LIMITATIONS ON THE PRINCIPLE OF NON BIS IN IDEM

FROM AN INTERNATIONAL LEGAL PERSPECTIVE

organized by the

Center for Justice and International Law
Allard K. Lowenstein International Human Rights Law Clinic of Yale Law School
Javierana University, School of Law

September 27 2002

Bogotá, Colombia
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DRAFT DISCUSSION PAPER

INTRODUCTION

During the last ten years, the Inter-American Commission on Human Rights (“Inter-American Commission”) has handed down final decisions in 19 cases against the state of Colombia, finding state agents responsible for serious human rights abuses, including disappearances, extra-judicial killings, and massacres, as well as the failure to ensure that victims and their family members have access to effective and impartial judicial remedies. The victims include approximately 93 men, women and children. In each case, the Inter-American Commission recommended that Colombia undertake an exhaustive and impartial investigation to identify, prosecute, and punish those responsible for the human rights violations. Six years after the publication of the Inter-American Commission’s final recommendations and an average of 12 years after the perpetration of the violations, not a single member of the Colombian security forces has been sentenced for extra-judicial killing or forced disappearance.

In many of these and other cases in Colombia, the military legal system and the application of the principle of non bis in idem have blocked the investigation and trial of state agents for human rights abuses in the civilian legal system. In 14 of the above-mentioned cases, the Superior Council of the Colombian Judicature awarded jurisdiction over the investigation of security-forces personnel to the military legal system. In 11 cases, the military courts either closed the investigations or the security-forces personnel were acquitted of all criminal responsibility. The decisions were not appealed and the principle of non bis in idem apparently barred prosecution in civilian courts. For the victims and their families, the right to an effective,
impartial and independent remedy has been denied; for the perpetrators, impunity has been
guaranteed.

The Center for Justice and International Law, deeply concerned with the role that the
application of non bis in idem has played in perpetuating impunity for human rights violations,
initiated, in collaboration with the Allard K. Lowenstein International Human Rights Clinic at
Yale Law School, a study of limitations on the principle of non bis in idem in international law.
Our chief objective has been to determine whether existing exceptions to the principle of non bis
in idem under international law permit the re-trial in civilian courts of perpetrators of serious
human rights abuses.

Whether civilian courts can retry members of security forces acquitted by the military
justice system without violating the principle of non bis in idem has been the subject of heated
debate in Colombia for years. The discussion has centered largely on domestic law standards
and considerations. We have focused on international standards and the contributions that the
international legal perspective can make to discussions about achieving justice.

The principle of non bis in idem – the right of a person once tried or punished not to be
subject to successive prosecutions for the same offense – is a fundamental right of criminal
justice in international law as well as in most national legal systems. The American Convention
on Human Rights (“American Convention”) explicitly recognizes the guarantee under the right
to a fair trial (Article 8(4)). The Inter-American Court on Human Rights (“Inter-American
Court”) has unequivocally stated the principle’s importance. However, this guarantee is not
absolute.

Part I of this paper examines the definition and scope of the prohibition against non bis in
idem, or double jeopardy, in international law. Its application requires several conditions, which
are discussed in this section. Part II investigates international law limitations on the application of *non bis in idem* in the interest of fundamental fairness. Part III applies international limitations on *non bis in idem* to a case study of Colombia, arguing that the prohibition against *non bis in idem* should not apply to cases of human rights violations tried in the military legal system.

This paper, still in draft form, is being disseminated among the participants in the roundtable, “Limitations on the Principle of Non Bis In Idem from an International Legal Perspective,” organized by the Center for Justice and International Law, the Allard K. Lowenstein International Human Rights Clinic of Yale Law School, and the School of Law at Javeriana University. Jurists, academics, human rights lawyers, and key policy makers will meet on September 27, 2002 in Bogotá, Colombia to discuss the position proposed in the paper regarding the scope of and limitations on the principle of *non bis in idem* as articulated by international legal standards. The participants’ observations will be considered in the final drafting of the paper.

I. THE PRINCIPLE OF NON BIS IN IDEM

The principle of *non bis in idem* is among the most firmly established rights in international and domestic law for guaranteeing criminal defendants a fair trial. The fundamental idea underlying *non bis in idem* is that “government should not structure the adjudication game so that it is ‘heads we win; tails, let’s play again until you lose; then let’s quit (unless we want to play again).”¹ The principle is established in various treaties as well as in customary obligations and general principles of law. Most governments recognize *non bis in idem* as a fundamental right of the accused, constituting part of the “universal law of nations.”
The national legislation of at least 50 countries, including Colombia, accord protection against multiple prosecutions.

Non bis in idem prohibits a state from prosecuting an individual twice for the same offense or act. Under both international and domestic laws, the application of non bis in idem requires several conditions. These include (a) an initial proceeding in which jurisdiction was properly exercised; (b) a determination on the merits was properly made in the initial proceedings with respect to the particular acts constituting the crime; and (c) the crimes or acts that are the subject of the successive trial are substantially similar.

A. Non bis in idem in international law

1. The American Convention on Human Rights

The American Convention on Human Rights (“the American Convention”) explicitly mentions the principle of non bis in idem. Article 8, paragraph 4, provides:

El inculpado absuelto por una sentencia firme no podrá ser sometido a nuevo juicio por los mismos hechos.

Like other international treaties, e.g., the International Covenant on Civil and Political Rights (“ICCPR”) and the European Convention on Human Rights & Fundamental Freedom (“European Convention”), the principle of non bis in idem attaches once a tribunal, established in accordance with the law and acting in conformity with domestic procedure, issues a final decision. A literal interpretation suggests that Article 8(4) would apply only to acquittals in criminal proceedings, but not to convictions. The Inter-American Commission on Human Rights (“the Inter-American Commission”) has noted that the term

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1 Akhil Reed Amar, Double Jeopardy Law Made Simple, 106 Yale L. J. 1807, 1812 (April 1997).
‘sentencia firme’ …no debe interpretarse restrictivamente, es decir limitada …
‘sentencia’ debe interpretarse como todo acto procesal de contenido típicamente
jurisdiccional y “sentencia firme” como aquella expresión del ejercicio de la
jurisdicción que adquiera las cualidades de inmutabilidad e inimpugnabilidad
propias de la cosa juzgada.³

The American Convention bars prosecution only if the accused was earlier judged “for
the same cause” (in the Spanish text, “por los mismos hechos”) and thus may provide somewhat
broader non bis in idem protection than the ICCPR and the European Convention. Under the
American Convention, if the charges relate to the same matter or set of facts, a subsequent trial is
prohibited even if the offense charged is different.⁴

The Inter-American Court on Human Rights has recognized that it is not legitimate for
subsequent charges to have a distinct name from the charges in the first proceeding but refer to
essentially the same cause. For that reason, the Convention’s non bis in idem prohibition
purposely refers to “hechos” (cause) instead of “delitos” (crimes or offenses), to provide
enhanced protections to criminal defendants:

A diferencia de la fórmula utilizada por otros instrumentos internacionales de
protección de derechos humanos (por ejemplo, el Pacto Internacional de Derechos
Civiles y Políticos de las Naciones Unidas, artículo 14.7, que se refiere al mismo
“delito”), la Convención Americana utiliza la expresión “los mismos hechos,” que
es un término más amplio en beneficio de la víctima.⁵

The Court’s emphasis on the deliberate choice of language in Article 8(4) demonstrates
its concern that states pay careful attention to the acts that are the subject of successive trials.

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⁵ Loayza Tamayo, ¶ 66, where “victim” refers to the defendant, victim of multiple prosecutions by the State for
the same cause. (“Unlike the formula used by other international human rights protection instruments (for example,
the United Nations International Covenant on Civil and Political Rights, Article 14(7), which refers to the “crime”),
The state may not simply rephrase the charge in order to get a second chance at convicting the defendants. Rather, it must bring a charge conceptually distinct from the former, one that not only includes different elements, but also will be based on different conduct.

In the *Loayza Tamayo Case*, the Inter-American Court interpreted Article 8(4) as forbidding a defendant from being retried in civilian court on terrorism charges after having been acquitted in military court of treason.\(^6\) The Court held that the terrorism and treason charges constituted essentially the same “cause.” Its holding rested, first, on the lack of a clear distinction in the definitions of these crimes under Peruvian law\(^7\) and, second, on the similarity between the acts that the prosecution cited as constituting the crime charged in each case.\(^8\) Therefore, the Court held, a second prosecution for the same acts for which the accused had already been acquitted violated Article 8(4) of the Convention.\(^9\)

2. **International Treaties: the ICCPR and the European Convention**

The *non bis in idem* protection in the ICCPR applies to the same offense. Article 14(7) states:

Nadie podrá ser juzgado ni sancionado por un delito por el cual haya sido ya condenado o absuelto por una sentencia firme de acuerdo con la ley y el procedimiento penal de cada país.

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\(^6\) *Loayza Tamayo Case*, ¶ 66-77.

\(^7\) *Id.* at ¶ 68.

\(^8\) *Id.* at ¶ 74-76.

\(^9\) “[L]a Corte concluye que, al ser juzgada la señora María Elena Loayza Tamayo en la jurisdicción ordinaria por los mismos hechos por los que había sido absuelta en la jurisdicción militar, el Estado peruano violó el artículo 8.4 de la Convención Americana.” (“[T]he Court finds that the Peruvian State violated Article 8(4) of the American Convention with Ms. María Elena Loayza Tamayo’s trial in the civil jurisdiction for the same facts of which she had been acquitted in the military jurisdiction.”) *Id.* at ¶ 77. In this case, the military court had already fully deliberated on the same facts: the court “conoció de los hechos, circunstancias y elementos probatorios del comportamiento atribuido, los valoró y resolvió absolverla.” (“took cognizance of the facts, circumstances and evidence relating to the alleged acts, evaluated them, and ruled to acquit her.”) *Id.*, ¶ 76.
Thus, according to the ICCPR, the principle of *non bis in idem* attaches once a tribunal that has been established in accordance with the law, and that is acting in conformity with domestic procedure, issues a final decision. Colombia ratified the ICCPR in 1969, and therefore is bound by its provisions.

Protocol 7, Article 4, of the European Convention contains specific obligations concerning *non bis in idem*. Article 4, paragraph 1, of Protocol 7 bars successive criminal prosecution or punishment once a person has been finally and lawfully acquitted or convicted.10

While the European Convention bars double jeopardy for the same offense, the European Court of Human Rights (“European Court”) has applied this prohibition to later prosecution for crimes defined by the same facts or act. According to the European Court jurisprudence, *non bis in idem* bars subsequent prosecution for lesser crimes subsumed under an earlier conviction.

In *Gradinger v. Austria*, the petitioner had been criminally convicted of negligent homicide. The district authority later fined the petitioner for driving under the influence and sentenced him to two weeks in prison. Before the European Court of Human Rights, Austria contended that its reservation to Protocol 7 had “limited [Article 4’s] scope exclusively to ‘criminal proceedings in the sense of the Austrian Code of Criminal Procedure’ . . . thereby excluding administrative or disciplinary proceedings.”11 The Court found the reservation invalid

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10 “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State.” Accordingly, a decision is final within the meaning of Article 4(1) “if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.” *Explanatory Report on Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, Strasbourg, 1985, at 11-12. Thus, the prohibition against *non bis in idem* does not apply if, for example, an acquittal is set aside and a rehearing is ordered by a review court during the course of an ordinary appeal.

because it contravened the *non bis in idem* protections required by the Convention.\(^\text{12}\) In finding that Article 4 of Protocol 7 had been violated, the Court noted that it was

fully aware that the provisions in question differ not only as regards the designation of the offenses but also, more importantly, as regards their nature and purpose.\(...\) Nevertheless, both impugned decisions were based on the same conduct.\(^\text{13}\)

However, at least one European Court decision suggests that subsequent prosecution arising from the same actions may be permissible where separate criminal charges rely on different elements of proof. In particular, if a criminal defendant is acquitted of a crime, it may be permissible to retry him for a less serious crime, subsumed within the first crime, based on the same actions, because the acquittal simply finds the defendant not guilty of committing all of the elements of the serious crime. Conversely, a conviction for one crime generally would not establish that a defendant did not commit a more serious crime based on the same actions; therefore, for example, a conviction for negligence would not bar prosecution for intellectual authorship of a massacre. In *Oliveira v. Switzerland*, the European Court held that prosecution for a greater offense, after an individual had been convicted of a lesser offense, did not violate *non bis in idem*. The complainant had been convicted of and fined for “failing to control her vehicle.” The Swiss district attorney’s office later fined the petitioner again for “negligently causing physical injury.” As the European Court explained, the case

is a typical example of a single act constituting various offenses.\(...\) The characteristic feature of this notion is that a single criminal act is split up into two separate offenses, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one. There is nothing in that situation which infringes Article 4 of

\(^{12}\) *Id.*, para. 51.

\(^{13}\) *Id.*, para. 55. In addition, the applicant complained that the decision of administrative authorities amounted to a violation of Article 6 of the European Convention (right to a fair and public hearing; he contended that he did not have access to a tribunal). Taking the existence of “criminal proceedings” for granted, the Court concluded that the notion of “criminal” in Article 4 is identical to the term “criminal” in Article 6 (para. 49). *See*, P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer, 1998), 690.
Protocol No. 7 since that provision prohibits people being tried twice of the same offense, whereas in cases concerning a single act constituting various offenses . . . one criminal act constitutes two separate offenses.  

3. **International criminal tribunals**

The statutes governing the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), and the Special Court for Sierra Leone (SCSL) all contain explicit protection of *non bis in idem*. The international tribunals’ statutes permit the successive prosecution of different crimes arising from the same set of facts. The international tribunals have primacy over the domestic courts in the prosecution of war crimes, crimes against humanity, and genocide. An individual who has been tried in national courts for a crime falling within the tribunal’s mandate may be subject to a second trial in the international forum if the acts that were in question at the

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15 The International Criminal Tribunal for the former Yugoslavia was established in 1993, and has jurisdiction to prosecute war crimes, crimes against humanity and genocide committed in the territory of the Former Yugoslavia from 1991.
16 The International Criminal Tribunal for Rwanda has jurisdiction to prosecute people accused of genocide, crimes against humanity and war crimes committed in Rwanda between January 1 and December 31 1994.
17 The Rome Statute entered into force on July 1 2002, and the Court is expected to be operational in early 2003. The Rome Statute provides for the creation of a permanent international criminal court to prosecute people accused of genocide, crimes against humanity, and war crimes.
18 The Special Court of Sierra Leone was established August 14 2000. It has jurisdiction to prosecute crimes against humanity and other serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone from November 30, 1996.
20 In its first case, *Duško Tadić*, the ICTY had to decide when *non bis in idem* attaches and whether deferral to the Tribunal by the national court where a proceeding is already underway violates a procedural aspect of *non bis in idem*. The review of the ICTY Statute and other authorities led the Trial Chamber to conclude “that there can be no violation of *non bis in idem*, under any known formulation of that principle, unless the accused has already been tried.” Since no judgment on the merits had yet been rendered in Germany, Tadić had not yet been tried for those charges for which he was indicted and, consequently, the principle of *non bis in idem* did not bar his trial before the ICTY. *Prosecutor v. Tadić*, Decision on the Defense Motion on the Principle of Non Bis in Idem, Case No. IT-94-1, T. Ch. II, November 14, 1995, para. 24. Tadić also argued that the principle of *non bis in idem* included a procedural aspect, which was violated when a national court deferred its proceedings against an accused in order to allow a trial by the Tribunal in circumstances other than those set out in Article 10(2) of the ICTY Statute. Although it discussed the relationship between deferral, primacy and *non bis in idem*, the Trial Chamber declined to rule on
national level form the basis for a distinct and separate charge under the tribunal statute. For example, one who is convicted of rape and murder in a national court may subsequently be tried by the international tribunal for crimes against humanity arising out of the same acts.

Complementarity, an important component of the principle of non bis in idem in the ICC, is articulated in the Rome Statute Preamble, Article 1, and Article 17 (on admissibility). The ICC, Article 20(1), is prohibited from trying a person for conduct for which that person was previously tried by the Tribunal or by another court, unless the prior proceedings were not conducted independently and impartially. Regarding the phrase in Article 20(3), “with respect to the same conduct,” the negotiations at the Rome Conference added the clarification that the ICC “could try someone even if that person had been tried in a national court provided that different conduct was the subject of the prosecution.”

II. FUNDAMENTAL FAIRNESS REQUIRES LIMITATIONS ON NON BIS IN IDEM IN THE CONTEXT OF THE STATE’S DUTY TO INVESTIGATE, PROSECUTE AND PUNISH

A. The duty to investigate, prosecute and punish serious human rights violations

The right of individuals to be protected against successive state prosecutions must be balanced against requirements that violators of international human rights law be brought to justice. Specifically, where a defendant’s right not to be subject to multiple prosecutions for the

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21 Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

22 The ICC “shall . . . have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.”

23 Article 17 describes when the ICC may and may not take jurisdiction following national judicial proceedings. See infra, section II.B.1.

same offense comes up against a victim’s right to a remedy for serious human rights abuses, the state must diligently seek to fulfill its obligations to investigate, prosecute and punish.

1. **Inter-American Law**

The obligation to investigate, prosecute and punish the perpetrators of human rights violations is firmly established in inter-American human rights instruments. It derives from the general duty to guarantee the free and full exercise of protected rights as well as the specific rights to due process and judicial protection. Inter-American jurisprudence requires states parties to initiate effective and impartial investigations which result in the prosecution and punishment of the perpetrators.

Article 1(1) of the American Convention requires states “a respetar los derechos y libertades reconocidos en ella y a garantizar su libre y pleno ejercicio a toda persona que esté sujeta a su jurisdicción.” In the Inter-American Court’s seminal case, *Velasquez Rodriguez*, which involved the disappearance of a student by the Honduran military, the Court established that

> El Estado está en el deber jurídico de prevenir, razonablemente, las violaciones de los derechos humanos, de investigar seriamente con los medios a su alcance las violaciones que se hayan cometido dentro del ámbito de su jurisdicción a fin de identificar a los responsables, de imponerles las sanciones pertinentes …

The Court further held that the state must investigate and punish every situation involving a violation of rights protected by the Convention.

> Si el aparato del Estado actúa de modo que tal violación quede impune y no se restablezca, en cuanto sea posible, a la víctima en la plenitud de sus derechos,

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25 American Convention on Human Rights; the Inter-Am. Convention to Prevent and Sanction Torture; the Inter-Am. Convention on the Forced Disappearances of Persons; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém Do Pará). Colombia is a party to the American Convention, the IA Torture Convention, and the Convention of Belém Do Pará, and has signed the Inter-American Convention on Forced Disappearances.

26 *Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. (1989), ¶174. (“the state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment. . . .”)
puede afirmarse que ha incumplido el deber de garantizar su libre y pleno ejercicio . . . Lo mismo es válido cuando se tolere que los particulares o grupos de ellos actúen libre o impunemente en menoscabo de los derechos humanos reconocidos en la Convención.27

To fulfill its duty to investigate, the state must conduct an “busque efectivamente la verdad” in which the investigation “debe emprenderse con seriedad y no como una simple formalidad condenada de antemano a ser infructuosa.”28 To fulfill its duty to prevent human rights violations, the state is required to investigate and punish those responsible. States must use todas aquellas medidas de carácter jurídico, político, administrativo y cultural que promuevan la salvaguarda de los derechos humanos y que aseguren que las eventuales violaciones a los mismos sean efectivamente consideradas y tratadas como un hecho ilícito que, como tal, es susceptible de acarrear sanciones para quien las cometa. . . .29

Articles 8(1) and 25 of the American Convention also oblige states to investigate and punish violations of the Convention. Article 8(1) guarantees victims and their families the right to judicial recourse before a competent, independent, and impartial tribunal within a reasonable time. Similarly, Article 25 guarantees the right to “un recurso sencillo y rápido . . . ante los jueces o tribunales competentes, que la ampare contra actos que violen sus derechos fundamentales.” States must ensure that judicial remedies are determined and enforced when granted.30 As the Inter-American Court emphasized in the case of Durand y Ugarte:

[E]l artículo 8(1) de la Convención Americana, en conexión con el artículo 25(1) de la misma, confiere a los familiares de las víctimas el derecho a que la

27 Id. at ¶176. “If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights. . . . The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”
28 Id. at ¶177. “undertaken in a serious manner and not as a mere formality preordained to be ineffective.”
29 Id. at ¶175. “all those means of a legal, political, administrative and cultural nature that promote and ensure that the violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible. . . .”
30 American Convention, Article 25. See also, Durand y Ugarte, Judgment of Aug. 16 2000, Inter-Am. Ct. H.R., ¶93.
desaparición y muerte de estas últimas sean efectivamente investigadas por las autoridades del Estado; se siga un proceso contra los responsables de estos ilícitos; en su caso se les impongan las sanciones pertinentes, y se reparen los daños y perjuicios que dichos familiares han sufrido.

In Barrios Altos, the Inter-American Court further elaborated on the rights found in Articles 8(1) and 25, explaining that these protections are “instrumental” in guaranteeing the victim’s right to the truth. The Court held that states must make available the necessary information to establish the facts and circumstances surrounding a violation of a fundamental right. The existence of courts and laws charged with fulfilling the obligations under Articles 8(1) and 25 is not enough. The duties are affirmative; states must fully investigate all perpetrators, both direct perpetrators and masterminds, of human rights abuses. Failures to search for the truth, whether they are caused by legal impediments, general conditions in the country, or the specific circumstances of the case, constitute violations of the rights established in Articles 8 and 25.

The Inter-American Court has recognized that, by not thoroughly investigating crimes, the state violates family members’ right to know the truth of what happened to their loved ones, increasing their suffering by creating “un sentimiento de inseguridad, frustración e impotencia

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31 Durand y Ugarte, ¶130. “Article 8(1) of the American Convention, in connection with Article 25(1) of the same, confer on victims’ family members the right that victims’ forced disappearances and deaths be effectively investigated by State authorities; that the State carry out judicial processes against those responsible for the crimes; that appropriate sanctions be applied in those cases, and that all damages that family members have suffered be repaired.” (unofficial translation)
32 The right to truth is further rooted in Article 13(1) of the Convention, which recognizes the right of victims and their families to seek and receive information. See Barrios Altos Case, Judgment of March 14, 2001, Inter-Am. Ct. H.R., ¶ 45.
33 Barrios Altos Case, at ¶45.
ante la abstención de las autoridades públicas de investigar los hechos.”  

Moreover, “Toda la sociedad tiene el irrenunciable derecho de conocer la verdad de lo ocurrido, así como las razones y circunstancias en las que aberrantes delitos llegaron a cometerse, a fin de evitar que esos hechos vuelvan a ocurrir en el futuro.” 

Public reckoning with the facts is undertaken with the goal that the information learned from the painful examination will prevent such offenses from occurring again in the future.

When a state has violated the duty to investigate and punish, the principle of “restitutio in integrum” imposes an obligation to provide the victim and affected family members with an effective remedy. The Inter-American Court held that in the interest of justice and non-repetition of the violations, a state must continue investigations into alleged violations and punish those responsible. In the case of El Amparo, military authorities in Venezuela acquitted suspected perpetrators for the murder of fourteen fishermen whom police and military forces believed were guerrillas. The Inter-American Commission urged the Court that the “Estado de Venezuela para que en base a las investigaciones realizadas, identifique y sancione a los autores intelectuales y encubridores, evitándose de esta manera la consumación de hechos de grave


41 Id.
The Court accepted the Commission’s request, finding that the government’s duty to investigate and punish had not been fulfilled and instructing the State to follow through with this duty “seriamente y no como una mera formalidad.”

In all its decisions since El Amparo involving violations of the right to life, the Inter-American Court has ruled that the state has the duty to undertake an investigation of the facts, identify those responsible for the violations and punish them in order to ensure compliance with the obligation to investigate and punish, the non-repetition of the harm, and the prevention of impunity.

2. **In international law generally**

The United Nations has considered principles and guidelines on remedies for gross violations of human rights. A final report in regard to violations of civil and political rights for the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on Human Rights) identified three fundamental rights of victims: the right to know, the right to justice, and the right to reparation. In the report, Special Rapporteur Theo van Boven concluded that

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42 *El Amparo Case*, Judgment of January 18, 1995, Inter-Am. Ct. H.R. ¶4 (1995). (“State of Venezuela be required to identify and punish, on the basis of investigations made, the intellectual and accessory violators, thereby preventing the consummation of acts of grave impunity that damage the foundations of legal order.”)


gross violations of human rights . . . , particularly when they have been committed on a massive scale, are by their nature irreparable. . . . Any remedy or redress stands in no proportional relationship to the grave injury inflicted upon the victims. It is nevertheless an imperative norm of justice that the responsibility of the perpetrators be clearly established and that the rights of victims be sustained to the fullest possible extent.\textsuperscript{47}

Explicit obligations to punish human rights crimes are included in the Convention on the Prevention and Punishment of the Crime of Genocide\textsuperscript{48} and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture").\textsuperscript{49} Article 12 of the Convention Against Torture imposes a duty to proceed to a "prompt and impartial" investigation wherever there is a reasonable ground to believe that an act of torture has been committed." As a party to both these conventions, Colombia is bound by their provisions.

Although the comprehensive international human rights conventions, such as the ICCPR, the European Convention, and the American Convention, do not contain explicit requirements that states parties prosecute or punish violations of rights, both Courts’ jurisprudence and that of the Human Rights Committee establish “that these treaties require states parties generally to investigate serious violations of physical integrity – in particular torture, extra-legal executions, and forced disappearances – and to bring to justice those who are responsible. . . . The duties

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\textsuperscript{47} E/CN.4/Sub.2/1993/8, July 2 1993 “The right to know includes the right to the truth and the duty to remember. Two specific proposals call for the prompt establishment of extra-judicial commissions of inquiry as an initial phase in establishing the truth, and taking urgent measures to preserve access to archives of the period of violations. The right to justice implies the denial of impunity. The right to reparation refers to individual measures intended to implement the right to reparation (restitution, compensation and rehabilitation) as well as collective measures of satisfaction and guarantees of non-repetition.” Dinah Shelton, Remedies in International Human Rights Law (Oxford, 1999), at 19, note 49.
\textsuperscript{48} Study concerning the right to restitution, compensation and rehabilitation, para. 131.
derive from states’ parties affirmative obligation to ensure rights set forth in these conventions.”

The ICCPR, Article 2(3), provides for the right to an effective remedy. Although the ICCPR is silent about a duty to punish violations of rights with respect to Article 7 (prohibition concerning torture and cruel treatment or punishment), the Human Rights Committee has indicated that “those who violate Article 7, whether by encouraging, ordering, tolerating or perpetuating prohibited acts, must be held responsible.” It further stated that complaints of violations must be “investigated promptly and impartially by competent authorities so as to make the remedy effective.” What’s more, “en el párrafo 6 del artículo 14 se establece una indemnización con arreglo a la ley en ciertos casos de error judicial especificados en él.”

Where torture is alleged, the Human Rights Committee has stated that the government carries an obligation to “conduct an inquiry into the circumstances of [the victim’s] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future.” Investigation and prosecution is also required in cases involving arbitrary executions and disappearances. In *Bautista de Arellana v. Colombia*, the Committee suggested that only criminal prosecution would comply with the requirements of the ICCPR.

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51 Human Rights Committee, General Comment 20, *Concerning prohibition of torture and cruel treatment or punishment*; 10/03/92, para. 13 & 14.
52 Human Rights Committee, General Comment 13, *Igualdad ante los tribunales y derecho de toda persona a ser oída públicamente por un tribunal competente establecido por la ley* (Art. 14): 13/04/84, para. 18. (“Art. 14, para. 6 provides for compensation according to law in certain cases of a miscarriage of justice as described therein.”)
54 *Study concerning the right to restitution, compensation and rehabilitation*, para. 53(d) and (e), *discussing, Quinteros Almeida v. Uruguay*, Comm. No. 107/1981 (duty to investigate and bring to justice persons responsible for disappearances), and *Baboeram v. Suriname*, Comm. Nos. 146/1983 and 148-154/1983, (duty to investigate and bring to justice persons responsible for executions).
An adequate investigation into allegations of serious human rights abuses must satisfy several criteria. It must be (a) capable of leading to the identification and punishment of those responsible; (b) accessible to the victim and/or family members; and (c) prompt and impartial.

The European Convention, in Article 13, establishes a right to a remedy that is linked to higher Convention protections, such as the right to life (Article 2) and the right to access to justice, implied in Article 6(1). The absence of an effective remedy can be evidence of official tolerance of human rights violations. The European Court has linked the failure to investigate and prosecute complaints against security forces to the violation of the underlying right, in addition to or instead of a violation of the right to a remedy. For example, the link between the prohibition of torture in Article 3 and the Article 13 requirement of a remedy imposes an obligation on states to investigate alleged incidents of torture. In Aksoy v. Turkey, the European Court cited Article 12 of the Convention Against Torture, “which imposes a duty to proceed to a ‘prompt and impartial’ investigation wherever there is a reasonable ground to believe that an act of torture has been committed.” The Court held that such a requirement is “implicit in the notion of an ‘effective remedy’ under Article 13.” In Kaya v. Turkey, the Court expanded on this link, noting that the protection of the right to life “would be ineffective, in

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56 Shelton, supra note 46, at 29. In McCann and others v. United Kingdom, the Court held that the effective protection of the right to life has a procedural component and entails a requirement that the taking of life by state officials be investigated. Id., citing, McCann and others v. UK, (1995) 324 Eur. Ct. H.R. (ser.A).


58 Id.

59 Id.
practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities.\textsuperscript{60}

In sum, wherever allegations of serious human rights violations are raised, states party to the European Convention bear a duty to carry out “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.”\textsuperscript{61}

B. International law recognizes an exception to non bis in idem where there has been a miscarriage of justice

The right to non bis in idem is not absolute in international law. Under most international agreements, non bis in idem will bar a subsequent prosecution only under certain circumstances. To constitute an initial “jeopardy” – and thus have the effect of res judicata – a judgment must be legitimate.\textsuperscript{62} Generally, there are three types of trials that are considered so illegitimate as to permit a second prosecution: (a) trials that were not impartial or independent; (b) trials that were designed to shield the accused from international criminal responsibility; and (c) trials that were

\textsuperscript{60} Kaya v. Turkey, Judgment 19 February 1998, Case No. 158/1996/777/978, para. 86. The applicant alleged his brother had been wrongfully killed by authorities, leaving a widow and two children. The government claimed that the deceased was a rebel killed in a military operation. Although the Court found there was insufficient factual basis for concluding that the government intentionally killed the deceased, it held that Article 2 was nonetheless violated due to the absence of an adequate investigation. The government in Kaya had conducted some investigation into the allegations, but the Court concluded it was inadequate because of “serious deficiencies of the autopsy and forensic examination conducted at the scene” and because the authorities failed “to consider seriously any alternative options” to the theory that Kaya was a terrorist who had died in a clash with the security forces. Id., para. 107.

\textsuperscript{61} Aksoy, para. 98. See also, Kaya, para. 107.

\textsuperscript{62} Even in the United States, where virtually no exception to double jeopardy is allowed, the court must have had jurisdiction over both the defendant and the subject matter for double jeopardy to apply. David S. Rudstein, Double Jeopardy and the Fraudulently Obtained Acquittal, 60 Mo. L. Rev. 607, 617 (Summer 1995), citing, Serfass v. United States, 420 U.S. 377, 391 (1975); and William Blackstone, 4 Commentaries on the Law of England, 335. The U.S. Supreme Court has indicated that the government may undertake a second prosecution for the same offense where the court entering the judgment lacked jurisdiction. “An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction.” Ball v. United States, 163 U.S. 662, 669 (1896). “We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb, the court in which he was acquitted . . . must have had jurisdiction to try him for the offense charged.”
not diligently prosecuted. Such sham-trials constitute an exception to the principle of *non bis in idem*, consistent with the equitable doctrine of bad faith in common law legal systems. “There is a palpable unfairness in permitting the accused to rely upon a sham initial proceeding in order to avoid a second prosecution.”63 In addition, international law explicitly provides for exceptions to *non bis in idem* where there is evidence of new or newly discovered facts, the decision of the tribunal was contrary to the evidence, or a fundamental defect in the previous proceedings could affect the outcome of the case.64

1. **Shielding the accused**

A lack of diligence in prosecution serves to protect the accused, either by design or effect, in a manner that removes any true sense of jeopardy from the first trial.65 When the accused has not been in “jeopardy” in the first proceeding, it may be treated as a nullity for purposes of *non bis in idem*.66

The international criminal tribunals prohibit the prosecution of persons in the domestic criminal justice system who have already been tried by the corresponding international tribunal. However, the mandates of the Yugoslav, Rwanda, and Sierra Leone tribunals and the ICC permit people who have been tried in domestic courts to be retried by the international tribunal under certain circumstances. In general terms, the statutes of these tribunals establish that a person who has been tried by a national court may subsequently be tried in an international tribunal if the act for which she was tried was characterized as an ordinary crime (as opposed to a serious violation of human rights or humanitarian law); or the national court proceedings were not

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63 Grafton v. United States, 206 U.S. 333, 345 (1907). The government may also prosecute a second time where the defendant’s first trial in a court lacking jurisdiction resulted in a conviction. See Rudstein, note 50.


65 See, e.g., European Convention, Protocol 7, Article 4(2).


66 *Id.*
impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.67

The complementarity principle has an important feature that is quite similar to non bis in idem, as is evident in Article 17 of the Rome Statute, which describes when ICC proceedings may or may not follow national judicial proceedings. Complementarity precludes trial of cases in the ICC concurrent with or following a trial in national courts unless it can be shown that the state has been unwilling or unable to carry out a bona fide investigation or prosecution. In determining whether decisions not to prosecute are bona fide, the ICC will determine whether the proceedings were undertaken for the purpose of shielding the person from criminal responsibility for crimes within the ICC’s jurisdiction, were conducted impartially and independently, or were subject to any unjustified delay inconsistent with an intent to bring the accused to justice.68

2. Standards of fairness: new or newly discovered evidence or fundamental defect

Article 14(7) of the ICCPR provides no explicit exceptions to the non bis in idem rule. However, the Human Rights Committee has interpreted the scope of this protection. In its General Comment 13, the Human Rights Committee noted that “la mayoría de los Estados Partes establecen una clara distinción entre la reanudación de un proceso justificada por circunstancias excepcionales y la incoación de un nuevo proceso, cosa prohibida en virtud del principio ne bis in idem contenido en el párrafo 7.”69 Thus, the Human Rights Committee implicitly leaves the

67 Statute of the ICTY, Art. 10(2); Statute of the ICTR, Art. 9(2), Statute of the Special Court for Sierra Leone, Article 9(2)(b), Rome Statute of the ICC, Art. 20(3).
68 Rome Statute, Article 20(3).
69 Human Rights Committee, General Comment 13, para. 19. (“most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7”)
door open to holding new trials when, for example, after trial, evidence emerges of serious procedural flaws at trial or new facts are discovered.

The European Convention, Protocol 7, Article 4(2), permits reopening of a case or a new trial after acquittal or conviction where new or newly discovered evidence is brought to light or the existence of a fundamental defect in the original proceedings is alleged.

3. Failure to impose sanctions or to enforce the judgment in its entirety

If the first sentence or sanction was not served in its entirety, courts may not be required to give the first judgment res judicata effect. The Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters (“Convention on Transfer in Criminal Matters”) provides:

A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State . . . if the sanction . . . imposed . . . has been completely enforced or is being enforced.\(^{70}\)

Failure to impose a sanction is not a basis, by itself, for allowing a subsequent prosecution. The Convention on Transfer in Criminal Matters, for example, bars a subsequent prosecution “if the court convicted the offender without imposing a sanction.”\(^{71}\) However, the International Law Commission stated, with respect to Article 12 (Non Bis in Idem) of the Draft Code of Crimes Against the Peace and Security of Mankind, that “[t]he failure to impose a punishment that is proportional to the crime or to take steps to enforce a punishment may

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\(^{71}\) European Convention on the Transfer of Proceedings in Criminal Matters, para. 35(1)(c); see also, European Convention on the International Validity of Criminal Judgments, art. 53.
indicate an element of fraud in the administration of justice;”\textsuperscript{72} and therefore non bis idem may not apply.

C. **The duty to investigate, prosecute and punish compels the creation of a sham-trial exception to the principle of non bis in idem**

The American Convention does not contain an express sham-trial exception to non bis in idem, as do the other international treaties discussed. Nevertheless, the Inter-American Commission and Court both have recognized that the conduct of prior proceedings is relevant in determining whether those proceedings should have the effect of res judicata and thus bar subsequent proceedings under the doctrine of non bis in idem. In *Orlando Garcia Villamizar y otros*, the Inter-American Commission rejected the Government of Colombia’s contention that, after charges had been dismissed against police officers accused of murdering and disappearing eleven people, the doctrines of res judicata and non bis in idem in Colombian law prevented the Government from reopening proceedings against the officers.\textsuperscript{73} The Commission recommended that the Government of Colombia reopen the investigation, “taking into consideration the principle whereby res judicata does not exist when there has been serious judicial error.”\textsuperscript{74}

Moreover, the Court explicitly held in *Cantoral Benavides* that the non bis in idem protection of Article 8(4) does not apply when civilian defendants have been acquitted in a military court that violates the right to an impartial, independent and competent tribunal under Article 8(1). In its decision on the merits, the Court held:

> En esta misma sentencia … se ha pronunciado la Corte en el sentido de que la aplicación de la justicia penal militar a civiles infringe las disposiciones relativas al juez competente, independiente e imparcial (artículo 8.1 de la Convención


\textsuperscript{74} Id. at ¶3.
Americana). Eso es suficiente para determinar que las diligencias realizadas y las decisiones adoptadas por las autoridades del fuero privativo militar en relación con Luis Alberto Cantoral Benavides, no configuran el tipo de proceso que correspondería a los presupuestos del artículo 8.4 de la Convención.\textsuperscript{75}

In recognizing that the military trial of a civilian did not constitute a trial by an impartial, independent, and competent authority, the Inter-American Court reasoned that \textit{non bis in idem} did not apply because “la presunta infracción del artículo 8(4) de la Convención resulta subsumida en la violación del artículo 8(1) de la misma.”\textsuperscript{76}

In \textit{Velásquez Rodríguez}, the Court stressed that the state must conduct “busque efectivamente la verdad,” which cannot shield particular individuals or groups – i.e., military and police officials – from prosecution.\textsuperscript{77} By failing to effectively investigate and prosecute such perpetrators, states directly violate the Court’s ruling in \textit{Velásquez Rodríguez}. Such failure sends the implicit message that the state accepts human rights violations that are committed by a privileged class of society.

\textit{Non bis in idem} provides an important protection for individuals against excessive state prosecution, and any exception must be carefully crafted to avoid abuse. A narrowly tailored exception to the principle of \textit{non bis in idem} would help avoid the distortion of the principle through sham trials that shield human rights violators from accountability, but would not erode the protection the principle provides against state persecution. This exception would be consistent with the purpose of the American Convention, existing jurisprudence of the Inter-American Commission and Court, and other international human rights law.

\textsuperscript{75} \textit{Cantoral Benavides Case}, Judgment of Aug. 18, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 69, ¶ 138. (“In this same judgment . . . the Court has stated that the application of military criminal justice to civilians infringes upon the provision regarding a competent, independent and impartial judge (Article 8(1) of the American Convention). This is enough to determine that the actions and decisions taken by the authorities of the exclusive military jurisdiction in the matter of Luis Alberto Cantoral-Benavides do not constitute the type of proceeding called for in Article 8(4) of the Convention.”)

\textsuperscript{76} \textit{Id.} at ¶140. “the alleged infraction of Article 8(4) of the Convention is included in the violation of Article 8(1) of same.”
III. A CASE STUDY: THE MILITARY LEGAL SYSTEM IN COLOMBIA

Exceptions to the principle of non bis in idem under international law permit retrial in civilian court of military and police personnel acquitted in military courts of serious human rights abuses. The non bis in idem prohibition should not be interpreted to protect alleged human rights violators from prosecution when their acquittals resulted from illegitimate legal process. Sham investigations and trials are biased in favor of the accused and do not comply with international standards of impartiality and independence. We argue that the investigation or prosecution of security-forces personnel for human rights abuses in the Colombian military legal system is inherently biased and lacks independence. Under international law, this type of illegitimate proceeding falls within the sham-trial exception to the application of non bis in idem.

A. Proceedings in the military legal system fail to meet the standards of impartiality, independence, and competence established by international norms and therefore do not trigger non bis in idem protection.

The connection between military courts’ lack of independence and their role in promoting impunity for military personnel, especially in Latin America, has long been recognized. One scholar has explained:

In Latin America, military courts have not generally shown themselves to be willing or able to provide competent, independent, and impartial justice. Rather they have stalled and then released the alleged perpetrators. The judges making up the military tribunals often have a strong spirit of solidarity with the military personnel whom they judge. Thus, they tend to justify violations, and even legitimize them in the superior interest of fulfilling the mission of the armed forces. In most cases, military tribunals do not appear capable of fulfilling the international requirement of an independent tribunal.78

77 Velásquez Rodríguez Case at ¶177.
Another scholar places a similar emphasis on the link between the lack of independence and impartiality of military courts and the promotion of impunity for the military:

Military proceedings, especially in Latin American states, have often been used to facilitate impunity sanctioned by the state and only rarely bring to trial and prosecution military officers accused of serious human rights deprivations. . . . Military legislation is often crucial for granting impunity to perpetrators, since in many national circumstances, military tribunals hold extensive jurisdiction over human rights conditions in the country. Military courts are composed of military officers, many who may be sympathetic to accused offenders and may render judgments based on personal loyalties rather than evidence or considerations of justice. 79

When military courts are not independent, the exercise of military jurisdiction over members of the military who commit human rights abuses — a practice prevalent throughout Latin America 80 — results in a systematic failure to bring these violators to justice. This not only denies victims their right to a remedy, but ensures that such abuses will continue in the future. The only solution for this systematic failure would be the adjudication of military personnel accused of human rights violations before independent civilian tribunals.

The problem of impunity for military personnel accused of committing human rights abuses is particularly endemic to Colombia. The military justice system, according to one report, is the cornerstone of impunity in Colombia. Military courts are not known to be inefficient when enforcing military discipline over offences and infractions unrelated to counter-insurgency operations and have acted quickly and effectively to investigate and punish non-political crimes committed by armed forces’ personnel. However, those responsible for politically motivated killings and other human rights violations committed in the context of the civil conflict, have been systematically shielded from justice. 81

International’s Concerns Regarding Torture and Ill-Treatment in Mexico (1997) (“Alarmingly, military jurisdiction has systematically blocked attempts by victims and their representatives to seek punishment for those responsible for human rights violations.”). 79


Id.
Indeed, in 1997, the Human Rights Committee urged the Colombian government to take “todas las medidas necesarias para conseguir que los integrantes de las fuerzas armadas y de la policía acusados de violaciones de los derechos humanos sean juzgados por tribunales civiles independientes . . . .,” recommending, in particular, “que la jurisdicción de los tribunales militares con respecto a las violaciones de derechos humanos se transfiera a los tribunales civiles. . . .”

1. Colombia’s military justice system is presumptively biased, and triers of fact are often subordinate to accused intellectual authors of human rights crimes.

The Colombian military justice system is structurally incapable of providing an impartial and independent judicial forum for the trial of security-forces personnel accused of human rights abuses.

In Colombia, the Superior Council of the Judiciary administers the judiciary service and decides competing claims of jurisdiction between the military court system and civilian courts as represented by the Prosecutor General. The Office of the Prosecutor General has the primary duty to investigate crimes and to bring charges against suspects in the competent courts and tribunals, except in the case of service-related crimes committed by members of the public security forces or national police on active duty. Article 221 of the Constitution authorizes

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82 UN Doc. CCPR/C/79/Add. 76 - 3 May 1997. Para. 34. (“all necessary steps . . . to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts,” recommending, in particular, “that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts.”) The Committee made similar recommendations to the governments of Chile and Peru, on the grounds that the “wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel . . . contribute[s] to the impunity which such personnel enjoy against punishment for serious human rights violations.” UN Doc. CCPR/C/79/Add. 104 - 30 March 1999, Para. 9; UN Doc. CCPR/C/79/Add. 67 - 25 July 1996, Para. 23.

83 In such cases, however, the Prosecutor General must ensure that those suspected of violating the criminal law appear before the courts, and see to it that those whose rights have been violated by the crime have their rights restored and are properly compensated for any damages. Second Report on the Situation of Human Rights in Colombia, Oct. 14, 1993, OAS Doc. OEA/Ser.L.V/II.84, ch. 3, section D, ¶¶ 12 [hereinafter “Second Colombia Report”].
military criminal courts to adjudicate only crimes committed by members of the public forces while in active service and in relation to that service.  

The Colombian military justice system is not part of the judicial branch of the Colombian state. Rather, this jurisdiction is operated by the public security forces and, as such, falls within the executive branch. International organizations, as well as the Colombian Constitutional Court, have documented that Colombia’s military courts are not impartial and independent tribunals. Military tribunals consistently fail to bring to justice military personnel who commit human rights abuses. As a result, the military judicial system promotes the impunity of human rights offenders and denies justice to victims of human rights abuses within Colombia.  

According to the Inter-American Commission on Human Rights, when the Colombian military justice system conducts an investigation into the conduct of members of the state’s security forces, the inquiry generally serves to conceal the truth rather than to reveal it. If an investigation is initiated in the military justice system, a conviction is significantly less likely than if it were undertaken in the ordinary courts. This may be true even if the case is later transferred to the civil justice system, as military investigative authorities may not have gathered the necessary evidence in an effective and timely manner and witnesses may have been tampered

\[84\] Article 221 reads: “De los delitos cometidos por los miembros de la Fuerza Pública en servicio activo, y en relación con el mismo servicio, conocerán las cortes marciales o tribunales militares, con arreglo a las prescripciones del Código Penal Militar.” Constitución Política de Colombia (1991).  


\[86\] Case No. C-141/95 (Constitutional Court of Colombia, March 29, 1995) (“No se garantiza una administration de justicia independiente e imparcial, si quienes intervienen en el proceso de juzgamiento son oficiales en servicio activo…”)(An independent and imparcial administration of justice is not guaranteed if those who intervene in the trial are officials in active service…).  

\[87\] See e.g. Question of Detention, at 131.  

with. When cases remain in the military justice system, investigations frequently are conducted in such a manner as to prevent the case from reaching the final decision stage.\footnote{Id.}

Trials under the military system are similarly inadequate. Decision-makers are not trained “judges;”\footnote{Id., at ch. V, ¶ 20.} they are generally members of the military in active service.\footnote{Id., at ch. V, ¶ 22; Question of Detention, at ¶ 133. The “Question of Detention” report provides a good example of the problems involved when judges are active military personnel. See Question of Detention, at ¶ 137.} As the Inter-American Commission pointed out in its report on Peru, military courts cannot be independent when the judges are “miembros del Ejército en servicio activo, lo que los coloca en la posición de juzgar a sus compañeros de armas, tornando ilusorio el requisito de la imparcialidad, ya que los miembros del Ejército con frecuencia se sienten obligados a proteger a quienes combaten junto a ellos en un contexto difícil y peligroso.”\footnote{Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, ch. II, ¶211. (“active duty member[s] of the Army, which means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since members of the Army often feel compelled to protect those who fight alongside them in difficult and dangerous contexts.”)} Responding to this concern, in 1995, the Colombian Constitutional Court interpreted the Constitution as allowing only retired, not active, military officers to serve on courts martial.\footnote{Case No. C-141/95 (Constitutional Court of Colombia, March 29, 1995) ("[S]e declarará inexequible la expresión ‘en servicio activo o’...")} However, shortly thereafter, the Colombian legislature modified Article 221 of the Constitution to provide specifically that active military officials may serve on the courts martial.\footnote{Third Colombia Report, at ch. II, ¶ 26.}

Thus, under current Colombian law, the commander of the respective division, brigade, or battalion serves as the judge of first instance in cases brought in the military justice system against members of the public security forces.\footnote{Id., at ch. V, ¶ 23.} The decision at the first instance is then subject to appeal to the Superior Military Tribunal. The President of the Superior Military Tribunal is the
general commander of the Military Forces. This arrangement allows for military officials to serve as judges of first instance in cases concerning incidents that occurred in operations that they ordered and directed as commanders of the military unit involved.

In addition to allowing active servicemen to adjudicate cases involving their peers or cohorts, the military court proceedings take place within the hierarchy of the Colombian security forces. Members of the military court must defer to their superiors and are bound to follow their orders or face consequences. It is unlikely that subordinate officers can serve as independent and impartial judges free from the influence of their commanders or other superiors. As noted above, the commanders may also have ordered and directed the very operation that their subordinates are judging as members of a court martial. The commanders may face responsibility if any irregularities are found. This situation may lead commanders to pressure the military judges or give outright orders designed to obtain a verdict absolving soldiers or officers of responsibility for alleged human rights violations.

Colombia has an affirmative obligation under the American Convention and other treaties to which it is a party not only to prevent such abuses, but also to investigate and punish abuses that occur. Any failure to investigate and punish human rights abuses will inevitably undercut effective prevention, foster impunity, and violate the victims’ right to a legal remedy. This right to a legal remedy includes judicial process before an impartial and independent tribunal. According to the American Convention, every individual has

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96 Third Colombia Report, ch. V, ¶ 23.
97 Id., at ch. V, ¶ 25.
98 Id. This concern has been echoed by the European Court of Human Rights, which strongly condemned the use of military judges and prosecutors who were not insulated from the military hierarchy in Gerger v. Turkey (Judgment of July 8, 1999, Eur. Ct. H.R., No. 24919/94). Military judges, explained the European Court, “are servicemen who still belong to the Army, which in turn takes its orders from the executive; . . . they remain subject to military discipline; and . . . decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the Army.” Gerger, ¶ 60.
99 See supra, notes 2, 48 and 49.
el derecho a un recurso sencillo y rápido o a cualquier otro recurso efectivo ante los jueces o tribunales competentes, que la ampare contra actos que violen sus derechos fundamentales reconocidos por la Constitución, la ley o la presente Convención, aun cuando tal violación sea cometida por personas que actúen en ejercicio de sus funciones oficiales.  

The Inter-American Court has held that this right imposes an affirmative obligation on state parties to provide effective judicial remedies to victims of human rights abuses. \(^{101}\) Investigation and prosecution by members of the same institution as those accused of the abuses is not an effective judicial remedy. As the Inter-American Commission has explained, “[c]uando el Estado permite que las investigaciones las dirijan los órganos potencialmente implicados, la independencia y la imparcialidad se ven claramente comprometidas.” \(^{102}\) Such compromised investigations would lead to “una impunidad de facto que ‘supone la corrosión del imperio de la ley y viola los principios de la Convención Americana’.” \(^{103}\) The Court has held that state parties have affirmative duties to prevent such impunity, declaring that “el Estado tiene la obligación de combatir tal situación por todos los medios legales disponibles ya que la impunidad propicia la

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\(^{100}\) Article 25. (“The right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”) Similarly, la Convención Interamericana para Prevenir y Sancionar la Tortura, Artículo 8, requires states to “garantizarán a toda persona que denuncie haber sido sometida a tortura en el ámbito de su jurisdicción el derecho a que el caso sea examinado imparcialmente,” y que “que sus respectivas autoridades procederán de oficio y de inmediato a realizar una investigación sobre el caso y a iniciar, cuando corresponda, el respectivo proceso penal.” (“any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case,” and that “their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.”


\(^{102}\) Inter-Am. C.H.R., 1995 Annual Report, Nº 10/95 (Case 10.580, Manuel Stalin Bolaños Quiñonez), Ecuador, para. 48. (“when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised.”)

\(^{103}\) Inter-Am. C.H.R., 2000 Annual Report, Nº 53/01 (Case 11.565, Ana, Beatríz y Celia González Pérez), Mexico, para. 81 (citing Inter-Am. Commission on Human Rights, 1995 Annual Report, Report Nº 10/95 (Case 10.580, Manuel Stalin Bolaños Quiñonez), Ecuador, para. 48. (“de facto impunity which ‘has a corrosive effect on the rule of law and violates the principles of the American Convention.’”)}
repetición crónica de las violaciones de derechos humanos y la total indefensión de las víctimas y de sus familiares.”

The Court has specifically noted the lack of impartiality and independence of military tribunals, holding in Castillo Petruzzi, for instance, that the exercise of military jurisdiction over civilians constitutes a violation of the Convention for this reason.

Thus, although the Inter-American Court interprets Article 8(4) to provide broad protection of *non bis in idem*, the Commission and Court do not consider the right to be absolute. In a series of cases in which military courts acquitted state agents, the Commission insisted on the state’s duty to undertake a full, impartial, and effective investigation under the ordinary courts’ jurisdiction. Both the Commission and the Court have repeatedly held that by its nature and structure, the military penal justice system does not meet the standards of independence and impartiality required by Article 8(1) of the American Convention.

2. The Colombian military legal system lacks jurisdiction over serious human rights abuses, because it has a “restrictive and exceptional” jurisdiction that does not include prosecution of human rights violations

The Inter-American Court has consistently held that the jurisdiction of military courts must be limited to cases involving military personnel and arising under narrow circumstances of a breach of domestic military law. In Cantoral Benavides, the Court found that military jurisdiction is designed to protect only the legal interests related to the functions that are assigned to the military by law: “[L]a jurisdicción penal militar ha de tener un alcance restrictivo y excepcional y estar encaminada a la protección de intereses jurídicos especiales, vinculados con

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104 Paniagua Morales et al., Judgment of March 8, 1998, Inter-Am. Ct. H.R. Ser. C, para. 173. (“the state has the obligation to use all the legal means at its disposal to combat [impunity], since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”)

105 Castillo Petruzzi, Judgment of May 30, 1999, Inter-Am. Ct. H.R., Ser. C, No. 52, 132. “La Corte entiende que los tribunales militares que han juzgado a las supuestas víctimas por los delitos de traición a la patria no satisfacen los requerimientos inherentes a las garantías de independencia e imparcialidad establecidas por el artículo 8.1 de la Convención Americana, como elementos esenciales del debido proceso legal.”
las funciones que la ley asigna a las fuerzas militares.” Only legal issues related to appropriate military functions may be subjected to military jurisdiction: “Así, debe estar excluido del ámbito de la jurisdicción militar el juzgamiento de civiles y sólo debe juzgar a militares por la comisión de delitos o faltas que por su propia naturaleza atenten contra bienes jurídicos propios del orden militar.”

In Durand y Ugarte, the Court elaborated on these ideas, holding that the violation of human rights may never be a legitimate function of military forces. In that case, Peruvian military officers, in order to quell a prisoners’ revolt, demolished a prison that held alleged supporters of the Shining Path. The Court found that the bombing and the subsequent disregard for the lives of the prisoners fell outside the scope of the military’s function: “En el presente caso, los militares encargados de la debelación del motín ocurrido en el penal El Frontón hicieron un uso desproporcionado de la fuerza que excedió en mucho los límites de su función, lo que provocó la muerte de un gran número de reclusos.” While the Court recognized a legitimate state interest in guaranteeing the prison’s security, it held that this interest is limited by fundamental human rights, such that no state action “puede fundarse sobre el desprecio a la dignidad humana.” Because the indiscriminate killing of prisoners exceeded any legitimate military function, the acts of the naval officers were not military crimes, but rather “ordinary, common offenses.” As such, the officers should have been investigated and punished “en la

106 Castillo Petruzzi, ¶130; Durand y Ugarte, ¶ 126; Cantoral Benavides, ¶ 114.
107 Cantoral Benavides, ¶113, citing Durand y Ugarte, ¶ 117. At the very least, the Court’s emphasis on the fact that military jurisdiction must be restrictive and exceptional indicates that when there is doubt about the impartiality of a military tribunal with regard to a particular case, that case should be tried by civilian authorities, as stated by the Colombian Constitutional Court. See infra, note 118.
108 Id. (emphasis added)
109 Durand y Ugarte, ¶ 118.
110 Id.
111 Id. at ¶69.
112 Id. Using similar reasoning, the Colombian Constitutional Court interpreted a phrase limiting the jurisdiction of military courts to crimes committed “in relation to service” as specifically excluding from military jurisdiction
justicia ordinaria, independientemente de que los supuestos autores hubieran sido militares o no.”

This position has international support beyond the inter-American system. The Joinet Report on the Question of Impunity of Perpetrators of Violations of Human Rights (Civil and Political) to the U.N. Economic and Social Council, for example, recommended excluding cases involving human rights abuses from the jurisdiction of military courts, in order to combat impunity for these crimes: “Because military courts do not have enough statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, excluding serious crimes under international law which must come within the jurisdiction of the ordinary courts.” Principle 34 of the “Joinet Principles” thus provides:

In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity by virtue of a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be limited solely to specifically military offences committed by military personnel, excluding human rights violations constituting serious crimes under international law, which come under the jurisdiction of the ordinary domestic courts or, where necessary, an international court.

In fact, certain international documents expressly provide for civil, rather than military, court jurisdiction to adjudicate cases involving human rights abuses. As the Inter-American Commission has noted, limiting the ability of military courts to adjudicate cases involving

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113 Durand y Ugarte, ¶118 (“in the civilian justice system, independently of whether or not the alleged authors had been military personnel.”)


115 Id., at 276 (Principle 34).

human rights violations does not deprive the military of the ability to discipline its own. Military courts will continue to have jurisdiction over those offenses traditionally adjudicated by military justice systems—those “ciertas ofensas propias del servicio y la disciplina militar.”

Colombia’s own legal norms require the civilian investigation and prosecution of human rights abuses committed by members of the military. Colombian law establishes that the military justice system lacks jurisdiction to try such crimes.

In 1997, the Constitutional Court of Colombia held that the Constitution’s grant of military jurisdiction does not extend to human rights abuses, because such crimes, by definition, cannot be considered to be related to active service. This has recently been reiterated by the

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118 On August 5, 1997, the Constitutional Court of Colombia issued a key decision limiting the jurisdiction of the military justice system and declaring unconstitutional certain provisions of the Military Penal Code of 1988 that had previously granted broad jurisdiction to the military justice system. Specifically, the Court announced three rules for the application of military criminal jurisdiction. First, it held that the Code’s requirement that acts falling within military jurisdiction be committed in relation to military service constituted a significant limitation on that jurisdiction, rendering such jurisdiction exceptional and restricted. According to the Court, “[p]uesto que la justicia penal military constituye la excepción a la norma ordinaria, ella sera competente solamente en los casos en los que aparezca nítidamente que la excepción al principio del juez natural general debe aplicarse.” Thus, in situations causing doubt regarding the proper criminal jurisdiction, cases should be processed by the civilian justice system.

Second, crimes against humanity should never be heard by a military tribunal, according to the Court, as such crimes stand in complete contradiction to the duties and responsibilities of the public security forces. As the Constitutional Court explained:

un delito de lesa humanidad es tan extraño a la función constitucional de la Fuerza Pública que no puede jamás tener relación con actos propios del servicio, ya que la sola comisión de esos hechos delictivos disuelve cualquier vínculo entre la conducta del agente y la disciplina y la función propiamente militar o policial, por lo cual su conocimiento corresponde a la justicia ordinaria. . . .

Lo que la Corte señala es que existen conductas punibles que son tan abiertamente contraries a la función constitucional de la Fuerza Pública que su sola comisión rompe todo nexo del agente con el servicio.

Since crimes against humanity may never be committed in relation to service in the public security forces, these crimes must always be prosecuted by civilian judicial authorities.

Third, the evidence offered in legal proceedings must fully demonstrate the active service relationship required by the Military Penal Code. In effect, in situations where doubt may exist as to the competence of the military courts to rule on a particular case, the jurisdictional decision should be in favor of the civilian courts, especially when it has not been possible to demonstrate that the situation constitutes the type of exception required by the Court’s first rule. All three rules announced by the Constitutional Court are binding on the country’s other jurisdictional authorities.

Case No. C-358/97 (Constitutional Court of Colombia, August 5, 1997).
Constitutional Court in several cases. The Military Penal Code currently in force affirms the holding of the Constitutional Court, asserting that crimes of torture, genocide, and forced disappearance may not be considered crimes committed in relation to service in the public security forces and therefore, may not be tried before military tribunals or courts martial. Nevertheless, the Colombian military justice system, not only continues to try cases involving alleged grave human rights abuses, but also actively requests jurisdiction over cases concerning alleged human rights violations committed by members of the armed services. This is in direct violation of the Constitutional Court’s ruling.

3. The sham-trial exception to the principle of non bis in idem permits future investigations and prosecutions in civilian courts of security-forces personnel who have been investigated or tried in the Colombian military legal system

Colombian military courts have repeatedly asserted jurisdiction over prosecutions of human rights abuses committed by the military. Such prosecutions do not create non bis in idem protection because, for several reasons, they do not constitute primary jeopardy. To end the Colombian military justice system’s attempts to guarantee impunity for military officers, it is essential, where Colombian military courts prosecute human rights violations, to apply the sham-trial exception to the principle of non bis in idem.

As international law generally makes explicit, the non bis in idem prohibition should not be interpreted to protect alleged human rights violators from serious prosecution when their acquittals were the result of an illegitimate legal process. That protection would twist the principle of non bis in idem into an accessory to serious violations of states’ duties to prevent,

119 Corte Constitucional de Colombia, Sentencia C-358/97, M.P. Eduardo Cifuentes Muñoz, párrafo xx.
120 Ley 522 de 1999, por medio de la cual se expide el código penal militar, artículo 3.
121 Despite the Constitutional Court’s decision, the Inter-American Commission and human rights organizations have repeatedly questioned whether, in practice, cases involving human rights violations and implicating military or police personnel have been properly handled by the civilian court system. Third Colombia Report, at ch. V, ¶ 40. (“Not only have the State’s security forces failed to automatically transfer cases to the civilian jurisdiction, they also
investigate, prosecute, and punish human rights violations, perverting the purpose of human rights instruments to promote human rights.

In a 1991 decision involving the 1982 disappearances by Colombian state agents of 13 individuals, the Inter-American Commission made the following recommendation to the Colombian government:

_Siguiendo las pautas fijadas por las Comisiones Investigadoras de la Procuraduría General de la Nación y Procuraduría Delgada para los Derechos Humanos, ordene reabrir una exhaustiva e imparcial investigación sobre los hechos denunciados y tomando en cuenta las coincidentes conclusiones acusatorias de los organismos citados, para evitar hechos de grave impunidad que lesionan las bases mismas del orden jurídico, disponga se revisen los graves y no desvirtuados cargos que pesan contra los oficiales sobreseídos, tomando en consideración el principio de que no hace cosa juzgada un grave error judicial._\(^{122}\)

Nevertheless the Colombian military continues to use military court prosecutions to guarantee its officers impunity for gross human rights abuses.

_Trials in Colombian military courts for human rights abuses are invalid _per se_, and _non bis in idem_ does not attach in cases where jurisdiction was improper. Thus, it is appropriate and necessary to apply a sham-trial exception, allowing accused perpetrators of human rights abuses previously tried in Colombian military courts to be retried in civilian courts. Furthermore, the Colombian government has an obligation to diligently investigate and prosecute alleged human rights violations in ordinary civilian courts. And for those convicted of such violations, the government has a duty to impose effective punishment._

\(^{122}\) _Orlando García Villamizar y otros, Inter-Am. C. H.R., Report No. 11/91, Case 10.235._ ("pursuant to the recommendations made by the Investigating Committees of the Attorney General of the Nation and the Special Prosecutor for Human Rights, it ordered that a thorough and impartial investigation of the facts denounced be reopened and that in view of the charges made by both those bodies and to avoid censurable acts that strike at the very grave but never disproven charges against the officers whose case was dismissed, taking into consideration the principle whereby _res judicata_ does not exist when there has been serious judicial error.")
IV. CONCLUSION

This discussion paper addresses a critical intersection between domestic criminal law and international human rights law, particularly the well-established principle that states have a duty to investigate, prosecute and punish perpetrators of serious human rights abuses. The focus of the paper is the apparent tension between this duty and non bis in idem, one of the most fundamental principles of criminal justice in both national and international law. Specifically, when an alleged perpetrator of serious human rights abuses has been subjected to criminal process within the military justice system, but without a serious investigation or prosecution or appropriate punishment, how can a state fulfill its duty to investigate, prosecute and punish despite the principle of non bis in idem?

Although the exact scope of non bis in idem protection afforded by international instruments and the domestic law of different states varies, both international and domestic law recognize exceptions to non bis in idem. Among the most universal of these is the exception for cases in which the prior proceeding was not impartial or independent. This exception takes on special importance in the context of serious human rights abuses. Colombia is a party to the international instruments that establish both the principle of non bis in idem and the duty to investigate, prosecute and punish. The paper shows that the exception for proceedings that were not impartial or independent applies to the prosecution of human rights abuses in the Colombian military justice system. The exception, in fact, makes the principle of non bis in idem complement rather than contradict the duty to investigate, prosecute and punish perpetrators of serious human rights abuses. Colombia’s fulfillment of that duty, therefore, cannot be frustrated by inappropriate application of the principle of non bis in idem.
In drafting this paper and organizing this roundtable, our objective has been to promote discussion of the relevant exceptions to *non bis in idem* that are recognized in international law as well as the domestic law of many states. We hope that the consultation will contribute to an already-existing debate in Colombia on these issues. Another goal of the consultation is to identify where and how the limitations on the principle of *non bis in idem* can appropriately be interpreted so as to ensure that the principle is not used to shelter perpetrators of serious human rights violations from justice.

This paper is a working draft. In bringing together respected jurists, legal scholars, policy makers, criminal lawyers, human rights lawyers, and officials, we seek to generate an open discussion of the issues the paper raises. Conclusions that emerge from the consultation on September 27 will be summarized in a brief report and incorporated into a final version of the paper, which will, in turn, be circulated to relevant parties in Colombia in hopes of further contributing to efforts to end impunity and achieve justice and respect for human rights.