a series of offensive actions against the guerrilla (Tribunal Superior 2012). According to General Jesús Arias, the Plan established that in case of a hostage situation, the military were to act promptly and decisively with no provisions of negotiation or dialogue (Verdad Abierta 2015). The existence of this Plan was proved to have an important role in the way the military dealt with the taking of the Palace of Justice (Tribunal Superior 2012; Juzgado Tercero 2010).

The military were not the only to react against the guerrilla. On November 12, 1981, the M19 kidnapped 26-year-old Martha Ochoa, sister of three members of the Medellin Drug Cartel. The subversive group asked for a ransom of 12 million dollars. The drug dealers decided not to pay and offered a public reward for information on the whereabouts of Ms. Ochoa. In December, 1981, 223 people formed a group called Death to Kidnappers (in Spanish, *MAS*), as a retaliation for the kidnapping of Ms. Ochoa. This organization became an armed force capable of conducting all types of violent activities to protect drug traffickers from the guerrillas.

The group grew rapidly. In different regions such as the Magdalena Medio and Santander, landowners, merchants, military and local authorities adopted the MAS model for 'cleansing' their regions of rebels. Their original goal was expanded to an offensive against anyone opposed to the organization: politicians, peasants, activists and different people were killed, tortured and subjected to different kinds of violence. The authorities recorded 240 murders attributed to MAS, in which 59 military and police officers in active service were implicated according to a report issued by the *Procurador General* (Procuraduría General 1983).

In this context, the Council of State conducted certain investigations addressing different human rights violations in which the military were involved and the Supreme Court censured the existence of martial trials conducted by the military against civilians, as well as the constant resort to states of exception for governing. These actions caused unease among the Armed Forces and, suddenly, the councilors of State began to receive threats saying that it was time for them to pay “for the infamy they had committed against the Army” (IA Court 2014: 523; Gómez, Herrera and Pinilla 2010: 32).

Although the *Procurador* tried to initiate a broader disciplinary investigation, the tribunals sent the case to the military jurisdiction where all charges were dropped. At that time, the Minister of Defense, General Landazábal, ordered military officers to contribute part of their wages for the legal defense of their fellows accused of wrongdoing (Jiménez 1986: 121). He also championed the paramilitary groups, describing them as civilians who simply protected themselves from the guerrillas.

The U.S. was a relevant actor in the escalation of violence⁴³. The US and the Colombian governments coined the term *narco-guerrillas*, as the new enemy characterized by a double identity of both drug dealers and communist guerrillas⁴⁴. The political and military pressure from the

⁴³ “[e]ven when the peace process between the guerrilla movements and the government began in 1982, the US continued to back the Colombian military and paramilitary groups which increased their counterinsurgency offensives against the guerrilla groups and Colombian civilians throughout the 1980s (Stokes 2005: 75). Disappearances and torture were ongoing, as were murders. A number of [...] paramilitary groups, involved with drug cartels, were also formed during this period, and were responsible for kidnappings, murders and mass killings, all with the assistance of the Colombian military, which provided intelligence on the identities and locations of some of the targets (Stokes 2005: 75–6). Yet the US did not condemn the activities of the Colombian military and, in 1984, sent \$50 million of arms to Colombia’s military and police forces (Stokes 2005: 77). Such aid would continue and, by the end of the Cold War, would be granted in the name of counterdrug as well as counterinsurgency operations” (Blakeley 2009: 99).

⁴⁴ “There followed significant investment in a war on drugs to be waged both within the US and in Latin America in the early 1990s. \$47 million of Foreign Military Financing was designated for Colombia in 1992, and \$58 million was requested for 1993, as well as \$2.5 million in International Military Education and Training (IMET) provision each year (HRW 1992). This intensified with the initiation of ‘Plan

guerrilla as well as the social unease and the public allegations for human rights violations committed by the government and the paramilitary, pushed the government to accept a peace process. In 1982, President Betancur agreed a ceasefire with the M19⁴⁵ and in August 1984, the M19 agreed to a truce with the government in Hobo (Huila) and Corinto (Cauca), under the promise of a “national dialogue” in order to carry out different institutional reforms. “President Belisario Betancur (1982-1986) applied a generous political amnesty and introduced an ambitious peace plan, which included cease-fire agreements with the main guerrilla groups” (UN Working Group on Enforced or Involuntary Disappearances 1988).

This agreement created tensions within the establishment. Consequently, the truce did not last much time: in September, the M19 and the military engaged in combat and in December 1984, the truce was totally contravened in an attack against the guerrilla headquarter at Yarumales - the military alleged that they were attempting at rescuing people that had been kidnapped (Maya and Petro 2006: 105). After 22 days of combats, the army withdrew and the guerilla decided to maintain the Corinto agreement.

However, On June 20, 1985, after further confrontations, the M19 declared the end of the truce, considering that the government and the military had systematically violated the agreement.

Colombia’ in July 2000, with a \$1.3 billion package of what was claimed to be emergency anti-drug aid to Colombia and its neighbors (CIP 2002). Since 1996, the International Narcotics Program covered most of the training, rather than the IMET program. Funding increased for the International Narcotics Program in Colombia, from \$16 million in 1996 to \$439 million in 2003, of which \$284.2 million was for police and military programs (CIP 2002). HRW reports that the UK also provided ongoing military assistance to Colombia, although the full amount or nature of that assistance is not publically known (HRW 2007a)” (Blakeley 2009: 128).

⁴⁵ “At last, the M-19 settled down in the countryside. First, they did so as a strategy that combined diverse scenarios, rural and urban, between 1978 and 1984. Afterwards, as a reduction of their own expectations, which they centered in the creation of a Bolivarian army in the countryside. This shift cannot be attributed to the ideological departure from the foquista strategy (fighting through little localized groups), but to a greater confidence in the idea that opposition and political resistance were more favorable in the rural areas” (Luna 2011: 165)

On September 30, 1985, their first public action was to steal a delivery van, distributing the milk it transported to the residents of the southern part of Bogota (an underprivileged area of the city). The Police killed eleven members of the M19 who participated in the events.

In 1985, in the context of the PJ events, it was evident that enforced disappearances had become not only selective -targeting popular leaders and social movements who represented political dissent, but massive. This violation grew into a mechanism of social control directed against the less advantaged members of society⁴⁶ (ASFADDES 2003).

In a climate of repression and control over the life of the citizens, and intensified intimidation against the opposition and the social movements, in the decade of the 1980s denunciations of disappearance became more and more eloquent. A turning point took place in 1982: between March 4 and September 15, 1982, twelve students of the National University, one independent worker and one peasant leader went missing. Two of them were subsequently presented as “executed” by the Police and the others never appeared. In response to these incidents, the families of the disappeared joined together in their search, thus forming the Association of Relatives of the Disappeared-Detainees (ASFADDES)⁴⁷.

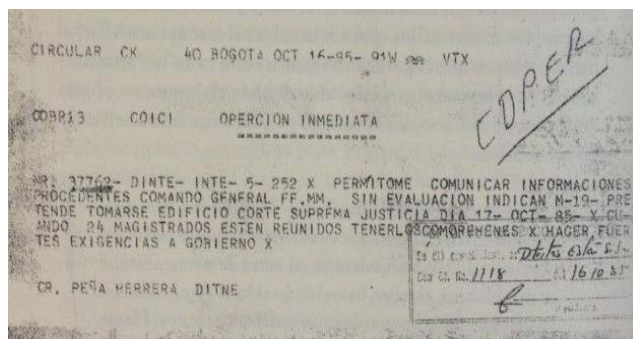
In October 1985, the military received an anonymous letter disclosing the M19 plans to take the building where the High Courts sat (IACHR 1993: Chapter VII). Simultaneously, the Supreme Court began to receive threats coercing the justices to turn against the enforceability of the

⁴⁶ In the PJ case, the military suspected the victims of being guerrilla because of their socioeconomic conditions or simply because they were at the cafeteria (Gómez, Herrera and Pinilla 2010, p. 114).

⁴⁷ With the aim of organizing around their demands against enforced disappearance as well as in favor of the fight against impunity (ASFADDES 2003). This organization was born with the participation of the family members, under the lead of the example of the Mothers of the Plaza de Mayo of Argentina and with the support of two prominent human rights defenders: lawyer Eduardo Umaña Mendoza (assassinated in 1998) and father Javier Giraldo (continually threatened and harassed) (ASFADDES 2003: 28-29).

extradition treaty between Colombia and the United States (IA Court 2014: par. 523). Shortly after, security was removed from the Palace of Justice in spite of the death threats against the Justices originated in the constitutional examination of the extradition treaty between Colombia and the U.S. as well as in the High Courts decisions concerning human rights violations by the Army.

In August 1985, the Army, the National Police and the DAS had information about the guerrilla's intentions, as the Minister of Defense stated before the Congress of the Republic on October 16, 1985 (IA Court 2014: par. 523). In October 18, 1985 the journals *El*



Picture No. 3 Telegram from the DINTe (military intelligence) informing the plan of the M19 to take over the PJ in October 1985. Retrieved from BBC (2015).

Tiempo, *El Siglo* and *El Bogotano* published different news regarding the plans that the military had discovered around the possible taking of the PJ by the M19⁴⁸.

From October 16, 1985, until the beginning of November 1985, the Minister of Defense ordered special reinforcements for the security of the Palace of Justice: 22 armed agents to be on duty during work days (IA Court 2014: par. 523). On October 21, 1985, the reinforcement order was withdrawn but Bogota's Police Department decided to maintain the security until November as a precautionary measure (IACHR 1993). However, on November 4, 1985, the reinforcement guard service was withdrawn and only six people were providing surveillance to the building.

⁴⁸ "Plan by the M-19 to occupy the Palace of Justice was discovered", *El Siglo*, October 18, 1985. "Due to anonymous messages, security measures were increased at the Palace of Justice", *El Tiempo*, October 18, 1985. "Plan for taking and kidnapping in the Court was dismantled", *El Bogotano*, October 18, 1985. "The M-19 in the Palace of Justice, they were after 2 justices", *Diario 5 pm*, October 18, 1985.

Regarding the withdrawal of the surveillance, the military at the time affirmed that the President of the Supreme Court, Justice Alfonso Reyes Echandía, had requested so due to possible inconveniences for the Courts' functioning. This information was disproved by the Plenary Chamber of the Supreme Court of Justice, the President of the Council of State at the time, the Special Investigative Court (1986) and the Truth Commission (IA Court 2014: par. 524) assessing that, on the contrary, the Justices had been emphatic about their request for adequate protection before the security risk they were confronting. Based on these circumstances, the IA Court concluded that while the State was aware of the imminent peril faced by the justices and the other employees and visitors of the Palace of Justice, it did not take the appropriate measures to counter the danger (IA Court 2014: par. 528).

3.2. The taking and the operation to retake the Palace of Justice

On November 6, 1985, at 11:40 a.m., an armed group of thirty-five armed M19 guerrillas seized⁴⁹ the National Palace of Justice, headquarter of the Supreme Court of Justice and of the Council of State - the highest courts of the ordinary and contentious-administrative jurisdictions. This building is located at the Plaza de Bolivar, central point of the center of Bogota, in front of the National Congress and only a few blocks from the Presidential Palace. As mentioned before, prior to the siege the military and different security forces had access to information on the possible takeover of the Palace of Justice and its approximate date (IA Court 2014).

⁴⁹ While this act has been referred to by judicial procedures and other social discourses as the taking of the Palace of Justice, the military (Plazas 2011: 280) have sustained that it can be referred to as an assault because the taking is a term reserved for military operations. Nonetheless, in this research we will refer to the 'take' as the act of seizing a place giving privilege to the judicial denomination. In the same sense and for the same reasons, the military operation will be referred to as the retake, although military (Plazas 2011: 280) have sustained that it should be called a recovery of the building, because if not it would mean to place on the same level the establishment and the guerrilla, "a perverse denomination created by the enemies of the State" according to Plazas (2011: 281).

After they gained control over the building, the M19 commando demanded the presence of President Betancur. They aimed for him to stand trial over having, allegedly, violated the peace agreements (Gómez, Herrera and Pinilla 2010: 52, 72). President Betancur decided not to negotiate. After the events, he declared on national TV: “The government could not negotiate what is nonnegotiable: the respectability of the institutions”. However, he did order the ceasefire.

The President’s orders were not followed and the operation to retake the courthouse continued under heavy weapon fire (Gómez, Herrera and Pinilla 2010: 225). Nonetheless, after the operation, the President affirmed in national TV that he had consented to the military operation and had personally taken all the decisions, keeping an absolute control over the situation.

Table No. 4 Pictures of the military operation to retake the PJ



Picture No. 4. The operation during the first night. Retrieved from BBC (2015)



Picture No. 5 The military entrance to the building. Retrieved from El Nuevo Siglo (2015)



Picture No. 6 Helicopter and tanks. Retrieved from CIVICO (2015)

The 13th Brigade, commanded by General Jesus Arias, led the operation. Colonel Plazas (actor of the main dossier considered for this research) was in charge of the field operation and was assisted by the Army Secret Service, led by General Ramirez, as well as by the Police that was commanded by General Delgado. In the military communications of the operations, known after the judicial inquiries, a voice under the alias of Paladin 6 -who is presumably the General Commander of the Armed Forces Rafael Samudio⁵⁰, issued the following order: “I understand that the Red Cross has not arrived yet. Therefore, we enjoy total freedom of action and we are against time. Please hurry up, let’s consolidate and finish with everything” (Patiño y Chaparro 2008: 5’06”- 5’24”). Not only the International Committee of the Red Cross was prevented from operating but the Ministry of Communications censured the media that instead of informing about the events, broadcasted a football match.

This military operation has been qualified by domestic courts, the Truth Commission on the facts of the Palace of Justice (Gómez, Herrera and Pinilla 2010) and the Inter-American Court of Human Rights (2014), as disproportionate and excessive. According to the Procurador General⁵¹ at the time, Carlos Jiménez, the operation violated the basic principles of the *ius cogens* because the military attack never had the purpose of protecting the hostages but, on the contrary, constituted an attack of the Armed Forces against its adversary while civil population was being held hostage (Procuraduría General 1986).

According to the Council of State, the State incurred in a “service-related failure” because of the “hasty, unconsidered and irresponsible way in which the Armed Forces quashed the taking of the Palace of Justice, leaving the judge with the depressing sensation of the insignificance of

⁵⁰ On November 13, 1985, the General Commander of the Army, Rafael Samudio, declared to the media he was proud of the operation because it had not only saved the institutions but because they had set an example on how to act in the fight against terrorism (El Espectador 1985 in Vega 2015: 3).

⁵¹ On the use of the word Procuraduría, see note 20

the life of the victims in the skirmish, whose petitions, supplications, and lamentation were futile. Their captors, whose unjustifiable recklessness, supported by the State's negligence, led to the tragedy, were annihilated. But, at the same time, almost a hundred people were annihilated, including eleven justices of the Supreme Court and eight officials and employees of this body and of the Council of State" (Council of State 1997 in IA Court 2014:105).

"Everywhere you looked [...] in every direction, it was a war zone. The entire fourth floor had been demolished. There was nothing left. Not a single dividing wall was still standing, the floor was deep in ashes, rubble, broken glass, and in places, the still glowing embers of the conflagration." (Amelia Mantilla, Emiro Sandoval's widow, in Carrigan 1993: 262)

Table No. 5 The interior of the PJ after the events



Picture No. 7 Retrieved from El Espectador (2013)



Picture No. 8 Conflagration. Retrieved from Semana (1985)

With respect to the numbers of the operation, the Council of State studying different contentious-administrative dossiers has established that in the operation over one hundred people were killed, including eleven judges of the Supreme Court. However. About this tragic numbers the IA Court (2014: 104) sustained that "[t]here is no certainty about the number of people who died during the events. The Institute of Forensic Medicine received 94 corpses from the Palace of Justice. The Report of the Truth Commission indicated that 'the problems that arose during the identification process give rise to serious doubts about the identity of some of them, and the irregularities, particularly in the case of the charred remains, could suggest the existence of a greater number of deceased.' In addition, according to the evidence in the case file, lists prepared by State personnel recorded between 159 and 325 survivors".

According to the Special Investigative Court (1986), 244 people survived the taking and the operation to retake the building. Officials from different law enforcement institutions evacuated some survivors to the *Casa del Florero*, a historical house and museum neighbouring the PJ that was used as center of operations of the intelligence services for the purposes of the operation to retake the Palace of Justice. Some of the survivors were labelled as suspects of being guerrillas or supporters of the taking and were classified as ‘special’ (Superior Court of Bogota 2014: 589).

According to the two first-instance Courts in the prosecutions against General Arias and Colonel Plazas (Juzgado 51 Penal del Circuito de Bogota 2011; Juzgado Tercero 2010), the workers of the PJ cafeteria were labelled as suspicious. In particular, in the criminal proceedings against the former Commander of the Cavalry School (colonel Plazas), the Third Criminal Court was “convinced that the special situation of some of the survivors, such as being university student, being born in a specific area of the country, working in the Palace cafeteria, etc., constituted grounds for presuming that they had collaborated with or were part of the insurgent group.” (IA Court 2014: 237). In this same line, in the second-instance judgment against the Commander of the 13th Brigade, the Superior Court of Bogota considered that, “from the outset, some soldiers considered that the cafeteria employees could be suspected of having supported the guerrilla.” (IA Court 2014: 237).

Table No. 6 The release and detention of hostages



Picture No. 9 The release and detention of hostages. Retrieved from BBC (2015a).



Picture No. 10 Hostages who survived conducted to the Casa del Florero. Retrieved from VOZ (2014).

Once in the *Casa del Florero*, most survivors were set free or were taken to hospitals. People classified as ‘special’ were held for interrogation by the military. These people were not registered as detained nor were they included in the lists of survivors (IA Court 2014). During and after the events, several next of kin of the victims received information that the some of the disappeared had survived and were being held in detention in military garrisons. Some people survived the detention and described that they had been subjected to interrogations, that they were ill-treated and some of them were transferred to military facilities, including the Cavalry School of the Colombian National Army and the “General Ricardo Charry Solano” Intelligence and Counter-intelligence Battalion (IA Court 2014).

According to the PJ Truth Commission (Gómez, Herrera and Pinilla 2010) these people were tortured and at least twelve of them were forcibly disappeared. Eight of them were cafeteria employees (Carlos Rodríguez, Ana Castiblanco, Hector Beltrán, Cristina Guarín, Bernardo Beltrán, Gloria Lizarazo, David Suspes and Luz Portela), three were visitors (Gloria Anzola, Luz Oviedo and Norma Esguerra), and one belonged to the guerrilla group (Irma Franco). According to the Appeal Court in the Plazas case, the armed forces were instructed not to allow guerrillas to survive and to forcibly disappear all those guerrillas that could have exited the building (Superior Court of Bogota 2012: 586).

Between November 6 and 7, three fires broke out inside the Palace of Justice (IA Court 2014: 36). In this regard, the Truth Commission asserted:

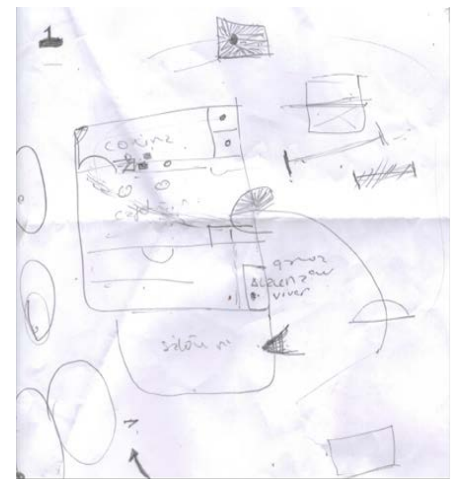
“[I]t was not possible to know with any certainty how the hostages and guerrillas who were on the fourth floor died, or even the real number of persons there. [...] However, the fact is that most of the bodies were found dismembered, mutilated, apparently by the effects of the explosions, and almost all of them were carbonized, and according to forensics, in at least three of the Justices remains [...] were found projectiles form firearms that the guerrilla was not using” (Gómez, Herrera and Pinilla 2010: 152).

After the conflagration that consumed most of the PJ, the military cleaned the area using water and brushes, as well as dropped burned bodies in the main hall. The corpses that remained inside the building were removed, others were washed and some were burned by state agents. The military took their clothing and belongings. Identifying the bodies became virtually impossible. In the aftermath, the Minister of Justice organized a group of judges to start the research at the crime scene, but the military prevented them from entering the PJ. Before the IA Court, the Colombian government declared that the military personnel actions or instructions after the events did not appear “completely unreasonable”, given the conditions of the Palace of Justice after the operation and the absence of standards for the inspection and preservation of the crime scene. Thus, during the trial, the State argued that “even when the evidence reveals errors in the handling of the corpses and the evidence at the scene of the events, this is not sufficient to assert that this corresponded to deliberate actions that can be attributed to State agents” (IA Court 2014: 432).

However, according to the Truth Commission “they wanted to hide or erase evidence related to the cause of death of the victims” (Gómez, Herrera and Pinilla 2010: 128). In this same line, according to different domestic courts, they removed the corpses in order to obstruct any subsequent investigation (Tribunal Superior 2012; Juzgado Tercero 2010). With this respect, the IA Court (2014: 270) established that these irregularities were of such significance that they cannot be considered a mere error, rather they constituted “egregious impropriety that has prevented the elucidation of the facts. Consequently, these irregularities are an indication that the soldiers concealed what happened during the retaking of the Palace of Justice, including what happened to the presumed victims”.

After the operation to retake the Palace of Justice, different family members were able to access the building, most of them resorting to excuses or distractions. On November 8, 1985, Amelia Mantilla, Emiro Sandoval's widow, entered the building using her credentials as public prosecutor. After thirty years, before the Prosecutor General's Office, she declared that when she reached the fourth floor she was able to see military criminal justice officials and a man with a bucket on his hands. The bucket had a flammable liquid and the man ignited the fire with the "purpose (of) disappearing the remains of Dr. Reyes Echandía [President of the Supreme Court of Justice]". "I started screaming: murderers! What you did doesn't make you happy enough, so now you want to disappear the remains of Dr. Reyes!" (El Espectador 2015).

Cecilia Cabrera also managed to enter the building stating she was the cafeteria's manager's wife. In a personal interview, she drew a map of the cafeteria. Reminding what she witnessed (Picture No. 11), she described the place not only as a cafeteria but also as a restaurant: "the space was divided in two, a cafeteria and a dining room". She explained that this was the reason why they had a provision of food, in contrast to the argument that the food supply was an evidence of their



Picture No. 11 Map of the cafeteria after the fire, by Cecilia Cabrera (wife)

participation on the taking, as some media at the time implied. In the cafeteria, she said, there was neither sign of shots, not even a mess. Nonetheless, she noticed that all the valuables of the cafeteria had been removed and that the cashier was empty: it had been forcibly opened. Then she suggested: "if there was no combat [in the cafeteria], the fire did not affect the place and no

guerrilla survived: how come that after one day [of the taking] there were no paintings, the money was stolen and the silverware was taken?”

The PJ events involved a great amount of misbehaviours, performed by different actors against several victims. The magnitude of the chaos and destruction was insidious and widespread but, at the same, time localized and targeted. From that fact, it is difficult to label what happened as a simple misfortune of war or as a fatality. In a sense, the degree to which chaos took place at the events is a manifestation that what happened was not necessarily chaotic in the sense of completely lacking organization or order.

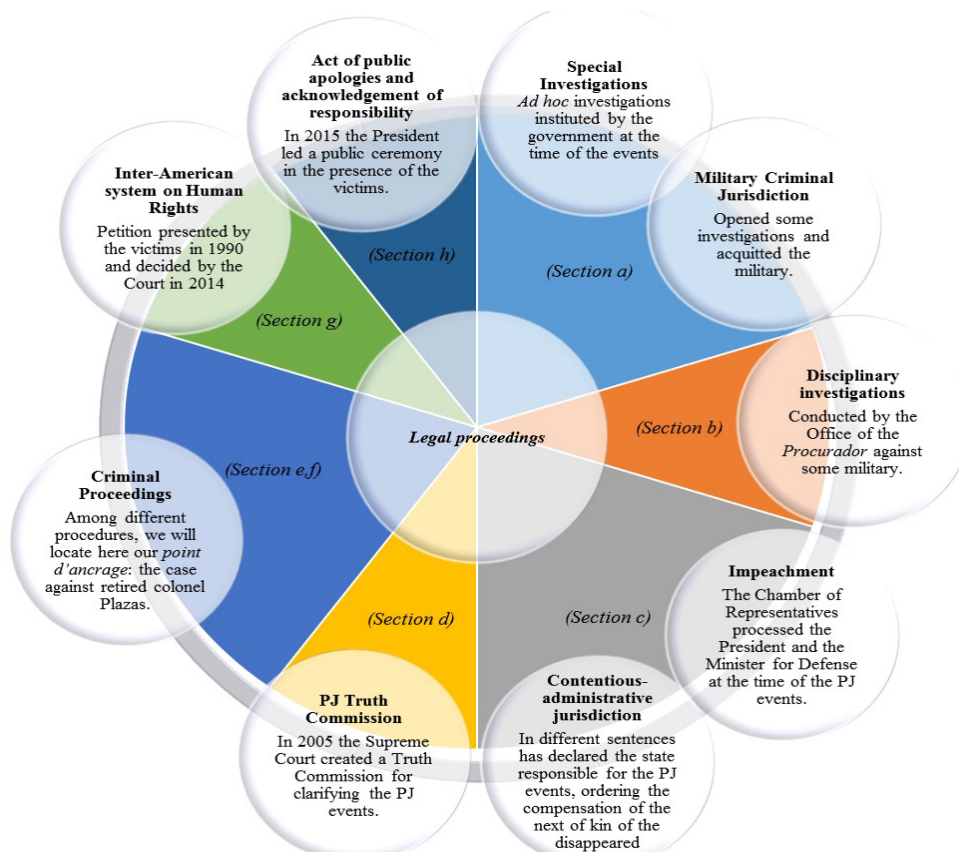
The use of violence at the PJ was public, explicit and visible, while simultaneously private, secret and censored. The attack by the guerrillas and the operation to retake the building by the military were forceful, a part of the battle was performed outdoors, in the heart of the country's capital and some events were broadcasted. At the same time, the events were private and kept in secrecy because, after a few hours of coverage by the media, they were censored by the government as well as because some events occurred at the inside of the PJ, the *Casa del Florero* and the military facilities. In these places, not only the military confrontation, but the interrogations, tortures and disappearances took place.

The brutality of what was visible and the uncertainty of what was not created an imagery of the events as a cruel confrontation between the guerrillas and the military. With this perception, it was less disturbing for the public in general to accept the violence that took place under their eyes, rather than the violence performed in secrecy. This violence, however, took place during and after the events. Uncertain, obfuscated and private, the particular events of the disappearances were characterized by the lack of information, the obfuscation or vanishing of evidence, the involvement

of state agents, the media censorship and the secrecy. The PJ events have been processed by the legal system through different mechanisms that will be described and analyzed in the following section.

3.3. After the fire: enquiries and criminal law in(-)action

In this part we will give a summarized account of the legal proceedings around the PJ case. This case has been submitted to numerous judicial instances. The multiplicity of actors, the diversity of factors and events surrounding the action of the legal system is not only pertinent but valuable for evaluating the functioning of the legal system *vis-à-vis* criminal problematic situations similar to the present case. This part offers an overview of the procedures describing the main legal advances of the case presented in eight sections:



Domestically, different proceedings have been taken in the Administrative, Disciplinary, Criminal and Military Jurisdictions. Also, a non-judicial Truth Commission on the events was established by the Supreme Court of Justice, with the objective of shedding light on what happened at the PJ. Internationally, the case has been dealt by the Inter-American System on Human Rights. In order to understand such wide variety and complexity of instances, we will draw a summarized judicial history of the case according to the various jurisdictions in action.

Since 1985 some families of the disappeared filed several complaints before the authorities asking for the whereabouts of their loved ones⁵². Some of them accessed the PJ after the military operation. Others went to the Institute of Forensic Medicine, the Colombian Army's 13th Brigade, the Cavalry School, the National Police headquarter, the Administrative Department of Security (hereinafter, DAS), and the F-2 (military intelligence), searching their family members without success (IA Court 2014: 110). According to the Truth Commission, "from the moment of the events, the families of the disappeared knocked on the doors of justice [...] and called for the solidarity of the society that, indifferent, took distance from the tragedy of their fellow citizens. The answer for years was the stigmatization and distrust of their claims" (Gómez, Herrera and Pinilla 2010: 40).

a. Special investigations and military criminal jurisdiction

The first legal action on the PJ case was performed by a special investigation commission appointed by the national government. On November 13, 1985, the national government installed a Special Investigative Court to investigate the events in question (Decree 3300/1985). This Court

⁵² Cecilia Cabrera (wife) and others next of kin of the disappeared wrote a letter to the Minister of Justice (November 12, 1985), then wrote a letter to the Supreme Court of Justice (November 19, 1985), then Enrique Rodríguez (father) wrote to the Minister of Defense (November 18, 1985), to the Special Procurador assigned to the Military Forces (November 19, 1985) and to the Special Investigative Court on the events (November 20, 1985).

was assigned to elaborate a report for the government and the corresponding judges for the pertinent effects. On May 8, 1986, the Supreme Court of Justice analyzed the enforceability of Decree 3300 and assessed that the Special Court was not legally empowered to make decisions on the crimes under investigation nor could rule to establish criminal responsibilities (IA Court 2014: 156). Therefore, the Court was in practice a political resource.

On May 31, 1986, the report was issued: it determined the exclusive responsibility of the M19. It also asserted that the disappeared who were at the PJ cafeteria died on the fourth floor where they were conducted as hostages during the taking. Finally, the Special Court mentioned more clarity was needed regarding “irregular actions” of the military, such as “the exit alive from the Palace of Justice and subsequent disappearance of Irma Franco, the detention of Orlando Quijano, Eduardo Matson and Yolanda Santodomingo, and also the ‘ill-treatment [to which they were subjected] by their interrogators’” (IA Court 2014: 158). These actions were characterized by the Special Court as “individual actions executed in default of superior orders, unrelated to the military institution” (IA Court 2014: 158). In line with these findings, the Special Court ordered the Sixth Military Criminal Investigation Court to continue with the investigation on these events, which had started on November 21, 1985.

In November 1985, while General Arias was promoted, the Prosecutor General’s office undertook an inquiry into those who “presumably disappeared from the Palace of Justice”. The investigation ended on September 15, 1988, when the Prosecutor General’s office concluded that only two guerrillas (Irma Franco and another unidentified woman) could be considered as disappeared. The entity stated that, based on the evidence on the case, there was no sufficient evidence on the evacuation of the employees of the Palace of Justice cafeteria “whose families

consider them disappeared” and, therefore, it was not pertinent to bring charges against any member of the Colombian Armed Forces.

Afterwards, on January 31, 1989, the ordinary criminal jurisdiction through the 30th Itinerant Criminal Investigation Court of Bogota issued an indictment against nine members of the M19 Central Command. The Judge also sent copies of the process to the competent body of the ordinary criminal jurisdiction with the purpose of initiating an investigation on members of the Armed Forces allegedly responsible for the detention, torture and disappearance of some hostages and two guerrillas.

Despite the provision of the ordinary tribunals claiming jurisdiction over the case, the military criminal jurisdiction conducted a criminal investigation. Proceedings were instituted against two members of the Army in relation to the forced disappearance of Irma Franco and the torture and ill-treatment of Yolanda Santodomingo and Eduardo Matson. “These proceedings culminated in the discontinuance of the proceeding for forced disappearance, and the declaration of the prescription of the criminal action for torture” (IA Court 2014: 441). On October 23, 1986, the Commander of the Army’s 13th Brigade, whose members had presumably participated in the tortures and disappearances, initiated the investigations. “The next of kin of Irma Franco filed a request to bring a civil suit in May 1987, which was not admitted because, under “military criminal law [...] civil suits can only be brought in proceedings for ordinary offenses and not in those related to activities conducted in compliance with mandates inherent to the Armed Forces.” (IA Court 2014:164).

On May 12, 1992 and October 22, 1993, a military court of first instance and a military appeal court ended the proceedings against the Commander of the 13th Brigade in relation to the operation to retake the PJ as well as resorted to the statute of limitations with regard to the tortures. Also, they

acknowledged that Irma Franco was still missing and therefore ordered for the investigation to be reopened against the Commander of the 13th Brigade (IA Court 2014: par. 166-167). Nonetheless, on June 27, 1994 and October 3, 1994, the Special First Instance Court of the General Command of the Military Forces and the Military Superior Court decided there were no grounds for convening a martial court to try these actions, ordering the closure of the proceedings against the Commander of the 13th Brigade and the Colonel Head of the B-2 (IA Court 2014: par. 168).

b. Disciplinary investigations: a tale of executive's interference

Different disciplinary investigations were conducted by the Office of the *Procurador*⁵³ assigned to the Military Forces and by the *Procurador* assigned to the National Police. In 1989, General Arias, who was the commanding officer of the operation to retake the PJ, was promoted as Commander of the armed forces (Decree 1592/1989) and President Virgilio Barco conferred him the highest rank in the military (*general de tres soles*). In June 1990, General Arias retired from service and in September and October of that year, the Procuraduría imposed a disciplinary sanction of dismissal on general (r) Arias and Colonel Edilberto Sánchez, former Chief of Military Intelligence (B-2), considering they had adopted inadequate measures of protection in favor of the life of the hostages at the PJ (Resolution 404 of 28 September and 24 October 438).

⁵³ The *Procuraduría* in Colombia is a supervisory agency of the public function directed by the *Procurador General*. The *Procuraduría*, as one of the main institutions part of the Public Ministry, is responsible of defending and promoting human rights, protecting the public interest, and overseeing the official conduct of those who perform public functions. Among its functions, the *Procuraduría* supervises the official conduct of those who hold public office, exercises on a preferential basis the disciplinary authority conducting the investigations and imposing the sanctions in accordance with the law. The word *Procurador* and *Procuraduría* will be preserved in Spanish in the present document because its translations remain ambiguous: some documents translate these terms as Attorney General and Attorney General's Office, others could refer to it as a kind of Ombudsman; however, to us these translations are insufficient for explaining the different functions that the *Procuraduría* presents in the Colombian context.

In response to this decision, on November 6, 1990, the Senate ratified his promotion (75 votes in favor and 5 against), as a demonstration of support. The decision was meant ‘not to leave him *sub judice*’, according to the congressmen (El Tiempo 1990a). On the other hand, they summoned the Defense Minister, General Oscar Botero, and the *Procurador General* defying them to determine who would bear the historic responsibility of the slaughter of the Justices, either the military or the guerrilla (El Tiempo 1990a). During the debate held on November 14, 1990, the Minister of Defense assessed that the sanction created the impression that the Army was a ‘horde of savages’. The speaker senator read a letter from the Procurador that had issued the disciplinary indictment, in which the official ensured he had being pressured by the Procurador General to sanction General Arias. According to these elements, the Procurador General was asked to resign being also accused of being an enemy of the military (El Tiempo 1990b).

Different Military Generals made public statements asserting that it “was difficult to defend a democracy that treats its most faithful servers like this” (General Alvaro Valencia Tovar in El Tiempo 1989a), that the sanction questioned the enforceability of the orders of the military (then Minister of Defense, General Botero in El Tiempo 1990e), that it fractured the spine of military discipline (General Valencia Tovar in El Tiempo 1994a), that it was absurd and clumsy (the Colombian Association of retired Officials of the Armed Forces in El Tiempo 1994b), and that it was against the interests of the Nation and the defenders of democracy (General Fernando Landazábal Tovar in El Tiempo 1990c). Finally, President César Gaviria stated the order of dismissal was ‘unfair’ and on November 16, 1990, the Procurador General, Alfonso Gómez Mendez, agreed with President Gaviria: “Yes, the sanction is unfair [...] from the point of view of

society the sanction is unfair and contrasts with the fate of those who attacked the Palace, who now benefit from an amnesty” (El Tiempo 1990d).

The dismissal of General Arias was only effective in 1994 when the government, through the Minister of Defense, Rafael Pardo, fulfilled the sanction through the Decree 731, asserting that the order was being implemented despite the disagreement from the government and the armed forces with that decision (Gómez, Herrera and Pinilla 2010: 288).

During that year, General Arias filed a lawsuit in which he asked the annulment of the sanction against him. Finally, that sanction was annulled by the Administrative Superior Court of Cundinamarca in 2001 on a ruling confirmed in 2005 by the Council of State (Gómez, Herrera and Pinilla 2010: 288).

c. The Impeachment and the Contentious-administrative jurisdiction judgments

Since 1985, at least three complaints have been filed before the Impeachment Committee of the Chamber of Representatives against President Belisario Betancur and the Minister of Defense at the time of the events. The first investigation was formally opened on November 27, 1985, and formally closed on October 17, 1986. The decision of the Chamber assessed that there were no grounds for the impeachment with no further argumentation.

The second complaint was filed in December 3, 1986, and was shelved in July 18, 1989, alleging that the responsible were the military and not the President. The third complaint was registered on November 6, 2004, by the next of kin of the disappeared, although there is no official record of that complaint (IA Court 2014: 215). Hence, in line with the different requests for investigation into the PJ events that were submitted to the Impeachment Commission of the House of Representatives, the President was never prosecuted.

The Council of State has issued more than 25 sentences declaring the State administratively responsible for the wrongdoing during the PJ events and ordering compensations for over 60 families, including the next of kin of the disappeared⁵⁴. When ordering the administrative redress for some of the victims, the Contentious-administrative jurisdiction recognized the lack of planning, prevention and proportionality in the operation to retake the PJ which was materialized through an exaggerated and irresponsible use of official weapons. In these cases, until 2014, thirty-seven next of kin of eleven victims of forced disappearance have received compensation for material and “moral harm” in this jurisdiction (IA Court 2014: 601).

d. Truth Commission

In 2005, during the twentieth anniversary of the PJ taking, the Supreme Court established a Truth Commission to address ‘the partial truth, the impunity and the existing pact of silence about what happened’ in the PJ. The Commission, composed of three former Justices of the Court, attorneys Gómez, Herrera and Pinilla, conducted a non-jurisdictional investigation of the events, issuing their final report in 2009. The Commission described the “tragic events” materialized by the M19 guerrilla and the Armed Forces involving the abduction of hundreds of people, the destruction and incineration of the “temple of justice”, the slaughter of the Supreme Court, the killing of almost a

⁵⁴ Until 2014, the Council of State issued decisions in eleven cases in favor of the victims of enforced disappearance with regard to: (1) the wife and daughter of Carlos Rodríguez (Judgment of July 24, 1997); (2) the father of Pilar Guarín (Judgment of October 13, 1994); (3) the sister and children of Gloria Lizarazo (Judgment of August 14, 1997); (4) the wife and daughter of David Suspes (Judgment of September 25, 1997); (5) the wife and daughters of Héctor Beltrán (Judgment of January 28, 1999); (6) the parents of Bernardo Beltrán (Judgment of October 13, 1994); (7) the mother and daughter of Norma Esguerra (Judgment of July 31, 1997); (8) the siblings of Irma Franco (Judgment of September 11, 1997); (9) family members of Ana Rosa Castiblanco (Judgment of December 2, 1996); (10) the mother of Luz Mary Portela (Judgment of September 6, 1995), and (11) the wife and daughters of Carlos Urán (Judgment of January 26, 1995) (IA-Court 2014: 592).

hundred people, thus leaving countless victims and constituting “one of the two most serious catastrophes in the history of the country in the last century” (Gómez, Herrera and Pinilla 2010: 23).

The study of this report can be divided into two main parts: a *factual* part and a part analyzing the *responsibility* of the actors who intervened in the taking and the operation to retake the PJ. With regard to the first part, the Commission documented the context of the taking, the threats against the High Courts’ Justices and the lack of proper response by the government. After a description of the events, the Commission referred to the subsequent facts, finding evidence of tortures and inhuman and degrading treatments committed against survivors who were transferred to military facilities, the irregularities committed while handling the crime scene, the wrongful identification of the deceased, the “inexplicable order” to bury some bodies, evidence of extrajudicial executions and the practice of enforced disappearance, at least against the people who were at the cafeteria at the moment of the events (Gómez, Herrera and Pinilla 2010).

In the second part, on the one hand, the Commission stated the responsibility of the guerrillas for the planning and execution the violent attack, as well as the disrespect for the life and integrity of the hostages. On the other hand, the Commission found the State responsible for the disproportionate reaction, the disregard of the duty of prevention, the media censorship, and the disproportionate use of force by the military. With respect to these responsibilities, the Commission concluded that despite countless enquiries many questions remain unsettled regarding the basic history of the PJ events. Only since 2005, the criminal justice system started a serious investigation, and only with respect to the enforced disappearance, presenting no progress on the investigations for torture and summary executions described in the report.

During the proceedings at the Inter-American Court, the government acknowledged “the important effort made by the Truth Commission” (IA Court 2014: 33). However, it asserted that “its composition did not represent the different sectors and components of the Colombian nation or, at least, those involved in the events” (IA Court 2014: 33) and that it was created by the Supreme Court of Justice as “an institutional victim” (IA Court 2014: 33) that does not have competence to create a public truth commission. Therefore, the government discredited its legal grounds, qualifying it as an ‘unofficial commission’ that was neither a public nor a judicial body. With this argumentation, the government asserted it had not provided any support to the commission. Consequently, it argued that “the Final Report of the Truth Commission [...] is an important source, but not the truth, especially if it also suffers from substantive problems” (IA Court 2014: 33).

Nonetheless, in a public event of the 25th anniversary of the taking of the Palace of Justice in 2010, President Santos stated that the Report of the Commission presents “a complete diagnosis and a report on the background, the events themselves, and what happened after the violent taking of the Palace of Justice by the M19 commandos. This document must be considered seriously and it is essential that all the proceedings undertaken to clarify the events are duly concluded” (Presidency of the Republic of Colombia 2010, in IA Court 2014: 33). Other commentators (Maya 2010; Vega 2015) and some of the victims in the interviews asserted that the Truth Commission failed on clarifying the specific responsibilities of the actors of the taking and the operation to retake the PJ, refraining from giving any particular recommendation to the Prosecutor Office to supposedly avoid interferences with the investigations.

e. Criminal Proceedings

In this section, we will refer to the criminal justice investigations on the PJ events. In the next section we will focus on the criminal law proceedings against high-ranked military including our *point d'ancrage*: the prosecution against the retired Colonel Plazas.

On September 15, 1988, the Prosecutor General's office issued a report evaluating the progress made into the investigations for the different complaints of disappearance presented in the PJ case, concluding that "only the guerrilla, Irma Franco, and an unidentified guerrilla can be considered disappeared." The Prosecutor General's office also put forward that regarding the "employees of the Palace of Justice cafeteria whose families consider them disappeared, there is insufficient evidence to establish that they were evacuated from the Palace of Justice and taken to the Casa del Florero", and that there was "insufficient evidence, to date, to bring charges against any member of the Colombian Armed Forces, [...] for those presumed disappeared from the Palace of Justice." (IA Court 2014: 169)

On February 7, 1991, the criminal procedure against General Delgado (Police Director) for ignoring the order of ceasefire, prescribed. In 1989, an amnesty was granted to the M19 members that were indicted for the PJ facts (Act 77/1989). Some days later, a judge closed the proceedings against 38 guerrillas that were under investigation for the events. Nonetheless, in 1992, another judge concluded that the acts of terrorism committed by the M19 could not be pardoned, ordering an investigation of the ex-guerrilla.

The political class reacted in defense of the peace agreements and the judge ended up under investigation on a disciplinary procedure (El Espectador 2014a). In November 2009, the Second Criminal Court of Bogota decreed statutes of limitations in favor of the M19 members for the PJ events. However, on September 8, 2010, the Superior Court of Bogota declared the PJ offenses as

crimes against humanity and decided to reopen the investigations. In line with this decision, on April 2, 2013, the Second Criminal Court delivered a guilty verdict against eight members of the M19, including Irma Franco for the PJ events (IA Court 2014: 205-207).

According to the Inter-American Commission, at the start of the events “the ordinary justice system failed to open investigations, ex officio, even though it was aware of the reports of forced disappearance and of torture [...] rather than an omission, in this case the lack of investigation constituted an additional concealment mechanism” (IA Court 2014: 430). With reference to the criminal proceedings, in 1985 there were little procedural advances in the criminal jurisdiction, but some evidence was collected by the victims who acted collectively under the legal counselling of lawyer Eduardo Umaña.

The legal representative of the victims, Eduardo Umaña, received death threats from the beginning of the inquiries. In August 1987, for instance, he received a threatening pamphlet in which he was labelled as critical of the PJ military operation. After lawyer Umaña was the target of different murder attempts, in April 1998 he obtained a court order for the exhumation of a mass grave at the Southern Cemetery of Bogota, wherein the bodies of the disappeared had been supposedly buried according to various military sources. The purpose of the order was to determine the fate of the remains of the disappeared.

Lawyer Umaña was murdered on April 18, 1998. His assassination impacted the PJ case. The PJ victims were deeply affected by lawyer Umaña’s murder. “The assassination of lawyer Umaña made us fall apart, it broke us. We saw him as our father, our brother, our friend, our everything”, Mrs. Navarrete claimed. The period between 1998 and 2000 became a state of limbo: nothing

happened in the case. It was not until 2001 when the Prosecutor General's Office⁵⁵ decided to open a criminal investigation for the PJ events for the crime of enforced disappearance. In 2005 the investigation was assigned to the National Human Rights Unit and Ángela Buitrago was appointed as the Prosecutor to conduct the criminal investigation.

On September 28, 2007, Prosecutor Buitrago issued an indictment against five members of the B-2 of the Army's 13th Brigade, for the crimes of aggravated abduction and forced disappearance. Also, between February 2008 and March 2009, indictments were brought against five other retired Army officers: Colonel Plazas as the Commander of the Cavalry School (11 February 2008); General Ramírez, Colonel Blanco and Sergeant Arévalo (January 20, 2009), members of the Intelligence and Counterintelligence Command (COICI); and General Arias (March 9, 2009), Commander of the 13th Brigade at the time, for the offenses of aggravated abduction and forced disappearance.

In domestic courts, four trials were conducted under the ordinary Criminal Jurisdiction against some of the military that participated in the operation to retake the PJ. As a result, three low-ranked military were acquitted, there is an ongoing criminal proceeding against several state officials and three high-ranked retired military were sentenced due to chain of command. The determination of the appeal court is still pending with regard to all the sentences but one, against retired Colonel Plazas, that was annulled by the Supreme Court of Justice in 2015.

f. High ranked military at trial: the point d'ancrage

⁵⁵ According to 1991 National Constitution "[i]t is the function of the Office of the Prosecutor General--either ex officio or in response to a complaint filed--to investigate crimes and to bring charges against the suspected guilty parties with the competent courts and tribunals" (IACHR 1993: Chapter III)

The State Group of Memory, on their final report, stated that the prosecution of high-ranked military like Plazas generated a state of turmoil among the most conservative sectors of society and within the military (CNMH 2013: 233). The criminal judicial process against retired Colonel Plazas started in 2005. In 2010, Plazas was sentenced to a 30-year term of imprisonment, convicted for the crime of enforced disappearance in the context of the operation to retake the PJ. This prosecution was led by prosecutor Ángela Buitrago and the procedures were conducted by Justice María Jara. The process entailed a specific burden for their security. The most serious intimidations were directed against the Judge of the case, the lawyer of the victims, the prosecutor, some of the victims and at least four witnesses

On June 9, 2010, Judge Jara sentenced retired Col. Plazas to thirty years of imprisonment. He was found guilty of the enforced disappearance of eleven people⁵⁶ when he was commander of the Cavalry School (Juzgado Tercero 2010). The defense and the *Procuraduría* appealed the sentence. On January 30, 2012, the Superior Court of Bogota (Tribunal Superior de Bogota 2012) partially annulled this ruling declaring Plazas's responsibility for the disappearance of only two people in the PJ events: Irma Franco and Carlos Rodríguez. According to the Tribunal:

“the survivors of the Palace of Justice were, indeed, taken to military garrisons, including the facilities of the Cavalry School, where the details of all of them were taken, and some of them were subjected to torture, and subsequently disappeared, [...] which allows the court to conclude that the [Commander of the Cavalry School] was part of an illegal organized power structure that designed and executed the disappearance of Irma Franco and Carlos Augusto Rodríguez Vera” (IA Court 2014: 177).

⁵⁶ Carlos Rodríguez, Cristina Guarín, Bernardo Beltrán, David Suspez, Gloria Lisarazo, Gloria Anzola, Norma Constanza, Luz Mary Portela, Irma Franco, Héctor Beltrán and Lucy Oviedo.

The defense and the Procuraduría filed cassation appeal that was accepted on February 5, 2013. Finally, in 2015, the Supreme Court ruled the last instance cassation appeal in the case and acquitted Plazas of all charges.

On April 28, 2011, the 51st Criminal Court of the Bogota Circuit found retired General Arias guilty of the crime of the enforced disappearance of eleven people and he was sentenced to thirty-five years of imprisonment (Juzgado 51 Penal del Circuito de Bogota 2011). According to the judge of the case “on November 6, 1985 General ARIAS CABRALES acted in fulfillment of his duty,[...] however, sheltering in the constitutional obligations imposed on him [... he passed] orders with the purpose of deploying clearly unlawful actions against the ‘suspects’” (Juzgado 51 Penal del Circuito de Bogota 2011: 321-322). The defense and the Procuraduría appealed the decision and on October 24, 2014, the Superior Court of Bogota partially annulled this ruling and claimed that Arias responsibility was related to the disappearance of five people⁵⁷ in the PJ events. This sentence is in a process of last instance cassation appeal at the Supreme Court of Justice.

On December 15, 2011, the 51st Criminal Court (the same judge that sentenced Arias in first instance) acquitted the former Commander of the Army Secret Service, retired General Ivan Ramírez, and the military officers Fernando Blanco and Gustavo Arevalo, who had been indicted on charges of enforced disappearance. According to the judge of the case “although plural evidence implicates the defendant [...] the dossier does not offer conviction beyond all reasonable doubt about how, when and why the indicted were involved in the non-appearance neither alive nor dead of the cafeteria workers of the judicial building” (Juzgado 51 Penal del Circuito 2011: 429). Nevertheless, the 51 Criminal Court made clear that the eleven disappeared persons had not

⁵⁷ Bernardo Beltrán, Luz Mary Portela, David Suspes, Irma Franco and Carlos Rodríguez.

died inside the Palace of Justice, they had rather been “subjected to forced disappearance, after the taking of the Palace by the guerrilla had ended” (IA Court 2014: 183).

On October 18, 2013, Prosecutor General’s Office appointed a single prosecution unit to conduct all the investigations into the PJ events. According to the fieldwork, this was interpreted by the victims as a measure to avoid an Inter-American sentence against the State.

On December 18, 2015, a Criminal Court of Bogota sentenced retired Col. Edilberto Sánchez Rubiano to forty years in prison as coauthor of the enforced disappearance committed against Carlos Rodríguez and Bernardo Beltrán. In the same decision, retired major Oscar William Vasquez was sentenced to a forty-year term of imprisonment as coauthor of the enforced disappearance committed against Irma Franco, Carlos Rodríguez and Bernardo Beltrán. Finally, the Court acquitted retired sergeants Rubay Jiménez, Luis Nieto and Ferney Causaya (Juzgado 52 Penal del Circuito de Conocimiento de Bogotá 2015).

g. Inter-American system on Human Rights: the international judgment against the State

On December 3, 1990, Enrique Rodríguez (father) presented a petition to the Inter-American Commission on Human Rights (hereinafter, IACHR). The Inter-American System on Human Rights opened the case 10,738 “The Holocaust at the Palace of Justice”, and started procedures on December 26, 1990 (IACHR 1993: Chapter VII). On July 25, 1991, the Colombian Government replied to the petition forwarded by the Commission that: “Colombia considers the terms and content of the petition presented to the Commission to be an insult to national dignity... the Government of the Republic of Colombia reiterates its rejection of said petition, believes any examination of its content to be unacceptable and respectfully requests that the petition be dismissed” (IACHR 1993: Chapter VII). On November 15, 1991, the Colombian Government again

requested that the case be dismissed “on the grounds that it’s content and language were unacceptable” (IACHR 1993: Chapter VII).

On February 9, 2012, the case came before the IA Court on the basis that Colombia had not complied with the recommendations of the Inter-American Commission on Human Rights. In 2014, the IA Court delivered a judgment for the case *Rodríguez Vera et al. (or The Disappeared from the Palace of Justice) v. Colombia*. This dossier studied the possible enforced disappearance of twelve people who were at the PJ cafeteria during the operation to retake the building as well as the presumed disappearance and subsequent execution of Justice Carlos Urán, the detention and torture of Yolanda Santodomingo, Eduardo Matson, Orlando Quijano and José Rubiano, and the alleged failure of the courts to clarify all these events and to punish all those responsible (IA Court 2014: 5).

On October 17 and November 10, 2013, in the context of the process before the IA Court (2014: 10-12), the State forwarded a partial acknowledgement of responsibility to the Court with regard to the violations claimed in the case. Particularly, the State acknowledged that Yolanda Santodomingo and Eduardo Matson were tortured while in the custody of State agents, that Carlos Rodríguez and Irma Franco were forcibly disappeared, and that there was an unjustified delay in identifying and returning Ana Rosa Castiblanco’s remains. In respect to the rest of the group, the State responded there were no disappeared and there was just an unjustified delay in identifying mortal remains, as well as in the investigations characterized as errors related to (i) the handling of the corpses; (ii) the lack of rigor in the protection and inspection of the scene of the events; (iii) the improper handling of the evidence collected, and (iv) the inappropriate methods to maintain the chain of custody. These mistakes, according to the State, occurred due to the omission and negligence rather than deliberate acts of state agents.

On November 12 and 13, 2013, the public hearings on the case took place during the forty-third special session of the Court in Brasilia, Brazil. After the partial acknowledgement, the dispute partially ceased; however, it subsisted with regard to other claims, mainly those relating to the alleged forced disappearances and the presumed extrajudicial execution of Justice Carlos Urán (IA Court 2014: 14-15).

On November 14, 2014, the Inter-American Court of Human Rights issued a judgment declaring the State of Colombia internationally responsible for human rights violations committed in the context of the events of the Palace of Justice in 1985. In particular, the Court found that the State was responsible for the enforced disappearance of ten people who were at the cafeteria⁵⁸ and in respect to other two for violating its duty to guarantee their right to life, given the lack of determination on the whereabouts of Ana Rosa Castiblanco for sixteen years and Norma Esguerra thus far.

Moreover, the IA Court declared the state internationally responsible for the enforced disappearance and extrajudicial execution of Justice Carlos Urán, the degrading treatments committed against Orlando Quijano, the arbitrary detention and tortures against Yolanda Santodomingo and Eduardo Matson; and, the lack of judicial clarification of the facts and the violation of the right to personal integrity, to the detriment of the relatives of the victims, as well as for the breach of its duty of prevention in favor of those who were in the courthouse the day of the taking.

h. Public apologies and acknowledgement of responsibility

In 2012, the Superior Court of Bogota acting as the appeal Court in the PJ case ordered the Ministry of Defense, the Commander of the Military Forces, the Commander of the National Army,

⁵⁸ Carlos Rodríguez, Irma Franco, Cristina Guarín, David Suspes, Bernardo Beltrán, Hector Beltrán, Gloria Lizarazo, Luz Mary Portela, Lucy Oviedo and Gloria Anzola

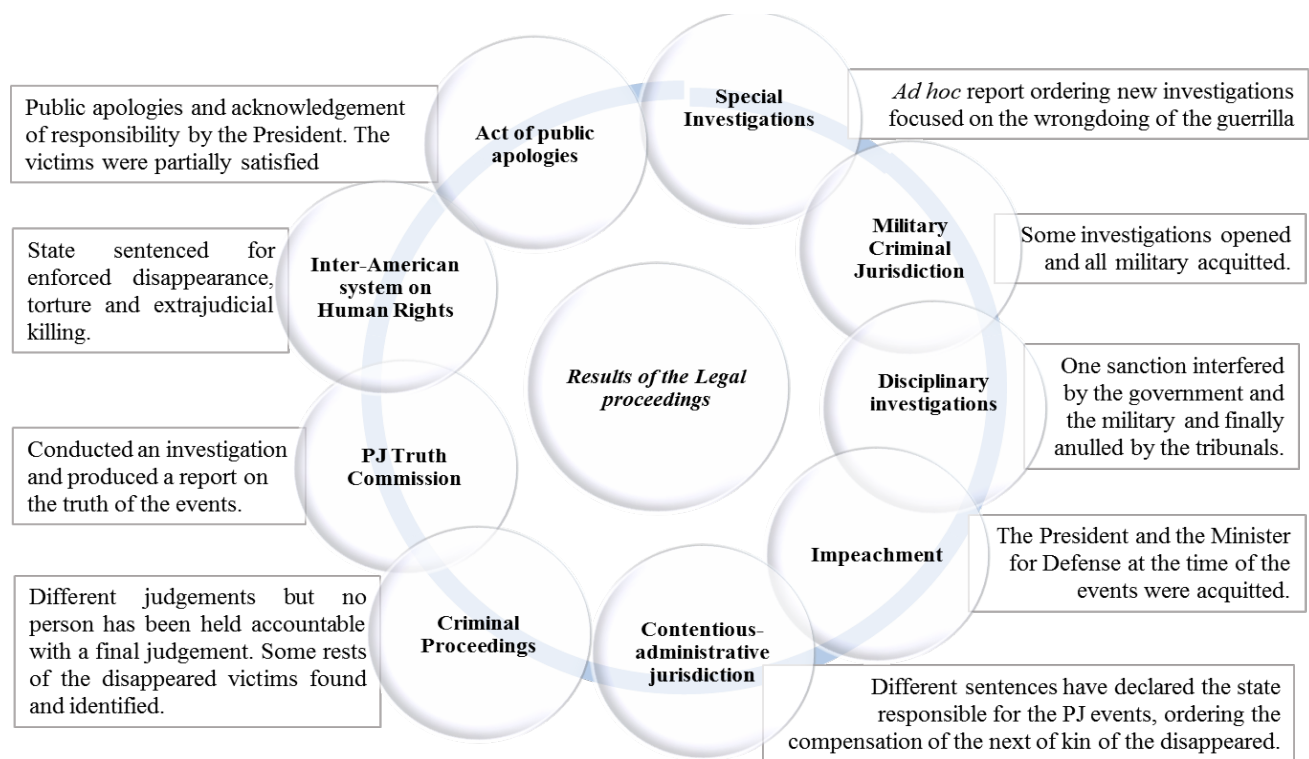
the Commander the 13th Brigade, and the Commander of the Cavalry School, to hold a public ceremony apologizing for the crimes committed on November 6 and 7, 1985, that resulted in the disappearance of Carlos Rodríguez and Irma Franco (Tribunal Superior de Bogotá 2012). This order was never fulfilled. Instead, President Santos decided to offer a public apology “*on behalf of all Colombians*” to President Betancur and the Armed Forces for the Appeal Court decision (El Espectador 2012c).

Nonetheless, during the public hearing held on November 12, 2013, the government decided to offer public apologies to the presumed victims and their families before the Inter-American Court of Human Rights. In this intervention, “the State partially acknowledged its responsibility with regard to the alleged detentions and torture, the presumed forced disappearances, its obligation to investigate, and some of the violations committed to the detriment of the next of kin of the presumed victims” (IA Court 2014: 21). Despite this, the IA-Court ordered the State to conduct a public act in Colombia to acknowledge international responsibility of the case, which ought to take place within one year as of notification of its judgment. The Court determined this measure was necessary “in order to redress the harm caused to the victims and to prevent the repetition of events such as those of this case. [...] The State has one year to comply with this measure”.

On November 6, 2015, the government conducted a public ceremony in the presence of senior State officials and the victims. Headed by the President of the Republic, the Vice-President, the Ministers, some Congressmen and the Presidents of the High Courts of Justice, among others, the President in representation of the State and its Armed Forces acknowledged their responsibility in relation to the human rights violations declared in the Inter-American judgment of the PJ case.

Conclusions on the enquiries and the criminal law in(-)action

This case presents a wide variety of complex procedures. In over thirty years of history, the case has been treated by practically every competent jurisdiction in the domestic arena and, internationally, by the Inter-American System on Human Rights. Furthermore, an *ad hoc* investigation tribunal and a Truth Commission were created and, a public act of apologies and acknowledgement of responsibility was held and led by the President. However, no single actor has been convicted in a criminal justice final judgment for the PJ events, whereas the opposite has happened in other jurisdictions as can be seen in the following graphic:



The variety of dossiers and interventions of different jurisdictions can be characterized as a legal web. The intervention of different jurisdictions acting through special investigations, the Congress and administrative dossiers, an Inter-American case, a truth commission and criminal and disciplinary prosecutions, weaves a legal web that is difficult to neatly distinguish.

In this context, it is clear that the criminal jurisdictions have failed to produce any definitive result, whilst the administrative and international jurisdictions have established a general responsibility of the State for the wrongdoing. In fact, on the one hand, the Special *Procuradores* assigned to the Military Forces and the National Police have undertaken disciplinary procedures with the purpose of sanctioning a handful of officers for their faults of prevention and control, but not for the crimes committed during and after the operation to retake the PJ. On the other hand, the criminal jurisdiction has not produced any definitive result: the military criminal jurisdiction acquitted all the officials under investigation, M19 guerrillas were sentenced for the PJ events and later granted an amnesty, and “the investigations under the ordinary system of justice into the possible enforced disappearance of the victims did not commence until 2001, at the insistence of the next of kin” (IA Court 2014: 471).

The crimes committed at the PJ, which had gone largely unexamined for two decades, were seriously investigated for the first time at the beginning of 2005, when some military members were indicted. Out of those, three low-ranked military individuals were acquitted in first instance, a decision whose appeal is pending; there is an ongoing criminal proceeding against a number of officials involved in the crimes and two high-ranked retired military members have been convicted to high sentences due to chain of command. Out of these convictions, retired Col. Plazas was acquitted of all charges by the Supreme Court and other rulings are suspended because of a cassation appeal to be solved by the Supreme Court. No government official has been definitively convicted for the events. Additionally, the proceedings enacted in the PJ case have suffered interference of the political system, threats against its actors –especially against the victims and their legal representatives, political pressures and legal actions obstructing the functioning of the judiciary.

4. State Crime

There is historical evidence of murders, massacres, genocides⁵⁹, enforced disappearances, tortures, and other crimes committed around the globe with the acquiescence or support of States (IA Court 2006; Rothe 2009). Although controversies about the existence of these wrongdoing are negligible, the term state crime remains elusive and particularly contested in the academic literature and other specialized arena as the international public law. This part aims at offering an account of these debates in order to problematize this notion and elucidate the kind of criminality that we selected as a relevant standpoint for conceptualizing impunity.

Through a state of art of state crime in sociological, criminological and legal studies, the present chapter will explore and analyze state criminality with the objective of enabling an advantaged perspective for elucidating and constructing a socio-legal concept of impunity. When conducting a preliminary review of the literature about state crime we were able to assess a certain opacity in regards to its conceptual boundaries. With this in mind, our first aim will be to offer pertinent parameters for a sociological distinction of the phenomenon. This task may enable different contributions for a socio-legal characterization of state criminality, in addition to the general purpose of offering a strategic perspective for a conceptualization of impunity. Ultimately,

⁵⁹ According to some commentators “[g]enocide is indeed a state crime: there is not a single instance of genocide in recorded history which was not committed either directly by a state, or by a state through one of its proxies” (Milanović 2006: 603).

in what sense does the phenomenon of state crime contribute to a better comprehension of the issue of impunity?

4.1. State crime according to International law

In the international public law, the concept of state crime has been extensively debated. While for some international law commentators “[t]he concept of state responsibility for international crimes is juridically feasible and may be analyzed in terms of a criminal organization model or a corporate crime model” (Jørgensen 2000: 280); to others, “[t]he criminal state is juridically speaking a nonsense [...]. The punishability of the state is both a legal and a practical impossibility” (Drost 1959: 304). Although currently, the common legal understanding represents this notion as alien to the legal tradition, this term has a relevant place on the historical debates and development of international law.

“[T]he issue of state crime has of course a genealogy, with a provenance largely from the mid- to late-twentieth century. The domain in which this debate has mainly taken off is in the sphere of international law” (Vincent 2012: 67). Within the mentioned genealogy, the work of the International Law Commission of the United Nations (hereinafter, ILC) on the codification of the State responsibility is one of the first antecedents referring to this topic, constituting a landmark debate within international law⁶⁰. For this reason, the first part of this chapter will study the ILC discussions around state crime. The second part of this chapter will focus on Latin-American developments, recognizing different contextual particularities with regard to the debates on the

⁶⁰ On the reasons to study the work of the ILC for a delimitation of international law, we agree with Allott (1988: 11): “In the case of the International Law Commission, the mere existence of its reports and draft articles has an effect on the development of international law. An aura surrounds the remarkable scholarly work of the Commission's special rapporteurs. Their reports on state responsibility, as on other topics, are among the most valuable material sources of international law”.

notion. With this purpose, we selected the discussions at the Inter-American Human Rights System as well as other domestic Latin-American case-law.

Exploring the obstacles, limitations and advantages that legal tradition confers to the notion certainly awakens different criminological and socio-legal reflections. Although there is no lineal connection between criminological and international law studies (cross-references are rare between these disciplines), when conducting an analysis of these subjects we realize that they raise similar issues. Considering this, after studying international law deliberations a propos the notion of state crime we will draw a criminological characterization of this type of criminality.

4.1.1 International law debate at the UN: introduction and dismissal of the concept of state crime

The notion of state crime was discussed in the international law a propos the debates of an international regulation on the responsibility of States. In 1930, the League of Nations, original scenario of the debates, held a Conference at The Hague which resulted in a number of discussions around the topics of nationality, territorial waters, and State responsibility for damages caused in their territory to foreign people or goods (UN ILC 2015). In spite of the fact that since 1927 these topics had been selected in consultations with the States as the most “desirable” matters for achieving a consensus, the Conference did not reach particular advances on these subjects - producing only four instruments regarding nationality and territorial waters (UN ILC 2015).

The scarce agreement reached on the subject of State responsibility was attributed to the extreme complexity of the problems that the topic posed for the discussions. In fact, the League of Nations never reached an agreement to complete a codification on the matter (UN ILC 1949: 49; 2015) and the attempt to regulate this topic was only resumed in 1949, when the United Nations

(hereinafter, UN) was in place and the International Law Commission (hereinafter, ILC) was trusted with the task of the progressive development of international law and its codification (UN 1947: art. 1).

In this new context and in spite of the 1930's failure to produce a codification on this matter, the ILC decided to include the topic of State responsibility in the list of topics to be studied, adding as a subtheme the criminal responsibility of States and of the people acting on their behalf. With this respect, the first study of the Commission on the codification of the responsibility for internationally wrongful conduct was authored by Commissioner García Amador. In his report, Commissioner García concluded that even though the topic of State responsibility should be limited to the public responsibility, the developments around the criminal liability should be considered due to their effects on the principles of public responsibility. One of these effects was the differentiation between unlawful acts and (graver) punishable acts, the former subjected to compensations and the latter to sanctions (UN ILC 1954).

Such presentation of this topic anticipated the trajectory of the discussions on the matter, which was drawn in constant reference to its legal consequences. Indeed, the success or defeat of the acceptability of the notion of state crime was strongly connected to the possibility of establishing legal consequences against its actors. In short, the debates around the draft articles indicated an analytical integration of the study of (state) crime and its consequences, as dependent and interrelated phenomena for their observation according to law.

In 1955, Commissioner García Amador was appointed Special Rapporteur for the topic of State responsibility (UN ILC 1955: 190). Ever since his first report in 1956, Rapporteur García raised one of the most controversial themes of his mandate: the criminal responsibility of States. According to García, State unlawful conduct could give rise to reparations as well as to

‘punishment’ that could take place concurrently with compensations for damage (UN ILC 1956a: 173-232). In 1956, the ILC discussed this report.

Commissioners François and Zourek, took position rejecting criminal responsibility of States as a matter that international law did not recognize. According to François, this concept ‘could not exist’ because the State is a mere legal fiction and, as such, it could not be held criminally accountable. Additionally, he argued that the Nuremberg Tribunal had reintroduced the criteria that ‘the king can do no wrong’, when establishing that unlawful acts coming from the State can only be attributed to its advisors or organs. In fact, the Nuremberg trial made clear that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” (International Military Tribunal 1946: 447). Therefore, although since the aftermath of World War II crimes against humanity was a typology of wrongdoing characterized as a state crime (Rodenhäuser 2014), the international tribunal restricted its reaction to the conduct of individual agents⁶¹.

With this regard, Commissioner Sir Gerald Fitzmaurice, even though agreed that this issue should not be dealt with in greater depth by the ILC (UN ILC 1956: Volume I: 241), noticed that the idea of punishing a State was not absurd and that the possibility of establishing penalties beyond *restitutio in integrum* was not impracticable. At the end of that meeting, the ILC Chairman

⁶¹ “The contemporary human rights movement is permeated with the logic of Nuremberg. Human rights groups focus on atrocities for which they seek individual criminal responsibility. Their method of work has a formalized name: Naming and Shaming. The methodology involves a succession of clearly defined steps: catalog atrocities, identify victims and perpetrators, name and shame the perpetrators, and demand that they be held criminally accountable. The underside of the focus on perpetrators is to downplay issues. This is problematic if one recognizes that political violence is often not a standalone incident but part of a cycle of violence – a fact obscured by the absence of a historical context” (Mamdani 2016: 352).

concluded that the task of the ILC was to address the ‘public accountability’ of States which had to be restricted to the duty of reparation *stricto sensu*, implying that criminal liability could only be attributed to individuals (UN ILC 1956: Volume I: 246). Through this last debate we can preliminarily observe from a sociological perspective how the understanding of the criminal liability is naturalized by the legal system as a process that can only implicate individuals and that has the goal of punishing them as its unequivocal and direct consequence.

In 1957, the Special Rapporteur submitted his second report (UN ILC 1957a). In this document he did not mention the possibility of awarding criminal consequences for State wrongdoing, although he warned that this was nothing but a ‘pending issue’ that at some point the Commission would have to address (UN ILC 1957: 105). According to the rapporteur, crimes do not necessarily originate ‘punishment’, but they could bear measures for the protection of the victims and their assets. In this line, in his 1958 report, he affirmed that the duty of reparation *stricto sensu* involves the ‘satisfaction’ element that, as such, may entail a form of criminal liability (UN ILC 1958: 70). However, the Special Rapporteur did not examine the subject of ‘satisfaction’ measures in greater depth. From a sociological perspective, this assertion seems to contest punishment (understood as a temporal measure of pain infliction) as the only consequence of criminal accountability, recognizing a specific weight to the protection of the victims as an acceptable and legal form of criminal accountability.

The ILC was unable to finish a draft of the codification as the decade of the 1950s ended. In 1961, rapporteur García insisted on the discussion of the criminal liability of States distinguishing between two types of reparation: the reparation *stricto sensu* - understood as a civil institution with pecuniary implications, and satisfaction measures -understood as a type of moral and political

restitution with an “essential and unvaryingly criminal feature” (UN ILC 1961: 14). The latter was understood as bearing two purposes: restituting the dignity of the State affected by the wrong and punishing the State wrongdoer (UN ILC 1961: 19). In this sense, the rapporteur stated that reparation *stricto sensu* could turn into punishment depending on the direness of the infraction.

Following the UN General Assembly Resolution 1686/1961, the ILC decided to prioritize the study of State responsibility⁶². With this task the ILC Secretariat prepared a document on the criminal accountability of States, analyzing the landmark discussion around the drafting of the project of the Convention on the Prevention and Punishment of Genocide. In these discussions, it was proposed that criminal liability for genocides should also cover States (UN 1948) arguing that the complexity of the structure of modern States often meant that their acts should not always be individualized on a human being, but on the system as a whole. Nonetheless, in the debates, State responsibility for Genocide was rejected bearing that only individuals could be held responsible as authors of this crime (UN ILC 1964: 126).

Concerning the antecedents, in further works the ILC Secretariat presented a compendium of international courts’ decisions regarding State responsibility and the new Special Rapporteur, Roberto Ago, submitted a report on the international codification of the topic (UN ILC 1963). In these works there was not much progress regarding the criminal liability of States. It was in the 1970s when the topic gained momentum when the Special Rapporteur submitted a second report entitled “The Origins of the International Responsibility”, in which he analyzed the conditions that had to be met in order to determine the existence of an internationally unlawful event. In his report, Ago stated that International Law increasingly labeled as crime the grave breaches of international

⁶² With this purpose, the ILC conformed a subcommittee on the matter. This organ submitted its 1963 and 1964 reports on the issue of State responsibility (UN ILC 1964: 126).

law coming from States -especially those infractions of *erga omnes* duties⁶³ as well as *ius cogens* obligations⁶⁴.

In 1971, Ago submitted his third report in which he studied the international law trend criminalizing State's unlawful conduct (UN ILC 1971: 212). With this respect, the rapporteur referred to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States approved in 1970, in which the war of aggression was defined as a crime against peace that, in accordance to international law, entails public responsibility. This precedent, in his view, allowed to shape the concept of international crime, as States are the only entities that can commit the crime of aggression. In this sense, the idea of criminal offenses perpetrated by the State did not only follow from the nature of the obligations breached by the conduct or the gravity of the wrong but also derived from the fact that there were a number of conducts that only the State as a whole may perform; in other words, there are illegal actions that could not be understood as committed by individuals without a substantial reference to the organization (the State).

⁶³ "For assessing what an *erga omnes* obligation is, he quoted the work of the International Court of Justice in the case *Barcelona Traction* that developed the idea of the *erga omnes obligations*. This norms are understood as obligations opposable to the international community as a whole, meaning that by their legal status they are concern of all States: "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" (International Court of Justice 1962: 32).

⁶⁴ "Article 53. Treaties Conflicting with a Peremptory Norm of General International Law ("Jus Cogens") A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (UN Vienna Convention 1969).

In 1972, the rapporteur submitted his fourth report on State responsibility, in which he assessed that wrongdoing performed by the State gives rise to international responsibility. Following this, in 1973 the rapporteur submitted a project regarding the general principles of State responsibility (UN ILC 1973). Despite the fact that these articles did not refer to forms of criminal responsibility, this topic was not abandoned in the further discussions. With this respect, in 1974 the rapporteur declared before the ILC that even though the articles should be limited to the study of the secondary norms of responsibility (norms on the legal sanctions), it should not turn a blind eye on the content of primary obligations (norms on the obligations of States)⁶⁵. The same observation was made by the Sixth Committee of the ILC, which affirmed that the study of State responsibility probably should take into account the existence of different types of obligations implying a distinction in their treatment according to their importance for the international community (UN ILC 1974: 6).

In accordance with this, the rapporteur proposed the Committee to consider distinguishing between grave unlawful conduct (which could be labelled as international crimes), and other less serious wrongs (UN ILC 1974: 6). From this distinction the latter would involve an obligation to make reparations while the former would entail the implementation of sanctions. This remark was based on a historical analysis that the rapporteur divided in three periods of time:

⁶⁵ “The emphasis [of the articles] is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law” (ILC 2001: 31)

<i>From mid-nineteenth century until the outbreak of World War I</i>	<i>Between 1915 and 1939</i>	<i>From the end of the Second World War onwards</i>
In general terms there was no differentiation with regard to the content of the international obligations violated by the State. Thus, the possibility of sanctioning remained only valid if reparations were denied – with the exception of cases of aggression when it was not required to make reparations before taking sanction measures.	The idea that there was not a single type of international wrongdoing was brought forth. In this vein, there could not be a single type of responsibility, enabling the possibility of penalizing States in line with the gravity of the infraction. This implied a step towards a criminal connotation of the international responsibility.	It was accepted that international crimes exist and that, as such, they should bear a corresponding responsibility, entailing more severe penalties. In the 1960s and 1970s, this idea was particularly relevant enabling a distinction between the types of international wrongful acts.

In line with his study, the rapporteur established that the project on State responsibility should contain an article differentiating the most serious breaches from other infractions: grave breaches, he proposed, should be addressed as crimes, therefore implying more serious consequences (UN ILC 1976). In this context, in 1976, the ILC decided to include the term ‘state crime’ in the draft articles on state responsibility (Weiler, Cassese and Spinedi 1989) in article 19 of the draft codification:

“[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime” (UN ILC 1977: 11).

The different governments reacted to this article⁶⁶. Between 1980 and 1982, rapporteur Willem Riphagen, replacing Commissioner Ago, received the comments of the States. The different positions with regard to the matter of state crime could be classified in three groups:

⁶⁶ The impact positions of the States in the UN allows to observe the political difficulty of creating international law categories without their consent. Further from their particular position concerning state crime, the fact that States are behind the discussions on regulations for creating constraints to state power, involve a political difficulty. Some commentators have understood the methodology of the ILC submitting to the governmental approval the international law developments may entail a form of immobilizing further

<p style="text-align: center;"><i>In favor</i></p> <p><i>Belarus, Ukraine, the Soviet Union, Yugoslavia, and Bulgaria</i></p>	<p>These States considered article 19 as an important provision for strengthening peace, international security and the principles of the UN Charter.</p>
<p style="text-align: center;"><i>Abstention</i></p> <p><i>Canada, Austria, Spain, and The Netherlands</i></p>	<p>These States abstained from making a definitive declaration, as the consequences to be awarded to the different categories of wrongdoing as well as an adjudicating forum with this purpose had not been clearly determined.</p>
<p style="text-align: center;"><i>Against</i></p> <p><i>Sweden, Federal Republic of Germany, Australia, France, Greece, Portugal, and the U.S</i></p>	<p>These States emphatically opposed article 19. The recurrent criticism within this group was that such provision would risk criminalizing the acts of States, without objective criteria: even if the definition of crimes enunciated a set of non-exhaustive examples, the debates cast doubt on the clarity of article when differentiating serious crimes.</p>

The lack of consensus around article 19 was basically argued around the distinction between criminal and non-criminal conduct and the attributable consequences for state crime. Considering these objections, during the 1990s, there were different debates focusing on the consequences of state crime and the possible forum to decide on the criminal responsibility of states. With this respect, in 1993, the rapporteur Arangio-Ruiz submitted a report on State responsibility in which he analyzed the consequences of state crime establishing that the distinction between delicts and crimes was not merely descriptive, involving the instatement of a regime of responsibility capable of awarding particularly serious consequences for the crimes. This connotation of state crime raised worries in different States around the problem of creating measures that could endanger the territorial integrity or the political independence of a State (UN ILC 1992). In this matter, the ILC concluded that only armed aggressions justified unilateral armed reactions and that indirectly injured States could eventually be authorized to react by a decision of

advances in international law: “Instead of limiting the power of governments, the ILC’s version of state responsibility establishes the limits of their powers. It affirms rather than constrains power. From the viewpoint of the people, the purpose of law is to realize their values and interests by directing the holders of delegated power to respect those values and to serve those interests. It is unlikely that anyone but a government official would regard the confirmation of government power as the purpose of law” (Allott 1988:2).

the competent body according to the UN Charter. With this regard, the rapporteur explained that intervention should be limited to an imperative need and should be proportional in extent.

In short, the rapporteur argued that the traditional distinction between States' serious offences (with civil consequences) and wrongdoing of individuals (entailing penal consequences), should be transformed acknowledging that States are capable of criminal conduct involving legal consequences other than civil. With this regard, the rapporteur concluded that criminal responsibility is an adequate response to State's criminal wrongdoing that should not limit legal redress to civil consequences, as well as should not involve collective responsibility which he qualified as a primitive and rudimentary institution⁶⁷ (UN ILC 1993).

In 1994, the ILC undertook a new debate on the characterization of certain illicit conduct of the State as criminal. A number of Commissioners defended the pertinence of this category, which legal consequences should be awarded by an independent international body - except for crimes of aggression for which the UN Charter already established an appropriate forum. On the other hand, other ILC members pointed out that the category of 'crime of state' should not be employed because article 19 aimed at establishing a distinction in reference to the degree of seriousness of the unlawful act, which was not clear and involved great discretion from the forum of attribution of responsibility.

⁶⁷ In this respect, Jørgensen (2000: 4) comments: "[t]raditionally, international law has been concerned with the activities of states, and it would seem that the concept of illegal war was at first discussed primarily in relation to the collective responsibility of the state. During the First and Second World Wars, crimes of a gravity never before equaled were committed and condoned by the state, and the intangibility of the state bureaucratic apparatus gave rise to the question of the criminal responsibility of the physical persons representing the state and acting in its name. [...] The criminal responsibility of states, individuals, governments, and organizations were all notions that received considerable attention in the aftermath of each of the two world wars and three possible systems were advocated: first, that of the exclusive responsibility of states; second, that of the cumulative responsibility of states and individuals; and finally, that of the exclusive responsibility of individuals".

In 1995, the rapporteur focused on the consequences of international wrong, particularly with the aim of determining the adjudicating forum for establishing the breaches, labeling them as crimes and awarding subsequent sanctions (UN ILC 1995). With this respect, the rapporteur established that the general consequence of states' wrongdoing is the obligation to make reparations, including the termination of the conduct, the restitution in kind, compensation and satisfaction measures as well as the guarantee of non-repetition. In this context, criminal conduct implies broad reparations to be made since the breach of *erga omnes* obligations damages the international community as a whole. Thus, although *restitutio* should not compromise the existence of the State and the essential needs of its population, the obligation of restoring the victim to the original situation before the gross violations could not be evaded on the basis of arguments of sovereignty, independence or prevalence of the domestic jurisdiction. Finally, the rapporteur established that, in the context of reparations, countermeasures may be invoked by the affected States, with the exception of possible unilateral interim measures for addressing a situation of genocide. From the trajectory of the discussions, we can observe the progressive emphasis of the debate around state crime on the consequences attributable to the wrongdoing.

The ILC examined this report, debating once again the concept of state crime. In this debate it was argued that the State was exempted from criminal responsibility because it was the only institution able and capable of punishing –the State punishing itself is viewed as impracticable (UN ILC 1995: 48). Additionally, it was argued that sanctioning a criminal State would unjustly extend its effects to the population and that the notion of state crime could stigmatize certain States as deviant, enabling eventual abusive counter-measures to be undertaken by powerful States. In spite

of these oppositions, the ILC provisionally approved the draft articles on State responsibility, maintaining the original version of article 19.

In 1996, rapporteur Arangio-Ruiz was replaced by James Crawford who cast doubts on article 19, which he deemed defective regarding the definition of the criminal conduct (UN ILC 1996). In 1998, different governments raised reservations on the notion of state crime, some of them opposing the notion of crime and others objecting the possible legal consequences when attributing a criminal conduct to the State. Considering these observations, the rapporteur concluded that the term 'crime' was unwelcomed by the states; even though there was a consensus on the relevance of the category of obligations *erga omnes* (UN ILC 1998: 77).

In 1998, after numerous meetings and intense debate, article 19 was changed and the concept of state crime was excluded from the draft articles on state responsibility (UN 2002a). The ILC decided to exclude article 19 considering that there was no consensus regarding the notion of state crime. The dismissal of this term implied a relegation of the concept within international law. In 2000, the rapporteur presented a new report clarifying that States were capable of committing illicit conduct but that criminal responsibility arising from this is only attributable to the individuals. Finally, he proposed alternative wordings to the original term 'crime', such as 'serious unlawful international act' or 'exceptionally serious unlawful act'.

In 2001, the ILC adopted the draft articles on the responsibility of States for internationally wrongful acts (UN ILC 2001) replacing the concept of state crime with the concept of serious breaches of obligations to the international community as a whole and essential for the protection of its fundamental interests. On December 12, 2001, the General Assembly took note of the articles and commended them to the attention of Governments without prejudice to the question of their

adoption (Resolution 56/83). In 2004 (Resolution 59/35), 2007 (Resolution 62/61) and 2010 (Resolution 65/19), the General Assembly insisted on commending to the attention of governments the articles requesting the Secretary-General to invite the States to submit written observations on the future measures to be adopted, as well as preparing an initial collection of the decisions of the international bodies related to the articles.

4.1.2 Remarks on the International law debate about the concept of state crime

The codification on the responsibility of States was the result of more than five decades of work. During this time the subject of state crime was largely debated. For a socio-legal characterization of state crime, this debate is not only relevant for a genealogical study of the notion, but also epitomizes three traditional issues when constructing a general definition of crime: what can we call a criminal action? Who can commit crime? And, what are (and should be) the legal consequences of crime?

With regard to the question on the content and extent of wrongdoing that can be called crime -*what can we call a criminal conduct?*, the ILC considered that further from bilateral obligations, it was important to define State responsibility when ‘essential’ international rules were breached. In this line, the category of criminal conduct was developed by the ILC along with the international law categories of *ius cogens* (non-derogable norms) and obligations *erga omnes* (obligations opposable to all). In accordance to this, the notion of *state crime* emerged as an expression referring to wrongdoing resulting from the breach of essential international obligations that, as such, may be recognized as criminal by the international community as a whole (ILC 1977).

In 1977, this notion was adopted in article 19 of the draft codification triggering an intense debate along two decades under the lead of different special rapporteurs on the subject (Umaña

2015). Article 19 of the draft articles was accepted by the States alongside the initial debates. However, as soon as the discussion focused on the legal consequences attributable to state criminal conduct, most governments expressed their dissatisfaction with the notion and paved the way to the exclusion of the term⁶⁸.

A similar situation emerged with regard to the question *who can do crime?* ILC discussions on the codification of State responsibility focused on establishing whether States were capable of wrongdoing and, if so, what type of wrongs they could commit. While to some of the discussants States could not be addressed as criminal actors because they are mere fictions that should not be submitted to criminal law -*societas delinquere non potest*; others sustained that states could be regarded as criminal actors when the State supported, acquiesced or participated in criminal conduct. This was confirmed by the fact that certain criminal conduct as the crime of aggression, apartheid or annexation could only be perpetrated by States. Furthermore, this category is relevant when criminal actions are performed through complex networks making it difficult to concentrate responsibilities on individuals.

For some time, the ILC discussions were in favor of understanding the state as a criminal actor. However, this option was discarded and the State was finally famed as a non-criminal actor, particularly because of reluctance on assessing consequences of such categorization of wrongdoing and the appropriate forum for the attribution of responsibility. These debates revealed that the

⁶⁸ In the 1980s, various States made comments on the draft articles. These comments can be analyzed into three groups: the first group of countries (Canada, the Netherlands, Spain and Austria) did not offer a definitive statement because they understood that penalties were pending development projects. A second group of countries (Belarus, Ukraine, USSR, Yugoslavia and Bulgaria) considered article 19 to be an important provision for strengthening peace and the purposes of the UN Charter. A third group (Sweden, Australia, France, Greece, Portugal, The Federal Republic of Germany and the U.S.) opposed to Article 19 because it could result in turning acts of States into crimes and because it was not clear what the consequence of this should be.

acceptability of the notion of state crime was not only a matter of naming a wrong and blaming the State for it but concerned the question of *what are (and should be) the legal consequences of crime?* With this respect, ILC debates presented different theoretical problems concerning the possibility of awarding criminal law consequences to state wrongdoing under the traditional framework of punitive measures, as well as more practical issues in respect to the operational elements of such responsibility – e.g. the adjudicating forum for determining breaches and the procedures and rules of attribution and allocation of responsibility.

While some governments and ILC Commissioners supported the idea of state crime as an adequate label for the most serious offenses under the general principle of the international responsibility for State wrongdoing, others argued that it had to be abandoned due to the impracticability of adequate legal consequences and pertinent adjudicatory institutions for state crime. Hence, the different issues around the category of state crime became progressively dependent on the possibility of finding an ‘adequate’ criminalization. Thus, in 1998 this concept was ‘put to one side’ due to the lack of consensus on its content and of the regime of responsibility that it should be granted with (UN ILC 1998). The replacement of *state crime* by the notion of ‘serious breaches’ was mainly based on the objections referring to the legal consequences for criminal states wrongdoing (Wyler 2002; Bagchi 2009:10).

The study of the possible legal consequences of state crime underlines the difficulty of the law for assessing the crime without a reference to its attributable penalties. Furthermore, this consequences should entail penal measures. This idea seems to be governed by the assumption of the necessity of punishment for attending criminal conduct. Indeed, the study of the genealogy of the ILC discussions allows to visualize a distinction drawn between civil law consequences and criminal

law consequences. In line with the traditional distinction between penal measures and compensatory measures, the former (sanctions) are attributable 'by nature' to criminal conducts and the latter (compensations) to civil wrongdoing. Do legal consequences attributable to wrongdoing have any essential or natural feature? The fact that reparations presented a penal element (e.g. punitive damages in tort cases) and other sanctions were found to have a compensatory element (e.g. compensation for criminal injuries), did not persuade the discussants of the lack of a natural bound between a particular measure and the sort of wrong materialized in the conduct.

When dealing with the conceptualization of state crime, international law draws a necessary conceptual correlation between the phenomena of crime and its criminalization. As such, (state) crime could not be conceptualized without an attributable consequence entailing the criminalization of the conduct. The common legal understanding is that only the law can define a crime and the applicable punishment (*nullum crimen [nulla poena] sine lege*). In this line, the formula assessing that there shall be no punishment without a crime (*nulla poena sine crimen*), was inverted by the discussion to a logics of no crime without applicable punishment. In short, when limiting the concept of state crime to the possibility of finding practicable legal consequences, the international law situates criminality and criminalization as two fields of observation intrinsically concomitant. Hence, the absence of viable means or basis for the criminalization of an action was observed as an argument for making the criminal category (state crime) impertinent.

The study of the concept of state crime in the international law illustrates the limitations of evaluating the phenomenon of criminality reduced to the notion of criminalization. This scope should be widened when constructing a socio-legal conceptualization of the phenomenon: for a sociological observation of (state) criminality, criminalization is a contingency. These are two

phenomena that need to be addressed as independent fields of observation and, as such, although related they are not necessarily conceptually nor practically interconnected. The conceptualization of state crime does not require a determination, or even the existence, of criminal law consequence (penalization) – notwithstanding valid attempts to create mechanisms of legal redress.

With the aim of drawing a socio-legal conceptualization of impunity a characterization of the phenomenon of crime should allow to uncouple the observation of the criminal conduct and the extent, form and aim of its criminalization. In other words, the reconstruction and characterization of the (State) criminal conduct may be drawn independently from the (still relevant) task of debating the legal redress for these actions and the problem of impunity. With this regard, we have the task of identifying the cognitive, operational, procedural and ideological obstacles for visualizing legal consequences to the criminal phenomenon and their particular meaning and weight for the conceptualization of impunity.

4.1.3 The regional law debates on the concept of state crime

In spite of the rejection of the notion of state crime at the UN, when reviewing the work of different Latin-American jurisdictions we found relevant evidence on the use of the term (Umaña 2015). This evidence was pertinent for evaluating the legal debates around state crime, from a genealogical, conceptual and contextual perspective.

However, instead of drawing a genealogy on the notion of state crime from a legislative or political perspective, in this section we will review other aspects and problems with respect to the definition of state criminality exploring regional international law. In the Latin-American region, the legal discussions around the notion of state crime have mainly focused on jurisdictional developments. To our work it is important to take into consideration these developments and their

possible particularities around the understanding of state criminality, as the geographical, social and historical context of the case study of the present research.

With this in mind, we will refer to the work of the Inter-American System on Human Rights (hereinafter, ISHR). The ISHR is a regional system of protection of human rights in the Americas, composed of normative, quasi-judicial and judicial mechanisms. The ISHR has competence on the violation of the obligations recognized in the American Convention on Human Rights principally and other instruments, in respect to States that have accepted the jurisdiction of the Inter-American Court of Human Rights (hereinafter, IA Court). In the exercise of that jurisdiction, the IA Court has extensively examined some of the most insidious actions of American States against people under their jurisdiction. Some of the Inter-American Court Justices have engaged in a debate around the notion of state crime.

These discussions were not part of the *ratio decidendi* of the Court but were a source of inspiration of the debates on the human rights responsibility of the State in different cases. Through the study of this debate, we would like to explore three kinds of issues that can be distinguished as problems of definition, problems of application of the concept and problems concerning the possible consequences to be attributed to actions that falling into the category of state criminality. In regard to *the definition*, we can provisionally anticipate that the reader will find that the problems of conceptualization of state crime appear to be thematically consonant with the discussions underlined in the last section. With regard to the *application* of the concept, the Inter-American Court debates allow us to explore possible difficulties that the usage and treatment of ‘state crime’ can present for the judicial system. Finally, in reference to the possible *consequences* of state criminality, this section attempts at enabling differentiating the operation of categorizing a

certain conduct as criminal and the operation of determining the consequences to be assigned to the phenomenon as well as the legal system anxieties and limitations *vis-à-vis* such task.

The Inter-American System on Human Rights presents recent developments regarding the category of state crime – different from the ILC discussions. The work of Justices García (IA Court, 2003a; 2006b) and Cançado (IA Court 2003a; 2006a; 2006c) brought the term into debate. When referring to gross human rights violations, Justice Cançado supported the category of state crime should be recognized by the ISHR⁶⁹ while Justice García opposed to this form of labeling human rights violations.

In different reasoned concurring opinions to the rulings, Justice Cançado has hold that the notion of state crime should be recognized by international law. The first time he did so was in the *Myrna Mack v. Guatemala* case (IA Court 2003a), in which the Court studied the extrajudicial execution of the anthropologist Myrna Mack Chang by the military on September 11, 1990. According to the IA Court her killing was politically motivated due to her denunciations and research concerning the displacement of rural indigenous communities that she concluded was caused by the Army's counterinsurgency program (IA Court 2003a: 134.7 - 134.13).

In this ruling, Cançado asserted that such cases are attributable to state agents who act as direct perpetrators and to the State on behalf of which crimes are committed. In this line, he sustained that with respect to this conduct, there is a sort of complementarity of the international criminal responsibility of the individual and the responsibility of the State. Thus, he concluded that

⁶⁹ “[w]hile the expression “crime of State” may seem objectionable to many international jurists [...] because it suggests an inadequate analogy with juridical categories of domestic criminal law, this does not mean that crimes of State do not exist. [...] Even if another name is sought for them the existence of crimes of State does not cease for that reason” (IA-Court 2003: 53)

in spite of the ILC draft articles on State responsibility setting aside, “rather lightly” (IA Court 2003b: 8), the concept of State crime, state crime ‘does exist’ (IA Court 2003b: 53).

“While the expression “crime of State” may seem objectionable to many international jurists (especially those petrified by the specter of State sovereignty) because it suggests an inadequate analogy with juridical categories of domestic criminal law, this does not mean that crimes of State do not exist. The facts in the instant case are eloquent evidence that they do exist. Even if another name is sought for them, the existence of crimes of State does not cease for that reason” (IA Court 2003b: 53).

In this sense, Judge Cançado linked the concept of state criminality to the protection of the fundamental interests of the international community defining it as “grave violation[s] of peremptory international law (the jus cogens), which directly affects its principles and foundations, and which is a matter that concerns the international community as a whole, and should not be dealt with by analogy with categories of domestic criminal law” (IA Court 2003b: 27). When Cançado asserts that these crimes should not be dealt as a form of domestic criminal law, he implied that these actions are not a category of crime but a form of criminality: the problem is not to create an offense with the label of state crime but to recognize state criminality as actions from which “[...] millions of human beings have been made victims of grave human rights violations perpetrated by state policies” (IA Court 2006: 24). This observation is an important indication for a further development of a sociological concept of state crime. Indeed, it can allow us to visualize that state crime is not to be limited to a debate on the existence of a (new) criminal law offense, but rather a phenomenon of criminality that refers to different sorts of criminal prohibitions⁷⁰.

⁷⁰ This idea was ignored by the Colombian Supreme Court in a case around unlawful interception of communications by the State Security Agency against the political opposition and human rights defenders. In the case, the plaintiff claimed for an exception to the application of the statute of limitations, arguing that the State should not benefit its own agents from the expiration of the statutory period when committing actions that use public power hidden from the public and the judiciary. In contradiction of this argument, the Colombian Supreme Court (2013) argued that domestic legislation did not establish the

Considering state crime as a type of violation, Cançado assessed the importance of determining the concomitant responsibility of the State and the individuals (acting as State agents) with regard to these conducts. Thus, Justice Cançado favored the concept of ‘crimes of States’ as an issue that involves the complementarity between individual and State responsibility. This, he assessed, was related to the international law trend towards the criminalization of grave human rights violations, in the context of the struggle against impunity. With this regard, according to Cançado, the legal consequences of state crimes would be the aggravated international responsibility in accordance with which the *reparatio* would involve a particular nature and a wide scope. This scope should comprise not only reparations but also punishment, the latter referring to punitive reparations taking the form of ‘obligations to do’ rather than merely pecuniary measures: these obligations “have exemplary or dissuasive purposes, in the sense of preserving remembrance of the violations occurred, of providing satisfaction (a feeling of realization of justice) to the next of kin of the victim, and of contributing to ensure non-recidivism of said violations (even through human rights training and education)” (IA Court 2003b: 50)

In this ruling, Judge Sergio García expressed a reasoned concurring opinion in which he described state crime as a ‘withering’ expression that serves identifying these kinds of criminal events and frustrating their justifications. However, he criticized this notion as it could entail “the temptation to subordinate effective and specific individual criminal responsibility to a hypothetical and general State responsibility or, at least, to hide the former under cover of the latter”, as well as it could also unreasonably expand the consequences of wrongdoing to every agent part of the State at the time of

category of ‘state crime’ as it did not take into account the ‘criminal objective’ for fixing the statute of limitation, nor contemplated ‘the impact’ on victims, society in general and State institutions. Hence, the Court concluded that in this case the statute of limitation was objective and should be applied with no exceptions.

the crime (IA Court 2003C: 34). Hence, according to Justice García, in cases as the execution of Myrna Mack Chang, it is not pertinent to concentrate criminal responsibility in the State; rather, when the Court determined the existence of particularly serious wrongs, it would be appropriate to consider reparations consistent with the gravity of the violations. These reparations, he proposed, could surpass merely economic consequences enabling different non-pecuniary compensations, “such as publication of the judgment, [the] expression of guilt and requirement of apology in official declarations, and [the] commemoration of the memory of the victim” (IA Court 2003C: 47).

In 2004, the subject of state crime was raised again on the occasion of the case concerning the massacre of 268 inhabitants of *Plan de Sánchez* by members of the armed forces of Guatemala on July 18, 1982 (IA Court 2004a). In his separate opinion, Judge Cançado insisted that state crimes are a reality and that it is essential in such cases to determine the concomitant responsibility of the State and the criminal liability of the perpetrators.

“The facts of this Case of Plan de Sánchez Massacre speak for themselves, eloquently, revealing that State crime does exist, even though part of international juridical doctrine, clinging to the dogmas of the past, seeks to deny or elude this. State crime, entailing aggravated international responsibility directly affects the fundamental values of the international community as a whole” (IA Court 2004b: 34).

In the *Plan Sánchez massacre case*, Justice Cançado asserted that state crime refers to wrongdoing perpetrated with the express intention from the State (in the form of a State policy) or through its tolerance, acquiescence, negligence or omission, in relation to grave violations of human rights perpetrated by its agents (IA Court 2004b: 35). According to this, the gravity of these crimes creates a particular regime of reparations covering various forms of reparation that may include symbolic measures – e.g. the rehabilitation of the surviving victims, the public acknowledgement of State responsibility and the preservation of the memory of the victims, or

more concrete measures - such as the combat against impunity or the creation of health, education, housing, production and infrastructure programs.

“Whether the reparations ordered in this judgment of the Court are called punitive damages – which should evidently cause those who deny the existence of State crime to shudder – or ‘exemplary reparations’, or any other expression of this type, their basic purpose remains the same: they recognize the extreme gravity of the facts, punish the State responsible for the grave violations committed, acknowledge the extreme sacrifice of the victims who died and alleviate the sacrifice of the surviving victims, and establish a guarantee of non-repetition of the harmful acts” (IA Court 2004c: 25).

In a former case (IA Court 2003b), Justice Cançado labeled these reparations as “punitive damages” which would take place beyond the boundaries of the classical civil law reparation, as non-pecuniary forms of reparation serving at “preserving remembrance of the violations occurred”, “providing satisfaction (a feeling of realization of justice) to the next of kin of the victim”, and “contributing to ensure non-recidivism of said violations (through human rights training and education)” (IA Court 2003b: 50).

In the *Mapiripán Massacre v. Colombia* case, the IA Court (2005a) studied the detention, torture, and execution of approximately 49 people committed by members of the paramilitary in 1997. This case, according to the Court, was an atrocity that counted with the acquiescence, tolerance, and collaboration of the State (IA Court 2005b: 32). According to Justice Cançado, cases as such involve a great convergence between international criminal responsibility of individuals and the State international responsibility; in accordance with which, “both must be addressed in a concomitant manner, as the atrocities are not merely acts (or omissions) committed by isolated individuals on their own” (IA Court 2005b: 32). In this case, it was the first time that the notion of state crime was discussed with respect to wrongdoing performed by paramilitary.

Cançado's position broadening the possible actors of state crime to actors other than *de iure* agents (e.g. paramilitary groups), can also be depicted in his concurring opinion of the *Ituango Massacre* case (IA Court 2006a). In this case, the Court studied the international responsibility of Colombia for the acts of torture and murder of a group of civilians committed by a paramilitary command "acting in conjunction with the Colombian armed forces, or at least with their acquiescence or tolerance" (IA Court 2006b: 2). In this context, Justice Cançado sustained that besides discussion around the different sorts of agents that can be involved in state criminal conduct, the State does not constitute an "abstract entity" but involves a structure that can implement repression and violence through its own agents or third parties.

With this view, according to Justice Cançado the State not only possesses a concrete manifestation but also, as such, States do perform crime (*societas delinquere potest*) and, accordingly, they can be held internationally responsible for criminal conduct. Such responsibility, he asserted, derives from the understanding of States as legal subjects of international law: state crime, planned and executed by the State and perpetrated in keeping with State policies, "can be attributed to the State as a juridical person of international public law, and entail unavoidable judicial consequences for the State (such as punitive damages, as a form of reparation)" (IA Court 2006b: 42). According to Justice Cançado, these violations not only imply the infringement of the law but entail the breach of the fundamental and higher values of protection of the human person without which the legal order "is simply not realized" and "ceases to exist as such" (IA Court 2003b :31), which is why such conduct may give rise to aggravated responsibility.

In this regard, Justice García expressed his concern on the scope of the use of the term 'state crime' in his concurring opinion to the case of *Goiburú et al. v. Paraguay* (IA Court 2006d).

According to him, this concept could improperly concentrate responsibilities in the State, overlooking the liability of the agents that committed the crime under the veil of a state policy (IA Court 2006d: 17). In this vein, to Justice García, state criminality, understood as collective in kind, involves a dilemma between attributing responsibility onto some actors (missing the responsibility of the organization, and attributing responsibility onto every member of the organization (most of who could be absolutely peripheral to the violations).

With this understanding of the phenomenon, Justice García asserted that only individuals can perpetrate crimes (IA Court 2006d: 18), and for this reason he chose to employ the term “crimes from the State” or “terrorism from the State”. These expressions have the advantage of recognizing that State agents have used their public authority to inflict harm against individuals, contrary to other expressions (as state terrorism or state criminality) that may involve dissipating individual liability into the general responsibility of the State and possibly suggesting that ‘everyone is guilty, except the criminal’ (IA Court 2006d: 27). Likewise, Justice García argued against the possibility of eluding the involvement of individual agents in the crimes through the notion of state crime.

In Cançado’s view the reaction to grave and systematic violations of human rights should generate a response from the international community as a whole against both the state and its agents for their wrongful actions and omissions (IA Court 2003b: 39). In this sense, as he stated in the *Plan de Sánchez Massacre v. Guatemala* case, there is no legal impediment in the coexistence of the international responsibility of the State and the criminal responsibility of the individual, being complementary in the struggle against impunity (IA Court 2004b: 10).

4.1.4 Notes from the Inter-American debate for a sociological construction of the concept of state crime

Up to this point, Chapter 4 has dealt with the Inter-American debate on the concept of state crime. The contradiction between Justices Cançado and Sergio García shows two opposite views around state criminality: the former accepting and the latter rejecting the notion.

The discussion around the notion of state crime is driven by the distinction *criminal actor/non-criminal actor* -as happens in the case of the universal debates. This distinction places on the non-criminal side the actors that are not capable of committing crime –in which Judge García includes the State. Within this distinction, the capability of committing crimes is drawn upon the legal status that the law confers to a certain actor. This status can be often verbalized as the ‘nature’ of the actor, according to which criminal actors are those that by reason of their (legal) nature can commit crimes. In fact, this verbalization veils the fact that the ‘capability’ of committing crimes is nothing but a legal decision. Indeed, with this understanding it is visible that there is no theoretical, conceptual or sociological obstacle to apply the idea of imputation of an act to the State. When reviewing the debates alongside ILC discussions around the notion of state crime, it is noticeable that the response to the question *can states commit crimes?* based on the ‘nature’ of the actor is artificial and circular: states can commit crimes if the law decides so.

Preliminarily, it could be presumed that the question about the possibility of States committing criminal conduct would be rather dissimilar between universal and Inter-American debates; after all, the universal debates were framed as a legislative function within international public law and the IA Court debates are part of a jurisdictional activity in the field of human rights, take into consideration the rights of the victims and the logics of human rights in order to elaborate

the debate. However, when reviewing the arguments of both forums, a main part of the arguments discussing State status as criminal actor were focused on the attributable consequences.

Can institutions be held accountable for their wrongdoing? Can a state be punished for crimes? Who can hold states accountable for their criminal actions? What are adequate procedures for this purpose? Can we take states to prison? These questions represent part of the discussion within international law indicating that the debate on the positioning of states as criminal or non-criminal actors is built upon a legal decision that is constructed through arguments of how and who can be hold accountable when dealing with state crime. In this sense, the notion of state crime is either rejected because of the difficulty for ascertaining adequate legal consequences, or it is accepted involving different forms of responsibility (punitive reparations, aggravated responsibility, measures of punishment, etcetera).

International law's attempts to use the concept bring to light the fact that despite the failure of the term at the UN, this notion can still trigger different legal debates as well as may be useful for characterizing particular violations. With this respect, the notion of state crime is not to be thought of as a new offense but as a form of criminality. As such, it can involve different infractions entailing various legal consequences. However, beyond the discussion around the attributable legal consequences, the notion of state crime has a descriptive potential, which is important from a criminological perspective: either as a blanket term that embeds a dramatic connotation or as a precise typology of violation with a sociological potential for the observation of criminality in society, the notion of state crime indicates a form of (ab)use of public authority implemented by concrete agents compromising the human rights of people.

Considering this panorama coming from the international law we would like to deepen our reflections from an interdisciplinary perspective. For this reason, in the following parts of this work we will draw a study using different socio-legal and criminological considerations with the objective of observing, describing, analyzing and conceptualizing state criminality as well as considering the forms of constraint and redress of those actions.

4.2. A sociological delimitation of State crime

It is difficult to trace the pioneer use of the term ‘state crime’ in social sciences⁷¹. Within criminology the term was introduced in the late sixties (Barak 1990). According to Cohen (1993) “[t]he first significant confrontation with the subject came in the early phase of radical criminology in the late sixties. That favorite debate of the times - ‘who are the real criminals?’ - naturally turned attention from street crime to white collar/corporate crime and then to the wider notion of ‘crimes of the powerful’⁷². The particular context of the Vietnam War, pushed our slogans [...] explicitly in the direction of ‘crimes of the state’” (Cohen 1993: 98).

⁷¹ “Only recently have criminologist studied state crime. Yet, state crime has been approached in a number of ways by a number of disciplines (i.e., criminology, history, political science, sociology). For example, at the end of the nineteenth century, a French judge, Louis Proall (1898), in his book *Political Crime*, focused on the crimes of statesmen and politicians. Becker and Murray (1971) analyzed how state governments break the law, as did Lieberman in 1972. Sociologists, such as Giddens (1987a) and Tilly (1985), explored the use of organized violence used by states. Keelman and Hamilton (1989) analyzed crimes committed by individuals acting in obedience to government authorities” (Rothe 2009: 1)

⁷² “Up until the early nineteen nineties criminological research on the crimes of the powerful tended to be separated into two distinct sub-disciplinary genres: corporate crime and state crime (Kramer 1992: 214). For Ronald Kramer and Ray Michalowski this was a matter of concern. They believed that by dividing the research on the crimes of the powerful into these two separate criminological strands, scholars were obscuring the fact that states and corporations are functionally interdependent, consequently it is rare for the deviant actions of one to occur without some assistance (whether by commission or omission) from the other (Kramer et al 2002: 270; see also Aulette and Michalowski 1993: 173; Green and Ward 2004: 28; Whyte 2003: 579-80). [...] In order to remedy this problem, Kramer and Michalowski authored a series of papers in the early nineteen nineties which initiated a new criminological research agenda whose focus would be those illegal or socially injurious actions that resulted from one or more institutions of political

Apart from a North-American perspective, one of the first explicit references to this term is to be found in Hanna Arendt's work. Arendt (1973) employed the term 'state crime' when referring to criminal actions perpetrated for the extraordinary 'survival' of the State - i.e. wars; or, as conducts part of the regular *modus operandi* of certain political regimes - e.g. ordinary (wrong)doing of totalitarian governments. The first case, Arendt attributed to exceptional actions perpetrated for assuring the survival of the State; while, in the second case, she framed a political program of action in accordance with which criminal conduct simply follows the typical course of action of certain regimes. In this last case, Arendt (1973) referred to totalitarian regimes which in her view implied the collapse of the traditional nation-state based on the rule of law, into States ruled by racism, anti-Semitism and imperialism.

Arendt's work is a landmark for the concept because of its precedence but also because it developed a correlation between state crime and the political configuration of the governments, particularly exposing Totalitarianism and Nazism as regimes organized around the practice of state criminal conduct. The extent of such correlation was however contested in criminological studies. Indeed, for some criminology commentators, state criminality "is not indigenous or symptomatic of any particular socio-economic formation [...] [C]rimes by and of the state can be found globally. In other words, historically it has been the case that both democratic and undemocratic regimes have engaged in state criminality" (Barak 1990: 16). According to this, the political organization of the State is relevant for properly contextualizing State's actions, but it is not *stricto sensu* an element of the concept. After all, history has proved that different violations of rights

governance [pursuing] a goal in direct cooperation with one or more institutions of economic production and distribution (Kramer and Michalowski 1991: 4; see also Kramer 1990: 1; Kramer et al 2002: 269). This criminological sub-genre was labeled state-corporate crime" (State-crime initiative n.d.).

have been perpetrated on behalf or in the name of states in the most diverse contexts and supported by the most diverse forms of governments (Inter-American Court 2006; Rothe 2009), including democratic systems.

Within criminology, state crime was conceptually pioneered by William Chambliss (1989) – his early studies in the subject focused on the issues of piracy, smuggling, plundering and other wrongdoing in which the State was a relevant actor. The use of this notion emerged to the discipline as a manifestation of the discussions around the role of the State with regard to the phenomenon of criminality as well as an expression of the concern for the crimes of the powerful and their social restraint. Thus, on the one hand, through this concept criminology challenged the *double standard* in accordance to which crimes against the government and the society have been understood as *real crimes* while the misconduct by the State has been understood as eventual mistakes that cannot be understood as criminal (Ross 2003: 84). On the other hand, when criminology referred to state crime it aimed at urging for a reinstatement of its field of observation moving beyond the orthodox emphasis on street crime and including other particularly harmful conduct.

Additionally, the category of state crime was part of the response coming from criminology against the lack of legal restraint for the harm committed by powerful actors as well as by large economical corporations and States. In this context, the study of state crime was not only part of the concern for the lack of research and social awareness around the crimes of the powerful - compared to the widespread study and over-excited social perception of the crimes of the powerless. This subject of study was also part of a concern with regard to the accountability of powerful actors and the characteristic social bias of the operation of the criminal justice.

“Historically, the crimes of the powerful have managed to avoid or escape criminalization and stigmatization. Time and again, these powerful criminal activities have been

conventionalized or neutralized by way of alliances, negotiations, and justifications that undermine the moralizations of these offenses (Carson 1979; Prins 2014; Ruggiero 2013). Concurrently, the legal reactions to as well as the ideological rationalizations of elite offenses by capitalist state actors and other defenders of the status quo contribute to this demoralization of the crimes of the powerful and to the denial of victimhood and liability for those harmed or injured. [...] These social relations of criminal non-enforcement are reflective of a legal order where the capitalist state not only possesses the monopoly over the legitimate use of force and violence, but also the sovereignty over the currency and the law” (Barak 2015: 2).

In this sense, the discipline referred to a problem of criminalization of these conducts when criminal laws were available for imposing sanctions on the offenses of state criminal agents and other powerful actors, but the criminal justice was simply indifferent, unavailable or blocked from acting. This assessment allowed us to consider this form of criminality as possibly advantaged for conducting an in-depth study of impunity. We will come back to this later on.

For the moment, we will draw a characterization of state criminality having in mind our study around the international law and developing from a criminological and socio-legal perspective a characterization of this form of criminality. Ultimately, this part will address the question: *under what circumstances can we identify a certain conduct as a ‘crime of the State’?*

4.2.1 The ‘Crime’

A reflection on the concept of state crime could not be done without a discussion on the concept of *crime*. In this subject, state crime studies have divided into two main standpoints: while some authors considered that ‘state crime’ referred to those actions considered by the legislation as ‘criminal’ (*criminal law approach*), others considered that the discipline should also be freed from the margins of the State legal framework and should broaden the general concept of crime (and particularly the notion of state crime), to the infliction of harm and to the infringement of other social rules or norms coming from the human rights (*non-criminal law approach*). In line with this,

the present section will problematize and clarify this debate with the purpose of elucidating what we mean by *crime* when pronouncing the term *state crime*.

When referring to crime, the observer should be vigilant in preventing substantialization or anachronism. With this purpose, the researcher should avoid assessing a certain ‘essence’ and awarding ‘natural features’ to the phenomenon. Indeed, while the notion of crime is often deemed obvious in law schools, “[c]riminologists warn us that ‘crime’ is a misleading general term covering a wide range of very different kinds of conduct (see Walker 1987), so we should be careful of unexplicated assumptions about what crime is” (Duff and Garland 1994: 4).

What can we observe as *criminal*? Can a crime be observed as an event of social life or is it an institutional construction? Does it involve a legal statement or the mere presence of a certain form of conduct or result? These questions are framed on a larger criminological debate on the characterization of crime. In accordance with this debate, some commentators understand that crimes as events characterized by their ‘essence’, a series of substantial features detached from the determinations of criminal law that can be observed as a matter of fact (*bare facts, faits bruts, hechos brutos*). Other commentators sustain that crime should be defined and observed according to extralegal criteria as harm or the violation of non-criminal law regulations such as human rights provisions. Finally, others identify crime as a legal construction that can only be observable with reference to the criminal law legislation.

Table. No. 7. Approaches to crime	
<i>Substantial approach</i>	Crime is an essential concept, recognizable by a series of substantial features.
<i>Legal approach</i>	Crime is a legal concept and its framework of observation is the criminal law.
<i>Extra-legal approach</i>	Crime is a concept that refers to a certain type of harm recognizable by its seriousness (harms-based definition) or by the violation of particular normative parameters such as human rights (rights-based definition).

These three positions involve different problems. In line with the substantial approach, criminal conducts present a series of ‘natural properties’ holding an ‘intrinsic nature’. If crime is to be understood as a *bare fact*, the observer accepts that it has a substantial, material and objective existence which is independent from any criminal law provision. Those observers who understand crimes as bare facts are incapable of delimiting their distinctions without conferring to the phenomenon an ontological and, therefore, universal character. Indeed, *bare fact views* are based on the conviction that crimes can be observed as a natural category with considerable stability, without any reference to the criminal law system⁷³. These criminologists understood that the discipline should throw away the shackles forged by criminal law - paraphrasing Schwendinger & Schwendinger (2014), concluding that criminality is a phenomenon that should have an epistemological primacy over criminal law (Pires 2006: 204)⁷⁴.

This position involves the problem of presenting a substantialized conceptualization that does not offer stable parameters for understanding the content and extent of those social phenomena that may be framed as criminal according to their ‘intrinsic nature’. Indeed, if crime is defined by ‘essential features’, the observer could only observe a criminal conduct when the events meet the subjective criteria of selection of the observer. With this respect, authors as Sutherland understand that there is a sort of relativity around the concept of crime impeding a universal or substantial definition of the phenomenon: “Crime is relative from a legal and also a social point of view. This should not only be acknowledged but emphasized” (Sutherland 1934: 18).

⁷³ Converselt, the reference to the criminal law is useful when referring to a conduct as non-criminal. How can a society decriminalize a particular behavior without a legal reference?

⁷⁴ Thorsten Sellin, who is one of the first authors supporting this position, declared in 1937 that criminology "should not permit nonscientists (e.g., lawyers or legislators) to fix the terms and boundaries of the scientific study of crime" (Schwendinger & Schwendinger 2014: 88), since they do not address the ‘natural properties’ or the ‘intrinsic nature’ of criminal behavior.

The assertions that “there is no ‘ontological reality’ of crime” (Hulsman 1986: 66) and that “crimes do not exist as a given entity” (Christie 2004: 11), are especially explicit for visualizing that in order to avoid the substantialization of the concept of crime we should adopt an objective parameter allowing a referential observation of the phenomenon. Overcoming the problem of naturalizing the distinction between different kinds of wrongdoing, especially between criminal infractions and civil torts, is also relevant for their supposedly *natural* respective consequences (Pires 1998⁷⁵). In contrast to the substantial approach, *legal* and *extra-legal* definitions of crime accept that the observer needs either a criminal law parameter or a certain type of harm or other normative framework as the human rights to be able to observe a criminal conduct.

Extra-legal definitions present a problem for differentiating and stabilizing the observation of criminality. This position constructs the notion of crime employing references to harm or other norms of conduct (e.g. human rights). These references are ambiguous making it difficult to distinguish and select the events. For instance, if we use the notion of *harm* for defining what constitutes criminal would be problematic: the first problem would be to clearly assess what constitutes a harmful conduct -particularly in the context of a society of risk; also, it would be unclear to what point the harmful quality of a conduct automatically involves a criminal law issue; and,

⁷⁵ “Curieusement, même si l'échec des philosophes et des juristes à démontrer le statut onto-logique du crime a été annoncé avant le début du rêve des criminologues, et même si les critiques les plus percutantes sont venues de l'intérieur même du savoir juridique, il semble bien qu'on soit encore en train de veiller le corps du défunt et que l'on hésite à l'enterrer ; bref, la mort fut dûment communiquée, mais l'enterrement se fait attendre. Et aujourd'hui, peu sont ceux ou celles qui croient encore au criminel-né ou au statut ontologique du « crime », mais on a continué à penser et à agir comme s'il y avait une différence naturelle entre les deux ou trois sortes d'illégalismes” (Pires 1998: 14).

additionally, we would find several examples of harmful conducts that should not be addressed as crime – e.g. deaths in the workplace⁷⁶.

The reasons provided by this approach for avoiding a criminal law reference refer to the political bias of criminal law. Some state crime literature argues that for the distinction of the phenomenon a legal framework might be a biased source because of the political constraints involved in the production and implementation of the legislation (Friedrichs 2010: 72). In line with this, the influence on the determination of the criminal legal framework could involve an opportunity for the immunization of those political forces determining the law, therefore ‘limiting’ a status of criminality to those conducts alien to their range of activities (Schwendinger & Schwendinger 2014)⁷⁷ - “[i]n the extreme, consider if a dictatorship arose in a society and we as criminologists simply accepted the legalistic definition of crime from which to construct our theories of criminal behavior?” (Milovanovic 2006: 82).

In our view, it is important to take into account that the production of criminal legislation is indeed embedded in power relations. If the *crime* is regarded as something that the state creates, thinking about it should take into account who has the power to define it (Whyte 2009). Nonetheless, this consideration is a matter of variable correlations of power related to the

⁷⁶ “The notion of “harm” is often used as a basis for defining what constitutes a crime. On the surface, it seems straightforward to suggest that sufficiently “harmful” behavior should be defined as criminal. However, there are several examples that suggest this is not an easily defined concept. For example, most people agree that causing death is a serious harm. In fact murder carries the harshest penalties in criminal law. Consider, however, that every year the number of deaths in the workplace far outnumber homicides in Canada. Even in cases where negligence is present, we rarely treat deaths in the workplace as a crime. In this respect, the concept of harm might tell us that behavior is serious, but it tells us little in terms of how we should respond” (Law Commission of Canada 2003: 3).

⁷⁷ For instance, in 1970 Schwendinger & Schwendinger (2014) asserted that a legalistic view that defines crime according to the legal codes and the institutions of criminal justice implies that important wrongs, such as the imperialist war or racism, are unjustifiable as criminological and inadequate if referred to as crimes.

specificities of social relations, more than a conceptual factor useful for delimiting the concept of crime. In other words, if we remove the criminal law reference, the problem of the correlation of power does not disappear and, perhaps, becomes only dispersed for the observation. More importantly, if we remove a program of reference for the observation, it becomes simply impossible to differentiate what is (not) a criminal event.

The text of Michalowski, Kramer and Chambliss (2010: 5) is particularly useful for illustrating the problem of removing a clear reference for the observation of events as crimes. These authors assert that the study of state criminality should undertake inquiries on “crimes and social injuries of state power regardless of their status under law”. Following this view, Ross includes within the concept of state crime “those practices that, although they fall short of being officially declared illegal, are perceived by the majority of the population as illegal or socially harmful” (Ross 2000a:74; 2003: 87).

In order to determine which conducts could be regarded as crimes, Green and Ward (2000) formulate a social audience test. In line with this test, state crime are those offenses that if noticed by a “significant social audience” (Ward 2013: 65) there would be at least a high likelihood of censure or sanction (Green and Ward 2000: 110). Rothe (2009: 6) qualified this definition as vague as far as it is unclear “what constitutes a social audience and which audiences may legitimately label behavior a crime”. In our view, the problem of this understanding is more serious: how would any audience (legitimate or not) be able to stabilize any observation of crimes without any previous established and generalized program of reference?

Indeed, the audience deprived of a program of reference would not be able to stabilize any normative expectations; in other words, an ‘audience’ simply could not distinguish the

phenomenon without any point of reference. Moreover, if for the sake of discussion we attempt at undertaking a social audience test (therefore necessarily adopting a certain program of reference), we would find the results confined to the inscrutable decision of the public opinion. If the concept is clarified according to majority support, this could imply that grave crimes, if popular or perceived as legitimate, would not amount to (state) crime. Thus, if a certain wrongdoing is disputed by small or marginal social audiences, it could not be understood as criminal merely constituting a non-significant social audience.

The idea that social audiences can detect crime without a reference to a criminal law regulation is related to a sort of *moral substratum* traditionally understood as implicit to the criminal law. According to this, “criminal law is always and inevitably expressive, or perhaps it would be better to say constitutive, of a prevailing social morality adopted and enforced by the state” (MacCormick 2007: 211). Following this idea, a part of the literature distinguishes between *mala in se* (wrongdoing in nature) and *mala prohibita* (regulatory offences). In line with this distinction, *mala in se* are wrongdoing for which the observer does not need a reference to a criminal offense in order to be able to recognize a situation as criminal. These crimes are wrongdoing because they collide with basic moral assumptions. On the contrary, the observer detects other wrongdoing as criminal only when the law prohibits them; nonetheless, “it is in some measure a public wrong, meriting public attention and concern—and, given appropriate proof, condemnation and punishment” (MacCormick 2007: 214).

However relevant the interaction between moral and legal ideas, basing the observation of crime on the distinction *mala in se/mala prohibita* entails different problems of observation and, at the end, it says little about the relation between law and morality. The existence of *mala in se* relies

on a sort of synchrony between moral ideas and legal prohibitions. Although, while in a particular society there can be general (shared) moral ideas in favor or against a particular conduct, the criminal law system can validly contradict it - e.g. in Colombia homosexuality is not widely accepted, however criminal law rather 'protects' it from discriminatory practices. In other words, even when a particular society considers something to be morally binding it does not mean that as such it is legally prohibited by the criminal law and vice versa. *How can we use this criterion and remain critical when the standard for observing crime is the erosion of a tradition, or an official way of life, or to prevent the harmless violation of a taboo?*⁷⁸

Non-criminal law approaches to state crime have developed different references to observe the presence of state crime. Some have chosen a harms-based definition that emerges from the idea that crimes should be defined "in terms of needs-based social harms inflicted by the powerful on less powerful people, independent of formal legal institutions" (Friedrichs and Schwartz 2007: 4). In line with this trend, Matthews and Kauzlarich (2007:51) point out that the notion of state crime cover all state-prompted harms, even if they are not technically law breaking.

While this view avoids legal arguments, it attempts to establish a sort of control for the observation of crime: the harm. The *harm principle* attempts to avoid criminal law prohibitions of those conducts causing no harm, as can be misconduct considered as such on the grounds of mere morality. However, this form of control remains elusive and ambiguous. Indeed, the categories of injury, wrongdoing or harm are vague standards for determining the occurrence of a crime. There can be cases where harm is explicit but where the presence of a criminal situation is not, e.g. when someone cheats on a bet by taking advantage of that situation or when someone bullies another

⁷⁸ Question inspired on Feinberg (1990:7)

person. There can also be cases where the existence or not of harm is doubtful and contested but there can be a criminal action, e.g. cases of abortion that are criminal in certain jurisdictions in spite of a case-by-case determination on the existence of harm. Moreover, there can be non-grievance evils or harmless actions that can be considered as criminal and, as such, be enforced by the criminal law, e.g. the Canadian criminal code regards as a criminal offense polygamy⁷⁹ or immoral theatrical performance⁸⁰.

Within the group of *non-criminal law approaches* to state crime different commentators have developed a rights-based definition with the reference of universally defined human rights (Doig 2011: 47). According to Schwendinger & Schwendinger (2014) redefining crime implies that criminologists redefine themselves not as the defenders of order (as when they adopt a concept of crime according to the law) but rather as the guardians of human rights. A rights-based definition asserts that state crime is an “organizational deviance involving the violation of human rights” (Green and Ward 2004: 2; also in Ward 2013). In line with this definition, human rights are not only legal norms the breach of which constitutes a violation; rather, they are principles that can be violated independently of particular legal rules (Ward 2013).

This reference to the violation of human rights results in an open-ended definition of crime since every claim that an observer presents as a human rights violation becomes criminal - when

⁷⁹ “(1) Every one who (a) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years”.

⁸⁰ “(1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation. (2) Every one commits an offence who takes part or appears as an actor, a performer or an assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre”.

human rights and criminal legislation are two faces of the same coin, either you fall in one or in the other. This poses serious conceptual and practical problems when determining the scope of the concept because the observer is not able to draw a clear indication for what is considered as (state) crime since all human right's violations become a crime. Nevertheless, not every human rights violation amounts to a crime: there is a multiplicity of human rights that can be violated by acts that are not criminal and there are a number of rights that do not violate human rights. We will come back to this later, however, examples of this can be when a child does not have access to primary education or when workdays exceeds the maximum legal ordinary working hours, there is a human rights violation but not necessarily a crime.

Considering the different problems that the lack of a clear reference involves to state crime studies when referring to the notion of crime, we agree with Stanley Cohen (1993: 98) who invites to use a “more restricted and literal use of the concept ‘state crime’” as both “more defensible and useful”. What concept could be useful for drawing up clearer boundaries for the concept of (state) crime? The *criminal-law approach* addresses this question affirming that the definition of state crime should be constructed around legal definitions of criminal conducts in order to avoid the indistinctiveness of the concept. In line with this, the literature working with a legal framework is focused on the legal definitions as the point of reference to indicate the presence of crime (Matthews and Kauzlarich 2007: 47).

The pioneering criminology conceptualization developed by William Chambliss (1989: 184) defines state crime as those “acts defined by law as criminal and committed by state officials in pursuit of their jobs as representatives of the state”. According to Kramer, Michalowski and Rothe this definition was problematic because it limited its scope to a “conventional definition of

law” (2005, p. 54), exclusively regarding legal prohibitions in a nation-state basis. In a sense, this critique can open the floor for the argument that the notion of state crime is a logical self-contradiction “since the sovereign state is the only valid legal presupposition to the concept of crime. In this sense the concept of crime simply cannot logically transcend or indeed temporally precede the state” (Vincent 2012: 68).

In 1995, Chambliss (1995: 9) integrated into his concept of state crime those behaviors violating “international agreements and principles established in the courts and treaties of international bodies”. With this incorporation, Chambliss original position restricting the concept to those violations recognized as crimes by international or domestic criminal legislation was unchanged in the basic assumption of the need of a legal reference for the observation of the phenomenon.

The position of integrating domestic and international law as parameters of the distinction of a crime entailed the observation of a legal development: international law became a relevant source of criminal law⁸¹. In order to identify which acts qualify as international crimes, Heller (2016) establishes that “the vast majority” of International Criminal Law scholars differentiate between “core” international crimes and other international criminal conducts. The former are

⁸¹ On the distinction between national and international law the ICTY established: “It is a settled principle of international law that the effect of domestic laws on the international plane is determined by international law. As noted by the Permanent Court of International Justice in the Case of Certain German Interests in Polish Upper Silesia, “[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures”. In relation to the admissibility of a claim within the context of the exercise of diplomatic protection based on the nationality granted by a State, the ICJ held in *Nottebohm*: But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court. The ICJ went on to state that “[i]nternational practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect” (ICTY 2001: 22).

those conducts universally criminal under international law and the latter somehow rely upon domestic frameworks⁸². Thus, with respect to core international crimes, the domestic rejection of a criminal offense in no way precludes the characterization of a conduct as internationally criminal as, conversely, what is unlawful in the municipal law does not necessarily mean that the act violates international law (ILC 2001: 36, 37)⁸³.

Chambliss's adoption of an international law parameter for delimiting criminal conduct was, to some degree, a response to the position against the use of a conventional definition of crime restricted to domestic legal prohibitions for state crime. According to this criticism, the use of a legal parameters makes "the activity of criminologists subservient to the State" (Schwendinger & Schwendinger 2014: 109), and makes it "dependent on arcane legal arguments about the meaning of what are often highly ambiguous and unsatisfactory laws" (Green and Ward 2004: 7). In this sense, an international law definition can be understood as a form of independence from merely domestic parameters to enact or enforce a criminal law prohibition.

Nonetheless, this answer may seem unsatisfactory to those who consider that international law is a framework that remains state-dependent. In this vein, Cox (1993: 62 -63) asserts that "[i]nternational institutions embody rules which facilitate the expansion of the dominant economic and social forces but which at the same time permit adjustments to be made by subordinated

⁸² "[A]lthough some acts that qualify as domestic crimes are universally criminal – murder, for example—their universality derives not from international law, but from the fact that every state in the world has independently decided to criminalize them. The universality aspect of the requirement, in turn, distinguishes an international crime from a transnational crime: although a transnational crime such as drug trafficking involves an act that international law deems criminal through a suppression convention, international law does not deem the prohibited act universally criminal, because a suppression convention only binds states that choose to ratify it. If a state decides not ratify a suppression convention, it retains the sovereign right to refuse to criminalize the commission of the prohibited act on its territory." (Heller 2016: 1-2)

⁸³ The general rule to international law for this provision is that a State cannot escape its responsibility under international law by appealing to the provisions of its municipal law.

interests with a minimum pain. [...] International institutions and rules are generally initiated by the state which establishes the hegemony. At the very least they must have the state's support". In this vein, commentators as Schwendinger & Schwendinger (2014) propose that redefining crime should entail for criminologists the task of making human beings and not institutions the parameter for the distinction of crimes. At the end, "legal systems are highly normative, slow to enact legislation, and often reflect elite, upper-class, or nonpluralistic interests" (Ross 2000: 6).

With regard to this problem, observing crimes as legal constructions involves different problems of power, legal creation, interpretation and application. However, in order to distinguish the phenomenon a reference of observation is necessary. For some commentators, this understanding may entail presenting criminality as a mere problem of legal definition, leading to a sort of moral indifference – if there is a problem of criminality we just adjust the definitions of what is criminal to make the problem vanish away without any groundbreaking aptitude of visualization and redress of the problem. Nonetheless, if crime is to be understood as an institutional construction this is meant to enable the distinction between crime and non-crime, but it does not turn invisible or even refer to the social problems that the phenomenon entails.

While from a legal point of view the State has the authority to define what crime is and to enforce the law criminalizing those conducts, from a sociological perspective the problem of distinguishing between crime/non-crime is different from the matter of whether crime is punished. The central idea in a sociological definition of crime is to be able to distinguish with a stable criteria what can be observed as crime and not to observe the presence or absence of punishment. In this sense, the legal reference (and the crime) does not vanish away the problem of the political strategies employed for neutralizing the operation of the criminal law system. For instance, if the

criminal code was to be destroyed in the middle of a sanguinary war by the state agents in order to perpetrate murders on a certain population ‘without accountability’, would we still be in a society with no crime⁸⁴? Would the binary code crime/non-crime, created by the destroyed code, be erased completely?

The legislative program does not vanish before a political strategy of obfuscation. The penalization of crimes is a different problem than the definition of crime. Let us refer to two main problems of the legalistic approach to state crime. The first is the alleged dependence between the conviction by a court and the existence of the criminal action and the second is the understanding of the legal framework as the implementation of a simple syllogism.

With respect to the problem of the identification between conviction and crime, this issue is extremely relevant to our reflections on the matter of impunity. From a juristic point of view it is traditionally conceived that crimes and criminals are only those qualified as such by the courts (Tappan 1947: 100; 2001: 31). Nonetheless, crimes and criminalization, as proposed in the present research, will be addressed as independent but interconnected phenomena. In this sense, criminality has an epistemological primacy over criminalization; in other words, the possibility for a sociological observation of the phenomenon of crime is not determined by the effectiveness (or even the presence) of its criminalization, *i.e.* its official qualification as “crime” by the criminal justice system. In fact, we can observe criminality from a sociological point of view *independently* from a statement of criminal law institutions.

⁸⁴ According to Rothe and Mullins (2010: 91) there is a “growing body of state crime research that shows how states actively use their sovereignty to shield their criminal actions from external bodies that could potentially intervene”.

When Sutherland defined ‘white-collar crime’ he asserted that it is a crime because the conduct is in violation of the criminal law. This selection expressly rejected the action of courts as the reference for the qualification of a conduct as criminal. “White-collar crime is [...] called crime [...] because it is in violation of the criminal law. The crucial question in this analysis is the criterion of violation of the criminal law. Conviction in the criminal court, which is sometimes suggested as the criterion [to determine if there is a crime], is not adequate because a large proportion of those who commit crimes are not convicted in criminal courts” (Sutherland 1940: 5). In this regard, Sutherland assessed that courts faced a problem of class bias as well as of the influence of certain actors holding the power to impact the implementation and administration of the law (Sutherland 1940: 7)⁸⁵. In this sense, he advanced on the criminological understanding that the implementation of the law was incidental to the problem of determining what is criminal – e.g. I can observe that the event of someone killing another person constitutes a “homicide” before any formal decision of a criminal court in a judicial process that a “homicide” has taken place.

Criminalization and criminality are not always convergent: some people are criminalized without having committed any crime and there are crimes that are not criminalized —indeed, most of crimes are not (Hulsman 1986: 65, 70; Baratta 1991: 61, 1989: 340-341; Duff and Garland 1994.: 9). While independence allows us to overcome possible inaccuracies of observation when

⁸⁵ This observation is still valid in many parts of the world. A paradigmatic example is the United States criminal justice system which is the largest in the world – in 2011 approximately 7 million individuals were under some form of correctional control in the United States, including 2.2 million incarcerated (Sentencing Project 2013: 1). According to the 2013 Report of The Sentencing Project to the UN Human Rights Committee, “racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences. African-American males are six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males. If current trends continue, one of every three black American males born today can expect to go to prison in his lifetime, as can one of every six Latino males—compared to one of every seventeen white males” (Sentencing Project 2013: 1).

limiting our understanding of crimes to criminalization; realizing their interconnectedness allows us to elucidate their interaction and to study the criminalization as a field of observation of the ideas, discourses, and practices of the criminal law system before the phenomenon of crime.

With respect to the second problem, the legalistic framework could be used as a form of limited syllogism. In this regard, considering once more the notion of white collar crime, it needs to be argued that state crime is not intended to be a criminal law category in order to be observed as a crime. As in the case of white collar crime, state crime is a category of observation that comprises different legal offenses. In this respect, using a legalistic framework, a Colombian judicial case results paradigmatic to our study:

In Colombia, the Supreme Court of Justice was questioned regarding the possibility to extend the time of the statute of limitations in a case of illegal interceptions of communications performed by the Security Department of the State against members of the political opposition, qualified as a state crime by the victims. In this case, the civil party argued that, as the State committed such criminal conduct through its main intelligence agency, preventing them from any legal intervention, the transgressors should not benefit from the passing of time that would eventually block the prosecutions (statute of limitations).

This argument was rejected by the Supreme Court (2013) arguing that “our legislation does not establish the category of ‘state crime’. It does not take into account the ‘criminal intention’ for setting a prescriptive term; nor does it consider ‘the impact’ that criminal acts in general can have on the victims, society at large and the institutionalism of the State as a criterion to vary the statute

of limitations. This term is objective and does not leave any doubt with regard to its application; for this reason, the claim by the representative of the civil parties is devoid of any legal basis”⁸⁶.

This case shows the mobilization of a legalistic argument for rejecting the reception of the notion of state crime by the legal system. Moreover, this case reveals the problem of a legalistic perspective that does not regard the factuality for understanding the sociological phenomenon presented by the criminal problematic situations. This position may entail major problems of observation, becoming a simple logical operation of a syllogism and not, as we propose, a relevant criminological phenomenon subject to sociological observation.

Table No. 7. Problems of the Approaches to Crime		
<i>Substantial approach</i>	<i>Legal approach</i>	<i>Extra-legal approach</i>
Main problem: substantialization of the criminal conduct that is defined according to subjective essential features.	Main problem: the criminal conduct becomes a mere legalistic reference, a matter of syllogism confused with the implementation of the code crime/non-crime by the criminal justice.	Main problem: the criminal conduct is undifferentiated or ambiguous, depending on the type of harm or other violations of particular normative parameters oriented on rights.

⁸⁶ To date (2017) the Colombian judiciary has rejected the notion of state crime based on a legalistic argument. Still, different social movements resort to this notion for explaining violations perpetrated with the support of the State. An example of this is the National Movement of Victims of State Crime (MOVICE), created in 2005 in Colombia by over 300 organizations representing victims. The precedent of MOVICE is the Project *Colombia Never Again* created in 1995 by different social organizations that consolidated local work teams for the documentation of the humanitarian crisis of the country. This project, unlike the other Never Again groups of Latin America, would not be located under a context of transition to a constitutional regime, but it was developed within the context of a formal democracy with the presence of a plethora of human rights violations. The project faced huge difficulties, such as the elimination and exile of people and organizations that contributed to the project and also to the seizures of the archive centers. In 2004, in the midst of the negotiations between the AUC (paramilitary groups) and the Colombian Government, the first National Summit of Victims was held in Bogota. In this meeting, more than 1000 delegates, 230 organizations and 400 local Delegates from 28 Departments participated. They concluded that it was necessary to organize the MOVICE. In June 25, 2005 MOVICE was founded at the II National Summit. Movice is a collective movement working for the enforceability, organization and mobilization of victims of state crimes and organizations of surviving victims, families of victims, social, political and legal organizations that have been victimized struggling against impunity and in favor of historical truth, justice, and integral reparation. MOVICE comprises 300 organizations representing victims of various crimes committed within the context of the conflict, including victims of forced displacement, massacres, and political genocide. In addition to a central coordinating body, MOVICE has over 22 regional groups.

Considering the above-mentioned problems for a conceptualization of crime, this research should point toward a different perspective beyond substantial, merely legalistic or extra-legal observations of different moral frameworks. For the definition that we will propose, a first step for the observation of a crime can be drawn using the notions of constitutive norms and institutional facts proposed by John Searle and adapted by Pires (2001) with this purpose.

When studying the notion of (state) crime and observing its occurrence in social life, the elements that enable its observation should address both, factuality and legal regulation. With this purpose in mind, the *paradoxical theory of crime* (Pires 2006) can be a satisfactory approach to the criminal element, unfolding a *double problem* in the understanding of criminality.

The *double problem* is based on the recognition that crime has no natural qualities. Accepting that crime has no inherent constitutive features implies that in order to identify what is “criminal” the observer should question *how the phenomenon of crime can be observed*, rather than *what is crime*. In order to answer this question, the observer needs to detect a *conduct* and an *institutional structure of expectation* instituted through constitutive norms. This approach acknowledges that (criminal) conduct is recognizable as a ‘brute fact’ - for instance, one can always observe an act of killing without a criminal law framework. Subsequently, when an institutional framework is available drawing a distinction crime/non-crime, this normative expectation enables the observer to consider those conducts as criminal in line with the communications of the criminal law system. In other words, crime is not only a conduct (external to the criminal law system), neither is it a mere normative expectation; it is rather a double faceted phenomenon.

According to this perspective, the conceptualization of crime depends on a series of constitutive norms coming from the criminal legislation, without which the observation of criminal

conducts becomes an ambiguous task. In other words, if crimes are understood as a social construction or as “institutional facts” (Searle 1969; 1995; 2005), an event can only be characterized as crime according to a social reference recognizing the acts as such. Francesco Carrara (1859: 41 in Pires 1995:17) asserted that crimes were not to be conceived as ‘actions’ but as ‘infractions’, that is, as a form of correlation between observed actions and criminal law provisions. In line with this view, human conduct can only be differentiated and observed as ‘criminal’ if we take into account an institutional fact created by the criminal legislation (Jeffery, 1959:464; Pires 2011:199). In this context, criminal conduct is historically and empirically constituted and observed in line with the existence of constitutive norms that can be materialized in the form of «institutional facts»⁸⁷. In other words, the criminal legislation is the constitutive norm⁸⁸

⁸⁷ Searle (1969; 1995) distinguishing between brute facts and institutional facts, assessing that the later can exist only within human institutions (such as money or sentences), while brute facts exist quite independently of any institution capable of formulating constitutive rules of the form X counts as Y in C (Searle 2005: 11).

⁸⁸ “Las reglas constitutivas o instituyentes son las que definen la institución y las condiciones dentro de las cuales podemos afirmar la existencia jurídica de la institución y su validez. Estas reglas nos permiten reconocer o identificar la institución tipo, institution-type, al fijar las condiciones definitorias de las mismas [(tipo ideal, categoría)], y nos permiten verificar la existencia de cada una de las concretas y específicas instituciones-token [(caso concreto, muestra, ejemplar)] [...]Podría decirse que el cambio social puede llevar al desarrollo de instituciones-muestras (tokens) concretas que no coinciden exactamente con los tipos o categorías de instituciones a los que en teoría corresponden sino que añaden matices o excepciones, como nuevas reglas constitutivas, o nuevas condiciones o reglas consecutivas distintas, o reglas consecutivas específicas o incluso nuevas reglas terminativas. Estos ejemplos concretos de instituciones concretas pueden entonces llevar a modificar las reglas de las instituciones-tipo. Así se produce también el cambio jurídico, no sólo a través de la intervención de agencias legislativas con la capacidad formal de modificar las reglas de las instituciones sino a través de la práctica jurídica y de agencias judiciales que interpretan de forma innovadora las reglas de las instituciones según su propia finalidad social o en función de las adversas consecuencias inesperadas a las que puedan llevar” (Bengoetxea 2015, pp. 79-81).

allowing the observer to draw a line of distinction between criminal and non-criminal conduct (the institutional fact) – constitutive norms are the condition for the existence of institutional facts⁸⁹.

This paradigm overcomes the dilemma built around realism and constructivism which has excluded one of both, behavior or normative expectations, for observing ‘crime’. The double paradigm approach allows us to observe a factual situation as problematic and defining it in reference to the criminal law regulatory framework. This form of observation of the phenomenon of crime allows the observer to notice that certain ‘events’ are problematic further from the legal framework, as it gives legal grounds to the observation of crime according to the criminal law institutional qualification of the situation.

For the moment, and in accordance to our general aim of characterizing and conceptualizing impunity, we can assess that the observation of the criminal conduct needs to be uncoupled from its criminalization through the legal system. In this sense, the action of the criminal justice with regard to a particular criminal wrongdoing does not affect the criminological observation of the criminal conduct. The criminalization is conceptually different but related to the concept of crime from a phenomenological perspective. This conclusion is a relevant reflection for constructing a social-legal definition of impunity. Indeed, in a sense, impunity takes place in reference to a criminal conduct precisely because the conduct can be observed as such, independently from the action of the criminal justice system (but not from its legislative program). In the PJ case this is particularly relevant for the observation of the criminal problematic situation. Let us review this in detail:

⁸⁹ Hart (2012: 27) holds that “the criminal law is something which we either obey or disobey and what its rules require is spoken of as ‘duty’. If we disobey we are said to ‘break’ the law and what we have done is legally ‘wrong’, a breach of duty’, or an ‘offence’”.

a. *Realizing enforced disappearance: the double problem perspective at work*

Realizing the mere factuality of a disappearance poses a relevant problem of observation. Enforced disappearances, paraphrasing Gutman, are denied simultaneously as they happen⁹⁰. In the PJ case, for a long time, the uncertainty about what had happened was an argument used for neutralizing the visualization of the events and, further, their characterization as a criminal conduct⁹¹.

The uncertainty and unrest stemming from not knowing about the fate of a person may confront some victims to the tragedy of preferring (and perhaps wishing) any other offense against their loved ones - perhaps even death over disappearance⁹². This constraint creates a difficulty for the observation of the disappearance. In certain occasions, it is difficult to determine whether a person has simply been unreached or if he or she has actually disappeared.

“When you’re looking for someone you love, and you carry their image with you, you’re looking for his face, for the color of his hair, for the way that it grew... In order to look for my husband, in the midst of complete chaos, I had to begin by reviewing the long lines of corpses... Only a very few were even recognizable as human beings.” (PJ events. Testimony of a women looking for her husband in Carrigan 1993: 262)

When it can be established that a person has disappeared (her whereabouts are unknown), the following question to be made is: was the disappearance voluntary? The causes of the

⁹⁰ “The denial, the blurring of reality and the eradication of traces and vestiges of the stark truth were part and parcel of the act of murder [we would add, of disappearance] itself” (Gutman 1985: 14 in Cohen 2001: 79).

⁹¹ In the PJ case, the appeal court recognized that rather than conducting an investigation on the fate of the disappeared, the response of the institutions denied this situation: “Las mismas fuerzas que entraron en un negacionismo de la ocurrencia de estas desapariciones, en vez de contribuir a la resolución del problema que subyace en la zozobra de las familias que después de 26 años, no pueden hacer el duelo al dolor del familiar ausente de quien se ignora todo” (Superior Court of Bogota 2012: 592-593).

⁹² “It would have been better for me if Jimmy had passed away because: you don’t know what happened after they were captured... it would have been better for me if he had passed away, instead of thinking so many things could have happened to him” (Pilar Navarrete -wife, in Romero 2015: 66).

“Thinking of all the atrocities they did to my sister does not give us peace of mind... They must have done wicked things to a girl like Irma, as young as she was, 26 years old, as pretty as she was... You don’t even want to think of it” (Socorro Franco -sister, in Romero 2015: 68).

disappearance may be diverse in nature. The lack of information characteristic of the disappearance constitutes a significant constraint for distinguishing between non-violent disappearances and violent abductions (Aim for Human Rights 2009). In the PJ case, at the beginning, “no one expected anything serious could happen” (Cesar Rodríguez, brother).

“The awareness of the disappearance came afterward. Rumors and news spread that the employees of the cafeteria might have been abettors, that they probably entered the guns through the basement and hid them in the cafeteria, that they had an amount of food that would have supported the taking for several months. I mean, there was a purpose of communicating the public opinion some sort of justification for the disappearance of the employees of the cafeteria. It was then when we became aware that they were disappeared” (Cesar Rodríguez, brother).

The factual awareness around the abduction of the group of people of the cafeteria arose when their families started to be intimidated for their search. When the families of the disappeared met in the surroundings of the PJ right after the operation to retake the building, they joined together in the search of their family members. Even though the fire had consumed the building, they were hopeful. Some of them had received phone calls indicating that the military had detained their loved ones.

“It was inconceivable for us that the State and the military forces would disappear people. Despite Mr. Enrique was familiarized with violence because he had been a judge and a prosecutor, I would say that during the first attempts to find the people he supposed that [his son] was being held prisoner, not disappeared” (Cecilia Cabrera, wife).

“My children, Hector’s siblings, were convinced that the authorities had mistaken him for someone else and unjustly detained him. They kept hoping that one day he would suddenly show up and explain it all” (Beltrán-father, 2014: 20)

The confidence that the detention put them safe from the battle and would protect them from further misbehaviour turned into despair: at the request of the next of kin of the disappeared, military officials met with some of them at the 13th Brigade. At the meeting, the officials advised them to stop searching because their loved ones were ‘guerrillas’ who “most likely had escaped to the mountains”

(Juzgado Tercero 2010: 111). Enrique Rodríguez (father) declared before the criminal prosecutor of the case that the week after the events he received a call saying that the military were torturing his son (Juzgado Tercero 2010).

The fact that the PJ had been scenario of a crude urban battle and that the flames consumed the building created a great confusion and chaos on the perception of the events. In this context, any observer would be more ready to accept that the people inside the Palace perished as a result of the calamity and not that an event of forced disappearance was taking place. However, the justificatory discourses and the tactic of stigmatization of the victims and denial of their fate, were relevant factors indicating that something different had happened. From this case we can learn that justificatory arguments and the stigmatization of the victims may be valuable for the factual observation of criminal conduct. State crime literature has not often explored criminal the potential of justificatory discourses around the wrongdoing and denial as empirical factors and analytical resources for the visualization of the crimes.

When the observer is able to remark that a person is absent because of a crime committed against her, the observer needs to delimit enforced disappearance from other violent actions. For conducting this operation the observer needs to resort to an institutional definition of the phenomenon (the double problem). With respect to qualification of the events as enforced disappearances, the PJ case entailed a difficulty coming from the criminal legislation: at the time of the events (1985) there was no domestic legislation concerning enforced disappearances. According to the UN Inter-Agency Working Group on Enforced or Involuntary Disappearances, at the time of the events:

“[t]he lack of a legal classification of disappearance sometimes renders it impossible to continue investigations on enforced disappearances unless the courts in question treat such acts

as abduction. [...] This enables the offence to be classified and proceedings to continue. However, this interpretation does not enjoy a consensus among the judiciary, so that there have been cases in which the judge has ordered the closure of the investigation, on the grounds that there is no such category of crime as enforced disappearance. In those cases in which an investigation has been initiated because of abduction, some cases have been filed on the grounds of limitation, even where the individual concerned is still missing” (UN 1989: 17).

Considering this difficulty, victims, human rights activists and organizations started pushing for the adoption of a criminal offense. In this context, six projects were presented to the Congress. The first time a project was presented was in 1988, when Ombudsman Horacio Serpa submitted a proposition of bill to the Congress. According to Amnesty International, in a public statement the Defense Ministry vetoed the initiative considering that it would undermine the power of the authorities, whose priority was to restore law and order (AI 1989: 126).

However, in 1991 the Minister of Interior reintroduced the same text to the Congress arguing that disappearances were widespread and that they were not properly dealt with by the legal system (AI 1991:97). Although this project did not succeed, the new Constitution expressly established that “no one shall be subjected to enforced disappearance, torture or cruel, inhuman or degrading treatment” (Article 12). This proscription gave a new impulse to the possibility of a bill criminalizing enforced disappearance.

In 1992, a Project introducing enforced disappearance as a crime was presented to the Senate. However, President Gaviria objected to the Project arguing that the military jurisdiction was the competent legal forum and due obedience as an exonerating clause were constitutional cornerstones that the proposed bill should not eliminate (Diario Oficial de Colombia 1994). In reference to these objections, the UN working group on Enforced Disappearances expressed its concern about the fact that the government regarded enforced disappearances as a service-related act (UN 1994),

emphasizing on the need of a prompt and effective judicial remedy and the country's obligation to put alleged perpetrators on trial (UN 1996, 1997).

In 1997, the succeeding government of President Samper presented a new bill to the Senate. Project 129/1997 aimed at criminalizing enforced disappearances and genocide, as well as enlarged the existing crime of torture. The project had a slow track in the Congress and the Government asked requested for an urgency procedure (a sort of fast track legislative proceeding). Nevertheless, in three different sessions the quorum was not met and the project was never voted. With this respect, the national newspaper *El Tiempo* (1998) highlighted that the possibility for the bill to be approved was rather "low" because congressmen were "occupied in the presidential campaign" and the voting session had coincided with the "opening session of the FIFA World Cup".

By July 15th 1998, the Minister for Justice reintroduced the project which was approved after more than one year of discussions. However, on December 1999, the succeeding President, Andrés Pastrana, objected to the Bill (*Diario Oficial de Colombia* 1999). The press regarded Pastrana's objections as "confusing and incomprehensible" because the government had not been raised any issues during the debates (*El Tiempo* 2000). An editorial published by the national journal *El Tiempo* (2000a) affirmed that the objections derived from the pressures of the Armed Forces Command and the association of military veterans who did not support the criminalization of enforced disappearance and genocide.

Finally, the House of Representatives voted in favor of the bill (*El Tiempo* 2000a) and on July 7, 2000, the Law 589/2000 was published. This text suffered considerable changes over time with the intervention of the Constitutional Court establishing that crimes such as genocide and enforced disappearance were excluded from military jurisdiction and that they could not exonerate

perpetrators when victims were member of illegal groups (Constitutional Court 2000) as well as established that perpetrators should not be limited to state agents (Constitutional Court 2002).

According to this, the crime was introduced into the criminal legislation in the following terms:

Article 165. Enforced disappearance: Anyone who deprives another person of their liberty in any way, followed by concealment and refusal to acknowledge the deprivation of liberty or to provide information on the person's whereabouts, thereby placing the victim outside the protection of the law, shall be liable to a term of imprisonment of twenty (20) to thirty (30) years⁹³, a fine of one thousand (1,000) to three thousand (3,000) times the current minimum statutory monthly wage and disqualification from the exercise of rights and the holding of public office for ten (10) to twenty (20) years. The same penalty shall apply to any public servant, or anyone acting at the instigation or with the acquiescence of a public servant, who commits the act described in the preceding paragraph.

According to this, enforced disappearance was composed by two acts: the deprivation of liberty (*ab initio* legal or illegal), followed by the concealment and the refusal to acknowledge what happened or to provide information regarding the whereabouts of the person⁹⁴.

The recognition of the crime in 2000 was extremely important for the PJ case. Based on this legal provision, the victims filed a new plea. In response to it, in 2001, the Prosecutor General's office opened a preliminary investigation –formal investigations only started in 2006. However, before 2000 and despite the lack of a legal provision, the PJ families had denounced the enforced disappearance of their next of kin. Furthermore, the category of disappearance was also employed earlier from its introduction as a domestic criminal offense by the President of the Republic in an

⁹³ This penalty can be aggravated according to the code depending on a number of aggravating circumstances enumerated on article 166. According to this article the perpetrator can be liable to a term of imprisonment of thirty (30) to forty (30) years. It can also be attenuated when the perpetrator voluntarily releases information about the whereabouts of the person in a short-term after the abduction.

⁹⁴ This definition differs from International Human Rights law in the sense that it extends the active subject of the crime to anyone. This definition also differs from the Statute of Rome in three main aspects: in Colombia the crime is not limited to political organizations but to anyone as active subject, the domestic regulation does not establish a minimal prolongation of time for the disappearance and there is no requirement on the intention to remove the person from the protection of the law.

official Decree in 1985⁹⁵, the Special Investigative Court in its final report on the PJ events in 1986⁹⁶, the Prosecutor General's office in 1988 and the Special Procurador assigned to the Military Forces who sanctioned the military for the disappearance in 1990⁹⁷.

The fact that the victims and some State institutions were able to observe a problematic situation called 'disappearance' exposes the possibility of drawing a factual observation that in this case supposed a form of wrongdoing. As such, when the justice and other institutions referred to the events they also recognized their possibility of scrutinizing these actions. However, procedures could only be initiated referring to offenses different from forced disappearance because there was no autonomous criminal offense in the domestic arena available. Indeed, the fact that discussions around the bills were not seriously addressed or were objected by different governments during a decade, created obstacles for framing the case as a crime of enforced disappearance to the formal institutions of the legal system.

With this respect, from the start of the investigations, retired Col. Plazas's lawyers requested the annulment of the prosecution arguing that the crime of enforced disappearance was not enacted at the time of the events (Juzgado Tercero 2010: 60). Lawyer Eduardo Umaña and the succeeding

⁹⁵ As soon as December 27, 1985, the President of the Republic issued decree 3822/1985 that the Law provides a special procedure for declaring the presumed death of those "disappeared" of the Palace of Justice through the municipal civil judges of Bogota using a special process set forth for that purpose.

⁹⁶ On June 17, 1986, the Special Investigative Court published its final report on the PJ events. In line with this document, the people that were 'allegedly disappeared' from the cafeteria had died in the middle of the confrontation at the PJ fourth floor. Additionally, the tribunal asserted that two of the guerrillas that participated in the siege (Clara Encizo and Irma Franco) had been taken alive by the military and "disappeared". Despite the fact that there was no criminal offense, the tribunal recognized the existence of a wrongdoing that was labeled as 'disappearance'.

⁹⁷ The assertion of the Special Investigative Court that the guerrillas had been forcibly disappeared is not the only evidence of the above-mentioned reception. Also in 1988, the Prosecutor General's office also concluded that Irma Franco had been forcibly disappeared; and, in 1990, the Special Procurador assigned to the Military Forces issued a disciplinary sanction against the Head of military intelligence body B-2, for the disappearances.

representatives of the victims sustained that the enforced disappearance could be prosecuted as such because at the time of the events this was already considered an international crime (criminal law reference): the negligence on the domestic adoption of the bill could not immunize the defendant.

With regard to this debate, after more than twenty years, a judge of first instance, an appeal court (Tribunal Superior 2012) and the Supreme Court asserted that enforced disappearance was an international crime in force at the time of the events, and that due to its criminalization in the year 2000 it could be currently prosecuted considering the permanent nature of the crime –implying that it is present as long as the fate and whereabouts of the victims are not clarified (Tribunal Superior 2012).

Considering the *double problem approach* for observing crime and the particularities of the case study we can conclude that the double reference emerges when a (mis)conduct is observable. Before the existence of a criminal law legislative program, the misconduct may be observable but is not available for qualification as a criminal offense to be processed by the criminal justice. In the case of enforced disappearance, when the criminal code does not contain a specific crime it can be processed through other offenses⁹⁸. However, as shown in this part, the justice system may find obstacles prosecuting the conduct as other offenses because of the particularities of the wrongdoing, creating opportunities for the containment of the legal intervention.

After having problematized and delimited the observation of criminal conduct, characterizing state crime could not be done without a proper reference to the actor of that kind of conduct. This will be conducted in the next section.

⁹⁸ “In jurisdictions where the criminal code contains no specific crime of enforced disappearance, prosecutors can pursue charges of kidnapping, abuse of power, torture (if there is relevant evidence available), and murder, particularly if the remains of the victim are found. There may be other associated crimes committed by authorities in relation to denials of detention or, even, the survival of the disappeared” (Dewhirstv & Kapurv 2015: 32).

4.2.2 The 'State'

Traditional positions, particularly deriving from the law and the social sciences, tend to observe the reference to the State as a criminal actor as improper or irrelevant. There is a tendency to dismiss the State conduct as part of the phenomenon of crime. Indeed, most theories of criminality reject the fact that States, or even those agents acting on their behalf, can be criminal actors. The idea of crimes committed by the State frustrates the biological theories of crime that explain criminal behavior according to the physical appearance, the personality, the social status or the life conditions of wrongdoers (*e.g.* dysfunctional families, poor neighborhoods, lack of formal education, *inter alia*). This is not only an obstacle for the social sciences. As studied before, the law debates the acceptability of the idea of States committing crimes based on the traditional conception of crime (only performed by individuals and established by the State) and the criminal responsibility (expressed through punishment as a mechanism of infliction of pain measured in terms of time to which organizations like the State could not be submitted).

In this part, we will elucidate the problems that the concept of *State* poses when referring to its criminal activities. We will not adopt or develop a theory or a concept of State, rather we will delimit the form of authorship that the subject of state crime raises. With this purpose, we will refer to some socio-legal ideas suitable for drawing empirical and theoretical delimitations of what can be considered and observed as State for state crime.

Boudon and Bourricaud's Critical dictionary of sociology (1989) bears that “[t]o define the State is an almost impossible task” because of the ambiguity and multiplicity of definitions that the notion presents. When defining the State, they explain, researchers face two main types of difficulties: a *descriptive* problem and a *normative* problem. The former is present when

researchers attempt to elucidate the characteristics that make the State distinctive in respect to its composition and basic physical and symbolical features. The latter refers to the problem of delimiting and understanding what the State should be and how it can be organized, not only regarding its administrative arrangement but also at the level of its goals, means, rules and organizational principles.

For the sociological delimitation of state crime both problems are pertinent. However, we will focus on the descriptive problem because it enables pertinent delimitations around the distinctive characteristics of the State when constructing the phenomenon of state criminality. Thus, we can start by affirming that the *State* is a form of organization consisting of interdependent or coordinated parts, established and designed to achieve different social objectives “by means of explicit rules, regulations and procedures” (Giddens 2009: 783). The State, like other private organizations, “is a particular type of social system that reproduces itself on the basis of decisions” (Seidl 2005: 408). These decisions are adopted, adapted, produced and reproduced in reference to determined social contexts and historical conditions presenting a public scope as they are capable of binding social communities. For the delimitation that we intend to draw in this part, it is important to give a historicized account of the *State* visualizing the characteristics upon which it is observable at a particular time and in a specific context. This form of referring to the notion may allow avoiding anachronism and obsolete uses.

In this context, referring to this form of organization requires an additional caution around implicit assumptions or substantializations often automatized when referring to the ‘State’ (Rothe 2009: 11). The State has no essence, the State has no heart, “not just in the sense that it has no feelings, either good or bad but it has no heart in the sense that it has no interior” (Foucault 2010:

77). Perhaps for this reason, when studying different definitions of State one can conclude that there is no consensus.

However, as Bourdieu (1994) suggests, the State appears today as a self-evident category⁹⁹ embodying an institution that exists beyond any choice and resulting from different power struggles that are sometimes overlooked under uncritical intellectual natural adherence¹⁰⁰ (in the same sense, Abrams 1977¹⁰¹). Such understanding may involve presenting the State as an unchanging (and always pertinent) structure in the history of humankind. Nonetheless, sociological attention should be awarded to the task of problematizing the conceptual construction of the State as an object of observation. With this regard, Skinner (2009: 326) asserts that “to investigate the genealogy of the state is to discover that there has never been any agreed concept to which the word state has answered [...] As the genealogy of the state unfolds, what it reveals is the contingent and contestable character of the concept, the impossibility of showing that it has any essence or natural boundaries”.

⁹⁹ An example of this lack of reflection on the sState is the UN Draft declaration on the rights and duties of States. By resolution 178 (II) of 21 November 1947, the General Assembly instructed the International Law Commission to elaborate a draft declaration on the rights and duties of States. During its first session, in 1949, the Commission examined the subject and adopted a final draft Declaration on Rights and Duties of States which was postponed until a sufficient number of States have transmitted their comments. With respect to the definition of the State, the Commission concluded that “no useful purpose would be served by an effort to define the term ‘State’, though this course had been suggested by the Governments of the United Kingdom and of India. In the Commission's draft, the term ‘State’ is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth in this draft Declaration the qualifications to be possessed by a community in order that it may become a State” (UN ILC 1949: 289).

¹⁰⁰ To Bourdieu this assertion expresses his concern on questioning and, perhaps, defying the beliefs on the State: “[t]he destruction of this power of symbolic imposition based on misrecognition depends on becoming aware of its arbitrary nature, i.e. the disclosure of the objective truth and the destruction of belief (Bourdieu 1994; 170)” (Gecienė 2002: 119).

¹⁰¹ “We have come to take the state for granted as an object of political practice and political analysis while remaining quite spectacularly unclear as to what the state is. We are variously urged to respect the state, or smash the state or study the state; but for want of clarity about the nature of the state such projects remain beset with difficulties” (Abrams 1977: 112-113).

In respect to the boundaries of the notion, one of the main problematic factors when referring to state criminality is the extension that the notion of State covers: for a conceptualization of state crime, *how broad should a concept of State be? What should it cover?*

With regard to these questions, a first problem that can be found when reviewing the literature is the construction of wide-ranging notions including an enormous quantity of phenomena and institutions into this form of organization. In this vein, some authors refer to the State as all the public structures and activities, either political or legal, commercial or symbolic; others refer to it as covering every social organization expressing any form of public authority; and some use the concept for private activities such as the commerce or other milieus that currently are not understood as intrinsically public as the family or the religion. In short, these understandings tend to frame within the State any form of social organized domination, control or authority exercised in society.

In this vein, a part of the literature identifies the State with the doctrine of the public function, which affirms that any organization or individual in charge of a public function can be considered, at least in respect to her activity, as State in nature. In line with this view, public authorities are instruments of the State that perform a *public function*; in other words, States express a degree of organization based on a functional assessment.

The notion of *public function* refers to activities reserved to the State according to their constitutional ends and the public interests at play (Corte Constitucional 1998). “Under the ‘traditional state function’ doctrine, an entity is a ‘state actor’ and thus subject to liability for constitutional violations if it performs a function traditionally performed by the government” (Edgar 2005:857). The legal doctrine refers to the ‘traditional functions’ of the State referring to them as

public services. These services are understood as activities that meet the needs of society and that are implemented through the general, permanent and continuous direction, regulation and control of the State. This doctrine has understood that prototypical activities reserved to the State are those services intended to preserve basic functions of law and order as well as tax collection or the management of public goods (Corte Constitucional 1998; Corte Suprema de Justicia 2012). This view has the purpose of ensuring that people have access to essential services that can be provided in accordance with constitutional rules and preventing market exploiting consumers (Edgar 2005:861).

Functional criteria allow to detect the State according to different competences usually delimited and distinguished through branches of the public power. In the *Politics*, Aristotle referred to this structure through the idea of the separation of powers¹⁰² which has accompanied the *modern political structure* of the State (Hörnqvist & Hörnqvist 2010: 21). These branches create abstract compartments of competence that can be classified into three main traditional functions¹⁰³: the *legislative*, through which the State dictates norms; the *judiciary*, dedicated to the resolution of individual disputes by means of the law; and the *executive*, usually defined as the branch responsible for enforcing the law.

In general, the distinctiveness that the public function doctrine proposes in respect to the State is far from conclusive. Paraphrasing Boudon and Bourricaud (1989), distinguishing between

¹⁰² “All constitutions have three elements, concerning which the good lawgiver has to regard what is expedient for each constitution. When they are well-ordered, the constitution is well-ordered, and as they differ from one another, constitutions differ. There is (1) one element which deliberates about public affairs; secondly (2) that concerned with the magistrates- the question being, what they should be, over what they should exercise authority, and what should be the mode of electing to them; and thirdly (3) that which has judicial power” (Aristotle 1999: 100).

¹⁰³ Currently, this classification can be reformulated adding more divisions and sections taking into account other social spaces where the public power has specialized and become differentiated such as the electoral administration and the military forces.

the activities that depend on the State and the activities that in no situation fall within its competence is very uneasy. In relation to state crime, in line with Doig (2011: 45), “most state crime authors focus on the state as, variously, governments, the executive and various public agencies”. Indeed, although ample definitions may be suggested by state crime literature, few authors would accept that the State can be any public agency (agent) capable of performing a public function. This is so because it is unlikely that any state official committing a crime could express the authority or political power that the State embodies, as the concept of state crime requires - we will come to this element in the section ‘on behalf of the State’.

The extension of the concept of State (*vis-à-vis* state crime) is a recurrent problem in the literature referring to the State as a structure of domination. A vibrant example of this understanding is Marxism. Earlier Marxists bear that the State is a superstructure apparatus in the hands of a dominant class (Jessop 2000: 121) which has a fundamental capacity of repression and intervention in the class struggle favoring the bourgeoisie and affecting the proletariat (Althusser 1971: 90)¹⁰⁴. Later Marxists consider that the ruling class is not uniform as it embraces different struggles, competitions and calculations of power. In this line, rival political elites emerge within the State (Callinicos 2007: 542).

¹⁰⁴ According to Althusser (1971), this concept refers not only to a the specialized apparatus furnishing basic supplies for legal practice, e.g. the police, the courts or the prisons; but also the army, which “intervenes directly as a supplementary repressive force in the last instance, when the police and its specialized auxiliary corps are ‘outrun by events’; and above this ensemble, the head of State, the government and the administration” (Althusser 1971: 90). Althusser assesses that when Marxism understands the State as a repressive apparatus, it is nonetheless differentiating state apparatus from state power: the class struggle is centered in the State power and by consequence on the use of the state apparatus as a function of class interest, being the apparatus an instrument of repression that can survive even in the presence of modifications on the state power. Hence, Althusser concludes that the state is a form of repression by physical and non-physical forms that exercises functions by violence and functions by ideology through distinct and specialized institutions (Althusser 1971: 90).

Developing the idea of domination, Gramsci, as a later Marxist, focused on the concept of hegemony. According to this, the *ethical State* educates the population into a particular cultural and moral type of organization “which corresponds to the needs of the productive forces for development, and hence to the interests of the ruling classes” (Gramsci 1971: 79). This *ethical State* articulates the political and civil society constituting an “‘image’ of a State without a State” (Gramsci 1971: 80). This form of organization implies that the individual becomes a ‘normal continuation’ and ‘organic complement’ of the political society (Gramsci 1971).

If the notion of State is constructed covering all possible actors of the public function and all possible forms of domination or power, the concept of state crime loses distinctiveness and pertinence, voiding its descriptive significance and specificity. With the purpose of a conceptual delimitation a relevant tool is presented by governmentality authors inaugurated by Foucault (2013: 283). This literature represented a relocalization of the State, not as the ultimate seat of power (Sharma and Gupta 2009: 9), but as one structure of power among others. When this literature claims the necessity of moving away from the State¹⁰⁵, it provided an important insight for delimiting the State itself.

Drifting away from Marxists and discussing the problem of power in a multifaceted way (instead of the idea of top-down hegemony or class control), this literature does not deny the existence of power in the State but widens the scope of power beyond it and beyond relations of

¹⁰⁵ “What does doing without a theory of the state mean? If you say that in my analyses I cancel the presence and the effect of state mechanisms, then I would reply: Wrong, you are mistaken or want to deceive yourself, for to tell the truth I do exactly the opposite of this. [...] However, if, on the other hand, “doing without a theory of the state” means not starting off with an analysis of the nature, structure and functions of the state in and for itself, if it means not starting from the state considered as a sort of political universal and then, through successive extension, deducing the status of the mad, the sick, children, delinquents, and so on, in our kind of society then I reply: Yes, of course, I am determined to refrain from that kind of analysis. There is no question of deducing this set of practices from a supposed essence of the state in and for itself” (Foucault 2010: 77)

domination¹⁰⁶. In this line, the problem of power would not rely on the law but on normalization, not on punishment but on control. In this respect, Foucault (1991) draws a double historical movement according to the transformation of power characterized by: *i*) the replacement of a society of sovereignty focused on the State, by a disciplinary society which takes shape of different micro-powers inoculated into the population and the bodies (Foucault 1978) and *ii*) the replacement of a disciplinary society by a society of government that deploys a technology of power based on different techniques of governmentality polymorphous, contingent and mobile. These techniques aim at achieving the control of populations and the bodies through different disciplines as the pedagogy, the medicine, the human sciences and the economics, marking the beginning of the era of ‘bio power’ (Foucault 1978: 140).

Considering the recognition that power can be found in all types of social relations as “a consequence of relationships between different social actors” (Whyte 2009: 3), and if we accept the idea that state crime is not merely about criminal conduct but is heavily related to power (Whyte 2009:3), this literature allows to localize the problem of state criminality within the idea of *institutional power*. In this vein, the State is not every social manifestation of relations of domination (as some Feminists may assert¹⁰⁷) or structures of power (as Marxism may affirm).

¹⁰⁶ In relation to the distinction between power and domination Foucault asserted “we must distinguish the relationships of power as strategic games between liberties – strategic games that result in the fact that some people try to determine the conduct of others – and the states of domination, which are what we ordinarily call power. And, between the two, between the games of power and the states of domination, you have governmental technologies” (Foucault 1988: 19).

¹⁰⁷ The problem of State power beyond class structures was explored by different feminist perspectives that emerged in the 1970s and 1980s. While some feminists understood the State as a neutral arbiter that tends to be dominated by men promoting masculine interests (Kantola 2006: 119); others understood it as “a gendered set of apparatuses, serving the aims of a patriarchal order. It is not only that state institutions are overwhelmingly staffed by men but that masculinist ideologies inform the policy and decision-making process” (McLaughlin & Muncie 2012: 415-416). However dissimilar (neutral or patriarchal), most of initial feminist kept discussing power enlarging the power of the State to different structures of domination.

The idea of state crime should focus on a form of institutional power expressed through state institutions and its agents that display different typologies of power (power of the capital, cultural power, colonial power, gender-based power, class power)¹⁰⁸.

For the description of state crime, this assertion requires complementary ingredients of observation. In the search of empirical elements to observe the institutional and organizational arrangement that the State presents, we may characterize States as modern forms of organization of the political power that interact in the social world through physical and non-physical structures, ideas, practices and discourses.

“A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices” (Crawford 2007: 5). States are politico-legal entities (Currie 2008: 21) acting with a legal status. “[I]nternational law plays an important role for the determination of when an entity constitutes a State, since it is for the international legal order to provide a legal qualification and establish the legal consequences of a subject of international law, in particular its rights and obligations. The role of international law in this regard is twofold: it has a positive role of determining, in certain cases, whether an entity constitutes a State even in the absence of effective government, as well as a negative role of denying Statehood to entities which claim it but which were established in violation of a peremptory norm of international law” (de la Cuba 2012:172-173).

In this context, international public law has developed a notion of the State in accordance to the matter of statehood. In line with this concept, the State should possess a permanent *population*,

¹⁰⁸ According to Bourdieu (1994) the different models of the emergence of the State have privileged the concentration of the capital of physical force as the invariant offering a systematic account of what we call the State.

a defined *territory*, a *government* and a capacity to enter into relations with other states (American Convention on Rights and Duties of States: article 1)¹⁰⁹. The political factor is an important ingredient when referring to state criminality. Despite population, territory and government are physical elements, for their observability they require in principle further elaborations than a physical verification in order to determine their content: we need to draw different legal and socio-political considerations in order to be able to determine that a group of people is a state's population, or to delimit a given territory within certain boundaries or to establish the existence of a government. After all, "there will be exceptional instances where one or more of the foregoing requirements of statehood may be absent or in abeyance, at least for a period of time, and yet where an entity is nevertheless treated as a state. Similarly [...], there may be situations where all of the foregoing criteria are met but where the entity in question is nevertheless not generally recognized as a state [...]" (Currie 2008: 24). In other words, for an entity to be characterized as a State, the mentioned elements require a sociological characterization without which they would simply be a group of loose objects detached from any collective realm.

These international law elements offer a number of empirical elements furnishing different features valuable for the sociological observation of the State. What is the relevance of these

¹⁰⁹ International public law has particularly debated this issue referring to the distinction of *declarative* and *constitutive* ideas on statehood. According to the former, States are identifiable by the mere presence of a group of material or symbolic elements, without the need of any further political recognition from other states. In contrast, *constitutive* ideas assert that statehood is achieved in accordance to the political recognition of other existing states. "Proponents of the declarative theory have argued that the constitutive theory is unsustainable in practice, as there is no international body with the authority to acknowledge the existence of States on behalf of the entire community of States. [...] In turn, proponents of the constitutive theory have criticized the declarative theory for being unable to explain the legal status of the collectively non-recognized territorial entities that do fulfill the factual criteria for statehood" (Zounuzy n.d.: 52-53).

elements for delimiting the notion of State for the expression *state crime*? Let us review this more closely.

(i) The permanent *population* refers to a stable human community present over time (Currie 2008; Brownlie 2003). This element is relevant because it refers to the human ingredient of the social organization that we call ‘State’. The notion of state crime raises a particular form of authorship comprising an organizational or collective level (States are collective entities) as well as an individual level recognizable through its actors (States operate through people). Even if the State has a relevant symbolic character, it has a concrete existence materialized through different organizations, facilities, and, ultimately, through people: state crimes are executed by people acting on behalf of the organization. People as agents of the State may be involved in criminal conduct not only as active perpetrators, but also as instigators, bystanders¹¹⁰ or collaborators¹¹¹.

Because the State can only act through individuals, “[a]n ‘act of the State’ must involve some action or omission by a human being or group: ‘States can act only by and through their agents and representatives’. The question is which persons should be considered as acting on

¹¹⁰ Bystanders are those spectators, onlookers, people who come to know but are not directly involved in the crimes. According to Cohen (2001: 15), there are three types of audience: “(i) immediate, literal, physical or internal (those who are actual witnesses to atrocities and suffering or hear about them at the time from first-hand sources); (ii) external or metaphorical (those who receive information from secondary sources, primarily the mass media or humanitarian organizations); and (iii) bystander states” (“whole governments and ‘the international community’ are also external bystanders. The term ‘bystander nations’ was originally used to describe the lack of response by Allied governments to early knowledge about the unfolding destruction of European Jews” (Cohen 2001: 17))

¹¹¹ When reviewing the ILC conceptualization on state crime we detected the criticism that this notion could ‘demonize’ a certain population as deviant. However, as a sociological definition, state criminality does not necessarily refer to the blame of a certain society as a whole, but implies the recognition that people (population) are present on the equation when evaluating a state crime, and that this element becomes more relevant when those crimes are systematic or sustained in time. State crime studies allow visualizing a rather structural and collective configuration of criminality that is perpetrated in the name of a State. Such definition does not victimize a society as a whole but recognizes that the crime committed through the state has an impact on people, even perhaps a specific one.

behalf of the State” (ILC 2001: 35). Acts are attributable to the State when they express somehow State’s authority. In principle, to the concept of state crime, agencies or agents incapable of expressing political authority cannot claim to have acted on behalf or in the name of the State. An example of this can be a public-school professor, or a public transportation driver or the technicians of a public journal who could not *ordinarily and validly* assert or claim that their actions do represent the State as a political organization.

The general rule of international law is the attribution to the State of the conducts of its organs of government as well as of others who have acted under its direction, instigation or control (UN ILC 2001: 38). This can be developed through the distinction between *de iure* and *de facto* state agency. *De iure* agents are persons or agencies designated by the law as state functionaries or institutions exercising some form of governmental authority. *De iure* agents are legally bound as members of the public authority while *de facto* agents are those persons or groups that, without express legal authority, act under the instructions, direction, instigation or control of a State. Ranging from total subordination to acknowledgement or tolerance, there can be various degrees of connection for establishing if a person can be called a (*de facto*) state agent. For a sociological observation of these agents, the question remains to what degree a level of involvement of an individual actor with the State must be established so that he or she can be considered a *de facto* agent.

“Establishing a link can be hard given a state’s incentive to hide its intentions. The link that establishes attribution may rely upon approval authorization, awareness, complicity, control, support, or tolerance, or manifest itself in the public nature of the act” (Townsend 1997: 678).

Under international law, this question remains unsettled because there is no treaty in force on the subject and case law is contradictory on this matter (Townsend 1997: 635). Nonetheless we

have traced some parameters under international law that can be useful for a sociological construction of state agency within the conceptualization of state crime. These parameters can be classified under three different criteria: *high*, *medium* and *low* standards.

A *high* standard refers to an intense relationship between the State and the agent. The ICTY *Tadic case* and the ICJ *Nicaragua case* are examples of the use of this standard, referring to state agents as those under the effective control of the State creating a form of dependency or subordination on the agent. In the *Nicaragua case*, the question was if the *contras* –a paramilitary group that acted against the Nicaraguan revolution in 1979, was to be equated to an organ of the US. Despite the fact that the US had financed, trained, equipped, armed and organized those groups, the ICJ found that the *contras* could not be considered agents of that country because there was no sufficient and effective control over them¹¹² since they had conducted different actions by their own initiative¹¹³. Following the *Nicaragua case* standard, in the *Tadic case* the ICTY found that the defendant was not to an agent of the Federal Republic of Yugoslavia when he committed different killings, beatings and forced transfers of Muslims in the context of ethnic extermination committed by Bosnian Serb forces against the non-Serb population of Prijedor. In this case, the Court employed a high standard “requiring a prosecutor to prove that the *de facto* agent greatly depends on the State, and that the State effectively controls the *de facto* agent” (Townsend 1997: 641).

¹¹² The question the ICJ posed was “whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government” (International Court of Justice 1986: 109).

¹¹³ Despite the large quantity of documentary evidence and testimony that has examined, the Court has not been able to satisfy itself that the respondent State “created” the *contra* force in Nicaragua. [...] Nor does the evidence warrant a finding that the United States gave “direct and critical combat support”, at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all *contra* operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court established that the United States authorities largely financed, trained, equipped, armed and organized the FDN” (International Court of Justice 1986: 108).

An *intermediate standard* refers to a moderate degree of involvement of the agent and the State. This can be referred to as a general test of dependency and control. As proposed by Judge McDonald (1997) in her separate opinion to the *Tadic case*, according to this position, absolute effective control is not a necessary element for finding an agency relationship. Instead some sort of dependency suffices for establishing the link – e.g. when the person is being paid a salary by the State and that subject is submitted to its operational command.

A *low standard* can be found in certain degrees of tolerance before the wrongful actions. This involvement can be analyzed under Grotius' distinction between *patientia* -meaning a lack of prevention, and *receptus* -meaning a level of complicity. This standard requires a level of *patientia* referring to the lack of duty of due diligence and failure to prevent. Private deviance can indicate States' acquiescence when it operates with enough tolerance from the State, materialized through its omission to countervail such actions¹¹⁴.

“The ‘due diligence’ standard has a long history in the law of state responsibility for injury to aliens and is a central doctrine of a number of areas of international law, including international environmental law. It entered international human rights law through a landmark decision of the Inter-American Court of Human Rights in 1988. In the *Velasquez Rodríguez* case, the Court found that the disappearance of the complainant had been carried out by state officials. However, more importantly for the present discussion, the Court further held that ‘even had that fact not been proven’, the State would have been liable for its lack of due diligence in preventing or punishing the violative conduct of putatively private actors” (Gallagher 2010: 242).

An example of this kind of attribution of responsibility can be found in the provisions of due diligence for violence against women exposed in the Declaration on the Elimination of Violence against Women (1993), according to which States are urged to “exercise due diligence to

¹¹⁴ A study of this class of omissions and their relation to the subject of state crime can be found on Martin's (2012) study on South African endemic vigilantism, as a practice use of force by autonomous citizens to protect themselves or as a reaction against certain illegality or injustice arguing that the South African police, stimulated through their omission a vigilante culture that creates different levels of criminality.

prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”. Following this provision, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW: 1992) noted in its General Comment No. 19 that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”

These standards are valuable for the sociological observation especially in modern times, when there is an accelerated privatization of military operations. Governments that cannot or do not want to be directly involved in warfare operations have extensively used the market of private security contractors. In a context in which different State activities are increasingly outsourced or performed by private corporations or individuals, there is a main problem for the sociological observation of state criminality.

With this respect, part of the legal literature has assessed that the conduct of private individuals may constitute state conduct when the agent performs functions that are traditionally reserved to the State. Besides the doctrine adopted, from a sociological and a legal perspective we are able to recognize that people do not necessarily have to be uniformed or become official members of a public entity in order to conduct state actions. With this respect, the ICTY (2001) has adopted a test composed of three different standards of control differentiating between: (1) acts by a single private individual or a group that is not militarily organized, to which the applicable standard is that of “specific instructions”, public endorsement or *ex post facto* approval by the State; (2) acts of armed forces, militias or paramilitary units, to which the applicable standard is the “overall control” test, provided not only the equipping and financing the group, but also by the coordination and assistance

in the general planning of its activities; and (3) acts of individuals assimilated to state organs on account of their role within the structure of a State, regardless of the existence of state instructions.

For a sociological inquiry, these standards are not to be regarded as disjunctive but may be applicable in different circumstances. It is important to assess different scenarios where these standards may apply when evaluating to what degree armed groups or private individuals can be regarded as a *de facto* organ of that State. With this purpose, the legal doctrine gives specific grounds for the sociological observation. In this context, for a sociological observation of state criminality performed through private agents, cases of *de facto* agency may be present when “private contractors [are] employed by the state to fulfill security or military functions without being incorporated into the police or armed forces, but also organized resistance groups and other military organizations with sufficient connection to the State in question. *De facto* agency also arises where a State ‘acknowledges and adopts’ the conduct of private persons as its own. The required acknowledgement and adoption does not have to occur verbally, but can also be inferred from the State’s own conduct as long as it is clear and unequivocal” (Melzer 2008:72-73).

(ii) States are the expression of a territorial power (Sánchez 1994: 152). We refer to *the territory* as the place where a public authority is exercised (paraphrasing authors as Burdeau and Hauriou). However, some commentators assess that the territorial boundaries of the States no longer coincide with those of the political authority (Strange 1996: ix) – “in a world of increasing globalization and transnational crimes [...] sovereign claims become problematic or irrelevant [...] sovereignty claims are now an illusion in terms of traditional meaning” (Friedrichs 2007: 13).

The territory is the physical context under the control of the alleged State, “even if its precise extent is uncertain or varies over time”¹¹⁵ (Currie 2008: 24) – e.g. when there is a loss of control of a certain territory or when there is a sort of hybridity of control where private and public actors share the control over the territory and the population (Jaffe 2013). In this sense, we can find multiple places where foreign authorities exercise political control over the territory or where non-state authorities are the recognized political authority of the place. This is what the literature has referred to as state-like entities. These forms of organization have *de facto* territorial authority over a place. Such intervention in the territories could not be asserted to be State criminal actions *per se*. Even though analytical criteria of state crime literature may be applied to state-like wrongdoing, this form of criminality requires to trace the source of the authorship within the structures of the State.

The territory is the space where crimes are committed and remain a basic reference to it, despite an increasing incidence of the cyber warfare¹¹⁶. However, the element of the territory does not necessarily allow us to distinguish the *State* that we are observing from a sociological perspective. The participation in criminal behavior of population from different origins in various territories is pervasive in a context of expanding globalization. From the sociological perspective, the connection required for an action to be considered as states’ behavior should not be based on the territory, but rather on the material connection of the actions to the State as a political organization.

¹¹⁵ Nonetheless, Higgins (1963) suggests that serious doubts as to boundaries can undermine claims of statehood.

¹¹⁶ “Cyber warfare has been defined as any hostile measures against an enemy designed “to discover, alter, destroy, disrupt or transfer data stored in a computer, manipulated by a computer or transmitted through a computer.” Examples of hostile use include computer attacks on air traffic control systems, on oil pipeline flow systems and nuclear plants.[...] The fact that a computer network attack during an armed conflict is not kinetic, physical or violent in itself, does not put it beyond the remit of IHL. As with other means and methods of warfare, computer network attacks against combatants and military objectives are legal as long as they are consistent with humanitarian law. However, computer network attacks open up new questions since they can be used, for example, against the enemy's production, distribution and banking systems, making the impact more difficult to judge”. (ICRC 2010)

This is particularly visible when combatants of different origins participate in *wars that are not their own*, when a conflict becomes internationalized¹¹⁷, when combatants or victims are not limited to one State, or when a State promotes and delivers war in absolute absence of its population into a foreign territory (e.g. the Plan Condor in the Americas) – “[t]here is some appreciation that not only can states be domestic contributors to crime but they can also be transnational criminals” (Chambliss 1989 in Ross 1998: 338). Before these situations, it would be inadequate to refer to territorial boundaries according to international law as the element *par excellence* to delimit the State.

While the territory and the population are important factors for delimiting physical boundaries of a certain State, the exclusive reference to these elements is insufficient for the concept of state criminality. The observation of a wrongdoing with a sociological interest, that is located in a particular territory and in contact with a specific population, still needs to employ other elements in order to delimit the presence of the *State* exercising political authority over that place and intervening in the social relations of that specific population.

¹¹⁷ “The expression “internationalized armed conflicts” is not a legal expression as such and does not imply a third category of armed conflicts. The expression rather describes situations of non-international armed conflicts with a dimension that is said to be “international”. This dimension can take several forms:

1) One or more third States or an international/regional organization (the States or the organization acting through a multinational force) intervene in support of a state involved in an armed conflict against an organized armed group. 2) One or more third States or an international/regional organization (the States or the organization acting through a multinational force) intervene in support of an organized armed group involved in an armed conflict against a State. 3) Other possible combinations between situations 1), 2) and 3). From a legal point of view, these situations can be translated into three specific cases:

- Some remain a non-international armed conflict; - Others become an international armed conflict; - Others become “mixed” conflicts. In such conflicts, depending on the nature of parties to the conflict, IHL of non-international armed conflicts applies to the relations between some parties (e.g. between an armed group and an intervening outside State), while IHL of international armed conflicts applies to other relations, e.g. between to States intervening militarily in support of two adverse parties of a NIAC)” (ICRC n.d.)

(iii) The third element, *the government*, indicates an institutional arrangement giving a form, a program of action and a configuration to the *political system* in place in a certain society which main aim is to govern and to exercise control over the territory and the population. Skinner (2009: 326) asserts that handbooks on political theory have regularly pointed out that the State is an established apparatus of government, which is why the words State and government have come to be virtually synonymous terms. For instance, Rothe (2009: 27) uses the term governmental crime interchanged with the term state crime as “we commonly call the government and its agencies [in] the state”.

Although both governmental crime and state crime imply a violation of the public trust due to the involvement of public authorities in illegal activities, paraphrasing Friedrichs (1992: 54) governmental crime refers to crime committed in the context of the government and not necessarily on behalf or in the name of the State -as it is the case of state criminality. Thus, we agree with Friedrichs (1992: 53) who observes this synonymy as misleading because while “[t]he term state crime suggests crime committed on behalf of a state [...] the term governmental crime ... can more naturally be applied to crimes committed within a governmental context on any level, and not necessarily on behalf of the state” (Friedrichs 1995: 53-54 in Ross 2003: 85-86).

Moreover, in general terms, there is a conceptual difference between the government and the State, the former being an administrative structure that governs and the latter being a social arrangement of institutional power. While they may appear as interconnected, there is no natural link between them. Thus, for instance, certain States have been qualified as such by the international law in the absence of verification of a government in effective control of the population and territory (de la Cuba 2012:129).

“While it is generally accepted that a state requires some administrative structure capable of governing its population, effectively controlling its territory, and representing it internationally, there are instances where this requirement appears not to be essential, at least for a period of time. In other words, the existence of an effective government can provide good evidence of the stable human community and sovereign control of territory referred to above, and thus of the existence of a state. However, its temporary absence appears not necessarily to be fatal to statehood” (Currie 2008: 26).

However different, the interrelation between the government and State should not be ignored when observing state criminality. Given that state crime involves the presence of a public organization with the capacity of acting *in the name of the State*, this element emerges as an important factor for observing state criminality. In other words, the government is an institutional configuration of the political power¹¹⁸ that, as such, can exercise political authority *in the name of a State* and to which can be attributed the behavior of its agents.

The authority of the State somehow resides in a *politico-juridical element*, a legal personality that the law confers to the State indicating that as legal subjects it has legal rights and can also enter into obligations: “the State is a real organized entity, a legal person with full authority to act under international law” (ILC 2001: 35). This legal personality can be understood as a mere fiction that is present only by the virtue of the existing personality of those people who compose it (*theory of fiction*), or as a legal category that corresponds to the existence of the State as a moral person, independent from its components (*theory of reality*).

Either a fiction or reality, through the idea of the legal status the legal system recognizes the possibility of the State to be responsible: “[i]n brief, the legal personality of a collective entity (such as the State) is a construction of the Law, and it constitutes a unit of imputation for its

¹¹⁸ Governments are the institutions that represent the state’s legal personality while acting before the people: “All government is a conspiracy. Good government is a conspiracy in favor of the people. Bad government is a conspiracy against the people” (Allott 1988:25).

conduct, carried out by the individuals who compose [the] said collective entity and who act [on] its behalf; thus, both the legal person and [the] said individuals must answer for the consequences of their acts or omissions” (IA Court 2003b: 20). In sum, the State’s legal status implies, among other things, that it is submitted to the law: “the state is no longer an absolute power which bears within itself its limits and its end” (Parvikko 2000: 228).

The legal personality of a State is important to the subject of state crime because it implies that the State has some legal duties and, as such, it is submitted to the rule of law - ultimately, this is the essence of the idea of the law-state or *Rechtsstaat*. Although in the legal doctrine only few would question that criminal conducts may entail State responsibility (Jorgensen 2000: 139), most of the literature rejects the fact that States could or should be held criminally liable. In this context, the traditional legal understanding of the State rejects its possible characterization as a perpetrator of criminal conduct. Rather, before the criminal phenomenon the State is characterized as *the legislator* –establishing the distinction crime/non-crime, *the organization of control*¹¹⁹ - determining what behavior can be considered as criminal and reacting against it, and the *victim*¹²⁰ - the State has been constructed as the injured party before the criminality, taking the place of the victim of problematic criminal situations.

With respect to the actors who commit criminal wrongdoing, the classic legal thought considers that criminal conduct is only performed by human beings. In this context, States are

¹¹⁹ In line with this view, authors like Durkheim sustain that the State operates restituting moral unity before the normlessness experimented by crime. In this view “plus l’État devient fort, actif, plus l’individu devient libre. C’est l’État qui le libère” (Lenoir & Durkheim 1958: 437).

¹²⁰ With this view, all crimes involve a victimization of the State simply because they erode State’s order. This is present not only when a criminal conduct victimizes concrete people, or the community as a whole, but also when there is a victimless conduct that is qualified as criminal even though there is no concrete injury. These interventions are not intended to protect any particular individual but the public order and the public interests that the State embodies, acting as victim and prosecutor of these cases.

fictional entities that are not capable of performing crimes. Despite different developments around the criminal responsibility of corporations, legal discussions have not been able to advance on the States for two main reasons:

The first reason is that the legal doctrine, taking as a basis a wide-ranging notion of the State, comprises a diversity of actors to which a general category of state criminality may create an inappropriate *stigma* involving unjust attribution of responsibilities. Moreover, even under a restricted concept, the international law would reject the notion of state crime as it could lead to stigmatize certain States as deviant, opening the door to eventual abusive counter-measures by powerful States.

The second reason is that the legal thought operates a criminal law program of action that presents a focus on measures of redress directed to the infliction of pain through temporal measures as imprisonment. With such understanding it remains unclear for the legal system what could be adequate measures of redress for state criminal conduct. According to this, the observation of an action as a crime of the State depends on the attributable legal consequences. In this sense, if no criminal law consequences apply or no sanction is available against states, the underlying criminal phenomenon is not recognizable.

Sociological and criminological studies challenge these reasons coming from the traditional legal view explaining that the State as any other organization may also be involved in criminal behavior (Rothe and Friedrichs 2006: 150). Sociological organizational theorists have put forward that organizations can be understood as criminal actors. This has allowed criminologists and sociologists to recognize that States may perform a form of organized crime (Ross 1998; Chambliss 1988) or organizational deviance (Green and Ward 2004). Doing so, these disciplines

take into account an empirical and theoretical distinction between the crime and its possibility of criminalization: States may commit criminal conduct regardless of the question of the *adequate* criminal responsibility. To a criminological debate on state criminality, observations are not limited to the pragmatic adjudication of responsibility.

Agreeing that States can be criminal agents does not imply demonizing the State but necessarily implies a sort of de-sacralization. The study of state criminality does not necessarily and generally support Nietzsche's assertion that the "State is the name of the coldest of all cold monsters" (2001: 62) nor, as some anarchists do, that the State is simply and at all times a criminal enterprise (Friedrichs 2010: 130). Rather, the category of state crime allows observing the State as a form of organization that may be involved in different criminal wrongdoing. Thus, the State, rather than the counter-phase of violence, the victim of all crime or the savior against terror, should be conceptually developed as an organization that can implement, support or contribute to different forms of criminal conduct¹²¹. According to Luhmann, the notion of "public force" is paradoxical. "Public power" understood as the exercise of violence is often presented as a necessary medium that it is preferable not to use. "Violence", writes Luhmann (2004: 213), "must be used to abort violence". This means that "we include in the concept of public force the exclusion of violence" (Luhmann 2004: 213).

¹²¹ Bourdieu (1994) asserted that the state is the culmination of a process of concentration of different species of capital expressed through a physical and a symbolic violence. These forms of violence are exercised "in the form of specific organizational structures and mechanisms", and "in the form of mental structures and categories of perception and thought" (Bourdieu 1994: 4). This form of organization locates their holders as legitimate agents of public power, composed by physical force and coercion, economic capital, cultural or informational capital and symbolic capital, and granting power over other species of power with a collective recognition that rests upon an organized bureaucracy.

Weber's concept of the State might be useful in order to advance on this discussion. According to Weber, the State is a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory (Weber 1946). Weber does not imply that all violence on behalf of the State is legitimate but that it is the political reference in order to legitimately authorize the use of violence. This conceptualization neither involves that "[...] the state is the only actor actually using violence but rather that it is the only actor that can legitimately authorize its use" because "[t]he state can grant another actor the right to use violence without losing its monopoly, as long as it remains the only source of the right to use violence and that it maintains the capacity to enforce this monopoly" (Encyclopedia Britannica Online, s. v.).

This conceptualization allows focusing on the claim of the monopoly of the legitimate use of physical force within a given territory, overcoming the conception of the State as a social organization opposed to a 'state of nature' where violence reigned¹²². Weber's definition does not imply that all state violence is legitimate, remaining possible to assert that the State can resort to an illegitimate use of force: using Weber's definition we can agree that States can do wrong. These wrongful actions are the genus of a species called state crime.

For a conceptualization of state crime, Weber's concept offers clarifications but also raises some elements that may be reframed in the context present societies. Contemporary society is not predominantly characterized as a central political authority. Indeed powers other than the State, as

¹²² This contrasts with the famous view of Hobbes' Leviathan: "[I]t is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. For war consistent not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known. [...] All other time is peace" (Hobbes 1651:77-78).

the international community¹²³, diversified local organizations¹²⁴, transnational economic corporations and political entities are capable of a degree of incidence in the political social life attributed in other times solely to the State. A current trend in political theory affirms that there is a decline of the State's capacity to influence social life. For some authors, amidst the continuing growth of multi-national corporations and international organizations States seem to be fading (Creveld 1999: 420 in Skinner 2009: 360), they are "on the way out" (Ankersmit 2007: 36 in Skinner 2009: 360) or are simply "losing their autonomy and authority" (Ubi 2008: 7) because their actors rationally pursue their self-interest rather than general public goals (Colin and Lister 2006:16), or because their capacities and obligations are being "evidently superseded" (Falk n.d. in Skinner 2009: 360). This is happening in a context of globalization of the economy (Ohmae 1995) and "a growing diffusion of authority to other institutions and associations, and to local and regional bodies, and in a growing asymmetry between the larger states with structural power and weaker ones without it" (Strange 1996: 4).

In this line, authors such as Strange, Ohmae, Greider, Sassen, Albrow, Hardt and Negri argue that globalization redefines nation-states, which have become less relevant. Hardt and Negri (2000: xii) refer to a decentered and deterritorializing apparatus of regulation called Empire, born in the midst of the "declining sovereignty of nation-states and their increasing inability to regulate economic and cultural exchanges". To other authors, the intensification of globalization has not

¹²³ The international community that can adjudicate the right to violence in a certain territory with a legitimate claim - this claim can reinforce state claims as it can openly compete against them.

¹²⁴ "ad hoc governance might be practiced by (traditional) political authorities at the local or sub-national level [...]. [L]ocal leadership and public institutions are generally ascribed greater legitimacy than a distant central state" (Wulf 2007: 9)

eroded State power but is restructuring State power between local demands and transnational networks (McGrew 1998)¹²⁵.

Contemporary phenomena as the privatization, globalization and localization of public powers involves different dealings, collaborations and competitions *vis-à-vis* the political power of the State. These phenomena are important for enriching our comprehension of States when thinking on state criminal conduct; nonetheless, this does not obliterate the fact that, even if there is an overlap or a competition between the State and the international community or private multinational corporations, we can still distinguish the State as a pertinent and relevant source of criminal violence - “[l]ooking at transformations of state authority and control over the use of force, is not the same as pointing to the end of the state” (Leander 2004: 8).

With the purpose of distinguishing state actors, another problem that stems from developing a socio-legal concept of state criminality based on Weber’s definition is that it does not provide much information on the sociological characterization of the State. Indeed, the limits of what may constitute a human community¹²⁶ that claims the monopoly of the legitimate use of physical force

¹²⁵ In Colombia, Orquist exposed the thesis of the ‘partial falling of the State’ characterized by the disintegration of the institutional apparatus of the State as a result of the confrontation between the traditional political parties. In his turn, Daniel Pecaut has assessed that in Colombia, there is a progressive dissolution of the State characterized by the weakening of its intervention in the benefit of industry owners because of the progressive adoption of a liberal model of development that has made of the State a non-autonomous entity where power is fragmented in favor of economic corporations (Sánchez and Meertens 1982). This is analyzed in a less univocal direction by García and Espinosa (2013) in the assessment that the Colombian presence of the State constitutes an institutional apartheid characterized by a strong disparity between territories with especially robust institutional control and territories with weak or no institutional framework, a situation of abandonment that comes to be regulated by illegal actors or by the social communities within themselves.

¹²⁶ A conceptualization of the state using the notion of community can also be found in the Politics where Aristotle asserts: “Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the

can be dubious as regards proto-states or organizations that have a certain control over a territory and a population – e.g. rebel organizations, mafias, terrorist groups. In this respect, Green and Ward (2004: 3) describe the State “in the traditional Marxist sense” using Engels notion (1968:577) of “a ‘public power’ comprising personnel organized and equipped for the use of force, ‘material adjuncts prisons and institutions of coercion of all kinds’ and agencies which levy taxes”. Then, they assert that public powers shall include “those ‘political entities (for example, the FARC –Revolutionary Armed Forces of Colombia) which deploy organized force, control substantial territories and levy formal and informal taxes but are not accepted members of the international society of states. We shall refer to such entities as ‘proto-states’” (Green and Ward 2004: 3).

With this regard, we agree with Doig (2011) who observed that although the definition of the State may be elastic, the inclusion of revolutionary groups, terrorist organizations and self-proclaimed independent movements, implies that “the definition may be too diffuse” (Doig 2011: 44). To call the crimes of those organizations “state crime” is imprecise because it could divert the focus of the concept to the territorial control exercised by an organization rather than on the existence of an organized public structure involving state political authority. Indeed, if state crime entails actions that are performed not as personal goals but on behalf of the state (as will be studied in the next section), we are referring to those actors that hold some sort of inclusion or relation with the political system and with those agencies in charge of enforcing the law.

Some of these boundaries can be further established using the reflections of Niklas Luhmann when he denotes that the State refers to a centralization of the political functions (Luhmann 2014: 212). As Luhmann points out, in ordinary discourses the State mobilizes two

rest, aims at good in a greater degree than any other, and at the highest good” (Aristotle 1999, Book One, Part I: 3).

contextual characteristics: firstly, like people, States are identified by names that allow others to refer to them; also, States are located in a specific territory, they have a population and they have a “public force”. Besides these elements, States present a self-designation of a political function - namely, “the social function of taking collectively engaging decisions” (Luhmann 2014: 212). The State involves the institutionalization of the political power configured through a public organization representing the public political power, paraphrasing Bourdieu (1994).

In this line, state crime can be characterized as conducts in which the State engages as an organization. In this sense, a concept of state criminality should include agents and agencies capable of expressing the political function of taking collective engaging decisions specially comprising the exercise of violence through the public power¹²⁷. In this vein, we may argue that States comprehend political actions and decisions that are objectified through public organizations acting *in the name of the State*.

States can act physically only through actions or omissions of their agents (agencies). In particular, state crime can be attributed to persons who through their actions or omissions¹²⁸ act “in

¹²⁷ The legal thought sustains a distinction between (*real*) crime committed in the streets by private agents, and the *legitimate use of force* necessary for public control, rejecting the category of state crime. This distinction may be understood from a sociological perspective as pertinent although certainly as governed by a *moral bias* distinguishing certain harmful actions as criminal while other (similar or graver) conduct is reduced to legitimate State practice.

¹²⁸ “[P]olicy’ does not require active orchestration; it is also satisfied by implicit support or encouragement, including deliberate inaction to encourage crimes” (Robinson 2014: 115). A similar provision may also be found in Ambos and Wirth (2002: 34), asserting that “[a] widespread attack which is not at the same time systematic must be one that lacks any guidance or organisation. The policy behind such an attack may be one of mere deliberate inaction (toleration). Such a policy, however, can only exist if the entity in question is able and, moreover, legally obligated to intervene”). Here, it is relevant to differentiate two levels of deliberate inaction which are willful blindness and negligence. The former means that an agent deliberately decides to remain ignorant while knowing the risk of failing on a certain duty (Supreme Court of Canada, 1989). The latter means that the agent does not exercise control over a risk and simply does not have any knowledge of the situation. Hence, while acting with willful blindness there is some degree of

official or covert capacity as agents of the state” (Kramer, Michalowski and Rothe 2005: 56). For this reason, it is relevant to study when a conduct may be performed *on behalf of the State*. In this research, the State is not observed as a mere fiction nor as a mere analytical concept; on the contrary, we do argue that States have a material configuration and concrete manifestations.

This perspective takes into account the State as an organization that has a precise and observable entity: when committing crimes, States can be differentiated on a number of elements that can be found in structural and functional features, referring to the specific configurations and institutions of the State or to the role and function of the State in society. When developing these two approaches in this work, we observed that there are not abundant indicators on the sufficiency of any of these elements taken separately and independently.

In this sense, we may argue that the State is a collective entity with a legal personality that operates through highly complex networks. Although embracing a multiplicity of legal entities and operating through a variety of persons, the observability of the organization that we call State remains possible from the sociological perspective. For state criminality, although the State may adopt ‘mobile shapes’ as Foucault would name it, its basic feature is the centralization of the expressions of the society’s political system, acting with the legal status allowing to enter into obligations and acquiring rights of the State. Luhmann (2004: 213) understands that this function is related to the “law enforcement”. The idea of “law enforcement” is at the ‘heart’ of state criminality. To the subject of state crime, institutions in charge of enforcing the law express the political function of taking collectively engaging decisions endorsed by the exercise of violence through institutional power.

awareness or advertence to the prohibited risk, acting with negligence means that there is inadvertence of information that should have been known.

4.2.3 On behalf of the State

State crime is an organizational conduct (Ross 1998; Chambliss 1988; Green and Ward 2004). As such, these crimes are not committed due to individual spontaneous initiative (Tilly 1985 in Ross 1998) or in the mere pursuit of personal gain but in accordance with the operative goals of the formal organization that we call the State (Schrager and Short 1977: 412; Green and Ward 2004; Kauzlarich, Matthews & Miller 2001¹²⁹). In this line, according to Chambliss (1989), “State-organized crime does not include criminal acts that benefit only individual officeholders, such as the acceptance of bribes or the illegal use of violence by the police against individuals, unless such acts violate existing criminal law and are official policy”.

This characterization recalls the distinction between private misconduct and organizational wrongdoing. The former refers to any kind of conduct committed for personal gain, beyond the goals of any organization; while the latter is a form of wrong that follows the objectives of an institution or some form of organic structure. When applying this distinction to our subject it follows that crime pursuing an organizational goal could be categorized as *crime of the State*, while criminality based on a private aim can be understood as conduct *against the State*. Although actions for individual gain and actions following organizational ends are theoretically distinguishable from a sociological perspective, in cases of state crime the phenomenological, functional and structural frontiers between these two are not always clear (Friedrichs 1995: 72).

With this regard, part of the literature has explored different forms of overlapping (e.g. state-corporate crime) capturing the existence of criminal joint-ventures benefiting not only private

¹²⁹ Reducing state criminality to the study of the individuals “is to ignore the social, political, and historical contexts which shape the nature, form, and goals of state agencies” (Kauzlarich, Matthews & Miller 2001: 189).

interests but also State goals¹³⁰. A phenomenon that paradigmatically captures this overlapping is corruption, e.g. when the latter is the mean for an organizational criminal goal, or when there is a waiver or tacit encouragement of corruption when contributing to organizational goals, or when the pursuit of profit through corruption becomes itself an organizational goal (Green and Ward 2004).

The concept of corruption is not clearly delimited in criminological studies. Acosta (1985) evaluating a number of conceptual developments with this respect¹³¹ concluded that criminological studies share as conceptual basics the identification of two parties: the *corrupt* who gets material, political or social benefits in exchange of an advantage for the *briber* who as the second party could not otherwise obtain certain resources. In this context, the only element that Acosta (1985) deems to be unanimous among different authors is the misuse of the public function. However, current sociology and international law have dealt with the subject of corruption as a problem affecting the private sphere as much as the public administration¹³². Indeed, there is a growing

¹³⁰ As an example of this, the notion of state-corporate crime emerged in criminological studies as the intersection of the State and institutions of economic production that act with a shared goal in direct cooperation through actions that can be actively initiated by the State or simply facilitated by a lack of restraint of deviant business activities (Kramer, Michalowski & Kauzlarich 2002).

¹³¹ “i. Rogow et Lasswell (1966 : 132/133) : un acte de corruption trahit la responsabilité envers un système d'ordre public ou civique est incompatible avec un tel système et risque de le détruire.

ii. Nye (1967 : 416) : la corruption est un comportement contraire aux devoirs statutaires liés à une fonction publique (de nature élective ou autre) en vue d'obtenir... un gain personnel ou améliorer une position sociale ; ou qui viole les règles qui interdisent l'exercice de certaines formes d'influence qui visent l'obtention d'avantages personnels.

iii. Rose-Ackerman (1978 : 1/2) : la corruption est l'utilisation de mécanismes illégaux du marché, dans des décisions concernant l'affectation des fonds publics, rejetée par le système politique démocratique.

iv. Sherman (1978 : 130) : la corruption est l'utilisation du pouvoir organisationnel pour l'obtention d'avantages personnels.

v. Benson (1978 : xiii) : corruption est toute utilisation illégale ou non éthique de l'autorité gouvernementale en vue d'obtenir des gains personnels ou politiques.” (Acosta 1985: 334)

¹³² The UN Convention against Corruption adopted by the General Assembly by resolution 58/4 of 31 October 2003, the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the

literature on private corruption understanding that acts contrary to the duties and responsibilities of a private position may allow to exercise a certain power or influence over a function, task or responsibility with the purpose of taking advantage to obtain a benefit for oneself or for another person (Argandoña 2003: 255). Thus, from the perspective of international law, despite the fact that there is no unanimity around its definition¹³³, there is a general understanding that this phenomenon amounts to the misuse of entrusted power for private gain (e.g. Gray and Kaufmann 1998: 22; Gray-Molina et al. 1999: 8; Klitgaard 1998: 45; La Palombara 1994: 77; Owen 1997: 40; Everett, Neu & Rahaman 2006: 3), either simply economical or for political advantage (i.e. *political white collar crime*¹³⁴).

Crimes committed with the purpose of personal gain can also be rooted in political goals involving public or state corruption but not necessarily acts *on behalf of the State*. While these phenomena may involve structural and phenomenological *couplages*, they remain different for a sociological delimitation. This form of criminality cannot be reduced to an event of corruption in

European Union on 26 May 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organization for Economic Cooperation and Development on 21 November 1997; the Criminal Law 1 See E/1996/99. 2 Official Journal of the European Communities, C 195, 25 June 1997; the Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999; the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999; and, the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003.

¹³³ International law has generally opted for offering an enumeration of different forms of corruption. Within these forms we can find the offering, granting, solicitation or acceptance by a government official or a person who performs public functions, of any benefit, in exchange for any act or omission in the performance of his public functions; or any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party; or the fraudulent use or concealment of property derived from any of these acts.

¹³⁴ Friedrichs (2010) highlighted that political white collar crime can be committed for a political advantage. Friedrichs (2010), Geis and Meier (1977:207) use the term political white collar crime to refer to illegal and improper activity perpetrated by governmental or political party officials for direct personal gain.

the pursuit of individual goals. Rather it is an intentional and strategic use of violence (Cohen, 2003), by which state agents and agencies participate in the planning, execution or covering of criminal activities, following a collective criminal setting expressing ideological, political or economic state goals and involving complex networks of organizational deviance and compromising the individual responsibility of the agents¹³⁵. In short, state crime is essentially crime by, for the benefit (Doig 2011: 44) and on behalf of the State (Friedrichs 1992: 53).

Organizational goals are official communications expressing a collective character that allows to characterize the actions that they mandate, endorse or authorize, as performed on behalf of the organization that we call *State*. As Bourdieu (1994) would assess, official acts or discourses are expressions of a situation of authority performed or authorized by officials holding a position assigned by the State. In this sense, the observation of organizational goals does not involve understanding the State as a homogenous ‘decision-making’ institution. States uphold a variety of decisions, discourses and practices often characterized by a lack of unanimity and even eventually competing with each other or struggling for power (Blakeley 2009: 37); after all, the State “is a complex web of connections between numerous entities that have varying degrees of autonomy” (Nicholson 1986: 29).

Although the different components of the State work to achieve a range of objectives that may suppose heterogeneous goals, from a sociological perspective the State can be understood as an organization capable of affirming, supporting and implementing common goals or shared overall

¹³⁵ The collective and organizational nature of these actions, challenges the “one-sided personalization” of criminal law accountability (as pointed out by the German historian Martin Broszat). Focusing in one actor of the atrocities may obfuscate the contextual and structural content of the actions (Koskenniemi 2002). However, this does not mean overlooking the individual, which would be in detriment of a complex understanding of state criminal actions.

objectives enforced with enough authority to be observed and followed by the various organs of the State. With this view, organizational aims can be understood as programs of action aiming at establishing the “correct decision making by defining specific goals that are to be achieved, e.g. “profit maximization”, and in this way structur[ing] the given decision possibilities” (Seidl 2005: 406). However defining, authoritative and influential, institutional programs of action are contingent to different ideological, doctrinaire, political, economic and religious factors (Rothe 2009: 12). This is so, not only regarding their design but also their interpretation and materialization, which can meet, negotiate with or confront different internal and external constraints. As such, these programs are, at the same time, outcome of struggles between different oppositions and source of governmental practices.

Accepting that organizational goals may involve a complex dealing of power structures (in some occasions less relevant in the context of totalitarian States), involves that their implementation may imply diverse forms of disciplinary control, repression or persuasive campaigns of indoctrination. In this context, States not only address their own institutions but often the organizational goals aim at the society in general. These goals are formulated as a matter of authority, expressing power and force.

Identifying such goals in the context of complex networks may pose considerable challenges for the observation. Addressing this constraint, with the purpose of detecting the organizational character of these wrongs it is advantageous to depict the degree of organization and coordination of the criminal actions. Sociologically, two relevant factors for this observation are the *capacity of operation, coordination and organization* of the wrongdoing as well as the existence of a *common plan of action*.

Table No. 8. Organizational goal	
Two main factors of observation:	
<i>Capacity of operation, coordination and organization of the actions</i>	<i>Common plan of action</i>
Capacity-oriented assessment	Goal-oriented assessment
Ability to coordinate and capacity to organize the criminal actions.	Organizational plan of action involving a collective planning and preparation of the crimes determined by the organization involving a criminal purpose. Evaluation focused on the preparation, coordination and common disposition of the actions.

The *capacity of operation, coordination and organization* of the criminal conduct refers to the capability of coordinating, controlling and organizing the activity, resources and/or infrastructure of the State for the wrongdoing. The organizational character of the misconduct may derive from the level of organization and the extent of public resources employed for planning, executing or obfuscating state criminal activities. The capacity of acting in a coordinate manner usually involves an ingredient of hierarchy and direction. States organize their capacity for inflicting violence through a hierarchical configuration that sociology has studied employing the concept of bureaucracy.

Bureaucracy is a form of constituting, organizing and developing institutional power which operates through delimited areas of competence. Weber, pioneer on studying this phenomenon in the context of modern organizations, asserted that “bureaucracy is the means of transforming social action into rationally organizing action” (Weber 1968: 62). This form of organizing supposes both, hierarchy and depersonalization of administrative management: functionaries make a career out of their jobs, this separates their private life from their official position and their properties from the material resources they employ in the pursuit of their posts (Weber 1968; Giddens 2009).

For some authors, bureaucracy creates more compliance to the rules, less arbitrariness, more equality and impartiality, treating all citizens regardless of their private moral life and divorcing the administration of public life from the private interests of officers (Du Gay 2000). According to others, as Arendt (1971), Bauman (1989) or Kelman & Hamilton (1989), on the contrary, bureaucracy produces an instrumental rationality upon which functionaries separate their jobs from any moral awareness¹³⁶. This lack of consciousness about the content, extent and effect of what they do, they argue, creates opportunities for atrocities as the Holocaust¹³⁷.

“When subordinates receive orders from duly constituted authorities operating within an apparently legal framework, they may well assume that the orders themselves are legal. More often than not, the question of legality does not even enter their minds, especially when they are working in official settings-military or civilian-surrounded by the trappings of legitimacy” (Kelman & Hamilton 1989: 47).

The role, force and scope of criminal organizational goals may be reinforced by the placing of the criminal behavior and its concrete actors within the structure of hierarchical organizations: functionaries employed under hierarchies are expected to follow instructions and orders. In these contexts, authorizations and commands to do wrong may be highly compelling and may somehow blur the criminal law proscriptions or the significance of their actions, especially with regard to officials acting under the representation of accomplishing a transcendent mission, namely an organizational goal¹³⁸.

¹³⁶ Dealing with state crime, IA Justice Cançado assessed that these wrongdoings have been historically accompanied by the insensitivity of States to the consequences of their own criminal practices as well as by state policies of ‘dehumanization’ of the victims, creating an alleged “right of the State to persecute or massacre [...] in other words, to perpetrate [...] state crime” (IA Court 2006b: 27).

¹³⁷ While some “scholars contest the notion of an amoral, unthinking bureaucrat as an historical and psychological phenomenon, Arendt used her famous phrase to point to the fact that the danger of the totalitarian state lay in the fact that it need not rely on inherently “evil” individuals, but rather on the motivations of ordinary people” (Davidson 2016: 259).

¹³⁸ “The most obvious sources of crimes of obedience are military, paramilitary, and social-control hierarchies, in which soldiers, security agents, and police take on role obligations that explicitly include the

With this respect, the ‘sociology of denial’¹³⁹ offers an important analytical insight for the study of state crime, referring to the conduct of people (state agents) who do not necessarily express a disagreement with the general social values or with the legal order but at the same time manage to neutralize¹⁴⁰ their validity through different forms of denial with the aim of performing criminal conduct - e.g. denying what happened, its repercussions, its magnitude, among others. This idea is an important element for understanding how state crime is performed ‘on behalf of the State’ and its order, even though it may involve the violation of that same order. In sum, denial focuses on the statements of motives deployed when someone espouses the duality of knowing and not acknowledging as well as the ambiguity of violating the legal order although supporting it. We will come back to this later on.

However relevant for the study of state crime, the bureaucratic involvement of state officials or agencies, does not definitively result in the univocal presence of a State goal in such actions. For instance, when a group of police members use their position and authority for

use of force. These hierarchies are the classic ones from which the term chain of command is borrowed; authority is bureaucratically stringent. The goals of these bureaucracies and the role definitions of actors within them in fact require harm to certain categories of others (such as an enemy or subversive). The sole question concerns the scope and definition of the target of harm rather than the existence of such a target. In this context authorization is explicit and backed by multiple binding forces: sanctions are potentially severe; surveillance by authority can be strict; and others' conformity is often observable. Routinization of actions that may contribute to harming targets is characteristic of the organization. And dehumanization of victims, especially in wartime, is systematic” (Kelman 1989:314)

¹³⁹ The *sociology of denial*, led by Stanley Cohen, studies how and why people overlook the suffering of others (Cohen 2001: x). Cohen developed the concept of denial as a form of knowledge that does not lead to a form of acknowledgement. “Denial is always partial; some information is always registered. This paradox or doubleness –knowing and not-knowing- is the heart of the concept” (Cohen 2001: 22).

¹⁴⁰ This theory is inspired in the work of Sykes and Matza (1957), authors that developed the concept of techniques of neutralization. These techniques are mechanisms by which a subject inhibits social controls on deviant motivational patterns while remaining committed to the dominant normative system. This idea was intended to shift the understanding of juvenile delinquency, not as originated by a learning experience in direct contradiction to the dominant society, but rather by techniques neutralizing the validity of norms in certain situations. “Thus the delinquent represents not a radical opposition to law-abiding society but something more like an apologetic failure, often more sinned against than sinning in his own eyes” (Sykes & Matza 1957: 667).

executing and organizing a personal *vendetta*, it could not be said that there is a state crime: in this case, there is no institutional or organizational goal governing the course of action, despite of the coordination and involvement of state bureaucracy in the wrongdoing; in other words, there is no action on behalf of the State.

If we accept that a criminal action with wide-ranging involvement of State organs indicates but does not necessarily imply that the actions are committed in accordance with organizational goals, the existence of a *common program of action* may be a relevant element clarifying the organizational character of a criminal action, at least from a sociological perspective. State crime can be characterized as part of a program of action providing general directions for the criminal conduct. Likewise, this form of criminality can be characterized as a *crime of obedience* (denomination of Kelman and Hamilton 1989) meaning that these actions are implemented in coordination with or ordered by a certain authority, either through express instructions or as part of a context in which the wrongdoing is sponsored, expected, or at least tolerated by the authorities -as occurs when the perpetrators are furnished with good reasons to believe that the action “conforms with official policy and reflects what their superiors would want them to do” (Kelman 1989:27).

Although state crime refers to the organization orienting its agents what to do, individual interests and strategies can play an effective role and can involve a phenomenological coupling with the organizational aim. From an *individual perspective*, organizational goals imply the involvement of people in order to materialize their program of action. The personality, the morality, the ideology, the capacities, the abilities, the awareness, perceptions and disposition of state agents, ultimately are determinant to set in motion, give content and extend to the organizational goals. Ideology, doctrine and training are relevant factors when evaluating criminal

state goals from an individual perspective. For instance, if a military trained under the doctrine of the enemy is assigned to deal with a situation of massive protests and general disorders, it is expectable that this official, if understanding political dissent as an enemy action, would probably respond to the situation with no consideration for the integrity of the protesters.

The structure of beliefs that agents uphold is a relevant ingredient for understanding their involvement in criminal actions. Although implemented individually, in the context of actions performed on behalf of the State, these ideas remain part of a collective communication endorsing particular organizational values and goals. For instance, in the PJ case, retired Col. Plazas recurrently claimed that he was *right* in his actions and that he was simply a victim of a complot from the “enemies of Colombia” (Vega 2011: 43; Caracol TV 2011). The distinction enemy/non-enemy¹⁴¹, evidences the socialization of an ideological framework. These type of manifestations are not expressions of mere auto-referential ideas but are part of collective communications. These ideas “are not individual and idiosyncratic in nature, mere personal beliefs, or states of mind. Rather they draw on widely available, socially approved vocabularies, beliefs and rationalizations that resonate in the wider society. They are ‘cultural constructs’, not personal belief systems”

¹⁴¹ Different studies show the impact that the distinction enemy/non-enemy has on stimulating and justifying all kind of atrocities against undesired social agents qualified as ‘enemies’. For instance, Herrera and Lehalle (2013) studied the memorandums of the U.S. Department of Justice that between 2001 and 2005, in the context of the war against terrorism, that ground to all necessary methods against the ‘enemy’, including the practice of torture as an interrogation method. In their analysis, the authors identified the memos as political communications transmitting direct messages to the understanding of the law system relativizing the absolute proscription of torture as justified using the distinction friend/enemy: “En se fondant sur la distinction ami/ennemi pour juger de la force d’une union ou d’une séparation, d’une association ou d’une dissociation, Schmitt nous amène à envisager les concepts d’ami et d’ennemi non pas comme des métaphores ou des symboles, mais dans un sens concret et existentiel : l’ennemi représente l’autre, l’étranger dont la différence est en soi une source potentielle de conflits (Lehalle, 2009). Il devient possible de déterminer comment, dans le cas de la torture, la séparation entre ennemis et amis-victimes permet à certains de justifier un usage limité de la torture. C’est sur cette opposition ami/ennemi que la position relativiste devant la torture s’appuie essentiellement” (Herrera and Lehalle 2013 : 282). These authorizations can certainly operate as arguments of justification mobilized through a language of legality.

(Hogg 2012: 91). When embraced and adopted by a certain individual as valid parameter for perceiving reality, these ideas may constitute authentic ideologies of aggression¹⁴², contributing to the emergence of multiple forms of engagement with the values that it upholds¹⁴³ as well as creating eventual justifications or excuses for the eventual impairment of legal intervention¹⁴⁴.

Ideological frameworks and, more extensively, organizational goals are frequently manifested, supported and organized around official policies. These are important for reflecting on the collective background of crimes performed *on behalf of the State*: state crime involve the commission of different crimes pursuant to or in furtherance of an institutionalized policy¹⁴⁵. While different organizations can adopt policies these are not pertinent to the concept of state crime when they do not denote or derive from the authority of the State. Paraphrasing the ICTY (1997), not only a policy must be present but the policy must be that of a State. The existence of a policy presupposes a political capacity of its adoption and promulgation: “[t]he capacity required for adopting a policy that provides broader guidance for the crimes in question [...] requires

¹⁴² For instance, in his research about state crime by the police, Menzies (2000: 143) asserts that some South American police were willing to engage in death squads based on their beliefs of defending the country from ‘godless opponents’. This phenomenon is particularly visible in the ‘war on terror’ and other law and order campaigns that create the dominance of security discourses inciting people’s fears and anxieties about security threats. Security thus takes the place of a technique of governance.

¹⁴³ With respect to the values, the writings of colonel Plazas (2011) in the PJ case reveal his view of the Colombian conflict as a history of fight against narcoterrorism and communism (Plazas 2011: 343). In his own words Colombia, as one of the biggest reserves of the Catholicism, has been under attack by communism and other ideas against Christianity, proved by ‘a proliferation of a faith crisis and atheism’, that he qualifies as ‘a perverse modernism’ that has created the “perversity of abortion, homosexuals, same-couple marriage, swinger couples and other customs that are far from the moral principles of Christianity” (Plazas 2011: 343).

¹⁴⁴ In the words of the Parliamentary Assembly of the Council of Europe (2009) “[c]rimes such as the reckless or negligent killing or ill-treatment of detainees by rogue members of the security forces are often not properly investigated and prosecuted because of a culture of ill-conceived solidarity among colleagues”.

¹⁴⁵ Most of the criminal law doctrine understands that the category of political crimes is reserved to the actions against the *statu quo* (i.a. Bassiouni 1975; Ingraham, 1979; Roebuck and Weeber 1978; Schafer 1974) while other in criminology refer to state political crime for referring to actions of the *statu quo* (i.a. Comfort 1950; Proal 1898; Tunnell 1993; Michalowski, 1985; Thomas & Hepburn, 1983).

leadership –although not at the highest level of a state or organization- that develops and promulgates some broader guidelines, or a framework, that actively promotes, encourages, and provides general directions for the attack” (Rodenhäuser 2014: 925).

Deriving from these policies or parallel to them the production of frameworks of authority delimiting the decision making is usually governed by institutional norms. As Cohen (1992: 102) observed “state crimes are not just the unlicensed terror of totalitarian or fascist regimes, police states, dictatorships or military juntas. [...] [E]ven in the most extreme of these regimes, such as Nazi Germany, the discourse of legality is used (Muller, 1991)”¹⁴⁶. During the twentieth century, conservative estimations calculate that between 100 million and 135 million deaths were caused worldwide by the deliberate actions of the State (Friedrichs 1992: 54). In a context where the rule of law (and not mere arbitrariness¹⁴⁷) has become a fundamental principle of democratic Western

¹⁴⁶ Similarly, Barak (1990) contented that US state criminality concerning acts of warfare have shared in common the adoption of a combination of legal, illegal and clandestine operations. In this respect, Pulantzas (2000) argues against the distinction Law/Terror that “even the most bloody state form has set itself up as a juridical organization, giving itself an expression in law and functioning in accordance with a juridical form”, concluding that “nothing could be more mistaken than to counterpose the rule of law to arbitrariness, abuse of power, and the prince’s act of will” (Poulantzas 2000: 76). Mattei and Nader (2008) study the role of the rule of law in practices of violent extraction that they call plunder, and they conclude that law has been used to justify, administer, and enact Western conquest and plunder as a mechanism of spoliation that is not always resisted or even resented. In this context, the law serves as an instrument enabling plunder, but also these authors acknowledge that this is not the only bound of law, being capable of creating opportunities for justice (Mattei and Nader 2008: 201).

¹⁴⁷ According to the UN, the modern conception of the rule of law allows human communities to be governed by non-arbitrary rules, in opposition to the rule of man, which implies to be governed by the whim of the ruler (UN n.d.). The IACHR has concluded in different thematic reports that the consolidation of the rule of law is a prerequisite of a democratic culture, state, and society. The IACHR bases its characterization of the rule of law on three main principles: *limitation of power, legality and fundamental rights*. The *limitation of power* refers to the constitutional limits, distribution, delimitation and balancing of public power refraining any form of totalitarianism. *Legality* implies that State organs function under subjection to the law, respecting the supremacy of the Constitution and following the parameters of the law. Finally, the declaration of fundamental rights involves an obligation of warranty, respect and protection of the individuals and communities who are the holders of different legal entitlements. “In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law

societies (European Court of Human Rights 1999), it is relevant to question the possible correlation between the discourse of legality and state crime.

As Hannah Arendt (1994) stated, one of the problems that Nazism presents to political philosophy is that, in a certain way, the atrocities were consistent with the laws created by the regime¹⁴⁸. In Arendt's (1994) study of the Eichmann trial, she observed that the Nazi's regime 'outstanding characteristic' was that crimes "took place within a 'legal' order" (Arendt 1977:290): "[s]urely, no one will maintain that Eichmann was in business for himself or that he acknowledged obedience to no flag whatsoever. [O]ne of the fundamental problems posed by crimes of this kind, [is] that they were, and could only be, committed under a criminal *law* and by a criminal state" (Arendt 1977: 262).

The legal nature of the regime may be discussed (Arendt herself wrote the word in italics). In fact, the existence of a regulatory framework enabling criminal conducts coexisted with the criminal law proscription of these same conducts: during the Nazi regime, the criminal code was not suspended although there were several legal mechanisms authorizing and ordering the act of killing and disappearing¹⁴⁹. At least from a sociological point of view we can observe the crimes,

form a triad. Each component thereof defines itself, complements and depends on the others for its meaning" (IA Court 1987: par. 26).

¹⁴⁸ In this respect, Martin Luther King (1963) affirmed: "[w]e can never forget that everything Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany."

¹⁴⁹ The Night and Fog Decree (Nacht und Nebel Erlass) was a directive stamped as 'secret' for "the prosecution of offences committed within the occupied territories against the German State or the occupying power, of December 7th, 1941" (preamble) issued by the Fuehrer and Supreme Commander of the Armed Forces. This directive states that 'communist elements and other circles hostile to Germany' having increased their activities against the German State 'obliged' them to take severe 'deterrent' measures (paragraph I). The directives to be applied were the 'death penalty' for offences committed against the German State - or for a simple state of readiness that could endanger its security. These offences "as a rule are to be dealt with in the occupied countries only if it is probable that sentence of death will be passed upon the offender [...] and if the trial and the execution can be completed in a very short time. Otherwise the

despite the fact that the law-like authorization could furnish the perpetrator with a legal argument for restraining the criminalization of the conduct.

With regard to the legal nature of these mechanisms, in a different context, the Peruvian Supreme Court of Justice (2009) characterized former President Alberto Fujimori's conduct in the *Cantuta case* as a 'state crime' (Question 134, 156), affirming that these actions involved the creation of a regulatory framework enabling criminal conducts involving a *disengagement from the legal order*. By doing so, the Court drew a distinction between the rule of law (as a system of law) and regulatory dispositions, asserting that while the rule of law is substantially antagonist to state crime, a regulatory framework may be capable of distorting (but not annulling) the law.

When a regulatory framework is engineered with the aim of providing foundations to do crime, rules may become mere formalisms that do not add to the substantial containment on the use of violence¹⁵⁰. This form of collaboration is not directed to attack the validity of the law, or the proscription of the criminal conduct but to obstruct legal constraints to it¹⁵¹; in other words, these

offenders [...] are to be taken to Germany" (paragraph II). Further, these prisoners taken to Germany were to be subjected to military procedure "only if particular military interests require this" and, "in case German or foreign authorities inquire about such prisoners, they are to be told that they were arrested, but that the proceedings do not allow any further information" (paragraph III).

¹⁵⁰ In this respect, Schwendinger & Schwendinger (2014) proposed a distinction between *Defenders of Order* and *Guardians of Human Rights*. These authors expressed the late sixties' sentiment of visualizing and condemning state crime in the USA (Cohen 1993: 98), denouncing the legal order as having anti-human grounds against minorities or allowing external warfare. Using Negri's and Hardt's (2000: xv) words on *Empire*, although discourses on legality are continually bathed in blood, the concept of law and legality is always dedicated to a perpetual state of peace.

¹⁵¹ An example of a legal enactment of these forms of containment is the Decree 070 of 1978 in Colombia. This decree provided that during the state of siege declared in 1976, alleged crimes were justified if, among other things, were committed by provision of law or mandatory order of a competent authority or if they were committed by members of the security forces when intervening to prevent and address crimes like extortion, kidnapping and drug trafficking. Within human rights movements in Colombia, this norm was known as the 'Decree 007 License to Kill' (like the cinematographic character of James Bond), because the crimes committed by the security forces were expressly excluded from legal scrutiny. Indeed, one of the

rules are not general permissions to do wrong but rather limits to the enforcement and law intervention *vis-à-vis* the wrongful actions (inspired on Herstein 2014: 23)¹⁵².

Forms of legal-like authorizations of atrocity are not only manifest or literal, they can also be interpretative. Cohen (2003:107) asserted that “powerful forms of interpretive denial come from the language of legality itself”. As Cohen (2001; 2003) presents, legalism can entail a powerful mechanism of interpretive denial creating a discrepancy between the rhetoric and the reality and producing a legal façade substituting the material violations as something less pejorative through the use of language¹⁵³: a “non-pictorial discourse which invariably yields opaque versions of reality” (Hogg 2012: 104). Conduct encouraged by legal-like mechanisms can be portrayed as complying with legal parameters, can be *accredited* as performed with proper legal endorsement, *normalized* as part of the ordinary development of the public function, and even *desired* or considered *reasonable* with the purpose of preserving the *statu quo* or for preventing greater harms.

There are legal authorizations that do not seem to be contradictory with the criminal law prohibitions but that may become interpretative authorizations or implicit licenses for wrongdoing. These regulations do not exempt the application of the criminal law but create a reasonable expectation of impunity. An example of this form of containment can be depicted in the case of the

mechanisms deployed by the State in order to commit crimes is the disposition of a legal framework enabling wrongdoing.

¹⁵² In this respect, Colonial Studies have called the attention on the use of law as a device that enables the destruction of the colonized, legitimizing colonial violence, criminalization and persecution of those who challenge the colonizing power (Atilas 2015: 84). Atilas (2015) does not limit the understanding of law to a collaborative regime of spoliation but frames a three-dimensional approach: law is not only destructive but derives from a colonial reality and subjectivity, additionally enabling possible resistance when anti-colonial movements make use of the law to resist colonialism.

¹⁵³ “[M]agical legalism is a method to ‘prove’ that an allegation could not possibly be correct because the action is illegal. The government lists domestic laws and precedent, ratifications of international conventions, appeals mechanisms and provisions for disciplining violators. Then comes the magical syllogism: torture is strictly forbidden in our country; we have ratified the Convention against Torture; therefore what we are doing cannot be torture” (Cohen 2003:108).

extrajudicial executions perpetrated in Colombia between 2002 and 2010. During this period, the country was under the rule of a hard-right government that promoted and supported a law and order campaign against the guerrillas aiming at their military elimination. With the purpose of encouraging military hits, the Ministry of Defense issued some directives rewarding the killing of subversives. For several years, the military executed defenseless peasants and underprivileged people presenting them as combat casualties. Under this strategy, the UN Human Rights Committee (2010) reported that from 2002 to 2010 over 1,200 Colombian civilians were submitted to extrajudicial execution. The military officials who participated in these killings were rewarded with money, days-off, special training and even promotions.

The fact that the executions were rewarded without eliminating the criminal law proscription did not entail a legal waiver (after several years some prosecutions took place) but created a normative parameter and a political structure for decision making that somehow repealed the operation of the criminal law. From the perspective of law, this can be understood as a matter of validity and effectiveness of the legal intervention; however, in the social life the structure of authorizations conflicting with criminal law prohibitions can be difficult to detect being at the same time sufficiently capable for enabling criminal actions.

Legal-like authorizations of criminal actions can take the form of a metaphorical discourse that in certain contexts can seem banal, but that a contextualized and historicized assessment can allow to understand its sociological value and significance. For instance, in the PJ case intercepted military communications revealed that the military affirmed in the operation to retake the building: ‘We hope that if the sleeve is there, the vest does not appear. Over’. Due to the context and considering the regular language used in these operations, during the criminal proceedings, Police

experts concluded that these communications were an order with coded language to commit illegal acts, specifically the order to execute enforced disappearances (Tribunal Superior 2012).

The *context* refers to the historic background, the socio-political circumstances and the cultural and economic conditions of a given society. These are relevant factors when evaluating if an action is executed on behalf of the State. With this respect, for state terrorism, Blakeley (2009: 41) asserts that while in some cases it is possible to confirm that the State intended to terrorize the population, when there is no such evidence “we have to look to the broader context. In the case of disappearances, it would be helpful to determine whether there were disappearances of other individuals critical of the state during the same period”. For instance, if in Sweden a person is missing this situation would probably not be labeled as enforced disappearance at the outset, meanwhile, if the same situation occurred in Buenos Aires during the Argentinian dictatorship, one would more readily suspect that the absence of the person is probably due to an enforced disappearance because that is a recurrent occurrence in that social context.

The ends and goals that are disposed by the organization with the purpose of guiding the criminal actions are not always found in public policies or legal-like dispositions. While there are state criminal conducts that are public and even publicized as victorious commands undermining rival networks of power or simply as tactics of intimidation against an opponent force (Lasslett 2012), there are others that are characteristically obfuscated or concealed. These aims may not only be observable through *positive* indicators but may suppose a *negative* inquiry for detecting the goals of the State in situations when there are no manifest or express statements of motivation. While for the public cases different evidences are materialized in official propaganda, advertisement, policies,

directives and norms; there are crimes that are kept out of the reach of any public scrutiny, before which another perspective may be pertinent for their sociological observation.

In the absence of active and concrete motivational elements, the observer can detect the organizational aim through an inference concluding that the actions could only be adequately explained through the existence of a state goal. Thus, using a *negative* perspective the observer of state criminality detects the presence of the State motivations through the absence of a different probable explanation of the actions. With this respect, Robinson (2014) develops this form of observation for cases of crimes against humanity, developing a test based on disclosing the organized nature of the acts of violence through the improbability of their random occurrence. This test assesses that the policy ingredient is satisfied by showing the improbability that the crimes were coincidental individual acts¹⁵⁴.

In this context, the sociological observation of the organizational capacity and coordination for the wrongs as well as the common plan of action can be observed through the analysis of the *opportunity structure*¹⁵⁵ available for committing the wrongs and the *operational control and constraint* in place for its prevention, restriction or redress. These elements have been raised by the state crime literature for the observation of the motivational element deriving from the State

¹⁵⁴ This seems an adequate criterion for constructing a negative form of observation of state crimes. “More recent Tribunal cases are settling on the test of ‘organized nature of the acts of violence and the improbability of their random occurrence’. See, e.g., International Criminal Tribunal for Rwanda, Prosecutor v. Nahimana, Judgment and Sentence, 28 November 2008, ICTR-99-52-A, par. 920; International Criminal Tribunal for the former Yugoslavia (Trial Chamber), Prosecutor v. Kunarac et al., Judgment, 22 February 2001, IT-96-23-T and IT-96-23/1-T, par. 429; Blaškić, par. 203, see supra note 13” (Robinson 2014: 115).

¹⁵⁵ The expression ‘opportunity structure’ was also found in a work of Bryant (1979) where through a military sociology he analyzed deviant behavior in the military context.

(Kramer, Michalowski and Kauzlarich 2002; Kramer and Michalowski 1990; Kauzlarich and Kramer 1998; Rothe and Mullins 2006, 2007, 2008; Green and Ward 2004; Mullins 2009).

Table No. 9 Factors of observation of the Organizational goal	
<i>Capacity and organization of operation</i>	<i>Common plan of action</i>
<i>Opportunity structure</i> Means for attaining organizational aims and the resources that are made available <i>vis-à-vis</i> the intended ends.	<i>Operational control and constraint</i> Mechanisms of control, prevention and redress, including legal sanctions and social overview towards the actions of the State.

“Being a state (or being in control of one) strongly enhances the ability to create and capitalize upon criminal opportunity” (Mullins 2009: 21). When referring to the *opportunity structure* the literature refers to the means available for attaining organizational aims. In this sense, means may be offered by the lack of constraints for obtaining an intended goal as they may also be given by the personnel assigned to a particular function and their equipment. For instance, when security forces are called to react vigorously against social upraise and are given the task of neutralizing a group of protesters (a non-criminal instruction, in principle), and to that end they are only furnished with lethal weapons, it can be asserted that criminal actions are not discarded and that officials are furnished with an express opportunity for wrongdoing. Such disposition may enable a sociological observation of an organizational goal fostering a criminal conduct.

The means are thus related to the *organizational structure* which indicates the form of organization, the degree of specialization, the corporate culture and the codes of conduct of an institution and its officers¹⁵⁶. In other words, it indicates to what extent an organization is structured

¹⁵⁶ With this respect Bryant’s work on deviant behavior in the military, assess as factors of such conduct “the informal pressures and stains inherent in military culture” and “the structured subversion of organizational goals frequently component to military enterprise” (Bryant 1979: 7 in Ross 2000: 120).

and designed so that it can either perform criminal actions or refrain from them¹⁵⁷. For instance, if a specialized military unit that has systematically performed torture in the past is instructed to cross-examine dangerous suspects, it is expectable that the course of action of the organization will take a criminal connotation.

The described situation supposes the combination of means available to an end and lack of control and constraint. This situation can be characterized as the creation of opportunity structures enabling criminal-like situations (Mullins & Rothe 2007:138). The *operational control and constraint*¹⁵⁸ refers to mechanisms providing forms of excluding, addressing, disabling or sanctioning criminal behavior. These can be provided by the action of the legal system¹⁵⁹ or can be raised by the mass media, by actors as the social movements or the international community, among others.

¹⁵⁷ With this respect, it is relevant to recall the debate on training in the British police between T. Jefferson and P. Waddington. The debate started in 1987 with a publication in the *British Journal of Criminology* by both writers. “Waddington (1987) argues that training the police in paramilitary techniques leads to less violence, as untrained police are more fearful of [...] violence than those with confidence in their ability to handle violence. Jefferson attacks this position as ‘idealistically abstract’ (1990: 131) and advocates viewing the police from the perspective of those at the bottom [...], those driven to protest” (Menziez 2000: 145). Hence, Jefferson asserted that paramilitary policing rather undermines the principle of the minimum force. Jefferson’s position seems more reasonable.

¹⁵⁸ A part of the state crime literature (Rothe and Mullins 2006) claims a phenomenological distinction between constraints and controls; according to which, a constraint is a barrier that operates at the onset of or during the action, while a control is the preparation of a blockage of the action operating as an ex post sanction. This distinction proposes a temporal-based differentiation involving distinct measures depending on their presence either ex ante, during or ex post factum; nonetheless, in the present work we chose to group them because of their similar identity as forms of restriction of criminal actions.

¹⁵⁹ In this direction, Gill (2000) studies the forms of control of security intelligence agencies before the phenomenon of state crime. Focusing on the Canadian case, he asserts that the rule of law according to which the officials are submitted to the same law as the citizens “should provide one of the main checks on the abuse of power by the state” (Gill 2000: 102). With this purpose, he assesses that the role of courts is fundamental; although, a number of different factors limit judicial control over national security in all countries, either because of unwillingness, reluctance or because of legal or political constraints. In the same vein, authors as Grabosky (1989 in Ross 2000) assert that state crime is a form of attack against the rule of law.

Internal controls created by the State to govern its own conduct may exist in the form of counterbalances. According to Ross and Rothe (2008), the effectiveness of internal controls to state crime is remote. They assert that this kind of controls are usually underfunded and/or understaffed and that their purpose is often restricted to alleviating public criticism. On the other hand, *external controls* are those placed out of the structure of States. Authors such as Ross and Rothe (2008) are more optimistic about the capacity of this kind of controls for promoting and supporting accountability. The role of victims¹⁶⁰, human rights activists, social movements, NGOs¹⁶¹, international actors and the media¹⁶², among other actors, is viewed as relevant sources of *external control*.

The absence of controls and the lack of counterweights coming from the State may constitute a sociological indicator of motivations for performing deviant actions. Using this perspective, Blakeley (2009) refers to the problem of *state terrorism*¹⁶³ asserting that an isolated criminal conduct

¹⁶⁰ Victims of grave human rights breaches have a crucial role in visualizing the violations, giving account of the events, identifying the perpetrators and exposing their *modus operandi*. This role has led to the emergence of organizations seeking public awareness of violations, accountability and effective legislation against impunity (Buitrago, 2007). Victims who join organizations find such association important because it reduces their sense of vulnerability and gives more visibility to their struggle (ASFADDES, 2003). In this respect, commentators such as Sikkink (2011) frame the role of civil institutions and actors in building new standards, strategies and practices for achieving accountability. Visibility of violations is gained through demonstrations, documentation, public campaigning and other strategies raising awareness on this issues.

¹⁶¹ Human rights defenders can exercise external control. As reported by the UN High Commissioner for Human Rights (UN, 2004) a human rights defender is the person that protects or promotes the rights of people or groups. In Colombia, human rights defenders are vulnerable to attacks, intimidations and judicial prosecutions (Programa Somos Defensores, 2008). These attacks undermine the accountability they are seeking in the cases they are litigating.

¹⁶² As major sources of public information, the media are relevant actors to disclose violations and prevent abuses of authority. Nonetheless, the media can also create or reproduce justifications and denial of the crimes, as well as stigmatize and intimidate victims, witnesses, and judicial officers. Still, journalists in Colombia suffer from different constraints preventing them to exercise their profession freely. The IACHR (2008) has highlighted that journalists are victims of death threats and other violations that make their work particularly vulnerable in the context of an armed conflict. The IACHR (2008) special study on murders of journalists showed that between 1995 and 2005 Colombia registered the highest number of journalists killed in a country of the Americas region, with seventy-five homicides.

¹⁶³ “The state terrorism narrative has [...] been utilized by human rights activists and politicians to provide a different account of atrocities. In countering justifications based on the notions of war and excesses, this

can be differentiated from an act of state (terrorism) through the evaluation of the reaction of state institutions against wrongdoing: “[i]f measures are taken, swiftly, to try and punish the perpetrator(s) through proper legal and disciplinary channels, and if there is no evidence of a broader pattern of such incidents, nor of the state sanctioning such activities, we might conclude that this was a criminal act by an individual or group, and not an act deliberately enacted by the state to terrorize” (Blakeley 2009: 38). On the contrary, we may add, if these restrictions are absent or inoperative, this gap of control raises an indicator for the observation of organizational aims.

Indeed, if the measures of control or redress are deceitful or simply fraudulent (e.g. when measures are taken giving a mere appearance of control), or when they are impertinent, remarkably futile or irrelevant (e.g. when the control is clearly inapt for limiting the crimes or when measures are taken after long time or once the wrongdoing has been recurrently committed or completed), these can be relevant factors for the sociological observation of the state organizational aim. These ideas may enable an understanding of the link of lack this form of wrongdoing and the accountability around it. Let us review this in the next section.

countermemory narrative pointed instead to how the state was responsible for implementing a systematic yet clandestine plan of appalling crimes, from torture to disappearances.” (Lessa, Olsen, Payne, Pereira & Reiter 2014: 99). In the present work we will not employ the term *state terrorism*. Different state crime scholars study this subject including Penny Green and Ward (2004, 2005), Kramer and Michalowski (2005) and Chambliss (1989), among others. In accordance with Blakeley (2009), this approach is used by a small number of academics mostly because scholars concerned with (state) crime, she claims, do not tend to study this subject as such because it has no existence as a legal category. We decided not to refer to this notion in the present work not because the absence of a legal categorization of terrorism but because of the different conceptual, ideological and political controversies that it embeds, which we believe we do not have the space to properly address in the present research. However, from the expression terrorism we would like to retain the idea that the actions of the State that cause terror are an issue related to the criminality of the State. The IA Court judge García Ramirez has claimed that “State terrorism means that the State becomes a terrorist, sowing fear and alarm among the population, and causing anguish that gravely disturbs the peace that should reign in society” (IA Court 2006d: 20). In this respect, for instance, Blakeley (2009) shows how state terrorism has been used in the South by Northern states in the service of securing and dominating the resources and markets in the South. This is related to the concept of the Colonial State Terror that colonial studies relate to the spoliation and exploitation of territories, resources and colonized subjects using state terrorism (Blakeley 2009).

4.2.4 Strategy of obstruction of the legal system

In the literature related to state criminality, there is a recurrent concern for legal intervention under the general observation that this kind of wrongdoing often lacks social restraint and proper redress (Andreu-Guzmán 1996; Welch 2009; Correa 2009, 2012). In line with this general statement, in the case of my father's assassination, the Prosecutor General affirmed there was an apparent impossibility to process the crime derived from the sort of criminality at hand: "There is nothing to be done, it is a state crime". Worldwide, several crimes such as the one committed against my father are perpetrated without legal redress¹⁶⁴: State-prompted crimes are often incited and performed in a way that nobody is held accountable¹⁶⁵. Under this premise, in this section we will study the relation between this subject and impunity. Subsequently, this

¹⁶⁴ With this regard, the Parliamentary Assembly of the Council of Europe (2009) established that investigations in that continent regarding "widespread abuses committed by the security forces in conflict situations" have been "plainly insufficient" causing "impunity in cases in which state agents are suspected of having ordered or otherwise instigated or covered up crimes committed by non-state agents". An example of this situation is the secret detentions and tortures committed in the context of the counterterrorism campaign led by the United States and European countries. "[T]he European governments involved have done little or nothing to hold those responsible to account. Italy has gone furthest, convicting Italian and US agents, the latter in absentia, for kidnapping a man who was sent to Egypt and tortured, but some of those deemed criminally responsible have since received a presidential pardon. Every other criminal investigation in Europe into European complicity – in Poland, Lithuania and the UK – is stalled or has been shelved. The UK government has shelved the work of a judicial inquiry into allegations of complicity in rendition and torture, and instead handed over the task to a parliamentary committee that lacks necessary independence. Successive investigations into European complicity by the Council of Europe and European Parliament faced obstruction from most of the governments under investigation." (Raj 2017)

¹⁶⁵ According to the Human Rights Watch 2016 world report, this is a worldwide situation. The organization observed *inter alia* that crimes perpetrated by law enforcement officials result in frequent impunity in Georgia (p. 275). In Guatemala, the use of lethal force by the national police is a chronic problem and impunity is the rule (p. 292). LGBT people in Kyrgyzstan experience ill-treatment, extortion, and discrimination from state actors with widespread impunity (p. 368). In Mexico, unlawful killings of civilians by security forces take place amid an atmosphere of systematic and endemic impunity (p. 401). In Nigeria, impunity for human rights crimes committed by security forces remains pervasive (p. 422). In the Philippines, there is a failure to address impunity for the government's rights violations (p. 457). In Sri Lanka, the organization observed that the government took no significant measures to end impunity for security forces abuses, including police use of torture (p. 527). In Ukraine, it noted a widespread perception of impunity on part of law enforcement agencies (p. 598). In Venezuela, it referred to impunity for abuses by security forces as a serious problem (p. 631).

exploration will enable us to address the question: *in what sense does the study of state crime contribute to a better comprehension of the issue of impunity?*

Considering the researches in the subject, we can assess that the subtraction of the state criminal conduct from the organized operations of the criminal justice system is a relevant element for a sociological characterization of this kind of criminality. The constitution of different forms of obstruction of legal redress may be described using the metaphor of a *sanctuary*. The idea of *sanctuaries* brings back to an ecclesiastical imagery of the space in temples destined to the high altar and the clergy¹⁶⁶ to which different civilizations have attributed a sacred character. The metaphor of *sancturium* represents the constitution of social spaces or situations that remain inviolable, especially from any measure of force or civil law. Our use of the term in this work refers to shelter or protection by virtue of which state criminality take refuge from criminal law accountability and general legal intervention. Let us develop this idea.

In premodern times, people were allowed to flee from justice or persecution within the limits of certain ‘sacred’ places (Alston 1912). “Sanctuaries in antiquity were multipurpose. As stated in Mosaic Law, they served as shelters to all those being prosecuted or persecuted. [...] They] were often large places, sheltering persons of all shades and varieties: political dissidents, rebels, fugitive prisoners of war, persons deviating from the official creed and opinion, debtors, and of course criminals” (Bianchi 1994:139).

This right survived antiquity and appeared in every major medieval legal tradition (Shoemaker 2011: ix). In the Western world, the confluence and tensions between the Christian

¹⁶⁶ Sanctuary is variously designated apsis or concha (from the shell-like, hemispherical dome), and since the Middle Ages especially it has been called “choir”, from the choir of singers who are there stationed. Other names are presbyterium, concessus chori, tribuna or tribunal, hagion, hasyton, sanctum, sanctuarium.

doctrines and civil powers gave an unprecedented attention to the enshrining of sanctuary as a right (Shoemaker 2011: 5). Some modern readings assert that this right emerged due to the imperfection of the legal system (d'Mazzinghi 1887) and the vulnerability of certain political regimes (Stanley 1861) which had to cede part of their power for the preservation of their authority. Although in the early Middle Ages this was perceived as an expression of the power of the Catholic Church over society, according to Shoemaker (2011) by the later Middle Ages this was perceived as an appropriate form of civil government and pious kingship, “occasionally implemented with more enthusiasm [...] than the papacy found commendable” (Shoemaker 2011: 5). Following this interpretation, we can understand that sanctuaries were not expressing a shortcoming of the civil political power: “[f]ar from being a concession to the Church by cowardly monarchs, grants of sanctuary actually enhanced their status as rulers” (Helmholz 2012: 589). The interpretation of Shoemaker (2011) of the right to sanctuary as an epitomized expression of the civil power is useful for the metaphor of sanctuary that we use for the conceptualization of state crime: the *right to sanctuary* and *sanctuary as containment of the legal system* are manifestations of (political) power blocking the possibility of legal redress.

If we accept the assertion by Hart (2012: 27) that “[t]he social function which criminal statute performs is that of setting up and defining certain kinds of conduct as something to be avoided or done by those to whom it applies, irrespective of their wishes”, the strategy of obstruction of the legal system creates a form of exception or pseudo-exclusion of those to whom the laws are to be applied upon. This can be portrayed in the PJ case through the repeated refusal of retired Col. Plazas to be present at the courthouse because, in his words, “I do not recognize as legal or constitutional the trial that is being undertaken by the ordinary jurisdiction” (Juzgado

Tercero 2010)¹⁶⁷. This contention was also put forward by his wife, Thania Vega (2011: 98), who wrote: “he decided not to go to the hearings because he felt that the military did not have minimum guarantees in criminal proceedings before civil courts”. The alleged right to special protection and to the enforcement of his social status, enunciated through the argument that a special jurisdiction was the competent forum for the case, entailed a demand of placing the defendant out of the reach of the ordinary criminal law system¹⁶⁸.

These imageries are not only constructed invoking the status of the actors, they are also allegedly immunized appealing to the supposed social worth of the actions, the protection of the *way of life* of a particular population or, ultimately, the survival of the State. The imagery of self-exclusion in sum is drawn on the grounds of an open claim of protection from the *ius commune* regarding conducts which instead weigh against others (paraphrasing Libellus de verbis by Cortese in Steinberg 2013: 115).

The premodern *right to sanctuary* however similar to the *sanctuary* created around state criminal actions as measures of exclusion from legal restraint, entail considerable differences. Let us review three substantial contrasts in order to better characterize *sanctuary as containment of the legal system*:

i) The first substantial difference is that while the ‘right to sanctuary’ is a legal entitlement in

¹⁶⁷ The defendant combined this with a continuous substitution of representatives: at least three times Plazas’s lawyers resigned in crucial moments of the procedures and, according to Plazas (2011: 377), the judge of the first instance appointed sixteen *ex-officio* lawyers when the defendant did not appoint a legal representative. Every time a new lawyer joined the case, the trial had to be suspended producing undue delays. These delays were used by the defense to raise motions of expiration of terms.

¹⁶⁸ The UN special rapporteur on extrajudicial killings observed that there is sometimes a “conscious attempt by military judges to frustrate the efforts of the civilian justice system” (UN 2010b: 16). The UN Working Group on enforced or involuntary disappearances has reported that cases regarding the participation of security forces in disappearances generally went unpunished especially when submitted to the military jurisdiction (UN 1989: 12).

favor of wrongdoers, who therefore enjoy protection from prosecution, for state criminality obstruction supposes a strategy and not a legal right. Thus, although an agent of state criminality may request, allege or demand the support and defense of the state political structure (to prevent the operation of the criminal justice system regarding the problematic criminal situation), such demand does not constitute a legal entitlement, since it does not meet a correlative duty, legally enforceable and justiciable - using Hohfeld's categories of analysis of rights.

Rather, sanctuary for state crime involves the design and implementation of a series of maneuvers or stratagems subtracting the wrongs from legal intervention. The efficacy of these mechanisms, however endorsed by different resources and machineries connected to the public power, is nothing but a probability and their applicability is a matter of force and power and not of legal enforceability. The effectiveness of this strategy is contingent, so it can be characterized as a constraint (in opposition to a jurisdictional limit recognized as such by the legal system – as in the case of the right to sanctuary). However, from a sociological perspective it is noticeable that the public authority deriving from the State and the considerable amount of resources that it supposes, entail a severe constraint for the legal intervention *vis-à-vis* state agents' misconduct: “[S]tate officials are in the privileged position of being able to mobilize significant resources to conceal their activities” (Lasslett 2012: 126). Under the auspices of these resources, culprits may be reasonably admissible for evading legal intervention (inspired in Rodenhäuser 2014: 916).

The forms of obstruction in opposition to a *right* to subtraction from the legal system operation, become noticeable in the PJ case with the regret that retired Col. Plazas, his family and political allies expressed about the supposed lack of support from the Government when the prosecution was in place. “They left him alone, in contrast to his attitude [...] when he defended

the flag that he swore to honor” (Vega 2011: 101). The deception expressed by Plazas when he was prosecuted allows portraying a demand for obstructing the legal system that was supposedly not met by the political system. As such, this request does not constitute a justiciable right (to be raised before the Courts), but a political expectation (presented to the Government). Moreover, such expectation expresses the recognition of the ability or at least the pertinence of a (political) action of interference for countervailing the legal intervention.

The PJ case, for example, presented several pressures against the autonomous implementation of the criminal law program of action, rejecting criminal accountability of the military and other high state agents. A paradigmatic graphic example of these constraints and their capacity of hampering the legal reaction can be found in *Picture No. 12* of the Parliamentary dossier against President Betancur for the PJ events. Its cover states: “Do not touch. PJ Dossier”.



Picture No. 12 Retrieved from Caracol Radio 2012.

In the criminal prosecution, the involvement of the political class and the military was portrayed among the actors of the case as a permanent and inexorable constraint affecting the ability of the criminal justice to produce an autonomous decision. These pressures were particularly visible in public statements from the Government (El Espectador 2012b)¹⁶⁹ – especially from Presidents Uribe¹⁷⁰ and his successor Santos¹⁷¹, the Military High Command (CM& 2011), the retired Generals

¹⁶⁹ When the Appeal Court asked the International Criminal Court Prosecutor to investigate former president Betancur (Tribunal Superior 2012), the government expressed ‘deep concern’ for this provision.

¹⁷⁰ When the ruling against Plazas was issued in 2010, then President Alvaro Uribe publicly expressed his regrets for the decision. In a publicized meeting President Uribe and the Military Commanders ‘examined’ the ruling declaring to the media that Plazas’s conviction was a piece of “legal insecurity”

and military veterans' (Revista Cambio 2007), some Congressmen¹⁷², some of the heads of the largest business corporations and high-level politicians (Revista Semana 2012b)¹⁷³. Regarding this situation, the UNHCHR asserted that political and media pressure against the verdict posed "a threat to judicial independence and can increase the vulnerability of judicial officials and victims' families and their representatives" (UN 2012).

The described interference from the political system reminds the metaphor of sanctuary as an act of kingship (in the sense of the right to sanctuary), demonstrating the intention and ability of the political power to obstruct the operation of justice. Sanctuary for state crime is a strategy of protection from prosecution supported by social systems capable of exercising some sort of intrusion. In these cases, the independence, authority, competence and impartiality of the judiciary are affected by influences alien to the administration of justice, intervening the circuit of operation of the criminal justice¹⁷⁴.

against the military while the Armed Forces Commander remarked the expectation of the institutions that the decision would be reconsidered (Revista Cambio, 2010).

¹⁷¹ When the Superior Court of Bogota acting as the appeal Court in the PJ case ordered in 2012, to different state authorities to hold a public ceremony apologizing for the crimes committed on PJ (Tribunal Superior de Bogota 2012), President Santos decided to offer a public apology "on behalf of all Colombians" to President Betancur and the Armed Forces for the Appeal Court decision (El Espectador, 2012c).

¹⁷² The then Congress President expressed about the Appeal Court ruling: "the judiciary commits excesses when it comes to judge the security forces" (Revista Semana 2012a)

¹⁷³ In September 2011, the former vice-president, the heads of the largest business corporations and high-politicians published a front-page article in the journal El Tiempo entitled "Why Colonel Plazas Vega is not free yet?", pushing for Plazas liberty. The Congress also put pressure on the case during the debates of a Transitional Justice Bill. The author of the project declared that the Bill could correct the "historic mistake" of sentencing the military in the PJ case.

¹⁷⁴ The Inter-American jurisprudence has established that judicial independence is essential for the exercise of the judicial function (IA Court 2004h: 171; 2005e: 145; 2009b: 67). This principle gives rise to a series of guarantees and rights, as the protection of judges against external pressures, guaranteeing their working conditions, stability and due process of appointment and dismissal. The IA Court has understood that the tenure of judicial officers under these parameters ensures judicial protection against interference and political pressures.

These forms of obstruction do not constitute proper rights. Their operation remains dependent on different social factors and their implementation remain contestable as unlawful. Thus, we are able to characterize this issue as a struggle between the criminal law system and those institutions or systems acting as protectors, interested parties or collaborators of the crimes (e.g. the military or the political system). This tension may involve an asymmetry of power between the legal system and the intervening system, impeding the former to react autonomously; in other words, the organized criminal group might be powerful enough to co-opt any scrutiny.

In the PJ case, for instance, lawyer German Romero (representative of some of the victims) asserted: “in this case one wonders how far the power of the military can go. Even today, the procedures depend on their acquiescence; the prosecutions are nothing but scratches on the wall”. The perception that the case was permanently submitted to interference and the feeling of impotence captured by the expression ‘scratches on the wall’ proposes a metaphor of a blockage affecting the judicial procedures (the wall) and a situation of asymmetry of power. The asymmetry of power concerns the possibility of action of the judicial system *vis-à-vis* the ability of the defendant interfering the judicial procedures (building a wall) and the vulnerability of the victims.

Different studies frame the phenomenon of impunity as a problem of power. In 1898, Tarde observed that powerful actors often escape from accountability and public redress placing them above the law. Tarde (1898) referred to this problem as ‘impunity’ shielding the strong (in terms of political power) from punishment. Tarde’s work is useful for indicating a problem of certain social systems or actors who are able to obstruct the possibility for implementing the criminal law program of action (although in his work Tarde preserved the traditional construction of impunity as opposed to punishment). With this respect, the prosecutor of the PJ case, who was dismissed from her position

afterwards, concluded: “when those submitted to prosecution are powerful people and [you as] a prosecutor enter their domains, you might suffer the consequences” (El Espectador 2011).

ii) The *second substantial difference* is that the medieval right to sanctuary enabled a composition system. According to this, the wrongdoer was protected from prosecution until a fine was paid, amends were made, goods were forfeit, or penance or exile took place, after which the person was exempted from corporal or capital punishment (Shoemaker 2011).

“Let no one dare drag forth a guilty one who has fled to a church, neither give him over to punishment or death, that the honor of churches may be preserved; but let rectors strive to obtain the fugitive’s peace, life and members. However, let [the fugitive] make lawful composition for that which he did iniquitously” (Gratian’s Decretum at C. 17. q. 4. c. 8 in Corpus Iuris Canonici, 1879–81 in Shoemaker 2011: 157).

While sanctuary for state crime may also be understood as a mechanism of protection in favor of the wrongdoer, it does not refer the parties of a problematic situation to any other form of composition or compensation to victims or society. In this context, the form of containment that we are describing may not only involve the concealment of the misconduct - ranging from methodical obfuscation, to denial or different forms of justification and excuses¹⁷⁵. Containment may also take the form of express endorsement, direct acknowledgement or indirect recognition of the actions without admitting their consequences, followed by the subsequent obstruction of the criminal justice reaction.

In short, for state crime, the mechanisms of denial, obfuscation, protection and moralization may portray legal intervention as implausible, absurd¹⁷⁶ and, even, unjust¹⁷⁷. In this context, there

¹⁷⁵ A regular justification of state criminal conduct is the allusion to the *raison d’état* as a narrative of necessity and urgency according to which wrongdoing is performed for the sake of the State. The *raison d’état* does not necessarily deny the illegality of the conduct but intends to legitimate it as an ultimate measure, a savior resource and *ultima ratio* for protecting a superior interest: in the words of Foucault (1991: 138), the reason of state adopts the form of the infringement of the principles of law, equity and humanity in the sole interest of the State.

¹⁷⁶ In public statements, retired colonel Plazas stressed that he had saved many people in the PJ siege and that the suggestion of his participation in the crimes was ‘absurd’ (Gibson, Salazar, 2012).

is no alternative legal response to the problematic situation, there is simply no offer for a solution and, essentially, no acknowledgement of the problematic situation.

iii) This is related to the *third substantial difference*, which is that the right to sanctuary entails a form of addressing wrongdoing rather than a way of obfuscating the misconduct. In its medieval form, the right to sanctuary was attributed to individualized wrongdoers recognizing their infractions against which the legal system refrained from reacting. On the contrary, sanctuary for state crime is meant to obfuscate the conduct, to hamper the application of the code crime/non-crime and to preserve the anonymity of the criminal (or at least of her actions as performed on behalf of the State).

With respect to state crime, the containment of the legal intervention may be implemented through strategies of silencing and denial. For instance, in the PJ case, the Truth Commission established that a political pact of silence was implemented concealing the misconducts committed during the PJ military operation: the complaints for the disappearances were not seriously addressed in the aftermath of the events, they were ignored and dealt with silence (Gómez, Herrera and Pinilla 2010).

Besides silence obfuscating the misconducts and hampering the recognition of the crimes, sanctuary may entail a “general acceptance of the relevant normative code whilst seeking to exempt the particular situation at hand” (Hogg 2012: 90). This entails a form of denial: a knowledge of the situation without the acknowledgment of what it involves. “Denial, then, includes *cognition* (not acknowledging the facts); *emotion* (not feeling, not being disturbed);

¹⁷⁷ In 2007, twenty retired Generals presented a letter to the Prosecutor General expressing their ‘indignation’ for the ‘unjust detention’ of the military in the case (Revista Cambio, 2007).

morality (not recognizing wrongness or responsibility) and *action* (not taking active steps in response to knowledge)” (Cohen 2001: 9).

Denial may be expressed through verbal statements or other discourses. As Cohen (2001) has underscored, there are at least three main classes of denial statements (referring to the object denied): the raw facts (*literal denial*), their meaning (*interpretative denial*) or the implications that follow from them (*implicatory denial*). Literal denial is usually present as: ‘nothing happened’. In the PJ case, retired Col. Plazas has affirmed many times that there are no disappeared in the case, while several times he has also affirmed the opposite:

‘People did not disappear’ ¹⁷⁸	‘People were disappeared’
“They are accusing me of disappearing people who have not disappeared” (Caracol TV 2011).	In 2008, Plazas published a book where he affirmed that Irma Franco “[...] is the only person about whom there is evidence that survived and was brought to the Casa del Florero, where she was interrogated by intelligence officers. At eight o'clock in the evening, a group of men in civilian clothes took her in a jeep. Since then, she does not appear” (Plazas 2008: 5).
“Such thing as the disappeared of the Palace of Justice simply does not exist” (El Heraldo 2012)	“The M19 is the one responsible for what happened. I think the M19 is not responsible for forced disappearance but for murdering. I want to make clear that the only disappeared is the guerrilla Irma Franco” ¹⁷⁹ (Revista Semana 2015)
“If we analyze what the legal procedures against military officials found [...] you can notice that the cafeteria employees never came out alive” (Plazas 2011: 27).	
“There are no disappeared people” (RCN 2012, min. 4’)	

Denial statements can be directed not only to the facts themselves but also to their conventional interpretation (*interpretative denial*). These are hermeneutic in nature and are expressed through a “phraseology [...] needed if one wants to name things without calling up mental pictures of them” (Orwel, *Politics and English Language*; 362 in Cohen 2001: 107). The

¹⁷⁸ This affirmation is also sustained by a publication from the Corporación Defensoría Militar (2013) that concludes that in the case there are no people disappeared but corpses without proper identification.

¹⁷⁹ In 2013, Plazas’s defense had already affirmed that “[i]n the PJ one person disappeared” (El Colombiano 2013).

usual interpretative denial statement is: ‘it is not what it looks like’. In the PJ case, retired Col. Plazas asserted that there were no disappearances but killings (performed by the guerrilla), wrong identifications of the bodies, or even good treatment and proper consideration toward the hostages:

<p>‘People did not disappear, they are dead or unidentified’</p> <p>“I insist: there are no disappeared” (Plazas in <i>Diario El Espectador</i> 2012).</p> <p>“They are not disappeared, they are dead because they were killed by the M19” (<i>El Colombiano</i> 2012; Plazas 2011: 27).</p>	<p>‘I am the rescuer, not the perpetrator. Others are responsible for what happened’</p> <p>“According to the prosecutor, retired Col. Plazas was coauthor of enforced disappearance just because he was cautious in dealing with the released hostages. What a conclusion! [...] It turns out that an act of mere courtesy with the hostages [...] trying to give them preferential treatment, when they were going out of that nightmare produced by M19 terrorists, called by the prosecutor ‘a rebel group’ [...] is the evidence of having committed such an atrocious crime as the one for which I have been wrongly accused? [...] No, Madame Prosecutor, that is not an argument of Col. Plazas ordering mistreatments or disappearance of people. It rather indicates quite the contrary” (Plazas 2008: 60-62)</p>
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Denial statements may also focus on the implication of the events (*implicatory denial*). In these cases, the denial relates to the psychological, political or moral implications that follow a wrongdoing. “Implicatory denial concedes the facts of the matter and even their conventional interpretations. But their expected implications [...] are not recognized. The significance of the reality is denied. These are ‘denials’ in the loosest sense. They evade the demand to respond by playing down the act’s seriousness or by remaining indifferent” (Cohen 2001: 22). These mechanisms are numerous; some of them are the denial or minimization of the victims, the

condemnation of the condemners, the advantageous comparisons with alleged aims and the scapegoating¹⁸⁰.

The minimization of the victims takes place when the implications of the harmful actions are minimized or unrecognized. In the PJ case, this form of denial had many expressions. For instance, when the victims' demands were portrayed as desperate expressions due to their social vulnerability¹⁸¹:

‘All they want is money’

Plazas (2011) published a book entitled *The Business of Pain*, where he argued that the prosecution was part of a “business” created by unscrupulous individuals who profit from the suffering of others (Plazas 2011: 327). According to him, investigations were prompted by a group of people that were focused on taking economic compensation out of the situation: “we have to remember that they are very humble people. The business of pain” (Plazas 2011: 135). In different opportunities, Plazas (2011) has assessed that the families of the disappeared are desperate to have money because they are poor.

Other forms of implicative denial are advantageous comparisons claiming the benefit of a collective goal through arguments of convenience of the wrongdoing. This can be noticed when the violations are portrayed as mechanisms preventing other harmful activities, when the victims are exposed as worthy of harm, or when violations are considered as defending higher interests (Cohen 2011). An example of this logic can be found in the PJ case: Col. Plazas, who was in command of the field operation, improvised a press conference in the middle of the military operation. When asked what the military were doing, he asserted: “Here we are pal, saving the democracy!” This

¹⁸⁰ Scape goating aims at blaming some ‘bad apples’ for the misconduct of the group. This argument aims at maintaining the credibility of the system as well as making believable the rhetorical denial of the violations (IPC and Corporación Jurídica Libertad 2010).

¹⁸¹ The portrait of the victims as individuals interested just in money is questioned in the interviews of the case as will be reviewed in chapter 5. Reparations do not seem to be the main argument why victims seek justice. In a general scenario, this was found on a research on the prosecution of crimes against unionized workers in Colombia where La Rota, Montoya and Uprimny (2010) concluded that only in 8.3% of the dossiers for violence against unionists victims requested the economic reparation of the damage. However, according to the study, in most cases the judge ordered *ex officio* financial compensation for the vict

phrase has remained as a stigma of the military operation to which the victims have replied: “murdering and disappearing people is no way for saving democracy!”¹⁸²

According to Aldana-Pindell (2004), the social acceptance of justifications can create a representation of empathy with the perpetrators. This could make prosecutions less likely because of the social consideration for the violations. Denial affects not only the information about the person disappeared, but also the denunciations or demonstrations that can be easily portrayed as conjectures or part of conspiracy plans. “The general uncertainty as to what is really happening makes it easier to cling to lunatic beliefs. Since nothing is ever quite proved or disproved, the most unmistakable fact can be imprudently denied” (Orwel 1984: 315, in Hogg 2012: 92).

‘There are no evidences’

“There is no evidence to suggest that there are people disappeared. The evidences that the prosecutor Buitrago presents to the public opinion through the mass media, are false! [...] If there is no evidence, there is no crime of forced disappearance. And, if there is no crime of forced disappearance, there is no way that civil courts have competence on this matter” (Plazas 2011: 29)

‘I am too clever to do things as what they say that happened’

“How could it make sense that Col. Plazas, whose troops helped to rescue at least two hundred and sixty people, would have taken a group of workers who served coffee to torture and kill them afterwards? That is outrageous”. “Col. Plazas, who has always been in top places [...] is not so clumsy as to have a group of people killed and buried in the same military unit he was commanding” (Plazas 2011: 257).

The condemnation of the condemners is a form of implicatory denial relevant to strategies of obstruction, by which the person accused of wrongdoing reply to the legal control with an accusation. In some situations, a person blamed for a crime can argue *tu quoque* by turning accusations back on the accuser. In the PJ case, retired Col. Plazas (2011) asserted that the testimonies of the prosecution

¹⁸² “At the time of the massacre in the Palace of Justice, and habitually, the military leadership depicted itself, and was described by the admiring media and politicians, as the defenders of democracy. And they are indeed the designated defenders of the particular version of democracy they defend with such ferocity. The Palace of Justice is a chilling but fascinating exploration of the realities that underlie the copious rhetoric of a pseudo-democracy.” (Cruise 1993: 9-10)

were frauds organized by ‘dangerous communists’ and her wife asserted that the people who gathered them were a ‘coalition of terrorists’ and a group of ‘monstrosities of evil’ (Vega 2011: 57). According to retired Col. Plazas, human rights NGOs, especially those involved in the procedures, are industries of conspiracy against the military and ‘apologists of terrorism’ that want to change democracy for a ‘totalitarian Marxist system’ by manipulating the justice system (Plazas 2011: 259-260). Also, he affirmed the prosecution was accomplice with drug trafficking and criminal gangs: “the organized crime infiltrated the judicial system” (Plazas 2011: 327).

In 2010 the judge of the case, María Jara, received death threats related to Plazas’s trial. In that same year, during an audience, Judge Jara denounced publicly that a false intelligence report was issued implicating her in drug trafficking (El Espectador 2010). Even though the IACHR (2010) granted precautionary measures to Judge Jara and her son, the threats continued and she had to flee the country right after she issued the conviction against retired Col. Plazas. Other judicial officers were also harassed at crucial moments of the PJ procedures: in 2009, Magistrate Claros was threatened when he was deciding whether the case should fall under military jurisdiction (El Espectador 2009a); and in 2011, prosecutor Buitrago denounced that during the procedures different journal editorials were issued implicating her in drug trafficking (El Espectador 2011) and qualifying her as a guerrilla collaborator. Additionally, in the official website of the Ministry of Defense a photo of her was published being targeted by a sniper.

Stigmatization is linked with this form of implicatory denial, facilitating to accuse the accusers as the ‘real’ deviant. The prosecutor of the case and the judges were not the only target of different acts of violence and criminal and disciplinary complaints for malfeasance, forgery, fraud and conspiracy presented by Plazas’s defense; the victims were recurrently stigmatized as well.

Incriminating the victims in the siege and portraying them as the ‘real’ deviants was used as a justification for the atrocities. An event of stigmatization frequently raised by the interviewees is the case of René Guarín (brother):

‘The case: a Greek tragedy set up by guerrillas’

In 2010, a radio station informed that René Guarín had been involved in the M19 guerrilla during the 80s (W-Radio 2010). At the same time, Journalism without Borders released an article identifying him as a ‘guerrilla’ who had planned a plot against the military “setting up a Greek tragedy” to falsely implicate Plazas for a crime that he had never committed: the disappearance of his sister (Periodismo Sin Fronteras, 2010).

Mr. Guarín admitted before the press his participation in the guerrilla, for which he had been granted an amnesty (El Espectador 2010c). In a personal interview, he asserted: “I decided to join the guerrilla and then I demobilized [...]. When my sister disappeared, I decided to take the risk of war. I went to prison. I was tortured. [...] Those are life choices that people make”. This information was revealed a month and a half after the first ruling for the PJ case and motivated death threats against Mr. Guarín, who fled the country in fear of death in 2011.

In his book, Plazas (2011: 192) affirmed that the procedures had been promoted by people like Mr. Guarín who was a ‘guerrilla’, a ‘kidnapper’, a ‘bank assailant’ and a ‘robber’. The use of this sort of justifications was also present in the criminal hearings. Before this, in one of the hearings prosecutor Buitrago concluded that retired Col. Plazas aimed at making the victims look like the enemies (El Espectador 2012b). According to the UNHCHR, in Colombia there is a tendency to discredit and stigmatize the victims of human rights violations (UN 2012).

The strategies of obstruction directed to the victims started when they received threats urging them to stop the search for their loved ones (IA Court 2014: 304). This implied a form of neutralization of the system, because the victims were the main actors pushing for the criminal law investigations. Additionally, their legal representative, Lawyer Umaña, was threatened from the beginning of the inquiries¹⁸³ resulting in his assassination in April 1998¹⁸⁴. With this regard, María Navarrete (wife) affirmed: “when Eduardo Umaña was killed I thought the case was lost”. According to Jorge Franco (brother), when this happened “I completely stopped everything [referring to the search of information about his sister], because I thought none of that legal activity was worth it”

¹⁸³ In August 1987, a pamphlet threatening Umaña signaled him as a lawyer critical of the PJ military operation.

¹⁸⁴ In that same month, Umaña had obtained a Court Order for the exhumation of the PJ remains.

(Juzgado Tercero 2010: 116). With this regard, Rosa Cárdenas (sister) said: “they killed the person who was like our father, who was taking us down that little road of justice; those were very sad times and the case was paralyzed”.

This form of blockage against the justice operators, the victims and their legal representative was also directed against the information that they had gathered. In this regard, Ángela Buitrago (Prosecutor) assessed that over seventy-five videos and several audio recordings of military communications that were part of the dossier had disappeared when she assumed the investigations on the case. Blockages against the justice system when assessing evidence may constitute a factor of impunity impeding the system to ascertain the facts, to establish the wrongdoing and to determine those responsible for them. This happens, for instance, when witnesses are affected. In the PJ case, out of the group of witnesses, a former military called Edgar Villamizar declared in 2007 that he had eye witnessed the torture of at least five people who, according to him, had been brought to the Cavalry School in 1985 (Revista Semana 2015). At a turning point of the trial, Villamizar vanished (El Espectador: 2009b; Tribunal Superior 2012: 403) and in 2011 retracted his confessions declaring before the *Procuraduría* that he had never served as a witness in the process¹⁸⁵. Finally, in 2015, Thania Vega (Plazas’s wife) tweeted: “Villamizar, who had the courage to denounce that his supposed testimony against Plazas was false, has died. May he rest in peace” (El Tiempo 2015b).

The attack against the forms of gathering evidences is particularly relevant in cases of enforced disappearance because this violation is based on the lack of information on the whereabouts of the person abducted. By erasing the traces of the person abducted, perpetrators delete traces of

¹⁸⁵ In this respect Villamizar asserted: “Mis apellidos son Villamizar Espinel y no Villarreal; soy de Cúcuta y no de Pamplona; la firma que aparece al final no es la mía (...) Tampoco es cierto que estuve en la Escuela de Caballería, la única vez que estuve allá fue en el año de 1982, cuando me enviaron del Batallón Vargas a adelantar un curso de contraguerrilla urbana” (El Tiempo 2015b)

their criminal actions and possible accountability. If there is no crime, there cannot be any responsibility, and of course, no legal redress.

The former observations enable us to establish as a relevant element of state criminality the constitution of forms of strategies obstructing the legal system. Through the metaphor of the *sanctuary* we were able to characterize this strategy of obstruction as a series of maneuvers or stratagems aiming at making criminal actions and their actors unavailable for legal intervention, and particularly *inaccessible* or *untouchable* for the criminal law system¹⁸⁶. In this context, the lack of control of crimes is not to be reduced to a failure of restraint but may be observed as an intended outcome fostered by social systems alien to the legal system. Indeed, the strategy of obstruction of the legal redress may be enforced by different social systems, creating a *safe space* for perpetrators beyond the reach of the criminal justice¹⁸⁷.

¹⁸⁶ David (2006) proposes a classification of delinquents according to their interaction with the criminal law system referring to four categories: the *sacrificeable* (under-privileged people who are recurring clients of the criminal justice system), the *undesirables* (deviants that regardless of their danger are portrayed as threatening and, hence, repressed through a combination of social control mechanisms), the *inaccessible* (delinquents who are hardly reached by the legal system, because of their skills, status or power) and the *untouchables* (who enjoy legal immunity from prosecution).

¹⁸⁷ An additional difference between the rights to sanctuary and sanctuary for state crime is that the latter cannot be physically delimited. In this sense, there is also a difference with Gerald Neuman's (1996) 'anomalous zones'. Through this expression the scholar refers to geographic areas or particular contexts wherein certain principles accepted as general to the wider society are suspended in regard to certain problematic situations. Within this idea, Neuman (1996) studies two examples: the red districts and Guantanamo refugee camps. In reference to the red districts, Neuman observes that the legal system tolerates activities that are normally considered as illegal (and even criminal in some cases), without need of a general assessment of breaking the validity of the legal order. In this same study, Neuman studies Guantanamo as a refugee camp, especially for Haitians. This is an example of the anomalous zones, because Guantánamo in this case (and so many more, we can add) emerges as a place where foreigners are deprived of their constitutional rights, including rules that are claimed to be essential to the legal system and that, although suspended, do not imply the formal deletion of the existing order. Within the study of 'anomalous zones' there is the authorization of certain activities, in favor or against certain people, without invalidating the legal order. This double condition shows a similarity with the metaphor of sanctuary to state crime, since on the one hand there is no general invalidation of the order and, on the other hand, it is presented as both a benefit to 'all' and an impairment to 'certain people'.

From this section we can therefore conclude that the characterization of state criminality allows to draw a relation with the phenomenon of impunity as well as it enables the observation of different elements for a construction of the concept of impunity. With this respect, one of the main indications is the localization of the problem outside the internal operation of the justice system. When reviewing the subject of state criminality, we were able to observe an environmental intervention obstructing the possibility for implementing the criminal law program of action. In this sense, when observing the problem of impunity we should consider the interactions of the legal system with other social systems and actors capable of affecting the autonomous operation of the criminal justice.

These considerations may be important for the reconstruction of the concept of impunity that will be developed in detail in the successive parts of the present work. For the moment, a word of caution is in order with respect to the extent of the phenomenon that we are designating as *obstruction*: any form of pressure, opposition or tension against the judicial system does not constitute the problem that we are referring. The problem of *obstruction*, as we are able to frame it through the study of state criminality, is quite singular and specific: this phenomenon emerges when the judicial system is unable to maintain, preserve and guarantee its possibility of autonomously implementing the criminal law program of action. This perspective, coming from the characterization of state criminality, raises important elements for a sociological reconstruction of the concept of impunity. Let us now concentrate in this possible reconstruction. With this purpose, we will draw a characterization of the literature and social discourses dealing with impunity, in order to subsequently offer a reconstruction of this issue from a sociological perspective.

5. Impunity

This part of the research aims at problematizing, elucidating and reconceptualizing ‘impunity’ from a socio-legal perspective. With this purpose, we will first determine: *how has impunity been observed until now?* And, furthermore, *how to critically assess discourses about impunity in contemporary societies?* This study will allow us to depict the forms that the term *impunity* adopts in social discourses as well as to problematize the blind spots and paradoxes that these conceptualizations produce. In this regard, we will focus on the constructions coming from the criminal law and the human rights¹⁸⁸. These are two relevant fields of observation which have produced profuse and leading representations on the subject of impunity. Through this analysis and problematization, we will attempt at establishing pertinent elements for delimiting a notion of impunity from a sociological perspective. Ultimately, this chapter of the research will attempt at addressing the following question: *how can we observe, conceptualize and characterize impunity from a sociological perspective?*

With regard to this question, we aim at elucidating what should be excluded from the notion of impunity – what is not impunity as a general sociological phenomenon; and, what

¹⁸⁸ This work will not embark on a discussion about the content of human rights. It will not elaborate on its propensity to imperialism (Hardt and Negri, 2009), on its lack of neutrality and universality (Mutua, 1996; 2001), on its ineffectiveness (Hathaway, 2002), or on its depoliticizing effect (Savage, 2008). This work will simply accept that the scope of human rights is wide-ranging, covering the basic conditions of respect and promotion for human life and dignity –which are themselves expanding concepts. However we consider human rights should consist on the protection and guarantee of life and dignity according to a social program of humanism and social justice.

conceptual elements should be relevant for constructing a socio-legal notion of impunity capable of avoiding the problems and paradoxes that we will refer to and analyze. For this construction, we will use as an empirical point of reflection the phenomenon of state criminality. However, we believe that the conceptualization proposed here will be useful for describing “impunity” in all criminal matters (and not only in reference to state crimes). Certainly, this is a theoretical statement that can be revised and evaluated by other empirical studies or theoretical reflections.

5.1. Impunity in social discourses: a tale of ambiguous unanimity

Impunity is more easily recognized or proclaimed than defined and there is not a consistent effort of reflection and clarification of this issue. Much like pornography or terrorism, this term presents a limited distinctiveness but a recurrent usage in social discourses¹⁸⁹. Most of these discourses are charged with a political and emotional burden of social denunciation and unease. While an observer can find a frequent reference to the topic, it is extremely difficult to delimit the concept of impunity. *How has impunity been observed until now? How can we observe, conceptualize and characterize impunity from a sociological perspective?*

Information on the subject of impunity is vast and diverse¹⁹⁰. In internet an enormous amount of information, sources and themes are associated to this topic. Until April 2017, there

¹⁸⁹ Inspired on Ben-Naftali and Michaeli (2003: 270) when referring to terrorism. “Like pornography, too, this discursive illusiveness is essentially due to the political and emotional baggage attached to the activity” (Ben-Naftali and Michaeli 2003: 270)

¹⁹⁰ When searching for the word ‘impunity’ in google scholar, between 1990 and 2000, 23,900 documents were produced on this subject; between 2000 and 2010, there were 30,900; and, between 2010 and 2015, there were 20,300 documents. While there is a phenomenon of expansion of internet access and the academic production worldwide has increased in number, these numbers nonetheless indicate the magnitude of the increase on the production of documents related to the subject of impunity being as significant as 10,000 documents more every decade.

were 13,3 million web pages (!) for the English word “impunity” in *Google*¹⁹¹ and 163.000 papers in *Google scholar*¹⁹². A random exploration of these sources can give the impression that impunity has been virtually related to every social life problem. In this context, conceptual delimitations on the term are obscure and vague. While the legal doctrine has produced different documents on this subject, it is rare to find sociological or criminological studies developing this notion. In sociological and criminological empirical research, *impunity* is often enunciated as a reference to evaluate the effectiveness of the justice system rather than through conceptual reflection (for example, referring to the number of cases unsolved by the police or lacking final judgment). In other words, the notion is “automatized” without having been object of theoretical attention. Indeed, reviewing different sociological and criminological handbooks and dictionaries in the search for a notion of impunity¹⁹³, it is often hard to find a definition of the term at all.

Etymologically, the word *impunity* comes from the Middle French word *impunité* which is derived from the Latin expression *impunitatem*. With regard to its semantics, this term is understood as a wrongdoing without (official) penalty, as an assimilated form of *in* and *poena* - opposite to punishment (Online Etymology Dictionary, n.d.; Skeat 1936; Craig, 1861: 1017). Indeed, at least since the seventeenth century, impunity as the exemption from punishment became

¹⁹¹ In Spanish (*impunidad*), there are about 12,700,000 results; in potuguese (*impunidade*), there are 2,960,000 results; in French (*impunité*) there are about 4,000,000 results; in Italian (*impunità*), there are 677,000 results.

¹⁹² In Spanish (*impunidad*), there are about 71,100 results; in potuguese (*impunidade*), there are 32,400 results; in French (*impunité*) there are about 28,800 results; in Italian (*impunità*), there are 11,500 results.

¹⁹³ No reference on this notion was found on: the *critical dictionary of sociology* by Boudon, R., & Bourricaud, F. (1989), on the Handbook of sociology by Smelser (1988), on the Sociology 6th edition of Giddens and Sutton (2009), on the The Oxford handbook of criminology by Morgan, Maguire and Reiner (2007), *The Sage dictionary of criminology* edited by McLaughlin and Muncie (2006).

identified as the dominant form of the term in Latin languages as French or Spanish¹⁹⁴. Today, the starting point of different texts is the (etymological) characterization of impunity as the lack or absence of (due) punishment (i.a. Pensky 2008; Acosta 2011). However, this definition does not provide the observer with a clear notion from the sociological perspective because, among other things, this notion limits the phenomenon to a non-modifiable state of affairs that, as such, could not be overcome. Moreover, the horizon that it covers remains elusive also in respect to what can be referred to as ‘punishment’.

Following another line of thought, according to Tarde (1898), impunity was originally understood as the legal protection of the *paterfamilias*’ authority over their descendants or the master’s over his slaves: the legal system could not challenge their authority over their family or their property, thus assuring impunity over their wrongdoing in these contexts. Impunity was thus understood as a legal subtraction from the attribution of responsibility. Submitted to historical transformations, the perception of impunity has experienced various modifications as it has been gradually and progressively understood as regretful. In this context, political and legal systems

¹⁹⁴ In the French language, the *Dictionnaire de l'Académie française* of the years of 1694, 1792, 1798, 1872, 1932, 1835 and 1992, *impunité* is the lack of punishment - *manque de punition*. The only variations in the *Dictionnaire* are the editions of the years 1694, 1792 and 1835. In the years 1694 and 1792 impunity was portrayed as a matter of power, being the lack of punishment of those who have the authority and the exercise of power (*pour ceux qui ont l'autorité & le pouvoir en main*); while in 1835, the reference to power was not present but it was added to the lack of punishment, the exemption from a deserved punishment (*exemption d'une peine méritée*).

Reviewing the semantics of ‘impunity’ in Spanish we find a similar situation than in French: this term emerges as well as the exemption from punishment. The Academic dictionary of the *Real Academia de la Lengua Española* of the years 2001, 1992, 1925, 1884, 1817 and 1780, present an identical conceptualization of *impunidad*, which is the lack of castigation - *falta de castigo*. Further, the meaning of the word *castigo* (that we have translated here as *castigation* but could also be translated as *punishment*) in the same documents was conceptualized as the penalty imposed to someone who has committed a crime or a wrongdoing - *pena que se impone a quien ha cometido un delito o falta*. Thus, since the thirteenth century the word *impunidad* has had the unaltered significance of the absence of punishment to someone who has committed a crime or a wrongdoing.

have increasingly and largely abandoned the view of impunity as a valid or appropriate social mechanism. Still, in the early nineteenth century we can find a strong tendency embracing impunity as a valid and positive mechanism for dealing with social unease, political transition or situations of “widespread”¹⁹⁵ criminality.

With regard to impunity as a valid mechanism for dealing with social unease, the subjacent argument was that impunity could allow other social remedies to be implemented in situations of extraordinary social tension when criminal law repression could be unbearable for maintaining order. This idea also took place in peacetime, when impunity was viewed as a valid mechanism for dealing with certain segments of the population. An example of this form of validation of impunity can be found on the London Report of the committee of the Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders (1818). Produced in the early nineteenth century, this document recommended that “amongst children of a very early age, absolute impunity would have produced less vice than confinement [...]. It is painful to reflect, that the remedy provided by the law should be one great cause of the evil; but the fact is indisputable”. Although nowadays there can be found different discourses of contention of the criminal law system before certain criminal actors such as the children, these are not framed as a matter of impunity but as part of a rehabilitative aim, as an argument of leniency or to support other democratic values.

During the nineteenth century there was a constant use of impunity as a valid mechanism for dealing with political transitions. In such contexts, impunity was “the political price paid to secure an end to the violence of ongoing conflicts or as a means to ensure tyrannical regime

¹⁹⁵ Even if the word “widespread” remains unclarified in the sense that figures of criminality suggest a great universe of criminal conducts, which the criminal justice deals with through an overall criterion of selection as the condition of operation of the system.

changes” (Bassiouni 1996: 10). Impunity was understood either as the warranty of the return of ‘military to their barracks’, or as the first measure to be taken for ending internal armed conflict (Andreu-Guzmán 2014); in other words, it was a ‘necessary evil’ shielding the political regimes under the pragmatic objective of transition towards democracy and peace.

The perception of impunity as a valid social mechanism has been radically contested and has been transformed. Currently, “those facing justice could not expect to trade impunity for laying down their weapons or giving up power” (Seils 2014). In our time, the political or legal system could not seriously employ the term impunity as a positive social action, although it remains valid to affirm that it is not appropriate to punish everyone for every action. However ambiguous this concept might be (Viñuales 2007), in the contemporary world no noble or respectable social objective can be called *impunity*: the *fight against impunity* has gained a remarkable unanimity embracing a consensus of social regret and dissatisfaction, even if its meaning remains vague. Nevertheless, or because of this, combating impunity has been installed as a fundamental human rights slogan (Engle 2015: 104). “The human rights movement in the 1990s has become increasingly preoccupied with the importance of punishing those responsible for gross violations of fundamental human rights. [...] The phenomenon is described as impunity, and we are urged to combat it” (Schabas 1997: 215).

What does the *fight against impunity* stand for? What are the means that this struggle does and should deploy? Is this a phenomenon of the criminal justice system or is it an issue of other social systems? Is impunity an expression of the moral conscience of a particular society or is it a phenomenon delimited by legal standards? To what extent is impunity related to issues of memory, reparations and truth when wrongdoing is committed? Is or should impunity be measured in line

with the quantity or quality of the legal consequences against wrongdoing? Does or should the *fight against impunity* aim at preventing the recurrence of wrongdoing?

Ultimately, when trying to answer these questions it is not clear what the actual limits of the slogan against impunity are. The widespread acceptance of the fight against impunity is rather vague, but persuasive. In this context, the observer can remain engaged and persuaded by the slogan while being actually unaware or, perhaps, in disagreement with its substance, means or ends.

The ambiguity of the notion of *impunity* is, however, a narrow observation if we are unable to identify, depict and characterize the different forms that the notion can adopt in social discourses. Considering this, we conducted an analysis on the use of ‘impunity’ in social discourses in order to depict the forms that the notion of impunity adopts in the context of the usual social communications.

a. Usual uses of impunity: the Colombian case

In order to construct a sociological concept of impunity, it is pertinent to explore the social constructions and perceptions that the notion of impunity raises. With this purpose, we conducted a poll exploring the perceptions of the Colombian urban population on the concept of impunity. Between 2014 and 2015, the University of Wisconsin Madison and the University Externado de Colombia conducted the second phase of a national survey on various social issues in the country. The second poll of “Communication and Politics” gathered information from 1,102 people living in ten Colombian cities. This sample was representative of the urban adult population of the country. At the present time, the majority of the Colombian population lives in urban contexts -76% of the 47.6 million inhabitants of Colombia live in urban areas (DANE, 2014).

Respondents were asked 86 questions related to their social perceptions on different subjects. I was part of the team responsible for this survey and proposed three open-ended questions on the subject of impunity: “what is impunity for you?”, “who is responsible for it?” and “what percentage of crimes do you think goes unpunished in Colombia?” The objectives of these questions were to depict the notions that respondents use when referring to ‘impunity’, who they regard as responsible for it, and what is their perception on the extent of the phenomenon. In the present study, we will focus on the question “what is impunity for you?” which provides pertinent data to detect what Colombian population understands by ‘impunity’.

The selection of an open question for the poll was intended to give respondents the opportunity of using the words they would spontaneously employ when unfolding their ideas on this subject. This selection implied a difficulty to process the information but was also convenient to consider different ingredients that were not anticipated before the poll. The data gathered in the poll provided a multiplicity of themes mobilized through the topic of impunity: the 1,102 respondents used 993 different notions. There is a remarkable variety of uses of this medium in ordinary communications.

In this context, we used a coding system that grouped the answers in accordance to the terms that respondents used as opposed to the notion of impunity. Taking into account a first reading of the results, we found pertinent to use the international law Crime Victims' Rights with this purpose: impunity was then coded as the opposite to justice (with the number 1)¹⁹⁶, the opposite to truth (number 2), the opposite to reparation (number 3), and the opposite to non-recurrence of the wrongdoing (number 4).

¹⁹⁶ The ordinary definition “absence of punishment” was not an independent category, but only an eventual specification of the category “opposite to justice” (number 1).

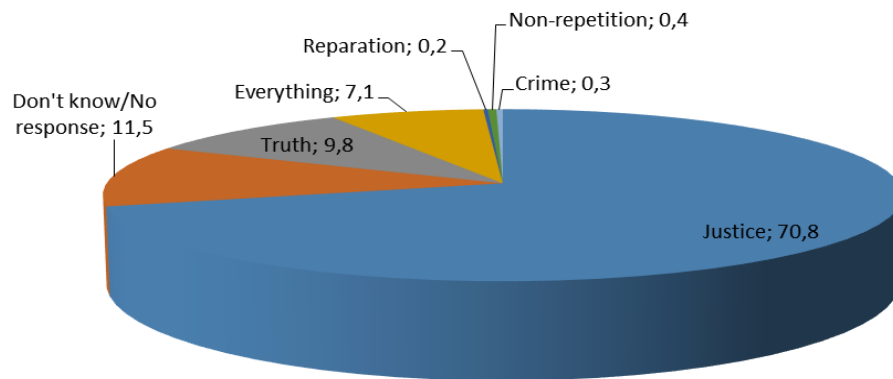
When respondents characterized impunity as a form of injustice, their answer was marked with the label “absence or lack of justice”. When they focused on the concealment or denial of wrongdoing, the responses were classified under the category “absence or lack of truth”. Those responses that referred to the lack of compensation to the victims, were grouped as part of the responses of “absence or lack of reparations”. Finally, those responses identifying impunity with the recurrence of wrongdoing were classified as “repetition of the wrongdoing”. In addition to these labels, we used two additional categories: (i) the “everything” response identifying impunity as a wide-ranging problem that amounts to any wrongdoing; and, (ii) the “don't know/no response” answers. The results of the processing and coding of the answers gathered in the poll are explained in the following table:

Table No. 10 Codification of respondents’ perception of impunity

<i>Category</i>	<i>Frecuency</i>	<i>Percentage</i>
Absence or lack of Justice	780	70.8
Absence or lack of Truth	108	9.8
Absence or lack of Reparation	2	0.2
Repetition of the wrongdoing	4	0.4
Everything	81	7.4
Don't know/No response	127	11.5
<i>Total</i>	<i>1102</i>	<i>100%</i>

The most frequent response to the poll was the definition of impunity as the lack or absence of justice (70.8%). The second most common answer, given by 11.5 percent of respondents, was ‘Don't know/No response’; the third was the construction of impunity in opposition to truth (9.8%); and, the fourth was the ‘everything’ answer identifying impunity as a wide-ranging notion with ambiguous limits (7.1%). Far from reaching those numbers, we found answers identifying impunity as the lack or absence of reparation (0.2%) or as the repetition of the wrongdoing (0.4%).

Chart No. 1 Distribution of responses categorized by opposition on the issue of impunity



In accordance with chart No. 1, in Colombia the majority of the urban population identifies impunity with the absence or lack of justice. In this category, we find responses referring to a wide variety of justice-related topics. However there is a blatant difficulty of delimiting what ‘justice’ is for our analysis, we can recognize a series of issues that respondents frame in reference to the justice system. While such delimitation remains elusive, this category of responses brings about perceptions of impunity as a straight forward opposition with justice (“when there is no justice” “no justice is served” “injustice on someone or something”), as the lack of operation of the justice system (“when justice does not investigate” “the judiciary are not interested in the pain of others” “when nobody is convicted for the crimes committed”), as a deficiency of design or implementation of justice mechanisms (“it is the consequence of the Colombian defective judicial system”, “the lack of authority of the judicial system”); or as a form of containment of the justice system (“an obstruction of justice”, “to hide something from justice”). In this category, justice issues were also portrayed with regard to a particular problem in the measures adopted by the judicial system. In this line, some respondents of the poll assessed that impunity is a problem of lack of equality (“justice is not equal for everyone”, “when politicians go unpunished for what they do” “benefits for the richer” “poor people are punished and the rich people are pardoned”); or a

matter of lack of severity (“justice is not severe against those who commit wrongdoing” “lack of severe and exemplary punishment”, or when wrongdoing is pardoned or amnestied (“to forgive those who have committed crimes” “to pardon, it means to leave crimes go unpunished”).

In short, when referring to impunity as opposed to justice the poll provides information on a wide variety of topics. The notion of impunity drawn on the basis of the absence of justice expresses a form of repudiation and denunciation of any kind of injustice perceived by the respondent. Impunity thus becomes a term employed for regretting what is perceived as unjust.

When processing the results of the poll, we also found different responses referring to impunity as a ‘state of affairs’, as part of a general perception that everything is considered to be wrong. These responses were grouped into the “everything” category, including answers like: “impunity is everything in our beautiful country”, “Colombia means impunity”, “around here it is a commonplace, it is a characteristic of our society”, “everything in Colombia is impunity, those in charge of keeping law and order do not prosecute wrongdoing”, “impunity in Colombia is part of our history: crimes, abuses, etc., all unpunished”, “it is the lack of morals of a society ruled by crooks”.

Here, the word impunity is employed to express all sorts of disquiet related to the social life. This could be expressed as a *blasé attitude*, adapting Simmel (2011) observations in his book *The Philosophy of Money*, according to which we could say that through the medium impunity injustices and social problems are regretted while there is an indifference to their specificities. Indeed, respondents identifying impunity as *everything* in social life base their answers on a strong blasé attitude (in the terms of Simmel). For this reason, these responses do not allow to distinguish what exactly can be called ‘impunity’. In other words, these discourses are an inadequate parameter for stable observations of the phenomenon.

Table No. 11 Responses without indication

<i>Category</i>	<i>Frequency</i>	<i>Relative percentage of responses without concept</i>	<i>Total Percentage</i>
Don't know/No response	127	61.95%	11.5%
Everything is impunity	78	38.04%	7.1%
<i>Total</i>	205	100%	18.60%

In *Table No. 11* we cross-checked data, revising responses that do not allow exposing the notion of impunity that the respondents are using. This table allows us to conclude that 18.6% of the respondents did not provide a meaning to the topic of impunity. Considering this data, while the majority of Colombian urban discourses on impunity identify impunity as the lack or absence of justice (70.8%), the second most common use of ‘impunity’ actually lacks a notion (18, 6%).

Considering the results of the poll, it is clear that the term ‘impunity’ in Colombia was selected by the majority of the respondents to denounce a situation experienced as a form of injustice, manifesting regret and a sense of grief or distress. In accordance to this finding, we will develop two possible connotations as principal for exploring the social constructions using the notion of impunity: denunciation and regret.

In accordance with our enquiries, impunity raises rather connotative meaning, in the sense that it brings about associations to the term rather than a conceptual content indicating what it exactly denotes (denotative meaning). In this line, impunity may be considered as a *medium* embracing different significances. Mediums have no essence; there is no sole form capable of absorbing all the options of meaning of the medium¹⁹⁷. Nonetheless, the medium (impunity) is

¹⁹⁷ “[L]es possibilités d’un medium ne peuvent jamais être saisies à partir d’une seule forme” (Luhmann, 2013: 165 in Pires 2015)

always expressed through a selection of meaning, which enables the perception of the medium¹⁹⁸. The selections of particular forms have the potential of suspending other selections. Such capacity does not imply an elimination of the other possible forms of the medium (Pires 2015: 6).

Besides ordinary social discourses characterized by their ambiguity and polysemy, there is a considerable amount of specialized literature referring to impunity. *How does this literature deal with the subject of impunity? Does this literature shed light upon the social discourses often obscured by their vagueness? Or perhaps, is this literature the source of further problems in the understanding of the phenomenon of impunity?* In this field, human rights developments have become the leading source of specialized studies: a study of the *fight against impunity* should not be currently conducted without referring to the human rights developments on this issue.

5.2. Human Rights discourses on impunity

In this section we will study human rights characterizations of impunity as a central issue to its current discourses, ideas and practices. This analysis is framed into our objective of detecting, considering and analyzing the problems and elements of how impunity has been observed until now. Dealt with by the doctrine, the jurisprudence, the treaties and other normative mechanisms, the notion of impunity has elicited a great interest for the human rights. Human rights have become the *leading discourse* expressing the need for a global “fight against impunity”.

This expression has become a slogan employed with different connotations, developed without in-depth sociological reflection, and characteristically indifferent to the implications of a discourse based on the traditional penal rationality. We will elaborate on these problems later on. For

¹⁹⁸ “J’ai besoin du médium pour construire des formes et de formes (propositions) pour employer le médium” (Pires 2015: 5)

the moment, considering the importance of taking into account the human rights constructions around the concept of impunity, we will conduct a general overview of the human rights position in this regard. In the second part, we will focus in different normative sources, giving particular attention to the most authoritative human rights conceptualization of impunity: the *UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. Ultimately, the analytical remarks of the present section will be complemented by further critical considerations in part 5.3 of the work.

5.2.1 Human Rights discourses on impunity: a general overview

The *fight against impunity* has become a fundamental campaign to human rights movements to the extent that “[s]ince the beginning of the twenty-first century the human rights movement has been almost synonymous with the fight against impunity.” (Engle 2015). In this context, the subject of impunity is remarkably present in the work of different human rights organizations. Large organizations such as Amnesty International¹⁹⁹, Human Rights Watch, the International Commission of Jurists, the International Federation of Human Rights, the World Organisation against Torture²⁰⁰, the Center for Justice and International Law, and other large international and local human rights institutions have devoted major efforts to fight against what they call impunity²⁰¹.

¹⁹⁹ In 2004, the Amnesty online database had 3.000 documents with the word ‘impunity’ on their heading, while in 2006 there were 3.366 documents (Viñuales 2007).

²⁰⁰ “Based in Geneva, OMCT’s International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent interventions across the world, in order to protect individuals and to fight against impunity” (OMCT n.d.).

²⁰¹ Moreover, those human rights institutions without an express agenda on this issue would rarely deny the importance of such campaign –although a good number of organizations could still advocate for less punitiveness.

These campaigns consider respect for human rights as one of the chief concerns and justifications of the fight against impunity. The human rights literature generally gives impunity a negative connotation as one of the most serious threats to human rights. Human rights campaigns employ the notion of impunity mostly as a problem that concerns human rights and that as such should be denounced as illegitimate, illegal and immoral (all at the same time). Indeed, when reviewing the great amount of literature produced by human rights experts and activists on this issue, the denunciatory use of this term is patent: “the time to end impunity has come”.

In this discourse, impunity is portrayed as a social problem capable of compromising human relations, affecting the rights of the victims and distorting the rule of law, it is uncommon to find a conceptual delimitation of the subject or clear contours about what the fight against impunity is actually about. For the moment, we will focus on depicting, studying and analyzing the main meanings that impunity presents according to human rights.

Revising the state of art in the field, we can find three major orientations of the use of this subject in human rights discourses: (i) impunity as a breach of human rights *obligation* of the States to protect their own citizens, (ii) impunity as a *cause or consequence* of other human rights violations, and (iii) impunity as a *human rights violation* in itself.

(i) According to different human rights institutions, impunity arises from a failure by the State to meet its obligations for addressing violations. Indeed, various human rights discourses have established that human rights obligations include fighting impunity: “States are to combat impunity [...] in order to uphold the rule of law and public trust in the justice system” (Council of Europe 2011). With this respect, the Inter-American Commission of Human Rights (2009: 36) has assessed that “one of the main dimensions of state obligations is linked to the judicial clarification

of criminal conduct with the view to eliminating impunity and preventing the recurrence of violence”. In this line, the Inter-American System on Human Rights has established a correlation between the fight against impunity and the right to access to justice (IA Court 2001b: 123; 1999: 65): “any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole” (IA Court 2002: 115).

Considering the view that States have a human rights obligation to *fight against impunity*, different human rights discourses have addressed impunity as a breach of States’ commitments to strengthen and to ensure the compliance with human rights (OHCHR 2011). In accordance with this perspective, the notion of impunity is constructed in contrast to the accountability of those individuals violating human rights and of the State on the occasion of wrongdoing (Groome 2011: 190).

In respect to the responsibility for violations, human rights have developed a series of ideas, discourses and practices favoring accountability in cases of human rights violations as an obligation of the state: “[t]oday, to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law” (Engle 2015). Human rights accountability therefore became identified with *criminal* accountability.

In different human rights sources, this obligation comprises the investigation, prosecution, trial and punishment of the direct perpetrators of violations, as well as their masterminds: *impunity* is “the overall lack of investigation, tracking down, capture, prosecution and conviction of those responsible for violating the rights protected by the American Convention” (IACHR 2003: 205; IA Court 1998: 176; 1998a: 173; 2005c: 203; 2005d: 170; 2004g: 148).

In line with this understanding, when human rights courts establish the violation of states' international commitments, they have intended to remedy human rights violations ordering states to “[c]onduct full and meaningful investigations and prosecute or punish those responsible for crimes²⁰²” (Groome 2011: 193). In this sense, the human rights view is that States have the obligation to use all the legal means at its disposal to combat that situation (IA Court 1998: 173; 2001d: 69; 2001e: 63; 2001f: 100): “the State that leaves human rights violations unpunished is also failing to comply with its obligation to ensure the free and full exercise of those rights to all persons subject to its jurisdiction” (IA Court 2002a: 101).

With this regard, the IA Court (1996: 61; 2000b: 75, 77; 2001d: 69, 70; 2001e: 62; 2001f: 100; 2002: 115; 2002a: 99) has consistently established that States party to the American Convention have the duty to investigate, identify and punish the perpetrators or accessories to human rights violations and that this obligation must be complied seriously, not as a mere formality – the problems that this position involves to the reproduction of the traditional structures of the criminal justice system will be further discussed in section 5.3.

²⁰² See Castillo-Piez v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 34, 1 90 (Nov. 3, 1997); Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 36, 1 124.3 (Jan. 24, 1998); Paniagua-Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 37, 1 181.6 (Mar. 8, 1998); Villagran-Morales, et al., Inter-Am. Ct. H.R. (ser. C) No. 63, 1 253.8 (Nov. 19, 1999); Bamaca-Velisquez v. Guatemala, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 70, 1 230.8 (Nov. 25, 2000) (requiring public dissemination of investigations results); Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, 1 51.5 (Mar. 14, 2001); Pueblo Bello Massacre v. Columbia, Inter-Am. Ct. H.R. (ser. C) No. 140, M 296.7, 296.10 (Jan. 31, 2006) (requiring search for missing pursuant to international norms); Baldeón-García v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 147, 1218.8 (Apr. 6, 2006); Ximenes-Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149, T 262.6 (July 4, 2006); Montero-Aranguren et al v. Venezuela (Detention Center of Catia), Inter-Am. Ct. H.R. (ser. C) No. 150, T 160.7 (July 5, 2006); Goiburú et al. v. Paraguay (Condor), Inter-Am. Ct. H.R. (ser. C) No. 153, 192.5 (Sept. 22, 2006) (The investigation is to include the "masterminds" of the crime. The court also required that the investigation's results be published and that Paraguay collaborate with neighboring countries in the prosecution of related Condor cases); La Cantuta v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 162, 1 254.9 (Nov. 29, 2006); Manuel Cepeda Vargas v. Colombia, Inter-Am. Ct. H.R. 1 265.8 (May 26, 2010); Chitay Nech et al. v. Guatemala, Inter-Am. Ct. H.C.R. 309.12 (May 25, 2010); Cyprus v. Turkey, 2001- IV Eur. Ct. H.R. 1, 388.11.2 (2001); and Srebrenica Cases, IM 220.7-8.

This first way to conceive impunity is therefore focused into the obligation of the States making particular reference to the commitment of the authorities to protect the individuals through adequate justice measures.

(ii) Human rights discourses have also addressed impunity as an unwelcome *consequence* of criminal conduct and, simultaneously, as *motivation* and *cause* of new or continuous violations. According to this, the fight against impunity does not only compromise States in accordance with their human rights obligations but also allows preventing new violations or further harms. In this line, “[a] causal link is made between ongoing human rights violations and the absence of prosecution for those of the past, and it is argued that by trial and punishment of individuals responsible for such crimes, individual and group rights will be better protected in the future.” (Schabas 1997: 215).

Some human rights commentators consider that ending with impunity is the most efficient way of deterring new acts of violence (Defensor del Pueblo 1997; ILO 2011; Council of Europe 2011). In this line, impunity is represented as a factor that fosters chronic recidivism (IA Court 1998: 173; 2000: 211; 2001a: 186; 2001b: 123; 2002a: 101; 2005a: 96.20), not only because it enables perpetrators to believe they will be sheltered from adverse consequences for their wrongdoing (Brussels Group for International Justice 2002; IACHR 2006: 144), but also because it perpetuates the social acceptance of crimes (i.e. before violence against women in IACHR 2007: 124, 167). In line with this, combating impunity and strengthening accountability allows preventing new criminal actions. This connotation seems to rely on the compliance of the norms for the effective coercion created by the legal system.

Hence, impunity is represented as an encouraging factor for the repetition of criminal conduct, therefore affecting human rights: “States are to combat impunity [...] as a deterrent with respect to future human rights violations” (Council of Europe 2011). Consequently, impunity may trigger new crimes and preserve the outcomes of previous or continuous violations allowing the perpetrators to think that they will be sheltered from adverse consequences for their actions²⁰³ (Brussels Group for International Justice 2002; IA Court 2005a; IACHR 2006: 144). Impunity, then, takes the form of a strategy of concealment with the purpose of reinforcing the objectives of the criminal conduct (Colombia Nunca Más, n.d.)²⁰⁴.

In line with this, for some, “human rights trials can play not only a retributive role but also an expressivist one, namely, to communicate the value of law and justice as social goods” (Freeman 2009: 22)²⁰⁵. In this vein, a part of the literature claims that prosecutions for serious crimes “can be important for shoring up local confidence in the state’s ability and willingness to ensure the rule of law” (Freeman 2009: 22), while impunity would imply the opposite effect. Such understanding of punitive measures involves a human rights representation not simply as ‘negative’ mechanisms of

²⁰³ An example of the link established between impunity and recidivism can be found in the *Mapiripán Massacre v. Colombia case* before the IA Court (2005a). The Court assessed that in Colombia the UN High Commissioner for Human Rights (2001; 2005; 2004; 2003; 2002; 2000; 1998) has constantly referred to impunity of human rights violations committed by the paramilitary and to connivance between these groups and the security forces, “as a consequence of criminal proceedings and disciplinary investigations against them that do not lead to establishing liabilities or the respective punishment” (IA Court 2005a: 96.20).

²⁰⁴ As we studied above, in the case of state criminality this is materialized through a set of institutions, discourses, ideas and behaviors enabled and enabling an opportunity structure favoring crime, a culture and context allowing repression, and particular political licences.

²⁰⁵ Arendt (1971: 253) sustained an opposite view against what she called the higher-purpose theory. In her famous work *Eichmann in Jerusalem*, she asserted that “the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes [... as making an historical record of Nazis atrocities] can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to [award...] due punishment”. In a way, she proposed that the Tribunal’s authority depends upon its limitations.

repression, but also as forms of obtaining a social improvements, capable of building up a human rights culture.

Human rights discourses often warn about the potential of this problem becoming a broad feature affecting the overall social life, creating an atmosphere of systematic and endemic impunity. Expressions as ‘culture of impunity’ or ‘climate of impunity’ epitomize this concern²⁰⁶. These representations are pervasive in human rights literature, aiming at indicating cycles of chronic lack of accountability for human rights violations (Rekosh 1995; Del Ponte & Sudetic 2011; Bongiorno 2001; Goldsmith & Lewis 2000; Nichols 2015; CEDAW 2006: 23).

(iii) In connection to this last aspect, a third connotation that can be found in the literature understands impunity as a *human rights violation*. With this respect, impunity is understood as “a recipe for continued violence and instability” (Akhavan 2001: 30) presented not only as the undesirable cause or consequence of a situation of lack of accountability, but also as a violation itself. In this sense, according to different commentators (Ventura 2005; Bottinelli 2007; Le Clercq, Cháidez & Rodríguez 2016), impunity affects multiple human rights and has a ‘multidimensional’ character that embeds legal, moral, social, political, psychological, economic and historical dimensions.

Human rights literature frame impunity as an insidious condition of social unease, as a grave problem of the administration of justice and as a serious impediment to democratization (Roht-Arriaza 2001; IACHR 2003). In line with different studies, impunity creates an impression

²⁰⁶ An example of this generalization of impunity can be found in the Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders on a Mission to Colombia, who asserted that in the country different factors produce a general climate of impunity (UN, 2002b). In the same vein, the Colombian state has declared before international bodies that impunity in the country “impacts in general the life of the nation and its culture” (IACHR 1999: note 6) and the IACHR (1999 par. 16) has asserted that “impunity in Colombia is structural and systemic”.

of ineffectiveness of the legal system and abandonment of the citizen before the phenomenon of crime (Tribunal Permanente de los pueblos 1989; Instituto Interamericano de Derechos Humanos 2007), especially when the same type of crimes (with different victims or offenders) do get punished or normally receive some sort of normative response from the system.

A major part of the human rights literature argues that impunity erodes the rule of law. These views understand that “the rule of law is mainly achieved by ensuring administration of justice that does not tolerate impunity” (IACHR 2003: 191). In this vein, the lack of legal redress is represented as a social problem decreasing confidence in the State as the legitimate forum to request for justice (UNHCHR 1998; Defensor del Pueblo 1997; La Rota, Montoya and Uprimny 2010). In line with this, combating impunity not only improves the rule of law but, ultimately, assures democracy (OHCHR 2011).

In human rights literature, impunity is often understood as a phenomenon that has a great capacity to affect the general social life. The lack of legal intervention can shield a social configuration where exclusion and inequality prevail (Colombia Nunca Más, n.d.). Denying basic human values and debasing the ‘whole of humanity’ (Brussels Group for International Justice, 2002) ²⁰⁷ is often portrayed as a form of creating the impression on the public opinion that relationships based on force are more effective than appealing to the law (Cobián & Reátegui, 2009: 152). Thus, the problem of impunity is portrayed by different commentators as capable of transcending the individual crime and becoming a general situation that impacts the life of the nations and their culture, affecting not only victims but also society in general (IACHR 1999: 16; 2001: Chapter 3; Akhavan 2001).

²⁰⁷ Discourses with this tone are not only contemporary, they can be found since the early nineteenth century: in an 1818’s writing on punishment of death in the case of forgery, Bowdler (1818: 21) asserts that “forgery would not be committed with impunity: justice would be done to the criminal, and to the public also”.

As such, the battle against impunity is comprehensive and should be fought on different social fronts (Groome 2011: 190): it “is not just a legal and political issue: its ethical dimension is all too often forgotten” (UN 1997). Human rights therefore offer a portrait of impunity as a social problem, capable of disturbing the administration of justice, the social safety, the rule of law and, ultimately, the human rights. In line with this view, some commentators conclude that impunity is a threat to democracy and public life²⁰⁸ (Ortega y Lara 2015: 5).

This representation of impunity often integrates the rights of the victims as a concern, ground and justification for the fight: “States are to combat impunity as a matter of justice for the victims” (Council of Europe 2011). In accordance with impunity as a violation of the human rights of the victims, human rights tend to characterize impunity as a trouble against victims, preventing them from obtaining justice, therefore creating further vulnerability, suffering and victimization²⁰⁹. With this perspective, human rights understand that impunity often deteriorates victims’ feeling of belonging to the State and to the larger society, preventing them from gaining moral redress and proper legal attention (Justicia y Vida 2006; IA Court 1998: 173). Indeed, different human rights studies portray impunity as a violation that raises and aggravates the original harms suffered by the victims (IA Court 2005a). Moreover, these studies often claim that these effects may expand to the social networks of direct victims, particularly to their next of kin who, when undertaking all

²⁰⁸ In this sense, Bentham (1843: 530) asserted that “[f]rom pardon-power unrestricted, comes impunity to delinquency in all shapes: from impunity to delinquency in all shapes, impunity to maleficence in all shapes: from impunity to maleficence in all shapes, dissolution of government: from dissolution of government, dissolution of political society”.

²⁰⁹ The Inter-American System has acknowledged that in the cases of human rights violations victims often feel anger, frustration and even fear of retaliation due to their search for justice (IA Court 2009) With this regard, the IA Court (2002) has established a presumption according to which violations of human rights and a situation of impunity regarding those violations cause grief, anguish and sadness, both to the victims and to their next of kin (IA Court 2002: 50).

pertinent actions to clarify the events, suffer an additional victimization from the indifference of society, the lack of operation of the legal system and the violence coming from the criminal justice (Instituto Interamericano de Derechos Humanos 2007).

Human rights studies have assumed that impunity is a form of hardship to the victims and harm to the larger society (Justicia y Vida 2006; Instituto Interamericano de Derechos Humanos 2007; La Rota, Montoya and Uprimny 2010). Victim-oriented human rights literature has, in sum, a tendency to focus on preventing victimization, controlling victimization and healing social troubles as a goal and motivation of the fight against impunity (inspired in Van Wijk 2013: 160).

Anti-impunity discourses emphasizing on victims' rights may also enable a counter-discourse against criminals. With this respect, representations of criminals as enemies of society (*hostes humani generis*) rather frequent in political discourses and in the media may also be found in human rights. An example of the representation of offenders as enemies of humanity in relation to the subject of impunity we can be find the *Brussels Principles against Impunity*. Adopted by a group of doctrinaires called the Brussels Group for International Justice, these principles assert: "the scope of serious crimes extends beyond the limits of the territories where they are committed. They constitute a challenge for the public conscience and result in their authors being considered as enemies of humanity (*hostes humani generis*). Within this context, the fight against impunity forms part of the fight for international justice and constitutes a responsibility for the entire international community" (principle 1.2). This excerpt is interesting to show the sense in which human rights defense from impunity may produce the exclusion of particular persons from the *humani generis*.

To this point, we have characterized different connotations of the fight against impunity according to human rights. However, in order to elaborate conceptual elucidations we need to

explore other human rights normative mechanisms and conceptual work. The next section will address different human rights norms focusing on exploring the most authoritative international law conceptualization of impunity: the UN *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. The analysis of this document may help us furthering our observations on the scope and objective of human rights when combating impunity. This is framed into our search for a socio-legal conceptualization taking into consideration the problems, issues and elements referring to how has impunity been observed until now.

5.2.2 The UN Impunity Principles: human rights conceptualizations of impunity

In the last section, we considered different connotations that the *combat against impunity* raises for human rights. Apart from different senses of meaning, we have not yet determined particular conceptual developments on this issue. One of the paradigmatic human rights documents enabling an exploration of this subject is the *United Nations Set of Impunity Principles*. Ironically perhaps, this study has its origins in a report on amnesty.

In 1985, UN Special Rapporteur on amnesty Louis Joinet presented a preliminary report to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in the subject of amnesty laws. The Sub-commission had requested this study “having become aware of the importance that the promulgation of amnesty laws could have for the safeguard and promotion of human rights and fundamental freedoms” (UN Commission on Human Rights 1985: 3).

In his study, Joinet explored amnesty as an outgrowth of individual pardon. Beginning by the ancient republics, the study shows a transformation of the understanding of amnesties. Indeed, these were gradually perceived – or appropriated- as a prerogative of the States, rather than as a private issue. Public pardons were sometimes collective, embodying not only clemency but also “a

concern to remedy the imperfections of criminal law” (UN Commission on Human Rights 1985: 5). In the sixteenth century, there was an increased impetus of amnesty as a means of assuring social and political *peace*. According to Joinet, this objective reached modern times when many countries resorted to amnesties employing different legal frameworks. In this context, “[t]he power of amnesty and its corollary, amnesty as a human right (the right of oblivion), are embodied in municipal law, but only indirectly reflected in international law” (UN Commission on Human Rights 1985: 5). According to this, Joinet assessed that peace might be gained by obviating disorder and sedition.

Considering this conclusion, Joinet drew a distinction between *amnesty as means for peace* and *amnesty as means for impunity*. In Joinet’s study, the former refers to amnesties granted with the objective of enabling political transitions, facilitating, if necessary, peace agreements. In these cases, the effect of amnesties is often the release of political prisoners, the return of political exiles, the cessation of proceedings or dismissal of charges, the restoration of civil and political rights, the reinstatement of the persons deprived of their positions and the reparations to the victims. However, Joinet shows that in international law amnesties are not only granted for political transgressions, but have also been admitted for ordinary criminality²¹⁰. In the terms of the study, amnesty for ordinary crimes is granted as “an expression of the relatively broad power of civil society to grant every citizen the right of oblivion” (UN Commission on Human Rights 1985: 23). These mechanisms are

²¹⁰ “In recent years, a growing number of countries have resorted to amnesties and pardons to relieve prison overcrowding in Africa, South America, Europe and Asia. For example in early 2013 the President of Sri Lanka granted amnesties to 1,200 prisoners on the country’s 65th Independence Day. Those released were serving minor sentences and some were those who had not been able to pay their fines. The prison population in Georgia more than halved from 24,000 to 11,000 in early February 2013, mainly due to a broad amnesty in which 7,985 prisoners were released. While providing short-term relief, amnesties and other forms of pardons have been shown not to provide a sustainable solution to overcrowding and can erode public confidence” (Allen 2015: 34).

employed with the objective of contributing to the reduction of social tension and addressing the overcrowding of prisons, as well as other humanitarian purposes, particularly favoring children, women, the elderly and the sick (UN Commission on Human Rights 1985: 8).

In contrast, according to the study, *amnesty as means for impunity* occurs when regimes use amnesties aiming to evade the democratic rule of law; for instance, when State or para-state officials responsible of grave violations are exonerated from their wrongdoing (UN Commission on Human Rights 1985: 16)²¹¹. Thus, however the described (wide) applicability of amnesties, the study sets certain international law boundaries to that possibility by underscoring that amnesties are not applicable in any circumstance. For instance, the study affirms that amnesties should not be applied to international crimes or to crimes against humanity -in such cases “the right of oblivion may become a right to impunity” (UN Commission on Human Rights 1985: 19).

Joinet’s study makes clear that international law admits amnesties as they may constitute appropriate tools for peace, allowing political transitions and social harmony. However, the study also recognized a form of amnesty that was a fraud because of its aim (evading the rule of law) or due to the relevance of the wrongdoing: “[s]ome amnesties are given to correct past injustices (e.g., Morocco 1994) and others to entrench impunity (e.g., Chile 1978)” (Freeman 2009).

In short, the negative connotation of the notion of amnesty developed in this document was drawn upon two conditions. The first is when amnesty involves the lack of legal response to international crimes against humanity. The second is when amnesty is granted by governments with the visible intention to evade the rule of law (as opposed to a need to restore lasting peace and

²¹¹ An example of this situation may be the amnesty promised by Rodrigo Duterte, President of the Philippines, to the any member of the police condemned for the state anti-drug campaign in which a large number of suspected traffickers or drug users have been killed, “de facto rendering the judicial system inoperative” (La Presse 2017).

democracy). In the latter case, regardless the quality of the wrongdoing, amnesties could not be considered as legitimate.

The negative connotation of amnesty (*amnesty to entrench impunity*) was thereafter emphasized, denounced and expanded by the human rights movements, to the point that amnesties have become relegated when not explicitly rejected by human rights: there is an emergence of an anti-amnesty norm equating it with impunity (Pensky 2008). The notion of “impunity”, therefore, grows to the point that it fully invalidates the institution on amnesty. In this vein, the movements have largely favored a standardized form of reacting to crime through the criminal justice, governed by ideas of retribution, deterrence and denunciation implemented through punishment as a form of inflicting pain. Indeed, since the 1990’s, international NGOs, activists, academics, and institutions such as the United Nations or the Inter-American System of Human Rights have adopted an anti-impunity position in accordance to which amnesties are undervalued in their possibility of bringing justice to social harm (Freeman & Pensky 2012). This position will be critically assessed in the next section.

For the moment we would like to refer to the possible antinomy between amnesty and impunity. In a context in which the combat against impunity is a condition for the championing of human rights, is there a contradiction between the authorization of amnesties and the proscription of impunity? To this question, Joinet’s study replies that the consideration of granting amnesty for political crimes and crimes of opinion does not imply an acceptance of impunity. In this sense, Joinet asserts that amnesties, although admissible with the aim of achieving peace or political transition, may involve a form of fraud when they are granted with the mere aim of impunity. For instance, amnesties allowing authoritarian regimes to escape from democratic rule of law by depriving the victims of reparation, do not intend to obtain reconciliation as much as impunity.

Let us draw some conceptual considerations in this respect further from Joinet's work. Indeed, amnesties and impunity may entail a degree of correspondence regarding their practical consequences, as they might involve the lack of a criminal law redress. In this sense, international organizations such as the Inter-American Commission on Human Rights tend to equate amnesties with impunity, as they prevent prosecution and punishment (Seibert-Fohr, A. 2009). However, these are two different phenomena.

Among different existing definitions, amnesty may be addressed as “an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law” (Freeman 2009). In this line, amnesty laws imply a legal recognition of a wrongdoing to be exonerated from which do not preclude all forms of reparation to the victims. As such, the conduct acknowledged as a form of wrongdoing becomes selectable for exemption from legal redress. Since the only way to exonerate someone from a consequence is to recognize that a wrongdoing (the cause) was committed, amnesties involve an acknowledgement of the offenses: the criminal law consequence vanishes (but not necessarily other civil law consequences) while the wrongdoing is recognized by the legal and political systems.

In this sense, amnesty is not only the refrain from criminal repression but, perhaps more importantly, may constitute a form of bringing certain wrongdoing and their actors to the surface - followed by the decision of not prosecuting or sanctioning from the criminal law system (at least, not with the usual rules of sentencing in the ordinary legislative program of the criminal law system). For this reason, the conception of amnesty as oblivion or amnesia is increasingly outdated

(Gavron 2002; Mallinder 2008; Freeman 2009)²¹² and transitional processes employ it as forms of bringing light to the violations and delimiting the responsibility of different actors.

Drawing a contrast between impunity and amnesty is useful for raising a provisional element for a conceptualization of impunity. With respect to amnesties, the fact that the criminal law system is obstructed from dealing with the problematic conduct derives from a legitimate goal that involves the acknowledgement of the problematic situation. In contrast, impunity appears to involve a lack of acknowledgement of the problematic situation that involves a containment of the legal system. From this construction a particular element needs to be retained for our conceptualization of impunity: that the criminal justice system is prevented from acting against a particular wrongdoing without the acknowledgement of the problematic situation.

The contrast between *impunity* and *amnesty* was present in Joinet's work, to the extent that his original study on amnesty progressively evolved into addressing the problem of impunity. In line with this, Joinet's final report entitled "Study on amnesty laws and their role in the safeguard and promotion of human rights" (1985), not only involved advances on international law studies on the subject of amnesty but entailed significant interconnections with the discussions of the subject of impunity – that ultimately led to that led to the identification between "impunity" and amnesty. As a result, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter, Sub-Commission) asked El Hadji Guissé and Louis Joinet to draft a working paper on the guidelines that a study of impunity should adhere to (Decision 1991/110).

Following the submission of a working paper, in August 1992, the Sub-Commission decided at its forty-fourth session to request the co-authors to draft a study on the impunity of

²¹² Amnesties, as in the case of South Africa, are currently understood, designed and used for facilitating the truth and the historical memory (Gavron 2002).

perpetrators of violations of human rights (Commission on Human Rights, Resolution 1993/43)²¹³. On August 1994, after the submission of the study, the Sub-Commission expressed its concern for the increasing impunity for perpetrators of human rights violations which qualified as a fundamental obstacle to the observance of human rights (UN Commission on Human Rights 1993). Accordingly, the Sub-Commission decided to continue with the study of impunity dividing it in two parts, entrusting Joinet with a report on impunity for civil and political rights and El Hadji Guissé with a study on economic, social and cultural rights (Resolution 1994/34).

According to Joinet, the concern of the international community over impunity experimented four stages. The *first stage* took place during the 1970s, when non-governmental organizations, human rights advocates and the democratic opposition mobilized to argue for an amnesty for political prisoners. “This was typical in Latin American countries then under dictatorial regimes. [...] Amnesty, as a symbol of freedom, would prove to be a topic that could mobilize large sectors of public opinion” (UN Commission on Human Rights, 1997, par. 2), as well as helped to amalgamate resistance against dictatorial regimes.

From the understanding of amnesty as a symbol of freedom and resistance, there was a change in the 1980s. In this *second stage* amnesties were “more and more seen as a kind of ‘insurance on impunity’ with the emergence, then proliferation, of ‘self-amnesty’ laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time” (UN Commission on Human Rights, 1997, par. 3). Different groupings of victims created a

²¹³ A preliminary report was presented in August 1993 (E/CN.4/Sub.2/1993/6) at the Sub-Commission’s forty-fifth session. Upon presentation of the preliminary report, the Sub-Commission requested the co-authors to extend their study to serious violations of economic, social and cultural rights.

number of organizations under the view that amnesties were employed as a form of dismissal and absolute refusal to acknowledge the problematic-situations.

The end of the Cold War implied the democratization of different countries along with the proliferation of peace agreements putting an end to internal armed conflicts. In the context of several peace negotiations, there was a manifest clash between “former oppressors' desire for everything to be forgotten and the victims' quest for justice” (UN Commission on Human Rights, 1997, par. 4). After several years of intense confrontation and polarization, at a *third stage*, international law proscribed amnesties for grave human rights violations.

In this line, the *Vienna Declaration and Program of Action* (1993) recommended that “States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law” (UN 1993, par. 60). Concurrently, the Inter-American Court of Human Rights issued a landmark case in which this transformation was crystallized. In the *Barrios Altos case* against Peru, the IA Court (2001c: Par. 40) concluded that amnesty laws and measures eliminating responsibility are inadmissible with regard to gross human rights breaches because they violate non-derogable rights recognized by international human rights law²¹⁴. In the same vein, “the Inter-American Commission on Human Rights²¹⁵, the organs of the United Nations²¹⁶ other regional organizations

²¹⁴ This line was reiterated in the cases: *Almonacid Arellano et al. v. Chile* (IA Court 2006a: par. 105 to 114), *La Cantuta v. Peru* (IA Court 2006b: par. 152 and 168), *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* (IA Court 2010e: par. 147), *Gelman v. Uruguay* (IA Court 2011: par. 195), and *El Mozote and nearby places v. El Salvador* (IA Court 2012a: par. 283).

²¹⁵ Cf. IACHR. Report No. 28/92, Cases 10,147; 10,181; 10,240; 10,262; 10,309 and 10,311. Argentina, of October 2, 1992, par. 40 and 41; IACHR. Report No. 34/96, Cases 11,228; 11,229; 11,231, and 11,282. Chile, of October 15, 1996, par. 70; IACHR. Report No. 36/96. Chile, of October 15, 1996, par. 71; IACHR. Report No. 1/99, Case of 10,480. El Salvador, of January 27, 1999, par. 107 and 121; IACHR. Report No. 8/00, Case 11,378. Haiti, of February 24, 2000, par. 35-36; IACHR. Report No. 20/99, Case 11,317. Peru, of February 23,

for the protection of human rights²¹⁷ and other courts of international criminal law²¹⁸ have ruled on the incompatibility of amnesty laws in relation to grave human rights violations with international law and the international obligations of States” (IA Court 2012a: 283).

1999, par. 159-160; IACHR. Report No. 55/99, Cases 10,815; 10,905; 10,981; 10,995; 11,042 and 11,136. Peru, of April 13, 1999, par. 140; IACHR. Report No. 44/00, Case 10,820. Peru, of April 13, 2000, par. 68; IACHR. Report No. 47/00, Case 10,908. Peru, April 13, 2000, par. 76, and Report No. 29/92. Cases 10,029, 10,036 and 10,145. Uruguay, of October 2, 1992, par. 50-51.

²¹⁶ In this regard, see revised final report of the Special Rapporteur on the question of the impunity of perpetrators of human rights violations (civil and political), prepared by Louis Joinet pursuant to decision 1996/116 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. U.N. Doc. E/CN.4/Sub.2/1997/20/Rev1, of 2 October 1997, par. 32, and Report of the UN Working Group on Enforced or Involuntary Disappearances. General comment on article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance. Report presented during the sixty-second session of the Commission on Human Rights. U.N. Doc. E/CN.4/2006/56, of 27 December 2005, paragraph 2, subparagraphs a), c), and d) of the general comments, 23 of the introduction and 599 of the conclusions and recommendations. Similarly, *cf.* UN Working Group on Enforced or Involuntary Disappearances. Report to the Human Rights Council, fourth session, U.N. Doc. A/HRC/4/41, of 25 January 2007, par. 500. Also, in the universal domain, the treaty bodies for the protection of human rights have sustained the same criteria on the prohibition of amnesties that prevent the investigation and punishment of those who commit grave human rights violations. *Cf.* Human Rights Committee. General Comment No. 31: Nature of the General Legal Obligations imposed on States Parties to the Covenant. U.N. Doc. CCPR/C/21/Rev.1/Add.13, of 26 May 2004, par. 18. This general comment expanded the content of General Comment No. 20 which only referred to acts of torture, and cruel treatment or punishment. In this regard, also, *cf.* Human Rights Committee. General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), U.N. Doc. A/47/40(SUPP), Annex VI, A, of 10 March 1992, par. 15; Human Rights Committee, Case of Hugo Rodríguez v. Uruguay, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988, Decision of 9 August 1994, par. 12.3 and 12.4; Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant, Concluding Observations with regard to Peru, U.N. Doc. CCPR/C/79/Add.67, of 25 July 1996, par. 9; Yemen, U.N. Doc. CCPR/C/79/Add.51, of 3 October 1995, section 4, par. 3 (255); Paraguay, U.N. Doc. CCPR/C/79/Add.48, of 3 October 1995, section C, par. 5 (9), and Haiti, U.N. Doc. CCPR/C/79/Add.49, of 3 October 1995, section 4, par. 2; Committee against Torture, General comment 2: implementation of article 2 (prevention of acts of torture) by States parties. U.N. Doc. CAT/C/GC/2, of 24 January 2008, par. 5, and Committee against Torture, Consideration of reports submitted by States parties under Article 19 of the Convention, Conclusions and recommendations with regard to Benin, U.N. Doc. CAT/C/BEN/CO/2, of 19 February 2008, par. 9, and of the Former Yugoslav Republic of Macedonia, U.N. Doc. CAT/C/MKD/CO/2, of 21 May 2008, par. 5.

²¹⁷ *Cf.* ECHR. *Case of Abdülşamet Yaman v. Turkey*, No. 32446/96, par. 552, 2 November 2004, African Commission on Human and Peoples’ Rights, *Malawi African Association and Others v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, decision of 11 May 2000, par. 83, and African Commission on Human and Peoples’ Right. *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, decision of 26 May 2006, par. 211 and 215.

²¹⁸ *Cf.* International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundžija*. Judgment of 10 December, 1998. Case No. IT-95-17/1-T, par. 155; S.C.S.L., *Prosecutor v. Gbao*, Decision No. SCSL-04-15-

As Joinet contemplated in his study, during the 1970s and the 1980s there was a transformation on the human rights position towards amnesties. Initially, amnesties were perceived as a pressing need for political prisoners. Different abuses were being committed by the use of the criminal law system, especially in Latin America different dictatorships and authoritarian regimes conducted atrocious campaigns of political persecution with the excuse of crime control. These campaigns instigated harassment, extermination and suppression of political opponents and human rights activists. Protestors, journalists, students, human rights defenders, unionized workers were main targets. Those who for some reason were not killed or disappeared were submitted to imprisonment. The criminal law system (and especially the military tribunals) were part of the strategy of persecution. Detentions offered spaces for torture and other ill-treatment.

When some of these regimes collapsed, amnesties were employed for escaping prosecution under the democratic rule of law. The human rights movements reacted against this ‘autoimmunization’, calling for punishment for the grave violations committed by these regimes. According to Joinet, this was the birth of the fight against impunity. This change implied a transformation within human rights organizations, especially in Latin America. From a position of

PT-141, Appeals Chamber, Decision on Preliminary Motion on the Invalidity of the Agreement between the UN and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004, par. 10; S.C.S.L., *Case of Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Judgment of the Trial Chamber, 25 February 2009, par. 54, and *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Sentencing Judgment, 8 April 2009, par. 253. In this regard, see also: Agreement between the Lebanese Republic and the UN regarding the establishment of a special tribunal for Lebanon, signed on January 23 and February 6, 2007, respectively, Article 16 and the Statute of the Special Tribunal for Lebanon approved by resolution 1757 of the Security Council of the UN. U.N Doc.S/RES/1757, of 30 May 2007, Article 6; State of the Special Tribunal for Sierra Leona, of 16 January 2002, Article 10; Agreement between the UN and the Royal Government of Cambodia concerning the Prosecution under Cambodian law of crimes committed during the Period of Democratic Kampuchea, of 6 March 2003, Article 11, and Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on October 27, 2004 (NS/RKM,1004/006), new Article 40.

distrust of the criminal law system, these movements accepted and embraced the traditional legislative program of the criminal law as an adequate mechanism for protecting human rights. With this regard we will draw some critical considerations in the next section.

For the moment we will consider Joinet’s conceptual elucidations. Joinet’s study was conducted on the basis that “impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations” (UN 1997: 22). With respect to this concern, between 1996 and 1997, Joinet prepared and submitted three different drafts of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (in June, 20th 1996; June, 26th 1997; and, October, 2nd 1997). This work was the basis of the final text of the *Set of Principles* completed in 2005.

Table No. 12 Definitions of ‘impunity’ drafted by Joinet

<i>Draft</i>	First Draft	Second Draft	Third Draft
<i>Date</i>	June, 20 th 1996	June, 26 th 1997	October, 2 nd 1997
<i>Definition</i>	Impunity means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted (UN 1996).	Impunity means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted, <u>and to reparations being made to their victims</u> (UN 1997a).	Impunity means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, <u>sentenced to appropriate penalties, and to making reparations to their victims</u> (UN 1997).

The drafts proposed by Joinet introduced three formulations of the notion of impunity based on a same basic conceptualization: *the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted.* As can be noticed in table 5, the different drafts are cumulative rather than contradictory or genuinely different. Between the first and the second draft (submitted one year after), Joinet added both the obligation to make reparations and (four months later) the duty of appropriate penalties against those who violate human rights - this element expresses an adherence to the traditional end and the legislative program of the criminal law system since it refers to accusation, *arrest* and trial.

The final *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, adopted by the then Commission on Human Rights and endorsed by the United Nations General Assembly²¹⁹, replicated the last concept of Joinet's drafts. According to that document, *impunity* is the impossibility, de jure or de facto²²⁰, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims (UN

²¹⁹ In 2005, the UN Commission on Human Rights (succeeded by the Human Rights Council in 2006) adopted the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (UN Commission on Human Rights 2005). In that year, the UN General Assembly endorsed the principles (Van Boven 2010).

²²⁰ Human rights doctrine has differentiated between impunity de jure and impunity de facto (ICJ 2008). The former refers to legal provisions or law institutions granting the exoneration of crimes or the immunity of perpetrators. The latter refers to situations where there is a lack of serious investigations, suitable prosecution and effective accountability.

2005). Let us review five main elements that this definition involves and the possible problems that they may raise for a sociological reconstruction of the concept:

(i) The “impossibility”: the English version of the Principles asserts that impunity means an “impossibility” of bringing the perpetrators of human rights violations to account. However, if impunity implies an impossibility, it is neither negative nor positive, but a state of affairs. In that sense, this conceptualization would involve that nothing could be done against it beyond recognizing the situation. How to sustain that impunity is a failure by States to meet with their obligations when it is understood as an invincible state of affairs? How can human rights countervail impunity if, as an impossibility, nothing can be done against it? This problem is only present in the English version of the document because the original in French and the Spanish version refer to the “absence” or “lack” of actions bringing the perpetrators of human rights violations to account.²²¹ - these two last expressions are also ambiguous since they are governed by extremely broad reasons, we will come back to this later on.

(ii) The violation of human rights: the principles operate the distinction impunity/accountability for human rights violations. The fact that the concept focuses on human rights violations as the form of wrongdoing from which impunity may emerge, widens the applicability of the phenomenon beyond criminal infractions. Human rights movements have advocated for a sort of correspondence between human rights violations and criminality – without proper reflection around its implications. However, these are different phenomena, the latter as a

²²¹ “L’impunité se définit par l’absence, en droit ou en fait, de la mise en cause de la responsabilité pénale des auteurs de violations des droits de l’homme, ainsi que de leur responsabilité civile, administrative ou disciplinaire [...]” (UN 1997b) “La impunidad se define por la ausencia, *de iure o de facto*, de la imputación de la responsabilidad penal de los autores de violaciones de los derechos humanos, así como de su responsabilidad civil, administrativa o disciplinaria[...].” UN (1997c)

conduct transgressing the criminal law and the former as a behavior against human rights norms and principles. Although eventually overlapping –e.g. when the violation to the right to life amounts to the crime of murder, they may also differ.

When a domestic criminal or civil law lacuna affects or impedes the regulation and redress of the violations, this may be understood as a human rights problem. However, the divergence between criminal law and human rights may be acceptable or, all the more so, appropriate or advantageous for the functioning of the system. Indeed, there are different human rights violations regarding which the role that the criminal law may be theoretically questionable. When a particular human right is incompatible with the culture of a specific society, should we refer to these human rights breaches as criminal conducts? When there is no cultural inconsistency, is it desirable to criminalize any breach of human rights? Is the criminal law the only way that the law has to offer for addressing human rights problems? In respect to social and cultural rights, can we validly claim that the fact of not guaranteeing the right, regrettable as it is, should amount to a crime?

(iii) Impunity/measures of legal redress: The mentioned concept focuses on bringing perpetrators to account, regardless of the circumstances, whether in criminal, civil, administrative or disciplinary proceedings. If the observer understands this conceptualization as an obligation of cumulating sanctions, all possible forms of legal reaction should be in place in order to avoid impunity. Human rights violations often concern different jurisdictions. The implementation of all the different forms of legal control is rather remote²²²; indeed, it is extremely improbable that

²²² This problem was avoided in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* according to which in cases of gross violations of international human rights law and serious violations of IHL constituting crimes under international law, there is impunity when States have disregarded the duty to investigate and, if there is sufficient evidence, the duty to submit to

human rights violations (or the most ordinary criminal law violations) are processed through all possible jurisdictions. In sum, this form of constructing the concept expands the notion to the point that it takes us back to impunity as a state of affairs connatural to the wrongdoing²²³.

In contrast, if we understand that the concept of impunity is only applicable when no form of sanction (either civil, administrative or criminal) is applied, the observer accepts that the implementation of any of these forms of redress would make impertinent the label “impunity” to describe the situation. In our view, however, there is a nuance of meaning behind such understanding in the sense that the *Principles* privilege criminal justice proceedings as the only inquiries that may lead human rights violators to be accused, arrested, judged and convicted- when a human rights violation does not amount to a crime to what extent and through which elements may we detect the phenomenon?²²⁴

In this line, there is evidence that criminal punishment has become the “preferred and often unquestioned method” to the intended end of human rights violations (Engle, Miller and Davis 2016:

prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him (Point III.4).

²²³ This imposes serious difficulties for the research on impunity. Different researches use the concept of the *Principles* while at the same time delimit their scope on a particular indicator because of the difficulty for analyzing all possible jurisdictions and mechanisms as the *Principle’s* concept asks. For an example of this kind of de-limitation, there is a report on impunity regarding violence against Colombian Trade Union members authored by *DeJusticia* asserting that they used the *Principle’s* definition as “appropriate for identifying the factors of impunity in the country, not only because it is a widely accepted conceptualization both internationally and nationally, but because it encompasses the various dimensions of the phenomenon. [...] However we adopt a broad concept of impunity as defined by Joinet and Orentlicher, this does not mean that this research we will deal with all these elements. The analysis developed in this study excludes several of the aspects outlined concept of impunity [...] The reason for this exclusion is not because we do not consider important these other forms of satisfaction of the rights of victims, whose importance is obvious. It was simply [because of a division of work] and a methodological decision to focus the study on one aspect of impunity that could be adequately studied within the time constraints of this research” (La Rota, Montoya, Páramo & Uprimny 2010 p. 7-8).

²²⁴ For instance, when a child does not have access to primary education or when the workday exceeds the maximum legal ordinary working hours, there is a human rights’ violation but not necessarily a crime.

1). Thus, the very notion of justice has become identified with one chief possibility: the infliction of suffering by the criminal justice (Pires 1998: 10). In this sense, the system is endowed with the authority and obligation to react against criminal conduct holding a maximalist expectation. As Kaminski (2009) puts it, the criminal system is currently presented as apt and required for dealing with all sorts of social problematic situations (a Swiss Army Knife imagery)²²⁵.

(iv) Impunity/reparations: the *Set of Principles* assesses that any human rights violation gives rise to a right to reparation, “implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator” (Principle 31). In this line, the notion of the Principles observe the lack of reparations to be made to the victims as part of the observation of the phenomenon: “[s]atisfying one of their obligations, such as the duty to ensure prosecution of those responsible for serious crimes under international law, does not relieve States of their independent obligations, including those bearing on reparations, the right to know and, more generally, non-recurrence of violations” (UN 2005: 7).

The right to reparation entails different economic, social and symbolic measures intended to provide material, psychosocial and moral redress (UN 1997). With this respect, Joinet assessed that the interpretation of the Principles should be guided by the *UN Basic Principles and Guidelines on the Right to Reparation*, in accordance with which this right should embrace a wide range of measures of restitution, compensation, rehabilitation, and satisfaction. These measures seek to restore victims to their previous state (*restitution*); to address those damages causing physical or emotional injuries, including the lost opportunities, physical damage, defamation and legal aid costs (*compensation*); to offer adequate attention, treatment, medical care, including

²²⁵ However, the fact that penal measures are represented as the mandatory reaction through the wide universe of misconducts, often creates the perception that the criminal system is actually useless.

psychological and psychiatric attention, enabling victims to continue with their life (*rehabilitation*); and, to provide moral reparation, through the recognition of the wrongdoing, the restoration of victims' reputation, the conduction of commemorative ceremonies or the preservation of historical memory of the violations, inter alia (*satisfaction*).

With regard to the extent of these rights, according to Cherif Bassiouni – UN rapporteur for the reparation principles, the elements of reparation have appeared in a large number of international law documents with so many different connotations and, when studied cumulatively they “carry the potential to produce a multiplicity of standards, principles, interpretations and terms” (UN Commission on Human Rights 1999: par. 6). In this sense, to what extent, in the presence of full satisfaction of one or some of the ingredients of reparations is this acceptable according to international law? To what extent does this impact the concept of impunity? The reparations to be made to the victims certainly entail to some degree conceptual vagueness: it is not evident and perhaps not observable to what extent the lack of compensation constitutes ‘impunity’.

(v) Impunity/adequate punishment: the distinction impunity/accountability for human rights violations, is further developed by the *Principles* into a distinction impunity/adequate punishment, according to which “inadequate” punishment entails impunity. The obligation to punish through *appropriate* sentences endorses the idea that there is only one kind of punishment that fits the crime (Hart 2008: 161) and that the criteria for assessing its “adequacy” is only *quantitative*. For example, not only a non-carceral punishment will tend to be observed as ‘inadequate’ but also an imprisonment of few years may be seen as ‘inappropriate’ because it is not causing “enough suffering” a propos a criminal infraction. Thus, the correspondence between wrongdoing and adequate legal redress is susceptible of different interpretations and is intrinsically related to a

“culture of imprisonment” in the contemporary criminal law system. Concerning the notion of impunity, this involves that punishment that is not understood as appropriate amounts to “impunity”. With this respect, a difficulty for assessing a non-impunity scenario arises.

In accordance with human rights, criminal prosecutions in the usual legislative program are increasingly considered as a *conditio sine qua non* in order to preserve the rule of law, institutionalize democracy and improve human rights²²⁶. Human rights jurisdictions have gradually accepted the prosecution of those responsible for violations as a human rights rule: regional courts have urged for domestic criminal procedures as an adequate human rights redress²²⁷. However, there is no such consensus coming from human rights in regard to the extent and quality of punishment or to the existence of a duty-right to punish -understood as a form of pain infliction and temporal exclusion of those responsible for the violations.

Nevertheless, when reviewing current human rights jurisprudence, a propensity to increase the pressures favoring punishment in accordance with the ordinary penal thought seems to emerge²²⁸. Additionally to the practice of international human rights courts, indicators of the obligation to punish are present in the human rights normative framework. This obligation can be

²²⁶ “[P]rosecutions are considered to be an unalloyed good: they deter future abuses, promote the rule of law, restore the confidence of citizens in government, guarantee respect for human rights, and ensure justice for victims of atrocious crimes. Even those who criticize the traditional criminal justice model or the practice of international criminal law suggest that the problems lie chiefly inefficiency and enforcement rather than in conceptualization” (Engle, Miller and Davis 2016: 1).

²²⁷ Alexandra Huneeus (2013) refers to this phenomenon as the quasi-criminal jurisdiction by human rights courts, observing that human rights bodies have developed a ‘new’ identity ordering, monitoring, and guiding national prosecutions. According to Huneeus (2013) this situation is problematic because it represents an illegitimate expansion of human rights jurisdictional mandates to criminal law issues. Further, this expansion involves the intervention of human rights bodies in criminal law issues, acting without the actual capacity or expertizes to supervise criminal procedures.

²²⁸ “Troubled by massive breaches of human rights, and the failure or outright refusal of governments to prosecute offenders, attention [of human rights movements] has turned to a perceived need for repression” (Schabas 1997: 215).

traced back to the international human rights conventions and their interpretative bodies in at least two main forms: the introduction of an express obligation to punish and the composition of parameters for punishing. While the former is rather explicit, the latter is less manifest because it involves a form of regulation, enforcement and acceptability of punishment under certain limits.

In regard to *the first form* of the human rights obligation to punish, several international conventions explicitly require *appropriate* or *adequate* penalties as an obligation that States should meet. In this respect, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²²⁹, the International²³⁰ and Inter-American²³¹ Conventions on Forced Disappearance, the ILO Forced Labor Convention²³², the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions²³³, endorse the criminalization of their breaches and require legal redress through “appropriate punishment” – this expression remains vague and suggest the idea of strict severity in the forms of sanctioning. Other instruments, as the

²²⁹ Article 4. 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

²³⁰ Article 7.1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

²³¹ Article III. The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person.

²³² Article 25. The illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.

²³³ 1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences.

Convention on the Prevention and Punishment of the Crime of Genocide²³⁴ and the IHL Geneva Conventions²³⁵, enunciate this obligation using the expression “effective criminal penalties” –this expression focuses on the materialization of the sanctions without suggesting ‘strict severity’ in the same way. Other dispositions use drastic and explicit formulations as the obligation of “severe penalties”, stated by the Inter-American Convention to Prevent and Punish Torture²³⁶ –this expression directly obliges and invites to harsh sanctions. When analyzing these mechanisms one should note the absence of reference to the idea of “rehabilitation” or “restorative justice” models, in spite of the fact that currently these forms of justice tend to be framed as an important part of the human rights discourses.

Besides the explicit formulation of the human rights obligation to punish, a *second form* can be depicted through the ideas and discourses aimed at offering different parameters for punishing: borders entail the reaffirmation of the territory within. Human rights parameters involve the administration of “decent conditions”²³⁷ in punishment, conditions capable of endorsing the rights to

²³⁴ Article V. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

²³⁵ The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article (article 49, Convention I; article 50, Convention II; article 129, Convention III; article 146, Convention IV).

²³⁶ Article 6. In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction. The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

²³⁷ The mobilization for decent living conditions for prisoners is traditionally ambivalent: while it provides arguments for campaigning in favor of decent and humane conditions for prisoners, it does not seriously confront the cause of imprisonment nor question the underlying nature of the measures restricting the liberty of those convicted for their wrongdoing. Paraphrasing Garland, it is like if pain was sufficiently sanitized by procedural rules becoming invisible, when not openly accepted and tolerated, for the society that inflicts pain while at the same time intends to disavow violence (Garland 1990). The critiques of imprisonment focused on

life, dignity and integrity of inmates regardless of their wrongdoing (IA Court 2004: 102; 2004b: 150; 2004c: 152; 2003: 126). With this regard, human rights propose restraints to severe physical distress in the form of *ius cogens* prohibition of torture and cruel, inhuman or degrading treatment or punishment²³⁸, the proscription of corporal punishment -including excessive chastisement for a crime or as an educative or disciplinary measure (UN Human Rights Committee 1994: p. 5), as well as outlawing prolonged incommunicado detention or solitary confinement²³⁹, and incarceration in totally inhospitable places or isolated locations which make difficult for the prisoner to receive visits from her family (UN Human Rights Committee 1994a, 1994b, 2002; IA Court 2003b: 87; 2000b: 150; 2000c: 83; 2005: 221; 2004: 104). Human rights also prohibit collective punishments, recognizing the principle of individual criminal responsibility by the IHL²⁴⁰ and other human rights conventions as the

the administrative issues of internment are incapable of reflecting on the existence of prisons as a problem. Focusing on the administration of prisons, the corruption and lack of independence of the judiciary or the interference of the executive in procedures (e.g. Human Rights Watch 2016), human rights have progressively left aside the critiques on the central ideas and discourses around the system program of action.

²³⁸ *Inter alia*, International Covenant on Civil and Political Rights (Art. 7); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; American Convention on Human Rights (Article 5); and Inter-American Convention to Prevent and Punish Torture.

²³⁹ The UN Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment (2011: 9) defined “solitary confinement as the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day. Of particular concern to the Special Rapporteur is prolonged solitary confinement, which he defines as any period of solitary confinement in excess of 15 days. He is aware of the arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful. He concludes that 15 days is the limit between “solitary confinement” and “prolonged solitary confinement” because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible”

²⁴⁰ Principle recognized in the IHL, in the Lieber Code (Articles 44 and 47), First Geneva Convention (Article 49), Second Geneva Convention (Article 50), Third Geneva Convention (Article 129), Fourth Geneva Convention (Article 146), Hague Convention for the Protection of Cultural Property (Article 28), Second Protocol to the Hague Convention for the Protection of Cultural Property (Article 15), Additional Protocol I (Article 85), Amended Protocol II to the Convention on Certain Conventional Weapons (Article 14), Ottawa Convention (Article 9), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Article 4).

American Convention on Human Rights (Article 5.3), the African Charter on Human and Peoples' Rights (Article 7.2), and the Cairo Declaration on Human Rights in Islam (Article 19.c).

The existence, adoption and adaptation of a series of human rights rules and principles to the idea of 'adequate punishment' do not contradict punishment but sets parameters for its implementation. This involves an observation of punishment as operative to human rights, reaffirming the territory within formed by the ideas, discourses and practices concerning punishment. "[A] major source of criminalization [sic] at national and international levels draws on the rhetoric of human rights" (Cohen 1992: 100).

After taking into account these five conceptual elements but also the general connotations that human rights discourses attribute to impunity as well as the ordinary social discourses in this matter, in the next part we will draw some critical considerations about the elements and arguments exposed in the last sections.

5.3. Critical considerations on the discourses and conceptualizations of impunity

In accordance with the human rights conceptualization of impunity as well as the characterization of the phenomenon in social discourses, we have detected some preliminary problems for a sociological construction of the concept. These problems are the ambiguity, lack of contours and limits of (the fight against) impunity, as well as the expansion of the concept and the repressive logics that the slogan of combating against impunity embeds. This section will furnish two critical accounts of such problems. With this purpose, we will start our reflections outlining two possible functions of the current discourses on 'impunity': (i) regret and social denunciation, and (ii) reproduction of the criminal law *traditional* structures centered in punishment as a form of pain infliction.

5.3.1. Impunity as a discourse of regret and social denunciation

If someone asks on the streets what love is, this question may raise rather positive answers²⁴¹. The same may probably happen if someone asks for a concept of hope, beauty or nature. These terms, although certainly ambiguous raise a positive perception, a rather optimistic sense of meaning. In our days, this is not the case for ‘impunity’. As we studied in the last sections, although polysemous, impunity involves a negative connotation of regret and social denunciation: impunity is generally perceived as a social problem that can be “solved” by severe punishment; after all, in contemporary Western societies who would proclaim impunity as a valid social aspiration? Who can legitimately disagree with the fight against impunity?

As a communicative mechanism of social regret, a wide variety of social wrongdoing can be mobilized through the topic of ‘impunity’. On the one hand, this discourse is simultaneously source and expression of moral indignation and social unease, and on the other hand it is often referred to as the cause and consequence of wrongdoing in society (a causal analysis). In sum, these connotations bring into being an overall discourse of impunity consisting of ‘a whole set of assessing, diagnostic, prognostic, normative judgments’²⁴².

When impunity adopts the form of a discourse of regret, the scope of the notion is broadened as a label capable of colonizing extremely varied social problems. This form of social regret is employed by both the left and the right as a communicative mechanism of social denunciation and mobilization of their political demands. In line with these discourses, the State is

²⁴¹ “For the majority, especially since Luther, genuine love is to the right of each of these divisions: self-giving, truth-seeking, submissive, unconditional, enduring. While lesser love (if one can call it love at all) is to the left. By contrast, a small band of rebels insists that all genuine love, especially love with an erotic content, is ineluctably self-interested, possessive and mercurial.” (May 2011 : 235)

²⁴² Inspired in Foucault’s (1975: 19) words for the penal judgment.

the main actor towards which denunciation and regret are mobilized. In addition to regret for the lack of redress for criminal problematic situations, in the course of the present research different interviewees brought light to the use of impunity for referring to other social actors.

In the PJ case, Hector Beltrán (father) drew a distinction between *social/legal impunity*, assessing that ‘social impunity’ is graver than ‘legal impunity’, because it creates a social authorization for the crime and oblivion on the atrocities that they suffered (Beltrán 2014: 94-95). His account closely parallels the one provided by a text written by the next of kin of Luz Mary Portela (disappeared), where they asked society “not to ignore us, not to discriminate us because we are not the only people suffering this problem, this could also happen to you” (Romero 2015: 112).

This can be encapsulated into the concept of moral or social impunity (Bottinelli 2007) according to which the absence or lack of social sanction can be depicted as a form of impunity. The notions of moral or social impunity sustained by Botinelli and other commentators assume that impunity hampers the emotional recovery of the victims. As we reviewed when examining human rights discourses on this topic, the adversity that victims bear in situations of impunity is a pervasive observation in human rights studies (Justicia y Vida 2006; Instituto Interamericano de Derechos Humanos 2007; La Rota, Montoya and Uprimny 2010).

However, some studies cast doubt on the universality on the presumption that impunity creates emotional harm to the victims and that “criminal punishment” is its remedy. With this regard, it is particularly interesting to examine a study of the Basque Institute of Criminology (Varona and De la Cuesta 2014). This research concludes that the next of kin of people killed by terrorist groups in the Basque Country since 1960, do not always recognize criminal law measures as significant for their psychosocial recovery. In fact, in cases where there is a criminal conviction,

only 36.6% of the victims consulted by the study suggested that this helped them in their moral recovery, while 46.3% of the respondents argued that this did not help them at all, and to 13.4% of the victims this was simply indifferent. The extent of the moral and psychological impacts that convictions bring about to victims exceed the scope of the present research. However, we can assert that the criminal law conviction of those responsible of criminal conducts, represented as a desired outcome and an aim of the fight against impunity, cannot be universally validated as an effective remedy for the recovery of the victims and their families.

The notion of social or moral impunity is ambiguous, imprecise and fluctuating depending on rather emotional factors, which can hardly offer stable elements for the observation. Indeed, for an observer using these conceptualizations it is impracticable to delimit a stable notion of impunity related to moral or social sanctioning. What means social sanctioning? How can we observe the absence or lack of “social sanction” in a given society?

The slogan of the *fight against impunity*, ranging from legal to ethical questions, from psychosocial to political dimensions, from a cause to a symptom, from diagnose to a prognosis of social problems, communicates and enables different forms of constituting, organizing and interpreting social life²⁴³. The discourses of denunciation and regret concerning entail different implications. Let us consider these implications more closely:

i) The constitutive connotation of discourses of regret and denunciation emerges when impunity is employed as an argument for creating, coordinating and bringing together institutional,

²⁴³ Prosecutions are considered to be an unalloyed good: they deter future abuses, promote the rule of law, restore the confidence of citizens in government, guarantee respect for human rights, and ensure justice for victims of atrocious crimes. Even those who criticize the traditional criminal justice model or the practice of international criminal law suggest that the problems lie chiefly in efficiency and enforcement rather than in conceptualization.

discursive or ideological initiatives in order to combat it. Anti-impunity campaigns both constitute and are developed through an institutional framework embodying a normative regret (Pensky 2008). Legal instruments, policies and administrative programs, human rights institutions, either at the domestic or international level, are among the mechanisms implemented.

This fight intends to undertake a series of mechanisms countervailing the social problems that are traditionally raised when referring to the absence or lack of punishment. As its source, *raison d'être*, goal and motivation, the action against impunity has served at creating a number of institutions engaged with combating impunity²⁴⁴. This is intended to express the message that there is an obligation of punishing (i.e. inflicting suffering) upon people who commit crimes. This seems to be the sense of the mantra “impunity will not be tolerated”.

In this context, the slogan of the combat against impunity creates legitimate grounds for the creation or justification of a specialized institutional framework oriented to address the problem through the program of action of punishing the criminals. New legislation, social procedures for legal intervention, technologies of control and repression, and the reform or creation of a series of institutional mechanisms with this purpose.

ii) The slogan of the fight against impunity implies also a sort of “*Weltanschauung*” (world view) that may be found in the arguments, ideas, discourses or practices enabling a particular observation or understanding of a certain social problems represented to be related to human rights.

²⁴⁴ Roht-Arriaza (2001) and Pensky (2008) describe four main transnational contemporary institutions. These institutions supplement the domestic efforts of implementation of the combat against impunity: a) the creation of international or hybrid international domestic ad hoc tribunals, b) the intervention of foreign courts acting as third party states through extradition, c) universal jurisdiction or civil law mechanisms investigating and prosecuting non-nationals outside of their home countries, and d) the creation of the Rome Statute of the International Criminal Court with the purpose of ending impunity for the most serious crimes.

When a situation of impunity is observed, it becomes an argument for delimiting the role, extent and aims of social institutions in relation to social problems related with the problematic situation.

In this context, discourses about impunity appear as reasons for developing the conventional program of action of the criminal law system, without any critical concern for the philosophy of intervention. This implies a normal social reproduction of legal institutions and ideas around punishment, influencing the hermeneutics of legal mechanisms as the statutes of limitation and the victims' rights²⁴⁵.

iii) The slogan of the fight against impunity serves also as a program of action for social *mobilization*. These discourses often use (the motto of the campaign against) impunity as an injunction aimed at orientating the actions of individuals and social movements. These discourses may involve moral, political and ethic arguments with the purpose of individuals embracing 'the fight'. Either as a general campaign or as the support in favour of the reaction against a particular problematic situation, the creation of advertising campaigns, educational programs and other strategies, aims at socializing the reproach. Often, these strategies focus in transmitting the idea that prosecutions and criminal punishment against perpetrators is the 'gold standard' that the fight impunity must support (Pensky 2008).

According to this, impunity as a discourse of regret and social denunciation creates opportunities for mobilizing the social consciousness against wrongdoing and its consequences.

²⁴⁵ An example of this can be found in a case brought to the European Court of Human Rights where the applicant, a Bulgarian national who belonged to the Roma minority, being sentenced under charges of fraud to three years of imprisonment, was refused the suspension of the sentence on the grounds that there was "an impression of impunity, especially among members of minority groups", considering that "a suspended sentence is not a sentence" (European Court of Human Rights 2010). In this context, the understanding of the deprivation of liberty is interpreted adverse to the offender using a discourse of impunity which served at regretting certain conditions of a particular human group.

This discourse around impunity may enable society to detect, name, recognize and address the social problems that the phenomenon entails. The awareness of the crimes, the visibility of the victims, the consciousness against the wrongdoing and the necessity of holding accountable those responsible for problematic situations are eventual valuable effects of this discourse.

The portrait of the fight against impunity as a struggle against the absence or lack of punishment often demands a shift towards more punitive forms of social control. Benefiting from social dissatisfaction, this may constitute an opportunity for a law and order rhetoric which amounts to penal populism. Repressive discourses and practices, false promises of judicial effectiveness or actual policies of respect and support to the judiciary, administrative and technical support to the action of the system of justice, are some of the traditional expressions of these discourses²⁴⁶.

These discourses often portray victims' needs through an automatized claim for retribution. In this context, "victims and victim movements [...] often are embraced by politicians that make Law and Order their central issue, as described by several authors (e.g. Fattah 1986, 1997; Kirchhoff 1991; Sherman and Strang 2007)" (Christi 2010: 117). The victims, deprived of voice, are employed as a standard justification of greater punitiveness – penal measures are allegedly implemented by the system for the wellbeing of actual or potential victims. In this context, the

²⁴⁶ "Les transformations de l'activité pénale de l'État au cours des dernières décennies vont recevoir plusieurs dénominations différentes dépendamment de l'aspect que l'on veut mettre en relief. Ainsi, ces transformations peuvent être identifiées comme *la montée de l'État pénal* (Wacquant), comme une *nouvelle culture de contrôle* (Garland) ou comme une *nouvelle pénologie* (Feeley et Simon). Quel que soit le nom qu'on utilise pour identifier ces transformations, elles semblent bien être associées à une nouvelle vague d'intolérance, de demandes de peines plus sévères et de renforcement de l'usage de la prison, toujours critiquée. La place pour les connaissances scientifiques ou juridiques plus approfondies et innovatrices semble grandement réduite sur le plan politique. Même l'ancienne idée du contrôle du crime par l'amélioration des conditions sociales et par la réhabilitation du coupable semble être un discours dévalorisé. Aujourd'hui, les politiciens trouvent plus facile et moins cher (même si cela est discutable) de tenter de séduire leur électorat par la proposition de peines plus sévères, par une posture « *tough on crime* »" (Xavier 2012: 12).

victims are simultaneously brought to light and silenced: “[t]he victim plays an ambivalent role in the anti-impunity imagination. The promotion of prosecutions often takes place in the name of the victims, even as their voices might be suppressed, limited, or distorted at trial. [...] The victim is thus both central and marginal, featured and featureless, a necessary representative of a horrific past and a feared brake on future transformation” (Engle, Miller and Davis 2016: 10-11).

In the context of these communications, it is not surprising when “victims of certain types of crimes get organized as lobbies that tend to push the legislator into punitive responses that may jeopardize or pervert the *ultima ratio* principle. These lobbies rarely call for abolitionism and decriminalization, for alternatives to criminalization or for approaches that take into account the successful re-integration of the offender” (Bengoetxea 2013: 119). People or movements with a strong demand for justice and peace may find themselves trapped in the paradox of supporting measures that entail different forms of injustice and vengeance.

In the particular case against the Argentinian dictator Jorge Videla, it is interesting to explore the clash of values that the slogan of the fight against impunity based on regret and denunciation may involve. Videla was a military General who became one of the most cruel and ruthless dictators in the history of the continent. On March 24, 1976, the Argentine armed forces initiated a coup d'état that lasted until December 10, 1983. Videla launched the so-called “National Reorganization Process” and an “Anti-subversive campaign” consisting in the systematic suppression of the people who were against the ‘Western and Christian Civilization’. This regime spread terror, repression and death through the practice of arbitrary detentions, mass torture, abduction of minors, extrajudicial killings and forced disappearance of thousands of people who opposed the military doctrines.

After his removal from power, he benefitted from different amnesties and presidential pardons issued to favor the military. These pardons were annulled and on December 22, 2010, the Federal Tribunal of Cordoba sentenced Videla to life imprisonment. Videla died in his cell in 2013. In respect to this, the then executive director of Amnesty International for Argentina, Mariela Belski declared: “the important thing here is that justice was done, that Videla was sentenced and that he died in prison” (Valente 2013). In the same vein, the then Vice-President of the republic, Amado Boudou stated: “it's good that he died in prison and with a sentence from the justice and the democracy in Argentina”. Correspondingly, the Secretary of Human Rights of Argentina, Martín Fresneda, said that although “the Argentine government cannot celebrate the death of anyone”, he was “satisfied” that there was “justice and not revenge” against Videla and that it was “important that he died of natural causes and in a common jail”.

These assertions communicate a sense of disquiet around the difficulty of putting on trial powerful actors. This concern triggers in the case a sense of triumph and relief in relation to the death of the perpetrator. Such understanding reveals the constitution of a paradox of sacrifice (Pires, 2012) according to which human rights aim at protecting human life through criminal law by sacrificing the (biological or social) life of the person against who the criminal law intervenes. This could also be seen as a trap of values according to which value *Y* is reaffirmed, essentially, by sacrificing value *Y*. Ultimately, this can be an indicator of a paradoxical relation between criminal law and human rights (on this subject, Cartuyvels 2007). With this regard, the combat against impunity when understood as a campaign for (criminal law) repression may entail a form of reproduction of social structures that will be studied in the following section.

5.3.2. Impunity: a mechanism for the reproduction of criminal law structures of pain infliction

In this part we will study how human rights discourses, ideas and practices around the fight against impunity may entail the reproduction of a particularly repressive way of thinking the criminal justice program of action, creating different obstacles for the innovation. Particularly, we will argue that such understanding may identify the fight against impunity with the reproduction of criminal law punishment as a form of intended pain infliction.

The *automatized* and one of the most frequent notions of impunity refers to the absence of punishment. The oldest document that we were able to trace referring to this notion of impunity dates back a document dated 1624: “one outrage unpunished provokes many more, through hope of the like impunity” (East India Company 1624: 2). This formulation, probably used by former communications, has spread throughout contemporary discourses, especially within human rights: in accordance with our study, the phenomenon of impunity is ordinarily identified as a social problem taking place when crimes (and other wrongdoing) go unpunished (e.g. Plataforma Argentina contra la Impunidad 1998; Justicia y Vida 2006; Bottinelli 2007: 196; IACHR 2007; La Rota, Montoya and Uprimny 2010; CCJ 2008, 2012²⁴⁷; Comisión Asesora Política Criminal n.d. in CNMH 2013: 197²⁴⁸; CPJ 2013). In this environment of ideas, the fight against impunity may

²⁴⁷ An example of this is also found in a research on the violence against unionists by the Colombian Commission of Jurists (CCJ 2012), which studied the problem of impunity in these cases with reference to the convictions of the perpetrators. In this sense, a history of impunity was drawn comparing the number of cases of violence officially registered by the Prosecutor General’s office and the number of convictions between 1986 and 2011. For instance, in this period there was a register of 225 unionist victims of enforced disappearance compared to a number of sentences in reference to only five victims. The research concluded that impunity amounts to 98%.

²⁴⁸ “La Comisión Asesora de Política Criminal, al analizar la eficacia del sistema penal frente a delitos graves como el homicidio, concluyó que las condenas por los homicidios ocurridos en distintos años fueron equivalentes al 5,9% de las entradas por dicho delito en el 2005, al 3,8% en el 2006, 3,3% en el 2007 y 2,7%

constitute a mechanism for the reproduction of criminal law structures of pain infliction from at least two perspectives: the lack of innovative proposals and the formulation of a program of action centered on punishment as a form of intended pain infliction.

On the one hand, traditional anti-impunity discourses (focusing on punishing as a mechanism of pain infliction) do not support as possible responses to impunity means other than penal measures intended at inflicting suffering. As we studied with regard to human rights discourses and norms, possible innovation coming from restorative justice ideas²⁴⁹, practices developed around the “transitional justice” (with the goal of allowing their presence in the ordinary legal framework), and alternative dispute resolution mechanisms, are absent from the program of action of the traditional way of representing the combat against impunity. These absences already illustrate, at least partially, one of the ways in which the mentioned discourse may reproduce the conventional structures of the criminal law system.

According to a notion of impunity constructed around the theories of punishment, the *fight against impunity* involves advocating for swift, certain, and harsh penalties, rejecting parsimony in punishment²⁵⁰. “If [this] is the starting position, then flexible punishment logically runs the risk of

en el 2008, lo cual equivale a tasas de impunidad cercanas al 95% para un crimen tan grave (Comisión Asesora Política Criminal, párrafo 89)”

²⁴⁹ From 1960 to 1970 a theory of rehabilitation emerged allowing a degree of non-intervention in regard to certain (non-grave) criminal conduct as well as creating some alternative penalties (that often do not represent an alternative to punishment). Alternative conflict resolution has also presented some degree of innovation creating reconciliation programs and compensatory schemas as valid forms of administration of justice. Ultimately, restorative justice has allowed the creation of an idea of justice as a means attending the necessities emerging from the social problematic situation. In line with these ideas, restoration of social relations disrupted by the conflict is offered as the ‘new’ end and identity of the system, rather than punishment (Tonche and Umaña 2016).

²⁵⁰ “The parsimony concept derives from the writings of Jeremy Bentham who argued that the goal of the State should be to maximize happiness or satisfaction and, accordingly, that whatever policy would do that should be adopted. [...] Inflicting pain or unhappiness on anyone, including offenders, is a bad thing and can only be justified when some larger good is achieved. The offender's happiness is no more or less

becoming simply the latest incarnation of impunity” (Roht-Arriaza 2015: 382). When excluding from its field of action, less repressive interests, goals and mechanisms, the ‘traditional’ fight against impunity may uphold a rather repressive penal rationality and, therefore, the structures of the system. However, the reproduction not only resides on the lack of alternative answers but also, and importantly enough, on the criminal law measures that such fight endorses.

For developing this issue, we will briefly present a theory concerning the characterization of the criminal law system that is at the same time concerned with the obstacles it confronts for possible innovation. The Modern Penal Rationality Theory (hereinafter, MPR) authored by Alvaro Pires (2008; 2014) and others (see Dubé, García and Rocha 2013), takes as a basis the characterization on the criminal system that authors as Foucault²⁵¹ had advanced, using different tools from the systems theory to structure and develop its observations.

According to this, the criminal law is currently presented as a self-sufficient, differentiated and self-contained legal sub-system. As such, this system absorbs the social function of operating

important than anyone else's and must be taken into account. The “principle of parsimony”, a concept revived in the writing of Norval Morris (1974), prescribes that the least painful or burdensome punishment that will achieve valid social purposes should be imposed. This is not an unfamiliar concept. Modern lawyers, and the American Bar Association's (1994) standards for sentencing, call for use of the “least restrictive alternative.” [...] Applied to policies governing intermediate sanctions, the principle of parsimony would require imposition of the least painful, burdensome, or intrusive punishment that achieves the purposes being sought”. (Tonry 1998: 206-207).

²⁵¹ Based on Foucault (1974), Pires (1998) observed four paradigmatic transformations on the control of crime creating the possibility of the criminal law becoming autonomized as a legal system. These are: *i*) the invention of the prosecutor in the twelfth century as a representative of the king, replacing little by little the role of the victim; *ii*) the emergence of the ‘infraction’ as the form for referring to the crime, abandoning the concept of harm against someone and replacing it by the notion of a mere offense against the king; *iii*) the *ex-officio* authority which involved the obligation to prosecute, on the basis of the irrelevance of compensatory agreements between the victim and the aggressor; and, *iv*) the compensation not as a form of reparation in favor of the injured party, but as a form of tribute in favor of the sovereign. These transformations involved an important shift of the criminal thought. The criminal justice became progressively autonomized as a legal system and the criminal sanction was identified as punishment.

the code crime/non-crime²⁵² (Pires and Acosta 1994: 10; Alvaro Pires 2008, 2014). Operating this code not only involves the definition of certain conducts as criminal but establishes as well a range of sanctions against the breaches of the criminal law²⁵³.

With this regard, according to the MPR, the identity and horizons of the criminal justice system have been shaped around the premise of communicating an alleged correlation between crime and (the obligation of) punishment (in the sense of intended pain infliction). In line with the MPR, in the Western world has reproduced an identity of the criminal justice system around a program of action centered in punishment as its main end, aim and character. In this context, punishment is a medium which particular selections of meaning are driven by the modern theories of punishment (Pires 2015). This system of ideas that can be denominated a penal rationality finds its rational, philosophical and practical grounds on the theories of punishment²⁵⁴.

These theories entail an *identity discourse* as they provide a rationale, a content and, further, an end to the criminal law. Also, the theories offer a course of action for the system constituting a frame of reference around which decisions are made (adapting the words of Hogarth 1971: 69 in García 2013: 43). Using the expression coined by Durkheim, these theories furnish the

²⁵² The system operates the distinction crime/non-crime through a set of criminal law norms. For establishing the frontiers and content of what may be considered criminal in society, the system mobilizes a series of norms (coming i.a. from the constitutional law, the criminal law, the human rights, police and administrative regulations), and for delimiting the conducts able for the system selection uses a series of principles (necessity, equality, proportionality, obligation to punish).

²⁵³ In this respect, the MPR adopts Hart's (2012) distinction between norms of conduct and norms of sanction, according to which criminal law requires a duty from the people that if disobeyed implies that the person has broken the law.

²⁵⁴ With this respect, Tulkens (2013: 10) explains that the MPR argues that "modern theories of punishment [retribution, deterrence, denunciation and even rehabilitation in prison] involve a major epistemological obstacle to the construction of an authentic criminal law for citizens and a new penal rationality, all at once, more human, more respectful for the freedom of all, more creative and better fitted to address the complexity of society".

system with a *program of action*²⁵⁵ that supplies, supports and orientates the arguments, practices and objectives of the criminal justice system.

For long time, the practical theories of punishment²⁵⁶ have been established around a paradigm contrasting utilitarianism²⁵⁷ (or consequentialist theories) to retributivism²⁵⁸ (or non-consequentialist theories). This understanding differentiate the *first* as a set of ideas that understand punishment as an obligation to deter other crimes or to obtain other public gains²⁵⁹, from the *latter* as a theory obliging to punish as a form of correcting the wrong and reaffirming social order²⁶⁰.

On the contrary, the MPR draw attention to the fact that these two groups of theories have shared the same basic assumptions and that, therefore, their opposition is only secondary with regards to the rational structures of the system: “a distinction without difference” (Pires 2001: 77). While the mentioned theories are traditionally represented as disputing philosophical grounds for

²⁵⁵ A *program of action* is not phenomenological in the sense that their role is not to describe or explain what happens or has happened in the social world; in other words, a ‘program of action’ does not propose a causal understanding of social phenomena (García 2013). Rather a (criminal law) program of action aims at orientating the action of the (criminal justice) system in a forward-looking perspective. Durkheim’s concept is related to the notion of practical theories that “have, as their object, not to express the nature of things as given, but to direct action. They are not actions, but are closely related to actions which is their function to orient” (Durkheim 1956: 313).

²⁵⁶ These ideas are practical since they do not only express an identity credential but also govern the possibilities of action of the criminal law.

²⁵⁷ Divided into classical positivists as Lombroso, Ferri and Garofalo and modern utilitarianists as Beccaria, Bentham, Blackstone, Filangieri, Feuerbach, Carmignani, Howard, Fry, Livingston, Lucas, Ducpétiaux, Julius, Beaumont, Tocqueville, among others.

²⁵⁸ Western philosophy has built more than a version of theories known as “retributivist”. In this sense, the term “retributivist theory” refers to a particular group of theories. This theory has a religious origin (Hélie, 1856, Berman, 1983). The first “retributivist” theory dates back to the eleventh century and refers to divine justice (Anselm, 1098). Some of the most influential representatives of this current are Kant, Hegel, Binding, Rossi, among others.

²⁵⁹ As Bentham asserted (1811: 12): “Ainsi la prévention des délits se divise en deux branches : prévention particulière, qui s'applique au délinquant individuel ; et prévention générale, qui s'applique à tous les membres de la communauté sans exception”.

²⁶⁰ As Hegel famously assessed: “the criminal act is a negation, and punishment is the negation of a negation”

punishment (and partially because of that), they have managed to hide their common characteristics (Van de Kerchove 1981: 291 in Pires 1998).

The three basic shared assumptions of these theories are: (i) a substantialized definition of punishment requiring an explicit and direct aim to inflict suffering through the operation of the system; (ii) the imposition of punishment (as a form of intended infliction of suffering) as an obligation; and (iii) an devalorization of any other form of conflict resolution beyond the obligation to inflict suffering. Let us review this more closely in relation to impunity.

(i) A substantialized definition of punishment as a form of intended pain infliction involves the *valorization of afflictive or exclusionary measures* as the consequence to crime. “[I]mposing punishment within the institution of law means the inflicting of pain, intended as pain. This is an activity which often comes in dissonance to esteemed values such as kindness and forgiveness” (Christie 1981: Preface). According to this, other forms of conflict resolution that are not characterized by communicating suffering (e.g. forgiveness) or measures that do not to inflict ‘enough’ pain (e.g. lenient penalties) are identified with ‘impunity’²⁶¹.

The definition of punishment, initially forged by religious communications through the theory of retributive divine justice, was subsequently adopted by secular theories about punishment (Pires 2015)²⁶². These theories were formed in reference to the religious concept of penance as a form of torment which at the time the ecclesiastical authorities imposed upon sinners “so that

²⁶¹ With this respect, Bentham (1811: 2) asserts: “Punir, dans le sens le plus général, c'est infliger un mal à un individu, avec une intention directe par rapport à ce mal, à raison de quelque acte qui paroît avoir été fait ou omis” “Le mal que vous m'infligez [...] S'agit-il d'une somme d'argent qu'on exige de vous, comme un équivalent pour une perte que vous avez causée à un tiers ? c'est un acte de satisfaction pécuniaire, non de punition” (Bentham 1811:4).

²⁶² The coupling between the religious notion of divine justice and the secular penal ideas can be characterized as non-coordinated uses of similar representations making possible to preserve the availability of a similar sense (Luhmann 2010 274-275 in Pires 2015).

through ‘sorrowful groans’ and a contrite heart they might be admonished, instructed and prepared for the future” (Shoemaker 2011: 20). According to this, sacrifice, penitence and suffering became identified as the consequence that the criminal justice is supposed to award to criminal wrongdoing. In this context, punishment is identified with an experience of ‘infamy’, a ‘legitimate pain’ suffered by those who behave against the authority of the law.

The aim of pain infliction was originally communicated through corporal punishment, which ought to be the causation of physical pain. However, this practice particularly transformed especially in the eighteenth century (Shoemaker 2001: 15)²⁶³ into the form of temporization of punishment (Pires & García 2007; Pires 2014; Umaña and Pires 2016) from the second half of the eighteenth century²⁶⁴. This form was constructed in opposition to the corporal infliction of pain under a representation that only inhumane punishment could derive from corporal pain – e.g. prison time is more humane than to be whipped in a plaza.

Hence, the constitution of an obligation of punishing evolved into the deprivation of liberty, administered in conformity with a *temporization of suffering* or *temporization of the punishment* (Pires and García 2007; Pires 2014; Umaña and Pires 2016). *Temporization*, using the neologism

²⁶³ “Within a relatively short period of years, beginning roughly in the latter portion of the eighteenth century, a wide range of corporal punishments employed throughout Western Europe and the American colonies gave way to less bloody penal methods. By the early nineteenth century, [...] no longer did punishment focus upon the dramaturgy of a condemned undergoing intense physical pain; now punishment operated without bloodletting, with minimized physical suffering, and almost exclusively within the walls of a penitentiary” (Shoemaker 2001: 15).

²⁶⁴ This position is particularly noticeable in Beccaria (1764: 11) who asserted that every criminal cause should be judged syllogistically where “[t]he major should be the general law; the minor the conformity of the action, or its opposition to the laws; the conclusion, liberty or punishment”. According to this, the right to liberty is constructed in opposition to penal sanctions.

derived from the study of Norbert Elias (1998)²⁶⁵, is a synthesis of the correlation drawn between two different sequences: the gravity of the crime and the amount of time of sentence, simultaneously used as the measuring scale of each other. To the phenomenon of crime, a scale was designed relating the seriousness of the conduct with a timescale - deprivation of liberty formulated in terms of days, months and years. Temporal punishment uses a form of political economy of repression on the body: the horizon of punishment and its declared function is expressed on time (*temporization of suffering*). However different from a system of corporal punishment aiming at the bloody chastisement of the body, the *temporization of suffering* involves as well a physical restriction on the person submitted to the deprivation of liberty²⁶⁶.

In this rational environment, prisons emerged as a standard social institution (Foucault, 1983), identified as the essential penal measure²⁶⁷ and the identity of the modern criminal law system (García 2013: 63; UN Office on Drugs and Crime 2007:3²⁶⁸). Moreover, in modern times,

²⁶⁵ In his studies on time, Elias (1998) noted that time has been used as a reference scale for measuring different phenomena. This correlation may be established between phenomena that have rather divergent characteristics –as may be time and criminal conduct.

²⁶⁶ As Foucault (1975) asserted: “even if they do not make use of violent or bloody punishment, even when they use ‘lenient’ methods involving confinement or correction, it is always the body that is at issue - the body and its forces, their utility and their docility, their distribution and their submission”.

²⁶⁷ Nonetheless, recently, ideas on transitional justice, restorative justice and rehabilitation theories have raised other possible schemas of thought with the aim of finding a more integral answer to the phenomenon of crime and, therefore, alternatives to punishment. It is still debatable and specific to every context, circumstance and crime, to what extent alternatives to punishment can be used, specifically in contexts of armed conflicts, war, massive human rights violations, and other grave situations.

²⁶⁸ “Prisons are found in every country of the world. Policy-makers and administrators may therefore simply come to regard them as a given and not try actively to find alternatives to them. Yet imprisonment should not be taken for granted as the natural form of punishment. In many countries the use of imprisonment as a form of punishment is relatively recent. It may be alien to local cultural traditions that for millennia have relied on alternative ways of dealing with crime. Further, imprisonment has been shown to be counterproductive in the rehabilitation and reintegration of those charged with minor crimes, as well as for certain vulnerable populations. Yet, in practice, the overall use of imprisonment is rising throughout the world, while there is little evidence that its increasing use is improving public safety. There are now more than nine million prisoners worldwide and that number is growing”

the prison is the dispositive that absorbs public reprobation (Feinberg 1981: 31 in García 2013: 60; Duff and Garland, n.d. 34). In this vein, the modern penal theories agree on the mechanism of operationalization of criminal law reproach, expressed in terms of time and represented as the length of the custodial sentence²⁶⁹ (García 2013: 53). The *overestimation of the forms of deprivation of the liberty* that characterizes modern discourses of impunity focuses the attention of the system on finding an ‘adequate’ severity rather than finding an alternative to severity²⁷⁰.

In this context, anti-impunity discourses entail a mechanism for the reproduction of the criminal law structures while the role of the criminal law to the fight against impunity becomes centered on a single mission: adopting (severe) penal measures implemented through a measure of exclusion and suffering that must correspond to a proportion of the wrong caused by the offense. In this vein, the operation of the system could not aim at more or better forms of social inclusion of the individual responsible for the wrongdoing -at least not done instantly the moment the sanction takes place, and pardon and amnesty are undervalued when not prohibited as a form of operation of the system²⁷¹.

²⁶⁹ While authors such as Drumbl (2007) observe that data on the criminal sanctions at the national and local levels show a certain diversification on the types of sanctions available -including community service, incarceration, lustration and compensation, we should notice that this diversification presents different formal and material obstacles. The graver the offense, the more difficult it is to find alternatives to imprisonment –apart from (increasingly rare) positions in favor of death penalty.

²⁷⁰ “Although in many countries, the philosophy of imprisonment is increasingly thought of in terms of the concept of ‘corrections’, for those deemed to pose particular risks there appears to be a greater emphasis on security. Examples include notorious ‘Super-max’ facilities where the purpose of the regime is to prevent all physical contact between a detainee and others, and to minimise social interaction between inmates and staff” (Allen 2015: 25).

²⁷¹ According to some, “domestic amnesties are not violations of international law according to the emergent anti-amnesty norm. It is not a crime not to punish a crime. But the non-performance of punishment now at least in principle triggers the legal scrutiny of the international community” (Pensky 2008). Other commentators as Lessa and Payne (2012), in return, accept that besides trials, amnesties are not only permitted in international law but also could contribute to political transition.

The criminal law system has therefore become a social system in charge of responding to criminal conduct through *negative* or *hostile* measures. *Negative* since these theories refer to positive actions as impertinent or insufficient for addressing the criminal conduct (e.g. apologies or reparations instead of punishment) suggesting that only the concrete and immediate evil caused to the deviant (classical notion of punishment) can reaffirm the value that the norm upholds and the well-being of the social group to which it belongs (Pires 2001a: 184). The adverse character of punishment is, therefore, the *conditio sine qua non* for materializing the regret to crime²⁷². According to this rationality, positive actions of integration or social assistance would be in principle inadequate for addressing the criminal conduct –in the exceptional cases when they exist they are often elusive and difficult to adopt and hard to implement. Furthermore, actions expressing reproach by allowing the offender to engage with performing positive actions for addressing the necessities that emerge in the criminal problematic situation would be perceived, at best, as insufficient and inadequate.

The *atomistic* character of such reaction implies that the preservation of the social links between the offender and the society is indifferent to the action of the criminal law system: while the action of the offender may sometimes express a rupture with the society, the action of the criminal law system is programmed for expressing, at all times, a rupture between the offender and society. Even if the offender commits a crime without any particular representation of detachment from society (i.e. when the actor have a strong sense of belonging to social values), the criminal law system creates a rupture between the wrongdoer and her context.

²⁷² With this respect, the Inter-American Court on Human Rights (2001: 106; 2004: 101) asserts that criminal law penalties “imply impairment, deprivation or alternation of the rights of an individual, as a result of an unlawful conduct”

This rupture is often *physical* in the form of the ‘ordinary’ measure of the deprivation of liberty but is, at the same time, *abstract* because it implies addressing a concrete problematic situation with a measure of pain infliction that is not concretely and primarily concerned with addressing the problems and restoring the necessities that the conflict raises: primarily it is committed with producing a sufferance and only secondarily it is concerned with producing a *good*²⁷³. In this rational context, the temporization emerges as an abstract form of measurement of the system’s reproach towards the crime without a concrete link to the criminal conduct initiating the reaction of the system: a uniform formula of penal temporization addresses very diverse problematic situations.

(ii) This understanding involves *the representation of punishment as an obligation (to inflict suffering)*. According to MPR, the imposition of punishment (as a form of intended infliction of suffering) constitutes an (either moral, pragmatic or legal²⁷⁴) obligation to be attributed against those responsible for criminal conduct, opposed to a simple authorization to intervene or even a form of sanctioning without directly seeking the infliction of suffering. In this context, impunity is constructed in contrast to the breach of the obligation to punish crime as a phenomenon that replicates and reproduces the social wrong derived from crime.

With respect to impunity and referring to the mentioned traditional paradigm of the penal thought, on the one hand, in the case of *retributivism* impunity would amount to a breach of the

²⁷³ In the Words of Bentham (1811: 10): “La peine produit un mal du premier ordre, et un bien du second ordre : elle inflige une souffrance à un individu qui l’a encourue volontairement ; et dans ses effets secondaires, elle se change toute en bien, elle intimide les hommes dangereux, elle rassure les innocents, elle est l’unique sauvegarde de la société”.

²⁷⁴ At the beginning of the nineteenth century we can find three main reasons governing the idea of punishing without a rest: a practical reason (Beccaria, Bentham), a moral obligation (Kant, Hegel) and a legal or logical obligation (Feuerbach) (Pires 2001: 82)

categorical imperative²⁷⁵ or of the moral or juridical duty to reaffirm the validity of norms. On the other hand, in the case of *utilitarians*²⁷⁶, the notion of *impunity* would refer to the breach of an obligation of punishing crime affecting deterrence and therefore creating recidivism or a general implicit authorization to commit crime²⁷⁷. In sum, these schools characterize impunity as the opposite to the obligation of punishing; in doing so, these theories propose no substantial difference from the point of view of the means to address impunity.

The notion of punishment based on pain infliction (*iii*) *under-values alternative punishments and, especially, alternatives to punishment (as a measure of pain infliction)*. Pires

²⁷⁵ For the *Kantian school*, morality is governed by a moral imperative that has to be observed in all circumstances not as a means but as an end in itself. “The categorical imperative would be that one which represented an action as objectively necessary for itself, without any reference to another end. [...] Now if the action were good merely as a means to something else, then the imperative is hypothetical; if it is represented as good in itself, hence necessary, as the principle of the will, in a will that in itself accords with reason, then it is categorical” (Kant 2002: 31). This moral imperative is structured according to principles of justice that are derivable from reason. In this respect, Kant (2002: 23-24) writes: “[f]rom what we have adduced it is clear that all moral concepts have their seat and origin fully a priori in reason [...]”. Kant described moral principles as ideas shared in society but adopted individually. Under this perspective, Kantians assert that punishment is an obligation that allows reaffirming the categorical imperative. According to this, *impunity* would be the breach of an obligation of punishing crime that goes against the law but also against the ethical principle of the categorical imperative.

²⁷⁶ Utilitarianism is often identified with two of its most influential contributors: Jeremy Bentham (1748-1832) and John Stuart Mill (1806 –1873) (Hudson 2003). Nonetheless, in 1725 the Irish philosopher Francis Hutcheson was the first to publish an utilitarian systematization of ideas. In (1729) he wrote on the utility principle, identifying the best action as that which procures the greatest happiness for the greatest numbers. This proposition was received, reinterpreted and reformed by his contemporaries Pietro Verri’s (1763) and Cesare Beccaria (1769), at the time assembled in the *Accademia dei Pugni*. Later, Jeremy Bentham formulated his principle of utility, closer to what Hutcheson had formulated: “[...] it is the greatest happiness of the greatest number that is the measure of right and wrong” (Bentham 1776: 3). Adapting it to the criminal system, Bentham (1830: 1-2) asserted that “punishment, whatever shape it may assume, is an evil” that it is “a physical evil; [involving] either a pain or a loss of pleasure”. However Utilitarianism presents different variations its philosophical framework privileges the utility as the determinant criteria of ideas’ moral worth. In this vein, to some, the utility comes from deterrence. According to Hart (2008) the instrumental sacrifice of a person with the purpose of deterrence is limited to the extent that the person broke the law voluntarily and that the system should not procure more punishment than the necessary to deter.

²⁷⁷ According to Bentham (1823: 287), “total or partial impunity of delinquents [favors] the occurrence of other similar offences”. In the words of Beccaria (1769): “It is doubtless of importance that no crime should remain unpunished [...]. A crime already committed, and for which there can be no remedy, can only be punished by a political society, with an intention that no hopes of impunity should induce others to commit the same”.

(2013) employs the notion of epistemological obstacle by Gaston Bachelard (1938), assessing that the criminal justice system presents a cognitive obstacle while professional practices or ideas that a social system understands as appropriate, good or interesting, prevent the adoption, generalization and long-term stabilization of new habits and better ideas, structures and practices for the system. In this context, the fight against impunity lacking of aptitude for proposing innovative ideas contributes at such blockage.

The mentioned cumulative elements constructed around punishment have shaped a rigid identity of the criminal law system stabilizing an epistemological obstacle to innovation and degrading alternatives to punishment; moreover (and perhaps fundamentally), it has obstaculized an alternative definition of punishment, which does not deliberately seeks to inflict suffering – “il est possible de dire que le système de pensée du système de droit criminel est un « système qui se pense pensé» (Gauchet) : il ne voit pas qu’il a le pouvoir de modifier les idées qui le composent et de changer ses valeurs actuelles pour des valeurs (ou des formes) moins guerrières et plus garantistes sur le plan de la conception des normes de sanction” (García 2013: 68).

“La sanction afflictive – celle qui est porteuse d’un message de souffrance – deviendra alors non seulement très valorisée, mais sera aussi étroitement attachée à l’image que le système construit et projette de lui-même. [...] Il observe comme menaçantes les tentatives pour définir autrement la punition ou pour remplacer ces théories de la peine” (Pires 2015: 12).

In sum, if we study the discourses of impunity with the tools of the MPR we find the construction of different philosophical arguments enabling a program of action of the criminal law system that consists on the obligation to punish, meaning by punishment the reaction to crime through abstract, negative, and atomistic measures (Pires, Cellard and Pelletier 2001: 198). In line with this description, punishment is understood as a pain delivery mechanism involving different

measures of restriction of rights epitomized in the deprivation of liberty - “[n]ous sommes chaque fois plus en présence d’un concept de punition énergiquement substantialisé” (Pires 2015: 31).

This is especially visible in the practice of human rights organizations: a number of ideas and arguments that human rights movements used in the past when campaigning for the amnesty of political dissidents or impoverished criminals, has largely transformed into demands for criminal law protecting human rights. The understanding of the criminal justice system as a field of possible repression and abuse of power to be confronted, has predominantly transformed into particular (rather administrative) examinations, or has been limited to certain conditions of detention, or to the implementation of imprisonment in particular circumstances, or to specific ‘criminal’ populations, rather than a critique of the subjacent punitive system of ideas. In this line, it may be argued that it is rather difficult to find human rights comprehensive critiques of the definition of punishment that the system employs and expresses. This may constitute evidence of the weakening of antagonistic relations and the emphasis on collaborative interaction between human rights and criminal law.

The discourse of impunity focused on punishment in our view contributes to the reproduction of dominant social structures of the criminal justice system. According to a traditional definition of impunity, the fight against it remains committed to the traditional ideas of the criminal law around punishment. When impunity takes the form of the exemption from exclusionary, afflictive, negative, hostile, atomistic and mandatory consequences to crime (punishment according to modern criminal law structures), fighting against it may involve a problem of reproduction and an obstacle for the innovation of the criminal justice system. Involving tacit and explicit forms of cooperation between human rights and the reproduction of criminal law traditional structures, the combat against impunity has become a major factor of the reproduction of criminal law social

structures. This problem is especially relevant for a sociological construction of the concept of impunity. Before taking that step, let us consider different elements for the construction of the concept that our case study may bring about to this purpose.

5.4. Experiences of the PJ case and the conceptualization of impunity: in the search for a sociological construction

This part of the research will study the experiences, ideas and discourses of the actors of the case study regarding the notion of impunity through an analysis of a series of in-depth interviews, as well as a literature and a media review about the case. The objective of this part is to observe and analyze the elements and factors that the interviewees provided when asked about impunity, so that we can understand *how these actors construct the notion and characterize the phenomenon*. Bearing this objective in mind we will take into consideration the views of (i) the victims, (ii) justice operators and (iii) writings and interviews of retired Col. Plazas (convicted and acquitted afterwards) and his wife, Thania Vega.

How do victims and justice operators construct the notion of impunity? During the semi-structured interviews conducted in the present research, the interviewees were asked if they observed impunity in the case. A common assumption is that victims tend to find impunity in their cases (particularly when serious offenses take place). This is often attributed to a sense of regret against the lack of severity from the criminal justice measures. According to our data, this assumption and its possible explanation may be contested. For the moment, we may assess that victims offered very varied views on the notion of impunity. Their perspectives raised different elements of reflection for reviewing and characterizing the phenomenon. The observations of this group of people, who have been fighting against impunity for thirty years, are then pertinent and useful to this research.

While the victims and justice operators tend to observe impunity in the case, when asked about the elements that they employ for this characterization they raised a wide variety of features. Despite the variable connotations among the actors of the case, impunity is rather a constant appraisal. If everyone refers to different elements when observing impunity, would the observation of impunity be actually constant? This part will depict different elements for the socio-legal conceptualization of impunity that this work aims.

5.4.1. Impunity/punishment: constructions from the point of view of justice operators

The ordinary definition of impunity as an absence of criminal law punishment (i.e. a measure of intended pain infliction), was taken into consideration when preparing the fieldwork for this research. For this reason, we prepared a set of questions on the subjects of the criminal justice system, punishment, the declaration of guilt through a judgment and the practice of sentencing. This part will develop and analyze some of these responses and findings from the perspective of the justice operators who worked in the PJ case.

On June 9, 2010, Judge María Jara acting as the Third Criminal Court of the Special Circuit of Bogota, found retired Col. Plazas guilty as indirect co-author of the aggravated disappearance of eleven people, sentencing him to thirty years of imprisonment. This judgment was upheld by the appeal court but, subsequently, was annulled by the Supreme Court.

In 2008, Judge Jara was appointed as the Third Specialized Judge in Bogota where the PJ process had been assigned. According to her, her first reaction was to say: “what did I get myself into?” However, afterwards, she thought, “this is just another professional challenge. I can make it”. Later on, as expressed in the interview, she regrets that decision because it caused her different

burdens to her security and personal integrity. “From this case I concluded that it is more dangerous to judge powerful state agents than anything else. Why? Because if I am threatened by a drug trafficker, for instance, I immediately receive security measures from the State. On the contrary, if I am threatened because of a process where a military is judged and there is a political power behind it, the State stops protecting me”. The fact that the judge understood the procedures as a challenge uttered the difficulty of the process from the legal perspective but specifically with regard to the risks that the case entailed: “the process confronted an extremely powerful structure. In these situations, one’s hope as a judge is to make a really good job. Now, after the process, I feel many burdens, I fear so much for myself and my family”.

In our encounters and different public appearances, Justice Jara presented a reflexive character about the ends of the judicial system and the obstacles it confronts. However, when we asked about her own activity in the process, she focused on presenting it as a legal duty. In line with her perspective, “to do a good job” is to follow the law, to judge and to pass a sentence on the person found guilty. The argument of legality was the *rationale* that judge Jara mobilized for explaining her activity and specifically the sentence of thirty years: “It is the consequence. That is what the law says”.

The judge represented the sentence as the application of the law in a sort of mechanical exercise. In a sense, legality is an argument that obstructed further elaborations or an auto-reflexive attitude around her own activity. Her representation about the process of decision-making about the case excluded questioning punishment and was limited to more operative issues as the conduction of the proceedings, assessing the evidence and deciding whether there was a crime or not in the case. In this answer, Judge Jara did not provide arguments or further reflections around the activity

of punishing: “I think that he has to face that consequence. Nor more nor less punishment could be granted due to the principles of legality and favorability”.

In this response, Judge Jara focused on the duty to punish and the proportionality between the evil committed and the suffering to be inflicted (punishment as an obligation). The existence of strict legal boundaries to decide the sentence contributes to observing punishment as the mechanic application of the duty of the State. With this respect, Lorenza del Castillo (judicial assistant) provided convergent but more elaborated arguments on how they “calculated” Plazas’s sentence. Mrs. Del Castillo explained to us the process of sentencing using as example a case of murder. First, she explained, the legal maximums and minimums for the crime under study must be considered:

“homicide has a minimum and a maximum, thirteen to twenty-five years - clearly it is already difficult to know what these limits are in a country with such a legislative inflation²⁷⁸ like ours [!]. Then, before the lapse of thirteen to twenty-five years, one should divide that into four quarters [...]. Then, if there are generic aggravating circumstances the sentence should focus in the maximum quarters... What I mean is that these parameters are objective. Only when the judicial operator moves away from the minimum, he or she needs to justify why he or she did so”.

In her answer, Mrs. Del Castillo portrayed the exercise of sentencing as an ‘objective’ arithmetical calculation according to the legal parameters: “You need to be objective; that is, to see things with impartiality”. This form of imposing the criminal law consequences expresses a sort of mechanical practice that is the result of the objective implementation of a legal disposition in accordance with the duty to punish criminal behavior: “That is what the law requires”.

The argument of legality seems to immobilize not only the alternatives to criminal law redress – “It is the consequence. That is what the law says”, but also the rational process of applying and reflecting on the legal consequences of the justice system. In this context, severe

²⁷⁸ By “legislative inflation” she referred to the persistent and substantial increase in the amount of legal norms and the extent of the penalties.

sentences awarded as a matter of law may become galvanized as a matter of legality that the justice system must implement and cannot renounce.

Even though the judicial assistant portrays the operation of punishment as an arithmetical exercise, she represented this process as an activity that may entail challenging situations: “there are difficult cases, there are easy cases, as we learned at the law faculty, you know what I’m talking about... but there are cases that are not black or white, rather they are gray, almost imperceptible to the human eye, then there is a great responsibility”. This answer, referring to the degree of difficulty of the case, reframed her original perspective about sentencing as a mechanical legal operation into a matter of responsibility.

When portrayed as a ‘responsibility’, Mrs. Del Castillo referred to the difficulty of cases taking into consideration the restriction of rights that the criminal law intervention entails: “Regardless of the passion or inclinations that you may have, for or against a certain position involved in the conflict, you should not forget that you are about to quash a person’s freedom”. When considering the rights of the person accused the sentence was not anymore depicted as a mere legal operation but as a form of affecting a person’s rights: “even the worst criminals deserve rights and guarantees. This is the least that one expects from a democratic state”.

Reframing punishment as a responsibility with the capacity of affecting the freedom of people convicted in the context of a democratic State, rather than as an obligation materialized through arithmetic and legalistic operations, enables visualizing not only the legal parameters but being aware of the person who is being punished. When deciding on the responsibility of the person accused for a wrongdoing, the justice system is also deciding on her life. Even when criminal law punishment is represented as established according to ‘objective’ legal boundaries, it

is important to understand that these boundaries are influenced by the conventional theories of punishment and that its practice involves (to some degree) variable judicial arbitrum.

Other considerations and possible ruptures to a merely legalistic view emerged during the interviews. Judge Jara's judicial assistant, Lorenza del Castillo, understood the attribution of guilt by the tribunal as a possibility to confer the victims relief and recognition. Moreover, in doing so, she did not stress nor even include the idea of a particular form of punishment as a condition to express this sort of acknowledgement:

"I imagine that the victims feel some relief [with the conviction], because it is a sort of ratification, of saying that their pain is the pain of the country, that we care about their pain. I think it's a way of saying that what happened was also against us, against our laws. On the other hand, this has happened for so long, it's so intimate and individual, that I should not dare to guess what they are actually feeling".

In Mrs. Del Castillo's view, the judgment in itself (without reference to the idea of inflicting suffering) was a way of expressing solidarity and assessing that what happened is important for society; ultimately, it was a way of saying: 'the law is with you'. However, in her sayings she recognized the possible limitations of the judgment for bringing a feeling of relief to the victims, particularly because of the gravity of what had happened and because of the delayed response from the justice system. Indeed, people are not homogenous with respect to their way of perceiving the world and it is rather speculative to have expectations of uniformity around their feelings or observations of the social life. For instance, as lawyer Alejandra Vicente (representative of the victims in the Inter-American procedures) underscored, "impunity" takes place when the conviction is delayed or is too late. In this discourse, the notion of impunity is attached to a temporal dimension rather than to other material or social outcomes:

"There have been judgments, but those judgments have come late. For this reason, there is already a violation of the right to justice for the families. Even if the rulings were final, that does

not mean that justice has been served. Many years have passed. Virtually until 2001 there was no serious investigation on the events, and prosecutions were only initiated at the request of the families”.

Judge Jara, after sentencing retired Col. Plazas to thirty years of imprisonment, affirmed: “I think there is [impunity in the case], because justice comes so many years later, twenty-eight years: that’s impunity or looks like impunity or pseudo-impunity”. In her answer, Judge Jara did not consider the declaration of guilt nor the amount of the sentence for observing the phenomenon of impunity in the case, but the passage of time between the prosecutions and the application of an effective penalty. The passage of time was observed as attached to the lack of effectiveness of the judgment in a way that she was no longer capable of giving a particular significance to the prison sentence. Indeed, between the events and the time of the interview (November 1985 - September 2013) the sentence had been suspended until a decision on the cassation appeal was reached.

The former answers somehow move beyond a construction of impunity in opposition to punishment, because they do not focus on the term that the person is sentenced to serve, but on the time that prosecutions start and last. In line with this, the longer the time lapse between the facts and the investigations, the more impunity is present. The particularities of the crime of enforced disappearance contribute to this form of observing the problem. Enforced disappearance implies an act of abduction followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person. The lack of information may be aggravated by the dearth of reaction from the State and, particularly, by the lack of adequate and effective investigations from the criminal justice. The time that passes between the disappearance and the start of the investigation may be decisive to find the victim or at least knowing her whereabouts.

In the PJ case, six days after the events, on November 13, 1985, the National Government

created a Special Tribunal for investigating the crimes committed during the PJ (Decree 3300/1985). The decision to open an investigation on the taking of the Palace, focused on the military confrontation rather on finding the people who disappeared or the bodies of those who were killed.

“Belisario Betancur [then President] makes me angry because that gentleman does not disclose what actually happened. If he had done an investigation immediately we would not be where we are and we would not have had to go through all these horrible things that they made us go through” (Ana María Bidegain, wife)

In the context of the litigation before the IA Court (2014: 432) the representatives of the Colombian State acknowledged “the prolonged delay in the investigations”. In this case, most of the further procedures remained or were deferred to a preliminary phase of inquiry during decades. Indeed, only twenty years after the events, criminal inquiries turned into official investigations for enforced disappearance and five years later there was a first-instance ruling - which was partially confirmed in 2012 by an appeal court and was overruled by a cassation appeal in 2015.

The absence of a serious investigation into disappearances can be observed as a factor of impunity in the sense of the obfuscation of the truth. Indeed, this delay has an impact on the quality of the investigation affecting the possibilities of obtaining any form of clarification of the wrongdoing and condemnation of the responsible actors. In the PJ case, the prosecutor of the case Ángela Buitrago assessed that when she was assigned to the case, after twenty-three years of the events, “it was a difficult to advance on the criminal investigation”. With this respect, she particularly regretted the missing of material elements, which prevented the prosecution from establishing the fate of the disappeared. In this respect, former Prosecutor Ángela Buitrago affirmed: “It is difficult to go beyond where we did when trying to conduct a prosecution of this complexity after 23 years [of the events], relying on tight terms of instruction, especially when

there is someone under arrest”.

However, the vice-Prosecutor General Jorge Perdomo assessed in an interview to the media (El Espectador 2014b) that the passing of time actually facilitated the investigations at least from the point of view of the technical advances around the production of evidences. According to Perdomo, new advances in forensic technology allowed, for instance, a better exploration of mass graves where the bodies were possibly buried: “In this mass grave [in Southern Bogota] they buried not only bodies found in the PJ but those coming from a hospital adjacent to the area. Additionally, after the tragedy of Armero²⁷⁹ the same mass grave was used to bury the bodies. Benefiting from the current technology advances to identify these remains is easier now than 29 years ago” (El Espectador 2014b). In this assertion, the vice-prosecutor general focused his observation on the advantages of the passing of time for the possibility to find remains, not on finding the people alive. Indeed, time is an impediment for finding alive people who were abducted: the more the time goes, the more it seems difficult to find the people alive.

The form in which justice operators portray their activity reaffirms the distinction between impunity and punishment. In this context, the justice operators observe their own activity limited to the ‘objective implementation of legal parameters’. Somehow, this focus reduces their awareness of the problematic situation (e.g. when the vice-prosecutor stops observing the importance of finding the people alive) and limits the capacity to respond to the situation differently than fixating a punishment (e.g. when the system urges the operator to move forward in the investigations with the objective of declaring someone responsible to the detriment of continue the inquiries into the fate of

²⁷⁹ “On Wednesday, Nov. 13, 1985, the Nevado Del Ruiz Volcano in Colombia, located in the Andes Mountains of South America, erupted sending a destructive mudflow down its slopes. Flooding claimed the lives of over 25,000 people in the town of Armero” (AccuWeather 2016).

the disappeared). With this respect, punishment is represented as a creation of the legislator who, despite the fact of not knowing the individual who is prosecuted or the concrete problematic situation at hand, determines the activity of the judge who has no role other than imposing the penalty. Thus, when the justice implements a measure for reacting to crime focuses on punishment and when it does so the judicial system becomes the operator of a political decision previously adopted by the legislative and not and not the operator of a complex legal decision (inspired from Pires 2001).

5.4.2. Impunity/non-impunity: constructions and deconstructions from the point of view of the victims

As we were able to establish in the previous sections, the notion of impunity automatized in social discourses refers to an exemption from criminal law punishment (impunity/punishment). Considering this (prevalent) distinction, when conducting our interviews we expected that punishment would constitute a predominant representation of the victims when addressing the issue of impunity. However, their responses allowed us to observe other elements when referring to impunity meaning that its contra-term is not necessarily limited to punishment.

Some of the victims awarded a centrality to the issue of punishment in their responses. For some of these victims, punishment was expressed as a desire that represented their expectation around the criminal legal redress.

Enrique Rodríguez (father), when asked by the media about the possibility of punishing those responsible for the disappearance of his son, replied: “This could give me a little hope, but I don’t think [is going to happen]” (Revista Semana 2006).

Given the MPR system of ideas has currently expanded among various communications - particularly influencing the social movements and the victims’ movements, we expected that at least some people would refer to punishment as a claim of pain infliction to be implemented via

imprisonment. However, in the case of retired Col. Plazas the factors enabling the observation of the infliction of suffering are complex. On the one hand, he was sentenced to a long-term imprisonment (30 years). But, on the other hand, he was sent to live in a military facility where he continues to be treated and observed by his soldiers as an authority, even as a war *hero*²⁸⁰. Where will victims lead their attention to? In the temporal dimension of the sentence or in the highly privileged treatment that the convicted will receive?

“The sentences of the case applicable are derisory: Mr. Plazas is in a military garrison surrounded by all the comforts; I mean: what suffering is he experiencing?” (Victim)

Hector Beltrán (father) asserted in his book that “for the victims of state crime it would be repairing that the Colombian justice operates with impartiality and promptness against those violating human rights in our country, sentencing them to severe punishments” (Beltrán 2014: 139).

When Judge Jara found retired Col. Plazas guilty as indirect co-author of aggravated disappearance, sentencing him to thirty years of imprisonment, some of the victims agreed on qualifying the decision as historical. In the same vein of the judge of the case, this qualification was not only due to the importance of the case in the Colombian context, but also because of the great obstacles that the prosecution faced before powerful actors, which they assumed would never stand trial. The fact that this decision was perceived as historical related the matter of impunity to the importance of someone being held accountable for the wrongdoing.

“Sentences are very important because someone was held responsible for what happened” (Pilar Navarrete, wife). In this respect, Cecilia Cabrera (wife) asserted that the sentence was only a step that needed to continue against the other responsible agents (Revista Semana 2010: 1’21”-1’50”).

“At last! In 2005 an investigation began. Twenty years after the PJ events, finally someone investigated something and found a number of elements that were already there since 1985 and

²⁸⁰ In 2011, the then Commander of the military General Navas declared that it was necessary to limit ordinary jurisdiction in respect to the military and affirmed that Plazas was innocent but also a national hero.

allowed to establish some responsibilities and to advance in the middle of complex and very difficult proceedings, reaching certain results [...] This conviction is historical, is very important” (Cesar Rodríguez, brother).

Some of the victims perceived the sentence as an act of satisfaction. This relevance was elaborated by some of the victims from the point of view of the life and death of family members. This is vividly captured in the fact that some of the family members, especially within the generation of the parents, have perished in their search:

“As soon as the sentence was issued, the person that first came to my mind was my grandfather. He was the one who fought for this for a long time. I was sad because he could not be there enjoying that achievement. For me, that was very hard. After that, obviously, I felt a lot of satisfaction because finally we had managed to show that justice is possible and we demonstrated that the responsible were those who we had said they were” (Alejandra Rodríguez, daughter).

“And so it is. Many of the family members have died: Mr. Rodríguez, Mr. Guarín, and Mrs. María. She left behind her life, her husband, her other children and completely focused on finding her son. If she had to be at two in the morning at the Palace of Justice protesting, she was there” (Pilar Navarrete –wife, in Romero 2015: 61).

The feeling of despair for dying is coupled with the feeling of (in)satisfaction for the (lack) of action from the justice system placing accountability for what happened.

“[...] We are dying, and we die without justice nor reparations granted to us, without knowing the truth nor witnessing the perpetrators paying for their crimes” (Hector Beltrán 2014: 90 – father).

In this assessment, Hector Beltrán frames their fight raising different elements: the truth, the justice (perpetrators paying for their crimes) and the reparations. Implicitly, his saying might also entail the claim for severe punishment expressed beforehand.

Concerning the case of retired Col. Plazas (detainee at a facility where he was regarded as military authority), when the implementation of the sentence of imprisonment was in place, different victims commented that the initial satisfaction around holding someone accountable

transformed into deception and regret when the sentence was not properly materialized. Pilar Navarrete (wife) expressed (before the Supreme Court acquittal): “the sentence is very important [...] but I feel disquiet about the fact that Plazas is not interned in a prison”. In this line, Hector Beltrán (father) asserted: “I do not understand why those people that commit murders, violations and different grave crimes [...] act with the conviction that the State will reward them for doing so, the clearest example of this to me is the so called operation to retake the PJ” (Beltrán 2014: 94-95).

When punishment is converted into a form of honorary privilege, victims that focused their claims around conviction, rejected the declaration of guilt as it subsequently could imply a cancellation of the declaration due to the imprisonment conditions: a State institution may de facto nullify the conviction produced by the criminal law system. We will come back to this issue later on.

The data gathered in our field-work allows us to observe other possible aspects of this problem. The idea that only punishment as conceived by the criminal law is capable of offering peace of mind to the victims, however, was not present in all of the interviews. When the victims evaluated the judgment, they raised a variety of purposes and ends of the fights against impunity in the case, apart from the penal measures intended at the mere infliction of pain. Other symbols, values and beliefs emerged when victims analyzed the value of the criminal law system with regard to their situation. One of the values found in the interviews is the victims’ relief and the social recognition of the offenses. This was especially visible when reviewing the saying of the PJ victims who are not part of the group of disappeared.

This group of people appreciated the fact of holding the perpetrators accountable with a very particular connotation: some people of this *external* group experienced the sentence as an “indirect form of doing justice” in their cases. With this respect, Alexandra Sandoval (Justice

Sandoval's daughter) noted "even though Plazas was not convicted for what happened to my dad [the death of Justice Sandoval was not part of this enquiry], to me, his sentence was an indirect way of doing justice. I used to say he is not sentenced in my case but at least he was sentenced for the disappeared. This was for me an indirect sentence that in a sense was also doing justice to us".

The declaration of guilt in this saying is observed as a general acknowledgment of the reproachable action of the military in this event. The condemnation of an individual who holds an important social status and position of authority in the army acquires a value that goes beyond a case-by-case observation and somehow compromises the organization on whose behalf he acted.

Moreover, from some of the victims' point of view, accountability is an important issue. Despite it does not directly address their personal case, it involves a possibility of holding the perpetrators accountable and, furthermore, as a possibility of social scrutiny and speaking out-loud the suffering around an event that affected a collectivity. In line with this assessment, some victims who identify a problem of impunity in regard to their own case, are also able to include themselves in a larger group receiving some sort of social recognition around a collective experience based on a shared criminal problematic situation.

In this sense, 'ending impunity' can be perceived by the victims as 'ending a global institutional inertia' characterized as general silence and the absence of recognition of responsibility in relation to the criminal situation. When the victims focused on the idea of holding someone accountable, we found a rupture with the automatized understanding of impunity because the significance of the conviction does not imply an express reference to punishment as pain infliction. Indeed, when the victims of the case developed their views about accountability they did not focus on the amount of time (thirty years of imprisonment). Even more, certain victims

undervalued the sentence of thirty years of imprisonment taking a further step with respect to the traditional response of the criminal justice:

“I don’t know, it doesn’t mean anything to me [the thirty-year sentence against Plazas]. I don’t see the difference [comparing the moment before and after the sentence]. I don’t even know if prisons make sense. I don’t know, I’ve heard the lawyers talking about that. I guess that is something acceptable, but it doesn’t mean anything to me [...] I don’t even know why prisons exist, why is that a way to punish those who have done something wrong? I don’t know, it’s something very strange to me, to claim ‘because it is the law’... no, other aspects are more important, [such as] the shame of these people” (victim, personal interview).

According to the discourse of this victim, the quantification of imprisonment involves a concern that refers more to the logic and the framework of the legal system and its operators than to her own way of thinking. In this sense, such issue is rather a secondary problem: whether the convicted is to be at a prison one day or thirty years, the perception of the victim does not vary.

In this answer, there was a clear rupture between the ideas of accountability and declaration of guilt of a person followed by a punishment taking the form of imprisonment and, particularly, of a severe amount of time in prison. Victims may take a critical distance from the justice operators as representatives of the legal system, which is immersed in the idea of punishing through the institution of prison. In this vein, Alexandra Sandoval (daughter of Justice) asserted:

“To me, what is important, more than imprisonment itself, was to know that he was deprived of liberty, although that deprivation of liberty is quite relative [as it is being implemented]. What matters to me, more than the trial, is the final judgment telling the world that what we are saying is true [...] Many people use the criminal law as a way of leaving people to rot in jail, so they don’t see the sunlight ever again; however, at home my parents had a speech about the fact that penalties were not directed against the individual but against the behavior and that these penalties should reintegrate the people into society. Then, it is very difficult to think: ‘let them rot in jail’. No matter how much I dislike Plazas, I could not use this discourse”.

Mrs. Sandoval has retained for herself other observations that appear as “immunized” to the system of ideas of modern penal rationality. However, with this respect, she sees herself as thinking against the mainstream:

“I have a deformation in my views because at home my parents were criminal lawyers and criminologists. Particularly, my dad detested the deprivation of freedom, so there I have a problem in my head. I do not need him [talking about Plazas] to be imprisoned but a conviction more than anything else, a court judgment”.

The fact that Mrs. Sandoval understands her views as ‘deformed’, involves recognizing her perceptions as outsider with respect to the traditional framework which she finds problematic. The difficulty here is not merely the fact of thinking against the mainstream of a philosophy of severe penalties; but, fundamentally, the difficulty lies on not being able to embrace a human rights position and, at the same time, avoiding to endorse a traditional repressive criminal law framework. In this sense, her answer epitomizes a rupture of the identification of holding someone accountable with imprisonment – debating a common assumption of victimological studies.

As we can see, the general framework of these discourses rather confronts the traditional approach of expressing responsibility through the infliction of severe suffering on people. Furthermore, through the image of the need for a ‘court judgment’ and for the ‘perpetrators to be ashamed for what they did’, the general framework of these discourses involve a degree of openness to possibilities of other criminal sanctions and of redress beyond the criminal law system.

In the discourse held by the victims it is possible to see two other important aspects that separate their position from the system of ideas of modern penal rationality. The first aspect dissociates this discourse from the retributivist philosophy that understands (severe) punishment as necessary to “correct the evil committed in the past”. The second aspect is perhaps more decisive,

as it shows that to the victims to “know the truth” and its recognition are more important than the infliction of suffering on the culprits.

Indeed, the satisfaction expressed by the victims with regard to the enunciation of guilt of the perpetrators is represented as unsatisfactory by the victims because of the impossibility of restituting their past. Some of the victims perceived the declaration of guilt as trivial for changing what happened. With this respect, they expressed that the judgments are simply unable to bring them peace of mind: “what troubles us is to think on the atrocities that they did to my sister” (Socorro Franco, sister). In this regard, considering the study of the Basque Institute of Criminology (Varona and De la Cuesta 2014) mentioned before and the qualitative findings of the present research we may draw as a preliminary conclusion that sentences do not consistently and generally bring peace of mind nor a sense of recovery to the victims and their families. In line with this, the assertion of satisfaction and relief that judgments bring to the victims is disputed – debating an assumption present in some victim studies.

Concerning the second aspect, the enunciation of the guilt of the perpetrators is represented by some victims as unsatisfactory because of the lack of truth around what happened. More than expressing a replacement (truth in exchange of guilt), the victims distinguish between more important (the truth) and less important (severe punishment) outcomes. With respect to the judgments Alejandra Rodríguez (daughter) suggested great unease: “I think is very nice to have some justice, it is great to have a judgment assessing: he is guilty; but this does not necessarily lead to the truth or to proper reparations. Not only in the economic sense, but also in disclosing what happened with our family members”. With this regard, Jorge Molano (representative of some victims) considers the victims feel disquiet with the judgments because it is still uncertain what happened to

the disappeared. To the victims, these cases are not only about prosecuting an individual but also about the whereabouts of the person abducted: to the victims, criminal prosecutions ultimately involve the possibility of disclosing the whereabouts of their loved ones.

“SEMANA.COM: Don’t you think it is an achievement that the Prosecutor General’s Office has finally opened an investigation?

ENRIQUE RODRIGUEZ [father]: No. My son will not return. What the prosecution is saying 21 years later is: ‘Sir, you were right.’ But it does so when it's too late and when we can’t do anything” (Revista Semana 2006).

When referring to the trajectory of time in the case, Enrique Rodríguez (father) gave preeminence to the fact that the victims could find their loved ones over the possibility of convicting someone. This is important because in a sense the distinction impunity/non-impunity is focused on the possibility of the system acting against the perpetrator; however, when the victims refer to their own problems they discard the distinction as being non-satisfactory and irrelevant. In the case of enforced disappearances the dismissal of the distinction is manifest when the victims claim for a prompt and effective judicial remedy in order to unveil the fate of the person abducted. In the interviews, the victims frequently raised the matter of finding their loved ones. Information on the fate of the victims and the recognition of what happened is, for the victims, a way of “finding the loved ones” even if they are no longer alive.

In this respect, it is important to examine more closely the meaning given by a large number of victims to the problem of the “lack of investigation” in relation to impunity. For them, this is not, at least primarily, a direct positive appraisal of police enquiries or the legal procedures *per se*. Something more complex and far more important is behind this claim: this is the only way in which they understand it is possible to know the truth. How could we talk about *justice* if the legal system is incapable of elucidating the whereabouts of their family members?

“In a case of enforced disappearance, justice without remains or justice without truth is a very lame justice. I think the case could have eventually be left as it was, with the investigation closed. I feel as if the State harmed us more by opening the case than by leaving it still, and why? This caused more harm to us because it created an expectation of justice that ultimately is not justice. This is because of what I am telling you: justice showed progress, but it is no justice because there is not a single element for recovering the remains nor finding the truth [...]” (Rene Guarín, brother)

The implementation of criminal prosecutions and penal sentences do not endorse the essential meaning of the word “justice” to the victims. These problems will be addressed in the section 5.4.4. For the moment let us focus on the subject of the truth.

Let us turn now to the question of knowing and recognizing the truth. Juan Anzola (son) asserted that for him, the most important was nothing else than “to know what happened to my mother, to know she rests in peace”. The weight given to the truth was also present in several other interviews. Alexandra Sandoval (Justice Sandoval’s daughter) insisted on the importance of the criminal jurisdiction with this purpose. Helena Urán (Justice Urán’s daughter) asserted that she expected from the trials that “they tell us and the country what they did and why they did it”. The sense given to the judicial truth was thus, not only directed to the self and to the other victims but to society as a whole. In line with this, some actors asserted that this case was important as a means of doing historical memory and enabling social recognition for what had happened. “To establish the historical truth and to close a chapter of the national history”, in the words of Alejandra Vicente (representative of the victims in the Inter-American case).

Knowing the truth is not only expressed as something that belongs to the victims. The truth was portrayed as a matter of the society as a whole. According to Alexandra Sandoval (Justice Sandoval’s daughter), the conviction means an acknowledgement of their truth: “to tell the world that what they [the victims] have been saying is true”. In the same vein, Juan Anzola (son) asserted

that the version of the judgment is not only for him but for the society: “if there is no judgment, if there is no recognition from the State, it is like saying that nothing happened, it means to close your eyes before such a heinous crime”. The fact that an observer refers to the trial or the judgment does not mean that what matters to them is the process itself or the judgment as such, but the discovery of the truth and its official recognition.

In this line, for instance, for some victims “public recognition” is more important than the imprisonment of those involved in the crimes: “I think it is important that Colombian society is aware of what the armed forces can do and what it means for society. To me that would be more important than to see them in jail” (Mairee Urán, Justice Urán’s daughter). In this assertion, Mairee distinguished between imprisonment and the possibility of establishing the truth for them and for society as a whole. In this sense, there is a clear preeminence with regard to the truth.

‘Telling the truth to the world’ was referred to by the victims as a form of recognition of their history of suffering. With this regard, Sandra Beltrán (sister) assessed the necessity of the books of history telling the truth so the new generations manage to know what happened and for cleaning the reputation of their loved ones who were accused of being terrorists. In this sense, also, Ana María Bidegain (Justice Urán’s wife) asserted her expectation for the life and work of her husband to be exposed in a national museum to tell society what happened. To Alexandra Sandoval (Justice Sandoval’s daughter), the conviction “is very useful to let people know that what you were saying was true”. To the victims, the concrete result or sentence may become secondary when the rulings declare a truth that does not acknowledge what happened, especially in express opposition to the truth from the defendant’s position, who during the process claimed that he was always *right*.

Judicial truth was relevant for the interviewees not only as a matter of speaking aloud their versions, but also to name the violations and to produce some sort of awareness within society.

The 4th of February 2012 the national TV station *Caracol* launched a national survey asking its audience: Do you think that the military should apologize for the PJ events? Out of 61,707 respondents, 81.58% responded negatively and only 18.42% agreed with the military should apologize (Revista Semana 2012b).

Anahi Urán (Justice Urán's daughter) asserted: "I do not think: 'let those bastards rot in jail'". Instead, one of the main objectives of the proceedings for her was to "let people know what those people do with their power". In this sense, Alexandra Sandoval told us that the most difficult aspect of Plazas being acquitted by the Supreme Court in the cassation appeal, was not that he was not in prison but that he now has a court decision stating that he is innocent. If the convictions are understood as an opportunity for reaffirming the version and dignity of the victims, in that context "the dignity of victims risks suffering when (an alleged) guilty party is judged innocent at the end of a fair trial, a risk that is always present" (Freeman 2009: 23). After all, the rulings refer to an institutional capacity of declaring acts right or wrong according to law (paraphrasing Rodenhäuser 2014: 916)²⁸¹.

The sense of recognition was also raised by the victims with respect to the acknowledgement from the perpetrators of the suffering caused. With this regard, Rosa Cárdenas (daughter) observed that the sentence against Plazas and the time that they have been looking for

²⁸¹ In that sense, in a research on the violence against unionists in which I participated with the Colombian Commission of Jurists (CCJ 2012), it was concluded that one aspect to take into consideration when referring to impunity should be the degree of clarification of the events that the rulings provided. This was particularly relevant before cases of convictions in which the versions of the perpetrators on the crimes were not controverted by the judges. In the few cases of conviction on violence against unionists in Colombia, it was noticeable that the justifications of the crimes formulated by the perpetrators were part of the rulings without any consideration of the actual labor and social role of the victim. Hence, the fact that the perpetrators were sentenced was awarded a minor importance by the victims that realized that the perpetrator had justified the crime, for instance, as committed against a 'delinquent' or because the person was a 'guerrilla'. A similar finding is present in DeJusticia's research on the prosecution of crimes against unionized workers (La Rota, Montoya, Uprimny 2010) in which it was asserted that in the convictions for crimes against unionists a low level of descriptive detail about the victims was found.

her mother matched (thirty years). This coincidence, she affirmed, does not mean anything if Plazas does not reflect on what he did and tells them the truth. In this line, she assessed that she would exchange the years of imprisonment awarded to Plazas for just one day of him standing in their shoes: “if only he had to experience that despair. If only he had to borrow money for a bus ticket trying to find his disappeared son, daughter or wife. I think with a single day, I would feel he served his sentence”.

We interpreted the idea of Plazas standing in her shoes as a matter of raising the awareness from the part of the responsible person for what he did. This discourse is not aimed at causing suffering on the perpetrator, but expresses a quest for the recognition of her suffering. In this line, Jorge Franco (brother) asserted: “someday, I suppose that I will not see it, I hope someone with remorse, someone unable of keeping up with that burden of conscience, tells the truth, I hope it can be soon before I die, I'm afraid this will not happen”. Different victims asserted that remorse should be one of the main objectives of the proceedings because that could create the opportunity of repentance and the possibility of the convicted revealing the whereabouts of their loved ones.

From this part, we can conclude that victims present deep elaborations around the problem of impunity. The truth, the reparations, the justice and the education of society are some of the most relevant elements that victims raised when observing impunity in the case and constructing the non-impunity scenario. While the justice operators tend to focus their attention in the legal operation of the system, the victims tend to give to this a rather instrumental or secondary value for addressing their situation and for being able of finding their loved ones.

5.4.3. Where are the disappeared and who disappeared them?

Referring to the aspects that the victims raised when addressing the subject of impunity and

deconstructing the automatized notion of impunity in opposition to punishment, we found that a central claim to the fight against impunity in the case was to find the disappeared or at least information on their whereabouts. Due to the centrality that the victims gave to this claim when assessing impunity, it is relevant to present some considerations with respect to this.

Until 2017, none of the PJ disappeared has appeared alive. There has been no news on the whereabouts of the cafeteria group, except on four of them: the identification of Ana Rosa Castiblanco's remains in 2000²⁸² and those of Lucy Amparo Oviedo²⁸³, Cristina Guarín and Luz Mary Portela Leon in 2015²⁸⁴. Eight of them have not been found and their fate remains unknown. Beyond the group of the disappeared from the PJ cafeteria, in June 2016 Auxiliary Justice Emiro Sandoval's his family was told that the remains did not match with their DNA²⁸⁵. Justice Sandoval

²⁸² Ana Rosa Castiblanco was 31 years old when went missing. She was a worker of the cafeteria and was seven months pregnant. The whereabouts of Ms. Castiblanco were unknown for sixteen years. In 1998, a number of remains were exhumed in a mass grave located in Bogota's Southern Cemetery. In June 2001, fifteen years after the events, her remains were identified. However, her family members are still uncertain on the fate of the baby she was expecting. In this case, an expert psychosocial appraisal presented to the Inter-American Court (2014: 534) established that "the way in which the restoration of the mortal remains was made and the absence of an official response to what happened to her and the baby she was expecting have created doubts and concerns among the family, both in their mourning process and with regard to the credibility of the State". The IA Court (2014) concluded that due to the carbonized condition of the body, she had probably died as a result of the fire inside the building and not as a result of forced disappearance. The State acknowledged the delay in the identification of her mortal remains, in respect to what the IA Court (2014: 217) concluded the State had failed to comply with its obligation to ensure the rights to life and to physical integrity to the detriment of Ana Rosa Castiblanco, due to the failure to establish her whereabouts for sixteen years.

²⁸³ On October 2015. Lucy Oviedo's remains were found in Bogota's Southern Cemetery during the exhumation in 1998; however, they were only identified 17 years later.

²⁸⁴ In 2015, the remains of Cristina Guarín and Luz Mary Portela were identified. They had been buried in graves of people who also died during the taking and retaking of the PJ. In the case of Cristina Guarín, her remains were found in the grave of Marina Isabel Ferrer whose daughter, Sofia, was unexpectedly informed that her mother was, then, missing. Before this situation, she declared to the press: "I'm desperate, I do not know where to find her, do not know where to search for her, I feel like if this [the Holocaust Palace of Justice] had just happened" (El Tiempo 2015a).

²⁸⁵ The remains were exhumed in 2015 because of a suspicion on their identification: the autopsy said that Sandoval's remains actually corresponded to "at least two adult corpses". Although there were two

was then disappeared and his fate was unknown²⁸⁶. With this respect, Alexandra Sandoval (Justice Sandoval's daughter) observed at the time that the case of her father was in an "absolute impunity. [...] in my dad's case we don't even know, after thirty years, if we have his body or not" and when asked what should happen to avoid this situation she replied "our interest is currently focused on finding my dad's remains. Rather than asking for criminal responsibility, the events of the recent years have led us to focus on finding the remains". In this sense, she added: "well-run criminal proceedings I believe could be very useful". Mrs. Sandoval's construction of a *good* operation of the criminal system is then focused on shedding light on what happened.

Thus, declaring someone guilty in this context becomes instrumental to the urgent need of finding the remains: what is central to the victims of enforced disappearance is to find their loved ones, dead or alive. This becomes the main claim around the fight against impunity. Although some victims constructed the notion of impunity in contrast to punishment, the question of *where are the disappeared?* somehow implied a rupture with this definition: the actors of the case considered that there would be impunity as long as they could not find their family members.

"I sometimes feel that it would have been better to leave the case as it was before the trial because I feel like the State harmed us more through the process than leaving it as it was. It created on us an expectation that wasn't satisfied because we didn't recover the remains and we could not find the truth of what happened" "It does not satisfy me that those who killed my sister, either Pedro, Juan or José have a sentence of 30 or 40 years of imprisonment, what do I do with that? But if I could know the truth and have the remains and I can make a funeral..." (Rene Guarín, brother)

"There is a sense of unease because we obtained a sentence without knowing what actually happened with the disappeared. We have a verdict on a crime that continues to be executed as we speak. What kind of justice is that? Families need to be able to grieve" (Lawyer Jorge Molano, representative of the victims).

bodies, the remains were buried as if they were of one person and the family was warned by state officials that the coffin could not be opened.

²⁸⁶ However, at the start of 2017, his remains were found in a different grave.

To the prosecutor of the case *Ángela Buitrago*, not having found the disappeared is one of her greatest “frustrations” in the case. Furthermore, in a personal interview she affirmed that it was not only a matter of finding the remains, she assessed that it was still possible the victims were alive: “a lot of people say that after twenty years they are simply dead but I say: wait a minute, there were very young people as Norma Constanza or Cristina del Pilar, very young people”.

In 2009, René Guarín (brother) wrote a document for the Truth Commission entitled: “Cristina, a phalanx will suffice”. Mr. Guarín told us that in this writing he wanted to express that he would sacrifice some of the truth and the justice in exchange for finding Cristina’s mortal remains: “I would do this sacrifice if only I could mourn and give to this suffering a proper closure”. In the interview he explained that not being able to mourn is “too harsh”, that he is tired of that burden he has carried around for thirty years²⁸⁷. In this sense, when accepting this as a sacrifice he portrayed that although justice was an important claim for him, he was ready to give it away for the sake of finding her sister, considered as entailing a higher or more pressing claim.

In 2012 and 2016, we conducted two other in-depth interviews with Mr. Guarín. In 2012, he replied to us that the justice in the case was “limp” [as incomplete] and that the impunity in the case was due to not having found the remains nor having clarified what happened to his sister. Months after this conversation, the remains of Mr. Guarín’s sister were recovered. After a prudent amount of time, we conducted a second interview concerning the impunity in the case. In this

²⁸⁷ The families have an imprescriptible right to be informed about the fate of the disappeared. Additionally, in the event of decease, the body must be returned to the family as soon as it has been identified, regardless to whether those involved in the crimes have been identified or prosecuted. In this respect, the IA Court has established the importance of the right of the next of kin to know the whereabouts of their loved ones in addition to the right to know the truth, recognizing the importance for the families to receive the bodies of those who died, as well as to be able to bury them in line with their beliefs, and thus closing the mourning process (IA Court 2014: 326; 2009: 245; 2012: 115).

interview Mr. Guarín assessed that finding the remains was insufficient for affirming that in the case there was no impunity. With this regard, I asked him to help me interpret his own views in 2012, when he emphasized on recovering the remains and the truth as essential measures for overcoming impunity. In this respect he said: “Camilo, I haven’t changed my mind since 2012 when we spoke about this: I still think there is impunity, as when the remains had not been found, because now, four years later, we have some remains, but what about the truth? What about justice?” Although he recognized that the most valuable achievement after thirty years of struggle was finding his sister’s remains, impunity to him remained intact due to the lack of clarification on the events and the lack of justice in the case.

In spite of having found the mortal remains, the lack of truth around the events and the whereabouts of the disappeared created the impression among the victims that the case had not overcome impunity: to the victims, who did it and under what circumstances are crucial issues that need to be solved for surmounting impunity. With this regard, Pilar Navarrete affirmed that they claimed for a “satisfactory truth”, involving not only the recognition and acknowledgement from the perpetrators of their responsibility but also finding the remains and knowing what happened to their family members. Thus, she regretted the fact that some rests have been retrieved without knowing what had truly happened to the victims.

In the case of Cristina Guarín this is particularly relevant. Indeed, the forensic institution after almost thirty years found Cristina’s remains and a piece of her skirt. “It is a piece that is not burned, that is in good conditions, somehow dirty but is there” assessed Mr. Guarín - how can a piece of cloth coming from such destructive circumstances be preserved in good conditions? Additionally, these remains were found in the grave of María Torres de Velasquez: “when I talked

to the relatives of María Isabel, they said to me: when we buried her, they only gave us a carbonized piece and a shoe”. The fact that originally there were no other rests as they now appeared in the form of a skirt and bones of her sister, he asserted, “raises many questions”. These doubts have led to new question marks around the circumstances of the death. Mr. Guarín’s account closely parallels the one provided by Rosa Cárdenas (daughter). Mrs. Cárdenas recognized that while finding the remains of her mother is a great step, the remaining question is: “what is the truth? Why are the remains incinerated? Who made this happen?”

Hence, the question of where are the disappeared reveals not only a search for a physical object (the body, the remains), but also constitutes a search for a trajectory the object, a historicized account of the events. The truth emerges as an issue intrinsically related to the finding. According to Mr. Guarín, truth does not mean an exhaustive account of what happened:

“I would not like to know all the specifics of what happened, if she died from mechanical asphyxia or if they killed her with three gunshots in the head or if they put her in sulfuric acid as Ricardo Gámez [former intelligence military] told me in Belgium, but I would like to know what was the chain of command in these state criminal actions, who decided to murder and afterwards put to death Cristina Guarín. That’s what I mean when I say that the prosecution owes to me this part of justice [the truth] as well as the restoration of the mortal remains”.

When Mr. Guarín referred to the truth as a matter beyond the little details of the wrongdoing, he framed this issue as a problem of information around those responsible for the disappearance and killing of his sister. When the reflection focuses on disclosing the actions of the perpetrators there is an understanding of the relevance of knowing the circumstances of the wrongdoing in order to give a sense of truth and restoration to the finding of the mortal remains. According to some of the views gathered among the victims, the truth constitutes an amount of information necessary to solve the questions around what happened (instead of multiplying them).

In this respect, it is important to refer to the work of the Truth Commission on the PJ events and the relevance that the actors award to its work. Although there was not a set of questions directed to the work of the Commission, during the interviews, allusions to the Commission were only fragmentary when elaborating on the subject of impunity. However, we were able to gather some reflections around this. Some valued the Commission's existence. In this line, Hector Beltrán (father) qualified the investigation as exhaustive and profound and the Deputy Attorney General asserted it was an important historical account of what happened (El Espectador 2014a). Others were more critical in respect to the Commission's work. In this vein, Alejandra Romero (niece of judicial assistant Rosalba Romero Lopez) criticized the report asserting that it had changed her aunt's name (for Rosalia) and her position (from judicial assistant to secretary):

“The mistake of the Final Report of the Truth Commission, whether intentional or accidental, not only has an impact in the historical or biographical discourses, but also has implications for my affections. The pain and anger that this created on me led me to investigate the issue and ask why my family had done nothing, or even, what had we done so we let the name of my aunt went wrong, and it is here where I consider important to stop: memory is a claim, is a key for mourning, healing wounds, rebuilding subjectivities, in short, it is a political action” (Romero 2015: 13)

Further from these appreciations, the fact that the Truth Commission referred to contextual and historical factors without referring to the responsibility of anyone weakened the perception around the relevance of the Commission among the respondents. The work of the Commission was valued as a historical account of the events that, among other important aspects, manifestly ratified that the disappearances took place – although this was stated in a point of history when the perpetration of this crime was much less controversial it was still debated specially around the judicial processes. Nonetheless, although this report endorsed the versions of the victims around the disappearances, it did not referred to the political or legal responsibility of the civil authorities,

of the military, of the police, and other official and private agents for what happened. *A version of a crime without perpetrator.*

In relation to this problem, Jorge Franco (brother) assessed that Plazas's acquittal by the Supreme Court of Justice revealed that no one was going to be held accountable for the wrongdoing: "Who did it? Was it the Holy Spirit and not a flesh-and-blood person? According to the tribunals it seems that it actually was the Holy Spirit" (Jorge Franco, brother). Indeed, the fact that the crimes are recognized but the justice system is unable to clarify the circumstances of the events – *i.a.* how did they die or who did abduct them, creates a constant impression of lack of information on the whereabouts of the victims.

With this respect, the victims did not express an expectation on a highly-detailed account of the episode - "when you know all kinds of details you can go crazy" (Xiomara Urán -Justice Urán's daughter, referring to the autopsy practiced on the remains of her father). Their claim involves finding the remains, knowing what happened and who did it. In this sense, ultimately, when referring to impunity victims seek to establish the fate of their loved ones. This is not necessarily expressed as a measure of pain infliction through a criminal law measure. In short, determining a perpetrator is related with the search of the family members, after all they need someone they can ask: where are the disappeared and what happened to them?

As the interviewees developed their views on the fight against impunity in the case and as they focused around finding the disappeared, the centrality of punishment vanished. This issue may emerge as a possible rupture with discourses constructing impunity in opposition to *punishment*. In this respect, when referring to Plazas's imprisonment, one of the victims asserted that although she could not say she was unhappy with the fact that the perpetrator suffered some pain, the purpose of

their struggle was to find the truth. In this context, the question of where are the disappeared involves knowing the truth, the authorship of the wrongdoing and the whys and wherefores of the events. In cases of enforced disappearance, the truth and the finding of the bodies are crucial to the way they portray their struggle against impunity. This form of obtaining truth and redress is meaningful to the victims when they are unable to find their loved ones. However, in their discourses some victims and the justice operators also referred to a notion of adequate punishment as the objective of the fight against impunity. Let us review this form of the concept of impunity in the following section.

5.4.4. Impunity as inadequate punishment

When the victims and justice operators addressed the subject of impunity through different contrasts with punishment, there remains an open question: under what criteria do these actors observe that a criminal sanction results in an adequate form of punishment? The expression *adequate punishment* designates a penalty that is perceived as sufficient so that impunity becomes impertinent in a certain situation. In order to develop this part, we will integrate the views of the actors who, in spite of their different positions (victims, justice operators, lawyers), referred that in the case there was no adequate punishment when were asked about impunity. How do the different actors of the case study characterize an adequate punishment?

When observing impunity as inadequate punishment, the actors mentioned themes such as the *term of imprisonment* and the *conditions of imprisonment*. When the actors were asked to develop these factors used for evaluating what adequate punishment is (in contrast to impunity), they employed ideas of *proportionality* (measuring the seriousness of punishment according to the gravity

of the crime), *equality vis-à-vis* the suffering of the victims ('they should suffer as much as we did') and *equality* towards other criminals ('they should be sentenced in equal conditions as other criminals are'). However, their discourses also revealed a form of neutralization of the criminal sanction that was not focused on the *conditions* or the *time* but on the possibility for implementing the sanction (*neutralization*). Let us review these elements with further detail in three subsections:

a. Time of imprisonment

On June 9, 2010, Plazas was found guilty of the enforced disappearance of eleven people and was sentenced to thirty years of imprisonment. On January 30, 2012, the Superior Court of Bogota (Tribunal Superior de Bogota 2012) partially annulled this ruling declaring Plazas's responsibility for the disappearance of only two people. Finally, retired Col. Plazas was acquitted in 2015 by the Supreme Court.

The actors of the case evaluated the adequacy of the sentence drawing a parallel between the time (temporization of the sanction) and the adequacy of the penalty. Thus, the concept of impunity was constructed in reference to too-low sentences, in contrast to sufficiently prolonged ones that would not entail impunity. In broad terms, criminal law measures are framed into a traditional understanding of the functioning of the criminal law system as a pain delivery operation against someone (MPR).

One of the rationales mobilized in this form of observing the problem was proportionality. Alejandra Vicente (lawyer representative of the victims before the Inter-American procedures) expressed that an adequate punishment must be proportional to the violation: "serious human rights violations must meet proportionate punishment". Although found clear the dependency of adequate punishment on proportionality, when we asked her to elaborate on how to observe proportionality,

she explained that this was variable, contingent to the judge of each case and to the domestic legal framework; in other words, the allusion to proportionality was clear but its content, extent and definition was blurred:

“It depends on each judge, then it is a very subjective issue. There is agreement that the penalties must be proportional but there is no agreement on what that means, what is the term of the sentences. It varies greatly depending on the judge that processes the case, the jurisdiction and the domestic regulations”.

Despite the lack of parameters to evaluate the adequacy of proportionality with respect to a measure of restriction, lawyer Vicente maintained her observation of proportionality as a fundamental factor for an ‘adequate’ legal reaction against criminal problematic situations.

In this line, when observing the *term in prison* a recurrent use of proportionality relates to the conventional juridical discourse of proportion drawn between the length of the sentence and the gravity of the violations. In this sense Gloria Gómez, family member of a victim of enforced disappearance and director of ASFADDES (association for the victims of disappearance) assessed in a personal interview: “we have always demanded that if a person forcefully disappears, those responsible for such atrocity should be given the highest possible penalty. We do believe that the penalty should be the highest because the damage done to us is too grave”. The elaboration on the seriousness of the crime brings about the necessity of a response in proportion to the gravity of the harm which could not be anything other than severe.

When individuals enter the system of ideas of the modern penal rationality and, therefore, privilege the theories of punishment that are indifferent to the social inclusion of people responsible for criminal conduct, they have some difficulty in indicating a precise and adequate threshold for the length of the sentence. With this respect, for instance, lawyer Alejandra Vicente was asked what could be an appropriate penalty in the PJ case:

“What should the sentence against Plazas be? Should it be 20, 25, 30, 15 years [of imprisonment]? I think that limit is a little more abstract, but if he is acquitted by the Supreme Court or if it sentences him for a two-year term, the families will have a sense that there has been impunity, that although there was a process the case remained in impunity. It is more difficult to determine what the maximum penalty should be, but I think it is easier to determine if there is a very low penalty that makes family members, or the victims who have taken their case to the courts, think there is impunity”.

Based on the principle of proportionality, lawyer Vicente delimited an appropriate penalty in the PJ case as an area formed by two possible limits. When observing these limits, she found more difficult to establish what would be an inadequate high sentence, in contrast to inadequate low sentences which she found more easily recognizable as inappropriate. This answer allows us to observe how the distinction impunity/adequate (ergo proportional) punishment, results fragile (when not irrelevant) regarding high sentences: in this vein, the fight against impunity may entail a claim for high sentencing. According to this use, an inadequate punishment (in relation to impunity) is opposed to ‘too low punishment’: impunity as a measure of leniency, in the words of the IA Court²⁸⁸.

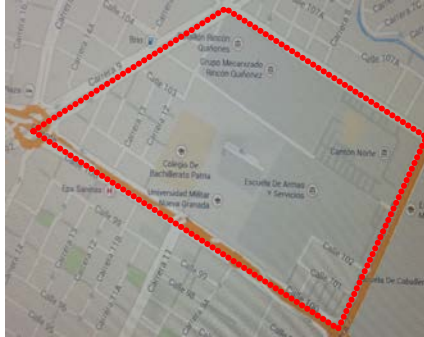
The described expression of adequate punishment encapsulates our description on the traditional discourses of criminal law by which low sentences tend to be observed as inadequate and high sentences as adequate. This is particularly visible in our research because the offenses of the case involve serious attacks against the life and safety of people. As Gloria Gómez (Asfaddes) has put forward: “We do believe that the penalty should be the highest because the damage done to us is too grave”.

²⁸⁸ A similar finding is present in a study on the perceptions of a significant number of victims, next of kin of people killed by ‘terrorist groups’ in the Basque Country since 1960 (Varona and De la Cuesta 2014). This study enquired into what those victims thought about the convictions in their cases. 144 people were interviewed, and 64.6% of the respondents said that there has been a conviction in their case. Out of the 82 people who knew the content of the ruling (53.24% of respondents), 57.3% found the sentence lax or too lax, 36.6% found it proportional and no one responded that it was harsh or too harsh. The lack of responses finding that punishment is harsh correspond to our findings: the themes of proportionality and adequate punishment emerge as inapt for questioning, or even recognizing, severe sentences.

b. Conditions of imprisonment

When Plazas was convicted, the conditions of imprisonment became the center of attention of different actors when identifying the ‘adequate’ implementation of the sentence. The situation of retired Col. Plazas presented different particularities as we can see in Table No. 13:

Table No. 13. Place of detention of retired Col. Plazas



Picture No. 13 Plan of the place of detention. Retrieved from googlemaps



Picture No. 14 and 15 Plazas at his place of detention. Retrieved from La Cariñosa (2010) and El Espectador (2015a)



Location: the Cantón Norte Military Facility is in Bogotá.

Approximate area: 180.000 m².

What is it? The Cantón Norte is a military facility wherein function a number of military educational institutions, a battalion, the National school of the army infantry, the military cathedral, restaurants, officials’ housing complex, and a sports and amusement complex.

The cell/room: As reported by the Director of the Army School of Infantry, Plazas was interned in one of the bedrooms of the Officials’ Casino, which consists of a bed, a nightstand, a desk, a chair, furniture for a library, a TV, a radio and a bathroom (Oficio 4235, November 25th, 2010).

Chronology of the internment: in 2007 a court ordered retired Col. Plazas’s preventive detention²⁸⁹. In accordance with it, the Ministry of Defense conducted him to the military facilities of the Cantón Norte. On August 5, 2009, the Third Criminal Court of the Specialized Circuit of Bogotá (Oficio No. J3-1528) ordered the INPEC to transfer Plazas from the Army Infantry School to the La Picota prison –more specifically, to a pavilion providing special security to former members of the Armed Forces. On August 26, 2009, the INPEC transferred Plazas to the Military Hospital because he was feeling ill. On June 9, 2010, the Criminal Court sentenced Plazas and the INPEC transferred Plazas to the National School of Army Infantry (at the Cantón Norte). In this place he served his sentence until December 17, 2015 when Plazas was released after his acquittal by the Supreme Court.

²⁸⁹ The 13th July 2007, the Prosecutor of the case ordered his preventive detention. The 16th July 2007 Plazas, gave himself up at the

Given these conditions, in 2013, Hector Jaime Beltrán (father), Cecilia Guerra Cabrera (wife), Cesar Rodríguez (brother), René Guarín (brother) and Pilar Navarrete (wife) filed an *acción de Tutela* (a legal action to protect fundamental constitutional rights) asking for Plazas to be transferred to a prison facility, based on their rights to justice and to an effective remedy. In accordance with this group of victims, those rights were allegedly violated when the Army School of Infantry was designated as Plazas's place of detention.

With this respect, the plaintiffs argued in the *tutela* that their right to justice was breached because of the scarce restriction of movement of the detainee, the conditions he enjoyed (similar to active officials²⁹⁰), the presence of particularly luxurious conditions in the place of detention (e.g. having service staff), and Plazas's activity as a professor. Thus, the plaintiffs portrayed the problem of 'justice' in this case not only as the detention in a military facility (wherein he held hierarchic authority), but as the lack of imprisonment (as a precarious and inflicting pain sanction). In short, the actioners constructed a relation between imprisonment and their right to justice.

Although, according to our research, the victims take into account a diversity of elements when observing the subject of impunity, the element of imprisonment was raised as the key ingredient for drawing their legal arguments. This was possibly created by the intervention of the lawyers translating the complexity of the victims' claims or their own constructions into the legal framework, as well as the use of impunity by the victims as a discourse of regret and denunciation that can be reduced without difficulty to a claim of imprisonment. This use of the fight against impunity reduces the complexity of the different interests, needs, doubts and reflections that victims uphold when asked about impunity, reducing it to the claims for sanctions that inflict pain through a

²⁹⁰ According to a testimony gathered by the IA Court (2014: 458), retired Colonel Plazas lived in the Infantry School like a regular officer.

temporal-corporal dimension. This form of the fight against impunity may involve that the victims sacrifice the possibility of translating to the justice system their own intricate aspirations.

The plea was contested by Plazas's defense arguing that the special place of confinement was intended to safeguard his right to life and that the only difference with other inmates in Colombia was that he was not suffering the overpopulation and corruption of prisons. Concluding that the defendant was following all due limitations of movement, Plazas's lawyers not only used the same categories as victims (equality and restriction), furthermore, as contradictory as this may sound, the defense argued that the convicted was suffering an adequate punishment that "must be retributive, rehabilitative, deterrent, reasonable, necessary and proportionate". Hence, the defense lawyer, instead of supporting good conditions as a form of legal redress, tried to persuade the justice system of enforcing the special imprisonment conditions describing them as sufficiently negative and exclusionary and, for that reason, admissible.

The Constitutional Court (2013) decided to remain Plazas's place of detention unaltered, under the argument of protecting his right to life from potential risks of security - the Court protected the rights to life in reference to the conditions of imprisonment without referring to the term of the sentence. Furthermore, in this case the Court assessed that punishment was adequate because it was fulfilling a simultaneous objective of deterrence, retribution and rehabilitation²⁹¹. Although,

²⁹¹ "In respect to the ends of punishment, this Court has stressed that in our legal system punishing has a deterrent aim, which is basically met at the time of the legislative enactment of the sanction, which is presented as a threat of an evil rising from the violation of the prohibitions; a retributive end, manifested at the time of the sentencing, and a rehabilitating end guiding its implementation in accordance with humanitarian principles and norms of international law. It has also been considered that the only penalties compatible with human rights are those aiming at the resocialization of the offender, meaning that the society incorporates the individual as someone that enriches it, which also contributes to a general prevention and a safe coexistence, all of which exclude the possibility of imposing the death penalty" (Corte Constitucional 2013).

according to the Court, the rights of victims are not confined to financial compensation –including a wide scope of rights as to the truth, the justice and full reparation for the damage, the Court concluded that there is not an entitlement of having the perpetrator in a particular place of detention.

In line with the discussions presented at the *acción de tutela*, some of the actors understood that for countervailing impunity a serious condition of restriction should take place against the person found guilty. Adequate punishment, therefore, should result in conditions of imprisonment that meet “serious” restrictions against the offender:

“The State has some discretion through its institutions with respect to the enforcement of the sentences and in this case, it decided that the detention place was going to be the Military Cavalry School for security reasons. This is questionable, because Col. Plazas could be interned in a different place with a secure area, where he could even be alone with security purposes and not serving his sentence in a military facility. Also, the fact that he enjoys different privileges can result on a perception of impunity, which are for example the permit to attend the wedding of one of his sons or the fact that he continues giving lectures at the university. Also, there is the fact that he is a military authority, and as such in the military facility he is at he will continue to hold authority. All these conditions create the perception that Plazas is not actually serving a prison penalty. This is again related to the subjective topic of proportionality that we always link to the theme of impunity and what is perceived as impunity when there is no serious enforcement of sentences” (Lawyer Alejandra Vicente, representative of the victims in the IA procedures)

According to this, the notion of impunity as the lack of adequate punishment is not restricted by certain actors to evaluate the term of the sentence but should consider also lenient conditions of imprisonment. With this respect, lawyer Vicente identified as indicators creating a perception of impunity: the special *benefits* offered to the inmate (e.g. permits for going to parties or giving classes at the Military University), the *place of detention* (i.e. the military facilities) and the preservation of the military *status* of the person convicted (i.e. the relevant hierarchic position that the person holds in the structure of power functioning at the place of detention). Let us

consider these three elements (*benefits, place of detention and status*) to analyze the notion of impunity in contrast to adequate and proportional punishment.

The word *benefit* is used to designate an advantage or profit gained from something. In this context, the term *benefit* refers to special conditions favorable to the inmate. During the interviews, other actors used the word *privilege* rather than the word *benefit* when referring to this circumstance. We will retain the formulation of *privilege* which closely parallels to benefits but portrays better the special advantage granted to a person, which is more accurate to this case. Let us, thus, reframe our question: considering that some actors regard privileged conditions of imprisonment as impunity, how do actors observe the subject of *privilege* in regard to prison conditions?

When detecting the refinements of living that are all but necessary (privileges), the observer needs to make an assessment about what he or she considers as the standard reference. In line with this reference, certain actors elaborated the subject of privilege in reference to *ordinary living conditions*. In this sense, some of the victims expressed regret about the difference between the normal living of people and the conditions created by the intervention of the criminal justice. According to Rosa Cárdenas (daughter) “the sentence is derisory: Mr. Plazas is in a military garrison living with all imaginable comforts. I mean, where is the suffering? Suffering is what I have to go through every day to put food on my table with a minimum wage”. In her assertion, Mrs. Cárdenas compared her life and the difficulties that she faces as a humble worker with the comfort and favorable conditions that retired Col. Plazas had, even though he was convicted for enforced disappearance.

Besides the comparison with ordinary living conditions, different victims characterized Plazas’s prison conditions as luxurious referring to a notion of ‘normal’ conditions of imprisonment.

These ideas were connected to the restriction of rights. The interview with Cesar Rodríguez (brother) allowed us to consider certain elements for analyzing how victims observe a *proper* restriction of rights:

“The sentences issued until now are a mockery. Why? Because of the places of detention, because the convicted officers are living in the same conditions as active officers as if they hadn’t committed any crime. They have a good apartment in a military garrison, very big, with a lot of freedom movement. They have a good food service, laundry, constant visits; not even visits, their families live with them. These are not prison conditions... Well, undoubtedly, they have some restrictions on their freedom of movement. Something that is at least a principle of justice, and in any case, there is a sort of social condemnation, and at least the guy is convicted and detained. Although the conditions are not entirely adequate, undoubtedly there has been something. However, it is a mockery considering that a criminal who has been convicted for arbitrary detention, torture and murder should not for any reason be under such conditions”.

Mr. Rodríguez affirmed that he found Plazas’s confinement was a ‘mockery’ because of the conditions of imprisonment. Although in his answer he recognized that the detention brings about some sort of justice, he regretted the lack of a proper restriction of rights during the time of detention. How to observe such restriction? In this respect, Mr. Rodríguez highlighted different elements as the visiting regime, the food supplies and the laundry services. Among these elements, he observed as the core condition the restriction of movement. In the same vein, several victims criticized the vast area where the inmate can move: “Is it acceptable that Mr. Plazas “limits” his mobility to 180,000 m², whereas no detainee in Colombia has that same space?” (*Acción de tutela* filed by the victims). This was verified by lawyer Molano, who also regretted the fact that retired Col. Plazas had waiters at his service, that he could move freely within the military facilities and that he had access to cell phones and other communication devices - “They are living like kings”, assessed Ana María Bidegain, Justice Urán’s wife.

The observations of regret we have described can be interpreted as the rejection of conditions aiming at preserving or reinforcing the social status of the inmate and, therefore, diluting the sense of the criminal law reproach. However, these responses may also correspond to a representation of acceptance and desirability of imprisonment as the standard response of the criminal law system and of precariousness as its ideal content and form of implementation - impunity takes place in situations where the measure implemented exceeds the precariousness of conditions.

“[Sandra Beltrán (sister) said:] as a regular detainee convicted by ordinary courts he should be at La Picota or La Modelo [regular civil prisons], he should be eating in a can-pot, getting out to a courtyard according to a timetable, sleeping on the floor, because he is a convict. There are thousands of prisoners under those conditions, and just for stealing a bottle of milk! [Pilar (wife) interrupted:] Exactly! He, who has committed those kinds of errors, must be in the same conditions. He should not have privileges”.

In this answer, Mrs. Beltrán assessed that eating, sleeping and moving must be seriously restricted for a measure to be characterized as adequate punishment. The evaluation of the conditions of imprisonment through the subject of impunity is often oriented in the direction of criticizing lenient conditions. The perspective of certain actors regarding imprisonment as characteristically precarious and restrictive, involves that some of the victims understand that conditions different from those aimed at inflicting pain may contribute to impunity:

“If he is suffering, then I am glad. I am glad he is having a bad time. And he can make all the faces he wants, he can say it does not affect him at all but, even in a military facility, he has to be moved somehow.” (Victim B)

“Yes, he cannot leave the place, but he is not suffering. Every morning they cook eggs for the man; he goes out and gives classes. He is not suffering! It is not punishment! Morally, it is, but nothing else. Also, when all this passes he is going to be a hero, I assure you, Camilo Umaña, that when Plazas is released, he will file a sue for his supposed undue detention against the State and we are all going to have to pay reparations in his favor.” (Victim A)

In these answers, the adequateness of imprisonment is identified with the extent to which suffering is experienced by the convicted. While both of these victims accept that the mere fact of

being sent to prison may cause suffering, they affirmed that imprisonment should suppose a form of *cumulative pain* according to which the detention should be followed by additional suffering experienced through the conditions of imprisonment.

From the point of view of the convict, Thania Vega (Plazas's wife) described that the internment of retired Col. Plazas caused them great suffering and humiliation: "only those who have experienced it can possibly know how the life of a family changes in a situation as such" (Vega 2011: 46). She asserted they felt an enormous humiliation by the simple fact of being taken pictures (Vega 2011: 44). During the detention, Thania Vega perceived her husband's "cheerful, smiling and caring personality" had transformed into "a constant state of irritation, irascibility, aggressiveness and mistrustfulness" (Vega 2011: 44). He suffered a "deep moral pain, a terrible inner agony and a sensation of defeat" (Vega 2011: 44).

According to the idea of *pain accumulation*, some of the victims found in this suffering not only an adequate consequence but also a sense of comfort as asserted the *victim B*. In this context, the claim for *equality* means a claim for equally poor conditions for all those people submitted to a criminal law penalty. Answers such as the ones we have presented, referring to unequal conditions of imprisonment as a factor of impunity, could not be understood as a position in favor of improved conditions. On the contrary, this form of constructing the fight against impunity constitutes an argument for demanding for more restrictive conditions (against retired Col. Plazas).

The representation of the accumulation of pain by means of criminal punishment expressed by some victims reminds us Foucault's remark (1975: 16) when referring to the nineteenth century criticism to imprisonment according to which punishment was not sufficient when prisoners were less hungry, less cold, less deprived in general than poor people or ordinary workers. This involves a

pressure on the criminal law system so that “a condemned man should suffer physically more than other men” (Foucault 1975: 16). However, in the answers of the victims we were also able to depict certain elements beyond a mere valorization of punishment as a form of cumulative pain infliction.

With regard to Plazas’s detention, another victim said: “I guess this has been very hard for him, I am very happy about this but I don’t think it’s enough because what we needed was the truth”. According to this answer, the discourse on suffering was somehow instrumental, representing the infliction of pain as a means to the truth. In line with this representation, conditions of imprisonment causing suffering are perceived as possibly apt for compelling those involved in the criminal actions to tell the truth.

“Perhaps with more rigor he [Plazas] would have been persuaded to tell the truth, so that we could know where they are [their loved ones] and what happened that day” (Pilar Navarrete, wife).

In this answer, imprisonment is not only instrumental but actually becomes irrelevant when the truth is perceived as ‘unreachable’. This is especially relevant in cases of enforced disappearance in which the whereabouts of a person are concealed. After Supreme Court acquitted retired Col. Plazas, this observation was clearer to some of the victims. With this respect, Pilar Navarrete asserted that, at the end, the fact that Plazas was imprisoned for eight years did not change anything, “as happens to all of those soldiers who are ‘detained’ in resorts or military garrisons where they are not treated with the full rigor of the law”, she assessed. In this answer, rigorous conditions of imprisonment are understood as pertinent, opportune and necessary, especially before rogue offenders, with the purpose of obtaining the truth.

Other victims evaluated the lack of restriction as a form of preserving the living conditions of the person found guilty. This situation was identified as impunity not because of the degree of

suffering that the measure inflicts upon the person but because of the expression of a sort of protection annulling the reproach derived from the criminal law reaction. In this sense, some victims reject those conditions improving or preserving inmates' conditions compared to when they were free from a conviction. Let us review this dimension in the next section.

c. Neutralization of the criminal law system operation

With respect to Plazas's detention, the IA Court (2014) asserted that the internment in a military institution would only violate the IA Convention when it is contrary to legal provisions or to Court orders and when the special conditions are not justified by valid reasons -such as the protection of the life and integrity of the person confined. On the contrary, special conditions would constitute an arbitrary privilege that could nullify the execution of the punishment in the form of "illusory measures that only appear to meet the formal requirements of justice" (IA Court 2014: 459; 2008 para. 203; 2010, footnote 225). According to these elements, the Court asserted that there was no violation of judicial guarantees and the right to an effective remedy of the victims in the case²⁹² (IA Court 2014: 459-469).

The elements that the Court raised to evaluate the appropriateness of the conditions of imprisonment allow us to observe a distinction between conditions of imprisonment and conditions of inequality or neutralization of the criminal sanction that are revealed or implemented through the *mise en scene* of a certain form of (containment of the) legal reaction. When observing this

²⁹² "Based on the foregoing considerations and the evidence it possesses at this time, the Court does not find that the incarceration conditions of the two individuals who have been convicted constitute a violation of judicial guarantees and the right to an effective remedy of the victims. If the sentences are confirmed, the Court considers that the domestic authorities must take into account the considerations of the Superior Court of Bogota inasmuch as it "urge[d] the national Government that the execution of the punishment imposed [on the Commander of the Cavalry School] be implemented in a way that it is not an offense to the pain of the victims and their communities." (IA-Court 2014: 470)

situation the actors drew two sorts of comparisons. The *first* is a comparison to the active army officers who have committed no crime, given retired Col. Plazas lived in the same place and under the same conditions as other officials²⁹³. The *second* is a comparison to the inmate's living conditions before the moment of the detention: the fact that Plazas's residence conditions remained unchanged was characterized by the victims as a privilege that distanced the criminal law action from reproach, as we mentioned in the last section.

This construction of impunity was sometimes constructed employing the notion of *equality*. Some of the interviewees contrasted Plazas conditions to those of other inmates in Colombia: unequal treatment is inadmissible as it entails privilege and, therefore, impunity. With this regard, Hector Beltrán (father) assessed in his book he found outrageous that someone who steals something little from a store would be sent to prison while “those who plunder the country obtain rewards, trophies and home detention”. In this assertion, impunity becomes detectable when the observer can draw a comparison between the social status of the actor and the legal reaction against his wrongdoing (social inequality). Impunity thus appears as an obstruction of the justice privileging individuals according to their place in society. This form of constructing impunity frames this issue within the social conditions of the transgressor of the norm.

“I think the next of kin feel upset because of the privilege or unequal conditions of them [referring to the retired Col. Plazas and General Arias] compared with those people who commit common crimes” (Lawyer Jorge Molano, representative of the victims)
“As a high ranked military, Col. Plazas should not be given any positive discrimination *vis-à-vis* other people convicted in Colombia, especially those who are accused of serious crimes” (Lawyer Alejandra Vicente, representative of the victims in the IA procedures).

²⁹³ “Is it acceptable that Mr. Plazas, convicted for crimes against humanity, has a bedroom in the same conditions as the Colonels on active duty and can stay in the Casino, like an officer on active duty and not as a convicted?” (Acción de Tutela presented by the victims)

In the PJ case, these lawyers implicitly perceived that the military status produced the differentiation of treatment and not the issue of security or protection in detention. In the interview with the prosecutor of the case, Ángela Buitrago referred to the subject of *privilege* affirming: “there cannot be social classes between those who commit crimes and even less to give particular preference to this type of crimes. [...] [P]rivileges of this nature should not be accepted”. In her assertion, prosecutor Buitrago differentiated between *special detention*, which she found admissible for any person that might need to be protected (in the case of the military because of security reasons), and *privileged treatment*, which she found inadmissible because it creates an arbitrary difference among criminals (neutralization of the sanction). In this context, privileges are viewed as guarantees of a certain social status and as mechanisms depriving the law from its general message and practical enforcement: “privilege is the name for that through which the laws are deprived of their general applicability” (Steinberg 2013: 92). In the PJ case, the described conditions were perceived by some of the victims as a form of dissolving any restriction²⁹⁴.

“The privileges enjoyed by Mr. Plazas on his site of detention are an insult and a great humiliation to us, the next of kin of the victims of the holocaust of the Palace of Justice. This is also the case for the Colombian Justice, disobeyed and ignored through this regime of privileges, which constitutes a contempt of the judicial decisions, as it is expressed in the fact that those military involved in crimes against humanity never pay any conviction making a mockery of our demands for justice and punishment” (*Acción de Tutela*).

The expressions of unease and indignation that the victims communicate about the conditions granted to retired Col. Plazas were portrayed as a form of contempt of Court. In other

²⁹⁴ “[A]ccording to expert witness Mario Madrid Malo, “it is a well-known fact that, in the Infantry School,” the retired Colonel lives “like a regular officer” of that unit; his movements within the School are unrestricted and “he has been the beneficiary of exceptional privileges that are not in keeping with the penitentiary and prison laws in force.” Meanwhile, the former Commander of the 13th Brigade has also been detained in the Infantry School since October 10, 2008, and, according to this expert witness, he enjoys “the same privileged situation.”” (IA-Court 2014: 458)

words, it was not presented by the victims as a matter of infliction of suffering but as a matter of neutralization of the criminal law system. The representation of disregard of the authority of the courts of law was not restricted to the lack of precariousness and restriction of the sanction, but heavily relied upon the aptitude of the sanction for effectively changing the life conditions of the person convicted of a crime. In the present case, this specific feature must be interpreted together with the fact that retired Col. Plazas was detained in the military unit that he once commanded. The status that retired Col. Plazas hold in his place of detention was observed by some of the actors as a form of protection rather than a reproach for the wrongdoing. This was to be found not only through the mentioned *material* conditions but also through different *symbolic* elements:

“We should not lie to ourselves, the military treats Plazas as if he was an active colonel, they say: 'My Colonel Plazas'. I do not mean that they should treat him inhumanely. He also has his dignity and should be treated as a person, but it is very different the treatment given to him in the military facilities than the treatment given to a person in a prison, where he would have more restrictions. Here, indeed, there is impunity from the practical point of view”.

In this answer, Jorge Franco (brother) explained how Plazas was treated during his detention following the forms of the chain of command. This he considered inappropriate for a measure of restriction of rights. In this response, the regret of the privilege is not expressed as an expectation of inhuman conditions of imprisonment - contrary to the dignity of people as Jorge Franco assessed; it rather is a claim of conditions not aimed at protecting the social status of the inmate.



Picture No. 16 “The officers that share with him show their admiration and respect to Plazas” (El Espectador 2015a)

Retired Col. Plazas referred to these conditions as normal: “I have a room, I live as an ordinary officer, I have my room here, a decent place where I live... here I have my books, I have my things” (Plazas in El Tiempo 2010). This perception founded upon his ranking in the military structure:

Question: “Are you confined to a room?”

Plazas: “No, I have certain movements in the School because I have the permission that the law gives me to move to the church, to move to the medical dispensary and to move to the gym, so I do have that freedom but most of the time I stay here at the Casino of officers and in my room”.

Question: “Could someone assert that is a privilege?”

Plazas: “No, that is the rule of law and the constitutional block that respects my military rank.” (Caracol TV 2011)

In different interviews to the media, retired Col. Plazas acknowledged that his detention preserved his status and assessed that it was legal. He identified this as a ‘right’ that he was entitled to (a matter of law), because of his military rank.

“There is a legal provision stipulating that the Infantry School is a place of detention for officers with a certain ranking, therefore my General Arias Cabrales, Uscátegui [and myself] are here detained”. (Plazas in El Tiempo 2010)

The idea of status in Plazas’s case is not only constructed around his condition as a military but around his authority and ranking within the institution, comparable with that of the Army Generals. Indeed, other actors of the case similarly perceived that Plazas’s special conditions were due to his status. In this respect, Justice Jara assessed:

“I took the determination to order his transfer [referring to Plazas] to the Picota [prison] because I said: he cannot do whatever he wants. The process was affected because the defendant just wanted to do as he pleased. No! Justice deserves respect. Its authority must be respected. I decided to transfer him to the Picota [...] I also had information that Plazas did not fulfill the orders that were given by the command of the Infantry School, it was a total lack of discipline, an absolute rebellion”.

In her answer, Justice Jara perceived that the defendant used his status as an excuse to obtain and maintain special conditions of imprisonment. Furthermore, Judge Jara asserted that the place of detention served as a measure of the lack of compliance of the court’s orders. In her view

this was 'unjust' and for this reason, when she was the judge of the case, she ordered the change of Plazas's place of detention.

In this case, not only the victims but also the defendant and the justice operators agreed on their perception that social status impacted the determination of the detainee's prison conditions. While Plazas assessed that it was a *right*, Judge Jara observed that it was an irregularity based on his power, aimed at excluding him from the rule of the law. In this sense, she claimed her decision to transfer retired Col. Plazas to a prison was intended to place him under the rule of law.

While actors of the case can characterize privileged detention conditions as a form of containment of the legal system placing someone over the rule of law (either as a manifestation of a legal entitlement or as illegitimate dispositive blocking the justice system), the underlying problem is the idea of reproach: impunity emerges as a lack of regret or reproach from the legal system and as a problem of interference with the functioning of the justice system. Thus, if the conviction results in a measure of protection of the status of those who were convicted, wrongdoing is not perceived as reproved or blamed. This situation was not only drawn by the victims in respect to the place of detention but also to other concessions as the fact that retired Col. Plazas was giving classes at the Military University to officers in courses of promotion (El Tiempo 2010).

To Plazas, the classes and other special conditions derived from his status as a high ranked military (El Tiempo 2010). The fact that Plazas gave classes to officers in the promotion courses implied a symbolic support placing him as an intellectual reference to the military institution, as an example and authority for younger officials who want to get promoted in the institution. In this context, the status of the person declared guilty is not only preserved but also elicited and amplified through the implementation of the criminal law measure. Thus, the measure of reproach

becomes a measure of prestige invalidating the sanction. This situation, according to some, not only benefited Plazas but also victimized them: “we continue to be victimized because we are watching how this person who disappeared our loved ones gets rewarded, even though for thirty years he has been hiding the truth” (Rosa Cárdenas, daughter).

In the former sections, we have reviewed different constructions of impunity found in the fieldwork. During the interviews, the actors constructed the subject of impunity in accordance with themes as the declaration of guilt, the lack of effectiveness of the conviction, the preservation of the status of those accused for the wrongdoing, the conditions of imprisonment, the lack of truth and social reproach. However different and distinguishable, these themes allowed us to observe a possible form of characterizing impunity as a problem of blockage and interference with the criminal justice when prosecuting criminal conducts. In the next section we will propose a possible reconstruction of the concept of impunity considering the different connotations and significances found in our case study but also in the social discourses.

5.5. On the sociological concept of impunity

In the last sections we attempted to elucidate the uses and notions of *impunity* in social discourses. When reviewing the different elements raised in the course of our research, impunity emerges as a polysemous and ambiguous term. This notion can be portrayed as a ‘medium’. A medium is a means that adopts a specific form, giving a determinate sense to the propositions where it intervenes. Mediums have no essence, there is no single form capable of definitively eliminating other possible forms – “les possibilités d’un medium ne peuvent jamais être saisies à partir d’une seule forme” (Luhmann, 2013: 165 in Pires 2015). However, the medium is always expressed

through a certain selection of sense: “J’ai besoin du médium pour construire des formes et de formes (propositions) pour employer le medium” (Pires 2015: 5).

The forms that the medium adopts are to be understood not as immanent properties but selections of significance. These selections have the potential of suspending other selections, according to their presence and authority before the communications of a social system. Nonetheless, the capacity of suspending other selections does not imply a necessary elimination of other possible forms (Pires 2015: 6)²⁹⁵.

Considering the different possible forms that impunity may adopt, the present section aims at drawing a socio-legal conceptualization apt for addressing the conceptual problems raised in the present work. Although some commentators assert that probably no definition of impunity is exempted from major conceptual problems (Bonet & Fernández 2009; Penrose 2000; Alvarez 2012), this observation should not be used as a pretext to induce the sociologist to renounce to a reconceptualization. The endeavor of this section is to construct a sociological concept allowing to deal with some of the problems reviewed in the last sections.

With regard to the problems we found in social discourses, we depicted different issues when impunity adopts the connotation of a general discourse of regret and denunciation. Such use, we argued, involves a form of vagueness and ambiguity that ultimately hinders the distinction between impunity situations and non-impunity. However normative expectations are relevant, a sociological definition allowing stable observations of the phenomenon entail a construction beyond the

²⁹⁵ “[L]es mots du vocabulaire, les adages, etc., fonctionnent comme médium (véhicule, moyen) à partir desquels nous construisons des formes et nous pouvons donner un sens aux propositions (Luhmann, 2013a : 165). La forme renvoie à la sélection et à l’actualisation de propositions avec un sens spécifique (ibidem). Par exemple, le mot ‘égalité’ est un médium et la proposition ‘tous les individus sont égaux devant la loi’, signifiant que ‘le droit doit être le même pour toutes les strates de la société’, est une forme.” (Pires 2015 : 4)

variability of social expectations that criminal accountability may raise. *How to construct a sociological notion of impunity without limiting the observation to social emotional expectations?*

For a sociological conceptualization it is also valuable to detach from the use of impunity as a mechanism reproducing the traditional structures of the penal rationality identified through negative, abstract and hostile forms of reacting against criminal conduct. On the one hand, this use of (the fight against) impunity may contribute to the lack of innovation of the criminal law system observable, for instance, when combating against impunity is used as an argument favoring long-term imprisonment and other radical measures of legal redress. On the other hand, when impunity is characterized as the counter-phase of punishment (understood as a legal human suffering materialized through measures of temporal exclusion from society), the notion becomes unrealistic (perhaps naïve) because in contemporary societies most of criminal behavior goes unpunished. This state of affairs should not be equated to the problem of impunity. We will come back to this later on. For the moment we should ask: *how to construct a concept of impunity avoiding the reproduction of the traditional structures of the modern penal rationality?*

For the reconstruction of the concept, we will use both, a strategy of *exclusion* removing those elements that a general concept of impunity should not include -ultimately elucidating *what is not impunity*, and a strategy of *inclusion* referring to the conceptual elements that a notion of impunity should comprise. The strategy of *exclusion* attempts to elucidate different aspects that should be excluded from a general sociological conceptualization of impunity while the strategy of *inclusion* will depict different elements through the study of state criminality as a privileged point of reflection for the study of impunity. In this regard, explorations using other criminal phenomena

can be part of upcoming studies; until then, we may use our considerations in the subject in order to address the concept of impunity regarding the operations of the criminal justice.

When assessing the concept of impunity, we must distinguish this phenomenon from other phenomena affecting the operation of the criminal justice system – *strategy of exclusion*. One of the most frequent issues with which the notion of impunity is associated is the selection of eligible events by the criminal justice. However, the phenomenon of the selection with regard to the operations of the criminal law system must not be confused with the phenomenon of impunity. Sociology currently understands that organized social systems operate through selection: events available for the internalization of social systems are submitted to selection. For instance, in order to operate, the health system selects what is going to be treated as a health issue (not every individual or condition are dealt with by the health system or “exhaustively examined” every time). If the health system were to treat (exhaustively) every single case, it would not operate. Another example can be the mass media. The mass media select and construct from all the information available what they esteem pertinent for diffusion considering the concrete vested interests, positioning and constraints. No one can seriously consider that it would be possible to inform about everything that is to be known.

These observations are also valid for the criminal law system. Selection is a constraint of the system that constitutes a condition for the operation of the system itself. Moreover, the process of selection should be understood as *the* condition for the functioning of the criminal law system. All social systems, including the criminal law system, operate through selection – in the case of the criminal justice selection is contingent upon a great number of circumstances as the pertinence and

accuracy of the complaint, the collection of evidence, the time and resources for the investigations, the due diligence on the part of the prosecution, the capacity of defense, *inter alia*.

The normal functioning of the criminal law system is characterized by the impossibility of processing all crimes. This could not be otherwise: what would happen to society if the criminal law system managed to process every problematic situation susceptible of being criminalized? Thus, the statement that the system ‘selects’ does not constitute a critique; it rather is a description of the *state of affairs* of the system operation. Furthermore, this may also be understood as a desirable outcome: firstly, the universe of problematic situations is virtually too large and most of it is obfuscated for different reasons²⁹⁶. Secondly, the criminal law is not the only legitimate normative system pertinent for or capable of dealing with events that can be criminalized. And, lastly, the system needs to select in order to operate: “too much law, too many offences and too many cases [...] threaten the whole criminal justice system with collapse”, as stated by the Law Commission of Canada (1976).

If we acknowledge that, at least from a sociological point of view, *selection* is a necessary condition for the functioning of the criminal law system, when assessing impunity we need to draw a distinction between this phenomenon and the process of selection of criminal events by the criminal justice. Thus, the relevant question to pose is: what is impunity if it is not a criminal event that is not criminalized or selected by the criminal law system?

The distinction *selection/non-selection* is neither theoretically decisive nor empirically crucial to define and detect impunity. The selection process of a possible criminal event is caught in

²⁹⁶ In the sixties we already find the assessment that “[i]t is a well-known fact that relatively few offenders are caught, and most of those arrested and released. But society makes a fetish of wreaking “punishment”, as it is called, on an occasional captures and convicted one” (Menninger 1968: viii).

a double bind. In the first instance, an event must be defined by an observer as *criminal* and must be communicated as such to the criminal law system – the discrepancy between criminal behavior and a crime reported to the system is traditionally referred to as the “dark figure”. In the second instance, the event shall be accepted and internalized in the organized operation of the criminal law system.

These two binds have been traditionally linked as part of the problem of impunity. However, while impunity indicates a *bad* sign of operation of the system, the lack of report of a criminal event or the decision not to internalize a criminal event into the operation of the criminal justice, cannot be automatically considered as a sign of a *bad* operation of the system. In different cases, avoiding the criminal justice may involve an appropriate and rational selection as a sign of *good* operation. For instance, when a minor crime is not reported to the system or when a police officer dealing with a problematic situation susceptible of being criminalized legitimately decides to choose mechanisms other than the criminal justice system to address the situation. If the officer decides not to internalize a criminal event, one cannot automatically consider this an *inappropriate decision*. There are many alternatives to the criminal law system that can be observed as appropriate from different perspectives. “For all acts, including those seen as unwanted, there are dozens of possible alternatives to their understanding [and redress]” (Christie 2004: 10), without necessarily implying impunity, we may add.

Characteristically, the criminal law system presents a significant disproportion between the number of situations over which the system is authorized by law to intervene and the number of situations where it effectively does so (Menninger 1968; Hulsman 1986: 65, 70²⁹⁷; Baratta 1989: 340-

²⁹⁷ “Those who are officially recorded as ‘criminal’ constitute only a small part of those involved in events that legally are considered to require criminalization” (Hulsman 1986: 65).

341²⁹⁸; Duff and Garland 1994: 9²⁹⁹; Pavarini 2009). ‘Impunity’ would be an inappropriate label for this form of selection. As early as the 19th century, Karl Biding coined the expression “fragmentary character of the criminal law”, asserting that this was a “serious deficiency of criminal law” (quoted by Jareborg 2004: 526); however, the current sociological knowledge allows us to understand the ‘fragmentation’ as a condition of operation of the criminal law system³⁰⁰.

Selection, as an operational condition of the criminal law system, is not only due to a problem of practicability, appropriateness or pertinence but is also founded through different rational criteria³⁰¹. Considering the need to clearly distinguish between the notion of impunity and the usual and necessary operations for the selection of the criminal law system, the features of the phenomenon of impunity must not be confused with the criteria used by the legal system to operate selection. In this context, the phenomenon of impunity must be distinguished from institutional regulations such as the laws of “immunity” from jurisdiction or principles of selection as the *ultima ratio*.

“Anyway, there is no doubt that actual criminalisation of criminalisable events - even in the field of traditional crime - is a very rare event indeed. In a country like Holland, far less than one percent of those criminalisable events is actually criminalised in the courts. Non-criminalisation is the rule, criminalisation a rare exception” (Hulsman 1986: 70).

²⁹⁸ “El modo como el sistema de la justicia criminal interviene sobre este limitado sector de la violencia "construido" con el concepto de criminalidad, es estructuralmente selectivo. Esta es una característica de todos los sistemas penales. Existe una enorme discrepancia entre el número de situaciones sobre las cuales el sistema es llamado a intervenir y aquel sobre el cual puede intervenir y efectivamente interviene. El sistema de la justicia penal está completamente y constantemente dedicado a administrar un reducidísimo porcentaje, seguramente es muy inferior al 10%, de infracciones. Esta selectividad depende de la estructura misma del sistema, es decir de la discrepancia de los programas de acción previstos por las leyes penales y las posibilidades reales de intervención del sistema” (Baratta 1989: 340-341).

²⁹⁹ “The penal system deals with only a small proportion of the total population of offenders, and generally does so only for short and intermittent periods” (Duff and Garland n.d.: 9).

³⁰⁰ Jurists often encapsulate this idea in the observation that “not all interests that are worthy of protection are, or could practicably be, protected by the criminal law” (Jareborg 2004: 526).

³⁰¹ When referring to this operation as rational we do not understand it as *right*, *accurate* or *good*, we refer rather to it as methodical and governed by a set of norms aiming at giving a pretension of correction to the resort (or not) to the criminal justice system and the implementation (or not) of the criminal law in accordance with such framework.

The laws of immunity refer to a legal entitlement that can adopt three basic forms: *functional* immunity, which refers to those rules that shield “all (former) state officials from the jurisdiction of foreign national courts with regard to the limited class of official acts performed on behalf of the state”; *personal* immunity, which “provides comprehensive protection from foreign jurisdiction to certain categories of foreign state officials during their term of office”; and, *state* immunity, which “precludes the exercise of jurisdiction over the *acta jure imperii* of foreign states” (Van Alebeek 2008: 2)³⁰².

Impunity does not differ from immunity just in one letter. The first difference between both notions is that the latter is a legal entitlement governed and authorized according to the rule of law - while impunity is not a legitimate *ratio* for the lack of operation of the criminal justice system. The second difference is that the laws of immunity recognize the transgression of a primary rule (the rule prohibiting the conduct) and simply formulate a protection from jurisdiction. Immunity therefore “regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful” (ICJ 2012: 4)³⁰³. “Accordingly, the person enjoying immunity is in principle not exonerated from

³⁰² These forms of immunity have a strong relation to the concept of state criminality since they are related to actions performed by states (agents) on behalf of the state or as functionaries. “Since human rights violations often occur under the veil of state authority national courts asked to adjudicate upon the human rights violations allegedly committed by foreign states and their officials have stumbled upon the traditional international law rules on jurisdictional immunity” (Van Alebeek 2008: 418). As a *ratio* governed by international law, there is an expanding assessment on the restriction of immunities specifically when human rights norms are violated. A human rights exception gains space *vis-à-vis* the rule of immunity, understanding that people cannot be sheltered from jurisdiction when committing especially grave violations.

³⁰³ In this respect, the International Court of Justice assessed that “the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed [...]. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility” (ICJ 2002: 60).

criminal responsibility [or other kind of responsibility]; it is simply that it is more difficult to invoke such responsibility” (ILC 2008: 175)³⁰⁴.

Besides the laws of immunity, one of the most pervasive substantive arguments to be found in the literature related to the selection of the criminal law is the *ultima ratio* principle. It is an internal criterion of the legal system employed to select the problematic situations that it will internalize. Although this principle emerged as a form of restraint with respect to the use of the criminal law, at least from the XVI century a connotation of justification of the functioning of the system was introduced to this principle (Mereu 2012; Pires 2001, 2012).

When the principle is used to justify the action of the system it is authorized and represented as a selection criterion of *last resort*. According to Mereu (2012), Pires (2012) and Xavier (2012), this use has allowed repressive practices: when the criminal law is pertinent as a last resort measure its operation must be, accordingly, compelling and its outcome (the sentence) must be particularly severe. On the other hand, when the *ultima ratio* principle results in a criterion of selection by which the criminal law system rejects processing a criminal conduct, this might imply that a certain crime goes unpunished.

With this in mind, some authors have drawn a link between *ultima ratio* with a problem of impunity (e.g. Bengoetxea, Jung and Nuotio 2013)³⁰⁵. In this vein, *ultima ratio*, when implying the lack of prosecution of different criminal behaviors, may be considered as part of the phenomenon of impunity. However, impunity is different from *ultima ratio*. Impunity implies a discrepancy between

³⁰⁴ E.g. the doctrine of diplomatic immunity shelter diplomats against prosecution for violations of the laws of their hosting state, while they are still subject to the laws of their hosting state.

³⁰⁵ “[...] There is therefore a legitimate concern that the principle of Ultima Ratio should not be abused in our European context and legal environment. But what would it mean for the principle to be abused and put at risk? [...] Risks also lurk in cases of impunity, when seriously harmful acts are allowed, for different reasons, to go unpunished” (Bengoetxea, Jung, Nuotio 2013: 4).

the possibility of operation of the criminal justice system and the criminal law program of action; meanwhile, *ultima ratio* is a criterion of operation that does not involve a dysfunction of the system but a principled form of selection of the system – that has implied in contemporary uses a rather justificatory agenda for repression³⁰⁶ (Xavier 2012). Impunity is not in any case an acceptance of the operation of the criminal law system, it rather is a blockage of that operation preventing the criminal law from acting (neutralization).

The notion of impunity, as we will elaborate here, implies a reference to a *structure* of blockage that is in place, affecting the usual operation of the criminal justice system, in contrast to a criterion of the system for its operation adopting (appropriate or inappropriate) concrete decisions. Moreover, impunity should not be constructed as a *passe-partout*, incorporating the universe of problems of the criminal justice system as part of the concept. Let us review some relevant distinctions with this regard.

So far we have referred to the concept of selection as a necessary condition of operation that can explain the general problem of the disproportion between the action of the system and the operational mandate of the criminal law (the ‘dark figure’). The criminological and legal literature, however, have referred to the problem of selectivity as a form of selection that has a negative or pejorative connotation. This issue refers to a differential selection and treatment of the criminal law operation derived from social bias on grounds of race, gender, or social class. With this respect, authors as Baratta (1987) and Zaffaroni (1998; 2011) assert that most of the activity of the system

³⁰⁶ Some liberal jurists refer to the concept of *ultima ratio* for limiting the scope of intervention of the criminal justice. So far, we have to acknowledge that, sociologically speaking, these expectations are not confirmed. Perhaps, with the framework of a new penal rationality, this principle may effectively come to play a role of limitation. Even in this case, this principle should not be confused with the notion of impunity that we propose in this work.

(either in the form of inaction or action) is due to a structural selectivity characterized by the designation of the more marginalized members of society as the system's 'clientele', excluding the most privileged from its attention³⁰⁷.

“[T]he sociology of penal law as well as the everyday experience shows that the criminal law system directs its action primarily against those violations of the weakest and most marginal parts of the population; that powerful groups in society are able to impose an almost total impunity to the system for their criminal actions” (Baratta 1989: 341).

This problem has become a well-known fact in all occidental jurisdictions, easily recognizable by the operators of the system³⁰⁸. This is verified by the fact that, at least since the birth of prisons in the beginning of the nineteenth century, the former has been the predominant socio-economical group of people in worldwide prisons³⁰⁹.

Since impunity and selectivity may imply forms of subtraction from the operations of the criminal justice (based on social bias)³¹⁰, it is understandable that some observers refer to these two phenomena as undistinguishable (*e.g.* Genelhú 2015: 64). However, while selectivity refers to the inclusion or exclusion of a person from the operation of the criminal law system based on social

³⁰⁷ Selectivity is eventually justified, mainly in political discourses, as a form of neutralizing populations labeled as particularly problematic in accordance with a function of prevention and control of crime. However, authors such as Pavarini (2009: 160) or Duff and Garland (1994: 26) have criticized this managerial logic as a justificatory rhetoric that tends to obfuscate its discriminatory aim and its role in the reproduction of violence.

³⁰⁸ According to Perez Perdomo (1991) criminal justice in Latin America and particularly in Colombia presents high degrees of selectivity in consonance with the social status of people, which is often determined by the economic resources. Thus, upper social classes often evade justice while the underprivileged are repressed.

³⁰⁹ In the case of the US, Loury (2013) asserted: “America’s prisoners are mainly minorities, particularly African Americans, who come from the most disadvantaged corners of our unequal society, cannot be ignored. In 2006, one in nine black men between the ages of twenty and thirty-four was serving time. The role of race in this drama is subtle and important, and the racial breakdown is not incidental: prisons both reflect and exacerbate existing racial and class inequalities”.

³¹⁰ Indeed, the blockage of the possibility for implementing the criminal law program of action (impunity) can be related to a problem of social bias by which certain people are shielded from accountability because of their social standing. Relations of power are established around social characteristics that can establish a biased selection of the criminal law system (selectivity).

bias, the problem of impunity only involves a form of exclusion. Moreover, in cases of exclusionary selectivity, these phenomena are not to the same. Impunity is not necessarily based on a form of social inequality. As studied in the last section, this can be due to different constraints, interferences and pressures from the environment of the criminal justice system acting from the exterior and within the system – e.g. individuals who do not belong to a dominant social status may be included in the phenomenon of impunity.

In our work, impunity is characterized as a form of neutralization or blockage of the possibility for implementing the criminal law program of action based on a variety of factors (including social bias). This delimitation of the concept does not involve an emphasis on the result that the system is expected to produce: impunity should not be equated to the ineffectiveness of the criminal justice³¹¹. The effectiveness of the system should be evaluated in reference to the materialization of a certain result. In order to draw the distinction ineffectiveness/effectiveness the observer focuses on the practical enforcement of the rule of law producing a reaction *vis-à-vis* a criminal event. Such result is often represented on the basis of a material outcome³¹². Some

³¹¹ Conceptual and practical research problems are manifest when delimiting impunity in accordance with the system's outcomes. These problems can be noticed when studies compare the aggregate of the criminal phenomenon (number of crimes) with the convictions produced by the system (e.g. IACHR 2007; La Rota, Montoya and Uprimny 2010; CCJ 2012; CPJ 2013; Comisión Asesora Política Criminal n.d. in CNMH 2013: 197). Generally, this form of measuring impunity results into high numbers, showing a state of affairs of the system but at the same time normalizing and broadening impunity. Thus, impunity becomes a state of affairs rather than a problem that can be solved.

³¹² However, even when working under the traditional framework, the operation of the criminal justice may involve results other than imprisonment. In this respect, different commentators (Foucault 1975; Froment 1996; Shoemaker 2001; van de Kerchove 2005; among others) have affirmed that the enunciation of the guilt through a judgment and the sentence became progressively differentiated at both levels, factual and juridical. This created a distinction between the results around the operation of the system and the results around the traditional outcome. Further from (variable) economic, psychological, emotional and social burdens on those convicted and their family members (King 2003: 167), concrete non-material legal consequences take place through the mere declaration of responsibility– e.g. the incapacitation for exercising certain civil rights (Van de Kerchove 2005: 159). In sum, an assessment on the effectiveness of

observers will center their evaluation on the perception of what should be an *adequate sanction* – often evaluated within the box of the modern penal rationality.

The assessment of the effectiveness of the system is often based on the assumption that imprisonment is the appropriate result. This presupposition constitutes an obstacle to innovations or alternatives. However, ineffectiveness assessed in reference to the lack of deprivation of liberty does not necessarily entail a problem of impunity. This situation may suppose an adequate and expected implementation of the criminal law program of action, for instance, when minor offenses are tolerated by the system or when a problematic behavior is processed through rather conciliatory measures. In short, in the absence of a particular result, we cannot automatically assess that there is impunity: how about when an alleged criminal dies in the course of prosecution? How to evaluate authentic amnesties or legitimate pardons? In these cases despite the lack of a particular result of the criminal law system (ineffectiveness), such system is able to operate autonomously before a criminal problematic situation.

The problem of impunity should not be attached to the evaluation of a certain result. Assessing impunity implies evaluating a structural distortion of the system's operation, consisting in a form of containment or suspension of an autonomous proceeding of the criminal law program of action. In line with this, an incidental problem in the operation of the system that does not entail a neutralization as the one described will not be observed here as a case of impunity.

Any lack of implementation of the criminal law does not entail a problem of impunity, neither any form of implementation removes the problem: the presence of criminal law procedures does not create *per se* a non-impunity scenario. The system itself may operate fraudulent or

the system with a traditional perspective should evaluate different material and non-material results other than imprisonment as possible effects and outcomes of the criminal justice proceedings.

surreptitious procedures with the direct purpose of avoiding legal recognition and proper redress of the problematic situation. For this reason, different international law mechanisms have recognized that the principle of *non bis in ídem* may be exempted when a person is tried in a manner inconsistent with an intent to bring that person to justice, with the purpose of shielding him/her from further criminal responsibility (Rome Statute of the ICC Art. 20.3; Statute of the International Criminal Tribunal of Rwanda Art. 9.2; Statute of the International Criminal Tribunal for the former Yugoslavia Art. 10.2).

The problem of impunity can be described as the creation of *empirical* or *situational sanctuaries* blocking the possibility of an autonomous operation of the criminal justice program of action. Thus, when observing impunity, the observer should take into consideration the obstacles that the criminal law system confronts concerning such possibility. Creating or maintaining conditions preventing the criminal law system from implementing its program of action may be characterized as a form of dependency on its environment. This type of dependency may emerge from the action of other social systems as when segments of the political system are able to impose a blockage against the intervention of the criminal law system³¹³.

Exploring the idea of the *sanctuaries*, on September 2015, I conducted a series of semi-structured interviews on the women's prison *El Buen Pastor* located in Bogota, Colombia. In this fieldwork I explored the representations of the interns of impunity and whether they found it to be a problem or not. In this respect one of the interns commented: "Of course impunity is an

³¹³ In Colombia, an example of this kind of interference may be the public declaration of the political leader Francisco Santos regarding the eventual prosecution against former President Alvaro Uribe because of different grave crimes. On behalf of Uribe's supporters, Mr. Santos stated "If they [the justice system] put a finger on Uribe, the country sets on fire. And it burns down on the hands of the president; because we all know that the responsibility for this lays on Juan Manuel Santos" (El Tiempo 2014a).

important problem! So many bad things happen here, but nothing happens [afterwards]”. In her answer, she was referring to an official state of apathy before different violent acts that some of the guardians and the other interns inflicted on each other; in other words, she was describing the presence of a form of *indoor* impunity, inside the institution of prison itself. In this situation, a paradox emerges: the prison that is designed to punish people can be a place where structures of impunity are created parallel to (and eventually to support) punishment.

The fact that impunity may be detected as a problem within the framework of traditional punishment (imprisonment) is eloquent. As we can see in our example, the sentence of imprisonment is not conflicting with the phenomenon of impunity and, for this reason, it is not by itself a direct and infallible solution to the problem. The fact that impunity can be found *inside* the framework of imprisonment -the modern criminal law sanction par excellence, makes it particularly visible that impunity is different from the issue of imprisonment. This problem should be rather understood related to the possibility of action of the criminal justice system towards criminal problematic situations. With this respect, the observation of impunity should only be based on the lack of implementation of the criminal law system? How about when other legal sub-systems address the problematic situation developing different forms of legal intervention?

As we have affirmed, the conceptualization of the present work is built with respect to problematic situations susceptible of criminalization. For this reason, the phenomenon is constructed in reference to the program of action of the criminal law. Identifying the criminal law as the point of reference for the conceptualization does not mean that in order to put an end to impunity we need to criminalize every crime-related situation. Neither does it mean that the operation of other law sub-systems or jurisdictions is irrelevant for the observation of impunity.

A valid indicator of the possibility of the criminal law system operating without a problem of neutralization may be the reaction of other jurisdictions³¹⁴. In this sense, the lack of legal intervention from other legal subsystems may be an empirical factor of the obstruction of the criminal law program of action. For instance, in the PJ case, we can observe the presence of social mechanisms of impunity due to various obstacles put in place to prevent the autonomous operation of the criminal justice system, but also to avoid any other form of social recognition and legal redress of the problematic situation as a whole.

As described in the last part of the research, the obstruction that the operation of the system suffers in cases of state criminality may refer to a relational obstacle. In this sense, the neutralization involves an environmental element obstructing the possibility of operation of its program of action. This form of the phenomenon is particularly present in cases of state crime, involving the action of a social system capable of creating a neutralization on the possibility for implementing the criminal law system.

Consequently, according to our conceptualization, impunity is related to environmental burdens against the criminal law system. In this sense and in accordance with the findings of the present research, state criminality may be depicted through indicators of undue pressure against the criminal law system such as improper influence, inducement, threat or interference, and attacks against the independence, competence or impartiality of the criminal law system. In sum, the phenomenon of impunity may be empirically observed and constructed in reference to those undue pressures acting against the criminal justice system affecting the possibility for implementing its

³¹⁴ In this sense, we should not discard non-criminal legal systems as scenarios for observing the phenomenon of impunity for the crimes, even though the issue of impunity should be studied in reference to the criminal justice system.

program of action. The proposed conceptualization of impunity (like any other concept) gives rise to questions on the empirical factors allowing to observe the phenomenon in social life.

These explorations, in our perspective, should not be focused on evaluating the existence or extent of punishment. In different situations, the absence of a legal consequence does not involve the presence of a mechanism of impunity³¹⁵. Hence, as asserted before, impunity is different from effectiveness, because it does not depend on the presence of certain results (prison, poor conditions of internment, suffering of the perpetrators, among others) but on the possibility for implementing the criminal law program of action.

³¹⁵ As studied before, for instance, impunity is different from amnesty. While the latter consists on legitimate political measures waiving certain wrongdoing as a form of political recognition of the wrong which expressly declines the legal consequences arising from the violation, impunity undermines the acknowledgement of the wrongdoing through its obfuscation, denial or total invisibilization.

6. Conclusions

In social discourses, impunity is a pervasive term and ambiguous notion. The slogan of the *fight against impunity* has gained political and legal unanimity, even though its content, extent and significance remain unclear. However equivocal, contemporary societies understand this phenomenon as a social problem that needs to be addressed. Discourses embracing impunity, mainly present before the nineteenth century, currently seem demoted, outdated and impertinent as a legitimate claim.

Considering the multiple meanings that impunity bears in social discourses, this research referred to it as a *medium* capable of mobilizing a variety of significances, connotations and social claims. Indeed, in addition to the *chaos of meaning* found in ordinary social communications, the specialized literature on the field does not offer significant clarifications. In this research, we found a great number of works that denounce the existence of impunity and demand for counter-action, without further characterizations of the problem; others seek to measure the phenomenon, with blatant problems of delimitation of the object to be quantified; and some attempt at assessing its causes and consequences, without introducing a problematized account of the phenomenon. In

short, it is rare to find a conceptual problematization, characterization and elucidation of what is being measured, assessed or denounced: ultimately, *what is impunity?*

Moreover, most of these works employ a conventional notion of impunity, which refers to the absence of adequate punishment. This understanding either overlooks, ignores or evades any critical consideration of the manner traditional structures of criminal law have constructed its form of responding to crime. Thus, besides a problem of *conceptual vagueness*, this research argues that the *fight against impunity* has fostered the reproduction of the traditional penal rationality centered in the temporized infliction of pain implemented through the standard institution of prison.

In order to characterize the traditional penal thought, we have resorted to the theory of the *modern penal rationality*. This theory shows that the criminal law has constituted a delimited subsystem of law, equipped and endowed with the goal, mission and identity of punishment as a measure of intended pain infliction. This identity has been justified and developed through a series of theories of punishment which coexist and generally agree on identifying punishment as the obligation of the State arising from criminal behavior, as well as a right of the society and the highest expression of the victims' rights. This system of ideas has provided the criminal law with copious philosophical grounds, reproducing and justifying the social function of pain infliction through the justice system.

In line with this, the criminal law program of action has been endowed with the obligation to react to crime through negative³¹⁶, abstract³¹⁷, atomistic³¹⁸ and hostile measures against those

³¹⁶ An adverse reaction against the negativeness of the criminal conduct to affirm the positiveness of the social system.

³¹⁷ Despite the wide variety of conducts and social problems immersed in the criminal phenomenon, the system addresses concrete problematic situations through measures focused on the deprivation of liberty,

people found to be responsible for criminal conduct. In accordance with this idea, when the notion of impunity is limited to the exemption from punishment³¹⁹, the lack of implementation of the deprivation of liberty is considered the focus of the problem of *impunity*. Imprisonment thus becomes its solution, hindering other possible forms of addressing the issue, its causes and consequences.

With the aim of overcoming the conceptual ambiguity and the critical deficits of the notion of impunity and with the purpose of offering clear theoretical distinctions and enabling stable empirical observations, the present research offered an in-depth reflection on the conceptualization of impunity through the initial question: *how can we observe, conceptualize and characterize impunity from a socio-legal perspective through the study of state crime?*

Although delimiting impunity seems to be complex and its conceptualization appears to be a difficult task, we studied it as a *phenomenon* in the sense that it presents concrete social manifestations. It is precisely because impunity does not constitute a mere artifice and introduces different social problems that we need to develop better analytical tools for its study, improving its understanding and offering eventual theoretical and practical contributions.

With this purpose, one of the first obstacles of observation is the delimitation of the source on the problem of impunity. Although in academic works there can be found a variety of wrongs to which the concept of impunity is applied³²⁰, the etymological construction of impunity in contrast to

which are not particularly concerned with addressing the problems and restoring the necessities that the conflict raises.

³¹⁸ The preservation of the social links between the offender and the society is indifferent to the action of the criminal law system.

³¹⁹ “Impunity obviously refers specifically to punishment: it declares the absence or deprivation of deserved punishment of guilty perpetrators to be an injustice” (Pensky 2008).

³²⁰ Anti-impunity campaigns often embrace extremely varied wrongdoing. Such a wide scope includes human rights violations, political deviance, moral misconduct and different kinds of harm. This form of framing impunity broadens its reach to the point that is viewed as pertinent to every social wrong and

punishment has drawn a visible relation of this phenomenon with the operation of the criminal law system. Thus, among the universe of (mis)conducts that the literature of impunity takes into consideration when employing this term, most works agree on taking the phenomenon of crime as a basis of observation. In this line, we limited the use of impunity to problematic situations that can be defined as crime through the materialization of a problematic behavior criminalized by the criminal law.

Given the wide diversity of conducts that the phenomenon of crime comprises, we decided to select a particular form of criminality that could enable a rich account of the complexity of the phenomenon, yet leading to clear delimitations of the subject. The analysis of this research is developed through the study of state criminality. This type of criminality was thus selected as a privileged point of observation of the phenomenon of impunity, taking into account at least three factors: a *theoretical* aspect, an *empirical* characteristic and a personal *experience*.

Regarding the *theoretical* factor, most of state crime literature referred to the problems of control of such actions by the legal system. Either due to the implementation of strategies of denial, or to the interference or obstruction against the legal system, or as a result of the inability of the judiciary to process such behaviors, these problematic situations are presented by the literature as constantly excluded from the possibility of control from the criminal law program of action.

Regarding the *empirical* aspect, we conducted a case study of an event of enforced disappearance that took place in Colombia. This event was initiated on November 6, 1985, when an armed unit of the M19 guerrilla took over the national Palace of Justice. The President ordered the

relevant for extremely different contexts, possibly becoming a cultural feature ('a culture of impunity'). This form of constructing the problem, we argue, may be advantageous for raising regret about the problem but certainly sacrifices its conceptual distinction, its empirical observation and its repressive resonances in the criminal law system.

ceasefire but his command was not respected by the Armed Forces. After twenty-eight hours of combat, the Armed Forces regained control of the building. Due to the battle, one hundred people were killed, including eleven Justices from the Supreme Court and the Council of State. A number of hostages were also released. Some of them, however, were identified, interrogated, and listed as M19 supporters. Eleven of those hostages, mostly workers of the cafeteria and visitors, were disappeared.

After the siege, different legal procedures were undertaken. Focusing on the prosecution against the officer who was in charge of the PJ field operation, we were able to visualize and explore different strategies of containment of the legal scrutiny. After twenty years of paralysis, the criminal justice finally walked out from that state. Although there was a multiplicity of procedures in place partially recognizing the wrongdoing and presenting some forms of reparation and acknowledgement coming from the State, the legal action has not furnished information on the whereabouts of the majority of the disappeared, the criminal justice has been unable to reach a final conviction to determine the criminal responsibility of any person and what happened to the victims remains concealed to their families and the society.

With reference to the *experiential* criterion, this type of criminality was selected based on an experience of victimization suffered by the author of this research. In 1998 my father, a committed human rights defender, was assassinated in Colombia. In a private audience, the Attorney General told my family: ‘There is nothing to be done, it is a state crime’. This expression, coming from the head of the criminal prosecutors, arouse my interest in researching on the link between the phenomenon of impunity and state crime.

From a methodological point of view, this personal experience has a double interest. On the one hand, it shows that an observer who is a “victim” himself of this type of criminality can

develop a sociological research on a theme related to his experience sustaining a critical and humanist perspective *vis-à-vis* the traditional philosophy of intervention of the criminal law system. On the other hand, this experience allowed us to combine an observation from the interior of the problem with an external observation derived from the sociological knowledge.

When we initiated our study on the subject of state criminality, we found different oppositions to the concept and a degree of opacity that needed to be addressed in order to advance into our inquiries. In this context, the first objective of the present research was to elucidate and characterize this form of criminality, not as a legal notion corresponding to an individualized criminal offense, but as a criminological category of observation that, from the point of view of the law, corresponds to different criminal offenses.

Although relegated by the mainstream legal thought, state criminality has presented a long history of legal reflection. While the genealogy of the notion tends to locate the origins of this concept within sociology and criminology, the developments from the international law inaugurate different debates around this notion. As such, these discussions are valuable for a sociological evaluation of the characteristics and problems surrounding the notion.

With this respect, the international law debate at the ILC allowed us visualizing the difficulties for the governments to acknowledge the existence of this form of criminality. Among the legal problems raised in the discussions, a constant concern was the difficulty to assess the legal consequences attributable to the wrongdoing and the competent forum for responsibility³²¹.

Through these debates we were capable to conclude that, on the one hand, the notion of (state)

³²¹ Indeed, the rejection of the notion of state crime in the ILC work was based on the impossibility of reaching a consensus on the legal consequences attributable to the phenomenon. With this respect, the work of the ILC represents the traditional legal reasoning around criminal phenomena emphasizing on its attributable legal consequences.

crime constructed in reference to its legal consequences (sanction) limits the sociological knowledge around criminal problematic situations to finding an 'adequate' legal response; and, on the other hand, this analysis contributed to show the lack of innovation of the self-portrait and objective of the criminal law system.

Indeed, the conventional form of understanding the criminal law intervention emerging from the discussions remains limited to the responsibility of individuals under a traditional framework of criminal penalties (mainly focused in prison time), excluding the possibility for attributing criminal responsibility to the organizations that support, tolerate or instigate the wrongdoing, especially if they are States. This literature also fails to recognize or construct forms of conflict resolution beyond the traditional framework of the criminal law legislative program.

This last consideration is a major problem for the construction of a notion of state criminality. This category of crime entails a form of organizational wrongdoing which relies on realizing and verbalizing the organizational character of the authorship. The observation of state crime involves realizing two coupled levels of participation and accountability: the collective or organizational and the individual. From our perspective, in the case of state criminality the State is not merely an abstract entity. As an organization, the State produces an institutional arrangement and is composed by a series of organizations, coordinated through a system of government that operates based on the work of public officials and other *de iure* and *de facto* agents.

From a sociological perspective, the criminality of the State refers not only to the individual as the source of the criminal behavior, but also and fundamentally to the structural and organizational involvement of the State in the problematic situation. State criminality is not a mere act of individual deviance. For this reason, in order to characterize it, the observer should be able to

depict a criminal organizational goal. The existence of a common program of action providing a general direction for the criminal conduct is not always in place. State goals may be explicit -in the form of public policies, political discourses or war propaganda, as they may be secret or obfuscated – in these cases the presence of the organizational aim may only be detectable through an inference concluding the lack of a different plausible explanation for the actions.

These elements involve some difficulty for visualizing state criminality and, furthermore, involve a challenge for their legal scrutiny. As we said before, this type of criminality explicitly underscores the problem of impunity. State crime studies raise as a general concern the legal scrutiny of this type of wrongdoing. In this context, we observed that the subtraction of the criminal conduct from the organized operations of the criminal justice system involved a strategy of obstruction of the legal system which is not simply characterizable as the avoidance of the system reaction but as the creation of a space allegedly immune to its intervention. Indeed, the implementation and design of different strategies of containment of the legal control is eloquent in cases of state crime. In this context, we observed that the problem of impunity indicates that certain conducts or certain people are placed beyond the possibilities of intervention of the criminal law system.

With this respect, the metaphor of the *sanctuary* was employed in this work to describe the constitution of zones of containment from legal redress, which are not legal entitlements but constitute empirical forms of suppression of the legal intervention. The creation and preservation of conditions that prevent the possibility for implementing the criminal law intervention may refer to the participation of different actors and social systems obstructing its possibility of action and creating different conditions of containment. Under these conditions, an assessment of impunity involves an

evaluation of the criminal justice system possibility of action or, conversely, the identification of constraints or obstacles that the system confronts for implementing its program of action.

In the PJ case, through thirty-one in-depth interviews, the observation *in situ* of different commemorations and other official acts, in addition to literature and media reviews, we were able to inquire into the views of the victims and the judicial operators about these empirical obstacles in the case. While the justice operators represented punishment as a legal obligation and some of the victims perceived impunity as a matter of inflicting suffering, other values, ideas, claims and aspirations emerged from our field work.

Under the traditional understanding of impunity, the victims' rights are usually constructed around an archetypical need of retribution and voluntary infliction of suffering without any concern for the "social inclusion" of individuals. Indeed, a common assertion of anti-impunity discourses is that the victims construct their expectations focusing on the basis of a 'retributive justice' (that the victims ask for the imprisonment of the responsible actors of the violations). In other words, these discourses identify the victims with what the dominant penal philosophy of the system promises to achieve. In the case study, we found some assertions that reproduced this form of circularity: some victims understood (proportional) infliction of suffering as the adequate measure for countervailing impunity and accomplishing 'justice'. These discourses reproduce the MPR ideas of infliction of suffering through prison time and also, eventually, through precarious conditions of imprisonment.

However, in the case study, the victims also raised different views of justice giving relevance to the acknowledgement of the wrongdoing and to reparations. Indeed, some victims framed the *combat against impunity* as a matter of knowing the truth, finding the disappeared,

divulging the violations, receiving an apology, achieving social awareness, or witnessing the acknowledgment of responsibility for the wrongdoing coming from the responsible agents or from State institutions such as the military - these discourses remain outside the Penal Modern Rationality system of thought.

Among the different ingredients raised in the interviews we found that some of the victims argued that *impunity* was related to the preservation of the power and status of the criminal actors. In the case, the fact that retired Col. Plazas was imprisoned in the same space that he commanded when the taking of the Palace of Justice took place did not annul his position of power and did not acknowledge his wrongdoings; after all, he was placed under the shelter of the exact same organization that participated in the crimes. This form of implementation of the sentence awarded by the Courts (afterwards annulled by the Supreme Court), placed him physically and symbolically at the heart of the organization and structure of power that was engaged in the actions of state criminality. This form of deprivation of liberty was perceived by the victims and some justice operators as a form of privilege creating and maintaining a structure of immunization after the declaration of guilt. All the actors of the case, including the retired Colonel, perceived that these measures were a manner to protect his military ranking, which led to the neutralization of the reproach of the criminal law system.

This empirical material was relevant for our reconstruction of the concept of impunity. Through the PJ case, we noticed that some of the ideas attached to the *medium* impunity were independent of the notion of punishment understood as a mechanism of voluntary pain infliction. Considering this, in our work we conceptualized impunity as a form of neutralization or constraint against the autonomous intervention criminal law program of action. Impunity understood as a

blockage of the possibility for implementing the program of action of the criminal law presents a form of dependence of the criminal law system with its environment.

This conceptualization was valuable for the empirical observation of the case study and at the same time allowed us to address different concerns that we found when studying the social discourses about impunity. With respect to our concern regarding the reproduction of the structures of repression of the *modern penal rationality*, this conceptualization allowed us to replace the center of gravity for the conceptualization of impunity from the system of ideas of modern penal rationality -emphasizing in the (proportional) infliction of suffering, to the possibility for the implementation of the criminal law program of action. This construction suggest possible different ways to think the philosophy of intervention of the criminal law system, and gives space for alternatives to the criminal law system itself (provided that these alternatives include forms of recognizing the wrongdoing and guaranteeing reparations for the victims).

In fact, as we saw, the ordinary functioning of the criminal law system is characterized by the impossibility of processing the universe of crime-related problems. Only a handful of conducts available for the internalization of the criminal justice (criminal behaviors) are selected by the system to fall into its operation. Selection is the condition for the system to operate. This is not only due to a problem of the possibilities of the system confronting the universe of criminal behavior (radically enlarged worldwide), but is also based on different legal and rational criteria that act as legal constraints for the identification of a situation as criminal or its prosecution by the criminal justice. Impunity should be constructed independently from this fact; in other words, it is not a state of affairs of the system, it rather is a problem for the functioning of the criminal justice. Otherwise, how are we supposed to *combat it*?

Concept of impunity	
Deconstruction	<i>Reconstruction</i>
Impunity is not the lack of criminal conviction for a violation of the criminal law.	<i>The concept of impunity refers to the neutralization of the possibility for the autonomous intervention of the criminal law.</i>
Impunity is not the lack of a criminal law punishment.	
Impunity does not mean the lack of a measure of intended pain infliction and the structures of the modern penal rationality.	
The concept of impunity differs from the assessment on the effectiveness or efficiency of the criminal justice.	
The concept of impunity differs from alternative ways of conceiving punishment or even from alternatives to punishment.	<i>The notion of impunity refers to the possibility of intervention of the criminal justice and it does not include the implementation of innovative measures of redress. The absence of any form of legal recognition and reaction through other legal mechanisms is an indicator of impunity.</i>
Impunity is not to be equated to transitional justice mechanisms and proper amnesties allowing the recognition of the wrongdoing and enabling other systems of redress.	
The concept of impunity differs from judgments based on the obligation to inflict suffering voluntarily on the person declared responsible for crime.	<i>The concept of impunity includes forms of nullifying the intervention of the legal system as when the sanction is neutralized by forms of rewards and privileges invalidating the reproach for the wrongs.</i>
The notion of impunity differs from the lack of precarious conditions in the implementation of the legal measures of redress.	

As the Law Commission of Canada (1976: 16) stated, the criminal law is a system of applied morality and justice that should serve to underline those values important to society. Understanding punishment as a mechanism of intended pain infliction and as a *standard, required, mandatory* and, further, *ideal* response to human suffering derived from crime, may hinder the visualization of the social needs that the criminal problematic situation raises and the observer may become unaware of responses other than the criminal law penalties – “[the n]aive belief that every

problem can be solved by ‘having a law against it’ has proliferated statutes, regulations and offences” (Law Commission of Canada 1976: 17). This perception overlooks multiple claims and different values that victims may uphold towards a harmful conduct performed against them.

Either *beyond* or *with* the slogan of the combat against impunity, the traditional fight against impunity relying in the structures of the traditional penal rationality should be replaced by a program of action oriented to visualize and countervail the structures obstructing the criminal justice and, particularly, should focus on constructive measure oriented to the recognition of the criminal conducts and the reparations for the victims. “The way in which we respond to various types of conduct is a reflection of the type of society that we want to live in. If we are to use one or many intervention strategies, then we ought to consider how they measure up against some of our key democratic values” (Law Commission of Canada 2003: 4).

The possibility of innovating the system of ideas around the penal rationality and creating forms of accountability different from imprisonment – and particularly from severe forms of imprisonment, may be a plausible mean for the objective of humanizing legal responsibilities, preserving social relations, redressing the victims and addressing social problems around the phenomenon of criminality. In this context, perhaps, as Tulkens (2013: 10) asserts with respect to the MPR theory, we should reflect not on a new theory of punishment, but more fundamentally and radically on a new theory of legal intervention. This project can be nourished by a human rights agenda with a critical capacity *vis-à-vis* the current philosophy of intervention of the criminal law system but, fundamentally, creating a space for innovation before wrongdoing and its accountability.

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