Prosecution of international crimes in Latin America

A case study of Argentina, Colombia and Peru*

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Abstract 1

The present paper examines the relevance of national justice systems with a view to the prosecution of international crimes. It analyses the major challenges of three Latin American jurisdictions (Argentina, Colombia and Peru), demonstrating the advances their justice systems have made and the shortcomings still to be overcome (1). Against this background, and assuming a functional relationship between the different levels of the international criminal justice system, a brief reflection is offered on the attitude that those jurisdictions should adopt with regard to the prosecution of international crimes (2). The authors conclude that, particularly in the Latin American context, a genuine commitment to the international criminal justice system necessarily entails the intensification of domestic efforts rather than the promotion or prioritisation of an international intervention (3).

I. Prosecution of international crimes in Latin America

The various conflicts and associated international crimes that have occurred in Latin America throughout its recent history have represented an enormous challenge to the national justice systems of the region. Although the perpetration of international crimes continues to be a widespread problem in the region,[1] the domestic political contexts of Argentina, Colombia and Peru allow these three States to be used as broadly typical examples to analyse Latin American justice systems from an international crime perspective. Each State begins from its own baseline – post-dictatorial 2

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1 Elena Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana* (Marcial Pons 2019) 21.

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(Argentina)[2], post-conflict (Peru)[3] and transitional (Colombia)[4]– that serve to demonstrate, in a generalised way, how Latin American justice systems function in the face of diverse conditions.

3 To begin with, one has to bear in mind that the analysis undertaken here involves diverse and complex factors framing each State's approach to international crime. This inherently runs the risk of resulting in an overly simplistic generalisation of the relevant regional criminal justice issues and is a pitfall the present authors are acutely aware of and have endeavoured to avoid. Since these factors (e.g. power struggles between different actors in domestic conflicts) have different effects on national prosecutions, it is necessary to interpret each national experience on its own merits. In the following, the different dimensions of international crimes prosecutions in these jurisdictions will be examined, taking into account the major advances already made and, especially, the shortcomings still plaguing their justice systems in this regard.

I. The institutional dimension

4 The institutional dimension plays an essential role in shaping the criminal prosecution of international crimes in Latin America. Indeed, the notorious institutional deficits that are a widespread reality in Latin America[5] have become a privileged *locus* of the strategies of impunity. In the Argentinian case, for example, the very nature of the *de facto* government led to the military takeover of institutions,[6] a dominance that was maintained even after the military dictatorship ended.[7] For this reason, the struggle to have military courts recognised as the genuine jurisdiction to prosecute crimes

2 With respect to Argentina, see Rosario Figari Layús, Transitional Justice in Argentinien: Dreißig Jahre Suche nach Wahrheit und Gerechtigkeit in Anja Mihr, Gert Pickel and Susanne Pickel (eds), *Handbuch Transitional Justice* (Springer 2016) 3–5.

3 On the conflict in Peru from a historical perspective, see Comisión de la Verdad y Reconciliación (CVR) Final Report, Vol I and V.

4 See Juan Esteban Ugarriza and Nathalie Pabón Ayala, *Militares y Guerrillas. La memoria histórica del conflicto armado en Colombia desde los archivos militares*, *1958 – 2016* (2nd edn, Editorial Universidad del Rosario 2018) 15ff.

5 See Carles Ramió and Miquel Salvador, *Instituciones y nueva gestión pública en América Latina* (Hurope 2005) 25.

6 Pablo E. Parenti and Lisandro Pellegrini, 'Argentina' in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds), *Justicia de transición* (KAS 2009) 135.

7 ibid.

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appears to be a strategy of impunity designed and prepared by the military itself. In the Peruvian case, there was also a similar attempt by the military to take advantage of the State's weakened institutional apparatus to secure the benefits of a more lenient jurisdiction.[8]

Institutional weakness, irrespective of which State is involved, has an 5
obvious effect on the prosecution of international crimes. The Argentinian and Peruvian political-institutional background clearly shows how weakened institutions could be used to mislead, weaken or even obstruct prosecution efforts. This hindering of such efforts may begin at the earliest stages of a given case by creating an information deficit for the subsequent investigation. It is precisely in this context the high relevance of truth commissions emerged as these greatly facilitated the prosecution of crimes in these two countries. Both the Argentinian National Commission on the Disappearance of Persons (CONADEP, *Comisión Nacional sobre la desaparición de personas*)[9] and the Peruvian Truth and Reconciliation Commission (CVR, *Comisión de la Verdad y Reconciliación Nacional*)[10] yielded important material that helped to both open and then support investigations[11], thus helping to counter the aforementioned obfuscation of information.

A similar truth commission (*Comisión para el Esclarecimiento de la* 6
Verdad, la Convivencia y la No Repetición)[12] was finally established in Colombia by way of an agreement between the Colombian government and the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*, FARC-EP).[13] Although the work

8 See Idehpucp, *Procesamiento de violaciones de derechos humanos en el Perú. Características y dificultades* (Idehpucp 2006) 29 (with fn 19).

9 See 'Nunca más' report <http://www.derechoshumanos.net/lesahumanidad/informes/argentina/informe-de-la-CONADEP-Nunca-mas.htm> last accessed 31 July 2023.

10 See CVR Final Report (n 3).

11 Valeria Thus, 'Trials for crimes against humanity in Argentina: Contributions of criminal proceedings to constructing Memory and Truth' in Jörg Eisele (ed), *Past and future: transitional justice versus traditional criminal justice?: ways of dealing with past conflicts and past autocracies* (Nomos 2020) 81; Ruth Elena Borja Santa Cruz, 'Utilisation of the archives of the Peruvian Commission for Truth and Reconciliation (CVR)' in Jens Boel, Perrine Canavaggio and Antonio González Quintana (ed), *Archives and Human Rights* (Routledge 2021) 281–82.

12 See <https://comisiondelaverdad.co/> last accessed 31 July 2023.

13 Available at <https://www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx> last accessed 31 July 2023.

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of the Colombian truth commission faced significant challenges generated by the complexity of Colombia's decades-long conflict, an issue exacerbated by the presence of a variety of actors,[14] it presented its Final Report in 2022.[15] The previous regional experiences in Argentina and Peru show the important role that the Colombian truth commission's Final Report can play here.

7 The effects of institutional weaknesses are not restricted to the investigation phase but persist through to the later stages of the judicial procedure. This is clearly reflected in concrete issues such as, in the case of Peru, the limited inter-institutional coordination between the Attorney General (*Ministerio Público*) and the judiciary resulted in serious difficulties concerning the investigation and prosecution of various macro-crimes.[16] These issues can be aggravated if there are material deficits, such as the lack of sufficient (specialised) personnel or limited technical resources,[17] and can become existential threats to judicial procedures if serious problems such as corruption are present which is, unfortunately, another problem widespread in the region.

8 These shortcomings should not be underestimated as they can lead to serious negative consequences for national justice systems. This is evident with regard to gathering information for the prosecution of international crimes in Peru, where a complete official record on the status of the prosecution of such crimes, which should be constantly updated and generally accessible, does not yet exist.[18] Notwithstanding the importance of the work of some non-governmental organisations in providing information about

14 Ugarriza and Pabón Ayala (n 4) 15ff.

15 See the Final Report in < http://comisiondelaverdad.co/hay-futuro-si-hay-verdad> last accessed 31 July 2023.

16 See on this regarding Peru Defensoría del Pueblo, *Informe Defensorial No. 162*: *A diez años de verdad, justicia y reparación. Avances, retrocesos y desafíos de un proceso inconcluso*, August 2013, 96ff., <www.defensoria.gob.pe/modules/Downloads/informes/defensoriales/INFORME-DEFENSORIAL-162.pdf> last accessed 31 July 2023.

17 See regarding the Peruvian case Defensoría del Pueblo, *Informe Defensorial No. 162* (n 16) 110. On the existence of shortcomings in the framework of inter-institutional and intra-institutional coordination with regard to the Colombian 'Law and Justice' process with mainly paramilitary groups see Kai Ambos, *Procedimiento de la Ley de Justicia y Paz (Ley 975 de 2005) y Derecho Penal Internacional* (Temis 2010) 135, 216–17. For Argentina see Centro de Información Judicial (CIJ), *Delitos de lesa humanidad. Informe sobre la evolución de las causas,* (updated 16 July 2010) 7–10, <www.cij.gov.ar/lesa-humanidad.html> last accessed 31 July 2023.

18 Defensoría del Pueblo, *Informe Defensorial No. 162* (n 16) 114.

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the progress of the prosecution of these crimes,[19] these efforts certainly cannot compensate for the State's failure in this area. The lack of official records may seem to be of minor relevance, however, the reality is it has pernicious effects on the prosecution of international crimes. One such effect of this particular material deficiency which, incidentally, is easily overcome using readily available IT tools, is that the performance of the domestic justice system becomes almost impossible to monitor. This has flow-on impacts as weaknesses remain difficult to identify and improvements become commensurately harder to achieve which, in turn, impedes the prosecution of crimes.

Against this background, it is noteworthy that in Colombia, information 9
on the procedures under Law 975 (*Ley de Justicia y Paz*, LJP),[20] and within the framework of the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP),[21] is now available while in Argentina, reports and informative prosecution statistics are now issued to give an accurate account of progress in international-crime cases.[22] Although substantively assessing criminal prosecutions requires gaining access to additional resources (e.g. critical and capable (academic) personnel who can analyse such data), the existence of such records on the status of the prosecution is an essential foundation to begin establishing at least minimally reliable empirical results to get a better understanding of the real problems present within these States' justice systems.

Institutional weakness is something that must be taken seriously. On the 10
one hand, the lack of information, inadequate resources, poor coordination between institutions and so forth are tangible challenges that legitimately call into question the capacity of a national justice system to deal with the prosecution of international crimes. On the other hand, the complexity of

19 See <https://idehpucp.pucp.edu.pe/lista_proyectos/seguimiento-de-casos-de-violaciones-de-derechos-humanos/marco-del-proyecto/jurisprudencia/> last accessed 31 July 2023. See also the annual reports of the *Coordinadora Nacional de Derechos Humanos*, <http://derechoshumanos.pe/documentos/informe-anual/> last accessed 31 July 2023.

20 See <https://www.ramajudicial.gov.co/portal/inicio/mapa/salas-de-justicia-y-paz> last accessed 31 July 2023.

21 See < https://relatoria.jep.gov.co/todaspro> last accessed 31 July 2023.

22 See Procuraduría de Crímenes contra la Humanidad, 'Informe estadístico sobre el estado de las causas por delitos de lesa humanidad en Argentina' (2021) <https://www.fiscales.gob.ar/wp-content/uploads/2020/12/Lesa_-informe-diciembre-1-2020.pdf> last accessed 31 July 2023; see also <www.cij.gov.ar/lesa-humanidad.html> last accessed 31 July 2023; CIJ (n 17) 11ff.

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international crimes will create workloads that can overwhelm a justice system operating in an institutionally weak environment and could lead to the neglect of other relevant tasks, such as the prosecution of ordinary crimes.

11 How national justice systems should deal with this problem is an open question. In this context, transitional justice mechanisms, such as truth commissions or other measures that seek to overcome specific shortcomings related to a national justice system's performance capacity, emerge as viable alternatives. As previously mentioned, good examples of transitional justice mechanisms can be seen in the contributions made by truth commissions in Peruvian and Argentinian efforts to investigate international crimes. Despite country-specific differences, these endeavours provide a good opportunity for an exchange of regional experiences to further mutual learning which would be particularly beneficial in addressing common challenges. A good example of other measures can be seen in the cooperation agreement[23] between the (former) Colombian government and the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). Under this agreement, the ICC prosecutor closed the 17 year-long preliminary examination of the situation in Colombia and the Colombian government has committed itself to support the national judiciary, particularly the JEP, and cooperate with the OTP.[24] Commitments of this kind could certainly help generate directly favourable conditions for national justice systems to prosecute international crimes. In the same vein, commitments aimed at addressing more general issues, such as those affecting national justice systems as a whole, can also be viewed favourably. However, these commitments should be seen for what they are, a promise to act that should not inherently carry an expectation that deep-rooted problems will be solved quickly or even at all.

23 Available at <https://www.icc-cpi.int//Pages/item.aspx?name=pr1623> last accessed 31 July 2023.

24 It should be noted that the OTP can resume investigations and receive submissions. See Kai Ambos, 'The return of 'positive complementarity'', EJIL: Talk, 3 November 2021 <https://www.ejiltalk.org/the-return-of-positive-complementarity/> last accessed 31 July 2023.

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2. The strategic dimension

Given the complexity of the investigation and prosecution of international crimes, there is a need for a special strategy based on selection and prioritisation criteria developed at the international level.[25] In Latin America, this issue has been dealt with through a variety of extremely different approaches. 12

More specifically, in the Argentinian case, there is a dissolution process taking place regarding the initial prosecutorial approach to international crimes. The initial focus on those 'persons most committed to the design and the implementation of a repressive plan'[26] and toward the perpetrators of particularly serious offences[27] was left aside and the prosecution widened to all the alleged perpetrators, regardless of their status in the hierarchy. This process has, however, not prevented the prosecution of landmark cases against people of high status and significance, such as the procedures against members of the military junta[28]. Nevertheless, the fact that there are still unresolved cases and ongoing delays in prosecution,[29] especially considering the time that has elapsed since the events,[30] clearly highlights the negative consequences of the lack of a prosecution strategy. 13

In contrast, a very different process has taken place in Colombia. The initial process, which began operating without any preconceived strategy, gave way to a discussion about the convenience of its adoption.[31] This discussion reached its peak with a debate on the selection and prioritisation criteria developed in the context of the so-called Legal Framework for Peace 14

25 On the relevance of the selection mechanisms, see Kai Ambos, 'The International Criminal Justice System and Prosecutorial Selection Policy' in Bruce Ackermann, Kai Ambos and Hrvoje Sikirić (eds), *Visions of Justice: liber amicorum Mirjan Damaška* (Duncker & Humboldt 2016) 33ff.

26 Parenti and Pellegrini (n 6) 136: 'los cuadros más comprometidos con el diseño y el impulso del plan represivo' (translation by the authors)

27 See Parenti and Pellegrini (n 6) 136–37.

28 See Cámara Nacional de Apelaciones en lo Criminal y Correccional, No. 13/84, 9 December 1985 (Military Junta CNACC); Corte Suprema, No.13/84, 30 December 1986 (Military Junta CS).

29 Procuraduría de Crímenes contra la Humanidad (n 22) 25–26.

30 See thereon n 2.

31 Affirming the need for a strategy in Colombia (with respect to the law No. 975 of 2005, *Ley de Justicia y Paz* (LJP) (Law of Justice and Peace), see Ambos (n 17) XX.

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(*Marco Jurídico para la Paz*, MJP)[32] as well as in the context of prosecution by the JEP.[33] However, it is not easy to predict whether those criteria will achieve the desired results if one takes into account criticisms regarding the lack of clarity of the criteria provided in the context of the MJP[34], or the decision of the Colombian Constitutional Court which has made any selection regarding serious and representative crimes subject to there being a prior sufficient investigation.[35] It also remains to be seen how selection criteria will be implemented in practice, particularly in a context (such as the JEP) where their determination has been left to judges.[36]

15 Yet another approach towards the same issue can be seen in Peru, where there is no strategy of prosecuting international crimes based on selection and prioritisation criteria. The issue is even absent in academic discussion regarding Peru's approach to international crimes,[37] which is surprising as the country's especially precarious institutional situation, as outlined above,[38] seems to demand such a discussion and the implementation of a strategy. It is obvious that the criteria cannot be identified by simply pointing to the emblematic or relevant cases that have been brought. It

32 On the Acto Legislativo (AL) 01/2012 (MJP) see Gustavo Cote Barco and Diego Tarapués Sandino, 'El marco jurídico para la paz y el análisis estricto de sustitución de la Constitución realizado en la sentencia C-579 de 2013' in Kai Ambos (ed), *Justicia de transición y Constitución. Análisis de la sentencia C-579 de 2013 de la Corte Constitucional* (Temis 2014) 198, 201.

33 See Artículo Transitorio 7 AL 01/2017.

34 See Cote Barco and Tarapués Sandino, 'El marco jurídico para la paz' (n 32) 198.

35 See Corte Constitucional, C-080, 15 August 2018, 378ff.

36 See JEP, *Criterios y Metodología de priorización de casos y situaciones en la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas*, 28 Juni 2018 <https://www.jep.gov.co/Documents/CriteriosYMetodologiaDePriorizacion.pdf> last accessed 31 July 2023; Critical of the JEP's decision (Sentencia Interpretativa Parcial, TP-SA-SENIT parcial 3, 2022, 28 April 2022) Santiago Vargas Niño, 'Transitional Justice? Concerns over Judicial Accountability at Colombia´s Special Jurisdiction for Peace' EJIL: Talk, 15 October 2022 (arguing that this decision for prevents legal challenges to the decisions of the Chamber for the Recognition of Truth, Responsibility and Determination of Facts and Conduct with respect to the prosecution of cases and individuals) <https://www.ejiltalk.org/transitional-injustice-concerns-over-judicial-accountability-at-colombias-special-jurisdiction-for-peace/> last accessed 31 July 2023.

37 For example, in Iván Montoya Vivanco, 'Límites y avances de la justicia penal frente a las violaciones de derechos humanos ocurridas durante el periodo de conflicto armado interno en el Peru' in Victor Manuel Quinteros (ed), *Temas de Derecho Penal y violación de derechos humanos* (Idehpucp 2012) 21ff.

38 Montoya Vivanco (n 37) 38.

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is also clear that the attempt to reinforce criminal prosecution bodies by entrusting the prosecution to specialised bodies[39] is insufficient, although, from an operational perspective, the involvement of such specialists would greatly help to implement a strategy. At any rate, the lack of any publicly acknowledged strategy has not prevented Peru from investigating international crimes that have allegedly occurred on its territory and bringing emblematic cases and high-profile perpetrators, such as former President Alberto Fujimori[40] and Abimael Guzmán[41], to trial.

In short, an overview of the three countries considered here shows there 16
is insufficient, or even a total lack of a commitment, to implement and then adhere to a clear strategy in pursuit of their national goals. This is surprising given that the backdrop of widespread institutional weakness in Latin American countries means that having a prosecution strategy goes from being highly recommended to virtually indispensable. Although the absence of such a strategy has not prevented the prosecution of relevant cases, these have to be analysed with caution. The presence of open cases and delays in hearing cases further suggests the need for a strategy that would, among other things, result in a more efficient use of resources.

3. The legal dimension

The prosecution of international crimes at the national level has, in the 17
countries here analysed and in Latin America in general, also faced numerous legal challenges. While this is reflected in a body of jurisprudence that has increased impressively in recent years,[42] out of necessity only two major challenges are referred to here.

39 Namely the subsystem specialised in human rights, composed of a set of organs of the judiciary (see <https://www.pj.gob.pe/wps/wcm/connect/ETIINLPT/s_cortes_suprema_home/as_poder_judicial/as_sala_penal_nacional> last accessed 31 July 2023) and of the Public Prosecutor's Office (see Idehpucp (n 8) 29ff.).

40 Corte Suprema de Justicia (CSJ), Sala Penal Especial, Expediente (Exp.) 19–2001, 7 April 2009 (Alberto Fujimori – Barrios Altos and La Cantuta CSJ-SPE) para. 710ff.; CSJ, Primera Sala Penal Transitoria, Exp. 19–2001, 30 December 2009 (Alberto Fujimori – Barrios Altos and La Cantuta, CSJ-PSPT).

41 Corte Superior Nacional de Justicia (CSJN), Sala Penal Nacional (SPN), Exp. 560–03, 13 October 2006 (Abimael Guzmán Reinoso et al CSJN-SPN) recital (rec.) 13; CSJ, Segunda Sala Penal Transitoria, Recurso de Nulidad (R.N.) 5385–2006, 26 November 2007 (Abimael Guzmán Reinoso et al CSJ-SSPT).

42 Maculan, *Crímenes internacionales* (n 1) 21.

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18 In principle, and as has already been noted by other scholars, one of the most relevant issues has to do with a lack of international criminal law rules in domestic legal systems.[43] To overcome this, several Latin American courts, in addition to applying the ordinary criminal law to offences, began to apply international law rules that had already partly found their way into domestic laws.[44] This was done primarily to characterise the crimes under consideration as crimes against humanity. The mechanism applied by Latin American courts can be described as a process consisting of a 'double subsumption'. Thus, there is a primary subsumption regarding the elements of crimes and sanctions under domestic law and a secondary one converting this so qualified conduct into international crimes.[45] This facilitated the courts having recourse to consequences that were otherwise impossible under domestic law,[46] especially the non-application of the statute of limitations, pardons, amnesties, the double jeopardy rule (*ne bis in idem*) as well as relaxing the principle of legality (*nullum crime sine lege*).[47]

19 This undisputably shows a genuine interest in the prosecution of international crimes, although this may also have been contributed to by important case law of the Inter-American Court for Human Rights (IACourtHR).[48] The role of the IACourtHR has been especially relevant with regard to opposition to normative mechanisms of impunity, such as amnesties (for example, in the case of the famous Peruvian amnesty laws No. 26479 and No. 26492).[49] Although recourse to such mechanisms has become less prelevant with growing observance of human rights law in the region, two current cases can be cited briefly in the present context that could

43 Kai Ambos and Ezequiel Malarino, 'Persecución penal nacional de crímenes internacionales en América Latina. Conclusiones preliminares' in Kai Ambos and Ezequiel Malarino (eds), *Persecución penal nacional de crímenes internacionales* (KAS 2003) 580–81.

44 See Ezequiel Malarino, 'Jurisprudencia Latinoamericana sobre Derecho Penal Internacional' in Kai Ambos and others (eds), *Jurisprudencia Latinoamericana sobre Derecho Penal Internacional* (KAS 2008) 421ff., 442.

45 ibid 444–45.

46 ibid 421ff, 442.

47 ibid 443; Maculan, *Crímenes internacionales* (n 1) 89–199, 199–201.

48 See Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 Int C.L.R. 665, 665–95.

49 See Alonso Gurmendi Dunkelberg, 'The Inter-American Human Rights System' (in this volume), highlighting the importance of the experience with the impunity laws for the evolution of the functioning of the IACourtHR in the sense of a conventionality control.

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serve as examples of the compatibility and incompatibility of domestic procedure in the region with international (criminal) law: i) on the one hand, in Colombia, Amnesty Law 1820 of 2016 (*Ley de Amnistía*) serves an instrument of the so-called Integral System for Truth, Justice, Reparation and Non-Recurrence ('Sistema Integral de Verdad, Justicia, Reparación y No-Repetición', SIVJRNR) which, in principle, complies with the standards of international (criminal) law;[50] ii) on the other hand, in Peru, pardoning former President Fujimori[51] which after much criticism and, above all, the intervention of the Inter American Court of Human Rights,[52] has not been implemented.

Another legal challenge facing Latin American jurisdictions has been 20
the definition of the mode of participation of the plurality of persons involved, as is common in such cases. In this regard, the theory of indirect perpetration by virtue of an organised power apparatus (*mittelbare Täterschaft kraft organisatorischer Machtapparate*), originally developed by the eminent German criminal law scholar Claus Roxin,[53] has commonly been applied[54]. In Argentina, it was invoked in the 1980s in the well-known and ground-breaking process against the leaders of the military junta[55] but has also been used more recently[56]. Peru, for its part, has employed this theory to find both former President Alberto Fujimori[57] and Shining Path (*Sendero*

50 See Kai Ambos, 'La Ley de Amnistía (Ley 1820 de 2016) y el marco jurídico internacional' in Kai Ambos, Francisco Cortés Rodas and John Zuluaga (ed), *Justicia transicional y derecho penal internacional* (Siglo del Hombre Editores 2018) 131–50.

51 Resolución Suprema N° 281–2017-JUS, 24 December 2017.

52 Barrios Altos v. Peru y La Cantuta v. Peru, Supervisión de cumplimiento de sentencia, 30 May 2018. Following that decision, the pardon was overturned by a Peruvian court (CSJ, Juzgado Supremo de Investigación Preparatoria, Resolución N° 10, 3 October 2018; CSJ, Sala Penal Especial, R.N. N° 793–2018, 2 July 2019). Although the Peruvian Constitutional Court reinstated the pardon (Tribunal Constitucional (TC), Sentencia 78/2022, Exp. N° 02010–2020-PHC/TC-Ica, 17 March 2022), the IACtHR recently requested Peru not to enforce the decision of the Peruvian TC (Caso Barrios Altos y La Cantuta v. Peru, Solicitud de medidas provisionales y supervisión de cumplimiento de sentencias, 7 April 2022, para 41).

53 See Claus Roxin, *Täterschaft und Tatherrschaft* (11th edn, De Gruyter 2022) 269–80.

54 Giulia Lanza, *Indirect Perpetration and* Organisationsherrschaftslehre (Duncker & Humblot 2021) 173–92.

55 Military Junta CNACC (n 28) rec. 7. It must, however, be kept in mind that in the end they were convicted as *cooperadores necesarios*, a special form of complicity. See Military Junta CS (n 28) 1701ff.

56 See, for example, Tribunal Oral en lo Criminal Federal de La Plata, Causa 2251/06, Septiembre 2006 (Miguel Osvaldo Etchecolatz TOCF).

57 Alberto Fujimori – Barrios Altos and La Cantuta CSJ-SPE (n 40) para. 718ff.

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Luminoso) leader Abimael Guzmán[58], among others[59], responsible as (indirect) perpetrators of international crimes. In Colombia, in contrast, the application of the theory faced resistance based on the alleged difficulties in making this form of indirect perpetration compatible with the wording of Art. 29 Colombian Criminal Code.[60] This has, however, not prevented the application of the theory in some cases.[61]

II. Overcoming the shortcomings and assessing the genuineness of commitments to the international criminal justice system

21 Although the institutional weaknesses and lack of a comprehensive strategy have not prevented the prosecution of international crimes as well as a number of emblematic cases and perpetrators, at times, via exemplary procedures,[62] these two issues remain evident and as such constitute relevant deficiencies in the three national justice systems analysed here.

22 Against this background the question arises whether and how these shortcomings may justify a possible intervention of the international criminal justice system. This question addresses a valid concern arising from the enduring nature of these deficiencies which, in turn, raise doubts as to the capacity or willingness of these States to prosecute international crimes. However, as has been shown elsewhere,[63] it is an overly harsh statement, from an abstract perspective, to say that the deficiencies identified in the countries analysed should lead to them being considered as unwilling or unable to prosecute international crimes within the meaning of Article 17

58 Abimael Guzmán Reinoso et al CSJN-SPN (n 41) rec. 13; Abimael Guzmán Reinoso et al CSJ-SSPT (n 41).

59 For example, CSJN, SPN, Exp. No 36–2005, 31 August 2016 (Accomarca CSJN-SPN) rec. 49; more recently CSJN, SPN, Exp. 35–2006, 18 August 2017 (Los Cabitos CSJN-SPN) rec. 49.

60 See Juan Fernández Carrasquilla, *Derecho Penal. Parte General (PG)*, vol. 2 (Ibáñez 2012) 847.

61 See the case law quoted by Lanza (n 28) 190–92 (with fn 120, 124–126). See also JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Auto 19, 26 January 2021, where charges have been brought on the basis of the idea of indirect co-perpetration.

62 For example, in the Fujimori case.

63 Kai Ambos and Gustavo Urquizo, 'Sistemas nacionales de justicia, persecución de crímenes internacionales y principio de complementariedad. Especial referencia a algunas experiencias latinoamericanas' (2019) 43 Revista Penal 5, 14–19.

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Rome Statute[64]. This conclusion is both reasonable and valid because these three national justice systems have some positive aspects and are genuinely endeavouring to prosecute international crimes. Naturally, this conclusion does not prevent, from a concrete perspective, that a contrary conclusion may be reached concerning certain high-profile cases which are of special interest to the ICC.[65]

The second question arising from the shortcomings discussed concerns 23
how the national justice systems under consideration can address these shortcomings. In other words, how should these Latin American justice systems seek to overcome these deficiencies within the bounds of the real-world functionality of the international criminal justice system? Answering this question requires briefly considering the interaction between the national and international levels of the international criminal justice system.

The interaction between different levels of the international criminal 24
justice system corresponds to the functional ambit of complementarity.[66] This interaction can be described in terms of the base function and the closing function of the respective national and international levels. Accordingly, the national level must assume its primary obligation to prosecute international crimes[67] while the international level must focus on preventing, or where possible, eliminating impunity gaps[68] in line with its modest objectives and limited capacities.[69] This means in practice that the national level has to adequately prepare the ground for the international level to fulfil its gap-filling function. In other words, the viability of the gap-closing function at the international level depends on a sufficiently functional prosecutorial base at the national level. From this, it follows that a primary need of the national level is to ensure it functions efficiently and is adequately equipped to fulfil its role as a solid foundation that, *inter alia*,

64 See William A. Schabas and Mohammed M. El Zeidy, 'Article 17. Issues of admissibility' in Kai Ambos (ed), *Rome Statute of the International Criminal Court* (4th edn, Nomos 2022) 970–71.

65 Ambos and Urquizo, 'Sistemas nacionales de justicia' (n 63) 18–19.

66 On complementarity see William Schabas, An introduction to the International Criminal Court (6th edn, CUP 2020) 182–95.

67 Highlighting the role of national jurisdictions Elena Maculán, 'Capítulo V: La Corte Penal Internacional' in Alicia Gil Gil and Elena Maculán (eds), *Derecho penal internacional* (Dykinson 2016) 85.

68 Florian Jeßberger and Julia Geneuss, 'The many faces of the International Criminal Court' (2012) 10 JICJ 1081, 1087.

69 Helmut Satzger, *International and European Criminal Law* (2nd edn, C.H. Beck 2018) 252.

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prevents the international level from collapsing under the weight of too many situations and cases.[70]

25 The recognition of this need is essential to justify the legitimacy of a practice that gives priority to national justice systems over the international one. This is especially relevant in the Latin American context as the existence of justice system shortcomings could give rise to the idea of abdicating any domestic responsibility and seeing the only feasible option for the prosecution of international crimes is to allow the intervention of the international level (i.e. the ICC). This is, however, questionable for at least two reasons. Firstly, this would entail a waiver of a State's primary obligation to prosecute international crimes, something which cannot be foregone without further ado. Secondly, this would not only weaken the national criminal justice system in question but also expose the international level, and ultimately the international criminal justice system as a whole, to failure since the international system is fundamentally dependent on (at least the vast majority of) States having adequately functioning justice systems to deal with international crimes at the national level.

26 This perspective is also a litmus test for the genuineness of a State's commitment to the international criminal justice system. Hence, one can argue that only those States that have adequately developed and maintained their justice systems, as far as they reasonably can, show a genuine commitment to the international criminal justice system as a whole. Conversely, States failing to do so call into question their ability, and indeed desire, to fulfil their primary obligation at the national level and bear their share of the burden to ensure the gap-closing capacity of the international level remains viable.

27 Regarding the deficiencies at the national level discussed here in the context of three Latin American jurisdictions, these States should be encouraged to put forth a more determined effort to fulfil their primary obligation of prosecuting international crimes at the national level rather than drifting into a situation where their systemic capacity is overwhelmed and gives rise to an otherwise unrequired and excessive intervention from the international level (by way of the ICC). Defining the concrete measures through which these efforts should be applied is, of course, an open question where the answer is necessarily determined by each national reality. However, this requires each State to adopt a self-critical, proactive, open and creative attitude to resolving these issues. Only in doing so is it possible

70 See Ambos, 'The International Criminal Justice System' (n 25) 24.

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to address the nuanced shortcoming of each justice system and to draw on the experiences, both positive and negative, of other systems that have or are facing these challenges to chart a successful path toward a robust domestic criminal justice system.

III. Conclusion

This brief study has highlighted that the prosecution of international crimes in three Latin American States (Argentina, Colombia and Peru) suffers from some shortcomings, especially regarding institutional weakness and a deficient, or even absent, prosecutorial strategy. However, there are positive aspects that stood out in the analysis, particularly concerning the legal challenges that have arisen in prosecuting international crimes and the three States' efforts to overcome those challenges. The shortcomings mentioned are long-standing and, in places, deeply engrained. This situation, unfortunately too common in the region, should not be seen as insurmountable and should not lead to the conclusion that the only viable option for the prosecution of international crimes is to abrogate this national responsibility to the ICC or other organs at the international level. Rather, the functional deficits identified should be understood as priority areas to be strengthened so that international intervention can be dispensed with altogether. In doing so, the States considered in this study, and by extension, all the States of the region suffering from similar shortcomings, show a serious commitment to the international criminal justice system that relies so heavily on a foundation of robust national criminal justice systems. 28

Further Reading

Ambos K, Treatise on International Criminal Law. Vol. III: International Criminal Procedure (OUP 2016).

Treatise on International Criminal Law. Vol. I: Foundations and general part (2nd edn, OUP 2021).

Gurmendi Dunkelberg A, 'Lucha contrasubversiva en el Perú: ¿conflicto armado o delincuencia terrorista?' (2013) Themis 63, 109.

Ibáñez Najar J E, Justicia transicional y comisiones de la verdad (2nd edn, Berg Institute, Europäische Akademie Otzenhausen, Justicia y Desarrollo Sostenible 2017).

Muñoz Conde F and Olásolo H, 'The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain' (2011) JICJ 9, 113.

https://doi.org/10.5771/9783748920717-759 - am 27.01.2026, 02:00:24. https://www.inlibra.com/de/agb - Open Access -

Peters S, 'Gewalt und Konfliktbearbeitung in Lateinamerika' in Peters S (ed), Gewalt und Konflikt (Nomos 2020).

Sancinetti M and Ferrante M, El derecho penal en la protección de los derechos humanos : la protección de los derechos humanos mediante el derecho penal en las transiciones democráticas, Argentina (Hammurabi 1999).

https://doi.org/10.5771/9783748920717-759 - am 27.01.2026, 02:00:24. https://www.inlibra.com/de/agb - Open Access -