Impunity

Has implementation of the accusatory legal system been an effective response to the fight against impunity in Colombia?
Introduction

The Colombian Constitution, like the majority of the Modern Constitutions, recognizes a series of rights to be enjoyed by its citizens, including due process and access to justice. It also establishes that the State’s ultimate goal is to guarantee the effectiveness of these rights.

The Constitution gives the Judicial Branch the function of administering justice, and therefore its purpose centers on the need to effectively and efficiently resolve the conflicts that arise among individuals and between individuals and the State. Its primary goal is to sanction those who violate laws in order to guarantee respect and obedience to the social rules of coexistence. A society with an efficient justice system identifies itself with the law and the judicial authority that administers it; it does not look towards private justice as a mean to resolve conflicts, and therefore has low crime rates. On the contrary, a society that does not recognize or trust its institutions, and that feels orphaned by the State when confronted with violent acts affecting its rights, feels that it is entitled to seek justice independently. These societies therefore have a high crime rate.

In the Colombian case, the challenges with justice administration are structural and respond to shortcomings in the design and implementation of the system itself, thus affecting all spheres of its intervention. The most visible effects are a severe legal backlog and high levels of impunity.

During the second semester of 2004, the Colombian Congress enacted Law 906 which became the new Criminal Procedural Code, as a response to the structural problems of the justice system. This was not a minor change. Colombia went from a Mixed Justice System (with elements from both the accusatorial and inquisitorial systems) to an exclusively accusatorial system. To implement an accusatorial/oral system (characterized by the debate and controversy among the implicated parties), after more than 100 years of inquisitorial/written tradition (with the burden of activities concentrated on the State) was a challenge not only for the judicial authorities, but for the attorneys, plaintiffs and members of the judicial police.

The largely inadequate infrastructure of the vast majority of the courts and tribunals has required a considerable economic investment in order to make them suitable to the new legal system. This, however, has been the least problematic
step, as the transition was in stages in the different courts throughout the country, and was completed in 2008.

The process of transition from the old system to the new one was funded and supported by the United States Government (USG) through the Department of Justice and through the funds allocated to Colombia every year within the context of Plan Colombia. In the last four years the Attorney General’s office has received over 150 million US dollars, as well as technical support and assistance.

Given this substantial investment of US capital, US officials should be interested in promoting a process of evaluation of the effectiveness of the new system in assuring rights to due process and access to justice for victims of violations of human rights and International Humanitarian Law. There is a great need to review the effectiveness of this investment and the impacts that it has had in progress made towards a more efficient and effective judicial system that assures truth, justice and reparations, especially for victims of grave human rights violations. This process of evaluation could start by reviewing the obstacles and challenges presented by the current implementation of the accusatory system.

This paper aims to review the obstacles and challenges present in the different stages of criminal justice proceedings in order to provide elements for reflection among US policymakers regarding their significant investment in this initiative.
Background

According to the World Banks’ 2012 Doing Business Report, Colombia ranked 178 out of 183 countries in judicial efficiency. The report states that a complaint filed within the Colombian legal system takes an average of 1,346 days to reach a decision. Colombia has the sixth slowest justice system in the world and the third slowest in Latin America. It is estimated that if the Colombian justice system continues to operate at the same rhythm, it could take at least 10 years to overcome the current backlog.

In a recent speech by Minister of Justice Juan Carlos Esguerra during debates in Congress on the justice reform, he stated that a judicial proceeding in Colombia could take up to ten years to be resolved—this without accounting for the appeal process. This means that in practice, justice is being denied. Statistics on criminality showed that through 2008, the rate of impunity reached an appalling 80%.¹ This rate is far worse than the average of developed nations and even of other countries in the region. When looking at grave human rights violations and infractions of International Humanitarian Law (IHL), levels of impunity are even higher.

It is within this context that impunity rates have become the yardstick for measuring the effectiveness of criminal policy in Colombia. While it is clear that a criminal justice system aims to effectively deal with the social threat that criminal behaviors pose to society, a comprehensive criminal policy should also look to prevent such behaviors. Instead, in order to combat increasing criminality in recent decades, the Colombian response has been to increase the number of actions that are considered crimes and to toughen convictions. But this has only resulted in overcrowded prisons—the overcrowding rate is at least 39.5%²—even though the average impunity rate in the country is 80%. This means that if impunity was to be reduced by 10%, the prison system would not be able to respond to the demand.

² “The National Prison System Institute reported that as of March 2012, there are 105,474 inmates in 144 prisons around the country. There are also 22,254 people under house arrest, 1,678 in municipal prisons and 1,198 in prisons that belong to the armed forces. In total there are 130,614 people under arrest. This number represents 0.28% of the total population, when considering that Colombia is a country with more than 46 million people, according to the statistics provided by the National Planning Department. http://www.elnuevodia.com.co/nuevodia/especiales/sucesos/138418-cada-mes-dos-mil-462-personas-son-privadas-de-la-libertad-en-carceles
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Western societies are advancing towards a minimal criminal justice system, which should not be interpreted as the renunciation of the duty to investigate, judge and sanction crime, nor as the renunciation of the victims’ rights to truth, justice and reparations. On the contrary, what they are trying to achieve is for the criminal justice system to concentrate its attention on responding effectively and efficiently to acts that gravely affect public goods protected by the criminal justice system or conducts that affect the social values that guarantee human coexistence. These are of course grave human rights violations, crimes against humanity and war crimes for which criminal proceedings should always be the preferred mechanism over alternative dispute resolution.

However, the reform to the criminal justice system in Colombia was centered on the logic of efficiency in attempts to reduce the shameful impunity rates by prioritizing reaching a decision over the need to conduct comprehensive investigations or the duty to ensure victims’ rights to truth, justice and reparations. We could argue that under this logic, there is a risk of not seeing the forest for the trees. In order to achieve a quick judicial decision, plea bargains become the best option in order to avoid the incursion of costs implied in opening a trial. The Attorney General’s office (AGO) focuses its attention on cases that do not require an investigative effort (in flagrant cases) over those that require ordering and collecting evidence, building case theory, and confronting the body of evidence in a public hearing.

The new system seems to have a positive impact on the persecution and punishment of crimes like property crimes, personal injuries and civil injunctions, which constitute 62% of the crimes reported according to a study by Rivera and Barreto. However it has not been effective in responding to crimes such as homicide which represents 5% of the reported crimes in the country and for which the impunity rate is nearly 100%. It has also not been effective in investigating and prosecuting grave human rights violations and infractions of IHL such as extrajudicial executions, forced disappearances, sexual violence and attacks against human rights defenders.

*According to the study by Barreto and Rivera, the impunity rate for homicides is of 97.3%. According to a report published by FIDH, the Coordination Colombia-Europe-United States (CCEEU) and the Human Rights Observatory in July 2012, the impunity rate for extrajudicial execution cases is of 99%. A Sisma Mujer study of 2011, states that impunity for cases of sexual violence against women is of 98%. The Office of the United Nations High Commissioner for Human Rights report for 2011 reveals that the Attorney General’s office is investigating more than 16,000 forced disappearance cases, evidencing the high rate of impunity as the vast majority of them are under preliminary investigations. The report on the International Verification Mission on the Situation of Human Rights Defenders also states that more than 90% of the attacks and aggressions against human rights defenders remain in impunity.

This overview shows that the criminal justice system implemented since 2005 is not an effective response to common crime, much less to grave human rights vio-

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3 La impunidad en el sistema penal acusatorio en Colombia*, Ibid
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lations and infractions of IHL. It has not guaranteed the right to truth, justice and reparations for the millions of victims of these crimes which are the product of five decades of internal armed conflict.

It would be a mistake to think that Colombia could fully adopt and integrate the Anglo-Saxon criminal justice system into their own. Marked social, economic and political differences mean that a system that is efficient for the United States it is not necessarily efficient for a country like Colombia. Neither the societies nor the States that enforce the laws are the same. It is important to take into account the levels of poverty and unemployment in each society, as well as the capacity and resources of the Judicial Branch, including human and technical resources that the police and prosecutors have. So as you might expect, though the system created through the passage of Law 906 of 2004 is characterized as “accusatory”, it has several differences from the one operating in the United States.

One of the differences between the Colombian and the Anglo-Saxon accusatory systems lies in the number of parties that are able to participate in judicial proceedings. In the Anglo-Saxon system, the proceedings revolve around the defendant and the plaintiff who, depending on the case, act on behalf of either the victim, the public welfare, or the State. In Colombia, the plaintiff role is given, in theory, to the AGO. In order to investigate criminal conduct, the AGO has the support of different agencies such as the judicial police and the National Institute of Forensics. However, as an inheritance from the inquisitorial system, the plaintiff role is not concentrated exclusively in the AGO.

The Inspector General’s office (IGO), which is in charge of monitoring and sanctioning public officials’ conduct, is able to intervene in criminal proceedings on behalf of the public interest and in order to ensure that access to justice and due process are being observed. Victims have also the ability to participate in the judicial proceedings, through their legal representation, as a way of ensuring the victims’ right to justice.

All in all, four different parties can formally participate in a Colombian criminal trial. There can be times when the AGO and IGO are in agreement and act together in one case, but in others the IGO might find mistakes in the investigations and ask for an acquittal. The same happens with the victims’ legal representation. In theory, the victims’ primary legal representation is the AGO, who is in charge of coordinating the investigations, collecting the evidence and building case theory. The victims and their legal representation are left with a secondary role in the trial stage, which is to support the prosecutor’s case theory and evidence, and also after the trial when they can initiate legal proceedings to seek reparations from the guilty party. In practice, however, the victims and their representatives have assumed a
more active role as they often disagree with the prosecutor’s case theory or course of action. This is particularly common in cases of grave human rights violations and infractions of IHL, and especially when the responsible parties are members of the Colombian armed forces.

In many instances, the victims of grave human rights violations demand the presence of their attorneys throughout the different legal proceedings as they feel that this will ensure an independent and impartial representation that is often not guaranteed by the AGO’s prosecutors. The victims often find that the AGO’s prosecutors do not give sufficient validity to their testimonies, are not seeking to restore their memory and honor, and do not conduct in-depth investigations to establish the victims’ background, the regional context, patterns of violations in a same area and the impact the crimes had on communities and social organizations. This is the case of crimes that have had a disproportionate impact on the human rights situation in Colombia due to their direct relation with the internal armed conflict, their size, the number of victims, the victims’ background, the levels of impunity and their pervasiveness throughout the country. Here we refer to cases of extrajudicial executions, forced disappearances, sexual violence and threats and attacks against human rights defenders.
Challenges and Obstacles to Justice Under Colombia’s Accusatory System

1. During the Process of Reporting a Crime

Under the new criminal code the AGO maintains the ability, in certain cases, to initiate an investigation without a complaint having been filed. In cases of grave human rights violations where the responsible party is a public official, however, the victims are still forced to file a complaint in order to start the investigations. This is not new. What changed is that the old system allowed for the complaint to be filed not only by the victims but by any other party with a special interest in a particular case, such as social and human rights organizations, whereas in the new system, the figure of interested third party is removed, leaving the duty of filing the complaint exclusively to the victim.

In the old system, immense legislative progress was made with regards to the participation of other actors in criminal proceedings. Civil society organizations had the ability to participate in criminal proceedings and act as interested third party in emblematic cases without having to prove their relationship to the victims. This was based on the understanding that crimes against humanity and grave human rights violations affect the society as a whole, and therefore any citizen has the power to act in a criminal proceeding to help uncover the truth and contribute to the prosecution of the responsible parties.

However, since the accusatory system came into effect, the victim must be present to initiate a criminal investigation, removing the figure of interested third parties and requiring the victim’s testimony in order to support the accusation. Though in theory this new element is not in contradiction with the right of access to justice, in cases of grave human rights violations it constitutes an obstacle when the victims do not file a complaint themselves due to fear, lack of confidence in the justice system, or lack of resources.

For example, this happened in the case of an arbitrary detention, forced disappearance and alleged extrajudicial execution, committed near the municipality of Remedios, Antioquia in 2006. On February 15 2006, José Gustavo Castaño was heading home when he was forcibly disappeared. His family reported the

5 with the exception of civil cases that require the plaintiff to file a complaint in order for the courts to initiate the investigations and administer justice
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disappearance to the human rights organization present in the area who in turn reported the case to the regional AGO. Since the municipality of Remedios is one of the 350 municipalities in Colombia that does not have an AGO office (31% of the municipalities in Colombia do not), the investigation was undertaken by the regional AGO in Segovia, Antioquia. The AGO in Segovia is located at two day’s distance from where the victim and his family live, and is very close to the military base of the brigade involved in Jose Gustavo’s disappearance. Therefore, the victim’s family and friends were afraid to travel and report the disappearance. However, the victim’s family has provided evidence in the case through their attorney. They have even submitted written testimony from a retired army official that confirmed that José Gustavo was detained and then killed by an army patrol. The family also asked on several occasions for an alternative to traveling to Segovia in order to give testimony. Despite abundant evidence, the criminal investigation is “suspended” until the victim’s family files the complaint formally in Segovia. The prosecutor has even refused to initiate any level of investigation, the most time-sensitive of which is the urgent search mechanism for missing persons.

2. During the Investigation

The first steps towards changing the justice system in Colombia were adopted with the 1991 Constitution. With the creation of a mixed system, elements of the accusatory system (Anglo-Saxon) were incorporated, while the inquisitorial system typical of the European law tradition maintained a strong influence. In line with these changes, the AGO was created as the agency in charge of investigating and prosecuting crimes. While in the accusatory tradition the AGO is under the executive branch and reports to the President, in Colombia it is part of the judicial branch and therefore the prosecutors are judicial authorities. Under the previous legal system, prosecutors were empowered to order, collect and evaluate evidence, and issue legal decisions that could affect the rights of individuals (personal liberty, mobility, and property), and could even decide on the criminal responsibility of individuals. Prosecutors also had power to recuse themselves, to archive or close a case without the intervention from a judge. So prosecutors in criminal investigations were seen as prosecutors and judges at the same time.

One of the biggest modifications of the new system has to do with this point. Under the new legal system, the prosecutor cannot order nor collect evidence, does not issue arrest warrants or levies, and it no longer definitively decides an individual’s criminal responsibility. The power to order, collect and evaluate evidence and to determine the outcome in the course of a criminal investigation belongs exclusively

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to the judges, who are responsible for presenting the evidence in a public hearing in which all the parties must be present.

In the new legal system, the prosecutor learns of criminal charges when a complaint is filed. The prosecutor then builds the case theory and issues a methodological plan with instructions to the investigators for collecting evidence to be presented at the public hearing, which becomes proof during the trial stage. The evidence is gathered by the Judicial Police whose duties are performed by members of the security forces (National Police), intelligence agencies (Administrative Security Department (DAS) or Unified Action Groups for Personal Liberty (GAULA)) or by the technical investigation group (CTI for its acronym in Spanish) of the AGO.

This change not only means that the prosecutor loses his direct contact with victims and witnesses, but also that he receives the facts of the case through the investigator’s eyes, incurring the risk that the prosecutor will adopt the investigator’s particular interpretation of the facts without coming to his own judgment. The prosecutor’s dependence on the investigator is particularly concerning in cases where the parties responsible for the crime are members of the armed forces or the police, given that the investigators come from the same institutions and there is great esprit de corps and loyalty which governs these institutions. Even though the AGO affirms that it is providing special training to the judicial police officials that work within the Human Rights and International Humanitarian Law Unit, this is not sufficient as not all grave human rights violations cases are investigated by this Unit.

The lack of resources and ability to carry out field investigations is also an important obstacle to progress in such cases, translating into an important number of cases which remain at the preliminary stages of investigation, when the judicial police have not delivered their report on the methodology plan, which the prosecutor needs to move forward with the trial.

Before the change in legal systems, the investigation was considered as part of judicial procedure, and as such, the victims and their attorneys were allowed to fully participate in this stage of the process. The victims and their attorneys were able to request evidence, participate in the process of collection of evidence and contest existing evidence from the beginning of the preliminary investigation stage. The previous system also allowed the interested third parties to contest the decisions made by the prosecutor during the investigation stage, such as the charges against the defendants (process in which the prosecutor defines the criminal conduct) and

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7. Definition of criminal conduct is the process under which the prosecutor identifies the act that is under investigation with one or more criminal conducts established in the Criminal Code.
decides whether to issue an arrest warrant or not), the decision to close the investigation and to agree or disagree to move into the trial stage.

In the new legal system, the pretrial discovery stage is closed and is conducted under the sole direction of the prosecutor who responds to the complaint and formulates the case theory. Based on the case theory, the prosecutor creates a methodological plan of what information is needed and therefore should be collected by the judicial investigators in order to support his theory. This information is known as the body of evidence. Under Colombia’s accusatory system, it is assumed that there is no debate in this stage that would require the participation of the involved parties. Therefore the victims and their representatives are not allowed to intervene.

However, any person that becomes aware that there are criminal investigations against them can petition the judge to order the prosecutor to disclose to them and their attorney the body of evidence that has been collected in order to prepare for the defense. But victims and their attorneys are not allowed to access the prosecutor’s methodological plan or the body of evidence. While there are several Constitutional Court rulings and sentences that order the prosecution to allow the victims’ attorneys to view the information collected—as a matter of access to justice—many public officials still use the criminal procedural code as an excuse to refuse victims and their attorneys access to the information gathered during the investigation.

This is when the victims’ legal representation is forced to submit legal petitions for the release of information or even to initiate a legal action for the violation of a fundamental right “acción de tutela” in order to obtain information about the case, provide relevant information, request investigative actions and or to hear the prosecutor’s case theory. The granting of any of these requests depends on the prosecutor, and in the meantime valuable time is lost.

A clear example of this problem is the case of Miguel Angel González Gutierrez, a social leader who was victim to an extrajudicial execution on January 27, 2008, near the Remedios municipality of Antioquia. Miguel Angel was an active member of the campesino organization Corporation Humanitarian Action for Peace and Coexistence of Antioquia’s Northwest (Corporación Acción Humanitaria por la Convivencia y la Paz del Nordeste Antioqueño (CAHUCOPANA)), which was created in 2005 as a response to the grave human rights situation in the region. On the morning of January 27, Miguel was traveling to Remedios when he was detained by members of the Calibio Batallion of the army. Miguel was then assassinated by army officials.
and presented as a guerrilla militant killed in combat. The case was quickly denounced and assigned to the Human Rights and IHL Unit within the AGO in Bogotá. However, four and a half years later, the case is still under preliminary investigation and none of the alleged perpetrators have been charged.

The prosecutor in charge of the case has refused on several occasions to disclose the evidence to the victims’ attorneys, has ignored the various legal requests for the release of information, and refuses to press charges against the alleged perpetrators. Despite the various Constitutional Court and Supreme Court rulings in favor of the victims’ ability to participate in the pretrial/investigation stages, these rulings are often unknown to or ignored by the prosecutors. This problem has several roots. First, prosecutors and other judicial authorities do not consider the victims as an active party within the criminal process and they often see them as an obstacle to the judicial proceedings. The victims and their families are secondary, as the debate revolves around the State as guardian of the law and the defendant. Second, and even more concerning, is that there is a certain defensive reaction of judicial authorities to the victims’ reports when the accused are members of the armed forces and the police. In such cases victim’s testimony is often put into question.

**3. During the Pretrial/Discovery Stage**

This is a void that still has not been filled, even though there have been several calls to resolve the issue since the beginning of the implementation of the new system. In Colombia there is a figure known as the statute of limitations for legal action. This concept refers to the time the AGO has in order to initiate a criminal investigation for a given crime. According to article 83 of the Criminal Code, the statute of limitations for initiating an investigation cannot be more than the maximum sentence for the crime, but in all cases it shouldn’t be less than five years and no more than 20. When it comes to crimes of sexual violence against minors, the 20 years start running when the victim turns 18. In cases of violations of human rights violations and violations of IHL the statute of limitations is 30 years. On this issue the Supreme Court has stated that in accordance with international human rights law, certain crimes have no statute of limitations.

While this could be interpreted as an important step forward of the Colombian legal system, it has been maliciously used by legal authorities in order to justify their negligence in the investigations by affirming that the law provides them with 20 years or more just to charge the responsible parties in crimes like extrajudicial executions and forced disappearances. This was denounced recently by Jackeline Castillo Peña, sister of Jaime Castillo Peña, a 42 year-old man who was lured by unknown men to Ocaña, Santander on August 11, 2008 with the promise of a job.
There he was killed by members of the army and presented as a guerrilla militant killed in combat. This case along with those of 16 other men that were killed by the army and found in Ocaña, are known as the “Soacha Victims”. The Soacha cases gave birth to the “false positives” scandal, highlighting an appalling practice that left more than 3,000 victims between 2000 and 2010, the vast majority poor, young men that were killed by members of the army to be later presented as gains in the fight against illegal armed groups.

Jaime’s case is one of the 1,579 cases that the AGO’s Human Rights Unit is investigating that correspond to 2,679 victims of extrajudicial executions between 2000 and 2010. Even though the information provided by the AGO does not discriminate between how many cases are under investigation under the new legal system and under the old one, the impunity rate is considerably high. Out of the 1,579 cases, 1,405 are under preliminary investigation (88.9%), in 45, the responsible party has been charged (2.8%) and 30 are in trial (1.9%).

Even the well-known Soacha Victims’ cases do not escape the negligence of the prosecutors conducting the investigation. Though the cases are being investigated under the new legal system, or Law 906, and they were able to garner national and international attention, four years into the process, there are no standing convictions. Jaime’s case is still under preliminary investigation despite the abundant and clear evidence against his aggressors. The prosecutor has told Jackeline that she must not worry as he has 20 years to investigate the case and issue charges against the responsible parties.

When it comes to criminal law, time is of the essence. Every day that is lost in a criminal investigation could translate in the loss of evidence. Evidence can be erased, hidden, altered. As such, the speed in which the investigations are conducted is essential to the pursuit of justice. If the investigative path taken by the prosecutor is incorrect and the victims and their attorneys are not allowed to intervene, there is little left to be done in the future.

These situations are possible and unfortunately very common. In contrast to the old system, the new legal system lacks specific time restrictions on the initial stages of the investigation. Therefore prosecutors take the maximum allowable time period in order to press charges, sometimes up 30 years infringing on victims’ rights to due diligence and access to justice.

Due diligence is necessary in the investigation of any crime, but it is imperative for investigations into grave human rights violations. Think of how important the first

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investigative actions in cases of forced disappearances are; the nature of a forced disappearance requires a rapid response in the activation of the urgent search mechanism to find the victim. Or in a sexual violence case, time runs against the need to perform medical examinations in order to obtain information that would help find the aggressor.

In Constitutional Court ruling T-843 of November 8, 2011, the Court refers to the importance of due diligence in the case of the sexual abuse of a minor where the alleged perpetrator was the victim’s father. The mother10 was forced to file a tutela against the prosecutor that was in charge of the case since December 26, 2007, which she did with the support of the women’s organization Sisma Mujer. Four years after the abuse was reported, the Court found that the prosecutor did not comply with several obligations established in Colombian and international law: “In the first instance, during the process of collecting the evidence, the standards set in international human rights law and in Constitutional legislation were not respected, (…) First, the prosecutor did not take into account that the ordering of an interview (the second one ordered) after two years could cause greater harm to the victim (…) Second, the prosecutor only ordered the collection and inclusion of the vast majority of the evidence into the case file after the victim’s attorney insisted, which shows his lack of diligence in this respect. In the second instance, this tribunal notes unjustified delays in the allocation of protection measures in favor of the minor. In the third instance, this tribunal considers that the prosecutor has also unjustifiably delayed the adoption of a decision, that is, after more than two years, the prosecutor has not defined if the investigation will be closed or the alleged perpetrator will be charged.”

Even though according to the Court, the lack of diligence in the investigation translates into the violation of the girl’s fundamental rights to access to justice and due diligence, “The Court cannot order the prosecutor to press charges against the girl’s father; however it will ask for the prosecutor to follow the protection standards set in this ruling in an strict manner when evaluating the evidence, and to reach a decision in a timely manner”.

This case is a clear example of how limited the victims’ participation in the new legal proceedings is. The sexual abuse occurred and was reported in December of 2007. After almost two years of investigation the girl’s mother, after trying every legal resource, decided to pursue an acción de tutela, which was denied on two different opportunities, at which point the legal action reaches the Constitutional Court. Two years later (and four years after the sexual abuse was reported), the

10 The identity of both the mother and the minor are not disclosed in order to respect and protect the rights of boys and girls victims of sexual abuse.
Constitutional Court ruled in favor of the girl’s rights. The ruling, however, only calls on the prosecutor to follow the set standards, as neither the Court nor any other agency can obligate the prosecutor to press charges, as the only time frame that he is obliged to follow is the one set by the statute of limitations ruling.

These system “shortcomings” help explain the high impunity rate for cases of grave human rights violations including cases of sexual violence against women, which is around 98%\(^{11}\), according to a recent publication by Sisma Mujer. This publication also reveals the high rate of underreporting for sexual violence cases, especially when the perpetrators are members of legal and illegal armed groups. According to recent statistics from the Ombudsman’s office, 81% of women victims of sexual violence in the context of the armed conflict did not report the abuses\(^{12}\).

4. During the Trial

During the trial stage, the victims and their legal representatives are only “formally” recognized at up through the hearing to press charges, which is presided over by one judge. This means that in pre-trial hearings, presided over by another judge, the “juez de garantías”, the victims and their representatives are not allowed to participate. However, important decisions can be made in these hearings that could affect victims’ rights to justice, including the decision to drop all charges.

During the trial, the victims’ legal representation has all the guarantees to exercise the right to due process, as a consequence of the Constitutional Court’s revision to the original criminal procedural code text, allowing the participation of the victims and their attorneys in the criminal proceedings. However, prosecutors often see that the role of the victims’ attorneys is reduced to filing for economic compensation for the damages caused. They do not believe that their intervention is necessary in the search for truth and the prosecution of the responsible parties.

In the new criminal justice system, the trial is based on the prosecutor’s accusation, in whose construction neither the victims nor their attorneys or the victims’ family members have participated. Thus, the role of the victims and their attorneys in this scenario is limited to supporting the prosecutor’s case theory whether they are agreement or not, and to reinforce the presentation of the evidence.

In other words, if the victims and their attorneys consider there has been an erroneous characterization of the crimes committed, or that not all the responsible par-


\(^{12}\) Ibid
ties have been added to the investigation, they are left only left with the recourse of adding new elements during the trial phase, that could make the judge order the reopening of the investigation. This however assumes the risk that during this process, the trial is affected, annulments are decreed and the defendants are set free. This situation is extremely concerning for cases of grave human rights violations.

Let’s imagine a hypothetical investigation into a grave human rights violation that involves by action or omission members of the armed forces, such as an extrajudicial execution or a forced disappearance. The AGO could press charges against the defendants for kidnapping and not for forced disappearance, a characterization that would reduce the gravity of the crime committed and therefore benefit the defendants. The AGO could also press charges on aggravated homicide instead of homicide against protected person in the case of an extrajudicial execution, with the same results. Or the prosecutor could focus the investigation on the material authors of the crimes, leaving intellectual authors of the crime outside the investigation, as was denounced in cases of extrajudicial executions in the report produced by the FIDH, CCEEU and the Human Rights Observatory.  

On the other hand, the new system has also given ample guarantees to the defendants, guarantees that should not be put into question. Among them is the mandatory presence of the defendant and the defendant’s legal representation in all hearings. The allowable time limit for the conclusion of a trial was substantially reduced to avoid eternal proceedings and the prolonged imprisonment of the defendants. However these guarantees have been maliciously utilized by the defense. In cases of extrajudicial executions, the military defense has used these new tools to delay the judicial proceedings and, in doing so, achieve freedom for the defendants. Human rights organizations and family members of the victims have denounced these practices by entities such as the DEMIL (Military Defense), a lawyers collective in charge of defending members of the armed forces. For the DEMIL, the tactic of delaying judicial proceedings has become commonplace in order to guarantee that the few cases that do reach the trial stage, do not reach a decision within the allowable time limit legal time frame so the defendants are set free, with many of them still on active duty.

Judges have been weak when trying to prevent these practices, allowing for trials that should be conducted in six months to go three years without holding the first hearing. They could report these practices, call on the attorneys and even provide information to the agencies in charge of disciplinary actions against judicial officials and attorneys, however complacency and silence is the norm.

13 La Guerra se Mide en Litros de Sangre. Falsos Positivos Crimen de Lesa Humanidad. Sus más Altos responsables se encuentra en la Impunidad. Ibid
Conclusion

As recommend by many policymakers, academics and judicial authorities and as demanded by Colombian civil society in general, there is an urgent need to introduce changes to the Colombian criminal justice system, both in its content as well as in its administration. These reforms should seek to establish a criminal justice system that is efficient and effective in the fight against crime, and that redoubles efforts in the fight against impunity for cases of violations of human rights and IHL, so it becomes a tool that contributes to the search for social justice and peace.

While these reforms are only possible through the legislative process within the Colombian Congress, it is imperative that the international community, especially the United States, which has invested a considerable amount of resources into the new Colombian judicial system, urge the Colombian government to amply discuss the reforms that are needed to guarantee a functioning judicial system that responds to the needs of a society with high crime rates and systematic and generalized violations of human rights and IHL.

The Department of Justice, through cooperation appropriated by the U.S. Congress, has been instrumental in the implementation of the new criminal justice system in Colombia since 2005, through economic and technical assistance to the AGO. Therefore the United States government should conduct and in depth review of how effective this aid has been in achieving a better administration of justice in Colombia, and should crate indicators to measure such effectiveness. These indicators should not be only quantitative, but should include qualitative analysis of the impact that the aid has had in the ability of the victims to access the justice system, participate fully within legal proceedings and reach a legal decision that satisfies their rights to truth, justice and reparations.

International support and monitoring is essential to guarantee that the three branches of power in Colombia work together to perform the needed changes to build a justice system that is efficient and effective and responds to the needs and the social, economic and political reality of the Colombian society. The legitimacy of the justice system and its institutions depends exclusively in the system’s ability to respond effectively and efficiently to the demands of the citizens that it represents. If this legitimacy is somehow rebuilt in Colombia, lower crime and impunity rates can be expected.